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Free Speech, Responsible Media, Law and Liberal Democracy

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In this chapter I will be discussing the role of the media in a liberal democracy, and the tension between the essential free flow of information in a free society and the accountability which all power, including media power, must be subjected to for a society to be truly free. I will look at issues of media power, media ownership, free speech, the role and impact of the internet, and possible models for regulation. My focus is on those media that deliver news and current affairs, such as electronic news, TV news and current affairs, and newspapers. The backdrop to my presentation will be the ‘perfect storm’ of events that has brought some of these issues into sharp relief in recent times, including the *News of the World* phone-hacking scandal.

My simple but fundamental thesis is that a free media is a bedrock element of a functioning democracy and a market economy; and that those proposing restrictions and regulation of the media must carry the onus of justifying the restrictions. That said, I believe that there is a compelling case to reform media regulation to recognise that the media has considerable power, and the exercise of this power needs to be accountable to the public. At the moment, media power is, in my view,

inadequately accountable and the existing amalgam of laws and codes of practice is not serving the public interest.

The role of media in a democracy

The media plays a central role in our lives — even more so now that we can access a range of media sources through the gadgets we all carry around. I do not just mean social media, but also more traditional forms such as television, radio and newspapers. We have an abundance of information and opinion at our fingertips, all jostling for our attention.

In order for democracy to flourish, it is vital that the citizen has various sources of information and access to proper forums for open and fair debate. The media plays a critical role in stimulating debate about important issues, presenting facts and reporting news, uncovering corruption and misconduct and providing a vehicle for diverse perspectives.

As acknowledged in one of the discussion papers from the current review of media convergence:

Australia has a long history of rules designed to protect and promote media diversity. In a democratic society, it is considered important to have diversity in programs such as news and current affairs, upon which people form opinions. This has been one of the driving factors behind ownership and control rules in Australia.¹

Importantly, the media is also a key accountability mechanism for keeping the institutions of power in check. These institutions include the political power of executive government, the social and cultural power of institutions as diverse as churches and sporting groups, and the economic power of the business sector.

This creates a dichotomy, because as a consequence of this role, the media itself accrues an enormous amount of power, in that it packages and shapes the flow of information. The power to promulgate that information is key to the freedom of the press, and one that is jealously guarded — and rightly so. My question is, how well is that power being exercised?

The owners, editors and journalists who make up ‘the media’, and who influence and control content, have a range of motivations, which are brought to bear on the multiple messages being communicated. These include economic self-interest and political ideology. As one journalist put it: ‘All [newspapers] try to balance political and commercial agendas to maximise their power, popularity and shareholder returns.’² These motivations naturally and invariably influence the exercise of media power.

Just as the media is an accountability mechanism for powerful institutions, so too must it be accountable. A failure of the media to be accountable is a serious deficiency in a democracy, as is the failure to hold other sources of power to account.

Recent developments

News Limited have been on the receiving end of the news recently, following the *News of the World* phone hacking scandal, though there is nothing to suggest that they have done anything illegal in the gathering of its news in this country.

The scandal has coincided with (or precipitated) a ‘perfect storm’ of events and commentary, triggering a wider ethical reassessment of the relationship between media and government in the United Kingdom, as well as in Australia.

In Australia, the editorial posture of the News Limited papers, particularly the national broadsheet *The Australian* and *The Sydney Telegraph*, has created unease, if not dismay, among various commentators, politicians and academics. Of course, traditional media has always had agendas, but what has disturbed many people has been the complete blurring of the line between commentary and opinion on one hand — and supposed news and factual reporting on the other. The ‘campaign style’ journalism of News Limited has exceeded all past examples of agenda-driven reporting (at least in recent memory).

A consequence of the *News of the World* scandal has been a willingness of politicians to challenge News Limited, but the underlying issues are much broader than one company and pre-date the current phone-hacking controversy. In Australia, three separate reviews are now underway that provide vehicles to examine the policy framework applying to the exercise of media power, namely:

- the convergence review of the media and communications landscape
- the Media Inquiry; and
- the proposal for the introduction of a tort for breach of privacy.

The Convergence review, which is currently being undertaken by the Federal Government's Department of Broadband, Communications and the Digital Economy, 'is an independent review to examine the policy and regulatory frameworks that apply to the converged media and communications landscape in Australia.'³

An 'emerging issues' paper was released in July 2011, followed by a number of consultation papers released in September of the same year to address a range of issues and options for consideration by the Convergence review committee and the public. Submissions responding to the discussion papers were lodged by media outlets and interest groups, telecommunications companies, a range of bodies concerned with issues of copyright, as well as universities and academics, including one from Professor Brian Fitzgerald of the Faculty of Law at Queensland University of Technology.⁴

The areas under scrutiny include media ownership, media diversity,⁵ regulatory mechanisms, spectrum allocation, local content and community standards, each of which has its own sets of complexities. However, the review is limited to broadcasting, telecoms and radio communications, and excludes newspapers,

which doesn't take account of the fact that newspapers are increasingly delivered online.⁶ The Convergence review is due to report its findings in March 2012.

The Media Inquiry will look at the effectiveness of media codes of practice, the impact of technological change on both the business model for traditional media and how the new media environment might enhance quality journalism, and ways of strengthening the Australian Press Council, particularly its handling of complaints.⁷

The Inquiry started in November 2011 with public hearings in Melbourne, followed by Sydney. It is due to report back at the end of February 2012.

The chairman of the Inquiry wrote to 70 newspaper editors, former editors, academics and the current and previous chairmen of the Press Council, seeking their contribution. At the beginning of the public hearings he had to defend it against criticism that it has a pre-determined agenda,⁸ with some commentators extremely scathing of the terms of reference,⁹ while Andrew Bolt accused it of being stacked with 'lefties'.¹⁰

Contributors included academic Robert Manne, who says that it is 'indefensible that one company, News Limited, owns 70% of the newspapers circulating in Australia'. He also proposed that the Press Council have the capacity to force corrections with sufficient prominence when newspapers make factual errors. He spoke in favour of media diversity and affirmed the right of newspaper owners to express their bias and influence content.¹¹

Eric Beecher, publisher of Crikey, has submitted that the Press Council needs to be revitalised to recognise the immediacy of the internet. He stresses the importance of 'financially sustainable quality journalism', advocates enlarging the 30% of the news media that News Limited doesn't own in order to expand diversity, and seeks greater accountability by and regulation of Australian print and online media.¹²

Speakers at the hearings tended to agree that the ‘market-place of ideas’ was not working all that well in the Australian media.¹³ However, few advocate increased statutory regulation of the media. One commentator stated that ‘regulation of the press imposed as revenge for anti-government reporting is much more a threat to democracy than any tabloid headline could be.’¹⁴

Many are speculating that the result of the Inquiry will see the Press Council beefed up, with increased funding, either from government or the news outlets themselves, and possibly with the capacity to fine publishers.^{15,16}

In the meantime, incoming News Limited CEO Kim Williams says in response to accusations of bias among News Limited papers: ‘Australian politicians need to toughen up and get over their glass jaws’.¹⁷

Also informing the current debate are Lindsay Tanner’s book *Sideshow: Dumbing Down Democracy*, and Robert Manne’s *Quarterly Essay* on ‘Bad news: Murdoch’s Australia and the shaping of the nation’. Online outlets such as *Crikey*, *Inside Story* and *The Conversation* are also contributing viewpoints which question the adequacy of current regulation and general media performance.

As a consequence, media plurality, ownership policies, accountability and responsibility in media and politics are being seen as ‘inseparably connected,’ as is the standard of journalism ‘that flows from the corporate cultures’ of media empires.¹⁸

Media ownership

According to one of the papers released in September from the Convergence review:

Media ownership and control rules have been a regulatory issue for successive governments in Australia due to their implication for access to a diversity of opinion, information, news and commentary. ... Media ownership rules apply to commercial television, radio and newspapers as they have traditionally been considered the most influential services in the community.¹⁹

At present, television and radio is regulated through the allocation of licences, which is based on old technology such as the power of transmitters and access to broadcast spectrum. Newspaper ownership does not require a licence, but is subject to media diversity laws, and ownership is effectively restricted to those with an adequate capital base to set up a newspaper — at least as we traditionally understand them.

The rules governing media ownership and control are outlined in the following tables:²⁰

Table 1
Statutory Control Rules

Medium	Rule
Commercial television	75% audience reach — a person must not be able to exercise control of commercial television broadcasting licences if the combined license area exceeds 75% of the Australian population.
Commercial television	‘One-to-one’ rule — a person must not be able to exercise control of more than one commercial television broadcasting licence in a licence area, except for commercial licences issued under section 38C of the BSA.
Commercial radio	‘Two-to-a-market’ rule — a person must not be able to exercise control of more than two commercial radio broadcasting licences in the same licence area, except for commercial licences issued under section 40 of the BSA.

Table 2
Media Diversity Rules

Medium	Rule
Commercial television, radio, newspapers	Minimum number of voices: the 4 & 5 rule — there must be no less than five independent and separately-controlled media operators or groups in a metropolitan commercial radio licence area, and four in a regional area.
Commercial television, radio, newspapers	‘2 out of 3’ rule — a person cannot control more than two out of three specified media platforms — commercial television, commercial radio or an associated newspaper — in a commercial radio licence area.

Our national media diversity is extremely low. As media commentator Bernard Keane notes, there are just six major national media groups, four of them family empires that often work together.²¹ News Limited has control of 70% of the nation's metropolitan newspapers, 25% of Foxtel and half of the Premier Media Group. In fact, changes made to media ownership laws in 2006 under the Howard government could even allow a company like News Limited to merge with a company like PBL.²² Although critical of these changes at the time, when Labor won power, Communications Minister Senator Stephen Conroy declared that the ownership of Australia's media would not be re-regulated, saying 'we wouldn't be able to unscramble this egg.'²³ Now the time seems to have come when all these issues will be teased out and potentially unscrambled.

The cross-media rules are problematic, as they have limited scope and do not apply to subscription television, national newspapers, telecommunications companies or online media services. The Convergence review has indicated that this narrow definition means the rules may not adequately reflect the degree of influence of all mediums or the diversity of voices (or lack thereof) available to consumers.²⁴

Options identified by the Convergence review to address media diversity included:

1. no change to current rules
2. to broaden the scope of cross-media rules
3. to retain the cross-media rules, and introduce a public interest test
4. to abolish the cross-media rules, and introduce a public interest test.²⁵

It can be argued that the explosion of new media makes the old rules and the concerns about the concentration in the ownership of the traditional media far less compelling. Equally,

the circulation of newspapers is in decline, which may indicate that the influence of traditional media is on the wane.

I do not accept these arguments. Direct circulation or audience reach does not measure the opinion leading role of traditional media. Nor can it be an excuse to not meet proper standards of journalist behaviour or the accountable exercise of power.

The prevalence of irresponsible journalism

There are plenty of examples of indifferent journalism in Australian media — you just have to watch the ABC's Media Watch each week to get a sense of sloppy or deceptive practices, or read Robert Manne's Quarterly Essay outlining the campaign-driven agendas of *The Australian*.

Robert Manne argues a case of ideological bias on the part of *The Australian*, which he attributes both to News Limited owner, Rupert Murdoch, and the editor of the newspaper, Chris Mitchell. Murdoch, he states, uses the '70 percent of the national and state-wide press he owns to ensure that the values drawn from his right-wing political philosophy remain dominant within the political mainstream'.²⁶

Furthermore, Manne believes that you cannot understand power in Australia without understanding what role *The Australian* plays. He describes it as having an 'overbearing character' and an 'unhealthy influence', exercising 'power without responsibility'.²⁷

His critique of *The Australian* consists of a series of case studies which illustrate the newspaper's agenda on issues such as Aboriginal history, the Iraq war and climate change, as well as its character assassinations of certain academics, journalists, politicians and political parties. For example, it has openly professed the view that the Greens 'should be destroyed at the ballot box.' In his essay, Manne exposes inaccuracies, misrepresentation and plagiarism in the pursuit of *The Australian's* single-minded political agendas.

Others agree that journalism does a very bad job of tackling the ‘accountability deficit’ in modern politics, and that ‘it fails to do what should be its core function — to scrutinise our governors and the governance systems that hold them in power.’²⁸ It is perhaps not surprising that many of these views are expressed on blogs, some by frustrated current and former journalists.

Departing News Limited CEO, John Hartigan, sees things differently. He recently told the 7.30 Report that ‘We are the only organisation that really takes it up to the government’. *The Australian*, Hartigan added, was the only newspaper that ‘properly’ covered national politics; the ABC and Fairfax newspapers, meanwhile, enjoy preferred federal government treatment because they are more supportive of its policies.²⁹ Further, *The Australian* ran a comprehensive response to Manne’s essay over several days.

As Media Watch’s Jonathan Holmes says: ‘In a news story, it’s not legitimate to cherry-pick facts and ignore one side of an important argument. That’s not journalism, it’s propaganda, and it undermines democracy.’³⁰

Education, the internet and the consumption of news

In 1983, when Bob Hawke became prime minister, an average of one-in-three Australians completed Year 12. Now that figure is more than two-in-three, with over a million people undertaking higher education in this country at present. However, juxtaposed with the fact that we are better educated as a population than ever before, is the reality that public debate in this country is widely argued to be at a low ebb. Lindsay Tanner points out in his book *Sideshow: Dumbing down democracy* that the divide between the consumers of entertainment and the consumers of information does not correlate with levels of education.³¹ Apparently even those with Masters degrees want to find out what Kim Kardashian is wearing this week.

Furthermore, Tanner feels that the more politically educated among us are just as likely to abandon mass media in

favour of specialised media as to force the mainstream media to treat politics more seriously.

Barry Jones does not entirely blame the media for this sorry state of affairs. He observes politicians as 'eager to exploit media relationships' and afraid of arguing for the long view in their campaigns.³² This results in the prevalence of sound bites and repetition rather than in-depth exploration of complex issues from a variety of angles.

Jones observes that today the technology is sophisticated, but the ideas are not, whereas it used to be the opposite. He uses the following example:

In 1860, in New York Abraham Lincoln began his campaign for the presidency with a very complex speech about slavery at the Cooper Union, 7500 words long, complex and nuanced. All four New York newspapers published the full text, which was sent by telegraph across the nation, widely read and discussed. In 1860 the technology was primitive but the ideas were profound and sophisticated. In 2011 technology is sophisticated but the ideas uttered by presidential aspirants are embarrassing in their banality, ignorance and naivety.³³

The internet is increasingly becoming consumers' biggest source of news and information, according to research by Nielsen.³⁴ Fifty-four percent choose the internet as their preferred source of information compared with 17% preferring television and 12% newspapers. Television remains the main source of news for the majority at 36%, but the internet is close behind on 31%, with newspapers trailing on 14%. The internet also outstrips its competitors on providing the 'best access to opinions' and 'most trusted source of information' at 54% and 34% respectively. Newspapers were the second highest-rated for these factors, at 13% and 20% respectively. Radio, pay TV and the internet accessed via mobile devices are cited as the least-preferred sources of news and information, though in the case of the latter, this has probably already changed with the rise of the tablet.

What the data does not convey, however, is the amount of news and information accessed on the internet that originated in another media form, such as television or newspapers. Consumers of internet-based media make judgments about the reliability or otherwise of sources, and content from a national newspaper or TV network still has a higher credibility than an anonymous blog. So we should not be dismissing the influence of these media just yet.

There is a contradictory phenomenon that is seeing an increased diversity of view and output through social media and other electronic means that empower citizens in a cost-effective way. At the same time, this very force is a contributing factor in concentrating the ownership of the mainstream media, with each company scrambling to maintain its market share.

There is no doubt that the internet has played havoc with the business model that the traditional news media have relied upon to sell newspapers and advertising. Although circulation of News Limited's flagship newspaper *The Australian* is only about 130,000 in hard copy, with a readership of 432,000,³⁵ (less than that of the *Courier Mail*), the online readership of news.com.au is over 5 million.³⁶ It will be interesting to see the impact of the introduction of a paywall for *The Australian's* online content. Apparently online traffic hasn't reduced as much as expected in the first month³⁷ — but once the three-month- free trials expire, the change may be more significant.

The government contributes an enormous amount of funding to the traditional media through subsidies, grants and advertising — former finance minister Lindsay Tanner estimates that the government spends \$40–50 million per annum on newspaper advertising alone, the majority of which is job advertising, though this is increasingly being moved online.³⁸ Tanner suggests that this effective subsidy could be continued as an incentive for quality journalism, and which others suggest could be linked to regulatory reciprocity.

Free speech versus privacy

Freedom of the press is a jealously guarded right, and as I have argued elsewhere, free speech is the oxygen of a liberal democracy and market economy. But it cannot be unfettered free speech, which is why we accept restrictions for social and economic policy reasons.

Recently, the Federal Minister for Home Affairs and Justice, Brendan O'Connor, released a discussion paper on proposals for a privacy tort. Some sections of the media have claimed that this is a sinister attempt to intimidate the media and silence free speech (Andrew Bolt being one). The President of the Rule of Law Institute of Victoria, Robin Speed, also has concerns, fearing that 'the Bill will not only operate as a de facto censor of an individual's freedom of speech but also of the freedom of the press.'³⁹ However, his fears seem to relate to the way the legislation might be drafted, which is pure speculation at this point. As Canberra law lecturer Bruce Arnold says: 'Reports by law reform commissions over four decades have emphasised that privacy law involves a balance between personal and community interests, along with the importance of a vibrant mass media.'⁴⁰ We need to ensure this is the case.

News Limited lawyer Justin Quill has asserted that a statutory right to privacy would be simply a means for the elite of Australia to protect themselves against the media, an argument refuted by another lawyer, Greg Barns, who uses examples of ordinary people having their privacy infringed. Barns argues that 'being able to protect against an invasion of privacy is a fundamental human right.'⁴¹

There is no question that freedom of the press is an important democratic requirement, but this must be tempered with responsible practices that respect privacy. This brings us back to discussion of the need for adequate accountability mechanisms to ensure that these rights are exercised responsibly.

Current accountability mechanisms

There are a number of mechanisms by which citizens can interact and hold government accountable. These include legal remedies, administrative systems, the nature of the institutions themselves, and the media. We have pluralism of systems which are diverse and unequal. We have non-government bodies which also impact upon our lives and are sources of power, such as corporations, as well as social institutions such as churches, trade unions and sporting associations, which hold different types of power. Lesser mechanisms exist to hold to account the exercising of various sources of power.

In addition to the ownership rules that I have discussed earlier, there are a number of mechanisms for media accountability. The Australian Communications and Media Authority (ACMA) is the government body responsible for the regulation of broadcasting, the internet, radio communications and telecommunications. According to its website, its responsibilities include promoting self-regulation and competition in the communications industry, fostering an environment in which electronic media respect community standards and respond to audience and user needs, and managing access to the radio-frequency spectrum.⁴²

The Australian Press Council 'is responsible for promoting good standards of media practice, community access to information of public interest, and freedom of expression through the media,'⁴³ and handles complaints against newspapers, magazines and associated digital outlets. However, it is seen as lacking resources and clout and therefore has limited influence on ethical behaviour.⁴⁴

Newspapers also have codes of conduct,⁴⁵ and the Media, Entertainment and Arts Alliance (MEAA) has a code of ethics. The crux of the MEAA Code of Ethics is that member journalists commit themselves to:

- honesty

- fairness
- independence
- respect for the rights of others.⁴⁶

Nick Davies, the *Guardian* journalist who broke the News of the World phone-hacking scandal, suggests the following are the ten commercial principles that really govern the modern news business:

- run cheap stories
- select safe facts
- avoid offending powerful interests and common societal assumptions
- select safe ideas
- publish both sides of the story
- give consumers what they want
- ignore truth if it doesn't fit the story
- give consumers what they want to believe
- go with the moral panic
- run what everyone else is running.⁴⁷

However, there are many instances of breaches of these codes — as Media Watch can attest — with no sanctions for those who do so. These regulatory approaches can be characterised as a mix of self-regulation (newspapers) and co-regulation (broadcast media).

Self-regulation of the media has come under criticism both here and overseas. Indeed:

Self-regulation in the UK was not a positive institution designed to promote high standards, deal effectively with complains and protect press freedom. It was there to defend the proprietors, who funded it, from the encroachments of politicians, journalists and members of the public who wanted the press to be more responsible than the owners were prepared to allow.⁴⁸

Between them, the Convergence review and the Media Inquiry will scrutinise regulatory models, and there is already speculation about the introduction of a single regulator by Communications Minister Stephen Conroy.⁴⁹

Possible future regulatory mechanisms

So what would work best in terms of accountability mechanisms for the media, bearing in mind that we need to ensure that we do not restrain its proper role, but do promote openness and transparency?

What is meant by media accountability? Feintuck and Varney define it as ‘a requirement to give an account of one’s actions, either directly to the public or via public authorities ... and being liable to sanction if found to have acted in breach of some requirement or expectation attaching to the exercise of power.’⁵⁰ These two aspects of accountability provide both democratic and legal legitimacy, though accountability via the courts should be considered as a last resort.

The definition of ‘regulation’ used by Feintuck and Varney extends the notion of accountability outlined above as ‘the promulgation of rules by government accompanied by mechanisms for monitoring and enforcement, usually assumed to be performed through a specialist public agency.’⁵¹

If media content regulation was to be contemplated, then it is generally recognised that a content regulator needs to be:

- independent of political direction when dealing with media content rules, especially as they relate to news and information
- independent of government and industry players when dealing with content complaints by consumers.⁵²

The Convergence review outlines a number of options that form part of a government’s ‘regulatory toolbox’:

- international cooperation

- education:
 - encouraging digital literacy
 - accreditation/endorsement (e.g. ‘safe zones’)
 - ‘naming and shaming’.
- self-regulation (e.g. industry codes of practice)
- co-regulation (e.g. industry codes of practice enforceable by a regulator)
- direct regulation:
 - primary legislation: licensing regimes, statutory conditions, criminal and civil penalties
 - delegated legislation: conditions or standards imposed by Minister, ACMA, ACCC etc.
 - administrative powers of regulator — approvals, powers of direction, enforceable undertakings etc.
- incentives, such as tax rebates, subsidies and grants or protections and benefits of a non-financial kind.⁵³

Some of the commentators who have been most critical of the media talk more of a ‘cultural’ or ‘social’ rather than legal approach to improving the current state of affairs.

For example, Robert Manne does not think you can regulate to get rid of bias. He believes that journalists themselves should be making a stand to effect change. Famously, it has happened before when journalists have taken a stand — namely the industrial action taken by News Limited journalists about the campaign waged against the Whitlam government in ‘what is still the only strike over editorial issues ever to disrupt an Australian newspaper.’⁵⁴

Manne also thinks the ABC and the Fairfax press should respond to the lampooning by *The Australian* rather than ‘turning the other cheek’, as he feels that it gives the Australian too much credibility if they don’t.⁵⁵

Lindsay Tanner suggests greater public financing of serious content-creation, citing subsidies by a number of European

countries of small newspapers under the auspices of cross-party bodies. Tanner also commends the introduction of online outlets for trusted, serious content, such as *The Conversation*, which is mainly university-funded, and suggests that arms-length funding by government of these kinds of projects is one option for government which does not risk a State-controlled media.⁵⁶

Jonathan Holmes of Media Watch states that he would rather 'put up with unfairness, and inaccuracy, and bias, than see a statutory authority play policeman over the press.'⁵⁷ I agree with this conclusion, but that is not an argument for no action.

Prominent barrister Geoffrey Robertson is an advocate of media regulation, and he has indicated in the UK press his view that the press needs two bodies: one to provide a full-blooded defence of media freedom, and an ombudsman with statutory powers to order rights of reply and factual corrections with due prominence, adjudicate (or mediate) code of conduct disputes, and arrange legal and ethical training for journalists (and refresher courses for editors). He sees this 'very limited form of regulation' as carrying no dangers to press freedom, as 'it works on the basis that the cure for abuses of free speech is more speech.'⁵⁸

I would suggest that the Australian Press Council, invariably described as a toothless tiger, or a dog that has lost its bite, be furnished with a full set of teeth, or be completely reconfigured. It is currently funded primarily by the very newspapers it is set up to monitor, which is a characteristic of self-regulation and no bad thing, provided the resources are adequate and independence is guaranteed. The Press Council's chair, Julian Disney, has acknowledged the body's limitations, but suggests that it needs more resources in order to be effective.⁵⁹ He argues that it is the independent Press Council model that should prevail if a single regulator is established, rather than the government body model of ACMA.⁶⁰

The Press Council's submission to the Convergence review advocates for a unified regulatory system based on two principles:

- Over time, one body should become principally responsible for setting and monitoring standards of practice for news and comment across all media, and for handling complaints about breaches of those standards.
- This body should be an Independent Council which has due independence from the media industry, governments and any other particular interest, and has adequate standards, powers and resources.⁶¹

The Press Council Chair, Julian Disney, has called for greater funding to enable it to lift standards.⁶² Incredibly, the current funding arrangements allow newspaper publishers to be prescriptive about how the Press Council spends their contributions, to the point where only three years ago they reduced their funding by 20% because they didn't want to pay for the general media research the Council was doing.⁶³

It has been suggested that submitting to regulatory mechanisms such as complaints procedures has to be voluntary.⁶⁴ But turkeys don't vote for Christmas, so regulatory reciprocity may work better, whereby media outlets submit to regulation in return for regulatory protection such as access to shield laws, or for access to government funding for quality journalism.

Either way, we need to formulate a regulatory structure with teeth — one that encourages media outlets to correct their misdemeanours prominently (not buried at the bottom of page 15) and quickly (within days, not months) and therefore promotes accountability — as media commentator Eric Beecher suggests, 'that would be a major achievement.'⁶⁵

A failure to regulate 'can result in the privatisation of democracy, through corporate control of information flows and access restricted to those who can pay.'⁶⁶

It is predicted that the Media Inquiry will shy away from the introduction of a statutory authority to regulate media, but that it will make the following recommendations:⁶⁷

- increased funding to the Press Council, possibly with up to a third coming from government via an arms-length mechanism, or through a levy based on circulation
- increased incentives to become members of the Press Council among purveyors of online news and opinion
- a requirement to publish apologies and corrections in a suitably prominent place, with the possible addition of fines for repeat offenders or ‘particularly egregious breaches of standards’
- the possible future introduction of a Media Council modelled on the Press Council but extending across all media platforms.

What about tackling the problem of ownership? When considering the high concentration of media ownership in the hands of a single corporation, most commentators cite the idea of enforced divestiture as unworkable, unfair and unwise. For instance, it is thought that if it found itself in the position of having to reduce its media holdings, News Limited would most likely seek to sell or close newspapers rather than divesting itself of its pay TV interests. Strident media critic, Greens’ leader Bob Brown, does not support enforced divestiture, especially if it would cause newspapers to close.⁶⁸

Many commentators point to the lack of profitability of *The Australian*, which would make it an unattractive proposition for potential buyers. The tabloid papers rely increasingly on content-sharing arrangements, so it would be more cost-effective to buy them as a group, but this also seems unlikely in a publishing environment where newspaper sales are declining — unless someone else wishes to gain News Limited’s political influence, which hardly solves the problem at hand.

Instead of reducing the holdings of existing owners, some advocate the introduction of funding models to support expanding news media alternatives. These models might include direct

subsidies, tax breaks for print and online subscriptions, philanthropic funding for news publishers, and introducing low-profit limited liability companies (L3Cs) as a business model for news outlets.⁶⁹ However, as Bernard Keane puts it: ‘encouraging more commercial media entrants is unlikely to be successful when the recent history of the sector is of decline and consolidation,’ so strengthening existing sources of diversity such as the ABC and SBS may be a better proposition.⁷⁰

Some advocate the development of not-for-profit ventures ‘like US investigative journalism venture ProPublica that serves the public good by employing the traditional journalistic values of accuracy, balance, context, fairness and publicly spirited inquiry [as] a properly functioning democracy demands from the media.’⁷¹ The general manager of ProPublica believes that ‘some kinds of journalism have become ‘public goods’ — much like ballets, history museums, and the symphony — and we need to find ways outside the market to fund them.’⁷²

A public interest test has been posed as an alternative to media regulation, both by the current Convergence review and previously by the Productivity Commission, while others argue that:

... a new approach to media diversity should include a ‘national media groups’ test — that is, expanding the remit and extending the application of the quantitative media diversity from licence areas to a national level. Mergers within major national media — key newspapers, commercial television, subscription television, the biggest radio networks — would be subject to restrictions ... Between that and a statutory right to privacy, you’d have a stronger media regulatory framework while avoiding most of the pitfalls of greater media regulation that is now being urged.⁷³

Conclusion

We are in the midst of a perfect storm of events and debate that is scrutinising afresh the role of the media in a democracy.

There is welcome discussion around issues of media ownership, diversity of content and opinion, responsible (and irresponsible) journalism, the impact and role of the internet, freedom of the press, rights to privacy and mechanisms for accountability. There are many complexities among these issues, so we need to keep in mind the fundamental requirement to have the media serve the needs of our democracy, rather than the other way round.

A tweet that has come to my attention from the London School of Economics Media Policy project relates to a core issue of the Convergence review: ‘When citizen and commercial interests conflict, the interests of the citizen must always be put first.’

Endnotes

- 1 ‘Convergence Review — Media Diversity, Competition and Market Structure,’ 20 September 2011, www.dbcde.gov.au/digital_economy/convergence_review, p. 11.
- 2 ‘Is this News Limited’s defence?’ <http://inside.org.au/is-this-news-limited%E2%80%99s-defence/>, 18 July 2011.
- 3 http://www.dbcde.gov.au/digital_economy/convergence_review, accessed 7 September 2011.
- 4 http://www.dbcde.gov.au/__data/assets/pdf_file/0006/139263/Professor_Brian_Fitzgerald_and_Kylie_Pappalardo,_QUT_School_of_Law.pdf, accessed 23 November 2011.
- 5 Emerging Issues Paper, www.dbcde.gov.au/digital_economy/convergence_review
- 6 ‘The rules of the game for media regulation,’ www.crikey.com.au/2011/07/15/media-regulation-australia-laws-diversity/, 15 July 2011.
- 7 See the Media Inquiry terms of reference at www.minister.dbcde.gov.au/media/media_releases/2011/254, accessed 20 September 2011.
- 8 ‘Media inquiry hearings begin’, www.abc.net.au/worldtoday/content/2011/s3358847.htm, 8 November 2011.
- 9 ‘The media inquiry masks government’s hidden agenda’, www.theaustralian.com.au/national-affairs/opinion/the-media-inquiry-masks-governments-hidden-agenda/story-e6frgd0x-1226193141708, 12 November 2011.
- 10 ‘Media inquiry to hold first hearings’, www.abc.net.au/news/2011-11-08/media-inquiry-begins/3651480, 8 November 2011.
- 11 ‘Media inquiry hearings begin’, www.abc.net.au/worldtoday/content/2011/s3358847.htm, 8 November 2011.

- 12 'A submission to the media inquiry,' www.abc.net.au/unleashed/3652702.html, 8 November 2011.
- 13 'Media inquiry: "marketplace of ideas" not working that well,' www.abc.net.au/unleashed/3652016.html, 8 November 2011.
- 14 'Media inquiry motives: accountability or revenge?' www.abc.net.au/unleashed/3652016.html, 8 November 2011.
- 15 'Better the devil you know: News Limited tells Media Inquiry they'll pay more to the Press Council,' <http://theconversation.edu.au/better-the-devil-you-know-news-limited-tells-media-inquiry-theyll-pay-more-to-the-press-council-4321>, 18 November 2011.
- 16 'Media Inquiry misses the point, as the news crisis worsens,' http://theconversation.edu.au/media-inquiry-misses-the-point-as-the-news-crisis-worsens-4357?utm_source=The+Conversation+Daily+updates&utm_campaign=5ad365d2d3-DailyNewsletter&utm_medium=email, 19 November 2011.
- 17 'News Ltd boss tells politicians to harden up', www.abc.net.au/news/2011-11-10/news-ltd-new-boss-tells-politicians-to-harden-up/3656420, 10 November 2011.
- 18 'Good News from the *News of the World*', <http://inside.org.au/good-news-from-the-news-of-the-world/>, 20 July 2011.
- 19 'Convergence Review—Media Diversity, Competition and Market Structure', 20 September 2011, www.dbcde.gov.au/digital_economy/convergence_review, p. 14.
- 20 'Convergence Review—Media Diversity, Competition and Market Structure discussion paper', 20 September 2011, www.dbcde.gov.au/digital_economy/convergence_review, pp. 14–15.
- 21 'The rules of the game for media regulation', www.crikey.com.au/2011/07/15/media-regulation-australia-laws-diversity/, 15 July 2011.
- 22 'Labor slams Govt plan to change media ownership rules', www.abc.net.au/worldtoday/content/2006/s1684521.htm, 12 July 2006.
- 23 'Unscrambled eggs on Labor's face as cross media laws remain', www.crikey.com.au/2007/12/06/unscrambled-eggs-on-labors-face-as-cross-media-laws-remain/, 6 December 2007.
- 24 'Convergence Review—Media Diversity, Competition and Market Structure', 20 September 2011, www.dbcde.gov.au/digital_economy/convergence_review
- 25 'Convergence Review—Media Diversity, Competition and Market Structure', 20 September 2011, www.dbcde.gov.au/digital_economy/convergence_review
- 26 R Manne, 'Bad news: Murdoch's *Australian* and the shaping of the nation,' *Quarterly Essay*, Issue 43, 2011.
- 27 R Manne, 'Bad news: Murdoch's *Australian* and the shaping of the nation,' *Quarterly Essay*, Issue 43, 2011.

- 28 'Fraudcast News — how bad journalism serves our bogus democracies', 12 August 2011, <http://fraudcastnews.wordpress.com/2011/08/12/hello-world/>
- 29 'Is this News Limited's defence?' <http://inside.org.au/is-this-news-limited%E2%80%99s-defence/>, 18 July 2011.
- 30 'One regulator to rule them all', *Media Watch*, 19 September 2011, www.abc.net.au/mediawatch/transcripts/s3321170.htm
- 31 L Tanner, *Sideshow: dumbing down democracy*, Scribe Publications, 2011, p. 198.
- 32 'Intelligent discussion all but extinct', 21 July 2011, www.nationaltimes.com.au/opinion/society-and-culture/intelligent-discussion-all-but-extinct-20110720-1hos2.html
- 33 'Intelligent discussion all but extinct', 21 July 2011, www.nationaltimes.com.au/opinion/society-and-culture/intelligent-discussion-all-but-extinct-20110720-1hos2.html
- 34 Nielsen 2011, the Australian online consumer report, quoted in 'Convergence Review—Media Diversity, Competition and Market Structure', 20 September 2011, http://www.dbcde.gov.au/digital-economy/convergence_review/convergence_review_detailed_discussion_papers
- 35 www.newsspace.com.au/the_australian, accessed 13 September 2011.
- 36 www.newsspace.com.au/news.com.au, accessed 13 September 2011.
- 37 'Online dips but mobile booming in paid-content strategy,' www.theaustralian.com.au/media/monday-section/online-dips-but-mobile-booming-in-paid-content-strategy/story-fna1k39o-1226200571709, 21 November 2011.
- 38 L Tanner, *Sideshow: Dumbing down democracy*, Scribe Publications, 2011, p. 198.
- 39 www.ruleoflawaustralia.com.au/Downloads/Freedom_of_the_Press_and_Freedom_of_Speech_in_Australia.pdf, accessed 13 September 2011.
- 40 'Far from sinister, privacy laws might mean media does its job better', 13 September 2011, <http://theconversation.edu.au/far-from-sinister-privacy-laws-might-mean-media-does-its-job-better-3326>
- 41 'Everyone deserves a right to privacy,' www.abc.net.au/unleashed/2813550.html, 28 July 2011.
- 42 See www.acma.gov.au, accessed 21 September 2011.
- 43 www.presscouncil.org.au/what-we-do/, accessed 13 September 2011.
- 44 'Media regulation is "bad for democracy"', *The Australian*, 16 July 2011, www.theaustralian.com.au/news/nation/media-regulation-is-bad-for-democracy/story-e6frg6nf-1226095574985
- 45 For example, *The Australian's* at www.theaustralian.com.au/help/editorial-code-of-conduct.
- 46 MEAA Code of Ethics, www.alliance.org.au/code-of-ethics.html, accessed 19 September 2011.

- 47 N Davies (2009), quoted in L Tanner, *Sideshow: Dumbing down democracy*, Scribe Publications, 2011, p. 154.
- 48 O'Malley & Soley (2000), quoted in M Feintuck & M Varney, *Media regulation, public interest and the law*, Edinburgh University Press, 2006, p. 204.
- 49 For example, see 'One regulator to rule them all,' *Media Watch*, 19 September 2011, www.abc.net.au/mediawatch/transcripts/s3321170.htm
- 50 M Feintuck & M Varney, *Media regulation, public interest and the law*, 2006, Edinburgh University Press, p. 171.
- 51 Black (2002), quoted in M Feintuck & M Varney, *Media regulation, public interest and the law*, Edinburgh University Press, 2006, p. 202.
- 52 'Convergence Review — Layering, Licensing and Regulation,' 20 September 2011, www.dbcde.gov.au/digital_economy/convergence_review, p. 24.
- 53 'Convergence Review—Layering, Licensing and Regulation', 20 September 2011, www.dbcde.gov.au/digital_economy/convergence_review, p. 22.
- 54 'The Australian at forty-five', 14 July 2009, <http://inside.org.au/the-australian-at-forty-five/>
- 55 R Manne, 'Bad news: Murdoch's Australian and the shaping of the nation,' *Quarterly Essay*, Issue 43, 2011.
- 56 L Tanner, *Sideshow: Dumbing down democracy*, Scribe Publications, 2011, p. 200.
- 57 'One regulator to rule them all,' *Media Watch*, 19 September 2011, www.abc.net.au/mediawatch/transcripts/s3321170.htm
- 58 'Get Rupert Murdoch on the Leveson inquiry stand', 13 July 2011, www.guardian.co.uk/commentisfree/2011/jul/13/murdoch-leveson-inquiry-cameron-police
- 59 'Press Council happy, but wants more funds', 15 September 2011, www.theaustralian.com.au/business/media/press-council-happy-but-wants-more-funds/story-e6frg996-1226137270508
- 60 'One regulator to rule them all', *Media Watch*, 19 September 2011, www.abc.net.au/mediawatch/transcripts/s3321170.htm
- 61 www.dbcde.gov.au/_data/assets/pdf_file/0020/142940/Australian_Press_Council.pdf, accessed 25 November 2011.
- 62 'Penalties urged for media campaigns', www.theaustralian.com.au/media/penalties-urged-for-media-campaigns/story-e6frg996-1226190657427?from=hot-topics-med, 10 November 2011.
- 63 'Media Inquiry predictions and observations', www.abc.net.au/news/2011-11-21/holmes-media-inquiry-predictions-and-problems/3683330, 21 November 2011.
- 64 'The logic of an inquiry into a media model under siege', 15 September 2011, www.theaustralian.com.au/news/nation/media-regulation-is-bad-for-democracy/story-e6frg6nf-1226095574985

- 65 'Beecher: media inquiry has mandate to address problems', 16 September 2011, www.crikey.com.au/2011/09/16/beecher-media-inquiry-has-mandate-to-address-problems/
- 66 M Feintuck & M Varney, *Media regulation, public interest and the law*, 2006, Edinburgh University Press, p. 171.
- 67 'Media Inquiry predictions and observations', www.abc.net.au/news/2011-11-21/holmes-media-inquiry-predictions-and-problems/3683330, 21 November 2011.
- 68 'Senators Bob Brown & Scott Ludlam press conference', 14 September 2011, <http://greensmps.org.au/content/tv/senators-bob-brown-scott-ludlam-press-conference-14911>
- 69 'Right time, wrong inquiry?', 21 July 2011, <http://inside.org.au/right-time-wrong-inquiry/>
- 70 'News Ltd strengthens the case for media inquiry', www.crikey.com.au/2011/08/31/news-ltd-strengthens-the-case-for-media-inquiry/, 31 August 2011.
- 71 'Journalism as a public good', The Failed Estate blog, <http://thefailedestate.blogspot.com/2011/05/journalism-as-public-good.html>, 28 May 2011.
- 72 'Podcast: Richard Tofel on the future of news', www.propublica.org/podcast/item/podcast-richard-tofel-on-the-future-of-news/, 26 May 2011.
- 73 'The rules of the game for media regulation', www.crikey.com.au/2011/07/15/media-regulation-australia-laws-diversity/, 15 July 2011.



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