



## Media reviews: all sound and fury?

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## Introduction

Since the seventeenth century the media have been seen as the watchdogs of democracy—guardians of the public interest, protecting the people against arbitrary rule by governments. In recent times however, there has been considerable speculation that the media has relinquished its role as defender of democracy; that it is in fact just another industry controlled by and serving commercial interest, rather protecting the public interest.

For many media commentators the *News of the World* (a former London newspaper owned by News International) phone hacking scandal in Britain validated such speculation. The scandal illustrated the extent to which at least certain sections of the media had failed in their remit by wilfully abusing power and invading personal privacy. Furthermore, the scandal demonstrated the potential negative influence on good governance that can result when powerful media interests become corrupt.

Following the setting up of an investigation into *News of the World* practices, there were calls for a similar investigation to take place into the Australian media. These calls were premised on assumptions that some of the Australian press was engaging in comparable practices.

The Australian Government announced on 14 September 2011 that an inquiry would be conducted into certain aspects of the media and media regulation.<sup>1</sup> The inquiry was undertaken by Ray Finkelstein QC, with the assistance of Professor Matthew Ricketson from the University of Canberra's School of Journalism and Communications.<sup>2</sup>

In addition, discussion about what effect media convergence was having, and would continue to have on the media landscape, prompted the Government also to convene an investigation into this phenomenon (see box below for definition of media convergence). In this context, and in light of government commitments made in the *NBN: Regulatory Reform for 21st Century Broadband* discussion paper and *Australia's Digital Economy: Future Directions Report*, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, announced draft terms of reference for a convergence review in December 2010.<sup>3</sup> In March 2011, final terms of

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1. The Inquiry is commonly referred to as the Finkelstein Review and I will refer to it by that title as well as the Review throughout the relevant section of this paper. I will refer to the Convergence Review also as the Review, as well as referring to the Review Committee, in the section which deals with that review. Any sections which discuss or compare both reviews will distinguish them by referring to the Finkelstein Review and the Convergence Review.
  2. Biographies of Finkelstein and Ricketson can be found on the Finkelstein Review website, viewed 13 July 2012, [http://www.dbcde.gov.au/digital\\_economy/independent\\_media\\_inquiry/independent\\_media\\_inquiry\\_biographies](http://www.dbcde.gov.au/digital_economy/independent_media_inquiry/independent_media_inquiry_biographies)
  3. Australian Government, *National Broadband Network: Regulatory reform for 21st century broadband: discussion paper*, April 2009, viewed 13 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0006/110013/NBN\\_Regulatory\\_Reform\\_for\\_the\\_21st\\_Century\\_Broadband\\_low\\_res\\_web.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0006/110013/NBN_Regulatory_Reform_for_the_21st_Century_Broadband_low_res_web.pdf) and Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions Report*, Australian Government, July 2009, viewed 13 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0006/117681/DIGITAL\\_ECONOMY\\_FUTURE DIRECTIONS\\_FINAL REPORT.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0006/117681/DIGITAL_ECONOMY_FUTURE DIRECTIONS_FINAL REPORT.pdf)

reference were provided to the Convergence Review Committee, which consisted of Glen Boreham, Malcolm Long and Louise McElvogue.<sup>4</sup>

The findings of both reviews were presented to the Government in the first half of 2012. The Government is currently contemplating the recommendations from both reviews, and speculation is rife about what actions it will opt to pursue—if any.

### Box 1: Definition: media convergence

Media convergence has been described as a phenomenon involving the interlocking of computing and information technology companies, telecommunication networks and content providers from the publishing worlds of newspapers, magazines, music, radio, television, films and entertainment software.<sup>5</sup>

Media convergence essentially alters the relationship between existing technologies, industries, markets, genres and audiences.<sup>6</sup> Convergence is both a top-down corporate-driven process and a bottom-up consumer-driven process. Media companies learn how to accelerate the flow of media content across delivery channels to expand revenue opportunities, broaden markets and reinforce viewer commitments. Consumers learn how to use these media technologies to bring the flow of media more fully under their control and to interact with other users.<sup>7</sup>

Convergence has resulted in a challenge to traditional thinking about regulation of the media. In the past the media has been regulated to comply with a consensus view of what should be available and with consideration of large, stable audiences for the consumption of print and broadcast information. Convergence, however, has resulted in the emergence of niche audiences, which are not prepared only to consume, but also wish to create and participate in the media experience.

## Finkelstein Review

In addressing its terms of reference, the Finkelstein Review developed a document which intermeshes theoretical analysis of the origins and objectives of maintaining a free press in a democratic society, with reports on the state of the media (particularly the print media) in Australia.

There has been some criticism of Finkelstein's narrowing of his terms of reference to refer in general to the print and news media, but this appears somewhat harsh given that reviews are often criticised

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4. Glen Boreham was the Managing Director of IBM Australia and New Zealand for five years until stepping down from the role in January 2011. Malcolm Long has considerable experience in broadcasting and communications having been a member of the Australian Communications and Media Authority (ACMA), Managing Director of the Special Broadcasting Services (SBS) Corporation and Deputy Managing Director of the Australian Broadcasting Corporation (ABC). Louise McElvogue has a broad range of media and new media experience in Australia, the United States and Europe. Profiles are on the Convergence Review website viewed 13 July 2012, [http://www.dbcde.gov.au/digital\\_economy/convergence\\_review/committee\\_profiles](http://www.dbcde.gov.au/digital_economy/convergence_review/committee_profiles)
  5. Encyclopaedia Britannica entry on media convergence by T Flew, viewed 13 July 2012, <http://www.britannica.com/EBchecked/topic/1425043/media-convergence>
  6. H Jenkins, 'The cultural logic of media convergence', *International journal of cultural studies*, vol. 7, no. 1, 2004, <http://eng1131adaptations.pbworks.com/f/Jenkins,+Henry++The+Cultural+Logic+of+Media+Convergence.pdf>
  7. Ibid.

for becoming too ambitious; thereby skirting around crucial issues. Moreover, fundamental aspects of discussion in the Review apply across all forms of media and to all aspects of those forms. Importantly, the conclusions reached, regardless of whether they are agreed with or not, can be applied to news and entertainment media and with some modifications, across the print, broadcast and online applications.

One submission to the Review remarked also that while it may seem strange to direct particular attention to newspapers at the same time as a number of sources have foretold their death, newspapers are in fact driving convergence because they are adopting other forms of publishing.<sup>8</sup> A second reason to focus on newspapers is that newspaper journalism is a more vital component of the democratic infrastructure of contemporary societies than has previously been recognised.<sup>9</sup> Third, newspapers play a vital role in upholding transparency, democracy and freedom of expression, mainly because of their editorial independence from governmental or other bodies.<sup>10</sup>

The Finkelstein Review intentionally focussed on the news media in its deliberations. This was because this sector of the media specifically has a responsibility to be fair and accurate in reporting, ethical in the conduct of its business and publicly accountable for its performance. Finkelstein concluded that the current regulatory environment has not achieved this situation, or the 'degree of accountability desirable in a democracy'. Moreover, in Finkelstein's view, problems with the current system 'are inherent and cannot be easily remedied'.<sup>11</sup>

## Defining the context of the review

The Finkelstein Review examined some of the rationales which underpin notions of free speech and press freedom and attempted to consider some of the dilemmas surrounding those ideals in the context of how the media contribute to democratic processes.

One rationale Finkelstein identified for maintaining a free press is that it protects free speech, which in turn protects the rights of people to participate in society. While one iteration of this 'democratic discourse model' allows that limited government intervention to establish regulatory frameworks

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8. P Cole and T Harcup, *Newspaper journalism*, Sage London, 2010, cited in D McKnight and P O'Donnell submission to the Independent Inquiry into Media and Media Regulation, November 2011, viewed 10 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0018/143415/Associate\\_Professor\\_David\\_McKnight\\_and\\_Dr\\_Pen\\_ny\\_ODonnell.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0018/143415/Associate_Professor_David_McKnight_and_Dr_Pen_ny_ODonnell.pdf) Note: given that submissions to the Finkelstein review and the various Convergence Review papers adopt different formats and describe the reviews in a variety of ways, I have elected to use the format used in this reference when citing any submissions.
  9. (United Kingdom) Department for Culture, Media and Sport and Department for Business, *Digital Britain*, 2009 and (United States) Federal Communications Commission, *Information needs of communities: the changing media landscape in a broadband age*, 2011, cited in McKnight and O'Donnell, op. cit.
  10. Organisation for Economic Cooperation and Development (OECD), *News in the Internet age: new trends in news publishing*, OECD, 2010 in McKnight and O'Donnell, op. cit.
  11. The section of the paper which summarises the Finkelstein Review will not provide specific references to the Review unless the Review is citing another source, as the majority of information refers to, and is sourced from the following document: R Finkelstein (with M Ricketson), *Report of the independent inquiry into the media and media regulation: Report to the Minister for Broadband, Communications and the Digital Economy*, Australian Government, February 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0006/146994/Report-of-the-Independent-Inquiry-into-the-Media-and-Media-Regulation-web.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0006/146994/Report-of-the-Independent-Inquiry-into-the-Media-and-Media-Regulation-web.pdf)

can enhance fairness and balance in democratic discourse, another version views government regulation of speech as self-interested, thus undermining democracy.

Finkelstein saw a number of problems with the democratic discourse model, including that the media may distort coverage of events to favour certain perspectives, they may omit important information from accounts and they may 'reduce the quality of discourse in the drive for profits'. In addition, as access to the media is not uniform or equal across society some, more privileged and/or powerful positions and perspectives are more reported than others; so the public does not receive a complete analysis of issues.

Another justification for free speech and a free press is that it promotes individual autonomy and self-fulfilment. The problem with this rationale, according to the Review, is that there may be conflict between free speech as a means of self-fulfilment and other freedoms which may also be self-fulfilling.

Yet another rationale is that a free press provides a check on democratically-elected governments and other forms of institutionalised power. But this rationale does not address the question it raises: who or what provides a check on 'an institution with its head in politics and its feet in commerce'.<sup>12</sup>

In addressing this question Finkelstein observed that it is almost universally accepted that there are indeed circumstances in which free speech and a free press should be subject to restriction. One idea is that these circumstances should be premised on the notion that the press has a social responsibility to citizens. That it is the duty of the press:

... to provide 'a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning'. The press should serve as 'a forum for the exchange of comment and criticism', give a 'representative picture of the constituent groups in society' helping the 'presentation and clarification of the goals and values of the society' and 'provide full access to the day's intelligence'.<sup>13</sup>

In other words, the press has obligations and should be accountable 'for what they publish and for how they behave'. Finkelstein contended that what is lacking is a robust discussion on what institutional mechanisms are necessary to ensure the press adheres to its responsibilities and that it is accountable for what it publishes. Finkelstein defined the job of his review as addressing how to accommodate an increasing and legitimate demand for press accountability from the public, 'but to do so in a way that does not increase state power or inhibit the vigorous democratic role the press should play or undermine the key rationales for free speech and a free press'.

## **Media privileges in the face of public disquiet**

In assessing Australian media standards and performance the Review noted the substantial body of evidence which traces the Australian public's evolving views in terms of trust; assessment of the

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12. J Schultz, *Reviving the fourth estate: accountability and the media*, Cambridge University Press, 1998, p. 95, quoted in Finkelstein, op. cit.

13. W Hocking, *Freedom of the press* (A Report from the Commission on Freedom of the Press), The University of Chicago Press, 1947, p. 21 and pp. 23–28 in Finkelstein, op. cit.

performance of media; bias; influence/power and ethics. In general it found that the level of public confidence in the media as an institution, and journalists as a professional group, is low.<sup>14</sup> Public perceptions of media accuracy are not flattering, nor are perceptions of the extent to which the media perform a role of scrutinising powerful officials and groups. The media is also generally perceived as biased; the public believing that despite the presence of self-regulatory codes of practice that reporting 'is not fair, accurate and balanced'. Moreover, there are community concerns about media intrusions on individual privacy and a belief that there is a considerable difference in what the media and the public consider is ethically acceptable behaviour. Finally, the media are perceived as one of the four biggest centres of power in Australia, alongside trade unions, big business and the federal government.

But despite widespread public disquiet about its conduct and performance, Finkelstein pointed out that the media enjoy privileges that are not enjoyed by other members of the community. These privileges are granted on the understanding that the media should play a special role in society and that they should be socially responsible in their practices.

So it is, according to Finkelstein, that journalists are not required to identify sources of information in legal proceedings for example, unless a court is satisfied that the public interest is better served in disclosing the identity of the source.<sup>15</sup> There are defences to certain criminal offences that are only available to the media; one of these is that they are not liable to the offence of stalking if they act without malice and in the normal course of the business of publishing news and current affairs. Journalists and media organisations are exempt from certain consumer protection laws and they need not comply with the Privacy Act's National Privacy Principles if otherwise contravening acts are engaged in 'in the course of journalism'. They are exempt under the *Corporations Act 2001* for the purposes of reporting on financial products and they may reproduce literary works without infringing copyright laws if the reproduction is for the purpose of reporting news.

## Rights of redress

Finkelstein discussed at length the issue of the mechanisms of redress in instances where it may be appropriate that a newspaper gives a fair opportunity for a reply and, where appropriate, the publication of a correction. But there is currently no mechanism by which such remedies can be enforced. So Finkelstein considered it necessary to reflect on whether there ought to be an enforceable right of reply or duty of correction, retraction or apology, or perhaps a right of access so that individuals or groups can express opinions or publish ideas.

The Review distinguished between a right of access and rights of reply, correction, retraction or apology. A right of reply enables a person or a group attacked by a particular media outlet to put an

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14. The Review notes that this does not apply to the ABC, which, regardless of platform—television, radio or online is consistently identified in surveys as Australia's most trusted media organisation. Similarly, the ABC is seen as the least biased media organisation.

15. *Evidence Act 1995*, subsection 126H(2), 'The court may, on the application of a party, order that ... the public interest in the disclosure of evidence of the identity of the informant outweighs: (a) any likely adverse effect of the disclosure on the informant or any other person; and (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts'.

alternative view of the incident or story and for a correction, retraction or apology to be published. Right of access refers to providing a general right of access for individuals and groups to the media which requires that diverse viewpoints are published.

The Review concluded that ‘obstacles to the implementation of any general right of access to the media are almost insurmountable’, and did not recommend this as a media reform. It is interesting that Finkelstein did not make more of the potential influence specialised online media outlets, blogs and citizen journalists can have in improving public access to a greater diversity of facts, ideas and viewpoints. As one submission to the Review stated, while mainstream media still holds considerable influence over public debate, access issues are less pronounced in the Web 2.0 environment.<sup>16</sup>

Finkelstein cites arguments in favour of an enforceable right of reply which include that it is an important means to assist individuals to address the imbalance of power between individuals and the media. It does this simply by requiring that a different perspective of reported events is published. Arguments against an enforceable right of reply maintain it limits freedom of speech, or it may lead to the media not publishing material which is in the public interest because it is unwilling to publish a reply. Codes of ethics and self regulation are seen as sufficient to ensure that all sides of a story are reported and that government regulators do not intervene in reporting to favour their own views or those of vested interests.

Finkelstein is convinced the arguments in favour of an enforceable right are more persuasive, and that it is a desirable media reform:

... freedom of expression is not an absolute right. In a number of circumstances it must give way to other rights. Here, the competing interests are the right to protect reputation and the public’s need to receive information and ideas. A right of reply would only arise in response to what the editor has chosen to publish as an attack on a person. The harm to the person’s reputation could be substantial.

...

Further, while an enforceable right of reply is an interference with editorial freedom, it is not censorship. Such a right would only be enforced after an independent process found there was merit in the complaint, and so would exclude baseless complaints.

## **Effectiveness of media code of practice**

One of the crucial terms of reference for the Finkelstein Review was investigation of the effectiveness of media codes of practice in Australia. In its theoretical discussion of the question of ‘why regulate’ it cited two main rationales for regulation—preventing or responding to market failure and pursuing social and equity objectives.

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16. M Pearson, submission to the Independent Inquiry into Media and Media Regulation, 4 November 2011, viewed 19 July 2012, [http://www.dbcde.gov.au/data/assets/pdf\\_file/0005/142925/Professor\\_Mark\\_Pearson.pdf](http://www.dbcde.gov.au/data/assets/pdf_file/0005/142925/Professor_Mark_Pearson.pdf)

For Finkelstein, while these rationales may establish a necessary condition for intervention, they alone are not sufficient reason to impose regulation.

Costs and benefits will result from any intervention and it is necessary, if intervention is proposed, to demonstrate that the benefits will outweigh the costs, including the costs of implementation. Intervention is justified only if it leads to an overall improvement in social welfare.

The alternative to existing structures is not some self-fulfilling ideal of a 'benevolent, costless and perfectly informed regulator' but rather some other, more realistic institution, the feasibility and efficiency of which require careful examination.

The Review continued that it cannot be assumed that regulation will achieve its objectives. It listed a number of reasons for this, including that any regulator will not be privy to all information surrounding issues and that it may be starved of sufficient resources to carry out its functions adequately. In addition, the regulation process itself is susceptible to political influence and capture by interest groups and regulated entities will seek to capitalise on any flaws in the system.

As the Review described, regulation exists on a spectrum ranging from full industry self regulation to comprehensive governmental intervention. Each form of regulation has advantages and disadvantages. Government regulation is generally better resourced than self regulation, for example; it provides the certainty of compulsion and legal enforceability and universal coverage. On the other hand, self regulation is generally more flexible and encourages more industry commitment to compliance.<sup>17</sup>

In working towards his final conclusion Finkelstein thought that whatever form regulation takes it should, however, feature the best of all forms. Hence, it should have clear and specified objectives, appropriate organisational structure, objective and transparent decision making processes and the means to enforce them, ongoing, adequate funding and appropriate accountability mechanisms.

## **Problems defined and reforms proposed**

After assessing the content of submissions and consultations Finkelstein's final conclusion was that there are two fundamental problems with the current media environment. The first can be traced to market failure arising from the concentration of ownership of mainstream news services. Media concentration, in turn, has led to a lack of diversity in the views, potential for a small group of people to have undue influence on public opinion and a decline in media standards as the result of lack of competition.

The second problem according to the Review is that there is an increasing distrust of the media. The general populace considers that newspapers fail to report accurately and fairly and that there is a lack of diversity of opinion in news and current affairs reporting. This results in people not having

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17. The Review lists some criticisms of self regulation, but not of government regulation. The criticisms of self regulation are that it may: lead to collusion and anti-competitive conduct; result in 'regulatory capture'—a scheme that operates in the private interests of the regulated entities rather than the public interest (or may be seen to operate in that way); not meet, or be seen to meet, relevant objectives; not be adequately funded; not have effective systems of transparency and may generally lack public accountability.

sufficient information available for them to evaluate and decide on issues. In addition, the political classes also distrust the media which they see as biased in reporting, commercially driven in opposition to certain policies and obsessive in attempting to influence government policy.

Finkelstein noted that there were several regulatory options advanced in the submissions he received, including the industry-preferred maintenance of the status quo. Other options included:

- providing more funding to the Australian Press Council (APC), enhancing its jurisdiction and powers
- establishing a new, independent body to take over the role and functions of the APC and the broadcast regulator, the Australian Communications and Media Authority (ACMA).

A further suggestion was to grant licences to online publishers on the condition they were 'fit and proper' persons.

Ordinarily, Finkelstein observes, his preferred option would be self regulation; only the ineffectiveness of this option in the case of newspapers prompted him to consider an alternative—a point seemingly ignored by many commentators. Finkelstein justified his recommendations in these terms:

To do nothing in these circumstances is merely to turn a blind eye to what many see as a significant decline in media standards. Australian society has a vital interest in ensuring that media standards are maintained and that there is public trust in the media.

Put more directly, the problems identified in this report have not occurred because the media have been unregulated—to the contrary, both the press and broadcast media have been and are regulated in Australia. That the problems persist provides clear evidence that the current regulatory arrangements need strengthening to improve their effectiveness.

Doing nothing, therefore, is not a road to success. It would simply perpetuate a self-regulation system that is only marginally effective and has not adequately measured up to community expectations.

The Review rejected the idea of licensing the press, because it agreed that in a democratic society government should not control who publishes news. The option of strengthening the APC was also dismissed because while membership of that body can be encouraged, it cannot be guaranteed, and because changes to the body would be dependent on the APC's willingness to implement them.

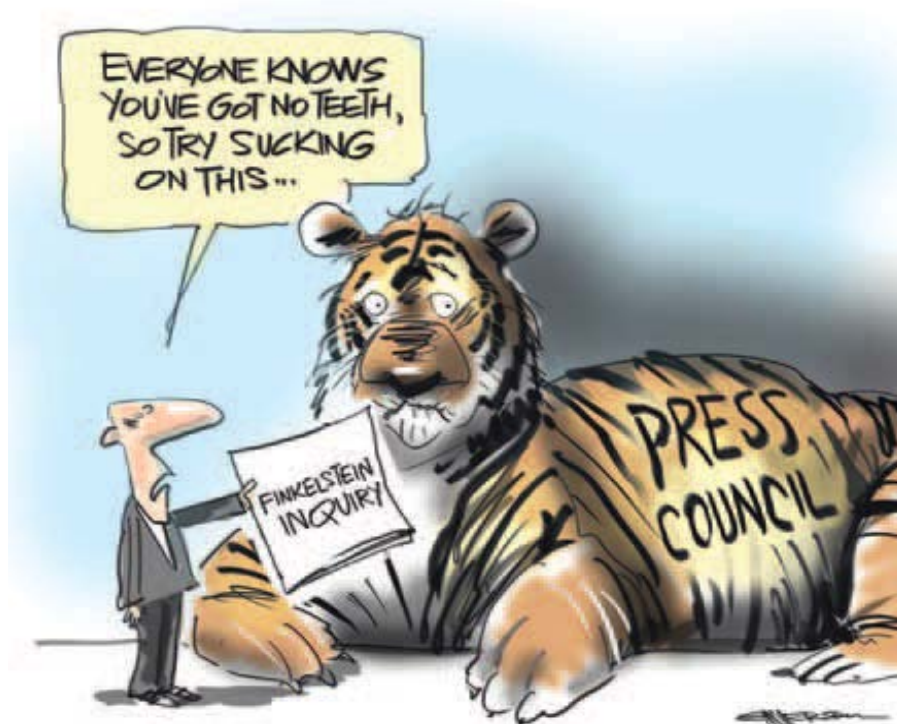
In developing its recommended model Finkelstein was convinced that the media, like any other social institution, should be accountable for its performance. An appropriately designed accountability process would not pose a risk to the freedom of the press, and therefore the media should not be able to opt out of a system that ensures accountability. Finkelstein labelled his proposed model 'enforced self-regulation'. He was convinced this model could retain the benefits of self regulation while delivering new benefits—consistency of decisions, the potential to improve competition, more robust and effective standards and operation across the various media platforms and one body with which consumers need to deal.

## News Media Council

The Review therefore recommends the establishment of an independent statutory body—the News Media Council (NMC), to oversee the enforcement of news media standards. The NMC would take over the functions of the APC and the news and current affairs standards functions of ACMA. (Details of the review’s proposal for the compositions and functions of the NMC can be found in Appendix C).

The Review envisaged that creation of the NMC would improve journalistic standards and boost public confidence that those standards would be upheld. The Council would also help make the media more accountable to audiences and to those about whom it reports. It would ensure that complaints would be fairly resolved and in a timely and efficient manner. Overall, it would enhance the flow of information and the exchange of views. It would not be like the APC—a ‘toothless tiger’—as is suggested in Figure 1 below.

**Figure 1: One view of the effectiveness of the Australian Press Council**



Source: R Emmerson<sup>18</sup>

18. Cartoon by R Emmerson in J Disney, Regulation: the Finkelstein Inquiry', in J Este (ed), *Kicking at the cornerstone of democracy: 2012 Australian Press Freedom Report*, Media, Entertainment & Arts Alliance, 2012, [http://www.walkleys.com/files/media/PF2012\\_2.pdf](http://www.walkleys.com/files/media/PF2012_2.pdf)

## Stakeholder comment

### Review submissions and consultations

#### The negative view

It was clear from the tone of many submissions to the Finkelstein Review and from the consultations it conducted that any recommendation for change to the current media environment was not going to receive a warm reception from the media. The News Limited offering to the Review maintained, for example, that any regulation imposed on the media on the grounds that it was not ‘perfect’ would limit the market of ideas and make those ideas less accessible to the public. News Limited was emphatic:

Decision makers should not fall in the trap of thinking that because a market is not perfect, it needs to be regulated. Regulation, in whatever form, will limit the availability of information to consumers, it will limit choice and it will be disincentive to investment. Regulation can only act to close a market.<sup>19</sup>

Fairfax Media disagreed with what it discerned was a suggestion in the terms of reference of the Inquiry that there is a serious ethical or moral problem with the press and online media in Australia:

We do not agree with this proposition. We do not see evidence of increasing problems that cannot be dealt with through the existing structures and systems, both within media organisations and, where needed, through external bodies including the Courts and the [Australian Press Council]. Inevitably, the operation of a free media that canvasses a wide spectrum of views will result in some stories that anger people—especially if they are the subject being reported on or commented about. This, of itself, does not warrant restrictions upon the freedom to deliver news and express opinions freely and without undue interference.<sup>20</sup>

APN News and Media ‘unequivocally’ opposed any proposal which may increase media regulation. It saw no evidence to suggest that the ‘robust’ system of self regulation had failed.<sup>21</sup> Country Press, the representative organisation for 350 newspapers, also supported self regulation, as did the Newspaper Publishers’ Association.<sup>22</sup>

These views were not only held by the media. The Law Council of Australia opposed what it detected were proposals in the Review to impose restraint on the criticism and scrutiny of public figures and officials:

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19. News Limited submission to the Independent Inquiry into Media and Media Regulation, 11 November 2011, viewed 10 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0018/143055/News-Limited.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0018/143055/News-Limited.pdf)
  20. Fairfax Media submission to the Independent Inquiry into Media and Media Regulation, November 2011, viewed 10 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0009/143199/Fairfax-Media-Ltd.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0009/143199/Fairfax-Media-Ltd.pdf)
  21. APN submission to the Independent Inquiry into Media and Media Regulation, November 2011, viewed 10 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0005/142727/APN-News- and -Media.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0005/142727/APN-News- and -Media.pdf)
  22. Country Press Australia submission to the Independent Inquiry into Media and Media Regulation, October 2011, viewed 10 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0005/142916/Country\\_Press\\_Australia.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0005/142916/Country_Press_Australia.pdf) and Newspaper Publishers’ Association submission to the Independent Inquiry into Media and Media Regulation, October 2011, viewed 10 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0018/142731/Newspaper-Publishers-Association.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0018/142731/Newspaper-Publishers-Association.pdf)

... restrictions on freedom of expression that have the capacity to prevent the ascertainment of truth, by silencing criticism, dissent or the articulation of unpopular views, or by limiting diversity of or access to the media, ought not to be tolerated in a liberal democracy; there will be cases where freedom of expression must yield to competing human rights, but that ought to occur only after the comparative importance of the specific rights being claimed in the individual case have been fully considered, taking into account the justifications for interfering with or restricting each right; and the indispensable role of the press as both a watch and attack dog – the fourth estate – must be given due weight.<sup>23</sup>

Queen’s Counsel Douglas Drummond also intimated that the Inquiry was set up by the Government with the intention of restricting the ability of the press to criticise its actions. This was reprehensible to Drummond and he resorted to the words of political philosopher John Stuart Mill in reply. Mill proclaimed in 1859:

The time, it is to be hoped, is gone by when any defence would be necessary of the ‘liberty of the press’ as one of the securities against corrupt or tyrannical government. No argument, we may suppose, can now be needed, against permitting a legislature or an executive, not identified in interest with the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear ... and, speaking generally, it is not, in constitutional countries, to be apprehended that the government, whether completely responsible to the people or not, will often attempt to control the expression of opinion, except when in doing so it makes itself the organ of the general intolerance of the public.<sup>24</sup>

Drummond continued that in modern Australia, it is vital that the press is not fettered in performing its public interest role by ‘coercive regulation’, which he identified as the Review’s objective. However imperfectly it does its job, Drummond added, there is no one else but the media to counter the power of government in manipulating and controlling ‘the flow of information to the public about its activities, for its own political advantage and to the disadvantage of good public governance’.<sup>25</sup>

### More positive assessment

Other submissions to the Review’s consultations process disagreed with the negative assessment of the Review. Wendy Bacon, Professor of Journalism at the University of Technology, responded to claims from various media commentaries with the counter claim that their criticisms were self serving and based on limited notions of what constitutes freedom of expression.<sup>26</sup> Their stances, in Bacon’s view, mirrored a long record of resistance to attempts to increase diversity or limit their

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23. Law Council of Australia submission to the Independent Inquiry into Media and Media Regulation, October 2011, viewed 10 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0006/142728/Law-Council-of-Australia.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0006/142728/Law-Council-of-Australia.pdf)

24. J S Mill, *On Liberty*, 1859, as quoted by D Drummond submission to the Independent Inquiry into Media and Media Regulation, October 2011, viewed 10 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0017/142262/Hon\\_Doug\\_Drummond\\_QC.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0017/142262/Hon_Doug_Drummond_QC.pdf)

25. Drummond submission to the Independent Inquiry, op. cit.

26. W Bacon (Part one of) submission to the Independent Inquiry into Media and Media Regulation, November 2011, viewed 13 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0015/143421/Professor\\_Wendy\\_Bacon-Part\\_1.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0015/143421/Professor_Wendy_Bacon-Part_1.pdf)

reach and power and a refusal to engage with the issue of community concern about journalism standards and the lack of diversity of opinion in the Australian media.<sup>27</sup>

Unlike the review critics, Bacon saw the press self regulator, the APC, as a complaints' driven body that had not been given adequate resources to play more than a small role in the positive promotion of media quality. The complaints system of the broadcaster regulator, ACMA, was also unsatisfactory. Both bodies needed to be replaced with an independent, well funded media council which could play a positive and proactive role in upholding standards and promoting quality journalism.<sup>28</sup>

Global advocacy group AVAAZ declared that regulation of the print media and freedom of speech and press are not mutually exclusive. According to AVAAZ, while a free press is critical for democracy, it is similarly necessary in the case of Australia for a strong regulatory regime and strong measures to prevent further media consolidation—and, by implication the further diminution of democracy. For AVAAZ, regulation was the means to ensure that Australia is better equipped to promote fair, accurate and diverse media voices. AVAAZ also supported the establishment of an independent statutory authority which would set up, administer and enforce a print and broadcast co-regulatory regime to apply to entities that supply commercial news in Australia.<sup>29</sup> In addition, the group wanted to see stricter media diversity rules and criteria for assessing media mergers significantly strengthened 'to take better account of the unique issues that arise in the context of media mergers, including through the adoption of a 'fit and proper person' test and a 'media plurality' test'.<sup>30</sup>

Tim Dwyer, Fiona Martin and Anne Dunne from the University of Sydney were also of the opinion that the unique position of the various media in society meant that equating them with other markets misconstrued the role of public policy in ensuring diversity and accountability were integral within this representative, society-shaping sector. Dwyer et al stressed, in opposition to arguments which insisted government regulation suffocated democracy, that a democratic pluralist view in fact holds 'government has a role in supporting and shaping spaces in which different ideas and identities can be examined, and in which competition is not the only justification for communication'.<sup>31</sup>

Dwyer et al were critical of the defence of the market place of ideas put forward by critics of the Review. They observed:

[Eminent American jurist] Justice Holmes' justification for freedom of the press, based on free trade in a 'marketplace of ideas' assumes open, ethical, equitable information exchange in media markets. However the 'marketplace of ideas' is a misleading and inaccurate concept in the context of making public policy. It is most recently allied with neo-conservative economic policy modes and does not

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27. Ibid.

28. Ibid.

29. Subject to limited exemptions being granted for smaller entities, such as small blogger sites.

30. AVAAZ submission to the Independent Inquiry into Media and Media Regulation, 4 November 2011, viewed 13 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0005/142988/Avaaz.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0005/142988/Avaaz.pdf)

31. T Dwyer, F Martin and A Dunne submission to the Independent Inquiry into Media and Media Regulation, November 2011, viewed 13 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0005/143258/Department-of-Media-and-Communications,-University-of-Sydney.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0005/143258/Department-of-Media-and-Communications,-University-of-Sydney.pdf)

take into account production or consumption trends in the operation of news media and communications markets.

...

[American academic John Durham] Peters argues rightly that this phrase offers (at best) an imprecise ideal of a free, unfettered media that “fudges profits and democracy, the freedoms to debate and to acquire” and is used in politics as a form of expedient “public sphere lite”. It incorrectly assumes, for example, equitable access to consumer attention and to information resources.<sup>32</sup>

Dwyer et al concluded therefore that government has an ongoing role in supporting a free, diverse and responsible exchange of information, opinion and ideas to ensure the maintenance of a democratic polity.<sup>33</sup>

In his submission to the Review Chris Nash, Professor of Journalism at Monash University predicted that within a decade there could be Australian state capital cities, as well as regional cities and rural areas, where no private sector media production of locally-relevant serious news and current affairs exists, and that such a situation:

... will afford a dramatic instance of the failure of the ‘free market of ideas’ model to address the needs of Australian citizens rights to relevant and timely information so they can exercise their democratic rights. In my view it is a prime responsibility of this media inquiry to recognise and address this possibility, not by trying to second-guess the likely replacements of the failing business models in the private sector news media markets, but by identifying and recommending potential strategies to fill the gaps created by this failure. Such strategies might include:

- Granting tax-exempt status to not-for-profit private sector production of investigative journalism and in-depth journalistic analysis
- Specific encouragement and funding for the national public broadcasters (ABC and SBS) to establish local current affairs and investigative journalism units in regional and rural centres, perhaps focusing on low-cost online, radio and local hardcopy publication.
- Schemes for funding investigative and in-depth analytical journalism through community and educational organizations including universities and TAFE colleges providing journalism education.<sup>34</sup>

Other comments further advanced this view. For example, Bill Birnbauer from Monash University made the point that journalism has always been subsidised (and governments have contributed to subsidies indirectly by placing advertising in the commercial media). Decline in newspaper revenue

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32. Ibid.

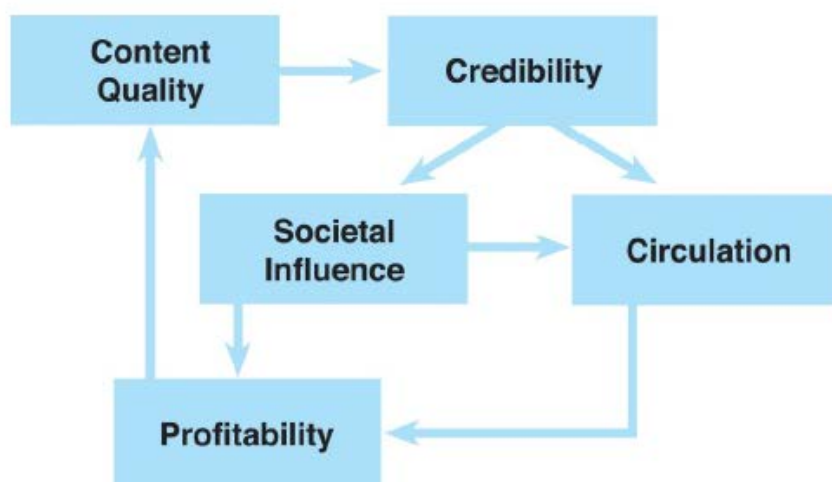
33. Ibid.

34. C Nash submission to the Independent Inquiry into Media and Media Regulation, November 2011, viewed 13 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0006/143259/Professor-Chris-Nash-Part-1.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0006/143259/Professor-Chris-Nash-Part-1.pdf)

will result in reductions in the production of a type of journalism that plays a vital role in democratic nations, unless options such as tax deductibility and direct government support are adopted.<sup>35</sup>

The Media Entertainment and Arts Alliance (MEAA) noted research which has found a strong circular correlation linking downturn in circulation and advertising revenue with diminishing quality, and this leading, in turn, to a downturn in circulation and advertising revenue (see also the illustration in Figure 1 below). To combat this spiral MEAA favoured the introduction of measures such as incentives for new non-profit media ventures, abolishing the GST on newspapers and news magazines, tax breaks for ‘low-profit’ ventures and tax deductions for organisations which increased their investment in news reporting.<sup>36</sup>

**Figure 2: Tracking the newspaper ‘death’ spiral**



Source: MEAA<sup>37</sup>

One further solution to the decline in quality journalism was advanced by the MEAA and others—provide more funding to the ABC and SBS. According to journalism scholars David McKnight and Penny O’Donnell, this solution had ‘the advantage of enhancing the work of news media that are widely recognized and respected as independent producers of serious journalism’.<sup>38</sup>

### **Post publication: media outrage**

Post publication of Finkelstein’s report the criticism intensified. Immediately following the Review’s release, Gerard Henderson, writing in the *Sydney Morning Herald*, labelled it ‘very thin’ on

35. B Birnbauer submission to the Independent Inquiry into Media and Media Regulation, November 2011, viewed 13 July 2012, [http://www.dbcde.gov.au/data/assets/pdf\\_file/0020/142931/Bill\\_Birnbauer.pdf](http://www.dbcde.gov.au/data/assets/pdf_file/0020/142931/Bill_Birnbauer.pdf)

36. Media Entertainment and Arts Alliance (MEAA) submission to the Independent Inquiry into Media and Media Regulation, November 2011, viewed 13 July 2012, [http://www.dbcde.gov.au/data/assets/pdf\\_file/0007/142990/Media\\_Entertainment\\_and\\_Arts\\_Alliance.pdf](http://www.dbcde.gov.au/data/assets/pdf_file/0007/142990/Media_Entertainment_and_Arts_Alliance.pdf)

37. Taken from P Meyer, *The Vanishing newspaper: saving journalism in the information age*, University of Missouri Press, 2006, in MEAA submission to the Independent Inquiry, op. cit.

38. McKnight and Donnell submission to the Independent Inquiry, op. cit.

substance, but added that despite this, its recommendations, if implemented, would restrict free expression and increase government regulation.<sup>39</sup>

Timothy Andrews' contribution in the *Australian Financial Review* declared the Review's recommendations would 'relegate Australia to the category of authoritarian regimes'.<sup>40</sup> Andrews continued:

The report's culmination—the recommendation of a taxpayer funded super regulator with powers of censorship, and a de facto licensing regime for political expression is antithetical to the vibrant political discourse necessary for our society to function, and rests upon a profound misunderstanding of human nature, and the relationship between the individual and the state.<sup>41</sup>

*The Spectator* magazine contended that the Review's recommendations were not about improving the quality of journalism in Australia; rather, they were 'a carefully-crafted attack' on News Ltd.<sup>42</sup> The implication was that the proposals were part of attempts by the 'so-called progressive Left' to 'nudge and bully an ignorant population towards their own version of the light on the hill'. In addition, decisions made by the proposed new regulatory body would necessarily be arbitrary and this situation compared with politicised investigations run by undemocratic, totalitarian regimes.<sup>43</sup>

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39. G Henderson, 'Lawyers and academics propose more regulation? It's hardly news', *The Sydney Morning Herald*, 6 March 2012, p. 11, viewed 12 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1479519/upload\\_binary/1479519.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo.parlInfo/download/media/pressclp/1479519/upload_binary/1479519.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)
  40. T Andrews, 'Finkelstein report threatens to muzzle free speech', *The Australian Financial Review*, 7 March 2012, p. 63, viewed 12 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1480527/upload\\_binary/1480527.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo.parlInfo/download/media/pressclp/1480527/upload_binary/1480527.pdf;fileType%3Dapplication%2Fpdf)
  41. Ibid.
  42. The Spectator added that the recommendations were also aimed against those 'who question the official narrative regarding climate change'. J Morrow, 'Shut up, they explained', *The Spectator*, 10 March 2012, viewed 12 July 2012, [http://parlinfo.parlInfo/download/library/jrnart/1499436/upload\\_binary/1499436.pdf;fileType=application%2Fpdf#search=%22Finkelstein%22](http://parlinfo.parlInfo/download/library/jrnart/1499436/upload_binary/1499436.pdf;fileType=application%2Fpdf#search=%22Finkelstein%22)
  43. Morrow, 'Shut up', op. cit.

**Figure 3: One view of the Finkelstein proposals**



*'Good work everybody! We've finally dragged book-burning into the 21st century!'*

Source: The Spectator<sup>44</sup>

*The Australian's* Paul Kelly accused Finkelstein of supreme arrogance:

[Finkelstein] asserts that he can devise a statutory system that does not infringe press freedom and he claims his model "will right wrongs perpetrated by the media" and make the media "accountable to their audiences". It is astonishing stuff ... This document is another threat to freedom in Australia. It testifies to the extent that elite opinion is fixated on legal controls of institutions and people whose ideas it dislikes. It is vital that the media challenge this report and then resist its implementation if it becomes law.<sup>45</sup>

The media enthusiastically took up the cudgels to challenge the Review's findings, mounting a campaign of regular criticism of the Review which has yet to subside. Terms used to describe the Review's recommendations have ranged from Orwellian to Stalinist with the proposed regulatory body often being referred to as a government-funded Star Chamber.<sup>46</sup> Other comments have included the prediction from Paul Murray from the *West Australian* that the Review report would

44. Ibid.

45. P Kelly, 'Naive hubris pervades media inquiry', *The Australian*, 7 March 2012, p. 12, viewed 11 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1480229/upload\\_binary/1480229.pdf;fileType=application%2Fpdf#search=%22Finkelstein%22](http://parlinfo.parlInfo/download/media/pressclp/1480229/upload_binary/1480229.pdf;fileType=application%2Fpdf#search=%22Finkelstein%22)

46. Comment on Star Chamber and Stalinist objectives for example in 'Protecting free speech', editorial in *The Weekend Australian*, 30 June 2012, p. 23, viewed 11 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1747630/upload\\_binary/1747630.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo.parlInfo/download/media/pressclp/1747630/upload_binary/1747630.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)

gather dust as it was intended simply 'to give the Government a sword of Damocles to dangle over the head of the print media' in the run-up to the 2013 federal election.<sup>47</sup>

A number of critiques alleged the Review had delivered a document that was elitist and overly theoretical. Keith Windschuttle, editor of the journal *Quadrant*, proclaimed that its conclusions were essentially underpinned by left-wing assumptions and theories served up to Finkelstein by academics (the implications being that Finkelstein had passively accepted these views).<sup>48</sup> Journalist Michael Gwanda also commented on the theoretical content of the report:

I have not read all 470 pages of the report and honestly, chances are I won't read it all. It is not an easy read. For a non-academic journalist like me, major parts of it read like a media studies thesis. Very theoretical, very much based on studies by media academics, sociologists and lawyers and judges, most of whom have never been journalists.

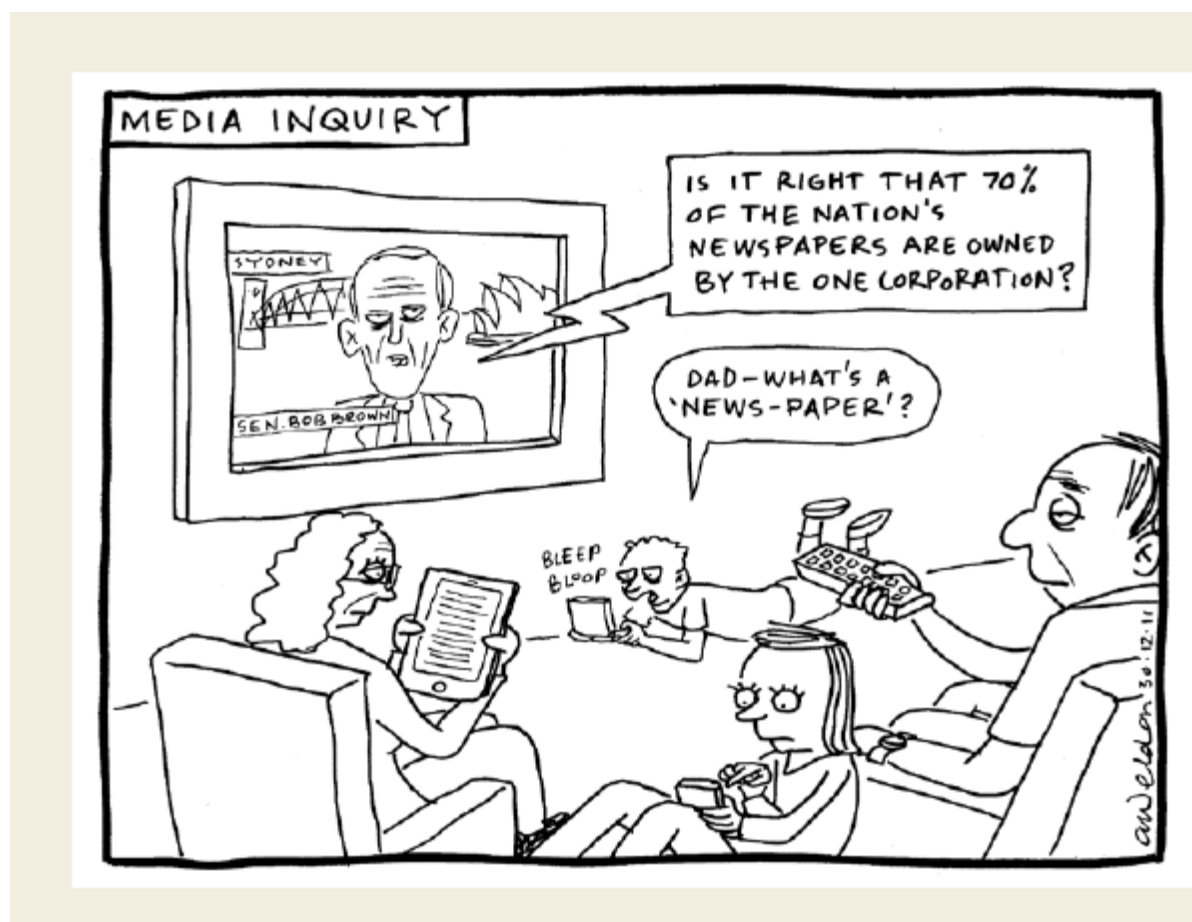
It is, in my view suffused with a sort of academic elitism. The "voice" of the report is philosophical, theoretical and academic. It is the voice of someone—if it is someone and not a committee—who does not watch *Today Tonight* and who does not read the *Herald Sun*.

Even long-time advocate for media accountability Jonathan Holmes of the ABC program *Media Watch* expressed alarm at the Finkelstein solution which Holmes considered gave 'statutory force to codes of conduct which by their very nature are fuzzy and hard to apply with precision'.<sup>49</sup>

The basic concept of a twenty first century media inquiry which focussed on newspapers was also questioned by cartoonists as is illustrated below:

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47. P Murray, 'Press probe destined for dust', *The West Australian*, 7 March 2012, p. 23 viewed 13 July 2012, [http://parlinfo/parlInfo/download/media/pressclp/1481681/upload\\_binary/1481681.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo/parlInfo/download/media/pressclp/1481681/upload_binary/1481681.pdf;fileType%3Dapplication%2Fpdf)
  48. K Windschuttle, 'Academics grab headlines', *The Weekend Australian*, 2 June 2012, p. 17, viewed 13 July 2012, [http://parlinfo/parlInfo/download/media/pressclp/1684666/upload\\_binary/1684666.pdf;fileType=application%2Fpdf#search=%22Academics%20grab%20headlines%22](http://parlinfo/parlInfo/download/media/pressclp/1684666/upload_binary/1684666.pdf;fileType=application%2Fpdf#search=%22Academics%20grab%20headlines%22)
  49. J Holmes, 'Finkelstein's own reporting is cause enough for alarm', *The Drum*, ABC website, 8 March 2012, viewed 13 July 2012, <http://www.abc.net.au/news/2012-03-08/holmes-finkelstein-and-media-watch/3876360>

Figure 4: Focus on newspapers misguided?



Source: A Weldon<sup>50</sup>

In response to these, and other disparaging commentary, Finkelstein's co-author, Professor Ricketson, defended the Review's recommendations:

What is actually recommended differs from the existing system in only one key aspect, namely government would fund the News Media Council.

It would draw on standards of journalistic practice already existing across the industry. If a complaint to the council was upheld, the adjudication would need to be published prominently in the media outlet a suggestion to which the industry strenuously objected.

But as Professor Rodney Tiffen, who assisted the inquiry, wrote in *The Australian Financial Review* on March 20: 'This objection is an assertion of their right to exercise censorship, to restrict, not increase, information available to the public'.

The news media is 'arguing for their right to withhold from readers the news that their paper has been criticised'. That is what it boils down to.

50. Cartoon by A Weldon in P Barry, 'Why is our news so limited?' in J Este (ed), *Kicking at the cornerstone of democracy*, op. cit.

I do understand industry and public scepticism about a statutory authority regulating news media—even the federal government's staunchest supporters have blanched at some of its missteps, and who is to say they wouldn't mishandle the introduction of a News Media Council?

But consider what we faced. Self-regulation does not work, according to the Press Council, even though it has been in place for 35 years. It is badly underfunded and industry players can come and go as they please, which they have done. The industry, however, says it's all good and no, the Press Council can't have any more money.

In short, the industry has created the problem or allowed it to continue. If it really wanted to avoid government-funded regulation it could put its own house in order.

...

There are certainly knotty questions inherent in regulating the news media, but Australia hasn't got within cooee of them because what little debate there has been about the inquiry's report has been crowded with knee-jerk responses that on other issues the news media would label as the voice of vested interest.<sup>51</sup>

## Box 2: Personalising criticism

Attacks on the Review also became personal when complaints about both Professor Ricketson and Dr Margaret Simons were aired. Dr Simons, journalist and academic, was accused of failing to disclose publicly the assistance she gave to the inquiry with regards to the appointment of media ethicist Denis Muller when she gave evidence to the Review's public hearings or in commentary on its findings. *The Australian* reported that St James Ethics Centre executive director, Simon Longstaff, believed Simons had not met the high standards she required of others.<sup>52</sup>

Professor John Warhurst, Emeritus Professor of political science at the Australian National University noted also that Ricketson has been the subject of over 70 emails of complaint calling for his sacking as a result of his involvement in the Finkelstein Review.<sup>53</sup>

*The Australian* reported that an advisor from the Minister for Broadband, Communications and the Digital Economy had canvassed Ricketson's appointment to the Review on the grounds that the Minister's office had a strong relationship with him.<sup>54</sup>

51. M Ricketson, 'Why I fear for the future of Australian journalism', *The Saturday Age*, 26 May 2012, p. 20, viewed 12 July 2012, [http://parlinfo/parlInfo/download/media/pressclp/1661190/upload\\_binary/1661190.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo/parlInfo/download/media/pressclp/1661190/upload_binary/1661190.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)
52. N Leys, 'Academic "failed her standards"', *The Australian*, 18 May 2012, p. 1, viewed 12 July 2012, [http://parlinfo/parlInfo/download/media/pressclp/1642381/upload\\_binary/1642381.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo/parlInfo/download/media/pressclp/1642381/upload_binary/1642381.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)
53. J Warhurst, 'When reputation is everything', *The Canberra Times*, 31 May 2012, p. 15, viewed 12 July 2012, [http://parlinfo/parlInfo/download/media/pressclp/1678425/upload\\_binary/1678425.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo/parlInfo/download/media/pressclp/1678425/upload_binary/1678425.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)
54. C Kerr, 'Conroy adviser backed media inquiry choice', *The Australian*, 16 May 2012, p. 5, viewed 12 July 2012, [http://parlinfo/parlInfo/download/media/pressclp/1638126/upload\\_binary/1638126.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo/parlInfo/download/media/pressclp/1638126/upload_binary/1638126.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)

Chris Mitchell, editor of *The Australian*, considered that Ricketson and Simons, who had both previously worked as journalists for the paper, would barely gain a pass mark as journalists. He found it appalling that such people were attempting to determine the future of journalism in Australia.<sup>55</sup>

Sydney Institute Director Gerard Henderson saw the Review as an exercise in some media academics 'writing jobs for themselves'. Henderson suggested that people who worked on the Review looked like the sort who would most likely work on the new regulator.<sup>56</sup>

In July, the Government denied an Opposition Freedom of Information request to disclose details about 'the suggested or proposed, and actual appointment of persons to both conduct and assist with' the Finkelstein inquiry. Senator Eric Abetz, in making the request, argued that it was 'in the public interest that the process involved in the government's selection of Ray Finkelstein and Matthew Ricketson to conduct the media inquiry be made totally transparent'.<sup>57</sup>

## Convergence review

### Framing terms of reference

There were signs from the outset that the Convergence Review would also face an uphill task in satisfying the various media sectors and other stakeholders in dealing with the issues of whether to recommend maintaining, lessening or redesigning approaches to regulation, media ownership and local content.

The Finkelstein Review had made many wary of what to expect, and in response to draft terms of reference for the Convergence Review released for public consultation in December 2010, the Australian Association of National Advertisers (AANA) was insistent that while media regulations may need to change, they did not need to do so in the way suggested by Finkelstein. The AANA was adamant regulations were problematic because they were inconsistent across media platforms and for some sectors, unduly burdensome.<sup>58</sup>

Other submissions were along similar lines—change may be required, but not change based on the Finkelstein model. A combined submission from Ebay, Google and Yahoo also stressed regulatory inconsistency in the system as the problem—audiences are able to view the same content on a

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55. C Kerr, 'Cosy club behind a media watchdog', *The Australian*, 19 May 2012, p. 17, viewed 12 July 2012, [http://parlinfo.parlinfo/download/media/pressclp/1645738/upload\\_binary/1645738.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo.parlinfo/download/media/pressclp/1645738/upload_binary/1645738.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)

56. Ibid.

57. C Kerr 'Labor defies plea for truth on media inquiry', *The Australian*, online version, 13 July 2012, viewed 30 July 2012, <http://www.theaustralian.com.au/media/labor-defies-plea-for-truth-on-media-inquiry/story-e6frg996-1226424879791>

58. AANA submission regarding Convergence Review terms of reference, 28 January 2011, viewed 16 July 2012, [http://www.dbcde.gov.au/submissions/20110201\\_13.19.40/60-Australian%20Association%20of%20National%20Advertisers.pdf](http://www.dbcde.gov.au/submissions/20110201_13.19.40/60-Australian%20Association%20of%20National%20Advertisers.pdf)

variety of media platforms, despite these being regulated differently.<sup>59</sup> The extent to which competition rules were appropriate in a converged media environment was another problem that needed to be addressed. The Australian Subscription Television and Radio Association (ASTRA) complained that television licensees were singled out for unfair treatment because of the strict controls imposed for Australian content.<sup>60</sup> It had consistently called for the removal of constraints to competition in the television broadcasting sector, including the long-standing anti siphoning rules.<sup>61</sup>

Arguments against regulation surfaced in a converged media environment guise. The Communication Alliance urged the Review Committee to consider non-regulatory options for the new environment, while Telstra called for regulatory forbearance, citing the relevance for the current market of the National Office for the Information Economy's convergence analysis published in 2000.<sup>62</sup> Some of the conclusions of this review were that markets should generally be left to form and operate without undue interference; that policy intervention should be in response to identifiable issues and that it should only occur where the achievement of desired national outcomes are threatened.<sup>63</sup>

It was clear that the Convergence Review was always going to need to deal with the issue of public interest. Indeed, as one submission to the terms of reference document astutely observed, it would be important that the Review Committee deliberations recognised that the ways in which the concepts of 'the public' and 'the public interest' are characterised can (and have had) an important influence on the shaping of media policy.<sup>64</sup> Recognising that the public can have different identities can contribute to a better understanding of what interests may be at stake in different communications scenarios. This understanding can in turn contribute to the design of policy and regulatory settings.<sup>65</sup>

One group of academics pointed out to the Review Committee it would need to keep in mind that existing traditional media objectives for media diversity and ownership plurality will not 'evaporate into thin air' merely because these industries are evolving (and converging). The challenge was to

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59. Ebay, Google, Yahoo combined submission regarding Convergence Review terms of reference, January 2011, viewed 16 July 2012, [http://www.dbcde.gov.au/submissions/20110201\\_09.26.21/83-Google%20\(with%20eBay%20and%20Yahoo!7\).pdf](http://www.dbcde.gov.au/submissions/20110201_09.26.21/83-Google%20(with%20eBay%20and%20Yahoo!7).pdf)
  60. ASTRA submission regarding Convergence Review terms of reference, January 2011, viewed 16 July 2012, [http://www.dbcde.gov.au/submissions/20110201\\_09.26.21/86-Australian%20Subscription%20Television%20and%20Radio%20Association.pdf](http://www.dbcde.gov.au/submissions/20110201_09.26.21/86-Australian%20Subscription%20Television%20and%20Radio%20Association.pdf)
  61. For a discussion of anti siphoning see R Jolly, *Sport on television: to siphon or not to siphon?*, Research paper no. 14 2009–10, Parliamentary Library, Canberra, 2010, viewed 16 July 2012, [http://parlinfo/parlInfo/download/library/prspub/SOVV6/upload\\_binary/sovv60.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo/parlInfo/download/library/prspub/SOVV6/upload_binary/sovv60.pdf;fileType%3Dapplication%2Fpdf)
  62. Telstra submission regarding Convergence Review terms of reference, January 2011, viewed 16 July 2012, [http://www.dbcde.gov.au/submissions/20110201\\_13.19.40/94-Telstra.pdf](http://www.dbcde.gov.au/submissions/20110201_13.19.40/94-Telstra.pdf)
  63. National Office for the Information Economy, *Convergence Review*, Department of Communications, Information Technology and the Arts, June 1999, viewed 16 July 2012, [http://www.archive.dbcde.gov.au/2008/01/convergence\\_review#publications](http://www.archive.dbcde.gov.au/2008/01/convergence_review#publications)
  64. L Hitchens submission regarding Convergence Review terms of reference, January 2011, viewed 16 July 2012, [http://www.dbcde.gov.au/submissions/20110124\\_15.24.30/27-Lesley%20Hitchens.pdf](http://www.dbcde.gov.au/submissions/20110124_15.24.30/27-Lesley%20Hitchens.pdf)
  65. Ibid.

develop regimes that encourage diversity; regimes which are based on enforceable rules in the public interest and which prohibit monopolised ownership and control of influential media.<sup>66</sup>

There are no characteristics inherent in new modes of delivery that suddenly remove the need for such rules, contrary to populist rhetorics about the diversity of the web or democracy of social media. As internet distribution evolves, and content production and distribution is beholden to similar commercial logics that apply to traditional media, existing policy objectives continue to be required in those countries that claim to have democratic media. Innovation in funding public service media is also an important component in media diversity frameworks.<sup>67</sup>

This group called for a plurality test 'capable of taking into account convergence and concentration across all platforms'.<sup>68</sup>

In other words, there were clearly two camps which would attempt to influence the thinking of the Convergence Review Committee—one which favoured less constraints on the media and more focus on a market-based environment and one which cautioned that change and convergence by themselves did not necessarily deliver solutions to problems or ensure that audiences were well served.

## The Interim Report

The Convergence Review Committee issued a number of papers, called for submissions and consulted extensively with the public and industry stakeholders throughout 2011. In December 2011 it released an interim report on its findings. This report gave an indication of the direction Review Committee thinking was taking. The Interim Report was criticised however because it contained scant detail about 'the nuts and bolts' of proposals or how the Committee had reached particular conclusions and decided on various recommendations. (A summary of what was proposed in the Interim Report is shown in Box 3 below).

Nevertheless, the outline of the Review Committee's proposal alone generated extensive comment, much of it lamenting that the Interim Report failed to seize the opportunity to suggest genuine change. In one commentator's view, the Review Committee had not thoughtfully engaged with the complexities of its task and so it had been unable to devise a coherent model of communications regulation which could make sense in an online world. In effect, while it had scope and ambition to make necessary changes to the media environment, it had failed to embrace the idea of deregulation.<sup>69</sup>

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66. T Dwyer, F Martin and G Goggin submission regarding Convergence Review terms of reference, January 2011, viewed 16 July 2012, [http://www.dbcde.gov.au/digital\\_economy/convergence\\_review/submissions\\_received\\_on\\_draft\\_terms\\_of\\_reference\\_for\\_convergence\\_review/convergence\\_review\\_terms\\_of\\_reference\\_structured\\_submission?submissionid=106](http://www.dbcde.gov.au/digital_economy/convergence_review/submissions_received_on_draft_terms_of_reference_for_convergence_review/convergence_review_terms_of_reference_structured_submission?submissionid=106)

67. Ibid.

68. Ibid.

69. C Berg, 'Convergence Review: complete, spectacular failure', *The Drum*, ABC website, 21 December 2011, viewed 17 July 2012, <http://www.abc.net.au/unleashed/3742152.html>

### Box 3: Convergence Review Interim Report recommendations

- creating an independent content and communications regulator with broad and flexible powers to make and enforce regulation on issues across the digital economy
- empowering the new regulator to oversee and determine content-related competition issues
- imposing platform-neutral content and media diversity obligations on all content service providers (Content Service Enterprises) that meet certain criteria
- replacing media ownership rules with a revised number of voices rule applying to changes of control of Content Service Enterprises and assessing mergers and acquisitions of Content Service Enterprises against a public interest test
- abolishing content licences in favour of specific content regulation
- harmonising management and allocation of broadcast and non-broadcast spectrum
- providing greater certainty around spectrum licence renewal
- requiring all Content Service Enterprises that provide audio-visual content to contribute to the creation of Australian content
- promoting local and community content and encouraging innovation in content delivery
- extending the 40 per cent tax offset available under the producer offset scheme to premium television content exceeding a certain cost threshold, and extending eligibility for the 20 per cent producer offset to interactive content.<sup>70</sup>
- imposing Australian content quotas on the public broadcasters.<sup>71</sup>

### Submissions: responding to the Review and stating positions

Key themes emerged in response to the Convergence Review's calls for submissions. These were related to the directions set by the Review Committee in its framing paper and various discussion papers and to issues identified as critical by industry and other stakeholders. These themes encompassed the issues relating to media ownership and diversity, the various aspects of content promotion and control and spectrum allocation and regulation.

70. See footnote 88 for more detail.

71. Summary on King and Wood, Malleons website, 'Convergence Review Interim Report recommends sweeping changes to Australian media and communications regulation', 20 December 2011, viewed 16 July 2012, <http://www.malleons.com/publications/marketAlerts/2011/Pages/Convergence-Review-Interim-Report-recommends-sweeping-changes-to-Australian-media-and-communications-regulation.aspx>

## Media ownership and diversity

Much of the comment provided to the Convergence Committee focussed on existing media ownership and diversity regulations.

### Emphasising de-regulation

Some subscription television and online media organisations maintained that as the Convergence Review Committee did not understand the new media environment, it was in danger of imposing unrealistic and inappropriate rules. News Limited, for example, observed that current laws target commercial television and radio and newspapers because of the extent of their influence in a pre-converged and pre-Internet environment. However, while these rules were intended to limit the concentration of ownership and to ensure a diversity of voices in the market, in News Limited's view, the Review Committee had simply assumed that as new forms of media became more influential, they would need to be subject to similar regulation.<sup>72</sup>

For News Limited, this type of reasoning was flawed. First, because the influence enjoyed by commercial television and radio was a result of the current rules. These limited the number of licences available and reflected the scarcity of spectrum in a pre-digital, pre-converged environment. Second, the reasoning assumed it was still valid to regulate to prevent concentration in a changed world where there were numerous and new sources of news. Third, it assumed that 'influence' is something that can and should be regulated.<sup>73</sup>

ASTRA argued that any attempts to impose diversity in a new media environment would hinder the development of original and differentiated content.<sup>74</sup> Telstra saw no evidence to suggest there is a lack of media diversity online; to the contrary, Australians have access to a greater diversity of voices online than could have been imagined when the current media rules were first drafted.<sup>75</sup>

The Treasury agreed that attempts to regulate broadcasters and producers or publishers of 'broadcast-like' services uniformly may lead to adverse situations: Australian companies that remain onshore could be at a competitive disadvantage; some Australian companies, providing 'broadcast-like' services over the internet, could choose to move offshore; reputable overseas operators could find the regime too onerous and choose not to provide services to Australians; less reputable producers would not comply with regulation which the Government may not be able to enforce.<sup>76</sup>

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72. News Limited submission to the Convergence Review, 1 November 2011, viewed 25 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0008/142964/News\\_Limited.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0008/142964/News_Limited.pdf)

73. Ibid.

74. ASTRA submission to the Convergence Review : key policy and regulatory issues, 22 August 2011, viewed 25 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0010/139258/Australian\\_Subscription\\_Television\\_and\\_Radio\\_Association.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0010/139258/Australian_Subscription_Television_and_Radio_Association.pdf)

75. Telstra submission in response to Convergence Review discussion papers, 28 October 2011, viewed 25 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0005/143375/Telstra\\_-\\_Consolidated\\_Submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0005/143375/Telstra_-_Consolidated_Submission.pdf)

76. Treasury submission in response to Convergence Review discussion papers, 7 November 2011, viewed 25 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0015/143241/The\\_Treasury.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0015/143241/The_Treasury.pdf)

With regards to existing media ownership rules, many in the industry insisted they were unnecessary; that issues relating to media ownership could be more than satisfactorily regulated by the *Competition and Consumer Act 2010*.<sup>77</sup> News Limited saw the Australian Competition and Consumer Commission's (ACCC) competition powers under this Act as the key to media diversity:

The ACCC has flexible powers to assess the market looking at the geographic reach of products, what content is supplied to customers and how, what opportunities are offered to advertisers and how content is acquired. The ACCC is able to look at businesses within a platform and businesses across platforms. The ACCC has an entire guideline on media mergers and assesses them in these ways.<sup>78</sup>

ASTRA maintained that self-regulatory and co-regulatory aspects of the existing system worked well; there was no need for change. Subscription television and narrowcasting codes of practice for example provided consumer protection and encouraged subscription broadcasters to be responsive to consumer needs and address consumer concerns. Consequently, heavy-handed regulatory intervention was not needed.<sup>79</sup>

News Limited captured the essence of what was essentially a case for deregulatory action:

There is a perception that as the media influences people's opinions, it is 'different' from other sectors of the economy. The argument made is that because a newspaper business is not like a manufacturing business, there must be special additional rules to ensure there is plurality of owners in the media market and a diversity of media.

In reality what proponents of special rules for the media want, is for there to be more Australian media content, preferably content that is relevant to a local community and for this content to be popular and influential. For example, many people would like to see more successful daily and weekly newspapers in cities like Adelaide and towns like Townsville and Wagga Wagga.

Neither competition law nor media ownership laws, whoever administers them, will be able to prevent closures of media businesses or make new businesses start-up or thrive and become popular and influential.

Varying cross-media rules, and voices tests that have been on the statute books for the past few decades have not achieved this and no media specific rules or competition rules will. If the government wants to act to intervene in the market to try to increase the amount of popular and influential media, they may be able to use a range of other methods including direct funding, for example ABC and SBS or indirect assistance through tax incentives.<sup>80</sup>

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77. For example Free TV Australia in its submission in response to open call for submissions, Telstra in its submission on the emerging issues paper and News Limited in its submission to the Interim Report.

78. News Limited submission, op. cit.

79. ASTRA submission, op. cit.

80. News Limited submission, op. cit.

## Emphasising diversity

The contrasting view is that the idea of diversity goes beyond simple ‘diversity of content’ or ‘diversity of services’. The Communications Law Centre (CLC) acknowledged that there is little doubt the public has access to a wider variety of content than in the past, but it:

... should not automatically be assumed that an increased diversity of content equates to a proportional increase in diversity of voices, views and information. Indeed, as providers choose to distribute their content and services over various platforms, this can give rise to pools of homogeneity in the online environment.<sup>81</sup>

Similarly, while there is potential for greater diversity in voices, views and information in a converging environment, established media organisations are still significant. This is because they control popular distribution channels. Television, radio and newspapers are still the most ubiquitous media. Furthermore, new media outlets in many cases lack the resources and professionalism of established providers.<sup>82</sup> Hence, regulation to ensure diversity of media ownership and content continues ‘to serve the public interest’, restraining over-concentration and monopolies and achieving competitive market outcomes.

The CLC observes that since the 1990s, Australia has seen deregulation in the media result in concentration. Restraining policies have been ‘the only force preserving competition and protecting the public against the emergence of media monopolies’. The CLC urged the Review committee to remember and take into account this historical experience in developing a new regulatory and policy framework for the convergent era. The CLC concluded that regulation is needed ‘to ensure that creativity, innovation and competition are promoted while genuinely protecting the interests of the public’.<sup>83</sup>

## The content debate

The CLC also presented one side of the content debate—there is a need to support the ongoing production and distribution of local and Australian content. The Media Entertainment and Arts Alliance (MEAA) discussed this issue in depth, warning that action was needed to counter the effects of new technologies. Otherwise, in the MEAA’s assessment, Australia may be swamped by cheap foreign content to the detriment of the telling of Australian stories and the promotion of Australian culture:

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81. Communications Law Centre (CLC) submission to Convergence Review Framing Paper, 10 June 2011, viewed 26 July 2012, [http://www.dbcde.gov.au/submissions/20110617\\_12.00.26/122-Communications%20Law%20Centre%20UTS.pdf](http://www.dbcde.gov.au/submissions/20110617_12.00.26/122-Communications%20Law%20Centre%20UTS.pdf)

82. Ibid.

83. Ibid

We are at a critical juncture in the evolution of the media and television industry with serious issues that will impact on Australia's sovereignty, democracy and culture. Creative solutions need to be engaged and considered. Changing times will require reconsideration of old funding models.<sup>84</sup>

MEAA submitted a number of options to the Review Committee to address the content issue. These included mandating levels of Australian content to be delivered by the public broadcasters and providing funding for the ABC and SBS to continue their role as a 'base level' of Australian content from which other providers can build.<sup>85</sup>

MEAA also supported Screen Australia proposals for direct investment in an Online Production Fund focussed on innovative narrative storytelling using digital technologies. It recommended an increase in the subscription television drama expenditure requirement from ten to 20 per cent and supported the introduction of a documentary expenditure requirement to the maximum level allowed under the Australia United States Free Trade Agreement.<sup>86</sup> It considered also that an expenditure requirement should be applied to television-like services over the Internet. It supported retention of quotas for Australian music on commercial radio, as without quotas, it considered stations would be likely to reduce the amount of Australian offerings.

Screen Australia emphasised the importance of local content for Australian audiences and submitted suggestions for new content approaches.<sup>87</sup> (See figure 5 below, which gives the results of a Screen Australia poll). These involved adjustments to content models for free-to-air and subscription television and 'television like services', such as increasing quotas and balancing the increased costs by reductions in licence fees for free-to-air broadcasters and requiring all content services providers to create Australian content by imposing an expenditure determination. They also involved the creation of an online production fund 'to provide funding for interactive and linear narrative content projects that are released online, demonstrating the cultural benefits of high-speed internet access'. In addition, Screen Australia advocated the creation of an Interactive Entertainment (Games) Offset for stand-alone games and altering the Producer Offset to include interactive components for drama and documentary content.<sup>88</sup>

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84. Media, Entertainment and Arts Alliance submission to the Convergence Review Australian and local content paper, October 2011, viewed 26 July 2012,

[http://www.dbcde.gov.au/data/assets/pdf\\_file/0003/143229/Media\\_Entertainment\\_and\\_Arts\\_Alliance.pdf](http://www.dbcde.gov.au/data/assets/pdf_file/0003/143229/Media_Entertainment_and_Arts_Alliance.pdf)

85. Ibid.

86. See fact sheet on the audio visual component of the Agreement at the Department of Foreign Affairs and Trade website, viewed 31 July 2012, [http://www.dfat.gov.au/fta/ausfta/outcomes/11\\_audio\\_visual.html](http://www.dfat.gov.au/fta/ausfta/outcomes/11_audio_visual.html)

87. Screen Australia submission to Convergence Review, October 2011, viewed 26 July 2012,

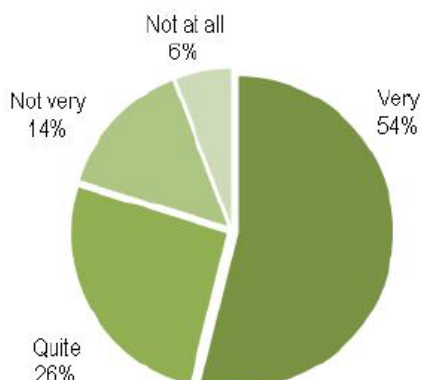
[http://www.dbcde.gov.au/data/assets/pdf\\_file/0014/143240/Screen\\_Australia.pdf](http://www.dbcde.gov.au/data/assets/pdf_file/0014/143240/Screen_Australia.pdf)

88. The proposal was to introduce a similar tax offset as existed for expenditure in producing games as exists for feature films under the Producer Offset scheme. The Producer Offset is a refundable tax offset equal to 40 per cent of a project's qualifying Australian production expenditure (QAPE) for feature films or 20 per cent of the QAPE for other projects. It is available to producers of projects that have been certified completed by Screen Australia. Broadcasters are eligible to apply for and receive funding under the offset scheme. To qualify for the offset the QAPE must reach certain expenditure thresholds. See more detail at Screen Australia, viewed 20 July 2012,

[http://www.screenaustralia.gov.au/producer\\_offset/](http://www.screenaustralia.gov.au/producer_offset/)

## Figure 5: Australian content

### Importance of Australia having a local film and television industry that produces Australian stories, 2011



Source: Compiled by Auspoll on behalf of Screen Australia.

Source: Screen Australia<sup>89</sup>

Telstra was not convinced, however, that content quotas were needed. It estimated that most likely there was sufficient Australian content already produced in convergent markets, and it considered costs associated with content quotas were increased in a convergent environment. However, in Telstra's view, if it was concluded that extra funding was necessary to deliver adequate Australian content, then this was a government, not industry responsibility.<sup>90</sup>

ASTRA wanted the Review Committee to avoid approaches to content regulation that attempted to extend existing regulatory mechanisms for these may no longer be appropriate or feasible in a converging media environment. ASTRA was insistent that any policy to encourage Australian content production should not legitimise regulatory protection of free-to-air broadcasters or any other part of the media and communications industry. For ASTRA, imposing a protective regime would not be necessary if it kept the objectives of diversity, competition and innovation at the core of the Review deliberations.<sup>91</sup>

There was general support for the principle of Australians having access to news and information of relevance to their local community. ASTRA believed the emphasis should be on non-regulatory measures to achieve this objective, however. Regulation should only be an option where adequate local news and information is not delivered across the range of media and communications platforms available to consumers.<sup>92</sup> Foxtel added that in its opinion access to local news and

89. Ibid.

90. Telstra submission on Convergence Review emerging issues, 5 August 2011, viewed 26 July 2012, [http://www.dbcde.gov.au/data/assets/pdf\\_file/0008/139265/Telstra.pdf](http://www.dbcde.gov.au/data/assets/pdf_file/0008/139265/Telstra.pdf)

91. ASTRA submission, op. cit.

92. Ibid.

information can be provided by the operation of the market, rather than the 'sledgehammer' of regulation.<sup>93</sup>

The ACCC argued along similar lines that competitive markets could be expected to meet the demand for local content if that is what consumers want. This would happen even if lower cost content or programming is available.

In determining whether regulation is required to promote Australian and local content, the ACCC recommends that consideration be given to the specific outcomes that are sought. If it is considered that regulation is necessary to achieve these outcomes, there may be merit in considering options based on direct, explicit and transparent subsidies to support Australian or local content production, rather than imposing quotas on certain providers. In comparison to well-targeted and explicit subsidies, quotas are likely to lead to greater distortions to competition, including higher barriers to entry. The ACCC also notes that imposing Australian or local content obligations on businesses that operate on emerging platforms may be particularly detrimental to the development of the sector and may be counterproductive.<sup>94</sup>

Macquarie Telecom considered the principle of local access to news and information was 'out of date and no longer important'.<sup>95</sup> While it mattered in the pre-Internet age where there were few sources of local news and information, the Internet has changed the meaning of local community.

It once meant a group with common interests defined by geography. Now local community also means a group with common interests independent of geographic location. News and information concerning Australian local communities, however defined, has never been so readily available as it is today in the Internet age. This principle should also recognise that communities located in regional and rural areas must be provided with affordable access to communications and information services of no less quality than that which is available to communities located in metropolitan areas.<sup>96</sup>

Not everyone agreed the Convergence Review Committee should take such a positive view of globalisation. The Communications Law Centre saw this phenomenon as actually disconnecting citizens from their local communities.<sup>97</sup> The Community Broadcasting Association of Australia added that as increased networking of commercial media reduces the sources of information and technological change broadens exposure to internationalised perspectives, access to local services and information is critical.<sup>98</sup>

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93. Foxtel submission to Convergence Review framing paper, June 2011, viewed 26 July 2012, [http://www.dbcde.gov.au/submissions/20110621\\_11.24.32/131-FOXTEL.pdf](http://www.dbcde.gov.au/submissions/20110621_11.24.32/131-FOXTEL.pdf)

94. ACCC submission to Convergence Review framing paper, June 2011, viewed 26 July 2012, [http://www.dbcde.gov.au/submissions/20110610\\_16.48.06/92-Australian%20Competition%20and%20Consumer%20Commission.pdf](http://www.dbcde.gov.au/submissions/20110610_16.48.06/92-Australian%20Competition%20and%20Consumer%20Commission.pdf)

95. Macquarie Telecom submission to Convergence Review framing paper, 10 June 2011, viewed 26 July 2012, [http://www.dbcde.gov.au/submissions/20110610\\_16.48.06/99-Macquarie%20Telecom.pdf](http://www.dbcde.gov.au/submissions/20110610_16.48.06/99-Macquarie%20Telecom.pdf)

96. Ibid.

97. CLC submission op. cit.

98. Community Broadcasting Association of Australia submission to the Convergence Review, 15 June 2011, viewed 26 July 2012, [http://www.dbcde.gov.au/submissions/20110617\\_12.00.26/123-Community%20Broadcasters%20Association%20of%20Australia.pdf](http://www.dbcde.gov.au/submissions/20110617_12.00.26/123-Community%20Broadcasters%20Association%20of%20Australia.pdf)

Those who supported local content rules noted the ‘digital divide’ which remains between regional and metropolitan areas, despite improvements in technology. It was important therefore, not to dilute local content rules on television and radio; but rather to encourage their extension to emerging media platforms if, and where possible.<sup>99</sup>

## **Spectrum allocation**

Spectrum is a scarce and precious public asset which all wireless communications need to use to deliver services. Under spectrum use policy, commercial radio and television licensees who use broadcasting services bands to deliver services are treated differently from other spectrum users. In the view of some media groups, this approach amounts to preferential treatment, a situation which Telstra claimed in its submission to the Review Committee is no longer appropriate in a converged environment. In the new media environment, spectrum needs to be allocated under a market based approach. In Telstra’s view, broadcasting apparatus licences held by the commercial broadcasters should be converted to spectrum licences. While these should initially be offered to the incumbent licensees (after payment of a fair market price for the spectrum), any future allocation of new spectrum licences, or reallocation of existing licences should occur through an open auction process.<sup>100</sup> The Communications Alliance also endorsed a market-based approach to the management of all spectrum.<sup>101</sup>

ASTRA and Foxtel submitted to the Review Committee that the existing regulatory framework for allocating broadcast spectrum has led to inefficient use and the restricting of the volume and diversity of broadcasting and other communications services which could be made available to the consumer.<sup>102</sup> FOXTEL accused the free-to-air networks of deliberately using their spectrum allocation unproductively as part of a strategy to exclude other terrestrial competitors and because spectrum has been priced on the basis of the terrestrial networks’ revenue rather than the amount of the spectrum used.<sup>103</sup>

The ACCC supported the principle that government should seek to maximise the overall public benefit derived from the use of spectrum and noted that this would require the spectrum to be allocated to its highest value use. It saw this as consistent with ACMA spectrum management principles whereby spectrum is allocated to the use that maximises the value derived from the spectrum by licensees, consumers and the wider community. The ACCC concluded a competitive process is generally the best means for allocating spectrum, but noted that spectrum allocated to the free-to-air broadcasters is not subject to any competitive process. It recommended therefore that the Review Committee consider whether such an arrangement is consistent with the objectives

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99. CLC submission to Convergence Review, 31 October 2011, viewed 26 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0011/143003/University\\_of\\_Technology\\_Sydney\\_UTS\\_-\\_Discussion\\_Papers.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0011/143003/University_of_Technology_Sydney_UTS_-_Discussion_Papers.pdf)

100. Telstra submission to Convergence Review emerging issues paper, op. cit.

101. Communications Alliance submission to Convergence Review, 1 November 2011, viewed 26 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0007/142828/Communications\\_Alliance.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0007/142828/Communications_Alliance.pdf)

102. ASTRA submission to Convergence Review framing paper, n.d., viewed 26 July 2012, [http://www.dbcde.gov.au/submissions/20110610\\_16.48.06/84-Australian%20Subscription%20Television%20and%20Radio%20Association.pdf](http://www.dbcde.gov.au/submissions/20110610_16.48.06/84-Australian%20Subscription%20Television%20and%20Radio%20Association.pdf)

103. Foxtel submission, op. cit.

of the Radiocommunications Act to ensure the efficient allocation of spectrum, whether it ensures spectrum is allocated to its most efficient use and whether it produces a fair return on the use of a scarce public resource.<sup>104</sup>

In contrast, Free TV Australia commented:

As a unique form of one-to-many communications, broadcasting remains the most efficient way of transmitting high quality content to millions of people simultaneously ... The specialist objectives for the management of spectrum in the BSA remain the most effective reflection of the particular social and cultural benefits arising from free-to-air television services ... The underlying rationale for specialist management of broadcasting spectrum remains valid, despite the rapidly changing media market.<sup>105</sup>

Commercial Radio Australia did not support the proposal in the Review Committee's interim report to replace broadcasting licences with spectrum licences. It contended that the proposal would undermine the licence rights of broadcasting services band licensees and potentially disrupt existing business models for commercial radio broadcasters.<sup>106</sup>

### Other issues

A number of other issues were put to the Review Committee for consideration. It was unacceptable to some, for example, that the national broadcasters were not subject to requirements to produce minimum levels of Australian content.<sup>107</sup> Community broadcasters sought a lessening of restrictions imposed under the BSA on their sector with regards to sponsorship acknowledgements.<sup>108</sup> One free-to-air broadcaster called for the abolition of 'anachronistic' children's television standards, which would then enable commercial free-to-air television broadcasters to respond more flexibly to changes in children's viewing habits and schedule programs at times when children were most likely to be watching television.<sup>109</sup>

With regards to the Review Committee's questions on what community standards should apply in a converged environment, the Australian Interactive Media Industry Association (AIMIA) observed that expectations of what are appropriate 'community standards' may differ between different

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104. Paragraph 3(a) of the *Radiocommunications Act 1992*, viewed 26 July 2012, [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ra1992218/s3.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ra1992218/s3.html) requires the management of the radio frequency spectrum to 'maximise, by ensuring the efficient allocation and use of the spectrum, the overall public benefit derived from using the radiofrequency spectrum' and ACCC submission to the Convergence Review framing paper, June 2011, viewed 26 July 2012, [http://www.dbcde.gov.au/submissions/20110610\\_16.48.06/92-Australian%20Competition%20and%20Consumer%20Commission.pdf](http://www.dbcde.gov.au/submissions/20110610_16.48.06/92-Australian%20Competition%20and%20Consumer%20Commission.pdf)

105. Free TV submission, op. cit.

106. Commercial Radio Australia submission to Convergence Review Interim Report, February 2012, viewed 30 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0004/146272/Commercial\\_Radio\\_Australia.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0004/146272/Commercial_Radio_Australia.pdf)

107. Foxtel submission, op. cit.

108. Australian Community Television Alliance submission to the Convergence Review, October 2011, viewed 30 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0018/143352/ACTA.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0018/143352/ACTA.pdf)

109. Seven West Media submission to the Convergence Review: Australian and local content, October 2011, viewed 30 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0003/143265/Seven\\_West\\_Media.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0003/143265/Seven_West_Media.pdf)

sections of the community.<sup>110</sup> The Australian Industry Group added that as such, in its opinion, agreeing to and applying a single set of community standards may be unrealistic, unachievable and contradictory in a converged market where consumers have been empowered to choose, and markets to provide, innovative content and services.<sup>111</sup>

The Australian Christian Lobby on the other hand, maintained that it was essential for certain standards to apply, regardless of the phenomenon of convergence:

If the community is to have confidence in an effective media regulatory system, there needs to be consistency in the meaning and application of ratings, and individuals need to know that content of a certain level of impact will be labelled as such regardless of the platform used for its delivery.<sup>112</sup>

Copyright and retransmission issues were raised in a number of instances. The Australian Content Industry Group (ACIG) believed that creative content needs to be protected to ensure its ongoing production and distribution, but saw misappropriation over the Internet as a serious threat for creators and consumers alike. ACIG suggested a scheme along the lines of a voluntary agreement reached in the United States as a solution to the problem. This scheme involves Internet Service Providers sending subscribers copyright alerts and warnings where there is evidence that illegal file-sharing may have occurred on their Internet account.<sup>113</sup>

Free TV's contribution to the retransmission debate called for a 'must carry' regime to be implemented. Under this regime there would be a legislative requirement for television suppliers to carry all relevant free-to-air signals or to negotiate with free-air-broadcasters to carry certain signals.<sup>114</sup> The Australian Copyright Council was not supportive of the must carry idea noting that while this may be desirable for free-to-air broadcasters, it was inherently anti-competitive.<sup>115</sup> Screen Rights Australia remarked that the Copyright Act does not apply with regards to retransmission over the Internet, and that this situation was absurd in a converged environment where the origin of television services will become increasingly indistinguishable.<sup>116</sup>

## Convergence Review: Final Report

After sifting through the views and arguments noted in the previous section as well as a myriad of other contributions, on 30 March 2012 the Convergence Review Committee presented its final

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110. Australian Interactive Media Industry Association (AIMIA) submission to the Convergence Review, 31 October 2011, viewed 30 July, 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0020/143345/AIMIA.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0020/143345/AIMIA.pdf)
  111. Australian Industry Group, submission to Convergence Review emerging issue paper, 18 November 2012, viewed 30 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0015/143331/Australian\\_Industry\\_Group.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0015/143331/Australian_Industry_Group.pdf)
  112. Australian Christian Lobby Group submission to Convergence Review community standards paper, 27 October 2011, viewed 30 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0006/142908/Australian\\_Christian\\_Lobby.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0006/142908/Australian_Christian_Lobby.pdf)
  113. Australian Content Industry Group submission to Convergence Review, 8 August 2011, viewed 30 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0010/139267/Australian\\_Content\\_Industry\\_Group.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0010/139267/Australian_Content_Industry_Group.pdf)
  114. Free TV submission, op. cit.
  115. Australian Copyright Council submission to Convergence Review October 2011, viewed 30 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0005/142871/Australian\\_Copyright\\_Council.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0005/142871/Australian_Copyright_Council.pdf)
  116. Section 135ZZJA of the *Copyright Act 1968*, Screenrights Australia submission to Convergence Review, 28 October 2011, viewed 30 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0009/142875/Screenrights.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0009/142875/Screenrights.pdf)

report to the Minister for Broadband, Communications and the Digital Economy, Stephen Conroy. The Committee Chair, Glen Boreham, noted that the Committee had digested over 340 written submissions and 28 000 comments before reaching its final conclusions and that these had been only fully formed after consideration of all consultations, including feedback from the Interim Report. Boreham was confident the final product recommended:

... a new principles-based policy framework that provides the media and communications sector with reduced compliance costs, increased certainty and flexibility while ensuring that services continue to meet the expectations of Australians.<sup>117</sup>

The Review Committee declared that it had adopted an underlying approach in favour of deregulation and intervention only when it believed that the public benefits outweighed the costs. It considered a number of options before reaching its fundamental conclusion that media regulation needed to be modified. One option was to leave the current rules in place but this was seen as problematic for a number of reasons. These included the fact that existing rules were limited in scope and not applicable to influential media sources, including national newspapers, telecommunications companies, subscription television and online media. A further option was to broaden the scope of the current rules, but the Committee rejected this idea calculating that this may 'stifle innovation and investment in areas that were not previously subject to the rules'. The Review considered two options involving a public interest test—retaining the current rules and introducing a public interest test or abolishing the rules and introducing a public interest test—before deciding on its final model.

## New Regulators

The Final Report recommended the establishment of two new bodies to regulate the media and communications industries. These would be:

- a new statutory regulator to replace ACMA
- an industry-led news standards body to oversee journalistic standards for news and comment.<sup>118</sup>

## Statutory authority

The Review Committee intended that, except in a limited number of specific matters, the new statutory regulator would be an independent body, functioning 'at arm's length' from government. Ministerial control over the regulator would be exercised through legislative instruments disallowable by either House of the Parliament, to encourage greater parliamentary scrutiny.<sup>119</sup> The Committee explained that statutory corporations are usually required to comply with the general

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117. Convergence Review Committee, *Convergence Review: final report*, Department of Broadband, Communications and the Digital Economy, March 2012, viewed 16 July 2012,

[http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0007/147733/Convergence\\_Review\\_Final\\_Report.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf)

118. The information in the following sections describing the Convergence Review proposals is derived from the Convergence Review final report, op. cit. unless otherwise stated.

119. The Review notes that under the *Legislative Instruments Act 2003*, section 44, item 41, a Minister's directions to any person or body are exempted from being subject to parliamentary disallowance (although directions 'of a legislative character' are still subject to the parliamentary tabling requirements).

policies of the Government and to supply requested information to the portfolio minister or the Finance Minister.<sup>120</sup> However, in cases where there is a perceived need for independence, legislation can provide that the authority is only subject to direction as expressly provided.<sup>121</sup> The Review Committee argued:

For the new regulator to be independent and perceived as such, there should be no general power for the minister to give directions to the regulator. Moreover, careful consideration needs to be given as to the circumstances, if any, where the regulator might be subject to direction from the minister in the performance of its regulatory functions.

The principles of responsible government necessitate that ministers be kept informed about the activities of Commonwealth agencies in their portfolios, subject only to specific secrecy requirements set out in legislation.

The responsible minister can have the usual powers to require information without the independence of the regulator being affected. It is clearly consistent with the role of the independent regulator that the responsible minister be able to require the regulator to inquire into and report on any matter relating to its functions.

While it may be the case that the new regulator will have broad powers, the Review Committee did not intend that those powers would be 'unfettered'; the regulator would be accountable 'through the suite of parliamentary, judicial and administrative arrangements'.

The statutory regulator would be administered by an independent governing board that would have 'full power to act within the constraints of the law'.<sup>122</sup> As the importance of an assured source of funding has been recognised internationally, the regulator would be furnished with secure funding. The Review Committee cited the comments of the United States' Federal Communications Commission on the matter:

An effective regulator should be independent from those it regulates, protected from political pressure, and given the full ability to regulate the market by making policy and enforcement decisions. The regulator should have the authority and jurisdiction to carry out its regulatory and enforcement functions effectively and unambiguously. And the regulator must be adequately funded from reliable and predictable revenue sources.<sup>123</sup>

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120. See *Commonwealth Authorities and Companies Act 1997*, section 48A and paragraphs 16(1)(b) and 16(1)(c).

121. The Australian Broadcasting Corporation provides an example of this requirement. See *Australian Broadcasting Corporation Act 1983*, subsection 78(6).

122. Cites as reference: J Uhrig, *Review of corporate governance of statutory authorities and office holders*, 2003, pp. 4–12.

123. Federal Communications Commission, *Connecting the globe: a regulator's guide to building a global information community*, viewed 17 July 2012, <http://transition.fcc.gov/connectglobe/sec1.html>

Following from recommendations outlined in a review of the current classification scheme, the regulator would also be responsible for a new national classification scheme for media content standards. This would apply across all platforms and would incorporate a new Classification Board.<sup>124</sup>

The new regulator would define the thresholds for what would be known as content service enterprises, administer the 'minimum number of owners' rule and a public interest test and ensure compliance with Australian and local content obligations. These powers were intended to complement the powers of the ACCC.

In addition to its regulatory role, the new body would be expected to promote the development of the media sector, engage with industry in developing solutions to problems, report on the state of the market and the performance of market participants, protect users, including supervising complaints processes, inform users through education programs and provide advice and propose initiatives to government.

### Industry standards body

The Review Committee recommended that all content service enterprises were required to become members of a self regulatory body which would be responsible for content standards that apply to news and commentary across media platforms.<sup>125</sup> The media code developed and enforced by this body would aim to promote news standards, adjudicate on complaints and provide 'timely remedies'.

This body would absorb functions performed by both the Australian Press Council and the Australian Communications and Media Authority in relation to news and commentary.

The majority of funding for the body would come from members, but as it would be in the public interest for the body to be appropriately resourced, the Review Committee recommended that government contributions for specific purposes should be available.

The Committee suggested:

Membership of the news standards body could be a condition of retaining legal privileges currently provided for news and commentary in Commonwealth legislation.<sup>126</sup> In particular, it seems reasonable that only those organisations that have committed to an industry self-regulatory scheme for upholding journalistic standards of fairness and accuracy should be entitled to the exemptions from the provisions of the *Competition and Consumer Act 2010* concerning misleading and deceptive statements and from the obligations of the *Privacy Act 1988* that would otherwise apply to those organisations. However, there is not the same argument for applying this requirement to

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124. Australian Law Reform Commission, *Classification—content regulation and convergent media*, Report 118, February 2012, viewed 23 July 2012, [http://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_118\\_for\\_web.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_118_for_web.pdf)

125. Content Service Enterprises were defined as 'significant media enterprises that meet a specified revenue and user (audience) threshold for professional content delivered to Australians'.

126. Refers to the section in the Finkelstein Review which deals with these matters.

laws protecting journalists' sources. These laws apply to information collected by individual journalists, who might be freelance journalists rather than employees of an organisation.<sup>127</sup>

The news standards body would be expected to impose 'credible sanctions' on members and have the power to order members to publish its findings 'prominently and appropriately' on relevant platforms. The body should be able to refer significant or persistent breaches and failure to comply with directions to the regulator. Similarly, the regulator should be able to request the news standards body to investigate an issue.

As one commentary which analyses the Final Report observes, the 'recommended formulation of an industry body to oversee the development and application of the news and commentary standards sits in contrast to the Finkelstein Inquiry'. Indeed, the Convergence Review Committee considered the Finkelstein news council proposal, 'an option of "last resort"'.<sup>128</sup>

## Ownership and diversity

The Convergence Review recommended a number of key changes in relation to current media ownership and diversity rules. (Box 4 below details the current rules).

### Box 4: Current ownership and control rules

Media diversity rules	
Medium	Rule
Commercial television, radio, newspapers	Minimum number of voices: the '4/5' rule—there must be no fewer than five independent and separately controlled media operators or groups in a metropolitan commercial radio licence area, and no fewer than four in a regional area. <sup>a</sup>
Commercial television, radio, newspapers	'2 out of 3' rule—a person cannot control more than two out of three specified media platforms—commercial television, radio or an associated newspaper—in a commercial radio licence area. <sup>b</sup>
Commercial television	'One-to-a-market' 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. <sup>c</sup>
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. <sup>d</sup>

127. Cites as an example *Evidence Act 1995*, section 126H; BSA, subsection 202(4).

128. I McGill, 'Convergence Review: wide-ranging reform on the horizon', *Communications Law Bulletin*, vol. 31, no. 1, May 2012, viewed 17 July 2012, [http://parlinfo.parlInfo/download/library/jrnart/1722538/upload\\_binary/1722538.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo.parlInfo/download/library/jrnart/1722538/upload_binary/1722538.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)

Media diversity rules	
Medium	Rule
Commercial television	'75 per cent audience reach'—a person must not be able to exercise control of commercial television broadcasting licences if the combined licence area exceeds 75 per cent of the Australian population. <sup>e</sup>

BSA - *Broadcasting Services Act 1992*.

- a. Sections 61AB and 61A of the BSA.
- b. Fifty per cent of the geographic area of the radio licence must fall within the television licence area for this prohibition to apply.
- c. Also see subsection 53(2) of the BSA.
- d. Section 54 of the BSA.
- e. Section 53 of the BSA.

Source: Convergence Review: Final Report <sup>129</sup>

### Revision of the four out of five rule

The existing 'minimum number of voices', or four out of five rule, requires that there are no fewer than five media operators or groups in a major metropolitan commercial radio licence area, and no fewer than four in a regional area. The Review Committee recommended revision of this rule to require a 'minimum number of owners' and for the rule to apply to all content service providers which deliver news and commentary. The Committee considers this change would better reflect the underlying objective promoting media diversity, as no single operator or small group of operators would be allowed to dominate news and commentary sources in a local market. The new regulatory body recommended by the Committee would be given power to determine the geographic scope of a local market for the purposes of administering the rule.<sup>130</sup>

The regulator would administer the minimum ownership rule and provide exemptions in the event of circumstances decreed to be in the public interest. Exemptions would generally relate to availability of services and to content. (See detailed discussion relating to the public interest later in this paper and brief description of the Convergence Review proposal and administrative arrangements in Figure 3 and Box 5 below). One type of exemption would be in the exceptional circumstances that the regulator considered a change of media ownership would result in a public benefit for a market.

129. Convergence Review final report, op. cit.

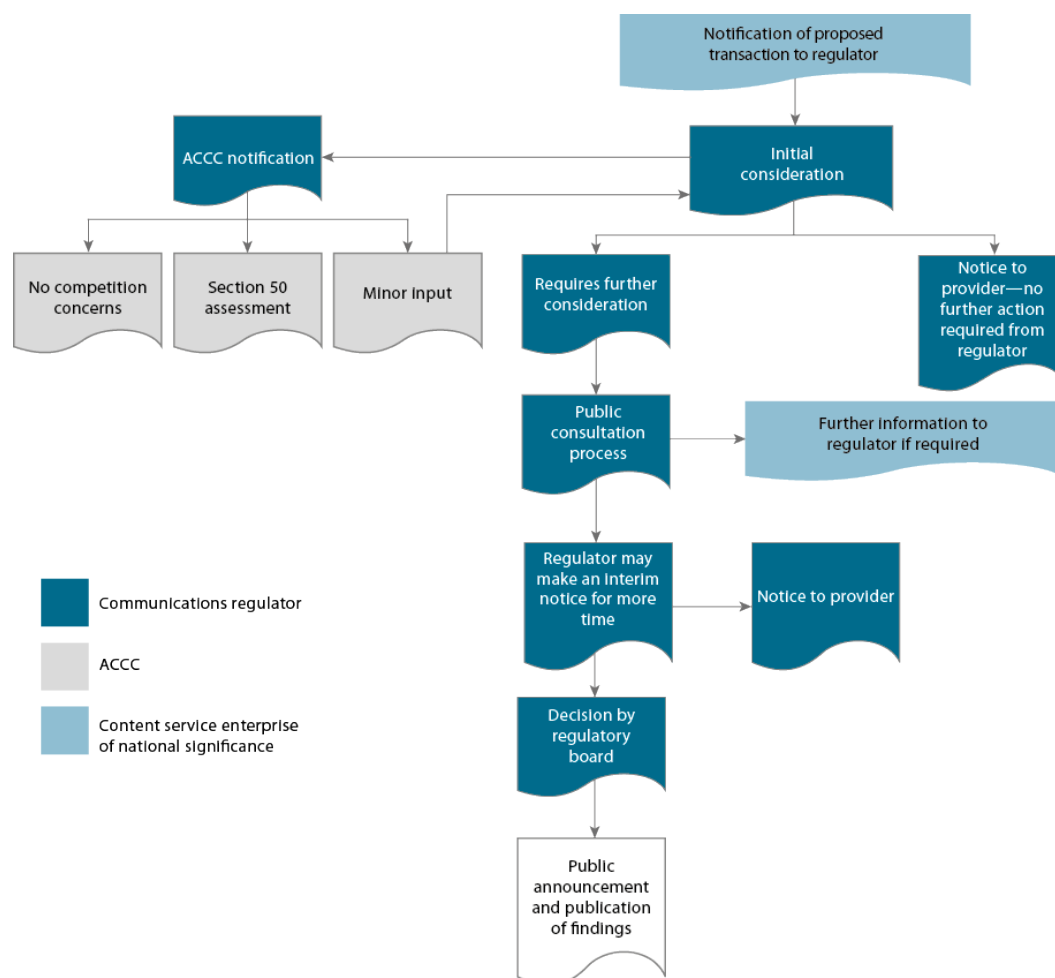
130. Currently media ownership and diversity rules are applied in relation to commercial radio licence areas, not specific geographic areas. Factors to be taken into account in determining a geographic area would be similar to planning criteria for the broadcasting services bands under the BSA (section 23). These include the demographics, social and economic characteristics and the number of existing broadcasting services within a licence area. The Broadcasting Services Bands are the designated parts of the radiofrequency spectrum which have been referred to ACMA for planning under section 31 of the *Radiocommunications Act 1992*.

### Box 5: Public interest test proposal

The Convergence Review recommends:

- a public interest test should be developed ‘to ensure that diversity considerations are taken into account in transactions where there are changes in control of content service enterprises of national significance’
- the regulator would develop, maintain and publish a register of content service enterprises of national significance. While the regulator would define the criteria for national significance, at a minimum this would apply to an entity which operates in multiple markets
- focus of the test should be on maintaining the diversity of content services at a national level
- the test should complement, not duplicate, the ACCC’s existing mergers and acquisitions powers
- factors the regulator could be required to take into account when making its decision should include whether the outcome of the transaction would diminish the diversity of news and commentary at a national level.

Figure 6: Convergence Review: suggested process for administering public interest test



Source: Convergence Review Final Report<sup>131</sup>

131. Convergence Review final report, op. cit.

## Abolition of existing requirements

In conjunction with the introduction of the 'minimum owners' rule, the Committee recommended the abolition of:

- the 75 per cent rule, which prevents the control of combined commercial television licences that reach more than that percentage of the population
- the two out of three rule, which prevents control of more than two out of a commercial radio broadcasting licence, a commercial television licence and an associated newspaper in a broadcasting licence area, and
- the two to a market rule and the one to a market rule which prevent the control of more than two commercial radio broadcasting licences in the same licence area and more than one commercial television licence in the same licence area.

The Review Committee justified this recommendation on the grounds that these rules are based on distinctions between traditional broadcasting and print media which no longer exist as media enterprises increasingly operate across a range of platforms. It considered that its proposed public interest test in conjunction with the ACCC's media and merger powers would 'provide sufficient safeguards to maintain diversity and a competitive market'.

## Content

### Content-related competition issues

The Final Report summarised the Review Committee's view on content-related competition issues.

Competition is a key driver of innovation and investment and underpins positive consumer outcomes. Market forces are the most effective way of ensuring competition when the playing field is level for all participants. However, in a converged world there is a risk that content will be a new competition bottleneck for which regulatory intervention will be required. Establishing a new communications regulator with flexible powers to address content-related competition issues offers the most effective means of ensuring a competitive content market.

The new regulator would deal with matters such as those relating to access to premium content (for example, first release films or live sport) which may be threatened for some audiences as the result of organisations owning exclusive content rights, or so-called bundling offers under which access to premium content is dependent on the acquisition of other products from a particular service provider.

### Content standards

The Convergence Review recommended taking a 'technology-neutral and flexible' approach to media content standards. Standards, except for those relating to news and commentary, would be administered by the new regulator and an independent classification board would be established under the regulator to undertake specific classification functions. It fully supported the Australian Law Reform Commission recommendations on how the classification board would operate. (See Appendix D for a summary).

As the Review pointed out, current industry and co-regulatory codes are content-specific, platform-specific and provider-specific, and as such, in a converged, blurred media environment they are at times, 'inconsistent, confusing and inflexible'. Hence, situations exist whereby the online presence of free-to-air broadcasters and newspapers are subject to different content standards and complaint structures whereas emerging platforms, such as Internet protocol television (IPTV), are not subject to content regulation.

The Review Committee also favoured the application of common and non-discriminatory content standards across delivery platforms, while allowing for flexibility in applying those standards in different ways, depending on how services are delivered. It intended this approach would operate in conjunction with general criminal and civil law that applies to content, and laws regarding particular issues (such as restrictions on tobacco advertising, online gambling and advertisements relating to medicine). Classification would apply to content across all media platforms.

The Review proposed that the new communications regulator would have the discretion to set standards for children's television content for relevant content service enterprises, either by adopting an industry code or making its own standards, similar to the current Children's Television Standards.

The Review acknowledged there may be problems with the enforceability of content standards in a digital environment, but added that it intended for the regulatory environment to apply only to content service enterprises. Content providers that did not meet requirements to be considered content service enterprises would be encouraged to opt in to compliance with codes or to develop their own codes.

The new scheme for media content standards would include effective mechanisms for complaints handling and enforcement. This would involve providing the new regulator with a range of mid-tier enforcement options to deliver the flexibility for it to take enforcement action that was proportionate to the severity of a breach of content standards.

In general, the Convergence Review recommended that the communications regulator should have power to set content standards in relation to content service enterprises if there is a need for regulatory intervention. Content standards may apply to particular categories of service and may take into account how the content is accessed by users. Other powers suggested for the regulator included which allowed it to:

- decide on matters relating to what was sometimes a blurred line between advertising and program content
- deliver education for Australian audiences to provide them with information and tools to make informed decisions about suitable content for themselves and those in their care
- make technical standards (for example, in relation to parental locks and age-verification tools) to assist content users in managing access to content in the digital environment.

## News standards

The Convergence Review took into account the findings and recommendations of the Finkelstein Review in developing an alternative approach to news standards. Specifically the Review noted the

concern from a convergence perspective that there is currently no consistency in the regulation of news content between platforms. The Review saw no justification for news and commentary to be subject to different systems for complaints and enforcement just because it was delivered on different platforms.

A comparison of the Finkelstein and Convergence Review approaches to news standards can be found in Box 6 below.

#### **Box 6: News standards bodies: Finkelstein and Convergence Reviews**

The Convergence Review differs from the Independent Media Inquiry approach in the key areas outlined below.

- > The news standards body proposed by the Convergence Review would not be a statutory authority. Instead, content service enterprises would be required to join an industry self-regulatory body. The Review considers that an industry-led approach could be implemented more effectively, with more immediate results, and with the potential for better long-term outcomes.
- > In the Convergence Review approach, the news standards body would cover only content service enterprises as defined in this report, rather than the much lower threshold for news providers as recommended by the Independent Media Inquiry. The Review recommended that media enterprises should be subject to content standards where they have control of the professional content they provide, have a large number of Australian users of that content, and have a high level of revenue derived from supplying that content to Australians
- > In the Convergence Review approach, the news standards body would be majority funded by its members, rather than being fully funded by the government. As it is in the public interest that the news standards body be adequately funded, there would be provision for the government to make a funding contribution.<sup>132</sup>

#### Production and distribution of Australian and local content

The Convergence Review noted the importance of examining matters relating to the production and distribution of Australian content. The Review Committee found that while production and distribution of Australian content is generally healthy, ‘the emergence of new online services, digital multi channels and on-demand programming makes the current support measures unsustainable in the longer term’.

##### *Television*

It recommended the repeal of quotas and minimum expenditure obligations which currently apply to free-to-air and subscription television sectors and that these were replaced with a uniform content scheme. (See Appendix D for information on the current requirements for television).

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132. Convergence Review final report, op. cit., Appendix I.

The uniform content scheme would apply to content service enterprises that meet defined service and scale thresholds. These enterprises would be required to invest a percentage of their total revenue from 'professional television-like content' in the production of Australian drama, documentary or children's content. Where this was not possible, they would be required to contribute to a new, government-created and partly funded converged content production fund. Premium television content which exceeded a certain threshold would attract the 40 per cent offset available under the Producer Offset scheme.<sup>133</sup>

Interactive entertainment, such as games, would also be supported by an offset scheme and the converged content production fund.

### *Radio*

The Review Committee noted that while submissions from radio broadcasters suggested that existing rules for Australian music quotas are expensive and inflexible, it considered that it is important to retain those quotas for analogue commercial radio services. These quotas should be extended to digital only radio services offered by content service providers, but at this point, the Committee did not recommend that these were extended to Internet-based music services (see Appendix F for details of the current rules).

### *Local content*

The Review Committee noted the importance of local content for communities. Local content ensures people living in regional and rural Australia receive information and commentary that reflects their local identity and communities. The Committee considered commercial free-to-air television and radio broadcasters who have the use of public spectrum should continue to devote a specified amount of programming to material of local significance, but that a more flexible compliance and reporting regime for television and radio should be implemented and the current radio 'trigger event' rules should be removed (see Appendix F for details of the local content rules)

### *National and community broadcasters*

The Review Committee considered the ABC and SBS:

... are two of the nation's most important institutions. Both organisations have led the way in developing a number of new services. These have been embraced by Australians and they have extended the reach and impact of publicly funded programming. However, these activities are not referred to in their charters.

...

The development and broadcast of Australian screen and radio content is one of the important roles of the ABC and SBS. Unlike the commercial free-to-air television broadcasters, the two public broadcasters are not subject to minimum quotas on the number of hours of Australian content broadcast on their primary channel. The Review believes that this should change.

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133. See footnote 88 for explanation of the Producer Offset.

The Review Committee recommended that the charters of the ABC and the SBS are updated to reflect the range of existing services they deliver and that while Australian content quota obligations continue for commercial free-to-air television broadcasters, quotas should also apply to the public broadcasters.

The Review also recognised the role performed by the community broadcast sector and supported providing spectrum funding from the converged content production fund to help ensure the sustainability of the sector.

## Spectrum

As the Review Committee noted, the amount of spectrum able to be used is limited, and while developments in technology have ‘freed up’ more spectrum, new devices are also competing to use that released spectrum. In an earlier emerging issues paper the Committee concluded that there was both a need to make difficult decisions in relation to competing uses of spectrum and also to ensure that it is used as efficiently as possible. It was important therefore to develop a policy framework which ensures government plans and allocates spectrum to maximise public benefit, with regard to commercial, community and public interest uses. As such, the Review Committee argued that it was essential to develop an objective means of determining future allocations where competing uses for spectrum arise.<sup>134</sup>

Currently, there are different approaches to allocating spectrum and the Review Committee agreed with the argument that these were unnecessary in a converged environment. It considered a single regulatory framework for the management and allocation of spectrum would be more efficient and more responsive to evolving technologies and shifting spectrum demands.

The Review Committee recommended an approach to spectrum management which would accommodate:

- market-based pricing for its use
- spectrum planning mechanisms that explicitly take into account public interest factors and social and cultural objectives currently reflected in the BSA
- ministerial powers to reserve and allocate spectrum to achieve certain policy objectives, such as ensuring spectrum is available for public and community broadcasting
- certainty about licence renewal processes for spectrum licence holders.

Broadcasting licences would be abolished under the system recommended by the Review and annual spectrum access fees would be put in place. These would be based on the value of the spectrum as planned for broadcasting use. Commercial broadcasting licensees would have the flexibility to trade channel capacity within their spectrum allocation.

With regards to the so called ‘sixth channel’ of spectrum that will be available as a result of the digital dividend from the switchover to digital only television, the Committee recommended that,

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134. Convergence Review, *Discussion paper—spectrum allocation and management*, Australian Government, 2011, viewed 23 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0005/139271/Paper-3\\_Spectrum-paper\\_access.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0005/139271/Paper-3_Spectrum-paper_access.pdf)

aside from setting aside capacity for community television services to continue, the channel was used for new and innovative services with the aim of increasing diversity.

## Other issues

Other issues addressed by the Review Committee included the suggestions that children's content standards, currently determined by ACMA, were not effective and no longer needed. The Committee concluded that retaining the standards remained important for the moment, but in the future technological advances in devices to restrict children's access to inappropriate content, may reduce reliance on such standards.

With regards to copyright and retransmission issues, the Review Committee observed the converged environment illustrates that current retransmission rules will need to be reviewed. It recommended that an Australian Law Reform Commission (ALRC) review into the operation of copyright in the digital environment currently underway, examine the issue.<sup>135</sup> The Review also proposed that in investigating content-related competition issues, the new communications regulator should have regard to copyright implications and be able to refer any resulting copyright issues to the relevant minister for further consideration by government.

## Public interest debate

### Background

The Productivity Commission (the Commission or PC) report to government in 2000 was supportive of media deregulation and its findings were used as one justification for the Howard Government's media ownership reforms in 2006. However, there were reservations attached to the Commission's recommendation regarding the abolition of the cross-media ownership rules. The PC believed that abolition of these rules should only be allowed to occur once a more competitive Australian media environment had been established. The Commission noted that as 'traditional media businesses in Australia are concentrated, [they] could become more so if the cross-media rules are relaxed and no other compensating measures, such as freeing entry [to broadcasting], are taken'.<sup>136</sup> Further, the Commission believed that it was not sufficient for multiple media 'voices' to exist if those voices were not accessible to the public, or if they were effectively controlled by dominant media interests.<sup>137</sup>

The Commission also recognised the need to consider the public interest in framing media policy. It suggested that a public interest test should be a fundamental aspect of a more deregulated media ownership environment. It did not attempt to define what the test should look like. However, fundamentally it advocated that proposed media agreements, actions, acquisitions and mergers

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135. See detail on Australian Law Reform Commission website, viewed 30 July 2012, <http://www.alrc.gov.au/inquiries/copyright>

136. Productivity Commission *Broadcasting Inquiry Report No 11*, March 2000, viewed 20 July 2012, <http://www.pc.gov.au/projects/inquiry/broadcasting/docs/finalreport>

137. Ibid.

would need to prove they would not substantially lessen 'plurality of ownership and thereby lessen diversity of opinion in the media market'.<sup>138</sup>

Not everyone agreed with the Productivity Commission, and indeed the Howard Government emphatically rejected the idea of a media public interest test as part of its 2006 media reform package. The underlying reasons for this rejection continue to be cited in arguments against a public interest test. One rationale is that the public interest necessarily alters over time to reflect changes in society. More importantly for those critical of a public interest test, the principle argument set against it is that such a test is inherently subjective.

David McCormack, writing around the time of the Howard Government media reform package, advanced this argument. In McCormack's view, any public interest test would be 'entirely subjective' as it would not involve assessing issues based on clearly-defined and objective criteria:

No matter how you structure it, qualify it or identify the basis on which it must be considered, ultimately a public interest test will require an individual, or group of individuals, to make a judgement call about which media mergers should proceed and which shouldn't.<sup>139</sup>

In contrast, Julian Thomas, Director of the Institute for Social Research at Swinburne University, contributed to the debate sparked by the PC and the Howard Government reforms arguing instead that a public interest test could be the means to halt the trend towards media concentration in Australia because of its broad base and adaptability.<sup>140</sup>

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138. Ibid.

139. D McCormack, 'Public interest test? How about some media policy debate in the real world', *Crikey*, 17 December 2007, viewed 20 July 2012, <http://www.crikey.com.au/2007/12/17/public-interest-test-how-about-some-media-policy-debate-in-the-real-world/>

140. J Thomas, 'Why a public interest test for media mergers is a good idea', *Crikey*, 19 December 2007, viewed 20 July 2012, <http://www.crikey.com.au/2007/12/19/why-a-public-interest-test-for-media-mergers-is-a-good-idea/>

The figure below illustrates that the concept of public interest is contestable.

**Figure 7: Public interest: in the eye of the beholder?**



Source: J Coopes<sup>141</sup>

## Debate in the context of the Convergence Review

### Uncertainty and subjectivity

Release of the Convergence Review's Interim Report revived debate about media public interest tests by suggesting that a test 'should be developed to ensure that diversity considerations are taken into account where Content Services Enterprises with significant influence at a national level are involved in mergers or acquisitions'.<sup>142</sup>

Bernard Keene from the online journal *Crikey* was one of those who criticised this proposal. Keene claimed many people were attracted to the idea of a public interest test because they could imagine themselves 'in the position of the decision maker, airily waving the arguments of a Rupert Murdoch or a James Packer away and declaring "sorry, your acquisition of this or that company isn't in the public interest"'.<sup>143</sup> Keene declared however, that there was virtue in a public interest test; it would enable a case-by-case consideration of mergers and assessment of cases that might fit the rules, but were problematic in other ways.<sup>144</sup> This view appeared to agree with that of Convergence Review

141. Cartoon by J Coopes in R Ackland, 'Just whose interest is it anyway?' in J Este (ed), *Kicking at the cornerstone of democracy*, op. cit.

142. Convergence Review Committee, *Interim Report*, Department of Broadband, Communications and the Digital Economy, 2011, viewed 23 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0007/143836/Convergence-Review-Interim-Report-web.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0007/143836/Convergence-Review-Interim-Report-web.pdf)

143. B Keene, 'Convergence Review: diversity and a public interest test', *Crikey*, 21 September 2011, viewed 23 July 2012, <http://www.crikey.com.au/2011/09/21/convergence-review-diversity-and-a-public-interest-test>

144. Ibid.

Chair, Glen Boreham, who was reported as seeing the merits of a public interest test to lie in its ability to provide any media regulator with greater flexibility to deal with changing media circumstances.<sup>145</sup>

But Keene's public interest compliment was backhanded. The potential for case-by-case flexibility was not the virtue it was intended to be; flexibility was in reality a fundamental flaw. To Keene, flexibility was akin to subjectivity—even if a public interest test were to be carefully drafted to relate to a limited number of criteria, ultimately it relied on the individual judgment of a decision maker, whether that decision maker was a bureaucrat, politician, or judge or even a panel of people.<sup>146</sup>

Keene appeared to dismiss the uncertainty a public interest test brought for business. He was of the opinion (as are many others) that media proprietors can look after themselves in terms of dealing with the uncertainties attendant on dealing with the business world. Additionally, Keene noted, the uncertainty in dealing with the current system in which the ACCC makes decisions about mergers.

While business would cope with a public interest test, Keene was not so certain about the outcomes 'for the rest of us'. We should be concerned he cautioned, about:

... whether a merger would be waved through by a tame regulator, or a prohibition would be overturned by the courts on a technicality. In any event, how many people would be satisfied by any public interest decision-maker who didn't block every major merger?<sup>147</sup>

Even the mention of a public interest test infuriated media representative bodies. ASTRA saw no need or justification for a test as it would bring significant regulatory uncertainty to the industry; it would be difficult to administer and most likely subject to extended litigation. Further, not only would an objective measure of diversity be difficult to devise, any public interest test per se would potentially be subject to political interference.<sup>148</sup>

Commercial Radio Australia derided the concept through a series of questions: what criteria would apply to determine if a media merger is in the public interest? How would public interest considerations be balanced against ACCC competition considerations and how will any conflicts arising from these considerations be resolved?<sup>149</sup> Free TV claimed that a convergence media environment would undermine any test model because it would increasingly complicate determinations.<sup>150</sup>

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145. D Crowe, 'Radical plan to remake media laws', *The Australian Financial Review*, 15 December 2011, p. 1, viewed 23 July 2012,

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F1295706%22>

146. Keene, 'Diversity and a public interest test', op. cit.

147. Ibid.

148. ASTRA submission to Convergence Review Interim Report, February 2012, viewed 23 July 2012,

[http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0020/146270/Australian\\_Subscription\\_Television\\_and\\_Radio\\_Association.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0020/146270/Australian_Subscription_Television_and_Radio_Association.pdf)

149. Commercial Radio Australia submission to Convergence Review Interim Report, February 2012, viewed 23 July 2012,

[http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0004/146272/Commercial\\_Radio\\_Australia.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0004/146272/Commercial_Radio_Australia.pdf)

150. Free TV submission to Convergence Review Interim Report, February 2012,

[http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0008/146663/Free\\_TV.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0008/146663/Free_TV.pdf)

In its condemnation of public interest tests per se, News Limited stated: ‘the public interest is in the eye of the beholder’, it is such ‘a vague and subjective concept that it can mean whatever regulatory staff want it to mean’.<sup>151</sup> In addition, it would fail:

... to meet the need for certainty that flows from society’s endorsement of the rule of law. Acceptance of our laws is based on knowing what our laws are. This would not meet this test and would fail any notion of consistency. The whole approach seems to be based on an assumption that the public interest is known, shared equally in knowledge across the political, regulatory and judicial landscape and that therefore no detail is required. This is, to put it politely, naive in the extreme and the promotion of such unformed views is disappointing. An additional layer of regulation in the media sector and the introduction of a new regulator to administer new laws will create unnecessary duplication and uncertainty. Beyond that, there is clearly a serious risk that a “public interest test” would be corrupted by highly political decision making – in fact that is almost inevitability as an outcome with a high degree of politicisation reminiscent of less democratic societies.<sup>152</sup>

Outside the industry, perhaps surprisingly, groups such as the Friends of the ABC were also suspicious of the test because interpretation of what constitutes the public interest may rest with a bureaucrat. Moreover, there were likely to be problems arising from what the Friends deduced would be an overwhelming imbalance in favour of media bodies in terms of resources available to present cases to any public interest regulator:

In the face of the influence that powerful vested commercial interests have with governments of some political persuasions, and the extraordinary pressure they have already demonstrated they can exert on all governments, no government or regulators (which, after all, are appointed and funded by government) can be relied upon alone to make decisions in the public interest in each instance of media ownership change.<sup>153</sup>

Another dimension of the case against public interest tests is derived from the general argument that there is no ‘public’ interest other than that which can be said to be the accumulation of the interests of individuals and special interest groups. From this perspective there is in fact no common ‘good’ or goods that need to be considered, because there is nothing which is good for the whole community. There are only various goods which, in turn, advantage various groups. In defending this view in an American context, academic Adam Thierer accuses policymakers of promoting fairy tale rhetoric in attempting to direct the content or character of the media towards some obscure, non-existent noble end that they label the public interest.<sup>154</sup>

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151. News Limited submission to Convergence Review Interim Report, February 2012, viewed 23 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0006/146283/News\\_Limited.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0006/146283/News_Limited.pdf)

152. Ibid.

153. Friends of the ABC submission to the Convergence Review Interim Report, February 2012, viewed 23 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0020/146306/Friends\\_of\\_the\\_ABC.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0020/146306/Friends_of_the_ABC.pdf)

154. Quoted in R Jolly, *Media ownership deregulation in the United States and Australia: in the public interest?* Research paper no.1, 2007–08, Parliamentary Library, Canberra, 2007, viewed 23 July 2012, [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/KA806/upload\\_binary/ka8o64.pdf;fileType=application%2Fpdf#search=%22library/prspub/KA806%22](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/KA806/upload_binary/ka8o64.pdf;fileType=application%2Fpdf#search=%22library/prspub/KA806%22)

However, even if this view is taken, it is possible to argue in favour of instituting a media-specific public interest test, and indeed media diversity rules, if clear cut parameters are put in place which are calculated to protect and reflect the interests of those various individuals and various groups—and not just one section of individuals or one group.

There may be an element of subjectivity in decisions under such a public interest test, as inevitably those who make decisions about the rules contained within the test will be members of groups or have individual preferences, ideologies and specific interests. At the same time, it could be argued that it would be naive to suggest that there is not subjectivity involved in the media's self regulation of its practices.

For a public interest test to avoid blatant examples of subjectivity it would not be unreasonable for a subcommittee of the main regulatory body on public interest consideration to consist of members of the public, academia, business, government, the legal profession and economic bodies. It would then reflect the various interests critics such as Adam Thierer note, and in so doing more likely reflect the public interest.

### **Workability**

It is often argued against media public interest tests that they just do not work. The British media public interest test has been cited by the industry as a prime example. See box 7 below for a summary of the British test.

#### **Box 7: Background: British media public interest test**

The British media public interest test was introduced by the (United Kingdom) Communications Act in 2003.<sup>155</sup> The test replaced specific media merger rules which had been in place to protect plurality in media ownership.<sup>156</sup>

The test gives the British Secretary of State for Business, Innovation and Skills the discretion to intervene in media mergers where he/she considers there may be 'public interest' considerations at stake. These considerations include: to protect the availability of a wide range of high quality broadcasting and news provision and to ensure that those with control of media enterprises have a genuine commitment in relation to broadcasting to standards set out in the Communications Act.

The test is intended to provide a safeguard to prevent undue concentration of ownership in broadcasting and newspaper enterprises, and in the case of newspaper mergers, to prevent a merger which may raise concerns about editorial interference in the accurate presentation of news.

The test also allows the Secretary of State to take into account factors other than competition issues which may be relevant to mergers, such as, where the merger may result in a lack of impartiality from the merged enterprise or restraint of free expression of opinion, which may act against the public interest.

155. Sections 375–380, *Communications Act 2003 (UK)*, viewed 31 July 2012, <http://www.legislation.gov.uk/ukpga/2003/21/contents>

156. Ofcom, *Ofcom guidance for the public interest test for media mergers*, viewed 31 July 2012, [http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/pi\\_test.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/pi_test.pdf) for more detail.

The British public interest test has only been applied on two occasions—in relation to the BSkyB/ITV share acquisition in November 2006 and the 2010–2011 aborted News Corporation bid for BSkyB.<sup>157</sup> An investigation of the latter bid by British media regulator Ofcom found:

.. it reasonable to believe that the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences.<sup>158</sup>

News Limited (News) argued to the Convergence Review that the British test provides a clear example of the ambiguity of public interest tests, as there is no indication of what is meant by certain terms in the legislation. News cited the terms ‘high quality’ and ‘genuine commitment’ as examples. In terms of the concept of there needing to be ‘sufficient plurality’ of media to serve the public interest, it was scathing. News claimed that the provision was controversial and despite considerable debate and legal consideration ‘its meaning remains far from certain and indeterminate’. News Limited’s criticism of Ofcom’s decision in the 2011 case noted above is that in assessing plurality the regulator failed to take into consideration ‘how the rise of social media has broadened the range of news sources used by individual consumers’.<sup>159</sup>

News Limited also cites the Centre for Freedom of the Media’s four concerns with the British test:

- it fails to address endogenous growth and provide for ongoing monitoring
- it fails to establish a coherent approach across all media sectors
- it fails to establish a clear methodology leading to consequent uncertainty, and
- it contains procedural failures of regulatory expertise and political influence.<sup>160</sup>

News Limited added further that some believed too much power was invested in the Secretary of State under the British test.<sup>161</sup> In addition, Ofcom had too much discretion in relation to the assessment of sufficient plurality. It noted that ‘in reaction to the lack of clarity’ in the test, Ofcom had agreed to conduct an inquiry into public interest matters.<sup>162</sup>

In reply to such criticism it could be argued that the public interest test in Britain may not be perfect, but it prevented the merger of News Corporation and BSkyB which would have reduced the number of media voices in Britain. It could be argued further that this outcome indicates that the flexibility of the British test allowed policy makers and administrators to deal with factors which can emerge

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157. For detail of the first incidence see the Ofcom website, viewed 23 July 2012,

<http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/policies/business-law/competition-matters/mergers/mergers-with-a-public-interest/broadcasting-and-cross-media-mergers>

158. Ofcom, *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*, 31 December 2012, viewed 23 July 2012,

<http://stakeholders.ofcom.org.uk/binaries/consultations/public-interest-test-nov2010/statement/public-interest-test-report.pdf>

159. P Kirwan, *Why the government’s examination of the News Corp BskyB bid is a mess*, Wired UK, 28 January 2011, cited in News Limited submission, op. cit.

160. Freedom of the Media, *Is the UK “media plurality test” fit for purpose*, cited in News Limited submission, op. cit.

161. Guardian Media Group Ofcom plurality submission, cited in News Limited submission, op. cit.

162. D Sabbagh, ‘Jeremy Hunt to ask Ofcom to measure cross-media ownership in UK’, *The Guardian*, 11 September 2011, viewed 23 July 2012, <http://www.guardian.co.uk/media/2011/sep/11/jeremy-hunt-ofcom-media-ownership>

almost instantaneously, and which may have a significant impact on media plurality. An assessment by the Communications Law Centre (CLC) adopts this perspective:

Rules-based regulation is likely to be ill suited to the converging media environment. Media ownership regulation is, at its heart, a public interest issue. The public interest should be the primary criterion for regulation. The public interest test should go beyond an assessment of anti-competitive behaviour, taking into account all likely impacts of ownership on access to diversity of opinion.<sup>163</sup>

## Public interest and ‘fit and proper’ persons

The idea of a fit and proper person criterion as integral in devising a public interest test has not been paramount in the overall discussion of this issue. However, as Bernard Keene has pointed out, there is a correlation between the two concepts ‘for it presumably is not in the public interest that someone not fit to hold a broadcasting licence holds one’.<sup>164</sup> Having made this point, Keene is still not convinced of its validity—he rejects the benefit of assessing the fitness of licensees and owners for exactly the same reason that he is disparaging of a public interest test; that is, the assessment of who is fit and proper to own, control or run a media enterprise will inevitably be subjective.<sup>165</sup>

In the British case, Ofcom's assessment of whether a person is ‘fit and proper’ depends generally on whether the regulator thinks that a person is willing to, and capable of complying with British broadcasting regulation. In the case of Rupert Murdoch for example, in 2011 a panel of experts for the *Guardian* newspaper expressed various opinions.<sup>166</sup> One declared that because there is no definition in the relevant British Act, Ofcom could not declare Murdoch unfit. To refuse a licence to Murdoch may therefore be seen as political interference.<sup>167</sup> Another expert observed that within the corporate world there are a number of frameworks and initiatives which set out acceptable minimum good practice standards for business; this source argued that these should be used to craft a detailed fit and proper test.<sup>168</sup> (See also examples of fit and proper standards that apply in the Australian context in Box 8 in the following section).

Ofcom has periodically published information on how it interprets the fit and proper person requirement. However, it has not produced formal published guidelines. It also does not publish rejected applications for broadcast licences, and there has only been one occasion when an existing broadcast licence was revoked. This was in November 2010, when Ofcom ruled that Bang Media

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163. CLC submission to the Convergence Review Discussion papers, [http://www.dbcde.gov.au/data/assets/pdf\\_file/0011/143003/University\\_of\\_Technology\\_Sydney\\_UTS\\_-\\_Discussion\\_Papers.pdf](http://www.dbcde.gov.au/data/assets/pdf_file/0011/143003/University_of_Technology_Sydney_UTS_-_Discussion_Papers.pdf)

164. Keene, ‘Diversity and a public interest test’, op. cit.

165. Ibid.

166. R Choueka, ‘BSkyB bid: What does Ofcom's 'fit and proper' test mean? The panel's verdict’, *The Guardian*, 7 July 2011, <http://www.guardian.co.uk/law/2011/jul/07/bskyb-bid-ofcom-fit-and-proper>

167. Ibid.

168. Ibid.

(operating adult chat channels) was not fit and proper to hold a licence. In this case there had been serious and repeated breaches of licence terms.<sup>169</sup>

### Australian context

In a dated, but still relevant article, academic Lesley Hitchens concluded that past interpretation of the British Broadcasting Act's fit and proper person requirements typified an approach which relied upon a broad and unstructured grant of discretionary power in order to give the widest possible scope for its exercise.<sup>170</sup> Hitchens argued that the Australian approach in law has adopted a similar stance.

Under the *Broadcasting Act 1942* (now replaced by the BSA) the Australian Broadcasting Tribunal (ABT) was required to take into account specified criteria when exercising its licensing power and these criteria included that applicants must be fit and proper persons to hold broadcasting licences. The legislation did not define fit and proper person, but the ABT issued policy statements listing principles it considered in making decisions about what constituted fit and proper. These included trustworthiness—that a person could be trusted to comply with the requirements of broadcasting legislation and licence conditions and to provide the best possible service to the public.<sup>171</sup> These statements noted that principles other than those cited may be relevant to decisions in certain circumstances, and that those circumstances could not be predicted.<sup>172</sup>

Hitchens assessed this type of approach as appropriate in the broadcasting context. She reasoned this was because rather than detailing a non-exhaustive set of general principles or indicators based on traditional interpretations of fit and proper, it encompassed matters specific to broadcasting.

Consistent with the concept that the grant of a broadcasting licence is the grant of a privileged access to a limited public resource, the [ABT] policy statement said: standards of conduct and responsibility to the public required of licensees are different to those expected in many other areas of business, where entry is less restricted and public impact not so great. Above all, a licensee must be a person who can be trusted.<sup>173</sup>

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169. J Lewis and B Roe, 'Interpretation of the "fit and proper person" test for broadcast licensing', *International Forum for Responsible Media*, 22 September 2011, viewed 23 July 2012, <http://inform.wordpress.com/2011/09/22/interpretation-of-the-fit-and-proper-person-test-for-broadcast-licensing-jaron-lewis-and-ben-roe/>

170. L Hitchens, 'Fit to broadcast? Fit to decide?' *Media Law and Practice*, vol. 16, no. 3, 1995, p. 115.

171. Australian Broadcasting Tribunal (ABT), 'Fit and proper person', POS 09, 20 December 1984, reissued 20 December 1990.

172. The High Court in *Australian Broadcasting Tribunal v Bond and others* [1990] HCA 33; (1990) 170 CLR 321, also addressed the issue of fit and proper person in deciding whether to overturn an ABT finding that Alan Bond was no longer a 'fit and proper person' to hold a licence under the *Broadcasting Act 1942*. Chief Justice Mason in giving his opinion observed that a licensee who lacks proper appreciation of the responsibilities attached to the privileges of a broadcasting licence, or who fails to discharge those responsibilities, is not, or may be judged not to be, a fit and proper person, viewed 31 July 2012, <http://www.austlii.edu.au/au/cases/cth/HCA/1990/33.html>

173. Hitchens, 'Fit to broadcast', op. cit.

The ABT's expectation of trustworthiness was comprehensive and wide-ranging as it involved personal and business propriety, fair dealing and candour and awareness of the licence as a public trust.

In all inquiries into the fitness of licensees the ABT was required to compile a report, which was made public, setting out the findings of an investigation, and importantly, the reasons for those findings. This satisfied Hitchens that the discretionary power involved in making fit and proper decisions was 'exercised within a consciously public arena'.<sup>174</sup>

Hitchens concluded therefore:

Given the importance of broadcasting for a democratic society, the commercial value of broadcasting licences and the corporate complexities of the holders of broadcasting licences, the existence of a test of fitness and propriety is a vital tool for ensuring that the freedom to broadcast is not abused. ... What is necessary is a structured discretion which sets out principles but at the same time leaves the regulatory body with discretion. Structuring the discretion would make the tool more useful; not to confirm its scope but to enable its potential to be realised.<sup>175</sup>

In its submission to the Review Committee international advocacy group, AVAAZ, saw scope to re-introduce a 'fit and proper person' similar to the one administered by the ABT.

It is appropriate that the public should expect that the character and conduct of broadcast media licensees be regularly appraised. Avaaz believes that the 'fit and proper person' test, applied to persons acquiring media assets at the time of the acquisition and on an ongoing basis in respect of broadcasters, such as pay TV broadcasters, provides an appropriate way to ensure that concerned parties do not have a poor track record of complying with their legal obligations, or otherwise have previously engaged in unacceptable practices (e.g. those that involve criminal activity or other forms of illegality).

Without such a test, media owners that regularly engage in such unacceptable practices, whether through their domestic media outlets or overseas ones, would effectively be unconstrained in their future actions. This is not an optimal situation for democratic societies.<sup>176</sup>

### Box 8: Australian context: various 'fit and proper' requirements

#### Broadcasting licence

The *Broadcasting Services Act 1992* (BSA) does not require that a person is 'fit and proper' in order for a broadcasting licence to be allocated. Section 41 of the BSA requires, however, that a person (or corporation—see information below) is 'suitable'.

The test of 'suitability' is whether the Australian Communications and Media Authority (ACMA) considers that the allocation of a licence may lead to a significant risk of:

174. Ibid.

175. Ibid.

176. AVAAZ submission to Convergence Review media diversity, competition and market structure paper, 10 November 2011, viewed 31 July 2012, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0018/143235/Avaaz.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0018/143235/Avaaz.pdf)

- an offence against the BSA being committed
- a breach of a civil penalty provision occurring, or
- a breach of the conditions of the licence occurring.

Under subsection 41(3) of the BSA, ACMA is to take into account the following matters when assessing that risk:

- the business record of the company
- the company's record in situations requiring trust and candour
- the business record of each person who is, or would be, if a licence were allocated to the applicant, in a position to control the licence
- the record in situations requiring trust and candour of each such person
- whether the company, or a person who is to be allocated a licence has been convicted of an offence against the BSA, and
- whether a civil penalty order has been made against either the company or a person.

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### **Corporations Act**

Part 2D.6 of the *Corporations Act 2001* details circumstances under which a person will be automatically disqualified from managing corporations. These include:

- where the person has a conviction or indictment of:
  - an offence in relation to decisions that affect the business of a corporation or its financial standing
  - an offence involving a contravention of the Corporations Act punishable by imprisonment for 12 months or more
  - an offence involving dishonesty punishable by more than three months imprisonment
- conviction for an offence against the law of a foreign country punishable by more than 12 months imprisonment, and
- being an undischarged bankrupt.

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### **Australian Securities and Investments Commission**

The Australian Securities and Investments Commission states that to be a fit and proper person to engage in credit activities for the purposes of the *National Consumer Credit Protection Act 2009* means that the person:

- is competent to operate a credit business (as demonstrated by the person's knowledge, skills and experience)
- has the attributes of good character, diligence, honesty, integrity and judgement
- is not disqualified by law from performing his/her role in a credit business, and
- either has no conflict of interest in performing his/her role in a credit business, or any conflict that exists will not create a material risk that the person will fail to perform his/her role properly in a credit business.

## Assessing the current public interest proposal

In assessing the Convergence Review's public interest test proposal journalist Richard Ackland took another tack in criticising the notion of public interest, calling it indefinable; a phrase which 'competes with itself in legislation.'<sup>177</sup> Ackland cited the *Court Suppression and Non-Publication Orders Act 2010* (NSW) under which a court can suppress information if the public interest served in doing so is considered to outweigh the public interest in open justice.<sup>178</sup> Similarly, in the legislation that is supposed to give journalists protection from revealing their sources in court, the public interest in preserving confidentiality can be overborne by the public interest in disclosure.<sup>179</sup> The BSA also gives the relevant Minister power to take control over material to be broadcast if it is deemed to be in the public interest.<sup>180</sup> In Ackland's view this proves the public interest to be 'a popular rubric because it artfully allows plenty of imprecision and circularity in its application' and makes a public interest test acceptable as long as no one attempts to define it precisely.<sup>181</sup>

*The Australian Financial Review* (AFR) remarked that by suggesting that Australia adopt a British-style public interest test, the Convergence Review was opening the door to political control of the media, and to restrictions on the freedom of speech that is a foundation of a robust democracy. The AFR continued:

We have only to look at what has happened in Australia to realise that these concerns are substantial. A minority Prime Minister has used the phone hacking scandal in the UK as an excuse to hold a media inquiry run by a politically naive former judge and various left-liberal academics. But the inquiry has been rigged from the start to threaten legislation in retaliation for the media's vigorous but legitimate coverage of the government's failings.

The Convergence Review takes the UK efforts a step further by recommending calling all media companies 'content service enterprises' and subjecting them to UK-style tests when it comes to takeovers, although the 'suitability' and 'public interest' tests in the UK apply to broadcast media, not newspapers. But to restrict potential media owners to those judged to be in the public interest by some arbitrary panel would limit the pool of capital available for media investment that would help neither public debate nor news gathering.

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177. R Ackland, 'The obscure world of public interest', *The Sydney Morning Herald*, 29 June 2012, p. 13, viewed 17 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1744260/upload\\_binary/1744260.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo.parlInfo/download/media/pressclp/1744260/upload_binary/1744260.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)
178. *Court Suppression and Non-Publication Orders Act 2010* (NSW), paragraph 8(1)(e), 'A court may make a suppression order or non-publication order on one or more of the following grounds ... it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice', viewed 17 July 2012, [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/csanoa2010493/s8.htm](http://www.austlii.edu.au/au/legis/nsw/consol_act/csanoa2010493/s8.htm)
179. *Evidence Act 1995*, subsection 126H(2), 'The court may, on the application of a party, order that ... the public interest in the disclosure of evidence of the identity of the informant outweighs: (a) any likely adverse effect of the disclosure on the informant or any other person; and (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts'.
180. *Broadcasting Services Act 1992*, Schedule 2.
181. Ackland, 'Obscure world', op. cit.

Not even English lawyers know what constitutes public interest or what makes a person fit and proper. These concepts are whatever the regulator, Ofcom, thinks they should be, and that is a recipe for political interference.<sup>182</sup>

## Convergence comment

### Less frenzied, but similar rejection

Following the release of the Convergence Review final report renowned journalist Laurie Oakes was of the opinion that the Review Committee had produced ‘a less provocative blueprint for regulation’ than had been advocated by the Finkelstein review. The Convergence Review recommendations had been more favourably received because they were couched in reassuring terms and because they recommended an industry led body to oversee standards rather than the ‘dreaded’ alternative favoured by Finkelstein. However, Oakes warned, while there was less government intervention in the Convergence Review proposals, it was there regardless.<sup>183</sup>

Chris Berg was of a similar view in his piece for The Drum opinion site on the ABC. Berg described the Review as a ‘watered-down’ version of the Finkelstein Review and ‘Finkelstein lite [sic]’. Indeed, the authors of the Convergence Review had gone ‘to a lot of effort to make their report subtle, not-too-obvious, politically-feasible and to avoid obviously upsetting the status quo’.<sup>184</sup>

Opposition communications spokesman Malcolm Turnbull was less generous, calling the proposals ‘a recipe for more intrusive regulation of speech’.<sup>185</sup> In Turnbull’s view, the Review’s recommendations, if adopted, could make ownership subject to political pressure through ‘an amorphous public interest test which would in effect mean the politicisation of decisions involving

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182. ‘Media control by political stealth’ Editorial, *The Australian Financial Review*, 3 May 2012, p. 70, viewed 23 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1606390/upload\\_binary/1606390.pdf;fileType=application%2Fpdf#search=%22convergence%20%20public%20interest%22](http://parlinfo.parlInfo/download/media/pressclp/1606390/upload_binary/1606390.pdf;fileType=application%2Fpdf#search=%22convergence%20%20public%20interest%22)

183. L Oakes, ‘Toned-down talk of regulation still has odour of intervention’, *The Australian*, 7 May 2012, p. 26, viewed 18 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1617102/upload\\_binary/1617102.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo.parlInfo/download/media/pressclp/1617102/upload_binary/1617102.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)

184. C Berg, ‘Convergence Review is clever, subtle ... and worrying’, *The Drum*, ABC website, 1 May 2012, viewed 18 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1610273/upload\\_binary/1610273.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo.parlInfo/download/media/pressclp/1610273/upload_binary/1610273.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)

185. J Lee, B Hall and K Simpson, ‘Plan for new media watchdog, more local content: Industry would bear the costs’, *The Age*, 1 May 2012, p. 3, viewed 18 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1601734/upload\\_binary/1601734.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo.parlInfo/download/media/pressclp/1601734/upload_binary/1601734.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)

changes of control'.<sup>186</sup> Turnbull later confirmed the Coalition stance; it would oppose the public interest test and the Finkelstein news media council and restore the status quo if elected.<sup>187</sup>

Sections of the industry, particularly television broadcasters, were predictably critical of the report for a variety of reasons. Free TV Australia, for example, claimed increased Australian programming requirements recommended by the Review would be a recipe for disaster for free-to-air television in light of increasing costs for content and decreasing revenue.<sup>188</sup> Foxtel accused the Review of ignoring market reality and increasing regulatory burdens for industry.<sup>189</sup> News Limited Chief Executive Kim Williams, simply decried the 'heavy-handed' regulatory approach of the proposals.<sup>190</sup>

The Greens media spokesperson, Scott Ludlam, however, welcomed the report's focus on the 'harm caused by concentration of media ownership'.<sup>191</sup> Later, retiring Greens leader Senator Bob Brown expressed concern that the Government would do nothing in response to both media reviews. Senator Brown said the Greens had come to expect the major parties would 'duck controversy when it came to challenging media proprietors'.<sup>192</sup>

Lawyer Peter Leonard commentated on the widespread negative commentary:

Any sensible reading of the Report should conclude that the overall scope of regulation as recommended by the Committee would be significantly wound back and focussed. Additionally, the Report's recommendations are not partisan: many, if not all, of the recommendations could be endorsed by any or all of the political parties in Australia. This is not a 'get the media' report.<sup>193</sup>

Leonard acknowledged that despite his assessment, the Review's recommendations were 'justly the subject of considerable controversy'; they were 'radicalism' by various means.<sup>194</sup> First, if fully implemented, they would affect all aspects of the media, changing regulatory institutions and processes. Second, they would institute a new regulator under which stakeholders would become subject to 'a public and structured policy making process run by an independent regulator exercising broad policy discretions outside of the political process'. Third, the Review represented a 'complete

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186. B Holgate, 'Networks slam new media rules', *The Australian Financial Review*, 1 May 2012, p.1, viewed 18 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1601859/upload\\_binary/1601859.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo.parlInfo/download/media/pressclp/1601859/upload_binary/1601859.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)

187. D Crowe, 'We'll axe media changes: Turnbull', *The Australian*, 29 June 2012, p. 3, viewed 18 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1744338/upload\\_binary/1744338.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo.parlInfo/download/media/pressclp/1744338/upload_binary/1744338.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)

188. Lee, Hall and Simpson, 'Plan for new media watchdog', op. cit.

189. Holgate, 'Networks slam new media rules', op. cit.

190. Lee, Hall and Simpson, 'Plan for new media watchdog', op. cit.

191. Holgate, 'Networks slam new media rules', op. cit.

192. K Murphy, 'Brown departs politics anxious that government will do nothing on media rules', *The Age*, 6 June 2012, p. 12, viewed 18 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1691514/upload\\_binary/1691514.pdf;fileType=application%2Fpdf#search=%22finkelstein%22](http://parlinfo.parlInfo/download/media/pressclp/1691514/upload_binary/1691514.pdf;fileType=application%2Fpdf#search=%22finkelstein%22)

193. P Leonard, 'Making converged regulation possible', *Communications Law Bulletin*, vol. 31, no. 2, June 2012, viewed 13 August 2012, [http://parlinfo.parlInfo/download/library/jrnart/1784334/upload\\_binary/1784334.pdf;fileType=application%2Fpdf#search=%22making%20converged%20regulation%20possible%22](http://parlinfo.parlInfo/download/library/jrnart/1784334/upload_binary/1784334.pdf;fileType=application%2Fpdf#search=%22making%20converged%20regulation%20possible%22)

194. Ibid.

rewrite and simplification of content regulation' and an attempt to create regulatory parity across delivery platforms. In Leonard's opinion seeking parity led to the Review's 'most heretical policy conclusion' which was:

... the focus of regulation should be narrowed to focus principally onto 'significant' 'content service enterprises' and away from smaller players, even where small CSEs provide substantially similar and substitutable services to those of the large CSEs.<sup>195</sup>

Finally, the Review's recommendations that a new communications regulator should have powers to deal with content-related competition issues ran contrary to the ruling orthodoxy that competition centred powers should be located with the ACCC.

### **Added complications**

On 18 June 2012 Fairfax Media announced fundamental changes to the company. These were intended to focus on positioning the metropolitan wing of the company to address structural movements and provide flexibility for the business to deal with a digital-only model 'if that is what is required in the future' and to strengthen the company 'balance sheet'.<sup>196</sup> The changes in reality amounted to closure of printing plants, the shift of prestigious titles to tabloid format and the shedding of 1900 jobs over three years. In addition to this announcement, a week later three of the company's senior editors resigned simultaneously.

Two days after the Fairfax proclamation News Limited also gave notice of a restructure intended to 'reinvent and transform' the company. The restructure involved an offer to purchase the Internet publishing company, Australian Independent Business Media, publisher of the Business Spectator website and Eureka Report and pay television holding company Consolidated Media Holdings. It was calculated that the restructuring plan would result in a number of positions being made redundant.<sup>197</sup>

While the angst provoked by the media reviews had not gone away, these announcements, particularly the Fairfax announcement, rekindled it, not least for the reasons noted by academic Rodney Tiffin:

Fairfax matters, first, because in terms of contributing to Australian democracy it is second only to the ABC among media organisations. It publishes three of the country's four quality newspapers, and those newspapers do more than any other media in terms of reportorial effort and in shaping the terms of debate.

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195. Ibid.

196. Fairfax Media, *Fairfax of the future*, media release, 18 June 2012, viewed 19 July 2012, <http://www.fxj.com.au/shareholders/170612FairfaxoftheFuture.pdf>

197. D Kitney and S Jackson, 'News Limited trims divisions to five in restructure aimed at print and digital future', *The Australian*, online version, 20 June 2012, viewed 19 July 2012, <http://www.theaustralian.com.au/media/news-limited-trims-divisions-to-five-in-restructure-aimed-at-print-and-digital-future/story-e6frg996-1226402831203>

Fairfax matters, second, because it combines a large concentration of journalistic talent with a sufficient degree of editorial courage and vision to allow that talent, most of the time, to flower. Such centres of excellence are difficult to build and easy to disperse.

...

Fairfax matters because newspapers matter. Many people are optimistic that the internet with its profusion of sites, its range of information and its pluralism of opinion will fill the gap. The proposition that the democratic functions of newspapers at their best – quality journalism with political impact – can thrive on the web remains unproven. The quasi-religious fervour about casting off the extraneous costs of printing and distribution to get to the pure essence of journalistic content, of allowing a hundred flowers to bloom, certainly has some persuasive force. But when edited well, and even when edited in a mediocre but honest way, newspapers still offer the most intense independent surveillance of government and the political environment.<sup>198</sup>

The Fairfax restructure issue was played out in the midst of a related, ongoing conflict between the company and shareholder mining magnate, Gina Rinehart. Rinehart sought two seats on the Fairfax Board, after raising her shareholding in the company in February 2012. She struck an obstacle however when the Board declined to offer the seats unless Rinehart agreed to sign the company's charter of editorial independence; that is, unless Rinehart agreed not to interfere directly in editorial matters.<sup>199</sup> Rinehart refused and reportedly demanded the deputy chairmanship, the unrestricted right to hire and fire editors, and for her alternate director appointments not to be vetted by the board. At least one institutional investor assessed the possible realisation of Rinehart's demands as setting 'a dangerous precedent'.<sup>200</sup>

Throughout June and July 2012 heated exchanges occurred between Rinehart and Board Chair Roger Corbett. Rinehart demanded that Corbett set performance targets to increase Fairfax share prices and reverse a decline in circulation of its mastheads. Fairfax called on Rinehart to launch a takeover bid for the company if she wanted control. In the meantime, a conservative activist group, led by Liberal Senator Cory Bernardi, picketed the head office of Fairfax calling for Rinehart to be appointed to the Board.<sup>201</sup>

After Rinehart sold some of her shares as a result of an insurance provision, there was some speculation that her bid for control of Fairfax was over. But the appointment of her ally, fast food

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198. R Tiffin, 'Why Fairfax matters', *Inside Story*, 27 June 2012, viewed 19 July 2012, <http://inside.org.au/why-fairfax-matters/>

199. K Simpson, 'Fairfax holds line against Rinehart', *The Canberra Times*, 28 June 2012, p. 4, viewed 19 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1741237/upload\\_binary/1741237.pdf;fileType=application%2Fpdf#search=%22gina%20Rinehart%20%20%20Fairfax%22](http://parlinfo.parlInfo/download/media/pressclp/1741237/upload_binary/1741237.pdf;fileType=application%2Fpdf#search=%22gina%20Rinehart%20%20%20Fairfax%22)

200. D Kitney and D Crowe, 'Rinehart rejection: board had no choice', *The Australian*, 28 June 2012, p. 6, viewed 19 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1742138/upload\\_binary/1742138.pdf;fileType=application%2Fpdf#search=%22gina%20Rinehart%20%20%20Fairfax%22](http://parlinfo.parlInfo/download/media/pressclp/1742138/upload_binary/1742138.pdf;fileType=application%2Fpdf#search=%22gina%20Rinehart%20%20%20Fairfax%22)

201. D Welch, 'Liberal senator founded group campaigning for Rinehart influence', *The Sydney Morning Herald*, 18 July 2012, p.3, viewed 19 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1785801/upload\\_binary/1785801.pdf;fileType=application%2Fpdf#search=%22gina%20Rinehart%20%20%20Fairfax%22](http://parlinfo.parlInfo/download/media/pressclp/1785801/upload_binary/1785801.pdf;fileType=application%2Fpdf#search=%22gina%20Rinehart%20%20%20Fairfax%22)

tycoon Jack Cowin, to the Fairfax Board on 19 July 2012 suggested that she had perhaps only changed tack.<sup>202</sup> One assessment of Rinehart's strategy can be found in Box 9 below.

### Box 9: 'Mogul with a megaphone'

An article by the Media Entertainment and Arts Alliance (MEAA) cites mining magnate Lang Hancock's 1979 book, *Wake Up Australia*, in which he wrote that the power of governments 'could be broken by obtaining control of the media and then educating the public'.<sup>203</sup> The MEAA saw Hancock's daughter, Gina Rinehart, as taking her father at his word.<sup>204</sup> Therefore, the MEAA argued: *... Rinehart has built up a powerful portfolio of media shareholdings. She has a significant voice in the affairs of Network Ten, where her ten per cent of shares has given her a board seat, and a 13 per cent shareholding in Fairfax, where she covets a board seat.*

*It has been speculated that Rinehart's influence at Network Ten extended as far as securing the appointment of Andrew Bolt, an outspoken ideologue and climate change sceptic, to run his own talk show.*<sup>205</sup>

The MEAA continued:

*There is a great deal of concern at the possibility of Rinehart extending her holding in Fairfax Media and seeking to have a greater influence in the day-to-day affairs of the company's newspapers.*<sup>206</sup>

*Rinehart launched court action in March 2012 to try to force The West Australian newspaper and its senior journalist Steve Pennells to reveal confidential sources behind stories embarrassing to her.*<sup>207</sup>

*The MEAA concludes that all these instances 'must call into question her commitment to free speech and the public's right to know'.*<sup>208</sup>

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202. Cowin is the founder and chair of Consolidated Foods, which owns Hungry Jack's. Source for this suggestion B Holgate, 'Cowin gets a big tick', *The Australian Financial Review*, 21 July p. 18, viewed 24 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1790914/upload\\_binary/1790914.pdf;fileType=application%2Fpdf#search=%22rinehart%20cowin%22](http://parlinfo.parlInfo/download/media/pressclp/1790914/upload_binary/1790914.pdf;fileType=application%2Fpdf#search=%22rinehart%20cowin%22)
203. F Petersen, 'Gina Rinehart, Australian billionaire, seeks bigger stake in Fairfax Media', *Global Post*, 1 February 1, 2012 cited in 'Media ownership', in J Este (ed), *Kicking at the cornerstone of democracy*, op. cit.
204. Others have expressed similar opinions to those of the MEAA. For example, Michael Yabsley, former advisor to Rinehart, and Mike Nahan, West Australian Liberal MLA, observed on an ABC Four Corners program that she believed the Australian media were not giving the mining sector 'a fair crack of the whip'. M Wilkinson and J Cohen, 'Gina Rinehart : the power of one', *Four Corners* transcript, 25 June 2012, viewed 21 August 2012, <http://www.abc.net.au/4corners/stories/2012/06/20/3529598.htm>
205. The Communications Minister Senator Stephen Conroy was reported as saying in February 2012 'it had been reported and not denied by Ten that Mrs Rinehart demanded conservative News Limited (publisher of *The Weekend Australian*) commentator Andrew Bolt should have a show on the network."Clearly she is seeking to exert her influence, but is she breaking the law by exerting her influence? No. Do we need stronger laws in this area? Yes,"', S Brook, 'Gina Rinehart never tried to run show at Ten: Brian Long', *The Australian*, online version, 4 February 2012, viewed 21 August 2012, <http://www.theaustralian.com.au/media/broadcast/gina-rinehart-never-tried-to-run-show-at-ten-brian-long/story-fna045gd-1226262278758>
206. A view expressed by *Sydney Morning Herald* journalist David Marr and Treasurer Wayne Swan for example on the Four Corners program cited in footnote 205.
207. S Jackson, 'Rinehart a 'free speech threat'', *The Australian*, 6 April, 2012 cited in Media ownership', in J Este (ed), *Kicking at the cornerstone of democracy*, op. cit

Some journalists speculated on how the Rinehart bid would be addressed under a public interest test. One claimed the test had two targets—Rupert Murdoch and Rinehart—and that it would have:

... direct bearing on the Fairfax-Rinehart imbroglio, and could thwart her aim of controlling the newspaper-cum-digital media group, which publishes *The Australian Financial Review*. It could also come into play in the official examination of News Corp's \$1.97 billion bid for Consolidated Media Holdings, which, if successful, would give News a 50 per cent stake in Foxtel and full ownership of Fox Sports.<sup>209</sup>

This journalist concluded that as a result, an 'omnibus provision' had been drawn up by the Minister for Broadband, Communications and the Digital Economy, Stephen Conroy to require editorial independence.<sup>210</sup>

In response, Minister Conroy argued that the test was not a knee jerk reaction to the Rinehart situation; the idea had been in development for some time.<sup>211</sup> Indeed, Conroy saw Rinehart as most likely passing a public interest test unless she attempted to take control of Network Ten as well as Fairfax, given the company's radio holdings, as she would then be in breach of existing ownership and diversity laws.<sup>212</sup>

### Ongoing campaign

In July 2012 seven media chief executives—Nine Networks' David Gyngell, Seven West Media's Don Voelte, AAP's Bruce Davidson, APN's Brett Chenoweth, News Limited's Kim Williams, Foxtel's Richard Freudenstein and Sky News' Angelos Frangopolous—wrote to the Government expressing vehement concern about media regulation. Fairfax Chief Executive, Greg Hywood and Ten Network Holdings Chief Executive, James Warburton declined to join the cross-industry initiative.

The media executives sought an emphatic rejection of what they saw was the state interventionist News Media Council proposed by Finkelstein. There would be a risk, they stated, that such a body would be subject to political controls and influence. With regards to a public interest test, they added that while it may sound appealing, it would amount to nothing more than a 'political interest

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208. 'Media ownership', in J Este (ed), *Kicking at the cornerstone of democracy*, op. cit.

209. A Clarke, 'Media public interest test has two targets', *The Australian Financial Review*, 29 June 2012, p. 56, viewed 19 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1743351/upload\\_binary/1743351.pdf;fileType=application%2Fpdf#search=%22gina%20Rinehart%20%20%20Fairfax%22](http://parlinfo.parlInfo/download/media/pressclp/1743351/upload_binary/1743351.pdf;fileType=application%2Fpdf#search=%22gina%20Rinehart%20%20%20Fairfax%22)

210. Ibid.

211. B Hall, 'Media test not a knee-jerk reaction to Rinehart—Conroy', *The Sydney Morning Herald*, 29 June 2012, p. 6, viewed 19 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1744179/upload\\_binary/1744179.pdf;fileType=application%2Fpdf#search=%22gina%20Rinehart%20%20%20Fairfax%22](http://parlinfo.parlInfo/download/media/pressclp/1744179/upload_binary/1744179.pdf;fileType=application%2Fpdf#search=%22gina%20Rinehart%20%20%20Fairfax%22)

212. C Kerr, 'Rinehart would pass test', *The Australian*, 23 July 2012, p.4, viewed 24 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1796918/upload\\_binary/1796918.pdf;fileType=application%2Fpdf#search=%22rinehart%20%20public%20interest%20test%22](http://parlinfo.parlInfo/download/media/pressclp/1796918/upload_binary/1796918.pdf;fileType=application%2Fpdf#search=%22rinehart%20%20public%20interest%20test%22)

test' with the capacity to be misused by politicians of all persuasions to block the acquisition of media companies by people they do not agree with or like.<sup>213</sup>

Ben Eltham from the online journal *New Matilda* commented that the correspondence was written:

... in that uniquely contemptuous tone with which [sic] big media bosses like to adopt with the elected representatives of the Australian people, the letter expresses lordly concern with 'the so called proposed "public interest"' test on media ownership; the recommendations on management of press complaints; and the tone and framing of the debate on these matters'. Elsewhere, it complains (in italics, no less) about a "massive increase in regulation".<sup>214</sup>

Eltham argued in contrast:

The opposition to the public interest test from some parts of the commentariat resembles the common argument that governments shouldn't intervene in the free market to 'pick winners'. The problem with the 'don't pick winners' argument is that it assumes that governments can somehow stand back from the self-regulating free market in the first place. This is a patently absurd claim, and nowhere more so than in media, where government regulation has shaped the entire industry for a century.

It is the government that regulates the radio spectrum on which television, radio and 3G data travels, which is why the Convergence Review devotes a whole chapter to the topic. It is the government that enacts and enforces the copyright laws that media companies rely on to protect their intellectual property. And it is the government that doles out hundreds of millions of dollars each year to free-to-air broadcasters in the form of license fee rebates and digital switch-over funding, and to newspapers in the form of government job advertisements.

Perhaps most ironically, given that several of the signatories to this week's letter are bosses of free-to-air networks, it is the government which maintains the remarkably anti-competitive broadcasting environment in which it is effectively illegal to start a fourth free-to-air television network in this country.

In other words, media regulation in this country is already with us. The debate is not just about "less is more". Most of the current regulations serve the interests of the big media barons, not the public. In this context, public interest tests are a step in the right direction. They represent a regulatory reform.<sup>215</sup>

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213. D Crowe, 'CEOs fight new media curbs', *The Australian*, 4 Jul 2012, p.1, viewed 19 July 2012, [http://parlinfo.parlinfo/download/media/pressclip/1755511/upload\\_binary/1755511.pdf;fileType=application%2Fpdf#search=%22public%20interest%20test%20%20letter%22](http://parlinfo.parlinfo/download/media/pressclip/1755511/upload_binary/1755511.pdf;fileType=application%2Fpdf#search=%22public%20interest%20test%20%20letter%22)

214. B Eltham, 'Who's afraid of the public interest?', *New Matilda*, 5 July 2012, viewed 19 July 2012, <http://newmatilda.com/2012/07/05/whos-afraid-public-interest>

215. Ibid.

At the time of writing, News Limited had reportedly threatened to challenge the Government's media reforms in the High Court were they to be implemented. This was despite the fact that the Government had not officially responded to either the Finkelstein or Convergence Reviews.<sup>216</sup>

## Government response

### Speculation

There has been constant speculation about how the Government will react to the recommendations in the Finkelstein and Convergence Reviews. In late June Minister Conroy declared in the Parliament that he intended to act on the recommendations in the near future. He refused, however, to be drawn on what exactly the Government intended.<sup>217</sup>

As lawyer Ian McGill noted in his summary of the Convergence Review, the Government is not required to accept the Review recommendations or even to respond to the report. It was not clear whether the Government would also offer stakeholders the opportunity to respond formally to the Review's recommendations (and to those made by the Finkelstein Review).<sup>218</sup>

Nevertheless, by the end of June, News Limited press reported that some Labor politicians were at least having doubts about the public interest test after a number of legal experts had condemned it and the Treasury's advice to Minister Conroy that it would be subject to challenge was emphasised.<sup>219</sup>

Fairfax reported that Federal Cabinet was expected to approve the test within six weeks and that in spite of possible backbencher doubts, Labor members had been told 'to sell the idea' to their electorates.<sup>220</sup> Support was expected for the test from 'key crossbench' politicians and clearly the

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216. D Davidson and J Kelly, 'CEOs offer to support Williams', *The Australian*, 16 July 2012, p. 32, viewed 19 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1782045/upload\\_binary/1782045.pdf;fileType=application%2Fpdf#search=%22high%20court%20%20media%20reforms%22](http://parlinfo.parlInfo/download/media/pressclp/1782045/upload_binary/1782045.pdf;fileType=application%2Fpdf#search=%22high%20court%20%20media%20reforms%22)

217. S Conroy (Minister for Broadband, Communications and the Digital Economy), 'Answer to Question without notice: media ownership' [Questioner C Milne] Senate, *Debates*, 20 June, p. 3884, viewed 24 July 2012, <http://parlinfo.parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=Content%3Aconroy%20Date%3A20%2F06%2F2012%20%3E%3E%2021%2F06%2F2012%20Dataset%3Asenators,practces,orderss,websen%20guide,procbull,journals,orderofbusiness,hansards,hansards80,notices,websds;rec=41;resCount=Default> and S Conroy, 'Answer to Question without notice: media' [Questioner S Birmingham] Senate, *Debates*, 21 June, p. 4109, viewed 24 July 2012, <http://parlinfo.parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=Content%3Aconroy%20Date%3A20%2F06%2F2012%20%3E%3E%2021%2F06%2F2012%20Dataset%3Asenators,practces,orderss,websen%20guide,procbull,journals,orderofbusiness,hansards,hansards80,notices,websds;rec=20;resCount=Default>

218. McGill, 'Convergence Review', op. cit.

219. D Crowe, 'Labor cools at tough curbs media investment', *The Australian*, 30 June 2012, p. 7, viewed 23 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1747505/upload\\_binary/1747505.pdf;fileType=application%2Fpdf#search=%22convergence%20review%22](http://parlinfo.parlInfo/download/media/pressclp/1747505/upload_binary/1747505.pdf;fileType=application%2Fpdf#search=%22convergence%20review%22)

220. G Daley, 'Labor's media rules enforce independence', *The Australian Financial Review*, 29 June 2012, p. 1, viewed 23 July 2012, [http://parlinfo.parlInfo/download/media/pressclp/1743160/upload\\_binary/1743160.pdf;fileType=application%2Fpdf#search=%22convergence%20review%22](http://parlinfo.parlInfo/download/media/pressclp/1743160/upload_binary/1743160.pdf;fileType=application%2Fpdf#search=%22convergence%20review%22)

Greens were in favour of the general principle as Senator Scott Ludlam had introduced a private Senator's Bill proposing a public interest test in June.<sup>221</sup>

### Links with Press Council appointments

Comments have also been made about the Australian Press Council's appointment of a National Advisory Council to advise the APC on a standards project which is reviewing the scope and effectiveness of the Standards of Practice with which the APC (Council) requires its newspaper, magazine and online publishers to comply. The project includes 'assessing the impact of the current Standards on the practices of print and online publishers and on key aspects of the public interest'.<sup>222</sup>

According to APC chairman, Julian Disney, appointees to the National Advisory Council were chosen because of their 'extensive and high-level experience in public life, including interaction with the media'.<sup>223</sup> The media, however, made much of the fact that none of the appointees had any journalism experience 'and several have been on the receiving end of media scrutiny during their careers'.<sup>224</sup> One commentator went so far as to remark that the panel was an 'essentially Left-leaning collective of the cultural elite' which would 'help determine the kind of reporting they don't want others to read'.<sup>225</sup>

### Moving towards compromise?

As July drew to a close and with Parliament set to resume after the winter break, reports emerged in the News Limited press that the Prime Minister was rethinking the legislative option; that she was seeking a truce; that the media had won. However, in reality the Prime Minister had merely replied to the Media Executives' letter, offering them the option to develop a credible model which would strengthen existing checks, if they wished to avoid a mandated regime. As one commentator put it:

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221. Broadcasting Services Amendment (Public Interest Test) Bill 2012, Bills home page, viewed 23 July 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs880%22>
222. Australian Press Council (APC), *Establishment of National Advisory Panel*, media release, 9 July 2012, viewed 31 July 2012, <http://www.presscouncil.org.au/apc-update-issue-11/> See also detail of project at the APC website, viewed 31 July 2012, <http://www.presscouncil.org.au/standards/>
223. APC media release, *National Advisory Council*, op. cit.
224. The appointments are: former Treasury secretary, Dr Ken Henry (currently Executive Chair, ANU Institute of Public Policy); former South Australian Liberal senator, Robert Hill, formerly Minister for Defence in the Howard Government and Ambassador to the United Nations (currently Chancellor of the University of Adelaide); Heather Ridout, retired chief executive of the Australian Industry Group and a current board member of the Reserve Bank; former Democrats senator, Andrew Murray (currently Chair, WA Regional Development Trust) and former South Australian Supreme Court chief justice, John Doyle. Comment from N Leys, 'Panellists have no editorial practice', *The Australian*, online version, 9 July 2012, viewed 31 July 2012, <http://www.theaustralian.com.au/media/panellists-have-no-editorial-practice/story-e6frg996-1226422017836>
225. A Bolt, 'A collective of the elite to determine what naughty journalism you shouldn't read', *Herald Sun*, online version, 10 July 2012, viewed 31 July 2012, [http://blogs.news.com.au/heraldsun/andrewbolt/index.php/heraldsun/comments/a\\_collective\\_of\\_the\\_elite\\_to\\_determine\\_what\\_naughty\\_journalism\\_you\\_shouldnt/](http://blogs.news.com.au/heraldsun/andrewbolt/index.php/heraldsun/comments/a_collective_of_the_elite_to_determine_what_naughty_journalism_you_shouldnt/)

... the classic ‘show us good cause why not/put up or shut up/what's your credible alternative?’ response that prudent politicians always offer their opponents when mooted reforms are challenged.

It’s a neat and entirely proper position for Gillard to adopt in a formal acknowledgment letter. She commits to nothing, yet sends a significant message.

The PM is reminding News and its camp followers that simply opposing any form of government-backed media regulation on absolutist ‘free speech’ terms is not good enough. By implication, she’s saying that if the media companies can’t propose a genuinely effective system of accountability, then the government will.<sup>226</sup>

## Concluding comments

The media wield power and profound influence. In a democratic society, it is expected that with this power and influence comes responsibility. The Finkelstein Review was clearly of the view that there needed to be an independent mechanism and process through which the media could be held to account. The dilemma Finkelstein believed he faced was to devise a circumstance under which it could be ensured that at least one media sector was appropriately accountable without inhibiting the ability of that sector to fulfil a crucial role in a democracy—to create involved, interested citizens. Finkelstein’s conclusion indicated his further belief that for people to be interested and involved citizens, they need to be assured that the information they are provided with is accurate, and that opinion in the media is distinguished from news reporting.

As noted a number of times throughout this paper, Finkelstein’s recommendations were fiercely criticised by the media, with accusations levelled that his proposals were an affront to democracy; an Orwellian imposition meant not to ensure accountability, but to restrain legitimate criticism and scrutiny of public figures and officials.

The Convergence Review was faced with a similar dilemma to Finkelstein—how to devise a new system that reflected a converged and ever converging media environment; a system that was feasible also for government to accept and implement. The Convergence Review Committee concluded there were valid reasons for abandoning regulations which reflected traditional media divisions, but found at the same time that there was some justification for certain regulation to remain. This was particularly so in the areas of media ownership and diversity, content standards and Australian and local content. The Review Committee was firmly convinced that it is in the public interest that restrictions and requirements continue to apply in these areas.

The Convergence Review was not subject to the same intensity of criticism as Finkelstein, but neither was it enthusiastically received by the media. The fundamental complaint about both reviews was the same—the more the media is regulated, the more democracy is threatened, and both reviews wanted too much regulation.

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226. D Salter, ‘News Limited versus Gillard: a tale of two letters’, *Crikey*, 30 July 2012.

Despite the hostile reception for these Reviews from the media, they have nevertheless provided government with a basis from which to consider reframing current media policy and regulations, to deal with the changed media environment of the twenty first century; whether that reframing will eventually occur, remains to be seen.

Minister Stephen Conroy and some of his colleagues appear keen for a new media environment to be put in place, but it appears that others within the Government are not as enamoured of change. As noted, the Prime Minister has been reportedly 'open to settlement' with the major media companies if they can present an acceptable media model which strengthens existing checks. In addition, it has been speculated that the Prime Minister's office has considered incentives to encourage the media to engage with a continuing self regulatory scheme.<sup>227</sup>

It appears that there is the distinct possibility that some of the Government's resolve for media reform, which prompted the commissioning of the Finkelstein and Convergence Reviews, has faltered as a result of constant media pressure. It may be that this is not the case, and overdue media reforms may emerge, albeit that they represent compromises. Or it may yet be that the major media reviews of 2011–12 will be remembered simply as sound and fury, signifying nothing more than media business as usual.

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227. D Crowe and M Franklin, 'PM seeks truce over media rules', *The Australian*, 25 July 2012, p. 1, viewed 31 July 2012, [http://parlinfo.parlinfo/download/media/pressclp/1798954/upload\\_binary/1798954.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo.parlinfo/download/media/pressclp/1798954/upload_binary/1798954.pdf;fileType%3Dapplication%2Fpdf)

## Appendix A: Finkelstein summary of broadcasting regulation<sup>228</sup>

### Licensing of broadcasting

#### History

Broadcasters have been subject to various licensing conditions since the 1920s when radio began in Australia. In 1942, the Commonwealth consolidated various broadcast regulations under the *Australian Broadcasting Act 1942* (the Broadcasting Act). Initially under this Act, licences were granted to broadcasters on conditions determined by the relevant Minister, but from 1956, the Minister was required to obtain a recommendation from the Australian Broadcasting Control Board before granting a radio or television broadcasting licence. The Minister could, however, suspend or revoke a licence on the ground (among others) that it was in the public interest to do so.<sup>229</sup>

In 1976, an Australian Broadcasting Tribunal was established, to perform the licensing and public inquiry functions of the former Australian Broadcasting Control Board. In 1981, the Broadcasting Act was amended, so that the Australian Broadcasting Tribunal could refuse to grant or renew a licence, and could suspend or revoke a licence, if satisfied (among other things) that the applicant or licensee was not a 'fit and proper person'.

In 1992, in keeping with the general shift in thinking towards deregulation a less interventionist, more market based approach to broadcasting was introduced under the new legislation, the *Broadcasting Services Act 1992* (the BSA).

### Current system—licensing, program standards and industry codes

#### Licensing

The BSA requires that a person obtain a licence to provide 'broadcasting services'. Some broadcasting services require an individual license, including commercial broadcasting services, commercial radio services and subscription television broadcasting services. Similar rules apply to the grant of these licences. A person is considered suitable to hold a licence unless ACMA believes there is a significant risk the person may commit an offence against the BSA or breach licence conditions. ACMA must renew commercial television and radio broadcasting licences on application by licensees unless it is satisfied that the applicant is not suitable. This test of suitability is much narrower than a former 'fit and proper person' test in place under previous legislation.<sup>230</sup>

#### Standards and codes

The BSA formally placed responsibility on commercial broadcasters to develop broadcasting 'codes of practice', which are meant to provide 'an appropriate balance between the public interest in maintaining community standards of taste and decency and broadcasters' desire to provide

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228. This appendix is a summary of Chapter Six of the Finkelstein Review.

229. In 1953, the Commonwealth began issuing licences for television broadcasting.

230. P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice*, [18.2790] Thomson Reuters as cited in Finkelstein, op. cit.

competitive services'.<sup>231</sup> Codes of practice 'may' relate to matters listed in the BSA, including 'promoting accuracy and fairness in news and current affairs programs'.

ACMA is required to register an industry code of practice if it is satisfied: the code provides appropriate community safeguards for matters covered by the code; it is endorsed by a majority of the broadcasters in the relevant section of the industry and members of the public have been given an adequate opportunity to comment on the code.<sup>232</sup>

Breach of a code is not a breach of licence conditions. However, ACMA can issue a remedial direction requiring a licensee to take action directed at ensuring that the licensee does not breach the code of practice. Failure to comply with a remedial direction is an offence and a breach of a civil penalty provision.

With regards to news reporting obligations, those imposed on broadcasters under their codes of practice are similar to obligations imposed on the print media. For example, broadcasters are required:

- to report news fairly and accurately, and to distinguish between factual material and commentary
- to make reasonable efforts to correct significant errors of fact at the earliest opportunity
- broadcasters must not divulge the private affairs of a person unless it is in the public interest to do so.

Codes of practice do not apply to broadcasters' online activities as online activities fall outside the definition of 'broadcasting services'. Therefore, they are not subject to complaints mechanisms. Nonetheless, generally, broadcasters voluntarily apply the same editorial principles in the codes to online news services.<sup>233</sup>

Commercial television and radio broadcasting licences and subscription television broadcasting licenses are subject to certain standard conditions in the BSA and to additional conditions imposed by ACMA. Breach of a standard condition of a licence may be grounds for a licence to be suspended or cancelled.

ACMA also has the power to determine broadcasting standards such as those relating to children's programs and Australian content that must be observed by commercial television broadcasters. Breach of these standards is a breach of the licence conditions. ACMA is required to develop a standard if it is satisfied that there is convincing evidence that an industry code of practice is not providing appropriate community safeguards for a relevant matter.

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231. Explanatory Memorandum, Broadcasting Services Bill 1992, p. 72, cited in Finkelstein, op. cit.

232. The national broadcasters (ABC and SBS) have adopted codes of practice relating to programming matters, as required by their legislation. These codes are notified to ACMA.

233. The SBS code of practice expressly provides that it applies to SBS's online news services. The ABC code of practice refers in terms only to television and radio programs; however, it is understood that the ABC applies the same standards to its online news services.

## Complaints handling

ACMA deals with broadcasting complaints. Persons may complain directly to ACMA if they believe that a licensed broadcaster has committed certain offences such as breaching conditions of its licence. Complaints about program content or compliance with registered codes of practice must first be made to a broadcaster. If persons do not receive a response from a broadcaster within 60 days, or if a response is considered inadequate, they may then take complaints on these matters to ACMA. ACMA must investigate a complaint, unless it is satisfied that the complaint is frivolous or vexatious or not made in good faith, or the complaint is not one that ACMA considers that it can deal with. ACMA must notify the complainant of the results of its investigation.

The BSA provides for ACMA to be able to issue various sanctions for those commercial broadcasters found in breach of licence or code conditions. For example, ACMA can impose an additional condition on a licence, such as those imposed on commercial radio broadcaster Radio 2UE following the 'Cash for Comment' inquiry in 2000. ACMA is able to suspend or revoke a broadcaster's licence. However, suspension or cancellation of a licence is a severe penalty and it is unlikely in practice that a commercial licence would be suspended or cancelled for breach of licence conditions.<sup>234</sup>

Currently on average, an investigation by ACMA takes four months to finalise. One reason for this, according to ACMA, is that this provides broadcasters with the opportunity to put their case in response to the complaint, and then again in response to a potential finding of a breach. It appears, however, that ACMA is less willing to provide complainants with opportunities to comment.

There have been a number of criticisms of handling of broadcasting complaints. These have included those relating to the time to deal with complaints, not only by the regulator but also the initial response by the broadcaster, inadequate monitoring of the system by the regulator and lack of meaningful penalties.

The Review considers that the criticisms indicate that the BSA does not provide an appropriate model for dealing with complaints. It adds that what can be learnt from an examination of ACMA's complaints-handling procedure is that a new system is needed, one which is swift in its operation, treats complainants and licensees equally and which requires licensees to broadcast findings of a breach.

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234. ACMA can deal with complaints that the ABC or SBS have breached their code of practice. If ACMA is satisfied that a complaint against the ABC or SBS was justified, it may recommend that the ABC or SBS take action to remedy the situation. If the ABC or SBS does not take action that ACMA considers appropriate, it may give the Minister a written report on the matter. The report must be tabled in Parliament.

## Appendix B: Finkelstein summary of print self regulation<sup>235</sup>

### Code of ethics

A journalist code of ethics was incorporated into the Australian Journalists' Association (AJA)[now the Media, Entertainment and Arts Alliance (MEAA)] constitution and rules in 1944. Its clauses included the need to report with 'scrupulous accuracy', to use 'fair and honest means' to gather news, not to allow personal interests to influence what was written, and for the journalist to respect all confidences received 'in the course of his calling'. At the time newspaper proprietors objected to the code arguing that the maintenance of ethical standards was a matter between newspapers and their readership.

The current journalist code was adopted in 1999. It restates earlier obligations and adds that journalists are required to report and interpret honestly, strive for accuracy, 'respect private grief and personal privacy' and do their 'utmost to achieve fair correction of errors'.

The MEAA code only applies to union members and not all practising journalists are members. Also, those working in senior editorial positions are exempt from membership of the MEAA.

Under the MEAA complaints procedure, if a complaint is lodged against a member, the chair of a national ethics panel convenes a complaints committee of three members, one of whom must be a public member. The committee must convene a hearing within eight days. The decision about whether to uphold or reject a complaint is made on a majority vote. If a complaint is upheld, the committee can impose a range of penalties including warning, reprimand, fines, suspension from membership and expulsion.

A review of this complaints procedure in the 1990s found its processes slow and unknown to the public, its hearings were often held in private, its decisions were too terse to be educative either for practitioners or the public, and its decisions were unenforceable.<sup>236</sup> The review recommended changes to improve the complaints committee's processes, but it remains largely ineffective.

### Publishers

In 1993 Herald and Weekly Times Ltd introduced a professional practice policy. This seems to have been the first code of journalistic practice adopted by a newspaper in Australia. It was influential in shaping later codes created for other newspapers. Also influential in shaping those codes were the values and ideals of the MEAA code. As newspapers have developed online activities they have extended their codes to cover material published online.

Differing views have been expressed about the value of standards or codes of ethics. Some believe they can be effective in institutionalising ethical behaviour. A different view is that they are only a

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235. This appendix is a summary of information contained in Chapters 7 and 8 of the Finkelstein Review.

236. Australian Journalists' Association Section, Media Entertainment and Arts Alliance *Ethics in Journalism, Report of the Ethics Review Committee, Media Entertainment and Arts Alliance*, Melbourne University Press 1997, p. 82, cited in Finkelstein, op. cit.

marketing tool. They do not change corporate culture, but give the impression that high standards are required. Another view is that if codes are voluntary, they are difficult to enforce and they cannot deal with all eventualities. Further, the competitive pressure in newsrooms to get a story published sometimes overwhelms codes of ethics.

Finkelstein sees a press ombudsman, an in-house advocate to whom a complaint, comment or question can be directed, as more satisfactory than a code of ethics.

## **Australian Press Council**

The idea of a press council was first mooted in Australia in 1942. It was not until 1975, however, that Dr Moss Cass, the Minister for the Media, set out options for press reform in which establishment of an Australian Press Council (APC) was seen as desirable and practicable. Moss suggested five options for discussion:

- establish an Australian Newspaper Commission, similar to the ABC
- establish a research unit at university level to investigate, monitor, and report on press performance
- establish a Royal Commission into the Media
- refuse to grant and renew TV and radio licences to an organisation or individual who owns or controls daily, regional non-daily, or suburban newspapers in Australia
- institute a system of newspaper licences which can be granted, suspended, or withdrawn on the basis of community satisfaction with performance.

The Australian Newspapers Council (ANC) responded to these suggestions by moving to establish an industry press council in 1976. The constituent bodies were the ANC, AJA, Regional Dailies of Australia and the Australian Provincial Press Association. The inaugural APC comprised an independent chair, three public members, three AJA members and six industry members.

### **Current membership**

The APC now has two categories of member. The first category comprises publishers and other organisations in the media industry which have agreed to provide funding for the Association and are known as 'constituent bodies'. The other category comprises people who have been appointed members of the APC in an independent capacity (that is, they do not represent a constituent body).

- The APC has 22 members, comprising:
  - the independent chair and eight public members, who have no affiliations with a media organisation
  - nine nominees of the media organisations which are constituent bodies and
  - four independent journalist members, who are not employed by a media organisation.

### **Obligations of members**

- The principal obligations of constituent bodies are to:
  - make annual financial contributions to the APC as set by the constituent funding subcommittee of the APC (which comprises the chair, vice-chair and all constituent bodies)

- comply with and promulgate the APC’s binding Standards of Practice
- publish with specified frequency a standard note about the APC’s role
- cooperate and comply with the APC’s procedures for considering and adjudicating upon complaints and
- publish with due prominence all adjudications relating to their publications.

## **Activities**

The APC’s three main areas of work involve:

- developing standards that constitute good media practice and are applied by the APC when considering complaints. The APC develops and promulgates Standards of Practice after consultation with the media and members of the broader community. They are subject to continuing review.
- responding to complaints from the public about material in Australian newspapers, magazines and associated digital outlets that relate to news or comment (excluding advertising material) and
- issuing policy statements on matters within its areas of interest, principally concerning freedom of expression, freedom of information, privacy, defamation and related matters.

## **Statement of Principles**

The APC has developed a General Statement of Principles, which it applies when providing advice or adjudicating on individual complaints. The principles include the following:

- publications should take reasonable steps to ensure reports are accurate, fair and balanced. They should not deliberately mislead or misinform readers either by omission or commission.
- where it is established that a serious inaccuracy has been published, a publication should promptly correct the error, giving the correction due prominence.
- where individuals or groups are a major focus of news reports or commentary, the publication should ensure fairness and balance in the original article. Failing that, it should provide a reasonable and swift opportunity for a balancing response in an appropriate section of the publication.

News and comment should be presented honestly and fairly, and with respect for the privacy and sensibilities of individuals.

## **Complaints procedure**

The APC only deals with complaints against publications and not against individual journalists.

If a complaint could be the basis of legal action against the publisher, the APC will ordinarily require the complainant to sign a document waiving his or her legal rights. One rationale is that the parties are more likely to provide information in a candid manner, which would not occur if the complaints-handling process was a trial run of possible future litigation.

When a complaint is received it is considered by the Executive Secretary. If the Executive Secretary believes there are not adequate grounds for bringing the complaint it will be dismissed. If a complainant objects, the dismissal decision will be reconsidered by the Executive Secretary in consultation with the complaints committee.

For most complaints the APC staff will seek to negotiate an agreed resolution between the complainant and publisher. This may involve the APC asking the complainant to contact the publisher to propose some type of remedial action. Alternatively, APC staff may themselves contact the publisher to facilitate an agreed resolution. In recent years about half of all complaints have been resolved informally at this stage.

If a complaint is to be adjudicated it is referred to the complaints committee.

The average time taken to finalise a complaint is one month, unless the complaint proceeds to adjudication in which case the average time is about three months. The steps involved are:

- convening a meeting at which the complainant and representatives of the publication make presentations and answer questions
- the Complaints Committee then prepares a draft adjudication, and
- the draft is referred to the APC which issues a formal adjudication.

The APC requires its adjudication, or a reasonable summary of the adjudication, to be published with 'due prominence'. With few exceptions the APC's adjudications have always been published, albeit occasionally in a summary form which has not been specifically approved. Often, however, the manner of publication has not complied with the APC's requirement of due prominence.

The APC also deals with informal complaints.

### **The effectiveness of the APC**

The Review has concluded there are several difficulties with the structure of the APC. For example, the inclusion of representatives of the public is not always as effective as it could be. The APC's structure makes its ability to carry out its functions effectively dependent upon the will of its constituent bodies. They can exert both formal and informal pressure. And importantly, they can impose sanctions if dissatisfied with the APC's conduct, by reducing funding or even withdrawing it altogether. There are also problems with the handling of complaints: for example, timeliness and the prominence of APC.

In addition, as the APC is set up and funded and managed by the industry it has been argued that the press have an incentive not to give it too much money, because it would only be able to criticise them better. On the other hand some believe that giving the APC more money would lead to more bureaucracy.

The APC submission and evidence given by its current chair also identified a number of APC's weaknesses:

- a lack of awareness of the existence of the APC and the assistance it can give to people who are aggrieved by a press publication
- the inability to investigate a complaint properly for lack of binding powers
- a lack of resources due to lack of funding. Most of the funding comes from News Limited (45 per cent), Fairfax Media (24 per cent) and Seven West Media (12 per cent). Currently the APC receives around \$1 million per annum. To meet its responsibilities it estimates that it needs

around \$2 million per annum. In those circumstances if one major organisation were to withdraw, the APC could collapse.

The APC suggested ways the membership of the APC could be secured. One way is through legislation. The press has certain statutory privileges. These privileges could be made conditional on membership of the APC.

A number of the problems confronting the APC are being addressed, to the extent that they can be by a body controlled, and almost exclusively funded, by its media members. This is being done by attempting to strengthen:

- Standards of Practice
- promulgation of Standards and monitoring their impact
- complaints-handling processes
- publication of adjudications
- sanctions
- independence and funding
- incentives for publishers to become, and remain, council members.

The APC argues that, if implemented, these reforms would improve its effectiveness. But the degree of improvement will depend upon the extent to which the APC obtains adequate funding, and print and online publishers becoming and remaining constituent bodies, subject to the APC's jurisdiction.

The APC accepts that to implement the reforms to enable it to become an effective regulator, government (that is, statutory) support is required. The critical areas where government support is needed are funding, the conferral of powers of investigation and enforcement and the mandating (even by indirect means) of membership.

In theory, the members of the APC could agree to modify its constitution so that funding will be forthcoming and the powers that are needed are conferred. In reality, that will not occur. First, the members will not agree to guarantee funding. One basis for this conclusion is that several members simply do not accept that further funding is required.

Even if some acceptable mechanism for funding were to be agreed, there will be no agreement on the conferral of appropriate powers of investigation and enforcement. The media regard the establishment of any compulsory or coercive means of enforcing APC adjudications as a grave attack on freedom of the press.

Few people outside the media contend that self regulation or, at a minimum, the current form of self regulation, is adequate. At the same time, the media will not tolerate, let alone finance, an effective industry regulator. It may, on one view, be reasonable for publishers to be suspicious of proposals, even well-intentioned proposals that would interfere with editorial independence. Another view which the review believes is 'the better view' is that there must be some effective means of raising standards of journalism and of making the media publicly accountable.

## Appendix C: Finkelstein Review: proposed News Media Council (NMC)<sup>237</sup>

### Membership

- full-time independent chair and 20 part-time members appointed by an independent body
- chair to be a retired judge or eminent lawyer
- half of the members selected to have no media connection; half to be appointed from the media or from those with media background; equal representation of men and women and
- members entitled to reasonable remuneration.

### Standards for media conduct

- NMC would develop two types of kinds of standards to govern the news media:
  - non binding principles and
  - detailed standards similar to the MEAA's code and the APC's standards
- would have flexibility to develop platform-specific standards
- standards should be reviewed every three years.

### Government funded

- NMC to identify the funds needed for three-year period with the claim verified by its auditors
- the claim assessed by the Auditor-General to decide funding level. If the Executive decides to award less, the responsible Minister to explain to the Parliament reasons for not providing the certified amount.

### NMC Functions

- to promote the highest ethical and professional standards of journalism by:
  - preparing and reviewing standards of conduct
  - investigating and resolving alleged contraventions of the standards whether on complaint or by own motion
  - at regular intervals preparing or commissioning a report on the state of the news media in Australia
  - educating the news media about the content of the standards
  - educating the public about the standards and about the existence and role of the News Media Council.
- supervise standards of all news media on all platforms.<sup>238</sup>

### Complaints-handling procedures

- Complainant should be required to waive any possible future action arising out of a grievance.
- There should be a filtering process to determine if a complaint is frivolous or vexatious and need not be pursued.

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237. The information in this appendix is taken from Chapter 11 of the Finkelstein Review.

238. It would be necessary for the NMC to adopt a definition of news media.

- Complainants generally to complaint first to NMC, not a media outlet. In the first instance the NMC to attempt to resolve complaints informally through discussions with media outlets. This process should commence immediately upon receipt of complaints. If a media organisation has an effective internal complaints handling procedure, the NMC to have discretion to refer a complainant in the first instance.
- If not resolved informally, complaints should be dealt with by a complaints panel consisting of one, three or, only in exceptional cases, five members of the News Media Council. The chair should have power to select the panel for any given complaint (and may, where appropriate, select himself/herself).
- There should be a strict timetable for handling complaints.
- The panel should have power to require the production of documents and call for the attendance of persons to provide information.
- Privilege should attach to all information provided to the panel.
- The panel should not go behind the confidentiality of a journalist's source of information.
- There should be no requirement for the panel to provide reasons for a decision although it would likely ordinarily do so.
- Power to develop further rules and practices for complaints-handling.

### **Remedial powers**

- require publication of a correction
- require withdrawal of a particular article from continued publication
- require a media outlet to publish a reply by a complainant or other relevant person
- require publication of the News Media Council's decision or determination
- to direct when and where publications should appear
- no power to impose fines or award compensation.

### **Enforcement of determinations**

- A legal requirement that if a regulated media outlet refuses to comply with a NMC determination, the NMC or the complainant should have the right to apply to a court of competent jurisdiction for an order compelling compliance. Any failure to comply with the court order should be a contempt of court and punishable in the usual way.

### **Appeals, merits review and judicial supervision**

- There should be no internal appeal from, or internal merits review of, a determination. Nor should there be external merits review via the Administrative Appeals Tribunal.

## **Appendix D: new National Classification Scheme<sup>239</sup>**

### **Guiding principles for reform**

The ALRC identified eight guiding principles for reform directed to providing an effective framework for the classification and regulation of media content in Australia. These principles underpin the 57 recommendations for reform in the Convergence Review Final Report. The ALRC considers that these principles should inform the development of a new National Classification Scheme that can

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239. Source: Appendix F, Convergence Review final report, op. cit.

more effectively meet community needs and expectations, while being more responsive to the challenges of technological change.

The eight guiding principles are that:

- (1) Australians should be able to read, hear, see and participate in media of their choice;
- (2) communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community;
- (3) children should be protected from material likely to harm or disturb them;
- (4) consumers should be provided with information about media content in a timely and clear manner, and with a responsive and effective means of addressing their concerns, including through complaints;
- (5) the classification regulatory framework needs to be responsive to technological change and adaptive to new technologies, platforms and services;
- (6) the classification regulatory framework should not impede competition and innovation, and not disadvantage Australian media content and service providers in international markets;
- (7) classification regulation should be kept to the minimum needed to achieve a clear public purpose; and
- (8) classification regulation should be focused upon content rather than platform or means of delivery.

### **Key features**

In this Report, the ALRC recommends a new classification scheme for a new convergent media landscape. The key features of the ALRC's model are:

- Platform-neutral regulation—one legislative regime establishing obligations to classify or restrict access to content across media platforms.
- Clear scope of what must be classified—that is feature films, television programs and certain computer games that are both made and distributed on a commercial basis and have a significant Australian audience.
- A shift in regulatory focus to restricting access to adult content—imposing new obligations on content providers to take reasonable steps to restrict access to adult content and to promote cyber-safety.
- Co-regulation and industry classification—more industry classification of content and industry development of classification codes, subject to regulatory oversight.
- Classification Board benchmarking and community standards—a clear role for the Classification Board in making independent classification decisions using classification categories and criteria that reflect community standards.
- An Australian Government scheme—replacing the current classification cooperative scheme with enforcement of classification laws under Commonwealth law.
- A single regulator—with primary responsibility for regulating the new scheme.

## Appendix E: current Australian content requirements for television and radio

### Television

#### Primary channel of commercial free-to-air television

Content type	Minimum Australian content requirements
Overall	55 per cent of all programming broadcast each year between 6 am and midnight
Australian adult drama	860 points of first-release Australian drama programs broadcast over a set three-year period between 5 pm and 11 pm and at least 250 points of first-release Australian drama programs broadcast each year between 5 pm and 11 pm
Australian C (children's) and Australian P (preschool) programs	260 hours of C material broadcast each year 130 hours of P material broadcast each year 50 per cent of the total time occupied by C periods <sup>b</sup> each year must be first-release Australian C programs All P programs broadcast must be Australian programs
Australian C (children's) drama	96 hours of first-release Australian C drama programs broadcast over a set three-year period in the C band <sup>c</sup> and at least 25 hours of first-release Australian C drama programs broadcast each year in the C band 8 hours of repeat Australian C drama programs broadcast each year in the C band
Australian documentary	20 hours of first-release Australian documentary programs broadcast each year between 6 am and midnight

- a. The drama score for an Australian drama program is calculated by multiplying the format factor for the program by the duration of the program. Different format factors apply to different program genres (Australian Content Standard section 11).
- b. C period means a period nominated by, or on behalf of, a licensee under Australian Content Standard section 9 during which the licensee will broadcast C programs.
- c. C band means the following periods: 7am to 8.30am and 4pm to 8.30pm Monday to Friday and 7am to 8.30pm Saturday, Sunday and school holidays.

#### Subscription television

- Subscription television broadcasting licensees that broadcast drama channels are required to maintain a minimum level of expenditure each year on new Australian drama. A subscription television drama service is a subscription television broadcasting service devoted predominantly to drama programs.
- At least ten per cent of the total program expenditure on a subscription television drama service must be on new eligible drama programs.

## Advertising

- At least 80 per cent of the total advertising time (other than the time occupied by exempt advertisements) broadcast annually between 6am and midnight is required to consist of Australian-produced advertisements.

## Radio

### Existing Australian music requirements for analogue commercial broadcasters

Format category	Minimum proportion of total time broadcasting music that must be Australian	Minimum new Australian music as a proportion of total Australian music
A: Mainstream rock, album-oriented rock, contemporary hits, top 40, alternative	25%	25%
B: Hot/mainstream adult contemporary, country, classic rock	20%	20%
C: Soft adult-contemporary, hits and memories, gold (encompassing classic hits), hip-hop	15%	15%
D: Oldies, easy listening, easy gold, country gold	10%	–
E: Nostalgia, jazz, NAC (smooth jazz)	5%	–
F: All other formats of service (including programs that have mostly open-line, news, talk and sport content)	–	–

## Appendix F: local content requirements for radio and television

### Radio<sup>240</sup>

Regional commercial radio licensees must broadcast prescribed amounts of local content ('material of local significance') during daytime hours (5am to 8pm) on business days.

The applicable number of hours is:

240. Source: ACMA, regional local content protections web page, viewed 20 July 2012, [http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_311597](http://www.acma.gov.au/WEB/STANDARD/pc=PC_311597)

- 30 minutes for small licences (licences which service licence areas with a population of less than 30,000 people); and
- three hours for all other licences.

The local content requirements do not apply to:

- licences allocated under subsection 40(1) of the BSA
- regional racing service radio licences
- remote area service radio licences

Regional commercial radio licensees are not required to meet the local content requirements during a prescribed five week period each year. The five week period commences on the second Monday in December each year (unless the ACMA has specified a different period).

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### **Trigger event conditions**

Some regional commercial radio licensees are also required to meet local presence criteria and minimum service standards for local news and information. These requirements come into effect following a 'trigger event'. Regional commercial radio licensees affected by a 'trigger event' must meet minimum service standards for local news and information, and maintain local presence requirements.

A trigger event is:

- a transfer of a regional commercial radio licence
- formation of a new registrable media group which includes a regional commercial radio broadcasting licence
- change of controller of a registrable media group which includes a regional commercial radio broadcasting licence.

As a result of changes made by the *Broadcasting Services Amendment (Regional Commercial Radio) Act 2012*, from 16 October 2012, a trigger event will also include changes in control of a regional commercial radio broadcasting licence, that is, situations where: a person starts to be in a position to exercise control of a regional commercial radio broadcasting licence; or a person ceases to be in a position to exercise control of a regional commercial radio broadcasting licence.

The changes will also introduce certain exceptions to when a change of control of a regional commercial radio licence will be taken to have occurred. These exceptions relate to: the transfer of shares to a near relative for no consideration; and changes of control attributable to circumstances beyond the control of the controllers.

### **Minimum service standards**

#### **Local news**

The minimum service standard for local news is the greater of:

- at least five eligible local news bulletins in a particular week; or

- the average weekly number of eligible local news bulletins broadcast under the licence in the benchmark year.

To meet the local news requirement:

- bulletins must be broadcast on at least five days during the week;
- the total duration of bulletins broadcast on each of those days must be at least 12.5 minutes;
- bulletins must be broadcast during prime-time hours (5am-8pm);
- bulletins must adequately reflect matters of local significance; and
- none of the bulletins may consist wholly of material that has previously been broadcast in the licence area concerned.

### **Local weather**

The minimum service standard for local weather is to broadcast at least five eligible local weather bulletins during a particular week.

To meet the local weather requirement:

- bulletins must be broadcast on at least five days during the week; and
- bulletins must broadcast during prime-time hours (5am-8pm).

### **Community service announcements**

The minimum service standard for community service announcements is to broadcast at least one local community service announcement each week.

A community service announcement is: community information, or community promotional material, for the broadcast of which the licensee does not receive any consideration in cash or in kind.

### **Emergency warnings**

The minimum service standard for emergency service warnings is to broadcast emergency service warnings on occasions during a week when requested to do so by an emergency service agency.

An emergency service agency is: a police force or service, a fire service, or a body that runs an emergency service specified in the regulations.

### **Five week exemption period each year**

Regional commercial radio licensees are not required to meet the minimum service standards for local news and information during a prescribed five week period each year. The five week period commences on the second Sunday in December each year (unless ACMA has specified a different period).

### **Local presence**

Local presence requirements relate to maintaining local staffing levels and facilities.

As a result of changes made by the *Broadcasting Services Amendment (Regional Commercial Radio) Act 2012*, the requirement to maintain the existing level of local presence applies for:

- In the case of trigger events which occurred before 16 April 2012 – 24 months starting from 16 April 2012.
- In the case of trigger events which occur on or after 16 April 2012 - 24 months starting from the date of the trigger event.

The minimum service standards and local presence requirements do not apply to:

- licences allocated under subsection 40(1) of the BSA
- regional racing service radio licences
- remote area service radio licences.

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## Television<sup>241</sup>

From 1 January 2008 a television licence condition applies to all regional commercial television licensees in the five aggregated markets (Northern New South Wales, Southern New South Wales, Regional Victoria, Regional Queensland and Tasmania) to broadcast material of local significance, within each specified local area.

Quotas are applied comprising:

- a minimum of 720 points per six-week period; and
- a minimum requirement of 90 points per week.

Because of low take-up rates of digital receivers in Tasmania, ACMA has granted alternative treatment to Tasmanian Digital Television (TDT) for a limited period. From 1 January 2008 TDT is required to meet minimum quotas comprising:

- a minimum of 120 points per calendar year.

Material of local significance can either relate to a local area or to the licensee's licence area.

Material that may be considered of local significance can include

- material that deals with people, organisations, events or issues that are of particular interest to people in the area, in a way that focuses on the interests of people in the area;
- material about an individual in whom people in the area are particularly interested because of an association with the area, such as the individual having grown up, or lived, in the area;
- material that deals with the effects on the area of an event that occurs elsewhere;
- material about a sporting event that involves a team from the area or that involves a team from a nearby area, whose principal support base includes the area, or a significant part of the area;
- material about market conditions that closely affect a major business activity in the area, such as prices of a commodity in an area where that commodity is produced on a significant scale.

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241. Source: ACMA local content conditions page, viewed 20 July 2012, [http://www.acma.gov.au/WEB/STANDARD..PC/pc=PC\\_91817](http://www.acma.gov.au/WEB/STANDARD..PC/pc=PC_91817)

The points system provides an incentive for licensees to broadcast local news above other material, while also recognising that other types of material of local significance may be of interest to local audiences.

The licence condition recognises both news bulletins and news updates. It notes that the traditional format of a 'news update' is a program of not more than two minutes that does not include advertisements.'

Both the bulletin and update format are acceptable, provided that they meet the licence condition's requirements. This flexibility allows licensees to broadcast different and complementary services within the local areas served.

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