



CENTRE FOR MEDIA TRANSITION

Impartiality and Commercial Influence in Broadcast News

ACMA Discussion Paper, January 2020

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About the Centre for Media Transition

The Centre for Media Transition is an interdisciplinary research centre established jointly by the Faculty of Law and the Faculty of Arts and Social Sciences at the University of Technology Sydney.

We investigate key areas of media evolution and transition, including: journalism and industry best practice; new business models; and regulatory adaptation. We work with industry, public and private institutions to explore the ongoing movements and pressures wrought by disruption. Emphasising the impact and promise of new technologies, we aim to understand how digital transition can be harnessed to develop local media and to enhance the role of journalism in democratic, civil society.

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Thank you for the opportunity to respond to the ACMA's Discussion Paper on Impartiality and Commercial Influence in Broadcast News. We have structured our response in two parts: first, a general response; second, specific responses to the issues for comment. In keeping with the Discussion Paper's structure, the second section has been further divided into subsections on Impartiality and Commercial Influence.

I - GENERAL RESPONSE

We endorse the ACMA's assessment of the need to review regulatory arrangements for impartiality and commercial influence in news. To some, it might seem unusual to review regulation in the absence of a publicly documented failure of existing rules. Examples of the latter include: commercial radio standards dealing with advertising and sponsorship in current affairs programs (following the 'Cash for Comment' inquiry of 1999/2000); code rules for reality TV in 2007 (responding to content on *Big Brother*); code rules on the treatment of participants in live hosted entertainment programs on commercial radio in 2010 (following investigation of a segment of a program on Today FM). The level of community concern over impartiality and commercialisation is demonstrated in a different way – not in response to complaints about a specific program or presenter – and in that sense is perhaps more like the response to widespread community concern about gambling advertising which led to amendment of the relevant codes in 2017.

The concern over impartiality and commercialisation has been evident for some time in the form of low levels of trust in media.

1. Addressing impartiality and commercialisation will help to address trust

Healthy levels of trust – trust among individuals, but also trust in institutions - are needed for a society and democracy to flourish.¹ Media is one of those institutions. Indeed, media plays a pivotal role, with one of its functions being the watchdog role of holding the powerful to account, as discussed in a 2018 Centre for Media Transition report (pp 18-21).²

Unfortunately, trust levels globally are low, including in media. In February 2020, the Edelman Trust Barometer revealed that governments, business, NGOs and media are widely distrusted. As the 20th annual study noted: 'No institution is trusted'. And in Australia trust levels in news media remain alarmingly low, with less than half of Australia's news consumers saying they trust the news, as revealed by the *Digital News Report: Australia 2019* and its predecessors.

This low level of trust in media is largely due to perceptions of impartiality and commercial influence.

¹ See, for instance, Francis Fukuyama, *Trust: The social virtues and the creation of prosperity*, Penguin, London, 1995 and Onora O'Neill, 'A question of trust: The BBC Reith Lectures 2002', <https://www.immagic.com/eLibrary/ARCHIVES/GENERAL/BBC_UK/B020000O.pdf>.

² Centre for Media Transition, *The Impact of Digital Platforms on News and Journalistic Content*, 2018, <<https://www.accc.gov.au/system/files/ACCC%20commissioned%20report%20-%20The%20impact%20of%20digital%20platforms%20on%20news%20and%20journalistic%20content%2C%20Centre%20for%20Media%20Transition%20%28%29.pdf>>

As found by a 2018 Roy Morgan survey, *Consumer Use of News: Final Report*, the characteristics most important to adult Australians when deciding which news providers to trust were accuracy of reporting (93%) followed by neutrality and unbiased nature of the reporting (90%) and that ‘the news provider is independent from political and/or government interests’ (73%) (p 19). The same survey found that the second most mentioned reason for avoiding news, for 40% of adult Australians was, ‘I feel that news content is biased towards a particular ideology’ (p 21).

The ACMA’s own research confirms this strong link between distrust and perceptions of impartiality and commercial influence (Discussion Paper pp 2, 10). In addition, there are now multiple examples of how the problem manifests, particularly in relation to commercial television. The ACMA’s research provides support for this view. Starting in June 2019, the ACMA monitored 160 hours of news and current affairs TV broadcasts in order to explore the issue of commercial influence. Citing examples, the ACMA observed several trends. These included: news segments that promoted products but did not make clear to viewers the nature of any commercial arrangement; news segments featuring a product followed by an advertisement for that product; and segments presented by a spokesperson for a business rather than a reporter (pp 22-23). On occasion, the ABC TV program *Media Watch* also records such instances. On February 17, *Media Watch* investigated the coverage by Nine News of retailer Costco, which has been extensive and glowing and smacked of advertorial, even though Nine denied any commercial arrangement.³ On another occasion, retailer Officeworks featured heavily in a news segment on Nine News, which had been introduced with the phrase, ‘This back-to-school segment brought to you by Officeworks.’ As *Media Watch* host Paul Barry said, ‘When it comes to the important divide between news and advertising, consumers can barely see the line at all.’⁴

These issues of impartiality and commercial influence in news media need to be addressed. However, before providing specific responses regarding existing regulatory provisions, we need to address the broader context.

2. A harmonised regulatory framework – could the ACMA be doing more?

The ACMA’s Discussion Paper is limited to ‘broadcast news’. More specifically, it covers ‘commercial and subscription television and radio that includes journalistic content, including news programs, news updates and bulletins, current affairs programs, panel discussions, talkback radio and related programming formats’ (DP, p 5). It does not cover the national broadcasters; nor does it cover print; nor does it cover online news. This is logical, given the nature of ACMA’s remit, which concerns regulatory oversight of broadcasters (DP, p 5). However, we disagree with this limited focus in three respects.

First, the omission of the national broadcasters means that a key part of the current regulatory framework for broadcasting is not considered. Internationally, research consistently reveals that countries with a strong public service broadcaster are less polarised, more trusting, and less susceptible to misinformation.⁵ Quite rightly, Australia’s public broadcasters are held to stricter standards of impartiality and commercial independence than commercial broadcasters. As a result,

³ *Media Watch*, 12 February 2020. <<https://www.abc.net.au/mediawatch/episodes/costco/11973190>>.

⁴ *Media Watch*, 18 January 2020. <https://www.abc.net.au/mediawatch/episodes/acma/11951582>>.

⁵ A good overview of this research is given in Eiri Elvestad and Angela Phillips, *Misunderstanding News Audiences: Seven myths of the social media era*, Routledge, Oxford, 2018, pp 27-28, 125-129, 134-136.

public broadcasters will necessarily invite complaints that they have fallen short of these high standards. Despite these complaints, research consistently shows that public broadcasters both foster trust and set a high standard to emulate when it comes to impartiality and other journalistic norms.⁶ While the ACMA does not have a role in rule formation, it has a critical role in compliance and enforcement. To the community, the ACMA is the ultimate decision maker on breaches of code provisions such as impartiality, and Parliament has given the ACMA the power under s 152 of the *Broadcasting Services Act 1992* to make recommendations to the ABC and SBS on conduct in response to code complaints and, under s 153, to report to the Minister and to Parliament where those recommendations are not acted upon. This approach helps to maintain the independence of the national broadcasters while also providing an additional level of accountability. In our view, it is appropriate in these circumstances for the ACMA to include consideration of the ABC and SBS codes in its review of impartiality and commercialisation, even if just to the point of observations and recommendations.

Second, the environment confronting Australian consumers which has led to an overall drop in levels of trust and to concerns about impartiality and commercialisation is one that affects more than commercial radio and television licensees. In a digital era, news is consumed in an increasingly diverse range of ways. Though most Australians still access their news via TV, digital has changed the game, with the rise of social media, news aggregators and smartphones ensuring that Australians are increasingly getting their news via non-traditional means, as revealed by the *Digital News Report: Australia 2019*. And increasingly content flows in unpredictable ways between these media. A soundbite for a radio bulletin may wind up in a podcast. A segment from the TV news might go viral on social media. ACMA's Discussion Paper recognises this very point:

The modern media environment is an integrated ecosystem in which news media businesses seek to engage audiences across different media platforms. Video or audio produced for broadcast is often published on the online services of the same media group or via its social media channels, while content from digital platforms is also appearing on broadcast news. Journalistic content—from hard news to lifestyle and entertainment—is traditionally produced and packaged as a bundle by a single media business. However, in the 'atomised' online environment, algorithms curate content from an array of disparate sources. In this environment, where news content competes on a story-by-story basis, traditional media may feel the pressure to alter their news content or programming to attract online audiences (p 3).

This cross-platform aspect of digital media – including news media - is captured in the word convergence.⁷ And such convergence is brought into relief – and exacerbated – by changes in media ownership. Most obviously in Australia, following the repeal of cross-media ownership laws, Nine Entertainment bought Fairfax Media in 2018. This means that the organisation responsible for the Nine Network television news is also responsible for the same day's *The Sydney Morning Herald*, as well as news bulletins on radio networks including 2GB. It is also responsible for its various outlets on the internet, including smh.com.au, and the secondary publication of content via social media and other digital platforms. Currently, these publications are held to different standards, and overseen by different regulators. The ACMA oversees broadcasters, but the Press Council oversees newspapers and their online outlets. This leads to the following inconsistencies:

⁶ *Ibid.*

⁷ See, for instance, Henry Jenkins, *Convergence Culture: Where old and new media collide*, NYU press, New York (2006) and the Final Report of Australia's Convergence Review, released in April 2012.

- Nine Entertainment Co journalists working on Nine News programs follow s 3 of the Commercial Television Industry Code of Practice, which is overseen by ACMA and prescribes that in news programs, a licensee must 'present news **fairly and impartially**;' while in news and current affairs programs it must 'ensure viewpoints included in the program are not misrepresented';
- Nine Entertainment Co journalists working on *The Sydney Morning Herald* follow the General Principles of the Australian Press Council's Standards of Practice 2014, which are overseen by the Press Council. Principles 3 and 4 prescribe that publications must take reasonable steps to 'ensure that factual material in news reports and elsewhere is accurate and not misleading' and to 'ensure that factual material is presented with **reasonable fairness and balance ...**';
- Nine Entertainment Co journalists working on 2GB follow s 3 of the Commercial Radio Code of Practice, which is overseen by ACMA and prescribes that in news programs, a licensee must use reasonable efforts to '**present news ... impartially**' while in current affairs programs a licensee must 'provide reasonable opportunities for **significant alternative viewpoints** to be presented when dealing with controversial issues of public importance, while the issue has immediate relevance to the community' and must use reasonable efforts to 'ensure that **viewpoints** expressed to the licensee for broadcast **are not misrepresented ...**'
- Nine Entertainment Co journalists summing up a news story on Twitter are subject to **no media standards of fairness or impartiality**.

Of course, news rooms for different arms of a diversified business such as Nine may well work independently, but there are certainly opportunities in cross-platform arrangements for content from one internal source to be repurposed for another.

The news media landscape is diverse and complex, and increasingly so. Unfortunately, there is no coherent regulatory regime to provide oversight. Rather, there are more than a dozen regulatory regimes to oversee the news media landscape. Hence regulatory oversight is inconsistent and fragmented. In 2018, research by the Centre for Media Transition identified the existence of 14 separate codes that lay down standards for Australia's media, all with varying provisions. As the Centre noted:

Australia's system of media standards is fragmented. The principal division is between broadcast media and print/online, but there are separate schemes even within those sectors. In the broadcast environment, there are eight separate sets of rules as each type of broadcasting service (e.g., commercial television, commercial radio) has its own code of practice, as does each of the national broadcasters. For print and online news and comment, most large publishers and some smaller publishers are members of the Australian Press Council (APC) and therefore subject to its two statements of principles (together the equivalent of a broadcast code of practice). The exception is Seven West Media, which established the Independent Media Council (IMC) with its own standards and complaints scheme. Overlaying all of this is the code of ethics operated by the journalists' union, the Media, Entertainment and Arts Alliance (pp 87-88, see footnote 2).

In our view, a key part of 'harmonisation' is resolving this fragmented and confusing regulatory landscape in order to promote trusted sources within the community. We understand that this is

not a part of the regulatory harmonisation program currently underway, but the problem with the ACMA's limited remit is this: if ACMA doesn't do it, no one will.

We note that the ACMA has in some way acknowledged this issue in its Discussion Paper:

... it is an appropriate moment to test whether current co-regulatory arrangements are effective in achieving public policy objectives and ensuring credible, informative news is broadcast on television and radio. In doing so, insights may also be gained as to which principles relating to impartiality and commercial influence might usefully be applied to the delivery of news across online platforms (p 4).

To start, we propose that the ACMA and the Press Council work together to develop principles that could be applicable across the news media landscape. These could apply to broadcasters, but also to print and online.

Finally, in a convergent media context, we also need to look at how digital platforms and other digital entities ought to be regulated. What sort of typology should be applied? What entitlements and responsibilities should they have? While in our view they should not have the same obligations as the media standards applying to news producers, this is not the end of the question. These issues are currently being addressed in other related areas of regulation, including the current process of defamation law reform. The digital news ecosystem is increasingly reliant on algorithms. These include the algorithm that determines which stories are recommended for you by a news outlet and the algorithm that determines which posts appear on your social media feed. As information law scholar Natali Helberger has argued, this has led to a 'digital dominance' which informs the biases of individuals: 'The true source of digital dominance is the ability to control the way people encounter and engage with information and the ability to steer their choices through the sheer knowledge about their interests and biases' (2018, p 156).⁸ And the significance of algorithms is revealed in research by Ofcom into how Facebook users receive news. While 19 per cent of respondents actively follow online-only news organisations and 34 per cent actively follow traditional news organisations, 55 per cent see news stories that are trending.⁹ For many people, Facebook's algorithms determine the news they see.

Algorithms play a crucial role in the dissemination of news. And they are underpinned and driven by commercial imperatives. What's more, their workings are opaque, with an opacity that is often fiercely guarded. In December 2018, in the Preliminary Report of its Digital Platforms Inquiry, the ACCC made preliminary recommendations for an algorithmic regulator to oversee advertising and related business content as well as the ranking of news and journalistic content (pp 11-12). In response, Facebook and Google responded forcefully, arguing that such regulatory oversight would be onerous and harmful. For instance, as Facebook wrote in a submission, 'The regulation of ads proposed by the Preliminary Report would harm Australian businesses, consumers and the broader Australian economy.'¹⁰ In the final report of its Digital Platforms Inquiry, the ACCC stepped back from its preliminary recommendation.

The news that people see is increasingly determined by algorithm. However, the workings of these algorithms are usually opaque. In our view, the answer lies in a compromise that involves a degree

⁸ Helberger, N. 2018, 'Chapter 6: Challenging Diversity - Social Media Platforms and a New Conception of Media Diversity', in M. Moore & D. Tambini (eds), *Digital Dominance. The Power of Google, Amazon, Facebook, and Apple*, Oxford University Press, New York, US, pp. 153-75.

⁹ Ofcom 2018b, *News Consumption in the UK: 2018*, Ofcom, London, p 51.

¹⁰ ACCC Digital Platforms Inquiry, *Response to the ACCC's Preliminary Report by Facebook Australia Ltd*, <<https://www.accc.gov.au/system/files/Facebook%20Australia%20%28March%202019%29.PDF>>.

of regulatory oversight rather than complete transparency, which could undercut the commercial advantage of its developers and create the potential for gaming the system. What is needed is a carefully circumscribed level of mandatory transparency and regulated accountability. We can conceptualise this in the shape of mandatory explainers, as the Centre for Media Transition has previously argued (see footnote 2, pp 62-63). That is, digital platforms ought to be required to have algorithmic explainers. These can come in two forms: in plain language for a general audience; and in a more technical version for regulators with technical expertise. Such an explainer, we propose, would form a key part of a harmonised regulatory framework. This leaves, of course, several outstanding issues. If the issue is, 'Why is this Nine news item being surfaced by Facebook's algorithm?', then is this a matter for a broadcast regulator, for a digital platforms regulator, or for a regulator that is one and the same? In our view - and recognising the need for legislative change to address this - this should be the territory of the ACMA, not the ACCC.

It is also important to recognise that our proposal for a degree of algorithmic transparency and oversight is not within the domain of the ACMA's activity on disinformation. Disinformation (alongside misinformation and malinformation) and impartiality are distinct topics. That said, these are topics that sometimes overlap, as in the case of inaccurate hyperpartisan content. The topic of disinformation is beyond the scope of this submission, although it is worth noting that any due reform of a harmonised media framework must take account of a broad sweep of issues, of which impartiality, commercial influence and disinformation are merely three.

3. Our approach to the specific questions

In its research, the ACMA clearly distinguished between impartiality and commercial influence as discrete lines of enquiry. We agree with that approach. In the literature these issues are often conflated. This point is even more relevant in the current news media context, which is characterised by misinformation, hyperpartisan content, growing social polarisation and the risk of self-curated echo chambers (see the Centre for Media Transition report cited in footnote 2). This context requires a more circumspect approach to impartiality, in particular, given that there is the very real risk that government interventions will be deliberately misrepresented and potentially undermined by various parties. As such, a public media literacy campaign about issues such as what constitutes fair reporting, working in tandem with regulatory reform, could help.

The general arguments we have made so far ought to be interpreted in light of this point: that impartiality and commercial influence warrant distinct responses. These responses will sometimes overlap, but will at other times diverge. This point will become apparent in our specific responses below. In general terms, our position on impartiality is that there is a range of views, and that more work needs to be done in defining clear prescriptions and bringing consistency to a fragmented environment. But there are some good precedents for code rules. On commercialisation, by contrast, we propose that the position is clearer. There is an urgent need for direct action that addresses consumer concerns about commercial influence.

All of the specific points that follow ought to be considered in light of the general points made above. In the context of a splintered news media ecosystem, and the need for a harmonised regulatory framework, reform is needed to streamline and clarify. Reform thus concerns both the relevant regulatory provisions, and also the regulatory body that is given oversight. Issues of trust, impartiality and commercial influence must be considered within the context of a news ecosystem that is increasingly complex and varied. Any attempt to improve the regulation of broadcasters must look beyond broadcasters. It needs to take account of the bigger picture, with the ultimate

goal being a harmonised and coherent regulatory framework that applies across the news ecosystem.

II - SPECIFIC RESPONSES TO ISSUES FOR COMMENT

A. Impartiality

Below we address Question 2 in detail as it calls for an analysis of the key concepts as they appear in the various codes; we use this to provide shorter answers to the remaining questions.

Elements of impartiality

1. Considering the various elements of impartiality, such as balance, fairness, and diversity of viewpoints, do any of the elements deserve greater regulatory emphasis in the current media environment?

It is helpful that the ACMA has identified a series of interrelated concepts associated with impartiality. The ACMA notes the use of the terms 'balance', 'fairness' and 'diversity of viewpoints'. To this we would add 'misrepresentation of viewpoints' because, as the ACMA noted in *Investigation Concepts: Fairness, Impartiality and Viewpoints*, these concepts 'rarely arise in isolation' (p 3). The ACMA also said: 'Circumstances including misleading editing or inappropriate juxtaposition of material in the representation of a viewpoint can contribute to a representation being rendered unfair' (p 31). It is possible that for complainants, impartiality is seen to arise from either the privileging of one person's view over another, or the fact that their view is not represented adequately.

In the comments in Part 1 about the community's lack of trust in media and in institutions more generally we noted the importance of both impartiality and accuracy. Impartiality and accuracy are clearly important concepts, but it is difficult to know whether community understandings are the same as those covered by current regulation. In any event, these concepts are used in different ways and in combinations in the various codes of practice. For this reason, we provide a more substantial analysis of the issue in response to question 2 below, where we examine how these concepts appear in the codes.

Regulatory approaches

2. Is a common understanding of, and consistent regulatory approach to, impartiality desirable or feasible? What principles and definitions would enable consistency across different sectors or platforms?

3. To what extent should the regulatory approach distinguish between news and current affairs?

4. How should the distinction between factual material and commentary or analysis be applied to hybrid programs that include, for example, news updates followed by panel-based discussions? How can this distinction be made clear to viewers?

Provisions from five of the applicable broadcasting codes are copied below, followed by an analysis of the scope and gaps in these various provisions. As the national broadcasters deal more extensively with the applicable concepts, some additional comments are provided.

In general, we think one essential ingredient of a harmonised and coherent regulatory framework is the definition of key terms and concepts. Currently, key terms and concepts including impartiality, balance and fairness are unclear and used in different ways in various codes and regulatory instruments, and intersect with community and industry understandings around concepts such as bias and objectivity. The ACMA Discussion Paper notes this in regard to impartiality and related terms, 'In the codes themselves, these terms go largely undefined' (p 7). Similarly, key terms including news, current affairs, opinion, comment, analysis, editorial and advertising are often undefined in codes and regulatory instruments. A clear and user-friendly definition of these key terms is essential.

A. ABC Code of Practice 2019

- i. The Code of Practice and Editorial Standards deal squarely (in item 4) with 'impartiality and diversity of perspectives'.
- ii. The code rules to which the ABC is held accountable are as follows:
 - 4.1 Gather and present news and information with due impartiality.
 - 4.2 Present a diversity of perspectives so that, over time, no significant strand of thought or belief within the community is knowingly excluded or disproportionately represented.
 - 4.3 Do not state or imply that any perspective is the editorial opinion of the ABC. The ABC takes no editorial stance other than its commitment to fundamental democratic principles including the rule of law, freedom of speech and religion, parliamentary democracy and equality of opportunity.
 - 4.4 Do not misrepresent any perspective.
 - 4.5 Do not unduly favour one perspective over another.
- iii. In addition to this rule, there are 'principles' in the code that inform the application of the standards. The Principles state that, 'Impartiality does not require that every perspective receives equal time, nor that every facet of every argument is presented'. In addition, there is a list of 'relevant factors' to be considered:
 - the type, subject and nature of the content;
 - the circumstances in which the content is made and presented;
 - the likely audience expectations of the content;
 - the degree to which the matter to which the content relates is contentious;
 - the range of principal relevant perspectives on the matter of contention; and

- the timeframe within which it would be appropriate for the ABC to provide opportunities for the principal relevant perspectives to be expressed, having regard to the public importance of the matter of contention and the extent to which it is the subject of current debate.
- iv. The principles also include several ‘hallmarks of impartiality’:
 - a balance that follows the weight of evidence
 - fair treatment
 - open-mindedness; and
 - opportunities over time for principal relevant perspectives on matters of contention to be expressed.
 - v. These concepts are themselves explained in a Guidance Note on Impartiality. Fair treatment is explained as applying to people as well as to ideas – for example, by providing appropriate background or context in the introduction to an interview and by not signing off with ‘good luck’ if that could be seen as endorsing a particular view.
 - vi. On balance, the Guidance Notes stipulate that ‘a balance following the weight of evidence’ does not mean equal time or even presentation of different viewpoints, ‘as if they were poised on either side of a scale’. The vaccination debate is given as an example.
 - vii. It is worth noting here the ACMA’s view on balance, expressed in its *Investigation Concepts* report. The ACMA described the difference between balance and impartiality as follows (p 8):

The requirement for balance essentially concerns *what* is presented (for example, a range of viewpoints), whereas impartiality essentially concerns *how* it is presented (for example, without prejudgement or in a way that follows the weight of evidence).

- viii. The ACMA has rejected the idea that balance means equal time; it has rejected the suggestion that all views on a particular topic must be explored; and it has rejected the idea all ideas should be given equal importance. It has said that the elevation of some, minority views might in fact mislead viewers about a matter of public importance, such as public health concerns. This it terms ‘false balance’. It has found *imbalance* in cases where an ABC news report suggesting brumby populations were out of control presented perspectives ‘overwhelmingly supporting one view’ with a ‘failure to canvass any other principal viewpoints or even that other viewpoints existed’ (Report 2126 – see *Investigation Concepts*, p 11).

B. SBS Codes of Practice 2014

- ix. The SBS code is presented in a more narrative format than other codes. The relevant provision is clause 2.2 which deals with accuracy, impartiality and balance. Excerpts are below.
 - Reasonable effort should be made to ensure news and current affairs content is balanced and impartial, having regard to the circumstances at the time of reporting and broadcasting or publishing, the nature and immediacy of the material being reported, and public interest considerations.
 - The commitment to balance and impartiality requires SBS to present – over time and across the schedule of content broadcast or published on the relevant service (Television, Radio or Online and Emerging Platforms) – a wide range of significant views, not misrepresenting them or unduly favouring one over another.

- It does not require SBS to present all viewpoints on an issue or to allocate equal time to different points of view. Neither does it preclude a critical examination of controversial issues or the expression of critical and provocative points of view.
 - The decision as to whether it is appropriate for a range of views or particular views to be included within a single program or story is a matter for editorial discretion.
 - In relation to news content, for major issues that are matters of controversy, balance should be provided over the period in which the controversy is active. Balance will be provided through the presentation, as far as possible, of principal relevant viewpoints.
- x. As these excerpts show, SBS requires impartiality in both news and current affairs, coupled with balance, applied over time and its schedule, but – like the ABC – balance is to be judged with reference to currency ('the period in which the controversy is active'). It involves recognition of the range of views as well as avoidance of misrepresentation.

C. Commercial Television Industry Code of Practice 2015

3.3 Accuracy and fairness

3.3.1 In broadcasting a news or Current Affairs Program, a Licensee must present factual material accurately and ensure viewpoints included in the Program are not misrepresented.

3.4 Impartiality

3.4.1 In broadcasting a news Program, a Licensee must:

a) present news fairly and impartially;

3.4.2 Nothing in this Section 3 requires a Licensee to allocate equal time to different points of view, or to include every aspect of a person's viewpoint, nor does it preclude a critical examination of or comment on a controversial issue as part of a fair report on a matter of public interest.

3.4.3 Current Affairs Programs are not required to be impartial and may take a particular stance on issues.

D. The Commercial Radio Code of Practice 2017

3.1. In broadcasting News Programs, a Licensee must use reasonable efforts to:

3.1.1. present news accurately and impartially;

3.2. In broadcasting Current Affairs Programs, a Licensee must use reasonable efforts to ensure that:

3.2.3. viewpoints expressed to the Licensee for broadcast are not misrepresented or presented in a misleading manner by giving wrong or improper emphasis on certain material or by editing material out of context.

3.8 Nothing in this section 3 obliges the Licensee to allocate equal time to different points of view, nor to include every aspect of a person's viewpoint, nor does it preclude a critical examination of, or comment on, a controversial issue as part of a fair report on a matter of public interest.

3.9 Current Affairs Programs are not required to be impartial and may take a particular stance on issues. However, a Licensee must provide reasonable opportunities for

significant alternative viewpoints to be presented when dealing with controversial issues of public importance, while the issue has immediate relevance to the community.¹¹

E. Subscription Broadcast Television Codes of Practice 2013

2.2(a) News and current affairs programs, including news updates, broadcast by Licensees must:

- (i) present news accurately, fairly and impartially;

F. Comparative analysis

- i. As can be seen, there are significant differences among these codes, all of which deal in some way with impartiality. They also use the various associated concepts such as fairness in conjunction with impartiality, but in different ways. Some observations on coverage and gaps are provided below.
 - The ABC and SBS have markedly more developed standards and they apply them to both news and current affairs. The codes include positive obligations to address a range of views and at a time when they are important to public discussion. The ABC provides extensive guidance including examples on how these standards can be met in practice.
 - Commercial radio also has positive obligations to present news impartially and for current affairs programs to contribute to the presentation of alternative views on significant issues at the time they are most relevant. However this rule does not apply to news, nor does the rule about misrepresenting viewpoints in current affairs programs; that rule only deals with viewpoints 'expressed to the licensee for broadcast', rather than all viewpoints it covers. There is no rule about fairness for either news or current affairs.
 - The commercial television code includes a positive obligation on news to be both fair and impartial. It has no positive obligation beyond this, to represent a diverse range of views, on either news or current affairs, but its rule about misrepresentation applies to both news and current affairs. There is no fairness rule for current affairs.
 - The subscription TV code has a positive rule to present news impartially, but no rules for either news or current affairs on fairness, misrepresentation or representing a range of views.

G. Conclusion and responses to questions 2, 3 and 4

- i. At a minimum, the variation among the rules applied by the codes of practice registered with the ACMA under Part 9 of the BSA should be rectified. In one sense, it is understandable that differences have arisen, given that since 1992 the legislation has required the various sections of the industry to develop their own rules. In hindsight, that

¹¹ For the purposes of this provision, 'reasonable opportunities' can be accommodated within the same Program or a similar Program. The requirement does not impose an obligation on Licensees to allocate equal time to different points of view, nor to broadcast all viewpoints expressed to it.

may well be seen as a mistake. Applying a current perspective, based on low levels of trust and the need to restore confidence in news, there is clearly a need for reform.

- ii. Our recommended approach for the Part 9 codes would be as follows:
 - A consistent regulatory approach is required to the key concepts of fairness, impartiality, representation of viewpoints and misrepresentation, which should all be retained. Balance is not used in these codes.
 - Rules relating to fairness, representation of viewpoints and misrepresentation should apply to both news and current affairs.
 - For fairness, there should be a positive obligation to ensure fairness towards individuals and in treatment of the topic.
 - Similarly, there should be a positive obligation with respect to the representation of principal relevant viewpoints on issues of public importance at the time the issue is relevant to the community, along with an obligation not to misrepresent viewpoints relevant to the issue.
 - There should be an additional requirement of impartiality on news programs. In our view, certain current affairs programs should also be subject to this rule. We accept that campaign journalism and exposure of misconduct may, in a sense, be partial, but in applying the hallmarks of impartiality in the ABC code, we think these programs could still meet requirements such as ‘a balance that follows the weight of evidence’. A definition of impartiality could take this into account in order to apply to programs such as *A Current Affair* and *60 Minutes*. In contrast, some radio and television programs are essentially opinion programs that engage with current issues. It may be worth considering a different categorisation for these programs so that they do not need to comply with any expectation of political impartiality etc, provided that: the factual content is accurate; interests, affiliations and expertise of guests are acknowledged; and any conflicts of interest are disclosed.
 - There should be a further requirement that news programs (including news components of current affairs programs) are clearly designated as such and that any opinion expressed in news programs and news components is clearly designated or distinguishable. Provided the rules about news are clear, there should be no obligation to label current affairs content such as panel discussions. Publicity of the ‘new rules about news’ could help to make this distinction.
- iii. Beyond these recommendations for Part 9 codes, in our view there is a convincing case to bring all news producers in Australia, working across various media platforms, into the one news standards scheme. This would help to address the lack of public confidence in impartiality of news and current affairs in Australia, and would be a logical response to the enabling of cross-platform operations through the removal of the cross-media rules. We recognise this is beyond ACMA’s powers, but we think there should be work on an industry standards and complaints scheme with higher standards applicable to the national broadcasters; an opt in mechanism for others who wish to demonstrate publicly their commitment to these higher standards; and an ultimate enforcement mechanism through ACMA for licensed broadcasters where remedies applied by the industry body fail. As noted in our submission on the Preliminary Report of the ACCC’s Digital Platforms

Inquiry,¹² we think the presence of digital platforms in the media ecosystem means they have a role to play in supporting news standards – not as publishers subject to media standards, but in contributing to the costs and governance of an industry scheme that would evolve out of the Australian Press Council.

5. What transparency measures might help to effectively and appropriately safeguard the impartiality of news? What are the practical implications of strengthening transparency measures?

The research reveals a serious problem. However, the research also points to a promising solution in the form of transparency. Mandatory transparency ought to play a key role in the regulation of both impartiality and commercial influence. Above, we discussed algorithmic transparency, and proposed the idea of a mandatory algorithmic explainer. Further, mandatory transparency can then be coupled with voluntary steps to increase transparency.

The Centre for Media Transition houses the Australian bureau of First Draft, an international initiative that works to counter mis-, dis- and malinformation by informing audiences and educating journalists. Fieldwork and research by First Draft is revealing a growing demand from audiences to know how and where journalists obtained their information and how they can 'prove' its provenance, in order that audiences can trust the information and therefore trust the journalism.

The public are eager to know more about journalists' sources. As such, it would help if interviewees were clearly identified. If they are guest speakers or experts, who are they working for and what other affiliations do they have? Are they linked to an advocacy or political group? Do they have first-hand or arm's length knowledge? The common excuse is there is too little time or space for such information, but this needs to be challenged. In an atomised and often overwhelming news ecosystem, audiences want to understand the motivations behind sources.

In a convergent media environment, as described above, there is further scope for confusion. Most journalists regard being active on social media as part of the job. There are risks of confusion when broadcast journalists tweet 'opinions' related to the work they're supposed to be reporting on impartially. There are also risks with presenters and guests on shows such as *The Project* or *Sky after dark*, where the line between journalism and comment is often difficult to discern, if not deliberately blurred. Again, transparency in the form of informing audiences of interviewees' positions or expertise can help.

What's more, transparency can have a positive flow-on effect. Background research by First Draft has found: 'The process of working transparently, or having to "show your work" to newsrooms that would otherwise be seen as competitors, resulted in higher quality journalism. Participants explained they were able to hold each other to account.'¹³

Currently there is considerable confusion among Australian news consumers. In its qualitative research, the ACMA found that those surveyed consistently wanted to be able to readily distinguish opinion and commercial content from reporting (DP, p 2). In qualitative research conducted in 2018, participants were asked to choose from various strategies designed to rebuild trust. Their preferred option was for 'explainers', which supplement stories with background information such as why a story has been written and why particular interviewees have been

¹² <<https://www.accc.gov.au/system/files/Centre%20for%20Media%20Transition%20%28Februaruy%202019%29.PDF>>.

¹³ Nikos Smyrniatos, Sophie Chauvet and Emmanuel Marty, *The impact of CrossCheck on journalists and the audience*, 2017, <https://firstdraftnews.org/wp-content/uploads/2017/11/Crosscheck_rapport_EN_1129.pdf/>

chosen. Their second-favourite option was for clear labels for news, comment and advertising.¹⁴ (Fray 2018 44-45, Molitorisz 2019). Clearly such transparency is a high priority.

The prevailing confusion among Australian news consumers could be ameliorated with better labelling of comment / opinion / analysis and better labelling of news. (Similarly, such confusion could be helped with the better labelling of advertising and editorial, as well as better labelling of in-between content such as native advertising – itself an unclear phrase - sponsored content and advertorial.)

Transparency has a major role to play in building trust. Transparency is particularly crucial in relation to commercial influence, but it can also play a part when it comes to impartiality. Mandatory transparency involves the labelling of comment / opinion / analysis. Mandatory transparency can also involve a degree of mandatory algorithmic transparency. Such mandatory transparency can then be supplemented by voluntary transparency, such as when journalists seek to provide supplementary background and context to their reports. In this way, the problem can be addressed, trust can be rebuilt, and unscrupulous operators are more likely to be exposed. What's more, obligations for mandatory transparency need not be onerous. In the United States, social media posts that have been sponsored must include '#ad', or an equivalent. These three characters, we suggest, make a big difference. Certainly, digital journalism seems better equipped by design to offer such transparency than broadcast and print, but that does not mean broadcast and print cannot adapt. (On transparency, see also the response to question 11, below.)

Other models and additional principles

6. Are there alternative or overseas approaches to impartiality which may provide better community safeguards?

We have not had the opportunity to adequately address this aspect to date.

7. Are there other principles or considerations not included in this paper that the ACMA should have regard to in its consideration of regulating impartiality in news broadcasting?

In response to question 2 above, we showed how the concepts of fairness, balance and misrepresentation of viewpoints are closely associated with impartiality; problems in respect of one affect the other and there is likely to be a cumulative effect on the community's perceptions of news media. But sometimes it is also difficult to disentangle a complainant or audience response to impartiality from that of accuracy, especially correction of inaccuracies and the extent to which this might be associated with a claim for right of reply. As the ACMA has not sought comments on the code provisions relating to accuracy, we will not address this issue in detail, but we do wish to say that the requirements regarding correction of inaccuracies in commercial TV and radio are inadequate, and failure to be responsive in this way is likely to worsen the overall climate of distrust.

In a similar way, we think rules on newsgathering are needed. Currently, the codes are almost exclusively limited to material that is broadcast and do not cover the practices used in preparation

¹⁴ Peter Fray, Sacha Molitorisz and Claire Marshall, *Trust and news media: a qualitative study*, 2018, Sydney, Australia: Centre for Media Transition, University of Technology Sydney, https://www.uts.edu.au/sites/default/files/2018-09/pdf_4_flipbook.pdf, pp 44-45 and Sacha Molitorisz, 'More top-down than peer-to-peer: talking to Australians about their ideal news source', *Media International Australia*, 11 December 2019, <<https://doi.org/10.1177/1329878X19891586>>.

of news and current affairs. This was seen in the Sally Faulkner story involving *60 Minutes*, where the ACMA issued advice saying it had no jurisdiction to examine the program's involvement in abduction of two children which resulted in imprisonment of the news crew.

B. Commercial influence

Commercial relationships

8. Does the paper capture the broad types of commercial arrangement?

We think the Discussion Paper does a good job of capturing the arrangements of which we're aware.

9. Do current ACMA-administered regulatory measures provide adequate and appropriate community safeguards that address the various types of commercial arrangement?

No. There are three aspects in which the current ACMA-administered regulatory arrangements could be improved. The first relates to commercial arrangements involving news programs that have the potential to influence editorial direction and should be prohibited. The second relates to types of arrangements that are subject to regulation. The third relates to the treatment of commercial arrangements (eg use of disclosure). These aspects are discussed below.

10. To what extent should regulation address the perception of commercial influence and the 'soft' influence of advertisers in addition to explicit commercial arrangements?

The question raises the important issue of 'soft' influence. Concern over the influence of large advertisers in particular was noted in the ACMA research and in research reviewed by the CMT, including the concern that commercial influence could change the focus, away from important issues.

This question raises the second of the points we think need improvement – the types of arrangements that are subject to regulation. For at least a decade it has been evident that positive editorial coverage has been given to some commercial entities, presumably in the hope of attracting future advertising or sponsorship arrangement. The ACMA and the Press Council have both received complaints about such matters and *Media Watch* has provided many likely examples (see above). After investigating, the ACMA has found no breach of existing regulations because there is no arrangement in place – essentially, there is no consideration given by the potential advertiser. These arrangements can have an impact on editorial content and add to the community impression of commercial influence. The starting point for addressing this problem could be the definitions of 'consideration', 'advertisement', 'commercial agreement', 'commercial arrangement' in the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard*, the *Commercial Television Industry Code of Practice*, the *Commercial Radio Code of Practice* and any other relevant codes.

While we think reform on this point is needed, we appreciate the difficulties faced by media organisations in a digital, global media environment, and that tighter rules could add to loss of revenue. Accordingly, we think there should be a re-balancing of regulatory interventions, with

greater attention to forms of soft influence and relaxation of existing limits on commercials. This point is addressed under question 18 below.

Regulatory approaches

11. What are the benefits or otherwise of the various approaches to transparency such as disclosure or distinguishability?

International research shows conflicting evidence on the effectiveness of disclosure statements, running at 9% in one nationally representative study in the US, 32.1% in another and 40% in another, with all these studies conducted between 2016 and 2018. Within individual studies the effectiveness of disclosure mechanisms has been shown to vary according to media literacy, demographic attributes and placement of disclosure labels. For example, one 2015 study of 242 US adults found that it is more effective to place disclosure labels at the top of the page rather than the bottom or the middle of an article. A 2016 study with 443 respondents found that those forewarned about the practice of native advertising were more likely to recognise it as such and a 2017 study of 738 participants found that younger, more educated audiences and those with higher news engagement were more likely to recognise native advertising. These studies are discussed in detail in the Centre for Media Transition's literature review, *News in Australia: Commercial Influence and Impartiality - Review of literature and research* (pp 14, 42 and 51-55).

Accordingly, in our view new regulation around disclosure could be accompanied with Australian research looking at different methods and their effectiveness.

Despite the conflicting evidence on effectiveness the studies do show that disclosure *is* something news consumers feel should be part of the commercial relationship governing news information. This has been found in the ACMA's own 2019 research of commercial radio listeners with 75% of radio listeners agreeing that advertising content should be clearly distinguishable and 55% agreeing advertising can be integrated if advertisers are identified. Consumer preference for transparency can further be seen in the overall erosion of trust discussed in our opening section and in levels of concern in Australia around issues such as headlines that look like news stories but turn out to be advertisements. According to the *Digital News Report: Australia 2018*, 53% of Australians are concerned about this issue. We believe transparency – which is also discussed above, including in response to question 5 – is an important component of an adequate regulatory response.

12. Can disclosure requirements be adequately acquitted through websites or program credits, rather than in real time during the broadcast?

Disclosure announcements in the credits of a program are unlikely to be seen by viewers, especially when credits are truncated, reduced in size to allow for promotions, or automatically skipped (when broadcast programs appear on streaming and catch-up services). In our view, a website statement acknowledging the commercial arrangements applying to a broadcast program does not constitute a disclosure of those arrangements. The need to visit that website – or even to know that visiting the website would provide such information – exceeds the actions that can be expected of an ordinary reasonable viewer or listener. As there is now ample evidence of community concern about undisclosed commercial arrangements, we think this should be a matter of high priority for the ACMA. In our view, there is convincing evidence that the Commercial Television Industry Code of Practice is not operating to provide appropriate community safeguards on a matter of concern to the community.

13. Are distinguishability requirements best directed to advertisers (e.g. through the AANA Code of Ethics), broadcasters (e.g. through industry codes of practice) or both?

No. A proposal to impose distinguishability requirements upon advertisers via AANA is misplaced. The broadcaster controls the content of the program and the way in which it is delivered to the audience. It might be reasonable for a disclosure to be made by an advertiser's representative who is featured in the program, but the obligation to ensure this occurs should be on the licensee. In the context of licenced broadcasting services, the enforceable obligation must be upon broadcasters. In the context of the Disclosure Standard, the ACMA has always taken the view that presenters are regulated by way of the obligations placed on licensees; we are not aware of any suggestion that this should change. In any event, given both the level of community concern and the potential for harm (in the form of viewers and listeners being misled, as they were by commercial radio hosts in 1999), moving to a self-regulatory model is not appropriate. As we have noted in our general comments, any effective regulatory scheme needs to accommodate the breadth of the digital media landscape. This includes, for instance, social media, search engines and news aggregators. We recognise this aspect is outside the ACMA's remit, but we think the arrangements relating to disclosure should follow that content across the broadcaster's catch-up service and social media sites.

14. Do current legislative requirements for the disclosure of cross-media interests within an individual licence area provide adequate identification of related interests? Are these still appropriate within the current media environment of networked services? Is 'business affairs' suitably defined?

Requirements of this type are still appropriate. The disclosure rules are seen in practice every day in relation to some media sources. The rules in Division 5B of Part 5 of the BSA were implemented in 2006 as a measure to offset some of the possible harm resulting from the abolition of the old cross-media rules in Division 2 of Part 5 of the BSA and their replacement with the prohibition on transactions resulting in an 'unacceptable three-way diversity situation' in Division 5A. With the removal of that rule in 2017, there are now no cross-media restrictions, yet the platforms on which this content appears have expanded. In our view, it would be reasonable to review the effectiveness of the methods by which disclosures are made, and to consider expanding the rules themselves to require disclosure in online formats. The definition of 'business affairs' could be reviewed to consider whether it should have wider application than just promotion or encouragement to use a co-owned media source. With no cross-media ownership limits and different rules about accuracy and fairness, this disclosures scheme could potentially work to enhance audience awareness of the number of different voices within a media market.

15. Is a consistent regulatory approach to commercial influence desirable or feasible? What principles would enable consistency across different sectors or platforms?

Consistency on all aspects across all platforms may not be possible, but this should not prevent the development of some principles that can be applied in contexts most likely to be encountered by consumers. The core principle could focus on the need to disclose any commercial source, at the time and as part of the presentation of content supported by that source. This includes where content is influenced by the presence or prospect of financial or other reward.

16. Should there be consistency in the application and use of terms across codes of practice, such as 'news', 'current affairs', 'advertising', 'commercial arrangements' and 'program material'? If so, what should those definitions be?

We have not finalised a position on this question.

Other models and additional principles

17. Are there alternative or overseas approaches to commercial influence not touched on in this paper that may provide more effective or more appropriate community safeguards?

We have not finalised a position on this question.

18. Are there other principles or considerations not included in this paper that the ACMA should have regard to in its consideration of regulating commercial influence?

As noted above, we recognise that a number of our recommendations, if adopted, would increase the regulatory burden on licensees (and other news media, if the regulatory framework were to be amended). We understand this would create additional financial strain at a time when these local firms are competing with international media and digital platforms. To alleviate this, we propose the code of practice limits on the amount of advertising be relaxed. In our view, an increase in clearly identifiable advertising content is preferable to expansion of 'soft' advertising and inadequate disclosure of sponsored content. While we think the concept of 'non-program matter' should be reviewed so that there is a more explicit recognition of commercial content, we propose that hourly limits should be removed from most of the schedule, at least on a trial basis with monitoring by the ACMA, and that broadcasters be given the opportunity to test levels of acceptance within the market and across different channels and formats.