
ABC ONLINE INQUIRY

Introduction

1.1 The Senate referred the inquiry into ABC Online to the Environment, Communications Information Technology and the Arts References Committee on 17 February this year. The inquiry was motivated by concern, both within and outside the ABC, that the sale of online content would have implications for the preservation of the ABC's fundamental values of independence and integrity. There were concerns about the ABC's editorial independence, its policy on advertising, and about the secrecy which surrounded many of its agreements for the sale of online content.

1.2 The Committee's inquiry has two parts. The Committee was required to table an Interim Report on terms of reference (a) and (b) by 3 April 2000. This was later extended to 11 April 2000. The full terms of reference are set out at the beginning of this report. Parts (a) and (b) examine existing and proposed commercial arrangements for the sale of ABC online content. The third part (c) is the subject of the Committee's ongoing inquiry. It will examine whether there is a need to amend the legislation governing the ABC to ensure its viability and integrity in the online environment.

Conduct of the Inquiry

1.3 The inquiry was advertised on 25 February 2000 in all major national and capital city newspapers. The Committee received 30 submissions. Two public hearings were held in Canberra on the 17 and 24 April 2000. Witnesses included the ABC, Telstra Corporation, the Friends of the ABC, the Community and Public Sector Union, the Media Entertainment and Arts Alliance, Mr Quentin Dempster, Mr Stewart Fist, and Mr John Millard. This inquiry has also drawn on evidence given by the ABC and Telstra at Estimates hearings on 10 and 11 February 2000.

1.4 The Committee thanks all those who assisted with its inquiry, including those who made submissions, gave evidence at public hearings and provided documents and other information. The ABC answered a large number of put questions on notice by the Committee. The Committee was not satisfied with three of those answers and is pursuing the matter as part of its ongoing inquiry into ABC online.

1.5 Witnesses expressed a range of concerns to the Committee about the ABC's commercial activities in regards to ABC Online, with particular concern being expressed about the proposed agreement with Telstra Corporation. The concerns included:

- That the ABC's core values of editorial independence and integrity could be compromised by the exercise of influence from outsiders. This may occur because of an over-reliance on external sources of funds, the introduction of advertising revenues or too close a relationship with one partner;
- That the ability of the ABC to protect its editorial independence within commercial arrangements was vulnerable to self-censorship, thus quietly undermining the application of editorial guidelines;

- That a climate in which the ABC's core allocations of public funds had undergone deep cuts, and were continuing to decline in real terms, had created an atmosphere in which the ABC's integrity and programming decisions could be undermined through a growing reliance on external funds;
- That by entering into commercial arrangements with Telstra and the owners of other large portals whose business models are predicated on keeping audiences within their site, the ABC risks allowing ABC Online to be overwhelmed by these larger portals and losing its audience to them.
- That advertising was currently being placed too close to ABC material, and that the agreement with Telstra in particular could create further pressures for the Board to modify the guidelines to allow advertising around ABC content;
- That the privacy of website consumers could be invaded through the use of technologies such as cookies, intra- and inter-site (DoubleClick) user tracking;
- That the statutory existence and role of ABC Online is currently unclear, as it is not covered by the *ABC Act 1983*. This creates legal uncertainty about its role in the ABC's activities, and status in relation to the ABC's commercial activities or prohibition on advertising. These elements are currently defined only in ABC internal policy and guidelines and are vulnerable to change;
- That the agreement with Telstra, through its combination of a whole series of discrete and far-reaching commercial arrangements into a single agreement, could contravene the spirit of the ABC's Act, constrain the ABC's strategic flexibility as the online environment develops, create an overall environment in which the danger of editorial compromise is greater, and expose the ABC to potential litigation should the expectations of Telstra not be met.

ABC Online

1.6 ABC Online was established in 1995 and, from its beginnings as a small operation within Radio National, has since grown into a very successful part of the ABC's operations. It is under the direction of ABC Multimedia which was established in July of the same year to co-ordinate the ABC's involvement in multimedia activities. This involvement includes the main 'portal' website, ABC Online, and its many subsidiary websites, along with projects in CD-ROM, datacasting, broadband and other 'convergent' media.¹

1 Australian Broadcasting Corporation, Submission 7, p 11.

1.7 When the ABC was restructured in 1996 ABC Multimedia was placed within the National Networks portfolio and ABC Online confirmed as a new output network alongside existing radio and television networks. According to the ABC:

The rationale for the network is not only to add value to the ABC's existing radio and television output but also to provide compelling and engaging multimedia content in its own right. To this end, Multimedia restructured its online output to serve audience interests via subject gateways...Multimedia also assisted other ABC networks to develop their own capacity to produce original web content.²

1.8 The website hosts more than 100 subsidiary websites related to ABC programs, with the most popular being ABC News Online, Triple J, Foreign Correspondent, BTN, Children's Television, Radio National and Radio Australia. Site visitors are able to gain access to online news services, program transcripts, program schedules and fact sheets, can listen to ABC radio services either in real-time or as excerpts, and engage in a range of more interactive activities such as chat, local event diaries, competitions and surveys.

1.9 ABC Online has been a major success with internet users. It is consistently ranked among the top five sites in Australia and sometimes receives as many as three million 'hits' (page accesses) a week. Its phenomenal growth is demonstrated by figures which show that, between March 1998 and March 1999, the average number of hits per week increased from 800,000 to 2.4 million.³

1.10 According to former Managing Director Brian Johns the Board first approved \$750,000 for the development of ABC Online in 1995. In 1998-99 the direct funding for ABC Online and other content gateways was \$2.7 million. This compares with approximately \$30 million annually spent by Fairfax and NineMSN.⁴

1.11 The Internet, and communications more generally, is currently undergoing rapid and sometimes bewildering change. This change is being driven by the technological 'convergence' between computing, telecommunications and broadcasting. This phenomenon is creating new kinds of audiences, new relationships between information providers and audiences, new commercial opportunities and new kinds of information and media environments. It has long been recognised that the new context creates particular challenges for regulators.

1.12 Within the terms of its Charter and obligations, the ABC has been quick to seize the opportunities provided by convergence. The establishment of ABC Online occurred only two to three years after CERN released the first universal specifications for HTML and coincided with the release of the early versions of the Mosaic, Netscape and Microsoft internet browsers. Since then there has been a rapid release of more advanced browser software; cheaper, faster and more user-friendly personal computers; and more sophisticated web-based programming languages and applications such as Java and XML. Further technological

2 Australian Broadcasting Corporation, Submission 7, p 11.

3 Australian Broadcasting Corporation, Submission 7, p 12-15.

4 *Hansard*, Senate Environment, Communications, Information Technology and the Arts Committee, Additional Estimates, 11 February 2000, p 202.

development will see interactive content that combines text, graphics, sound and moving pictures delivered at greater speeds to a widening array of platforms, such as WebTV and palm-top computers.

1.13 As the development of the Web has created new audiences, it has also created new media players who are building website content businesses out of areas previously distinct from media - such as software companies, telecommunications, internet service providers and search engines. Media content has not been those organisations' core businesses and such companies are arguably unfamiliar with the regulatory environments, codes of practice and workplace cultures which have traditionally governed older media.

1.14 Media content in the online environment is often being delivered for new reasons. Rather than as a public service or a directly revenue-making business, it is being used to gather consumers into spaces where other products and services are being promoted or sold. On the one hand, these new organisations in part acknowledge their inexperience with media by buying content from established players like the ABC, AAP and others, or engaging in strategic partnerships (such as the NineMSN partnership between PBL and Microsoft). On the other hand, their unfamiliarity generates anxiety that a culture of journalistic integrity is not ingrained or that an organisation's business interests will take priority over editorial integrity.

1.15 The ABC strongly maintains that ABC Online is a core element of their operations and will be crucial to maintaining a strong media presence in a convergent media environment. This is a view that the Committee endorses. Former Managing Director Brian Johns told the Committee on 11 February that:

Online is at the heart and core of the activities of the ABC...we are utilising some 800 journalists throughout the country to provide material for Online. We are using our specialist program makers to produce material for Online. We are using our radio networks to produce material for Online. We are doing that as an integrated activity. It is part of our one ABC strategy...⁵

1.16 ABC Management maintains that the sale of content by the ABC to third party websites is a further element of the overall ABC Online strategy. Acting Head of Corporate Strategy and Communications, Dr Julianne Schultz, said that in March 1999:

The ABC Board reaffirmed that it wanted to maintain ABC Online as a vertically integrated, non-commercial national network...The Board decided that, as a subsidiary element of this maintenance of www.abc.net.au as a core national network it would also encourage the licensing of content to third-party sites where that could be done under editorial control of the ABC where we were satisfied that the licensing was appropriate.⁶

5 *Hansard*, Senate Environment, Communications, Information Technology and the Arts Committee, Additional Estimates, 11 February 2000, p 201.

6 *Proof Committee Hansard*, Canberra, 17 March 2000, p 2.

1.17 She explained the rationale for the licensing of content thus:

There were two key interests. One was to ensure that ABC Online content...was as widely as possible available in as many platforms as possible, but that that was done within our editorial control. The Board recognised at the same time that there was a commercial value in ABC Online content.⁷

1.18 The ABC also indicated that their sales strategy was also driven by concerns that, within a few years, the internet may be dominated by ‘a handful of dominant content providers within information sectors’:

Most analysts predict that within a few years the combination of non-exclusivity, compelling content, techniques to ensure stickiness, maximise advertising revenue and build audience reach and loyalty, will lead to the dominance of several major players within each sector.⁸

1.19 In this context, the ABC is seeking to expand its Online presence in an evolving context where, as Dr Schultz suggests, ‘there will be increasing audience fragmentation’.⁹ In response to a suggestion that the ABC should not be selling content to other sites at all, Dr Schultz argued that:

...[if so] ABC content will become increasingly less visible. You will increasingly find that there are many other entry points to the online world where people go for their online shopping - whatever it may be. You would find that the ABC content would not be visible and not be present and not be present in those sites. I think it would be a disservice to all Australians.¹⁰

1.20 A related concern of ABC management, which appears to be driving elements of the proposed agreement with Telstra, is concern about access to broadband delivery systems such as cable. Brian Johns told the Committee at its Additional Budget Estimates hearing on 10 February 2000 that:

The second important feature [of the Telstra agreement] is that it centres ABC in the development of new media delivery systems...Under the emerging news era that we have [other broadcasters] have delivery systems that we do not have of our own and will never have of our own - broadband services, for example. So this arrangement gives us access to that.¹¹

7 *Proof Committee Hansard*, Canberra, 17 March 2000, p 2

8 Australian Broadcasting Corporation, Submission 7, p 13.

9 *Proof Committee Hansard*, Canberra, 17 March 2000, p 16.

10 *Proof Committee Hansard*, Canberra, 17 March 2000, p 7.

11 *Hansard*, Senate Environment, Communications, Information Technology and the Arts Committee, Additional Estimates, 10 February 2000, p 106.

1.21 Broadband cable infrastructure is currently owned by Telstra and Cable and Wireless Optus. Whereas the telecommunications network is currently restricted in bandwidth (the capacity to carry volumes of information) due to copper cabling only being available to most homes, the hybrid optic-fibre coaxial cabling has the potential to carry very large amounts of information. This is crucial for the real-time delivery of video or television which requires the transmission of very large amounts of data at high speeds, and for the inclusion of interactive elements (backchannels). Cable infrastructure is privately owned and the only regimes of access to it at present are commercial. It is possible commercial agreements between content and infrastructure providers will involve exclusive access to cable infrastructure.

▪ **Existing agreements for the sale of ABC Online content**

1.22 The ABC currently has agreements with fifteen Internet portals for the supply of content, and is in ongoing discussions with Reuters, Fairfax, and News Corporation. Existing customers of ABC content include AOL Australia, Red Rock Communications (which supplies news to Optusnet), Yahoo! Australia, LookSmart (which supplies news to the search engines Anzwers and GoEureka-Altavista), Ezyfind, Excite Australia, Sanford securities, Tribe Online, Virtual Communities, Optibuy, and Ninemsn (cricket only).

1.23 These agreements are currently worth \$500,000, and projected revenues are \$1.5 million in 2000-1 and \$2.5 million in 2001-2.¹²

1.24 In most of these arrangements ABC Online news feeds are supplied to third party websites on a non-exclusive basis, on the condition that ABC editorial independence and integrity are respected and that stories are not changed or altered in any way. The news feeds replicate those hosted on ABC News Online news. The online presentation of the stories is subject to the prior approval of the ABC, and advertising on ABC news pages is not permitted (other than advertising for ABC products, programs and online co-productions). Advertising is permitted on the third parties' home pages and on news index pages containing headlines or brief summaries. The ABC must be clearly identified as the supplier of the content and a hyperlink back to ABC Online must be placed on each page. These general conditions are the subject of a one page document, "ABC Online Licensing Guidelines".¹³

1.25 The Committee is not aware of any widespread problems with third parties over their observance of the Licensing Guidelines. However the Committee is aware of two recent instances where problems occurred. A news item on 15 February revealed that Red Rock Communications, who supply content to Optusnet, had failed to supply the ABC's entire news feed to the Optus site, in breach of an undertaking made to the ABC. The result was that some stories were dropped. The practice was ceased after protests by the ABC, who maintained that it occurred because Red Rock's 'technical platform' dropped the stories.¹⁴

12 Answers to Questions on Notice, Document provided by ABC.

13 Australian Broadcasting Corporation, Submission 7, p 18, and Annex E, ABC Online Licensing Guidelines.

14 Geoff Elliott, "ABC's fury over Optus bad news", *The Australian*, 15 February 2000.

1.26 In evidence Mr Harry Bardwell, the ABC's General Manager of Media Business, told the Committee that the problem occurred because, while Optus requires news stories between 7 a.m. and 8 p.m., Red Rock had been receiving a continuous 24 hour news feed and 'letting it overflow':

As a result of this being drawn to our attention, we have asked Red Rock, and they have agreed, to cease taking stories during the period when they do not require them and, during the period when we are supplying stories, Optus has increased the number of stories that it is publishing on its server so that it takes all of our stories. So I would say that, in reality, the situation was that there was an oversupply rather than any wilful slimming down of the service, cherry picking or selection.¹⁵

1.27 The ABC maintains that licensed news providers are monitored weekly by the Business Development Unit, through spot checks, and are also monitored 'on a constant output at the news editorial level'. Notwithstanding this, Mr Bardwell admitted that the problem with Red Rock/Optus had 'occurred on a number of occasions...during a period of months'.¹⁶

1.28 The Community and Public Sector Union also presented evidence to the Committee that Looksmart and Optusnet had censored a story on 8 March about Telstra's profit announcement. The versions placed on the Optus and Looksmart sites were missing two lines present on the ABC Online story:

Telstra Corporation has confirmed it is to cut 10,000 jobs over the next two years.

It is part of a \$650 million per annum cost-cutting program announced by Telstra today.¹⁷

1.29 The ABC's explanation for this breach is reproduced in the note below.¹⁸

15 *Proof Committee Hansard*, Canberra, 17 March 2000, p 9.

16 Australian Broadcasting Corporation, Submission 7, p 18; *Proof Committee Hansard*, Canberra, 17 March 2000, p 9.

17 Mr Graeme Thomson, *Proof Committee Hansard*, Canberra, 24 March 2000, p 69.

18 In answer to a question on notice the ABC explained that: 'ABC news stories and stories sent to third party websites are updated regularly throughout the day to reflect breaking news. The story as sent to Looksmart and Optus was an amalgamation of the first TWO stories of the Telstra result that day: the announcement of the \$2 billion profit, and an addition filed by the ABC's radio reporter of the stockmarket reaction. Both have been identified as stand-alone stories in the radio queues. The version used on the ABC site is an amalgamation of the first THREE stories filed on that day: the two stories mentioned above, and a third story which referred to the job losses. The difference in the time stamp is explained simply because the ABC added to the story on its own site in the time it took the third parties to pick up the original story from the ABC's server (delays of up to an hour are inevitable as each client updates its site at different times). It is likely that later versions of the story would have appeared on the third party websites on 8 March as soon as they picked them up from the server.'

The Proposed ABC-Telstra Agreement

Preamble

1.30 Since August 1999 the ABC has been in negotiations with Telstra Corporation on a five-year deal to supply online content and co-operate in marketing and datacasting development. The proposed agreement involves payments of a basic fee of \$13.5 million per year for 5 years, with an additional fee of at least \$2.5 million (or a percentage of e-commerce and advertising revenues received by Telstra on traffic which originates from a Telstra page containing ABC content, if greater). This involves a minimum payment of \$70 million.

1.31 At the Committee's request, the ABC supplied a copy of the *term sheet* outlining the current state of negotiations between itself and Telstra, along with legal advice which the ABC had sought on the document and their position. In view of the commercial sensitivity of these documents, the Committee accepted that they could be supplied on a strictly confidential basis. They will not be made public by the Committee. The ABC has emphasised in particular that the publication of confidential legal advice could seriously prejudice its ongoing negotiations with Telstra and others. This report makes no reference to the legal advice supplied to the Committee.

1.32 In view of the request by the ABC that these documents remain confidential, this report refers to the proposed agreement with Telstra, as set out in detail in the Term Sheet, in broad terms only. These basic features are already a matter of public record, through evidence presented at Senate Estimates hearings and the public hearings of this inquiry. General reference to the agreement is made on the basis of public interest criteria - that is, where the proposed agreement raises issues of editorial independence and integrity, the ABC's Act, its Charter and Editorial Guidelines in matters such as advertising, and where there is a legitimate public interest in the ABC's viability and direction in the evolving convergent environment.

1.33 The Australian Democrats acknowledge that this latter area may take the Committee into the area of ABC commercial decision-making, which is the responsibility of the ABC Board as it possesses powers under the *ABC Act 1983*. However ABC Online is currently a unique case in that it is not yet covered by the ABC Act. In such a context, and in such a rapidly evolving and uncertain media environment, broad parliamentary scrutiny is legitimate where the public interest is at stake.

1.34 The ABC informed the Committee that the Term Sheet, dated 17 February, summarised a concluded set of negotiations between Telstra and the ABC as to the basic elements and scope of an agreement. Detailed negotiations on the text of a legally binding contract are now under way.

The Proposed Agreement - Relevant Features

1.35 Under the proposed agreement, the ABC will receive a 'basic fee' of \$13.5 million per year for five years, with an 'additional fee' of at least \$2.5 million (or five per cent of e-commerce and fifteen per cent of advertising revenues received by Telstra on traffic which originates from a Telstra page containing ABC content, if greater). This involves a minimum payment of \$70 million. The ABC will be required to devote 25 per cent of the basic fee, and

45 per cent of the additional fees, to the production and repurposing of online content for Telstra.¹⁹

1.36 The proposed agreement confers *non-exclusive* rights on Telstra to place a wide variety of ABC online content on its website and to take ‘repurposed’ content from the ABC.²⁰ Such repurposed content (that is, modified for carriage on different technical platforms) includes the ABC’s existing sports result service which is to be used for Telstra’s WAP and SMS services.²¹

1.37 The non-exclusivity feature of the agreement, which confers some flexibility on the ABC to sell its content to other third party sites, is limited by a provision which insists that in all areas of the agreement, each party must treat the other on a ‘most favoured nation’ basis. That is, Telstra must not favour another party over the ABC and vice versa. This is arguably widely interpretable and, given the breadth of the proposed agreement, may create some legal ambiguity as to what agreements with others each party may make.

1.38 The agreement also provides for Telstra and the ABC to co-produce new content using existing or future ABC online content on an *exclusive* basis. The ABC is obliged under the proposed agreement to undertake co-productions, which are to be agreed between the ABC and Telstra and funded from the 25 per cent cost component of the basic fee to a ceiling of \$1.8 million per year.²² Co-productions appear to be subject to ABC editorial policies and guidelines, which require the ABC to determine whether a proposal would involve any conflict of interest or infringement of its independence, before proceeding.

1.39 The agreement provides for the online and offline cross-promotion of ‘suitable’ ABC and Telstra products in each other’s shops, subject to the provisions of the *ABC Act 1983*.

1.40 The proposed agreement also provides for the ABC and Telstra to actively investigate the possibility of putting a hyperlink to Telstra’s EasyMail service on ABC Online. In evidence Dr Schultz explained that this was not an advertisement for this service, but would be in the interests of providing ABC Online visitors with a free web e-mail service, which is something many online portals provide.²³ There is some ambiguity about whether this could amount to advertising, although the current situation is that to gain access to EasyMail one has to become a ‘member’ of telstra.com. Further, if EasyMail follows the pattern of other free e-mail services, which are sustained by advertising, this proposal would potentially require the ABC to endorse its users following a hyperlink directly into an

19 Mr John Rolland, *Hansard*, Senate Environment, Communications, Information Technology and the Arts Committee, Additional Estimates, 10 February 2000, p 78.

20 Mr Harry Bardwell, *Hansard*, Senate Environment, Communications, Information Technology and the Arts Committee, Additional Estimates, 10 February 2000, p 109.

21 Wireless Access Protocol (WAP) is a common protocol developed for the transmission of many different kinds of internet services to wireless devices such as pagers and mobile phones. Short Message Service (SMS) is a service for sending messages of up to 160 characters to mobile phones that use Global System for Mobile (GSM) communication. < <http://www.whatis.com/> >, 30 March 2000.

22 Mr John Rolland, *Hansard*, Senate Environment, Communications, Information Technology and the Arts Committee, Additional Estimates, 10 February 2000, p 75.

23 *Proof Committee Hansard*, Canberra, 24 March 2000, p 90.

advertising-rich environment. If the ABC were to offer a free internet service, free of advertising, it would be both costly to the organisation and likely to take over a major component of the current market.

1.41 The agreement commits the ABC and Telstra to work together to develop and share skills, and conduct joint trials, in relation to datacasting and multimedia.

1.42 The proposed agreement also potentially commits the ABC to future commercial relationships with Telstra. This occurs in two ways:

- through the ABC's purchase of Telstra's broadband and data services - for example, in using Telstra as a preferred ISP backchannel for interactive datacasting, in distributing ABC Online to Telstra broadband customers, and providing expanded bandwidth and server capacity to the ABC. These are possibilities the parties undertake to actively explore.²⁴
- In the event of ABC proposing to sell any of the digital broadcast spectrum allocated to it by the Government, the ABC will be obliged under the proposed agreement to notify Telstra of any tender, or if not selling by way of a tender, it must provide Telstra with an exclusive 30 day right to negotiate such a purchase.²⁵

1.43 The proposed agreement with Telstra could thus be characterised as having four central components:

- the licensing and repurposing of 'off-the-shelf' ABC online content on a non-exclusive basis for the life of the agreement;
- the requirement to undertake online co-productions on an exclusive basis for the life of the agreement;
- proposals for the cross-promotion of ABC and Telstra products, and for publicity in relation to joint projects;
- intended co-operative activities and commercial arrangements, in the development of datacasting and multimedia applications, in the purchase of access to Telstra broadband capacity, and the potential sale of ABC-owned digital broadcast spectrum.

1.44 The breadth of this agreement, and particularly its commitment of the parties to co-operation in strategically important convergent developments, has prompted some witnesses, notably Mr Quentin Dempster, to characterise it as a 'strategic alliance'.²⁶ Their concerns are that such a broad agreement could create a climate in which the ABC's editorial integrity may be compromised, its relationships with other online players embittered, and its strategic flexibility compromised. While not having in-principle objections to many of its elements, the Australian Democrats share such concerns about the *breadth* of this proposed agreement.

24 Mr John Rolland, *Proof Committee Hansard*, Canberra, 24 March 2000, p 57.

25 *Proof Committee Hansard*, Canberra, 24 March 2000, p 65.

26 *Proof Committee Hansard*, Canberra, 17 March 2000, p 31.

Secrecy and haste

1.45 A range of witnesses expressed concern about the haste and secrecy with which the proposed agreement had been developed and negotiated. A selection of these views appear below:

- The Community and Public Sector Union (CPSU):

It has been quite an extraordinary process around the ABC. There has been more secrecy attached to the process about the development of this arrangement than I think in any other proposal I have seen in the 10 years I have been associated with the CPSU around the ABC. The development of this deal has been clouded in secrecy.²⁷

- The Friends of the ABC:

The process has not been transparent. I do not know how we would make it more transparent. Even if we are to do that, even if you do have a more transparent process and more oversight, as long as the ABC is receiving a significant percentage of its funding from a commercial source, there is a danger.²⁸

- The Media Entertainment and Arts Alliance (MEAA):

It is certainly clear from the views of our members in the ABC that they believe these processes should be open and transparent. We are dealing with a significant cultural institution, not a normal commercial arrangement.²⁹

1.46 The Committee is also aware of concerns about secrecy and haste throughout the ABC. According to the evidence of Brian Johns at Senate Estimates hearings, ABC management did not inform the Board of the talks with Telstra until ‘two or three months’ after they began in August.³⁰ Thus the Board was given no opportunity to discuss the wide variety of proposals that have been incorporated into the Term Sheet for up to three months after negotiations had begun. ABC executives were briefed individually in the weeks after the beginning of negotiations in August.³¹

1.47 ABC management argues that it pursued this course in order to protect the commercial sensitivity of the discussions. In any case, the Australian Democrats cannot understand why ABC management did not inform the Board of the discussions until the basic architecture of the proposed agreement with Telstra - which raised serious issues of editorial independence and philosophy - had already been set in place.

27 *Proof Committee Hansard*, Canberra, 24 March 2000, p 70.

28 Mr John Cassidy, *Proof Committee Hansard*, Canberra, 17 March 2000, p 52.

29 *Proof Committee Hansard*, Canberra, 17 March 2000, p 22.

30 *Hansard*, Senate Environment, Communications, Information Technology and the Arts Committee, Additional Estimates, 10 February 2000, p 107.

31 Australian Broadcasting Corporation, Answers to questions on notice, 23 March 2000.

1.48 The Australian Democrats acknowledge that commercial sensitivity has its place in the decisions made about such matters. However the Australian Democrats also note the views of many, such as the MEAA, that the ABC is a valuable cultural institution rather than simply a commercial organisation like any other. The undue secrecy which has surrounded the development of this agreement has unnecessarily generated much anxiety about the ABC's direction and willingness to consult with staff on matters of importance. The Australian Democrats suggest that the ABC should consider, within the constraints of commercial confidentiality, finding improved ways of consulting with its staff and the public on general matters of editorial integrity, philosophy and direction in the changing media environment.

ABC Editorial Integrity and Independence

1.49 Under the proposed agreement with Telstra, ABC editorial policies and applicable ABC Board guidelines will apply to all content provided by the ABC to Telstra. While Telstra does have great discretion about the placement of content on its website, and the ABC is obliged to consult regularly with Telstra as to the 'mix and variety' of content, Telstra is constrained by this overarching obligation. The current situation is that this prevents advertising being placed around ABC news pages (but not index pages) and provides the ABC with full editorial control over content that it prepares for Telstra.

1.50 ABC editorial guidelines also apply to online content supplied to other third-party sites. The standard online licence agreement contains provisions which stipulate that the ABC must retain editorial control of all licensed content and that Licensees may not 'change, manipulate, modify, reverse engineer, decompile, distort or enhance' ABC content.³²

1.51 Given that these safeguards are in place, two main concerns were expressed by witnesses. The first was that the editorial guidelines could be quietly circumvented by subtle self-censorship in order to please a client; and second, that the wide scope of the deal, resembling a strategic alliance, created a general atmosphere in which the ABC's integrity would be more likely to be compromised.

Self-censorship

1.52 An ABC journalist, Mr John Millard, put the view to the Committee that editorial guidelines, by themselves, were insufficient to protect editorial integrity:

I believe the security of such commercial relationships in protecting editorial independence at the ABC is not based at all on words and guidelines, it is not based at all on assurances, but it is dependent on a culture in the workplace. This is an intangible thing. Having worked in situations where that culture has led to compromise from commercial influence, it is subtle, it is difficult to grasp, and it has not been mentioned much at all in this debate.³³

32 Australian Broadcasting Corporation, Submission 7, Annex E, "ABC Online Licensing Guidelines" and "ABC Online Licence Agreement".

33 *Proof Committee Hansard*, Canberra, 17 March 2000, p 33.

1.53 Mr Millard was personally involved, as a whistleblower, in efforts to expose the compromise of ABC editorial integrity in regards to the outsourcing and co-production of a number of information and lifestyle programs in the early 1990s. He explained that:

The health program was funded by the snack food and junk food industry. McDonalds, Kelloggs and the sugar industry were paying the ABC to help fund the health program. They did not hide it very well, but they hid it well enough for the Board to go on ignoring it when we put it up because they hid behind the name The Australian Food Foundation.

....

An item on food labelling was done by the *Everybody* program and *The Investigators*. [The *Everybody* program] was 100 per cent funded by the processed food industry. Helen Wellings walked down the supermarket aisle saying, 'Why do we have to have numbers on the back of the labelling to distinguish what content is there? Who knows? Do we have to carry a book? Why can't we do what is done in other countries and list the names of the problem ingredients?' A commercially-funded program walked down the aisle and said, 'Isn't it great? - we have this great labelling system. The numbers are there, and I can look up a book. Isn't it terrific?' These items went to air. That is self-censorship.³⁴

1.54 Mr Millard opposes the 'external funding and external production, that is the outsourcing, of ABC Information programs' because:

As our personal experience and the independent inquiries confirm, it has always and inevitably led to self-censorship by ABC staff, who are normal human beings. ABC staff are no better and no worse than Herald Journalists...We are vulnerable to the natural and normal pressures that are in every workplace, and certainly in every publishing house. We are certainly vulnerable, as history as shown, to the self-censorship that occurs when you have a commercial relationship.³⁵

1.55 Mr Millard stated that when he and other journalists sought to raise their concerns with ABC management, they were met with indifference:

Within a year of me and other journos and program makers giving evidence here at the Senate Inquiry into Backdoor Sponsorship, we were sacked from our television positions or had to leave our positions under the worst of circumstances...I was victimised, as the Coleman Inquiry concluded, by three ABC executives, including as high as the television head, and sacked from my position in television for raising concerns about editorial policy compromise.³⁶

34 *Proof Committee Hansard*, Canberra, 17 March 2000, p 38.

35 *Proof Committee Hansard*, Canberra, 17 March 2000, p 34.

36 Mr John Millard, *Proof Committee Hansard*, Canberra, 17 March 2000, p 34.

1.56 In response to his evidence the ABC commented that:

Mr Millard's employment with the ABC was terminated in late 1995. He claimed subsequently that he was being victimised as a result of his earlier revelations that the ABC was improperly involved in compromising sponsorship. This led to the establishment of the Coleman Inquiry, the findings of which upheld his claims. The ABC accepts that Mr Millard has suffered a detriment as a result of this process. Mr Millard and the ABC subsequently agreed on a remuneration package which takes into account his past loss of career opportunities with the ABC. Notwithstanding these arrangements, Mr Millard does not accept that the ABC's response to the Coleman Inquiry was adequate or proper in the circumstances...Mr Millard is still employed by the ABC as a senior television producer-reporter with the program *Australian Story*.³⁷

1.57 Federal Secretary of the Media Entertainment and Arts Alliance (MEAA), Mr Chris Warren, declared faith in the integrity of ABC journalists and executives:

I do not have any hesitation in saying that I believe the executives - particularly in the news and current affairs area, who will be directly responsible for this - would have the same concerns as the journalists at the ABC and would seek to apply the guidelines with integrity...If the guidelines are properly applied, not just by the ABC but by all parties, then people, albeit with some nervousness, would have a preparedness to enter into this project or embrace this project.³⁸

1.58 He did however acknowledge that the experience with 'backdoor sponsorship' has created some doubts about the protection of editorial integrity in co-production environments:

The concern in a coproduction environment, as we saw with information programs about ten years ago, is that you are dealing in an environment where that culture is not so deeply ingrained. It is good and important to have those policies enshrined in the agreement, but it is a cultural question more than anything else, and I do not think we can tell in advance how transferable that culture is to co-production environments.³⁹

1.59 ABC executives stated that the ABC is forbidden, under Section 4.2.3 of its editorial guidelines, from entering into co-productions in the news and current affairs area.⁴⁰ However as some witnesses also explained, potential conflicts of interest can arise in many other areas outside news and current affairs, in information, lifestyle, or children's programming. ABC editorial guidelines now specify that in assessing any co-production proposals, ABC management must reject any proposal when they are not satisfied that the ABC's

37 Dr Julianne Schultz, *Proof Committee Hansard*, Canberra, 24 March 2000, p 81.

38 *Proof Committee Hansard*, Canberra, 17 March 2000, p 25.

39 *Proof Committee Hansard*, Canberra, 17 March 2000, p 25.

40 Dr Julianne Schultz, *Proof Committee Hansard*, Canberra, 24 March 2000, p 83.

independence, integrity, and editorial control are fully protected. These criteria also apply to ABC Online co-productions and a record of reasons for the acceptance or rejection of all proposals must be kept.⁴¹

1.60 The Committee has faith in the integrity of ABC staff and management, and accepts that the ABC editorial guidelines are generally adequate both in their relation to the preservation of editorial integrity in the licensing of content and in co-productions. However the strength of the guidelines in relation to co-productions is dependent on ABC executives exercising their judgement in a consistent and transparent way. It is unclear to the Committee how decisions about co-productions, and the recorded reasons for them, are reviewed within the ABC. It would seem proper for the review process to be more transparent.

1.61 Notwithstanding this general concern, the Australian Democrats believe that the concerns expressed by the MEAA are valid in the context of the proposed agreement with Telstra for two reasons:

1.62 Firstly, the way in which the proposed agreement deals with co-productions creates potential for pressures which could undermine the practical force of the editorial guidelines. Under the proposed agreement the ABC will be legally obliged to engage in co-productions with Telstra, the scope and variety of which is currently unknown. While there is no specified minimum (and a ceiling on ABC expenditures of \$1.8 million p.a.), given that co-productions will be paid for from the basic fee there are obvious commercial expectations on Telstra's part for them to go ahead. Telstra appears to have an expectation that \$1.8 million *will* be spent on co-productions.⁴² All proposals, however, will be subject to the editorial guidelines and some could conceivably be rejected on those grounds.

1.63 In this context, pressure to interpret the guidelines leniently could conceivably arise in some circumstances. It is the Australian Democrats' view that such potential pressure could be avoided by removing the intention to engage in co-productions from the proposed agreement, and commensurately reducing the basic fee. Both the ABC and Telstra would still be free to consider co-productions on a proposal-by-proposal basis.

1.64 Secondly, it is true that in Telstra a culture of editorial integrity is not deeply ingrained, primarily because it is a very new media content provider and its core business lies elsewhere, in the provision of network services. Telstra is a vast commercial organisation which touches the lives of virtually every individual and business in Australia in some way. It is in fierce competition with other telecommunications companies, and has been in litigation with other market participants and the ACCC for a number of years.

Its quality of service, particularly in rural and regional areas, is an ongoing matter of debate and controversy. It is the subject of large amounts of media coverage on a weekly and sometimes daily basis.

1.65 It is clear that Telstra aggressively defends its interests in the marketplace. On the other hand the ABC currently reports on Telstra in a forthright and robust fashion. An unmodified news feed from ABC Online will undoubtedly mean that stories whose content is critical of Telstra in some way will appear on Telstra's own website at regular (and at

41 Australian Broadcasting Corporation, Editorial Policies, ss 13.2.8 and 13.2.9.

42 Mr John Rolland, *Proof Committee Hansard*, Canberra, 24 March 2000, p 55.

particular times frequent) intervals. It is to Telstra's credit that it has willingly accepted the inclusion of the ABC's editorial guidelines in the proposed agreement, but it will need to resist the temptation to modify or drop content which it may otherwise perceive to be detrimental to its wider commercial interests.

1.66 It is in this real world context that concerns about self-censorship, or possible breaches of the agreement, arise. Should the agreement be breached by Telstra modifying a news feed, Telstra risks embittering its working relationship with the ABC and particularly those ABC journalists who create content for its website. A range of more discreet or subtle pressures which result in self-censorship by ABC journalists risks corroding ABC morale and could raise questions over its integrity. Under the proposed agreement it is the responsibility of Telstra, as much as the ABC, to act in ways that protect the ABC's editorial independence and integrity. This integrity also has a commercial value for Telstra - should it come into doubt both the cultural and commercial value of the ABC's content will gravely decline.

1.67 The MEAA aptly stated what is at stake here:

One of the things that gives people nervousness is that the integrity of the ABC did not just turn up one day. It is the result of, in the case of news and current affairs, over 50 years of work and conflict both within the ABC and between the ABC and external organisations...the integrity of the ABC is not something you can have a little bit of - you either have it or you don't.⁴³

1.68 The ABC strongly maintains that its editorial integrity will be preserved through its transition into the convergent environment. Dr Schultz told the Committee:

I can say to you that the non-commercial nature of the ABC and the preservation of the integrity and independence of its services and content are of paramount importance to the organisation, the Board, to senior management and to all those who work for it.⁴⁴

1.69 The ABC stresses that its editorial independence is protected by the safeguards built into its licence agreements and the proposed agreement with Telstra, by its processes of upward referral in the event of uncertainty, by its editorial guidelines, and by its internal culture of editorial integrity.⁴⁵ It also explained that, in the case of the proposed agreement with Telstra, there would be a complete separation between the client and journalists through having client liaison conducted by ABC enterprises.⁴⁶

43 *Proof Committee Hansard*, Canberra, 17 March 2000, pp 24-25.

44 *Proof Committee Hansard*, Canberra, 24 March 2000, p 96.

45 *Proof Committee Hansard*, Canberra, 24 March 2000, pp 96-97.

46 Harry Bardwell, *Proof Committee Hansard*, Canberra, 17 March 2000, p 10.

1.70 The ABC also told the Committee of the currently available remedies for journalists who were concerned about editorial compromise:

Section 3.1 of the Editorial Policies sets out the process for upward referral and Appendix 7 (both at Annex B) sets out the upward referral charts for National Networks, Regional Services and News and Current Affairs.

In addition, all ABC staff have a direct administrative supervisor, who is often different from the editorial supervisor. Training in supervisory and management skills is provided to ABC staff. Nearly all staff have some form of annual (or more frequent) performance review/assessment where they can raise issues of concern. Where employees feel the need for support or advice, they are formally encouraged to discuss matters with Human Resources staff or make use of the Employee Assistance Program.

The ABC, following an internal report on Grievance Procedures and Public Interest Disclosures which went to the ABC Board in December 1996, embarked upon a range of initiatives to improve the individual grievance procedures in the ABC.

Personal grievances associated with 'upward referral' decisions are but one reason for a personal grievance to arise generally.

The ABC is committed to develop personal grievance procedures, emanating from the December 1996 report, in the life of the next Enterprise Agreement (section 14 of the draft agreement provides this commitment). That agreement will be going to the staff in May.

In the context of 'whistleblower' concerns, the ABC developed a Fraud Awareness Campaign in 1997, as well as other measures to handle allegations of inappropriate behaviour. The mechanisms for handling personal grievances will be developed during the life of the next Enterprise Agreement.⁴⁷

1.71 The Australian Democrats acknowledge these arguments and accept that in normal circumstances they will provide helpful safeguards. However the Australian Democrats remain concerned about the possibility of the ABC's editorial integrity and independence being compromised, for two reasons:

- The experience of Mr Millard and others shows that the 'upward referral' of concerns to management failed in that case, and can be undermined if management is unresponsive. Without wishing to question in any way the integrity of ABC management and editors, the Australian Democrats feel that 'upward referral' remains hostage to management discretion and is by itself inadequate.
- The open-ended commitment in the proposed agreement to engage in co-productions could place stress on the assessment of co-production proposals, in relation to editorial guidelines, by ABC management. There may also be a need to further ensure the

47 Australian Broadcasting Corporation, Responses to questions on notice, 29 March 2000, p 3.

transparency and consistency of such assessments, through the automatic referral of documentation to the Board. It may be better also to remove the open-ended commitment to future co-productions from the proposed agreement with Telstra, without prejudice to the freedom of both parties to develop co-productions on a proposal-by-proposal basis.

1.72 The Australian Democrats are concerned that it appears difficult for staff to raise concerns about editorial compromise both in the context of the ABC selling online content and in relation to programming generally. It would be desirable for the ABC to foolproof its editorial structure from the dangers of subtle self-censorship, or more overt pressures, by creating a “safe atmosphere” in which journalists can raise concerns about editorial compromise, in the event that upward referral processes fail or if they fear that by raising concerns they could jeopardise their positions within the ABC. One potential solution here could be the formation of an independent committee that would include staff and union representation and which might be required to provide a summary of complaints and findings in the ABC’s Annual Report. In any case such a body should be clearly independent of ABC management and should be developed in close and broad consultation with ABC staff.

ABC funding , independence and advertising

1.73 A number of witnesses, including the Friends of the ABC, Mr Quentin Dempster and Mr Stewart Fist, raised concerns about the creeping commercialisation of the ABC in a climate of substantial reductions in public funding. There were fears that the ABC was becoming increasingly reliant upon external funds, and that further pressures to accept external funding for programming, either directly or through advertising, may become more intense if the funding crisis continues.⁴⁸

1.74 The ABC currently receives approximately \$500 million p.a. in public funding. It also receives gross revenues of approximately \$117 million from external sales (although net profits to the ABC would be substantially less). This represents a doubling of external revenues over five years.⁴⁹

1.75 In the 1996 Commonwealth budget the ABC’s allocation was cut by \$55 million per year. Notable casualties from this reduction were a large part of Radio Australia’s service and a dramatic reduction in Australian drama production. The Committee was told that while currently all news and current affairs is directly produced by the ABC, 48 per cent of its other Australian production is produced from co-productions or outsourcing.⁵⁰

1.76 An ABC triennial submission, which includes a request for approximately \$80-90 million to fund the transition to digital television, is currently before the Government for

48 Quentin Dempster, Submission 4, p 2. The communications journalist Mr Stewart Fist expressed concern about ‘incrementalism’ in the ABC, while the Friends of the ABC’s John Cassidy argued that ‘as long as the ABC is receiving a significant percentage of its funding from a commercial source, there is a danger’. *Proof Committee Hansard*, Canberra, 17 March 2000, pp 46, 52.

49 Dr Julianne Schultz, *Proof Committee Hansard*, Canberra, 17 March 2000, p 6; Mr Brian Johns, *Hansard*, Senate Environment, Communications, Information Technology and the Arts Committee, Additional Estimates, 11 February 2000, p 203.

50 *Hansard*, Senate Environment, Communications, Information Technology and the Arts Committee, Additional Estimates, 11 February 2000, p 203.

decision. This includes a grant for the capital and equipment upgrade, and a further amount within the triennial funding allocation for the development of digital content. The amount does not cover the full estimated cost of the transition to digital broadcasting which the ABC estimates to be \$160 million, to be further realised through management efficiencies and the sale of property.⁵¹ There is currently some speculation that the Government will not grant the full amount of the ABC request for digital funding - possibly not the content component within the annual funding. This is likely to place further pressure on the ABC to top up its budget from external sources to fund the production of new content.

1.77 Some witnesses expressed the concern that the Telstra agreement alone was a substantial new contribution to external revenues and could compromise the ABC's integrity. Mr Quentin Dempster for example argued that 'the ABC's current strategy of maximising revenues from online commercial arrangements could create irreconcilable differences between that strategy and the ABC's guidelines designed to protect the ABC's independence and integrity...the ABC's independence could therefore be at risk through a developing reliance on external revenues'.⁵²

1.78 The ABC's gross revenues from the Telstra agreement will be a minimum of \$13.5 million p.a. (\$67 million over five years) with the potential for further revenues from advertising and e-commerce. Thus the Telstra agreement could amount to 11 per cent of the ABC's gross external revenues over the next five years.

1.79 Responding to a question from the Committee, the Friends of the ABC acknowledged that the amount was a relatively small one in relation to the ABC's total budget. However their representative also commented that:

Irrespective of whether it is \$7 million or \$13 million...that will influence ABC programs. That amount of \$13 million a year would probably be a whole series of documentaries, so that becomes, 'Do we make this series of documentaries or don't we?'.⁵³

1.80 The Australian Democrats acknowledge the ABC's argument that the Telstra funds will be a small component of external revenues and only two per cent of the ABC's total budget.⁵⁴ However this does not diminish the legitimate concerns of witnesses about the ABC's direction. The Telstra revenues are five times the ABC Online annual budget. While it must be borne in mind that ABC Online uses content produced throughout the ABC, it will nevertheless be the case that the vast bulk of the ABC's dedicated funding for online content will be coming from a single external source.

1.81 Mr Quentin Dempster told the Committee that he did not have an in-principle objection to the sale of ABC content. Nor does he oppose the activities of ABC enterprises in selling programs, recordings and merchandise either overseas or through ABC shops.

51 *Hansard*, Senate Environment, Communications, Information Technology and the Arts Committee, Additional Estimates, 11 February 2000, p 201.

52 Quentin Dempster, Submission 4, pp 2-4.

53 *Proof Committee Hansard*, Canberra, 17 March 2000, p 50.

54 Dr Julianne Schultz, *Proof Committee Hansard*, Canberra, 17 March 2000, p 6.

However he did oppose the proposed agreement between the ABC and Telstra. He urged the Committee to:

state its opinion that the ABC/Telstra proposed commercial arrangements are not in the national interest as they would inevitably compromise the ABC's independence and integrity through developing an ABC dependence on commercial revenues through fees and a possible future share in advertising. Such an arrangement would compromise the ABC's editorial control of its content through imposing a commercial imperative in the selection and access to that content.⁵⁵

1.82 He went on to say that the proposed agreement would force a 'fundamental change' in the ABC process of funding and commissioning programming:

We need money to create moneys; we do not make programs to make money. It is a fundamental change in the commissioning processes and in the reasons we do things. What this Senate Committee has in front of it...is to help the ABC secure its future direction. Of course, as you say, governments - this one or some future government - will be quite stringent in funding the ABC, but at the same time I do not think that constraint on our funding should force us inevitably to compromise our independence through requiring us to go commercial as it were.⁵⁶

1.83 Mr Dempster appears to be raising two related concerns. One is that the decision-making about content and programming will increasingly be made with an eye to commercial imperatives rather than the ABC's charter. The second is that the provision for advertising revenues will enhance such tendencies by creating commercial imperatives within the ABC itself, and that this could also compromise the ABC's basic editorial integrity and independence. These concerns are dealt with separately in the following paragraphs.

Program design and the ABC Charter

1.84 The Australian Democrats believe that the concern expressed by Mr Dempster that the criteria for program design and commissioning will fundamentally change is a serious one. This is already a potential problem with co-productions, and it is possible this problem will increase in the context of the Telstra agreement. Currently programming decisions are framed by the ABC's charter. Yet Telstra will quite rationally seek content which will maximise traffic to and within its website. This content may or may not reflect the ABC's charter.

1.85 Mr John Millard told the Committee that previously, when NewsRadio was being sold to commercial interests:

What happened there...was that favour was given - given limited resources - to subjects which are marketable: sport, science, medicine, and financial services...There are other subjects - the environment, social issues,

55 *Proof Committee Hansard*, Canberra, 17 March 2000, p 29.

56 *Proof Committee Hansard*, Canberra, 17 March 2000, p 30.

unemployment and youth issues - that do not sell well. In time...certain subjects were advantaged and given precedence over others.⁵⁷

1.86 The Australian Democrats believe that it is an important matter of principle that the ABC's programming and content should continue to reflect, and be guided by, its charter. The ABC should avoid becoming a generalised production house or website developer in the online environment. Where the ABC is delivering its own content to Telstra or any other person on a non-exclusive basis this concern is lessened, but not entirely eliminated. It may be of greater concern in relation to exclusive co-productions. One simple way of reducing such concerns would be to modify the ABC's editorial guidelines to ensure that a decision about particular co-productions should also take account of whether the proposal reflects the ABC's charter.

▪ Advertising

1.87 The potential scope opened up by the Telstra agreement for advertising around ABC content is of very serious concern to the Australian Democrats. Advertising on ABC broadcast services is currently proscribed under Section 31(1) of the *ABC Act 1983*. The ABC maintains that this legislative prohibition does not extend to ABC Online.⁵⁸ An ABC Board policy decision currently proscribes advertising on ABC Online and around the content supplied by the ABC to third party websites.⁵⁹

1.88 The Australian Democrats note the view of Mr Brian Johns that the Board thus possesses the power to reverse that decision and allow advertising on ABC Online at some time in the future.⁶⁰ It is presumably with this in mind that the Term Sheet contains provision for the ABC to share in 15 per cent of Telstra's advertising revenues on pages with ABC content, should the ABC Board decide to allow advertising.

1.89 However the Term Sheet also provides for the ABC to receive a flat fee of \$2.5 million as a minimum proportion of potential advertising and e-commerce revenues. Thus, whether or not advertising is subsequently allowed, Telstra will be required to pay the ABC \$2.5 million. Telstra maintains that 'we could go for five years on this agreement with no advertising or e-commerce revenues. We are comfortable with that.'⁶¹ Notwithstanding these sentiments, the Australian Democrats are concerned that this could create an unacceptable commercial pressure for the ABC Board to change its policy on advertising.

1.90 The MEAA, which had surveyed ABC staff about their attitudes to the sale of online content, explained the views held by ABC staff on this matter:

The general question of the extent to which the ABC's online service is going to be exempt from advertising is a very important one. I know that on the Board of the ABC, for example, there are differing views about

57 *Proof Committee Hansard*, Canberra, 17 March 2000, p 38.

58 Australian Broadcasting Corporation, Submission 7, p 8.

59 Dr Julianne Schultz, *Proof Committee Hansard*, Canberra, 24 March 2000, p 80.

60 *Hansard*, Senate Environment, Communications, Information Technology and the Arts Committee, Additional Estimates, 10 February 2000, p 112.

61 Mr John Rolland, *Proof Committee Hansard*, Canberra, 24 March 2000, p 63.

that...For all the reasons of the different tradition and history of the ABC, the view of people within the ABC is that online advertising, either direct or indirect, will inevitably have the same impact on the online news and current affairs service that it could potentially have on the news and current affairs services on radio and television.⁶²

1.91 The Australian Democrats strongly dispute the view of Mr Johns and ABC management that it is a matter of Board discretion as to whether to allow advertising on ABC Online. This is simply a matter of historical accident, in that the technologies and services which make up ABC Online were simply not foreseen when the ABC Act was first drafted. It is clearly a general intention of the ABC Act to prohibit advertising on all its existing services, something which the Board's current policy recognises. It would be a simple matter, as Mr Dempster recommends, for Section 31 of the ABC Act to be amended to extend the prohibition of advertising to ABC Online and online content sold to third parties.⁶³

1.92 As a matter of principle, the Australian Democrats are opposed to advertising on ABC Online or around content supplied to third party websites by ABC Online. For the Board to unilaterally decide to allow advertising on ABC online or its licensed content, in a context of legislative uncertainty, would generate enormous controversy and risk being subsequently overturned with a simple amendment to the ABC Act. It would thus be commercially unwise for the ABC to enter into any agreement premised upon future revenues from advertising. The Australian Democrats believe that this aspect of the proposed agreement with Telstra should not be pursued.

The Scope of the ABC-Telstra Agreement

1.93 A number of witnesses expressed concern about the overall breadth and scope of the proposed agreement with Telstra. Thus while many witnesses were not opposed to the sale of "of-the-shelf" content, they were concerned about a range of other elements - co-productions, co-operation in datacasting and multimedia, the future purchase of broadband capacity and so on - being rolled into the same agreement. They were concerned that it could create an overall atmosphere in which pressure to compromise editorial integrity might be greater. They were also concerned that it could antagonise the ABC's competitors, other potential clients or service providers. The Australian Democrats share these concerns, and have related concerns about the dangers involved in making a legally binding agreements in relation to unspecified future activities.

1.94 Mr Quentin Dempster thought the agreement 'reads like a strategic alliance between the ABC and Telstra, which goes beyond selling content to them for a price':

Because it is a strategic alliance, as I said in my submission, it involves the ABC in a fully commercial business plan with a another operator and delivery system. This arrangement will cause us all sorts of trouble with Optus, with any other player. I am basing this on my bitter experience being on the Board of the ABC as we did a deal with Fairfax and Cox Communications on PayTV...That provokes commercial rivalries.

62 Chris Warren, *Proof Committee Hansard*, Canberra, 17 March 2000, p 27.

63 Quentin Dempster, Submission 4, p 5.

Everybody's attitude to the ABC changes as a result of that...I do not think this is the direction in which we should go.⁶⁴

1.95 The Friends of the ABC agreed that the proposed agreement was taking on the quality of a strategic alliance, which raised concerns about influence:

The ABC is not simply having to enter into this sponsorship arrangement but is entering into a much closer arrangement with Telstra. If the ABC were to enter into such a close relationship with Coles Myer or the ANZ banks or BHP or anyone else, we would start to get really worried about it. Yet Telstra is bigger and more influential than any of them.⁶⁵

1.96 The MEAA shared these concerns about influence. Referring to the provision which commits the ABC to actively explore making Telstra its preferred ISP backchannel for datacasting, they said:

The things that probably give people the greatest unease about the Telstra agreement are provisions such as that - anything that can mean that the content of news and current affairs services is altered by commercial considerations...I have some unease about anything that involves a quid pro quo of promotion of Telstra services or any special reference to Telstra services...I think it is in everybody's interest to not have in the agreement provisions that can be interpreted - they may say misinterpreted - to involve any influencing of news and current affairs material on commercial grounds. I think that would be better for both parties.⁶⁶

1.97 In response to the Committee's suggestion that the proposed agreement with Telstra was 'an extraordinarily long and definite contract when the whole communications environment appears to change so rapidly', the ABC replied that:

It [is] and it [is] not. Over the next five years, we will see significant changes occurring. Part of the benefit for the ABC will be that, as a result of these arrangement, we will be well placed to engage with some of those new media as they develop. It merely gives us access to these emerging new commercial networks. Otherwise we may not have access to them in this way.⁶⁷

1.98 The Australian Democrats note the concerns of the ABC about obtaining access to new delivery platforms, and agrees that it is important for the ABC to position itself to do so. The ABC's PayTV venture foundered when it was locked out of access to cable because of exclusive access deals between C&W Optus and Telstra (the owners of cable infrastructure) and competing PayTV consortia such as Foxtel. In recognition of the unfairness of this situation, and its anticompetitive nature, in 1999 the ACCC 'declared' analogue specific

64 *Proof Committee Hansard*, Canberra, 17 March 2000, p 31.

65 *Proof Committee Hansard*, Canberra, 17 March 2000, p 48.

66 Mr Chris Warren, *Proof Committee Hansard*, Canberra, 17 March 2000, p 48.

67 Dr Julianne Schultz, *Proof Committee Hansard*, Canberra, 17 March 2000, p 12.

subscription television services under Part XIC of the *Trade Practices Act 1974*, directing the cable owners to provide carriage to all PayTV services on reasonable commercial terms.⁶⁸

1.99 The Federal Court recently upheld a challenge by TARBS and Channel 7 to the exclusive agreement between Telstra and Foxtel, ordering that Telstra provide carriage to Channel 7 and others. Thus, pending appeals, it is likely that a firm open-access regime for PayTV to cable infrastructure is now in place.⁶⁹ It is this same infrastructure that is likely to be a major carrier of broadband convergent services in the future.

1.100 However this declaration and decision is specific to PayTV services, and cannot be extrapolated into the future in relation to convergent services. This would require a new declaration by the ACCC. Thus there remains a legitimate level of anxiety that access to carriage will be locked up between a few players on the basis of exclusive agreements. On the other hand a general principle of open access to cable, and regulatory intervention to achieve it, has been established.

1.101 The Australian Democrats note that a number of witnesses, including Quentin Dempster and the CPSU, have recommended that the ABC's access to broadband carriage services be mandated by government.

1.102 The CPSU also raised the broader concern that a range of additional elements were being levered into what was primarily an agreement to supply content:

This is presented to staff as a technology issue - that is, if we do not get onto this broadband technology, we are going to be left behind. The fact is, however, that Telstra is not approaching this deal as the provider of a technology; it is promoting the deal as a content producer. So Telstra's confused role here has forced the ABC - albeit willingly perhaps - into compromising itself at the beginning of the deal. It would be different if the ABC were simply saying, 'Telstra's a great provider of broadband services, we'll do a deal with them.' But that is not what is happening here. There is a content element, and editorial element, being driven directly into the deal.⁷⁰

1.103 This echoes the concerns expressed about the potentially compromising impacts of engaging in a 'strategic alliance' which were discussed above. The Australian Democrats find such concerns persuasive. The Australian Democrats share the mystification of many witnesses as to why such a disparate series of elements have been combined into an agreement whose central component, as the ABC explains, is the sale of online content. The Australian Democrats agree that the very wide scope of this proposed agreement potential

68 Australian Competition and Consumer Commission, *Declaration of Analogue Subscription Television Broadcast Carriage Service*, August 1999. The ACCC has declined to declare technology-neutral subscription TV services (which would include digital services) because of the uncertainty about digital broadcasting in general. It stated however that it would continue to monitor developments in digital services and technologies in order to assess whether a future declaration would be justified. Australian Competition and Consumer Commission, *Declaration of Subscription Television Broadcast Carriage Service (Technology Neutral)*, August 1999.

69 Luke Collins, "Telstra loses cable control", *The Australian Financial Review*, 28 March 2000, p 1; Bryan Frith, "Cable on the table for Seven and other little Australians", *The Australian*, 28 March 2000, p 22.

70 Mr John Cleary, *Proof Committee Hansard*, Canberra, 24 March 2000, p 73.

exacerbates an atmosphere in which editorial values could be put under pressure. Conversely, if the extra elements were removed from the agreement about content, these concerns could be lessened.

1.104 The Australian Democrats also have a range of further concerns about the broader scope of the proposed agreement. These relate to the following areas:

1.105 *Co-productions:* As discussed above, the Australian Democrats feel that an undertaking in this agreement to engage in an unspecified number and type of online co-productions may be unwise. Co-productions need to be carefully assessed by the ABC in terms of its editorial guidelines (and, the Australian Democrats would recommend, in relation to its Charter). It is important that these are able to be assessed in an environment free from the pressures that an earlier legally binding undertaking could create. There may also be a danger of litigation if the expectations of Telstra in this area were not met over the longer-term. The Australian Democrats suggest that it may be more advisable to remove the undertaking about co-productions from the proposed agreement, and that co-productions be assessed on a proposal-by-proposal basis as they arise.

1.106 *EasyMail:* The Australian Democrats agree that providing access for ABC Online visitors to free e-mail services would be useful, and it welcomes the assurances of the ABC that it will look at services other than Telstra's before making any decisions.⁷¹ However a decision about this would need to be carefully assessed to ensure that it would not involve the ABC in advertising or that it would not be in breach of its editorial guidelines about hyperlinks. The current conditions for access to Telstra's free e-mail services, which stipulate that one must 'join' Telstra.com, would be compromising for the ABC, as would any advertising on an ABC-endorsed e-mail service. The Australian Democrats believe that reference to EasyMail should be removed from the proposed agreement.

1.107 *Datacasting co-operation and broadband services:* The Australian Democrats believe that reference to datacasting co-operation and broadband services should be removed from the proposed agreement in the interest of preserving the ABC's editorial integrity from potential compromise. If such options are to be pursued, they should be the subject of a separate agreement. The ABC Board may also wish to give these proposals more detailed and lengthy consideration before committing the ABC to future commercial and/or strategic relationships before their contours and scope are clear. Three issues arise here:

- Has the ABC adequately assessed the potential benefits of co-operating with Telstra in the development of datacasting and multimedia applications? While there may be benefits in this regard, there may also be potential drawbacks, such as a loss of strategic flexibility. While continuing to explore options with Telstra, there are also reasons for proceeding with greater caution in this area.
- The concerns about access to cable carriage for convergent services have been discussed above. While the ABC is obviously free to purchase carriage services from Telstra, it may also want to preserve its flexibility in this area. Its own interests will be better served by the institution of an open-access regime to cable infrastructure, and it is important that the ABC should not engage in behaviour which suggests to the cable owners, or competitors, that exclusive agreements are the best path. This is a very real

71 Dr Julianne Schultz, *Proof Committee Hansard*, Canberra, 24 March 2000, p 90.

concern with the Term Sheet in its current form. If exclusive access were to become the rule there is a danger that the ABC could be locked out after being outbid by a competitor. If this was to occur, as it did with pay television, the Australian Democrats believe that it might neither be in the ABC's nor in the national interest.

- The 'most favoured nation' clause in the Term Sheet currently refers to the entire agreement. The ABC Board may wish to consider whether such a global clause constrains the ABC's strategic flexibility or decisionmaking in relation to the variety of future commercial transactions that the proposed agreement contains.

Privacy

1.108 Some witnesses and submissions expressed concern about the potential invasion of privacy implied by the collection of information about users of telstra.com, and that the ABC may be drawn into such potential abuse. Particular concerns were raised about the possible aggregation of information with Telstra's other customer databases.⁷²

1.109 Telstra collects information through membership forms to telstra.com, through the use of cookies (small files created on the user's computer to record user preferences on the host website), and through electronic records of the time, date and source of web page requests.⁷³

1.110 Telstra is governed in privacy matters by the *Telecommunications Act 1997*, industry codes of practice and its own privacy policies. Its information collection activities and privacy undertakings are contained in a privacy statement published on its website. This statement includes the following undertakings:

The personal information that you provide to us during registration is used for identification purposes and will assist you to subscribe to telstra.com services and help you to shop online...

...The data that is gathered when you use telstra.com is aggregated for analysis by Telstra. Identifiable characteristics are removed and the user remains anonymous. Additional data provided to us is used to examine Internet trends and demographics to help Telstra offer you improved online products and services.

The information we collect from you is strictly confidential. Telstra is required by law not to reveal, disclose, sell, distribute, rent, licence, share or pass on to any third parties, other than those who are contracted to Telstra, any personal information that you may have provided to us unless we have your express consent to do so.

72 See Stewart Fist, Submission 3.

73 < <http://www.telstra.com/res/docs/Privacy.asp> > , 31 March 2000.

Exceptions to this include:

- where there are reasonable grounds to believe that disclosure is necessary to prevent a threat to life or health; and;

- where Telstra is required to provide information in response to

Subpoenas or Warrants or other legal process including requests from the Australian Stock Exchange.⁷⁴

1.111 ABC management told the Committee that:

The ABC's own privacy standards are very strict. We jealously guard and protect the privacy of audiences. We are governed by the Privacy Act and standards that the Commonwealth adopted...Privacy is going to be one of the big make or break issues, and how companies are able to respect and honour that privacy is going to be very crucial.⁷⁵

1.112 The ABC told the Committee that while the Term Sheet had no reference to privacy, 'we will certainly be ensuring that Telstra has adequate privacy provisions on their service'.⁷⁶ The Committee recommends that this be pursued by the ABC during contract negotiations, and that a clear undertaking to respect the privacy and confidentiality of users, over and above general references to privacy policies, be included in the final contract.

The ABC Act and ABC Online

1.113 As the discussion above about the likelihood or otherwise of advertising shows, the legislative coverage of ABC Online is a significant factor bringing uncertainty into the future direction of the ABC and ABC Online. A number of witnesses to this Inquiry recommended that the role of ABC Online should be defined in the ABC Act.⁷⁷ In view of the assertions of ABC management as to the central importance of ABC Online to the Corporation's future, it would seem logical to take this next step. This matter is the subject on the Committee's ongoing Inquiry into ABC Online.

Conclusions and Recommendations

1.114 ABC Online is a very successful new component of the Australian Broadcasting Corporation and is a legitimate source of pride. The Australian Democrats commend the ABC for its foresight and skill in establishing and developing ABC Online, and strongly supports its maintenance as a core ABC activity. In such a context, the Australian Democrats have no wish to see inappropriate constraints imposed on the ABC's freedom of action in developing a strong presence in the evolving convergent environment. However this freedom

74 < <http://www.telstra.com/res/docs/Privacy.asp> > , 31 March 2000.

75 Dr Julianne Schultz, *Proof Committee Hansard*, Canberra, 17 March 2000, p 19.

76 Mr Harry Bardwell, *Proof Committee Hansard*, Canberra, 17 March 2000, p 19.

77 *Proof Committee Hansard*, Canberra, 17 March 2000, Mr Quentin Dempster, p 29, Mr Chris Warren, p 22, Mr Darce Cassidy, p 49.

needs to be balanced by attention to the ABC's Charter and core responsibilities as a respected public broadcaster and institution, in which its editorial integrity and independence, and the value of its brand, are preserved. In framing its recommendations, the Australian Democrats thus suggest to the Board a course that seeks to preserve the ABC's freedom of action and to balance this against the need to ensure that the ABC's integrity is protected under new commercial arrangements.

1.115 The Australian Democrats have no in-principle objection to the sale of ABC Online content to third party websites, provided that the agreements to do so require the strict application of ABC editorial policies and guidelines and that advertising (other than for the ABC's own products and services) is not placed around or otherwise associated with ABC material. However the Australian Democrats have substantial reservations about the conclusion of the proposed agreement with Telstra in its current form.

1.116 The Australian Democrats do not oppose the sale of ABC online content to Telstra, or the potential for the two organisations to engage in online co-productions. However the Australian Democrats have reservations about a range of other elements in the proposed agreement which they believe could contravene the spirit of the ABC's Act, constrain the ABC's strategic flexibility as the online environment develops, or create disagreement about future expectations.

1.117 The Australian Democrats have substantial reservations about the inclusion of clauses which provide for the ABC to share in Telstra Online advertising revenues, that require the cross-promotion of Telstra products and services either on ABC Online or in ABC shops, and which commit the ABC to early decisions about co-productions with Telstra, the purchase of Telstra broadband capacity, or co-operation in the development of datacasting products and applications.

1.118 The Australian Democrats believe that it may be commercially unwise for the ABC to enter into agreements for the future performance of vaguely specified activities. Such agreements potentially constrain the ABC's future freedom of action. More significantly, they could potentially expose the ABC to the risk of future litigation should the (currently unspecified) expectations of Telstra not be met.

The Australian Democrats also agree with the concern of some witnesses that for the ABC to enter into a strategic alliance with a commercial organisation, within the context of an agreement for the sale of large volume of content, could unnecessarily compromise its editorial independence and integrity.

1.119 The Australian Democrats suggest that the ABC Board may wish to consider a new agreement solely for the sale and repurposing of ABC Online content to Telstra Corporation. This agreement could deal merely with the sale and repurposing of online content and would be repriced if necessary on that basis. It should include strong provisions to ensure that ABC content is not altered by Telstra, and that ABC editorial policies and guidelines will apply to all content supplied by the ABC to Telstra.

1.120 The Australian Democrats agree that the ABC should be free to enter into co-productions with Telstra, but considers it better for these to be the subject of separate agreements made *as and when* clear proposals with a discrete commercial value arise. Co-productions would also be subject to ABC editorial policies and guidelines, particularly Sections 13.2.8 and 13.2.9. The Australian Democrats also suggest that, when decisions are

made, the relevance of the co-production to the ABC's Charter be considered. The Australian Democrats suggest that in order to free such decisions from undue pressure, no general agreement for future as yet unspecified co-productions should be made at this time.

1.121 Likewise while the ABC should be free to consider buying Telstra broadband capacity, cross-promoting ABC products in Telstra shops or co-operating in the development of datacasting applications, these should be the subject of separate agreements. The Australian Democrats suggest that it may be strategically unwise for the ABC to commit to co-operate in *future* activities that are not clearly specified and highly uncertain both in potential scope and value. Where future decisions are taken to undertake such activities, they should be subject to ABC guidelines where applicable, with particular attention to preserving the ABC's strategic flexibility, its editorial integrity and the value and reputation of its brand.

1.122 The Australian Democrats are particularly concerned about the inclusion of a reference to future advertising revenues in the agreement. Advertising on ABC broadcast services is currently proscribed by Section 31 of the *ABC Act 1983*. Advertising on ABC Online and around ABC Online content sold to third parties is currently proscribed by an ABC Board policy decision, in the absence of any direct reference to ABC online services in the ABC Act. The Australian Democrats strongly dispute the view of the ABC that the Board possesses the discretion to change this policy to allow advertising - this is properly a matter for the Parliament to consider. The Australian Democrats strongly recommend that any reference to advertising revenues be removed from the proposed agreement with Telstra.

1.123 The Australian Democrats share the concern of many witnesses about the apparent secrecy and haste with which the Telstra and other online agreements have been developed. This has unnecessarily generated much anxiety about the ABC's direction and willingness to consult with staff on matters of importance. The Australian Democrats acknowledge the need for the protection of commercial confidentiality in such matters. However it would still be possible for the ABC to find improved ways of consulting with its staff and the public on general matters of editorial integrity and philosophy prior to branching out in new directions.

1.124 The Australian Democrats acknowledge the ABC's legitimate desire to ensure that it has access to broadband carriage services in the future. However the Australian Democrats suggest that, at this early stage, it may be better to remove reference to the future purchase of Telstra's broadband carriage or ISP services from the proposed agreement. A 1999 ACCC declaration on subscription television services, and a recent Federal Court decision, have demonstrated that the principle of open-access to cable infrastructure is growing in strength.

While carefully positioning itself to obtain access to broadband carriage services, the ABC should make it clear to Government that its interests may be best served by the early institution of an open-access regime to cable infrastructure for internet services. The Australian Democrats suggest that the ABC avoid signing an exclusive agreement with any cable owner that might prejudice the achievement of an open-access regime.

As a result of its review of the issues raised, the Australian Democrats make the following recommendations:

Recommendation 1

The Australian Democrats recommend that the ABC Board consider pursuing an alternative agreement with Telstra Corporation solely for the sale and repurposing of ABC online content, subject to the strict application of ABC editorial policies and guidelines and a contractual undertaking by Telstra that ABC content is not to be materially altered.

Recommendation 2

The Australian Democrats recommend that all reference in the proposed agreement with Telstra to future advertising revenues be removed, and that the ABC Board policy decision prohibiting advertising on ABC online and around ABC content sold to third parties be maintained at least until after the completion of part (c) of the Committee's current inquiry has been completed.

Recommendation 3

The Australian Democrats recommend that, in order to ensure that internal ABC processes are free from potential pressures, no agreement for unspecified future co-productions with Telstra be made at this time. Co-productions could be explored as and when concrete proposals arise with a discrete commercial value. The Australian Democrats recommend that they be assessed closely in relation to the ABC editorial policies and guidelines and that their relevance to the ABC's charter also be considered.

Recommendation 4

The Australian Democrats recommend that, within the reasonable limits of available resources, the ABC seek to improve its monitoring of third party purchasers of ABC online content to ensure their fidelity to ABC editorial policies and guidelines. Where technological solutions may be available they should be explored.

Recommendation 5

The Australian Democrats recommend that reference to the cross-promotion of the two parties products in Telstra and ABC shops be removed from the proposed agreement. The Australian Democrats recommend that the ABC give further consideration to this proposal to ensure it does not breach ABC guidelines about the sale and promotion of other products.

Recommendation 6

The Australian Democrats recommend that reference to Telstra's EasyMail service be removed from the proposed agreement. The Australian Democrats recommend that the ABC give careful consideration to any proposal to link ABC Online to a third party's free e-mail service to ensure that it does not compromise the ABC's guidelines or integrity.

Recommendation 7

The Australian Democrats recommend that reference to future co-operation between the ABC and Telstra in the area of datacasting and multimedia be removed from the proposed agreement. The ABC may wish to give further careful consideration to this proposal to assess its potential advantages and disadvantages, and to ensure that the ABC's strategic flexibility is not constrained.

Recommendation 8

The Australian Democrats recommend that, within the limits of commercial confidentiality, ABC management improve their consultation with the ABC Board and with staff over commercial arrangements that raise basic issues of the ABC's editorial independence, integrity, philosophy and future direction.

Recommendation 9

The Australian Democrats recommend that the ABC, in close consultation with its staff, introduce new measures to protect staff who wish to raise concerns about the ABC's editorial integrity and independence in the evolving online environment. This might take the form of an independent committee with elected staff and union representation and the ABC might be required to provide a summary of complaints and findings in the ABC's Annual Report.

Recommendation 10

The Australian Democrats recommend that the ABC ensure during contract negotiations that Telstra's service is covered by an adequate privacy policy, and that a clear undertaking to respect the privacy and confidentiality of users, over and above general references to privacy policies, be included in the final contract.

