

SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

INQUIRY INTO THE COMPETITIVE NEUTRALITY OF THE NATIONAL BROADCASTERS

June 2018

Commercial Radio Australia (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 260 member stations, comprising 99% of the Australian commercial radio industry.

CRA welcomes the opportunity to respond to the Department's inquiry into the competitive neutrality of the national broadcasters (**Inquiry**).

The commercial radio industry understands that the national broadcasters are a valued part of the Australian community and media landscape. We do not seek to change this. There are many examples of content produced by the national broadcasters that fulfil their Charters and supplement content offered by commercial broadcasters, such as the SBS in-language radio programs and ABC Classic FM.

There is much to like about the current framework within which the national broadcasters operate. CRA strongly supports the principle of government funding rather than advertising revenue to support the national broadcasters. However, this funding must be used appropriately and in a way that permits commercial radio stations also to thrive.

Our primary concern is to preserve diversity within Australian media by ensuring that the commercial and public broadcasting sectors can operate in a complementary manner and on an equal footing, notwithstanding their divergent sources of revenue.

1. **Key points**

The Commonwealth Competitive Neutrality Policy¹ requires that government business activities should not enjoy net competitive advantages simply by virtue of their public sector ownership.

Competitive neutrality policy requires government business activities to '*charge prices that fully reflect costs and to compete on the same footing as private sector business in terms of taxation, debt, regulation and earning a commercial rate of return*'.²³

¹ Developed in 1996.

² Page 10, Issues Paper (extract from the Harper Review 31 March 2015).

In responding to this Inquiry, we have considered whether the national broadcasters use 'best efforts' to comply with key elements of the Commonwealth Competitive Neutrality Policy, particularly whether they are competing appropriately in markets.

Accordingly, this submission focuses on the following:

- The absence of regularity neutrality between the commercial and publicly funded broadcast sectors. The commercial radio industry is subject to significant local content and Australian music obligations. No such restrictions bind the national broadcasters. This places regional radio broadcasters – who are subject to the local content regulations – at a particular disadvantage.
- The absence of a requirement to earn a commercial return of assets greatly benefits the ABC. The absence of third party advertising means it has time to promote heavily its own programs and products. The range of platforms over which the ABC operates allows extensive cross platform promotion, which on occasion blurs the line between news and entertainment content. This particularly benefits the ABC when launching new and emerging content formats, such as podcasts.
- The ABC uses its government funding to market aggressively against the commercial sector. For example, the ABC pays for its own services to be listed above commercial services on App Store and Facebook, even when the consumer has searched for the commercial service. This does not reflect the ABC's obligations either under section 6(2) of the ABC Act or under the Commonwealth Competitive Neutrality Policy.
- The ABC also on occasion conducts commercial promotions that divert advertising revenue away from the commercial sector. Businesses are unlikely to spend money advertising on commercial stations if they are able to obtain free promotion on their local ABC station.
- In November 2000, the Council of Australian Governments (COAG) agreed that the ABC and SBS should adopt a 'best endeavours' approach to compliance with the Competitive Neutrality Policy. The national broadcasters do not always appear to take such an approach.

2. Exemptions from regulatory constraints or costs

There is currently a gaping inequality between the regulations applicable to commercial compared with the national broadcasters.

Commercial broadcasters are more heavily regulated than their publicly funded counterparts. There is no regulatory neutrality between the sectors, as the national broadcasters have neither local content nor Australian music obligations.

³ We note that competitive neutrality does not extend to competitive advantages arising from factors such as business size, skills, neutrality or customer loyalty.

Its heavy regulatory burden places commercial radio at a significant disadvantage in terms of the content it is permitted to produce, as commercial radio is forced to divert significant resources into compliance with the regulatory framework.

The local content obligations impact heavily on regional commercial radio stations, who must employ additional compliance staff to manage the regulatory burden.

All commercial radio stations (other than talk stations) must play a percentage of Australian music. The national broadcasters have no equivalent obligation.

Regulatory framework – general

The commercial radio industry is regulated primarily under the *Broadcasting Services Act 1992 (BSA)*.

Section 123 of the BSA contains the requirement for a co-regulatory Commercial Radio Code of Practice (**Code**), which is administered by the Australian Communication and Media Authority (**ACMA**).

The current Code was registered by the ACMA on 15 March 2017 following an extensive period of public consultation and discussions with the ACMA that lasted over 12 months.

Section 123(2) sets out twelve areas which the Code may cover. These include:

- preventing the broadcast of programs that are not suitable for broadcast in accordance with community standards;
- methods of ensuring the protection of children;
- promoting accuracy and fairness in news and current affairs;
- preventing the broadcasting of programs that mislead or alarm the audience;
- broadcasting of Australian music; and
- complaints handling.

The framework is co-regulatory and requires the ACMA to be involved in the development of the Code, the assessment of community safeguards and consultation with the public. It is not open to the commercial radio industry to draft or enforce its own Code or complaints mechanism (unlike the national broadcasters). The Code is reviewed triennially.

Before registering the Code, the ACMA must be satisfied that:

- the Code contains appropriate community safeguards; and
- members of the public have been given an adequate opportunity to comment on the code (section 123(4) BSA).

Local content

The regional commercial radio industry is subject to the most onerous local content requirements in the broadcast sector. *Local content* means content local to the station's licence area.

Under section 43C of the *Broadcasting Services Act 1992 (BSA)* and the *Broadcasting Services (Regional Commercial Radio – Material of Local Significance) Licence Condition 2014* all regional commercial radio stations must broadcast specified levels of material of local significance.

Small commercial radio licensees must broadcast **30 minutes** of material of local significance each day, and all other licensees must broadcast **three hours** each day⁴.

The content must be broadcast during day time hours (5am to 8pm) each business day. This means that the local content is broadcast during peak listening times, thereby reaching the maximum number of listeners.

Further local content obligations apply to stations that have experienced a 'trigger event'. A trigger event is, broadly, a change in control of the licensee or registrable media group.⁵

Following a trigger event, licensees must:

- meet 'minimum standards' for local news, local weather, local community service announcements, emergency warnings and, where applicable, designated local content programs; and
- maintain the existing level of local presence (defined by reference to staffing levels and studios and other production facilities) for a period of 24 months after the trigger event.

The 'minimum standards' set out in section 61CE, *Broadcasting Services Act 1992* are as follows:

- Local news: a local news bulletin lasting at least 12.5 minutes must be broadcast on at least 5 days per week during prime time hours. None of the bulletins may consist wholly of material that has been broadcast in the licence area.
- Local weather: local weather bulletins must be broadcast on at least 5 days per week during prime time hours.
- Community service announcements: trigger event affected licensees must broadcast at least one local community service announcement each week.

⁴ Excluding remote area, section 40 and racing radio stations.

⁵ Section 43B of the *Broadcasting Services Act 1992* and *Broadcasting Services (Regional Commercial Radio – Local Presence) Licence Condition 2014*.

- Emergency warnings: trigger affected licensees must broadcast emergency service warnings when requested to do so.

Australian music

All commercial radio stations are subject to the obligation to play Australian music. This is set out in section 5 of the Code. In summary, this provides that:

- licensees must play the applicable proportion of music performed by Australians during the Australian Performance Period (section 5.1);
- Australian Performance Period means the total period of 126 hours occurring in each week between the hours of 6.00am and 12.00 midnight daily (see Definitions section);
- Australian means a person who is a citizen of or ordinarily resident in Australia;
- the applicable portion of total time is determined based upon the predominant format of the licensee's service and ranges from 0 (e.g. talk stations) to 25% (e.g. Top 40 stations). This is set out in a table at section 5.2 of the Code;
- there are additional obligations for some categories of station (A, B and C) to play New Australian Performances as a proportion of their total Australian performances (section 5.3); and
- New Australia Performances means a sound recording of a previously unpublished performance performed by an Australian, which has been on sale for a period not exceeding 12 months from the date recorded in the ARIA Report as the date of its initial release in Australia.

3. Inequality of technical regulations

The commercial radio industry suffers from an inequality of technical regulation in relation to both FM and AM spectrum. This places it at a significant disadvantage when compared to the national broadcasters.

FM

The ABC dominates the FM spectrum. It has numerous very high power sites across the country and continues to apply for more. This has made AM-FM conversion extremely difficult in many regional areas.

A case in point is the recently allocated frequency in in the Horsham licence area at Mt Arapiles at 20kW, the frequency is currently officially "LAP planned – no licence". The ABC has the major site at Mt Dundas 80km south with all 5 services operating at 80kW.

The same applies for lower power repeater services for the ABC and SBS which have been turned off, officially "transmission expired" but the frequency is not released. For example there is a SBS service in Gunnedah town on 103.9MHz which may be useful for AM-FM conversion.

The commercial radio industry would like to see some flexibility for the ACMA to release FM frequencies that are currently not operational for the ABC or SBS if there is a commercial need.

AM

In the metropolitan markets the ABC transmits its AM signals (used for talk stations) at 50Kw. Commercial radio stations transmit at power levels generally approved for less than 25Kw. This confers an advantage on the ABC as it has access to a greater audience than its commercial competitors.

In Brisbane, the owner/operators of Radio 4BC are forced to undertake a very restrictive antenna pattern in order to protect a Melbourne broadcaster, compounded by the need to adhere to licence conditions that enforce transmitter power differences (day/night switching) This unfortunately has the effect of actively reducing power in the direction of a substantial growth corridor in Brisbane. The ABC in Brisbane (4QR) have been allowed almost 1.5x the power in all directions, with no restrictions in terms of antenna pattern.

In order to be able to compete effectively, the power levels allocated to the national and commercial broadcasters should be equivalent, unless there are exceptional reasons for differentiating between them.

4. Absence of need to generate revenue allows heavy promotion of ABC content

The absence of a requirement to earn a commercial return of assets can result in an undue advantage to the ABC.

The ABC can experiment with formats, content and technologies without having to consider whether it will attract advertising. Nevertheless, commercial radio generally manages to develop equally innovative new content, despite the larger investment risk.

More significant is the ABC's ability to promote heavily its own content in the absence of third party advertising. This places commercial stations at a severe disadvantage, particularly when launching new content, such as podcasts.

Cross platform promotion

Commercial radio stations are funded entirely by advertising and may incorporate around 15 minutes of third party advertising per hour. The broadcast of extensive station content promotions, in addition to third party advertising, would weaken the content product being offered by the radio station. This would turn listeners away and would also make commercial radio less attractive as an advertising platform for third parties. The net result would be reduced revenue for the commercial station.

By contrast, the ABC is able to bombard listeners with adverts for its own content and products, without facing the risk of overwhelming its audience with advertising content. Its extensive promotions cover programs, podcasts and its own merchandise. The promotion of ABC merchandise is particularly aggressive around occasions such as Mother's Day and Christmas.

The ABC also uses its top programming slots as platforms for cross platform promotion. This gives it an unparalleled advantage over commercial networks, particularly when competing over new media offerings, where the market place is immature and fickle.

For example, on Monday 11 June 2018, the ABC used its 8.00pm Australian Story time slot to run a program promoting its new podcast *Unravel*. In doing this, the ABC exposed *Unravel* to an Australian Story audience of around 700,000 viewers.

This type of advertising is invaluable in launching a new product and provides the ABC with a huge advantage over a commercial radio station trying to launch a podcast.

A commercial radio station's reliance on advertising in each day part means that it could never sacrifice the advertising revenue from, for example, a breakfast show, in order to promote its own cross platform content.

It is difficult for commercial stations to compete for consumers for new products – particularly in a disrupted new media market place – when the ABC has such a powerful advertising tool (its own programming across a range of platforms) at its disposal. Ultimately, this is likely to inhibit competition and diversity within the market.

Promotion of ABC content in news

The ABC's promotion of its own podcast content in news formats is particularly concerning.

In 2017, the ABC launched a podcast called *Trace*, which looked at the unsolved murder of Maria James in 1980. The ABC used the news pages on its website to cover the unsolved murder, while at the same time promoting its podcast.

The ability to promote its own content, particularly in the relatively new podcast format, gives the ABC a huge advantage over its commercial counterparts.

Commercial radio stations do not operate across this range of platforms – online news, television and radio – and will never be able to promote content in this way. This impedes its ability to compete effectively with new, innovative platforms.

It is also concerning that the ABC appears to be selecting its news stories partially in order to promote its own entertainment products.

<http://www.abc.net.au/news/2017-07-19/trace-what-happens-next-in-maria-james-murder-investigation/8717254>

Will the case be reinvestigated by police?

In short, yes.

Mark James has been told his mum's case will be reinvestigated by Victoria Police's cold case unit.

In light of the "embarrassing" DNA mix-up, it is understood police will retest the exhibits from the crime scene in the hope of finding a DNA sample to compile a new profile of the killer.

This sample would then be tested against those suspects who were previously cleared.

Bongiorno is among those who will be re-examined. Mark and Adam are calling on police to also investigate Father Thomas O'Keeffe.

Adam was also allegedly abused by O'Keeffe at St Mary's church in Thornbury in the weeks prior to his mother's murder.

Trace has spoken to other survivors of abuse at the hands of O'Keeffe, who describe him as a violent "psychopath".

Subscribe to Trace, and join the investigation



- [Subscribe with iTunes](#)
- [Listen on ABC Radio App](#)
- [Visit the program page](#)
- [Subscribe via RSS feed](#)

5. Aggressive marketing against the commercial sector by the ABC

The ABC appears to use its government funding to market aggressively against the commercial sector. On occasion it appears to seek to erode rather than complement existing commercial services.

This is contrary to both section 6(2) of the ABC Act⁶ and the principles of the Competitive Neutrality Policy.

The ABC Act requires the ABC to take account of 'the broadcasting services provided by the commercial and community sectors of the Australian broadcasting system'. It is not in the spirit of this provision for the ABC to compete unreasonably with the commercial sector.

Further, the Competitive Neutrality Policy requires that government business activities should not enjoy net competitive advantages simply by virtue of their public sector

⁶ Section 6(2) of the ABC Act provides that:

The Corporation shall take account of:

- (i) *the broadcasting services provided by the commercial and community sectors of the Australian broadcasting system; [...]*
- (ii) *The responsibility of the Corporation as the provider of an independent national broadcasting service to provide a balance between broadcasting programs of wide appeal and specialised broadcasting programs.*

ownership. Use of the ABC's government funding to target the commercial sector is not consistent with these principles.

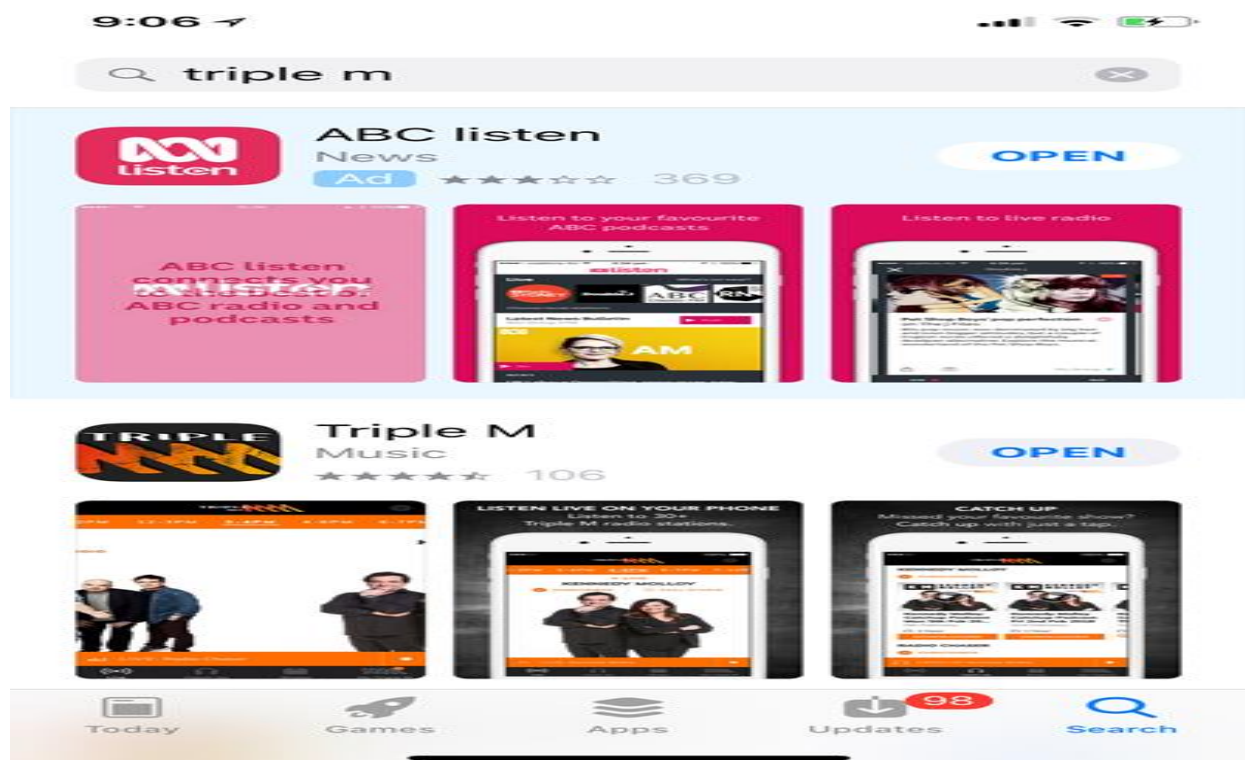
In Senate Estimates on 24 May 2018, the **ABC revealed that it had spent \$440,000 on Google Ad words and \$1.4 million in Facebook advertising in the past year.**

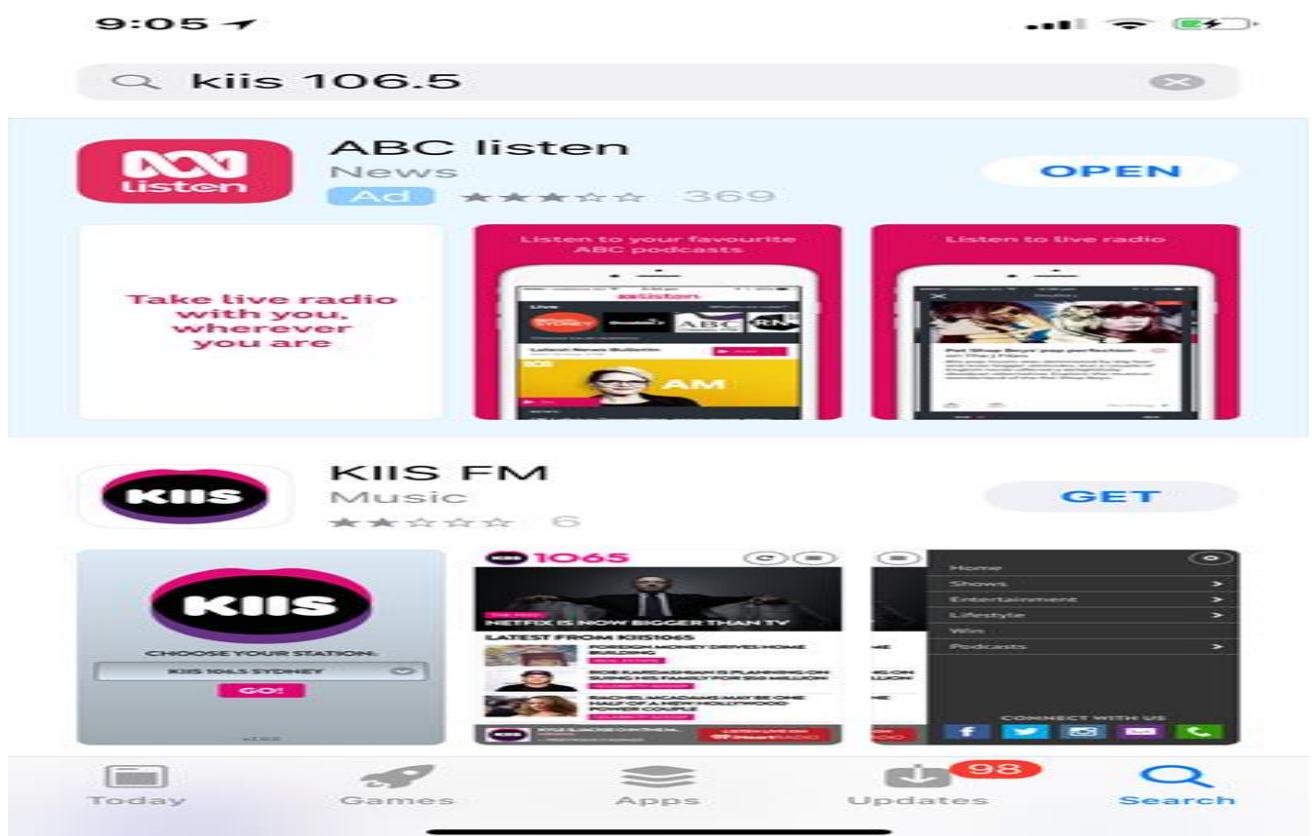
For example:

The ABC is using App Store Marketing that prioritises its own ABC Listen App over commercial radio offerings in the Apple app store.

Upon entering commercial radio station names in the App Store the ABC Listen App appears above the commercial stations. This is paid advertising by the ABC, deliberately aimed at impinging on the commercial stations' product.

Below are two screen shots, which demonstrate this point. These are the results that come up when performing an App Store search for (i) Triple M and (ii) KIIS.





A further example is the DAB+ station Kinderling, which was started by Kinderling Pty Ltd using spectrum owned by Southern Cross Austereo in 2015 and, from 1 July 2018, will be broadcast using spectrum owned by ARN.

Kinderling was the first radio station aimed specifically at children launched in Australia. In February 2018, the ABC launched ABC Kids Listen, which replicated the format of Kinderling.

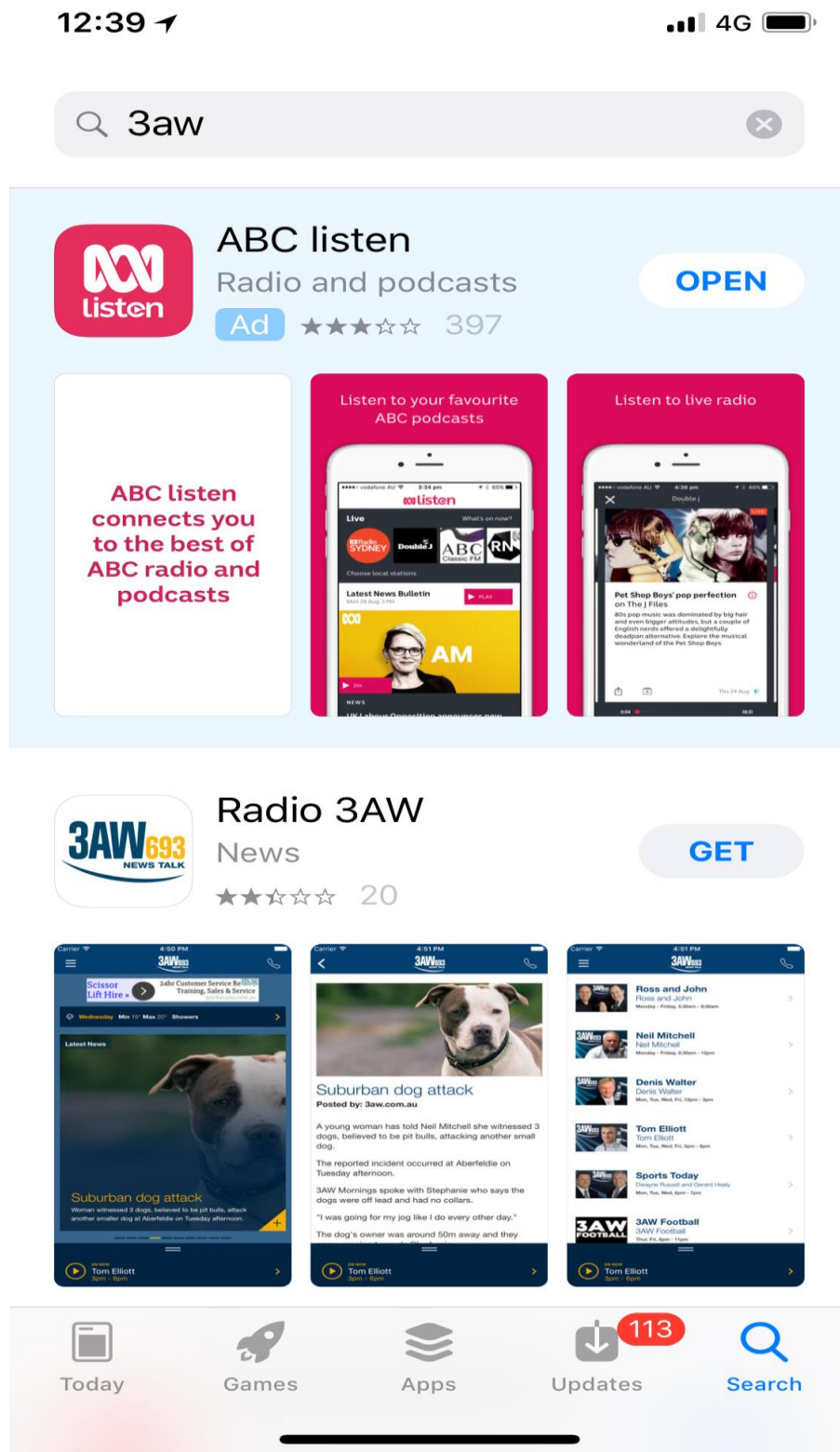
The ABC has aggressively marketed ABC Kids Listen across its platforms. It is extremely difficult for commercial radio to compete with this level of exposure when promoting Kinderling. If formats such as Kinderling become commercially unsustainable then this will ultimately result in less diversity in the market for consumers.

Crowding out in news talk format

The ABC's dominance in the talk market – due in part to its ability to cross promote and market aggressively - has damaged commercial talk stations. Macquarie Media was unable to continue 2UE as a viable competitive operation in Sydney partially due to the dominance of the local ABC talk stations.

The inability to compete with the ABC meant that 2UE was converted to Talking Lifestyle and then to Macquarie Sports Radio, resulting in less diversity for listeners in the Sydney News Talk format.

Below is a screen shot of the result a listener gets when it searches for 3AW on App Store. The ABC's paid advertising pushes 3AW below the ABC's App.



6. Commercial content

Section 31(1) of the ABC Act provides that the ‘*Corporation shall not broadcast advertisements on any of the Corporation’s broadcasting services*’.

CRA strongly supports this prohibition on the provision of advertising by a service that is publicly funded.

Commercial content

Our members have concerns regarding the level of commercial promotional content being broadcast on the ABC, which limits revenue opportunities for commercial competitors.

Businesses are unlikely to pay for advertising if they are receiving free promotional content from the ABC. The ABC is funded by the government and has no need – or entitlement – to take advertising. Its use of promotional content diverts advertising revenue away from commercial stations, who need such revenue simply to survive.

For example, the Adam Steers breakfast show in Darwin recently ran a Golden Ticket promotion with Deckchair cinemas in Darwin. Its website included a link to the Deckchair Cinema website with the words ‘*you can see what’s on offer at the Deckchair cinema here*’. It invited people to ‘*listen out on breakfast with Adam Steer ... for your chance to win*’.

Promotions of this nature directly disadvantage commercial stations, as businesses will remove paid advertising from commercial stations if offered the opportunity of free promotion on a government funded ABC station. The ABC station benefits from listeners tuning in to access the promotion, while commercial stations lose out on both advertising revenue and the opportunity to host a promotion that is attractive to listeners.

Below are screen shots of ABC Radio Darwin’s Deckchair Cinema promotion.

[Listen to breakfast to win a golden ticket to the Deckchair Cinema - ABC](#)

www.abc.net.au/radio/darwin/deckchair-cinema/9801776 ▼

May 25, 2018 - Be delighted this dry season and secure yourself a golden ticket to the Deckchair Cinema. ABC Radio Darwin has one double pass for program ...

Listen to breakfast to win a golden ticket to the Deckchair Cinema

Posted Fri 25 May 2018, 5:57pm Updated Fri 25 May 2018, 6:04pm



Share    

Be delighted this dry season and secure yourself a golden ticket to the Deckchair Cinema.

ABC Radio Darwin has one double pass for program 2 to give away to one lucky listener.

This ticket will gain you access to all films in the program 2 line-up.

You can see what's on offer at the Deckchair Cinema [here](#).

Listen out on Breakfast with Adam Steer from Monday May 28 for your chance to win.

Listen in from 5.30AM each day for your cue to call.

Program highlights include:

Breath

ABC opposition to Commercial Radio Australia trade mark

Commercial Radio Australia was established in 1930 as the Federation of Australian Radio Broadcasters (FARB). In 2002, FARB changed its name to Commercial Radio Australia.

No complaints were made by the ABC regarding this name change until 2008, when the ABC opposed the registration of the trade mark *Commercial Radio Australia*, claiming that it was deceptively similar to its own use of Radio Australia (the ABC's international radio service).

After two years of litigation the matter was finally settled, on confidential terms, in 2010.

The ABC's use of tax payer's money to try to prevent the Australian commercial radio industry from continuing to use the name it had used for 6 years, a name which clearly indicated the commercial nature of the services represented by CRA, was extraordinary.

Most worryingly, the ABC's claim over the name 'Commercial Radio Australia' may be seen to contemplate a move toward commercialisation of its own radio services as well as an acknowledgement that its own services may at some point be expanded to duplicate those offered by the commercial radio industry.

CRA submits that such an approach by a publicly funded broadcaster is not appropriate and the use of public funds in this way does not accord with principles of competitive neutrality.

The national broadcasters' services must not be expanded to duplicate services that the market will create and support on its own. Rather, the national broadcasters should be funded to supplement and complement existing commercial services, thus creating a diverse and competitive broadcast market in Australia.

CRA would be pleased to provide more detail on any of the above points. Please contact Joan Warner, on 02 9281 6577, for clarification on any aspect of this submission.

Commercial Radio Australia