



Australian Government

**REPORT
OF THE
INDEPENDENT INQUIRY INTO THE MEDIA
AND MEDIA REGULATION**

**BY
THE HON R FINKELSTEIN QC**

**ASSISTED BY
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**REPORT TO THE MINISTER FOR BROADBAND,
COMMUNICATIONS AND THE DIGITAL ECONOMY**

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Letter of transmittal



Independent Inquiry into Media and Media Regulation

28 February 2012

Senator the Hon Stephen Conroy
Minister for Broadband, Communications and the Digital Economy
Parliament House
CANBERRA ACT 2600

Dear Minister

Report of the Independent Inquiry into aspects of the media and media regulation

I have the pleasure in presenting to you my findings and recommendations as required by the terms of reference issued on 14 September 2011.

I acknowledge the assistance of Dr Matthew Ricketson.

Yours sincerely

A handwritten signature in black ink that reads "Ray Finkelstein".

The Hon R Finkelstein QC
enc

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Executive summary—conclusions and recommendations

Media codes of ethics and accountability

1. There is common ground among all those who think seriously about the role of the news media and about journalistic ethics that:
 - a free press plays an essential role in a democratic society, and no regulation should endanger that role
 - a free press has a responsibility to be fair and accurate in its reporting of the news
 - a free press is a powerful institution which can, and does, affect the political process, sometimes in quite dramatic ways
 - a free press can cause harm—sometimes unwarranted—to individuals and organisations
 - a free press should be publicly accountable for its performance
 - codes of ethics regarding accuracy, fairness, impartiality, integrity and independence should guide journalists and news organisations.
2. There is less consensus on how this accountability should be enforced.
3. In Australia for newspapers there are several existing mechanisms of self-regulation:
 - the adoption of ethical codes or standards which at a minimum impose obligations of fairness and accuracy
 - the appointment by some newspapers of an ombudsman or readers' representative to handle complaints from the public
 - the establishment by the newspaper industry of the Australian Press Council (APC) to handle complaints from the public and monitor professional standards.
4. Broadcasters (radio and television) have additional regulation. They are required to observe standards both approved and overseen by the Australian Communications and Media Authority (ACMA).

5. There is, however, external regulation which applies to all news media. They must operate within the laws of the land, most importantly for the media, the laws of defamation and contempt.
6. I have come to the conclusion that these mechanisms are not sufficient to achieve the degree of accountability desirable in a democracy:
 - Of the existing self-regulation measures, only one or two newspapers have appointed an ombudsman or readers' representative.
 - Online news publications are not covered.
 - The most important institution, the APC, suffers from serious structural constraints. It does not have the necessary powers or the required funds to carry out its designated functions. Publishers can withdraw when they wish and alter their funding as they see fit.
 - ACMA's processes are cumbersome and slow.
 - If legal proceedings against the media are called for, they are protracted, expensive and adversarial, and offer redress only for legal wrongs, not for the more frequent complaints about inaccuracy or unfairness.
7. The problems with both the external and self-regulatory mechanisms are inherent, and cannot be easily remedied by piecemeal measures.
8. I therefore recommend that a new body, a News Media Council, be established to set journalistic standards for the news media in consultation with the industry, and handle complaints made by the public when those standards are breached. Those standards will likely be substantially the same as those that presently apply and which all profess to embrace.
9. Moreover, I recommend that the News Media Council have those roles in respect of news and current affairs coverage on all platforms, that is, print, online, radio and television. It will thus explicitly cover online news for the first time, and will involve transferring ACMA functions for standards and complaints concerning news and current affairs. It will replace the voluntary APC with a statutory entity. In an era of media convergence, the mandate of regulatory agencies should be defined by function rather than by medium. Where many publishers

transmit the same story on different platforms it is logical that there be one regulatory regime covering them all.

10. The News Media Council should have secure funding from government and its decisions made binding, but beyond that government should have no role. The establishment of a council is not about increasing the power of government or about imposing some form of censorship. It is about making the news media more accountable to those covered in the news, and to the public generally.
11. A guiding principle behind the design of the News Media Council is that it will provide redress in ways that are consistent with the nature of journalism and its democratic role. Like the APC, its members should be comprised of community, industry and professional representatives. It should adopt complaint-handling procedures which are timely, efficient and inexpensive. In the first instance it should seek to resolve a complaint by conciliation and do so within two or three days. If a complaint must go to adjudication it should be resolved within weeks, not months.
12. An important change to the status quo is that, in appropriate cases, the News Media Council should have power to require a news media outlet to publish an apology, correction or retraction, or afford a person a right to reply. This is in line with the ideals contained in existing ethical codes but in practice often difficult to obtain.
13. If these recommendations are adopted, both the public and news media organisations should be confident that the News Media Council will carry out its functions independently and effectively. There will be a single, properly-funded regulator with the power to enforce news standards across all news media outlets.
14. Although I recommend that these steps be taken to make the news media properly accountable, there is another side to the media that ought to be acknowledged. Despite the volume of complaints and criticisms, what also became apparent to me during the course of the Inquiry is the news media's many achievements, and just how strongly many people, both inside and outside the media, care about the health of news and journalism. Australia's newspapers employ many dedicated professionals, performing their roles skilfully and diligently. The process of accountability proposed here recognises the realities and difficulties of journalism, emphasising immediate exchange and correction rather than financial or legal

punitiveness. Equally it is consistent with the ideals guiding journalism by emphasising transparency and recognising the public interest in how a major institution of our democracy performs.

15. These proposals are made at a time when polls consistently reveal low levels of trust in the media, when there is declining newspaper circulation, and when there are frequent controversies about media performance. Many of the criticisms are self-interested or expedient; much of the public cynicism is misdirected. Yet a news media visibly living up to its own standards and enforcing its own high ideals is likely to increase rather than undermine public confidence and acceptance.

Changing business models and quality journalism

16. New technology, particularly the internet, has revolutionised access to the news. The result has been a reduction in the circulation of newspapers and a reduction in revenue from classified advertising. The advertising expenditure is now spread across platforms. Main news organisations are recovering only a small proportion of these revenues by moving to online publishing.
17. These changes have been greeted with dramatic rhetoric: Who killed the newspaper? asked *The Economist* magazine in 2006¹. In the United States, the crisis has been felt by the news media much more acutely, and there has been considerable pessimism about the news media being able to continue their traditional democratic roles.
18. It is too early to reach such conclusions in Australia. We are in the midst of changes whose future direction can only dimly be discerned. Moreover there are many positive as well as negative changes with the increasing importance of the internet. Low barriers to entry will facilitate new ventures, and so may lead to more democratic diversity, given the concentrated ownership of Australian newspapers.
19. I have reached the conclusion that at this stage there is not a case for government support.

¹ 'Who killed the newspaper?' *The Economist* (London) 26 August 2006, 9.

20. Nevertheless, the situation is changing rapidly, and requires careful and continuous monitoring. Therefore, I recommend that one function of a News Media Council should be to chart trends in the industry, and particularly to see whether there will be a serious decline in the production and delivery of quality journalism.
21. In addition, I recommend that within the next two years or so the Productivity Commission be issued with a reference to conduct an inquiry into the health of the news industry and make recommendations on whether there is a need for government support to sustain that role. It should also consider the policy principles by which any government support should be given to ensure effectiveness, as well as eliminating any chance of political patronage or censorship.
22. Apart from reviewing those issues on a national scale, one area that requires especially careful monitoring is the adequacy of news services in regional areas. There is some evidence that both regional radio and television stations and newspapers have cut back substantially on their news gathering, leaving some communities poorly served for local news. This may require particular support in the immediate future, and I recommend that this issue be investigated by the government as a matter of some urgency.

1. Introduction

Terms of reference

- 1.1 The Minister for Broadband, Communications and the Digital Economy announced on 14 September 2011 that he had appointed me to conduct an inquiry into certain aspects of the media and media regulation. The minister also announced that he had appointed Dr Matthew Ricketson, Professor of Journalism at the University of Canberra, to assist in the preparation of the report.
- 1.2 The terms of reference² required me to investigate:
- The effectiveness of the current media codes of practice in Australia, particularly in light of technological change that is leading to the migration of print media to digital and online platforms.
 - The impact of this technological change on the business model that has supported the investment by traditional media organisations in quality journalism and the production of news, and how such activities can be supported, and diversity enhanced, in the changed media environment.
 - Ways of substantially strengthening the independence and effectiveness of the Australian Press Council, including in relation to online publications, and with particular reference to the handling of complaints.
 - Any related issues pertaining to the ability of the media to operate according to regulations and codes of practice, and in the public interest.

My report was to be delivered to the Minister by 28 February 2012.

Resources

- 1.3 Much work had to be done in a short time. This made it necessary to appoint a team to assist with aspects of the report. At my request the following people were appointed:

² See Annexure A.

- Dr Rodney Tiffen, Emeritus Professor in Government and International Relations at the University of Sydney and a Fellow of the Australian Academy of Humanities. He is the author or co-author of many books and scholarly articles. His books on media include *News and Power* (1989) and *Scandals: Media, Politics and Corruption in Contemporary Australia* (1999). Professor Tiffen completed three major consultancies on Radio Australia and was an observer, working with the Media Monitoring Project, during South Africa's first democratic election in 1994.
- Dr Francesco (Franco) Papandrea, Adjunct Professor, Faculty of Arts and Design, University of Canberra—formerly Professor of Communications and Director Communication and Media Policy Institute at the University of Canberra. Dr Papandrea is a leading expert in communications and media economics and has more than 25 years of research experience in that field. He was the principal adviser to the House of Representatives Select Committee on the Print Media and played a major role in the preparation of the Committee's report.
- Dr Denis Muller, currently teaching media ethics at the University of Melbourne and Swinburne University. Dr Muller held editorial positions in a number of UK newspapers (*The Times* and *The Financial Times*) as well editorial executive positions in Australian newspapers (*The Sydney Morning Herald* and *The Age*). He has also held several academic positions in Australia. His doctoral thesis 'Media Accountability in a Liberal Democracy' considered the importance of a free media and why it should be accountable to the public.
- Kristen Walker, a barrister who practises in constitutional law, administrative law and human rights law. Until 2011, Ms Walker was an Associate Professor of Law at the University of Melbourne. She taught human rights law and legal ethics at Columbia University in New York.
- Christopher Young, a barrister who practises in commercial law as well as in constitutional and administrative law. Prior to coming to the Bar Mr Young was the Associate to the Chief Justice of the Federal Court of Australia. He completed his Masters' degree at Cambridge University.

- Graeme Hill, a barrister who practises in constitutional and administrative law. Mr Hill studied free speech theory and media law at Columbia University in New York. He is a co-author in the latest edition of *Hanks on Constitutional Law*.
- Two law students from Monash University, Jack Bourke and Mansa Chintoh, who helped summarise the submissions and transcripts.

The Department of Broadband, Communications and the Digital Economy assigned an Assistant Secretary, Brian Kelleher, as Executive Officer. He provided invaluable assistance to the Inquiry.

Origins of the Inquiry

- 1.4 Following revelations that journalists at the News of the World, a London newspaper owned by News International, the English subsidiary of News Corporation, had engaged in phone hacking of politicians, murder victims, footballers and entertainers, on 13 July 2011 the British Prime Minister established an inquiry (under the chair of Lord Justice Leveson) to investigate the culture, practices and ethics of the press and whether employees of News International and other media organisations had engaged in unlawful and improper conduct³.
- 1.5 This provoked calls in Australia for the establishment of a wide-ranging investigation into the media. It was not suggested that News Limited, the Australian subsidiary of News Corporation, had engaged in similar practices. But the leader of the Greens, Senator Brown, called for a general inquiry into the newspaper industry. He suggested that the inquiry should canvass whether:
- publishers should be licensed
 - a 'fit and proper person' test should be applied
 - there should be limits on foreign ownership of the press
 - the newspaper industry is too concentrated

³ United Kingdom, 'Leveson Inquiry: Culture, practice and ethics of the press', Terms of Reference (2011) <www.levesoninquiry.org.uk/about/terms-of-reference/>.

- there is a need for independent regulation of the press⁴.
- 1.6 Concern was also expressed by several politicians and others that certain of News Limited's papers (The Australian and the Daily Telegraph) were biased in their reporting on particular issues. Climate change and the National Broadband Network were given as examples⁵.
- 1.7 The terms of reference were not as broad as had been called for. For example, I was not required to investigate whether there should be restrictions on foreign ownership of the press. Nor did the terms of reference permit an investigation into whether there should be changes to the law relating to press ownership. Still, the terms of reference did require the consideration of a host of important issues.

Conduct of the Inquiry

- 1.8 On 21 and 28 September 2011 advertisements were inserted in the press and published on the Inquiry's webpage, setting out the terms of reference and inviting persons who desired to express views to the Inquiry about matters falling within the terms of reference to forward submissions by 31 October 2011. The advertisements stated that it was proposed that all submissions would be publicly available unless it was otherwise determined⁶.
- 1.9 After considering the terms of reference I thought it appropriate to distil from them and explain what would be some of the principal issues that would be considered. To that end I prepared and on 28 September 2011 published an Issues Paper in which those issues were set out⁷. The Issues Paper was not intended to be a comprehensive list of the topics to be dealt with, but it contained some of the most important.

⁴ Siobhan Ryan and Christopher Kerr 'Julia Gillard open to media probe' *The Australian* (Melbourne) 15 July 2011 <www.theaustralian.com.au/media/julia-gillard-open-to-media-probe/story-e6frg996-1226094945168>.

⁵ Richard Willingham 'Push on for media inquiry' *The Age* (Melbourne) 15 July 2011 <www.theage.com.au/national/push-on-for-media-inquiry-20110714-1hg7n.html#ixzz1j0FiVeUj>.

⁶ See Annexure B.

⁷ See Annexure C.

- 1.10 Between 7 and 21 October 2011 I wrote to many publishers, editors, academics and others inviting them to make submissions. In some instances I wrote asking for information on specific topics⁸.
- 1.11 Submissions were received from some 11 000 persons and organisations⁹. Of these, about 9600 were facilitated through an advocacy group.
- 1.12 I decided to hold public hearings. There were several reasons. First, I thought I would derive a better understanding of the views that were being put forward in several written submissions by discussing them with the persons concerned. Second, a number of persons who had useful contributions to make had not had the opportunity to file written submissions and they were invited to appear.
- 1.13 In the conduct of the hearings I departed from the usual practice of requiring the appointment of counsel to assist the Inquiry. The traditional role of assisting counsel is to take a witness through his/her evidence. I felt that I would gain more if I conducted the process myself.
- 1.14 In all, 41 persons gave evidence¹⁰. In addition to the information obtained from the submissions and the witnesses, there is a large body of literature to which reference was made¹¹.
- 1.15 At the invitation of *The West Australian*, Professor Ricketson and I, together with members of our team, visited their offices on 5 December 2011. We were permitted to walk through the newsroom and speak with journalists. We also attended the early afternoon news conference to observe how decisions about the news content of the next edition of the newspaper were made. This was a most enlightening experience.
- 1.16 On 16 December 2011 two members of my team, Professor Ricketson and Kristen Walker, held a discussion with a number of academics who were attending the Freedom of Expression Roundtable convened by The University of Melbourne (Melbourne Law School).

⁸ See Annexure B.

⁹ See Annexure D.

¹⁰ See Annexure B.

¹¹ See Annexure E.

The discussion concerned current theories about freedom of expression and how the theories relate to the issue of freedom of the press. The contribution from those that participated was valuable.

Overview

- 1.17 Section 2 is addressed to the central role the news media play in a liberal democracy such as Australia. It begins by investigating how press freedom came about, especially in English law. It then considers the various rationales that justify the maintenance of free speech and a free press. It notes that in no democracy is the freedom of the press unlimited, and that all societies need to draw lines between what is and what not permissible. Finally, the section examines how these rationales have had an impact on the possible obligations of the media to society and discusses what those obligations should be.
- 1.18 Section 3 considers the impact of the internet on the news media landscape. It traces the development of the news media, the increasing concentration of media ownership and the waves of rationalisations that have occurred in response to earlier technological and economic changes. It describes the current state of the media market in Australia and the fundamentals of newspaper economics, particularly the emergence of online alternatives to traditional advertising options. It notes that this is leading to the creation of some pressure points in the industry.
- 1.19 Section 4 acknowledges the generally valuable work of much of the Australian media, but also identifies some deep-seated weaknesses, especially in professional standards and accountability. It contains an analysis of public opinion about the media, and presents a number of case studies that illustrate instances of poor or questionable performance. It contains data that shows journalists themselves to be aware of some of the shortcomings, but also reveals a disconnection between the media and the public on some key questions of ethics.
- 1.20 Section 5 sets out the legal position of the media in Australia, and describes the privileges and restrictions that apply to them. The legal position in general is that the media are subject to the laws of the land like everyone else, and that there are no laws that apply only to the media. Some laws have a bigger impact on the media than on other sections of the

community, but nonetheless they are laws of general application. Some laws protect freedom of speech and some restrict it. These laws attempt to strike a balance between competing interests, often between the public interest and some legitimate private interest. The privileges enjoyed by the media include, in some jurisdictions, immunity from having to disclose confidential sources to a court, and otherwise have to do with exemptions from certain laws such as privacy and trade practices, as well as special access to forums such as parliament and the courts.

- 1.21 Section 6 analyses the regulation of broadcasting. In contrast to the self-regulation of the print media, the broadcast media are subject to statutory regulation through the Australian Communications and Media Authority (ACMA). The reasons for this fundamental difference are re-assessed in the light of recent technological changes. ACMA's complaints-handling procedures are described, as are the in-house procedures of the public sector broadcasters, the ABC and SBS. Criticisms of ACMA's procedures made by previous inquiries are summarised. Finally there is a discussion of issues concerning public funding and media independence, and of the potential for government regulation of media to have a 'chilling effect' on freedom of speech.
- 1.22 Section 7 describes certain aspects of the self-regulatory regime that applies to print media: the journalistic codes of ethics and various initiatives taken by print publishers to improve accountability. These include the appointment of ombudsmen and readers' editors. The complaints-handling procedures of the Media, Entertainment and Arts Alliance (MEAA) are described and assessed for efficacy, as are other mechanisms of accountability such as the effect of market discipline. The section contains a summary of the history of the MEAA Code of Ethics and a description of the codes developed by publishers. Weaknesses in the codes and the difficulties of enforcing them are also discussed.
- 1.23 Section 8 is devoted to the main mechanism for print media accountability, the Australian Press Council (APC). Its origins and history are described. There is a detailed analysis of its strengths and weaknesses and a discussion about what might be done to improve it. This analysis takes place against the background of what is happening in other jurisdictions, including the United Kingdom, Ireland, South Africa and New Zealand by way of press council development. There either are, or have been, substantial efforts at reform in all these countries. Particular attention is paid to current and previous attempts in the United

Kingdom at press council reform, in large part because the APC was modelled on the British Press Council.

- 1.24 Section 9 deals with means of redress against media errors and harms: rights of reply, corrections, retractions and apologies. It also discusses rights of access to the media. It acknowledges that 'right' of reply and of access is in fact a misnomer: there is no 'right' recognised in law or otherwise enforceable. As things stand in Australia, it is a matter of ethics. The case for the introduction of a statutory right of reply is proposed, but not a corresponding right of access.
- 1.25 Section 10 discusses theories of regulation. It presents the rationale for regulation, including market failure, and the promotion of social and equity objectives in public policy. The classic tests for whether regulation is justified are described and discussed, as are various modes of regulation on a spectrum from complete self-regulation to complete governmental regulation. The advantages and disadvantages of each are canvassed, and the basic design features of a regulatory system set out.
- 1.26 Section 11 contains the Inquiry's proposals for reform of the current system of media regulation. It begins by answering the question put directly to it in the course of its hearings: Is there a problem? The answer given is yes, and the problem is described as taking many forms: market failure, general public distrust of the media and the consequences of this for the Australian polity, numerous instances of the media doing unjustified harm to people, and the failure of the existing regulatory systems to hold the media to account for these harms. It was found that under the present system, the costs of the harms done by the media are borne not by the media but by other sections of the community, including those who are the subject of unjustified adverse coverage who may be powerless to obtain redress. It is concluded that this has created perverse incentives that militate against the likelihood of improvements if these are left to the media to instigate.
- 1.27 Section 12 addresses the question of whether government assistance for the media is necessary or justified in the context of the significant changes being wrought by the internet on traditional media markets. It describes and analyses changes in revenue patterns not only in recent years but over a longer time frame, and does so by reference to macro-economic factors which have affected not only the media but the economy as a whole. It considers the

impact of the internet on journalism as well as on the commercial side of media operations, and recounts the ways in which media companies in Australia and elsewhere are adapting to the new order.

Acknowledgment

- 1.28 It is appropriate to acknowledge that at all times the Inquiry received invaluable assistance from those who made submissions and those who appeared at the hearings. That the Inquiry lacked the compulsive powers of a Royal Commission was not an impediment to obtaining the material that was needed.

Some key terms

- 1.29 **Media:** This report deals with news media. It does not purport to deal with other forms of media.

Press: This term is used as a generic descriptor for the news media in certain contexts. It includes broadcasting and online news media, as well as print.

2. The democratic indispensability of a free press

- 2.1. 'Freedom of speech is the life blood of democracy.'¹ On this basis, political philosophers and lawyers, journalists and publishers have contended that the media is entitled to a substantial degree of immunity from regulation. The role of the media in a democratic society is therefore an issue that must be considered whenever a government asks whether publishers and journalists should be subject to some form of regulation.
- 2.2 This section examines the development of the central democratic ideas and other ideals at the heart of the notions of free speech and press freedom, and some of the dilemmas surrounding them. These doctrines were given political expression in such important declarations as the first amendment to the Constitution of the United States (the free speech clause) and Article 10 of the European Convention on Human Rights (which deals with freedom of expression).
- 2.3 The section begins by investigating how press freedom came about, especially in English law. It then considers the various rationales that justify the maintenance of free speech and a free press. It notes that in no democracy is the freedom of the press unlimited, and that all societies need to draw lines between what is and what is not permissible. Finally, the section examines how these rationales have had an impact on the possible obligations of the media to society and discusses what those obligations should be.
- 2.4 Like many people, including lawyers, who work in the great institutions of democracy, media practitioners are not confronted every day by the need to reflect on the origins of the freedoms we have come to take for granted. An inquiry like this one provides an opportunity to reflect on these freedoms and how they are exercised in 21st century society.
- 2.5 Central to the discussion is an appreciation of democracy. Scholars have constructed many types and definitions of democracy (classical Athenian democracy and its antecedents; republicanism; direct democracy; deliberative democracy) and variants of each². The two main streams are republicanism and liberalism. Republicanism is rooted in the French

¹ *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115, 126 (Lord Steyn).

² David Held, *Models of Democracy* (Stanford University Press, 3rd Edition, 2006); John Keane, *The Life and Death of Democracy*, (Simon and Schuster, 2009).

Revolution and emphasises the importance of common goals and shared values. Liberalism follows the English tradition and accentuates the interest of free and autonomous individuals³.

2.6 The Inquiry's concern is centred on Australia and its long-established liberal democracy with representative government. Under this system, the policymakers (the people's representatives) are chosen at regularly-held competitive elections. To make an informed choice, voters must have access to both sufficient and relevant information so they can decide whom to elect. As well, voters (at least those who are interested) can influence government policy all the time. Their representatives know they can be voted out of office if they are not responsive to the communities they serve⁴.

2.7 The importance of the press to this democratic process has been recognised by the High Court⁵ when accepting what was said by Lord Simon in *Attorney-General v Times Newspapers Ltd*:

People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument⁶.

The historical background

2.8 The newly-invented printing press came to England in 1476. It brought about a sweeping change in communication possibilities. There was now a means, which could be employed by many, of carrying speech far and wide⁷. It did not take long for the state to exercise strict control 'over the printing, publication and importation of books' in the interests of the state's 'peace and security'⁸. As early as 1484, monopolies were granted to publishers to print

³ Clifford Christians, Theodore L Glasser, Denis McQuail, Kaarle Nordenstreng and Robert A White, *Normative Theories of the Media: Journalism in Democratic Societies* (University of Illinois Press, 2009) 93–94.

⁴ Henry B Mayo, *An Introduction to Democratic Theory* (Oxford University Press, 1960).

⁵ *Australian Capital Television v New South Wales* (1992) 177 CLR 1.

⁶ (1974) AC 273, 315.

⁷ David Lange, 'The Speech and Press Clauses', (1975) 23 *University of California, Los Angeles Law Review* 77, 94.

⁸ Sir William Searle Holdsworth *A History of English Law* (Sweet & Maxwell Ltd, vol 5, 3rd ed, 1945) 203.

particular books. Then, in 1534, it became an offence to purchase a book published abroad. This was followed by proclamations against seditious and heretical books⁹.

- 2.9 In 1586 the Star Chamber issued a decree prohibiting all printing other than by licensed stationers. The Stationers' Company had been given power to supervise the grant of, and charge fees for, patent monopolies to printers to publish particular works in exchange for helping the state suppress objectionable works¹⁰.
- 2.10 In 1643 parliament replaced the Crown in controlling printing¹¹, but an ordinance preserved the Stationers' Company's monopoly to license publishers. From 1649 there began to be enacted a series of Printing Acts which preserved the monopoly of the Stationers' Company for prior publications and passed the right to control new publications to the jurisdiction of the Council of State¹². The 1662 Printing Act was the last attempt to regulate printing by statute. The Act established a licensing system. The licensor was required to certify that his work was not 'contrary to the Christian faith ... or against the state or government'¹³.
- 2.11 By the early 1690s advances in technology had significantly reduced the cost of printing and it was no longer practicable for the state to keep printing under control¹⁴. At the same time there was growing pressure from publishers to abandon the licensing laws. The 1662 Act was allowed to lapse in 1694.
- 2.12 Nonetheless, the state still attempted to control the press. It did so first by prosecutions for treason and, when that proved to be unsatisfactory, by prosecutions for seditious libel. By the mid-18th century, however, prosecutions for seditious libel became difficult to enforce because of the unwillingness of jurors to convict. Moreover, publishers began calling for freedom of speech, adding their voices to a campaign that had begun a century earlier in the

⁹ David Brennan 'Printing in England and Broadcasting in Australia: A Comparative Study of Regulatory Impulse' (2000) 22 *Adelaide Law Review* 63, 65.

¹⁰ Sir William Searle Holdsworth *A History of English Law* (Sweet & Maxwell Ltd, vol 6, 2nd ed, 1937) 363–364.

¹¹ David Brennan 'Printing in England and Broadcasting in Australia: A Comparative Study of Regulatory Impulse' (2000) 22 *Adelaide Law Review* 63, 67.

¹² *Ibid* 68.

¹³ *Ibid* 69–70.

¹⁴ Philip Hamburger, 'The Law of Seditious Libel and the Control of the Press', (1985) 37 *Stanford Law Review* 663.

time of Milton. It was a battle fought on many fronts, with political dissenters and pamphleteers challenging the boundaries of control¹⁵.

- 2.13 The long struggle against regulation was increasingly successful. By 1822 Blackstone was able to write:

*The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every free-man has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.*¹⁶

Rationales for free speech and a free press: the search for truth

- 2.14 Often the expressions 'free speech' and 'free press' are used interchangeably. Some commentators, however, see them as different concepts. Nimmer, for example, suggests that freedom of the press is a right distinct from freedom of speech because each serves a different function. The press (he would no doubt include all news media) is the power through which the people inform themselves about matters of government. Speech, he goes on to say, serves a self-fulfilment function¹⁷. Professor Sampford, in his evidence to the Inquiry, made the same point¹⁸. From time to time it will be necessary to distinguish between the two concepts. For the most part, though, they represent the same ideal. Similarly there are strong rationalisations for both, which are inter-related but which will be discussed in turn.

- 2.15 The rationale of searching for the truth is sometimes based on the concept of the 'marketplace of ideas'. It emerged from the writings of JS Mill's *On Liberty* published in 1859, but with antecedents going back at least to John Milton's *Areopagitica* published in 1644. Milton protested the licensing laws in England. He wrote: 'All opinions, yea errors, known,

¹⁵ John Keane *The Media and Democracy* (Polity Press, 1991); James Curran and Jean Seaton *Power without Responsibility. Press, broadcasting and the internet in Britain* (Routledge, 7th ed., 2010).

¹⁶ Sir William Blackstone *Commentaries on the Laws of England* (Vol 4, 17th ed, 1830) 151.

¹⁷ Melville B Nimmer (1975)26 *Hastings Law Journal* 639, 639.

¹⁸ Oral Submission to the Independent Media Inquiry, Melbourne, 8 December 2011, 259–260 [37]–[9] (Professor Charles Sampford).

read, and collated, are of main service and assistance toward the speedy attainment of what is truest.¹⁹ In *On Liberty* Mill asserted that to form judgments people must assess all competing adverse claims. Truth, Mill said, did not always triumph immediately, but would win out in the long run.

*The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.*²⁰

2.16 Dr Sarah Sorial, in her submission to the Inquiry, described Mill's theory in this way²¹:

For Mill, we can never really be sure that the opinion we are trying to prevent is false or an erroneous one, so preventing a person from expressing her views could potentially deprive us of some truth. As humans, we are unable to employ a specific method that would guarantee error-free judgment. The methods of inquiry, analysis and evaluation that constitute rational human thought do not guarantee or generate certainty. Their use, however, throughout the entire human community over a period of time, leads to the overall reduction of error in our beliefs.

2.17 Under the truth-finding rationale, free speech contributes to the growth of knowledge and understanding. People contribute to discussions about social and moral values. The assumption is that the best view will be brought to the fore if the widest possible range of ideas is able to circulate. That way, the strengths and weaknesses of each can be identified²².

2.18 The truth-finding rationale has had a profound influence on United States jurists in their interpretation and application of the First Amendment (proposed in 1789, ratified in 1791) to the United States Constitution, which provides that: 'Congress shall make no law ... abridging

¹⁹ John Milton, 'Areopagitica', republished in Isabel Rivers (ed), *Areopagitica: a speech of Mr. John Milton for the liberty of unlicensed printing to the Parliament of England* (Deighton, Bell & Company, 1973).

²⁰ John Stuart Mill, *On Liberty and other essays* (John Gray ed) (Oxford University Press, 1991) at 21.

²¹ Dr Sarah Sorial, Submission to the Independent Media Inquiry, 2011, 1.

²² See discussion in Frederick Schauer *Free speech: a philosophical enquiry* (Cambridge University Press, 1982) 15–16. See also discussion in, John Corker, Submission to the Independent Media Inquiry, 2011, 1-2.

the freedom of speech or of the press'. In his famous dissent in *Abrams v United States*, Oliver Wendell Holmes Jr said²³:

The best test of truth is the power of the thought to get itself accepted in the competition of the market.

In later cases, influenced by what Barron describes as Holmes J's 'romantic view' of the first amendment²⁴, similar observations were made. In *Dennis v United States* Frankfurter J observed that²⁵:

The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other beliefs. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge.

And in the same case Douglas J (dissenting) said²⁶:

When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

Thus in the United States constitutional status has been given to a 'free market theory in the realm of ideas'²⁷ through the first amendment, although there remain some areas, broadcasting in particular, where the marketplace of ideas approach has had less influence²⁸.

- 2.19 Truth-finding is linked to another rationale for free speech: that for democracy to function effectively, voters must be informed. Free speech and a free press are indispensable to a voter's acquisition of relevant information to make informed choices. If truth emerges from a

²³ 250 US 616, 624 (1919).

²⁴ Jerome Barron, 'Access to the Press—A new first amendment right' (1966–1967) 80 *Harvard Law Review* 1641, 1643.

²⁵ 341 US 494 551 (1951).

²⁶ 341 US 494, 584 (1951).

²⁷ Jerome Barron, 'Access to the Press—A new first amendment right' (1966–1967) 80 *Harvard Law Review* 1641, 1643.

²⁸ Including in the regulation of broadcasting, where the Supreme Court upheld the 'fairness doctrine' imposed upon broadcasters: *Red Lion*. This is discussed in more detail in Section 6 of this report.

marketplace of ideas, then voters will be acting on true rather than false information. That is, the argument from truth assumes that free discussion will keep people from 'embracing what is cheap and false to the end that victory will go to the doctrine which is 'true to our genius''²⁹.

- 2.20 The assumptions behind the marketplace of ideas rationale have been widely criticised.
- 2.21 The prime assumption, that the market contains all relevant ideas, is never likely to be correct. Fiss contends that in reality the market is a 'structure of constraint'³⁰. First, it privileges those with the capital to acquire a newspaper, journal, TV station or radio station. Second, there is the influence of the advertiser. Fiss also contends that editorial and programming decisions are affected by choices to do with profitability³¹. Thus, 'an aggregation of economic and social power [may] so largely determine what the public hears that unfavoured ideas have no chance to gain a foothold'³². Third, for any market to operate with efficiency (here the market is to produce sufficient information for truth to be discovered) requires competition from a sufficient number of news organisations. Whatever may be the position elsewhere, that competition does not exist in the Australian market. As Professor Lesley Hitchins explained: 'There are no obvious reasons as to why a market of ideas should necessarily function efficiently'³³.
- 2.22 A second assumption which has been criticised is that having more information reduces the risk of error. It may be true that where free speech is suppressed lack of information may result in error. But even armed with full information, people do not necessarily have the means for weighing and evaluating that information. And, in any event, more information is only desirable if it is relevant.
- 2.23 A third problematic assumption is that the rationale stylises people as 'rational truth-seekers' who wish to, and are able to, distinguish fact from fiction. In reality, the marketplace model permits falsities to circulate; and it may be impossible for people to distinguish between

²⁹ *Dennis v United States* 341 US 494, 585 (1951).

³⁰ Owen M Fiss 'Why the state?' (1986–1987) 100 *Harvard Law Review* 787.

³¹ *Ibid* 788.

³² Kent Greenawalt 'Free Speech Justifications' (1989) 89 *Columbia Law Review* 119, 134.

³³ Lesley Hitchins, Submission to the Independent Media Inquiry, 2011, 2.

truth and falsehood. Sometimes that may not matter. A market can produce efficient (truth-based) outcomes simply as a result of vigorously competing voices, but it is not guaranteed.

- 2.24 Dr Sorial observed that, in order for Mill's conception of freedom of expression to operate, two central components are required³⁴:

Citizens must have the capacity to engage in debate, in the form of the relevant critical reasoning and speaking skills. They must also have equal opportunity to participate, in the form of access to public forums where they can articulate their views and debate with one another.

- 2.25 There is real doubt as to whether these capacities are present for all, or even most, citizens. And, even if they are, both speakers and audiences are often motivated by interests or concerns other than a desire for truth including, of course, the desire to make money, and personal, political and religious motivations that may render truth of less importance. People are often 'persuaded to believe what is already dominant or what fits their irrational needs'³⁵.

- 2.26 A final assumption is that on any given issue there is a truth to be found. This fails to acknowledge that some ideas are and will always remain contested matters of opinion, rather than fact. Classic areas involve politics, religion and ethics, or what Greenawalt terms 'value claims'³⁶. Common enough examples are: Which political party ought be elected to govern? Is there a god and, if so, what conduct does god expect of people?

- 2.27 There may be no truth (or perhaps no discoverable truth) on these and other matters, in which case the marketplace of ideas cannot produce or reveal truth on these issues. However, it still may be accepted that, as Greenawalt points out, 'discourse certainly can test the coherence of value claims, and can elucidate and clarify the values of a culture and of individuals'³⁷.

³⁴ Dr Sarah Sorial, Submission to the Independent Media Inquiry, 2011, 2.

³⁵ Kent Greenawalt 'Free Speech Justifications' (1989) 89 *Columbia Law Review* 119, 136.

³⁶ *Ibid* 132–3.

³⁷ *Ibid*.

2.28 Pessimism about the ability of people always to ascertain the truth does not necessarily result in the conclusion that government ought be able to limit speech; distrust of government, particularly in the realm of speech might nonetheless lead one to conclude that freedom of speech is less damaging to truth seeking than regulated or suppressed speech. As Greenawalt observes, judgment on this question will depend on views about 'people's responses to claimed truth, about the effects of inequality of private power over what is communicated, and about the soundness of government determinations about valid ideas'³⁸.

Rationales for a free press: democratic discourse

2.29 This rationale holds that free speech is to protect the right of all persons to participate in the democratic process: that people can understand political issues to effectively participate in the workings of democracy by deciding what propositions to accept and what to reject. Meiklejohn, one of the main proponents of this justification, points out that 'what is essential is not that everyone shall speak but that everything worth saying will be said'³⁹.

2.30 Likewise, Sunstein sees political speech⁴⁰ (though perhaps not all speech) as a necessary part of 'the processes of political deliberation that are a precondition for democratic legitimacy', involving free communication among the people as a component of self-government⁴¹. Similarly, but expressly adopting a Habermasian view, Post sees political speech as part of a 'communicative structure of self-governance' in which all views must be permitted to be heard so as to avoid pre-judging the outcome of the discourse⁴².

2.31 The rationale was summed up by Rand J of the Canadian Supreme Court in *Switzman v Elbling* as being to ensure 'government by the free public opinion of an open society ... [which] demands the condition of virtually unobstructed access to and diffusion of ideas'⁴³.

³⁸ Kent Greenawalt, *Speech, crime & the uses of language*, (Oxford University Press, 1989) 20–21.

³⁹ Alexander Meiklejohn *Political Freedom* (Oxford University Press, 1965) 25–28.

⁴⁰ Political speech is defined by Sunstein as speech that is 'both intended and received as a contribution to public deliberation about some issue': Cass R Sunstein, *Democracy and the Problem of Free Speech* (The Free Press, 1995) 130.

⁴¹ Sunstein (1995) 130 quoted in Katharine Gelber 'Freedom of Political Speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory' (2010) 9 *Contemporary Political Theory* 304, 304.

⁴² Post (1995) 7, 144, 273, quoted in Katharine Gelber 'Freedom of Political Speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory' (2010) 9 *Contemporary Political Theory* 304, 308.

⁴³ [1957] SCR 285, 305.

- 2.32 The argument from democracy also underpins the development of the implied freedom of political communication by the High Court of Australia⁴⁴. It is supported by several persons who made submissions and/or gave evidence to the Inquiry⁴⁵.
- 2.33 Some versions of the democratic discourse model, including that espoused by Meiklejohn, may permit governmental intervention to establish a framework in order to sustain or enhance the quality of democratic debate. This includes regulation that will produce fairness and balance in democratic discourse. On the other hand, more libertarian versions of a democratic discourse model, which combine elements of the marketplace of ideas model and a distrust of government, view government regulation of speech as inimical to democratic discourse because of a belief that government intervention will be self-interested and incompetent and will undermine, rather than serve, democracy.
- 2.34 Problems with the democratic discourse rationale directly relevant to the media were summarised by Balkin⁴⁶:
- the media may skew coverage to promote issues they support
 - the media may omit important information that the public should take into account
 - the media may reduce the quality of discourse in the drive for profits.

In addition, access to the media is not uniform or equal across individuals and groups who may wish to engage in speech relevant to democratic decision-making. As a consequence, certain powerful voices and positions are privileged over those that are less powerful, meaning voters do not receive a complete picture on political issues. In any event, in a modern society there is a limited capacity of people to learn all that they must to fully participate in the democratic process⁴⁷.

⁴⁴ See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁴⁵ See, Oral Submission to the Independent Media Inquiry, Sydney, 16 November 2011 46 [25]–[28] (Professor McKinnon); Oral Submission to the Independent Media Inquiry, Sydney, 16 November 2011 63 [8]–[9] (Mr Hywood); Dr Sarah Sorial, Submission to the Independent Media Inquiry, 2011, 2–3; Associate Professor Paul Jones, Submission to the Independent Media Inquiry, 2011.

⁴⁶ Jack M Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' in Thomas Gibbons, (ed) *Free Speech in the New Media* (Ashgate, 2009) 201.

⁴⁷ Owen M Fiss 'Why the state?' (1986–1987) 100 *Harvard Law Review* 781, 786.

Rationales for free speech: self-fulfilment and autonomy

- 2.35 A common justification for free speech and a free press that is adopted particularly by European thinkers is individual autonomy and self-fulfilment⁴⁸. The concern here is not with what is good for society as a whole, but with the individual. Schauer contends that freedom of speech—more importantly, freedom of communication—is important for self-fulfilment⁴⁹. He explains: ‘[I]n short, it means that citizens should live their own lives as fully as they can’⁵⁰. Dr Helen Pringle, of the University of New South Wales, says in her submission that rights such as free speech ‘rest on the central principle on the inviolability of the person’. It protects ‘against unwarranted intrusions in the privacy of [all persons’] lives and choices’⁵¹.
- 2.36 A variant on self-fulfilment is the capabilities theory adopted by Nussbaum and Sen⁵² and built on, in the free speech context, by Gelber⁵³. Capabilities theory is a theory of ethics that places certain functional capabilities as central to human flourishing. This theory requires that the state guarantee the concrete circumstances necessary for people to choose how to live. While speech itself is not one of the central human capabilities postulated by Nussbaum, speech is integral to several such capabilities, including⁵⁴:

Senses, imagination and thought ... being able to ... think and reason ... Being able to use one’s mind in ways protected by guarantees of freedom of expression in respect of both political and artistic speech.

⁴⁸ See discussion in Susan J Brison, ‘The Autonomy Defense of Free Speech’ (1998) 108 *Ethics* 312.

⁴⁹ Frederick Schauer *Free speech: a philosophical enquiry* (Cambridge University Press, 1982) 55.

⁵⁰ *Ibid.*

⁵¹ Dr Helen Pringle, Submission to the Independent Media Inquiry, 2011, 2.

⁵² Martha Nussbaum, ‘Women’s Capabilities and Social Justice’ (2000) 1 *Journal of Human Development* 219, 237; Martha Nussbaum, ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’ (2003) *Feminist Economics* 33; Martha Nussbaum, ‘Nature, function and capability: Aristotle on political distribution’ (1988) *Oxford Studies in Ancient Philosophy* Supplement 145; Amartya Sen *Inequality Reexamined* (1992) (Katharine Gelber ‘Freedom of Political Speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory’ (2010) 9 *Contemporary Political Theory* 304, 314).

⁵³ Katharine Gelber ‘Freedom of Political Speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory’ (2010) 9 *Contemporary Political Theory* 304, 315.

⁵⁴ Martha Nussbaum, ‘Women’s Capabilities and Social Justice’ (2000) 1 *Journal of Human Development* 219, 237; Martha Nussbaum, ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’ (2003) *Feminist Economics* 33, 41–2; quoted in Katharine Gelber ‘Freedom of Political Speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory’ (2010) 9 *Contemporary Political Theory* 304, 315.

Practical reason ... being able to form a conception of the good and to engage in critical reflection about the planning of one's life.

Affiliation ... being able to engage in various forms of social interaction (protecting this capability means protecting ... freedom of assembly and political speech).

Control over one's environment ... being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.

2.37 Under this approach⁵⁵:

the prominence afforded freedom of speech generally, and freedom of political speech specifically, does not arise from a distinct argument about a right but rather from an acknowledgement of the constitutive role of speech in the formation of individual capabilities ... [I]t is the act of engagement in thought and its expression that are ... key to the development of the capabilities required for good human functioning.

2.38 Gelber has also connected the capabilities approach with the argument from democracy, observing that for speech to contribute to effective deliberation and legitimation in a democracy 'individuals must have the ability to participate in speech in a way that ensures the reasons for holding their own views are accessible to others'⁵⁶. In other words, people must have 'equal capabilities to make effective use of deliberative resources and opportunities'⁵⁷. According to Habermas, speech rights 'institutionalize the communicative conditions for a reasonable political will-formation'⁵⁸. Capabilities theory goes beyond this to postulate the conditions necessary for citizens to participate meaningfully in democracy, and free speech is an important aspect of this approach⁵⁹.

⁵⁵ Katharine Gelber 'Freedom of Political Speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory' (2010) 9 *Contemporary Political Theory* 304, 315.

⁵⁶ *Ibid* 317.

⁵⁷ James Bohman, 'Deliberative Democracy and effective social freedom: Capabilities, resources, and opportunities' in James Bohman and William Rehg (Eds) *Deliberative democracy: Essays on Reason and Politics* (1997) 321, 345.

⁵⁸ Jurgen Habermas, *The Postnational Constellation* (2001) 115, cited in Katharine Gelber 'Freedom of Political Speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory' (2010) 9 *Contemporary Political Theory* 304.

⁵⁹ Katharine Gelber 'Freedom of Political Speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory' (2010) 9 *Contemporary Political Theory* 304, 316–7.

- 2.39 While it may be accepted that freedom of expression is important for self-fulfilment, it is not clear that *unlimited* free speech is essential for self-fulfilment⁶⁰. Indeed, as Gelber observes, under the capabilities approach, the speech that warrants protection is not all speech but ‘that speech that is constitutive of the formation and planning of one’s life in ways commensurate with one’s informed conception of the good’⁶¹. And even speech that performs this role may be subject to limitations under the capabilities approach where it causes harm to others⁶².
- 2.40 If this is correct, there may be a conflict between free speech as a means of self-fulfilment and other freedoms which may also be self-fulfilling—for example, the right to be treated with equal respect. The point is usefully demonstrated by hate speech and pornography, which are demeaning of particular groups in society and may impact on the ability of those groups to enjoy equal rights⁶³. Where there is a conflict between speech rights and other rights, it is not clear that speech rights should always prevail, although as Greenawalt observes ‘suppression of communication is a more serious impingement on our personalities than many other restraints of liberty...’⁶⁴

Rationales for a free press: The fourth estate

- 2.41 Thomas Macaulay is commonly credited as the first to refer to reporters of parliament as ‘the fourth estate of the realm’⁶⁵. The first three English estates—it is now usually forgotten—were the Lords Spiritual, the Lords Temporal and the Commons.
- 2.42 The fourth estate rationale assigns to the press a central role in safeguarding democracy. In an address to the Yale Law School, Justice Stewart, then a justice of the United States

⁶⁰ Eric Barendt *Freedom of Speech* (Oxford University Press, 2005) 13.

⁶¹ Katharine Gelber ‘Freedom of Political Speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory’ (2010) 9 *Contemporary Political Theory* 304, 316.

⁶² Ibid 315. Geber focuses on hate speech as an example of speech that, while it may perform a constitutive role for some individuals, may nonetheless be regulated to the extent that it harms the ability of others to become capable of constructing and implementing their own conception of the good life.

⁶³ Eric Barendt *Freedom of Speech* (Oxford University Press, 2005) 15; Katharine Gelber ‘Freedom of Political Speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory’ (2010) 9 *Contemporary Political Theory* 304, 317–321.

⁶⁴ Kent Greenawalt, *Speech, crime & the uses of language*, (Oxford University Press, 1989) 28.

⁶⁵ Baron Thomas Babington Macaulay *Essays—Critical, Historical and Miscellaneous*, (University of Michigan Library, 2005) 537.

Supreme Court, said that a free press permits the 'organised expert scrutiny of government'. Thus, he said, the press is the 'fourth institution outside the Government as an additional check on the three official branches'⁶⁶. So the term 'the fourth branch of government' has become as widespread in America as 'the fourth estate' in democracies influenced directly by the United Kingdom.

- 2.43 No formal enunciation of the functions of this fourth estate accompanied Macaulay's description. The doctrine implicitly recognised the necessity of a free press to animate the concept of the sovereign people, and the necessity of ensuring its independence from government. But, as Professor Stone told the Inquiry, at its base the fourth estate function 'is directed to exposing governmental abuse of power.'⁶⁷
- 2.44 Underpinning the rationale is the view that government would be better if its conduct and policies were subject to thorough review. The review can point out errors, deter against unfair policies and even lead to a change in government⁶⁸. Greenawalt observes that, apart from any truths it actually reveals about government, and even though some claims are inaccurate, 'a critical press affects how officials and citizens regard the exercise of government power, subtly supporting the notion that government service is a responsibility, not an opportunity for personal advantage'⁶⁹.
- 2.45 The rationale is connected with the argument from democracy, for its principal focus is, at least in Western liberal democracies, the role of a free press as a check on the democratically elected government. However, it goes further in that it also encompasses the role of a free press as a check on any form of institutionalised power. Further, it has a more distinctive focus on the role of the media than the argument from democracy, which concentrates on the need for electors and elected to communicate, while recognising the important role the media can play in that communication.

⁶⁶ Potter Stewart, 'Of the Press' (1974–1975) 26 *Hastings Law Journal* 631, 634.

⁶⁷ Oral Submission to the Independent Media Inquiry, Melbourne, 8 November 2011, 131 [16]–[17] (Professor Adrienne Stone).

⁶⁸ Zechariah Chaffee, *Government & Mass Communication* (A Report from the Commission on Freedom of the Press, The University of Chicago Press, 1947) 41; and Dr Sarah Sorial, Submission to the Independent Media Inquiry, 2011, 3.

⁶⁹ Kent Greenawalt 'Free Speech Justifications' (1989) 89 *Columbia Law Review* 119, 143.

2.46 Schultz has observed⁷⁰:

The ability of the Fourth Estate to accommodate a wide range of operational definitions may demonstrate the flexibility of the ideal, but it also ensures that the operation of the news media is based on a fundamental paradox. Of the institutions which emerged to provide checks and balances, to ensure that the political system was subject neither to the arbitrary authority of a capricious monarch, nor the tyranny of the majority, the press was the only one whose survival depended on, and was measured by, commercial success.

As she comments:

... this characterises what Francis Williams describes as the 'Janus face' of the press, Les Carlyon as 'the corporate face of free speech', and George Boyce as 'an institution with its head in politics, its feet in commerce'.⁷¹

Whatever the rationale, free speech is not absolute

2.47 There is general agreement that free speech is not an absolute. An acceptance of the importance and distinctiveness of a right to freedom of expression does not mean an acceptance of the proposition that speech generally, or the media specifically, may not be regulated. One reason for identifying the rationales of free speech and a free press is that those rationales will assist in determining what limits on the freedom can be justified. Whatever view one takes of why, in a democracy, free speech and a free press perform such an important, if not a critical, function, it is almost universally accepted that there are circumstances in which free speech and a free press should be subject to restriction. Whether there should be restraint will depend upon the time, place, manner and content of the expressive act in question. In a liberal democracy, when there are competing private or public interests at stake, the social benefits of those interests may be more important than the benefit of free speech.

⁷⁰ Julianne Schultz, *Reviving the Fourth Estate. Democracy, Accountability and the Media* (Cambridge University Press, 1998) 95.

⁷¹ *Ibid* 48. Francis Williams, *Dangerous Estate: The Anatomy of Newspapers* (Longman, 1957); Les Carlyon, *Paper Chase: The Press under Examination* (HWT Books, 1982); George Boyce, 'The Fourth Estate—A Reappraisal', in Boyce, Curran & Wingate (eds) *Newspaper History: From the 17th Century to the Present Day* (Constable, 1978).

- 2.48 What is of fundamental importance is the kind of speech that is sought to be restricted. Professor Stone made this point strongly in her evidence to the Inquiry. She said that the proper approach is to consider ‘what the underlying rationale of freedom of expression is and consider whether any particular expressive act [she did not confine her views to speech] is important for that underlying rationale’⁷².
- 2.49 The examples she gave are instructive. When dealing with political expression, for example, Professor Stone said it should have a broad scope and be interfered with as little as possible. ‘At the other end of the spectrum,’ she said, is speech ‘uttered in the course of committing a criminal conspiracy’ which is not worth protecting at all. Obscenity, particularly obscenity about children, and criminal speech are also to be regarded as ‘lower value’ speech⁷³.
- 2.50 The process of deciding what speech should be protected and what speech can be restricted is performed primarily by parliament and to a lesser extent by the courts. Sometimes it involves a weighing-up process, although Professor Stone argues that a better approach is for ‘tightly formed rules’ to create categories of protected and unprotected speech. Whatever the process, it has led to the identification of a number of areas in which speech can be restricted. Most are relatively uncontroversial. While it is not easy to place the restrictions into easily definable categories, by and large they perform the following socially important functions:
- the protection of individual interests against false or misleading statements
 - the protection of community standards
 - protection against violence and disorder
 - protection from external aggression
 - protection of national security
 - the protection of the administration of justice, and
 - the protection of private property.

⁷² Oral Submission to the Independent Media Inquiry, Melbourne, 8 November 2011, 129 [2]–[5] (Professor Adrienne Stone).

⁷³ Ibid 130 [20].

What underpins those categories are several values: the avoidance of harm to society; the avoidance of harm to an individual; the avoidance of harm to the state; and the protection of the vulnerable (for example, children). In other words, speech may cause harm that warrants regulation⁷⁴.

- 2.51 Hence there are laws which prohibit incitement to murder, ‘falsely shouting fire in a theatre and causing a panic’⁷⁵, libel, misrepresentation, conspiracy, obscenity, perjury, hate speech and other publications. They will be examined in more detail in a later section. At this point it is only necessary to observe that these laws are instances where it has been thought that the harm caused by the targeted speech justifies its regulation, notwithstanding the risk of harm to democracy.

Social responsibility: a theory of the press

- 2.52 CP Scott, the famous editor of the Manchester *Guardian*, wrote in 1921⁷⁶:

A newspaper has two sides to it. It is a business, like any other, and has to pay in the material sense in order to live. But it is much more than a business; it is an institution; it reflects and it influences the life of the community ... it has, therefore, a moral as well as a material existence, and its character and influence are in the main determined by the balance of these two forces.

The balancing of these two forces was a central concern, as people have tried to reconcile the original free press ideals with the realities of the contemporary news media.

- 2.53 The realities are that:
- large media organisations, particularly newspapers, exercise a profound influence by the information (fact and opinion) which they publish

⁷⁴ See discussion in, Susan Brison ‘Speech, Harm and the Mind-Body Problem in First Amendment Jurisprudence’ (1998) 4 *Legal Theory* 39; Robert C Post, ‘Managing Deliberation: The Quandary of Democratic Dialogue’ (1993) 103 *Ethics* 654–678; Katharine Gelber ‘Freedom of Political Speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory’ (2010) 9 *Contemporary Political Theory* 304, 317–321.

⁷⁵ *Schenk v United States* 249 US 47, 52 (1919).

⁷⁶ C P Scott *1846-1932 The Making of the “Manchester Guardian”* (F Muller, 1946) 161. See also Institute for Ethics, Governance and Law, Submission to the Independent Media Inquiry, 2011, 3.

- large media organisations, including newspapers, have the ability to exercise this influence over government policy by the focus, prominence and volume of coverage on a particular issue.

As John Hartigan, while still chairman and chief executive officer of News Limited, explained in his address to the National Press Club on 1 July 2009:

Great press campaigns shape new laws and change history. They build a bridge between public opinion and public policy.

- 2.54 With that power comes the question: Should the news media be accountable? The question can be posed in another way: Does the news media have responsibilities? These difficult questions have, over the years, received a great deal of attention.
- 2.55 The most influential exposition of what a modern liberal democratic society expects from its media is found in the studies published by the Commission on Freedom of the Press, including *A Fair and Responsible Press* published in 1947. Financed by Time Inc and Encyclopaedia Britannica Inc, and operating under the aegis of the University of Chicago, the Commission was chaired by Robert Hutchins, Chancellor of the University. Its 13 members contained no representatives from the publishing industry or the profession of journalism.
- 2.56 In the United Kingdom at about the same time as the Hutchins Commission was publishing its studies, the National Union of Journalists successfully campaigned for the appointment of what was to be the first Royal Commission on the Press⁷⁷.
- 2.57 Both the Hutchins Commission and the first Royal Commission were established because of general dissatisfaction with the state of the press. In general, the themes of dissatisfaction in both countries were that the press:
- wielded enormous power for its own ends
 - was subservient to big business and put commercial interests ahead of editorial independence
 - resisted social change

⁷⁷ Fred S Siebert, Theodore Peterson and Wilbur Schramm, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility and Soviet Concepts of What the Press Should Be and Do* (University of Illinois Press, 1956) 75.

- paid more attention to the sensational than to the significant
- had become a danger to public morals
- had unjustifiably invaded people's privacy, and
- had become a barrier to the 'market place of ideas' through high entry costs⁷⁸.

2.58 William Hocking, Professor of Philosophy at Harvard University, was the author of the most important and influential of the six special studies made for the Commission: *Freedom of the Press*⁷⁹. In this work Hocking articulated the idea that the press owed a responsibility to society. This moral debt, he argued, arose from the fact that the press enjoyed certain protections and privileges that society conferred because only the press had the means of fulfilling certain of society's most important needs.

2.59 His argument began with this statement about the indispensability and ubiquity of the press in 20th century life. It touched, too, on the consequences for the press⁸⁰:

The press is no longer a separable commodity of which one can ask, 'Shall I or shall I not have it?' It has become a part of our mental existence. For this reason, no function exercised by the press can be indifferent to the citizen or to his community.

2.60 He developed his argument further by describing the power of the press⁸¹:

[T]he use of press freedom affects the mental diet of entire populations, qualifies the soundness of all democratic processes of thought, and in the international field becomes a mass factor affecting issues of peace and war. To the press with its present scope and equipment attaches an unprecedented power.

2.61 He then argued that among the most prevalent menaces to freedom of expression were the effects of the development of the press itself into a large-scale industry. This, he said, had resulted in the press developing a set of inherent biases: an interest in promoting those factors which contributed to its own commercial success; financial and cultural interlocking

⁷⁸ Ibid 78.

⁷⁹ William Ernest Hocking, *Freedom of the press* (A Report from the Commission on Freedom of the Press, The University of Chicago Press, 1947).

⁸⁰ Ibid 41.

⁸¹ Ibid 53.

with other parts of ‘big industry’; owners’ control over editorial hiring and firing which impinged upon editorial independence; and a tendency to concentration of ownership, which squeezed out competition.

- 2.62 This had created a dilemma for the press: as a part of big business, it was in no position to impartially judge big business, yet judging it—in the sense of holding big business to account—was one of the functions society relied on the press to perform. There was no escape from this dilemma. The only course was for the press to consider itself party to a bond of trust between itself and the public⁸²:

The work of the press is, in a sense, a public trust; the bond which it may freely offer is its willingness to summon witnesses from the opposition and from the neutral areas.

- 2.63 Hocking specifically identified the concentration of ownership, and the consequent crowding out of voices, as against the public interest: the public needed a wide variety of views and voices to choose from. Against that, he argued that free speech was advanced by there being a nationwide press and only big media companies possessed the ‘equipment of freedom’ to provide it. So here was a further dilemma: the achievement of greater press reach could probably be achieved only at the cost of impoverishing another and indispensable freedom, ‘a sufficiently typical variety of editorial policies’⁸³.

- 2.64 An even bigger obstacle to freedom of expression, Hocking said, was ‘arbitrary exclusion’ of material by editors⁸⁴.

What the writer and the public have a moral right to demand is that the editor’s selection be made in the interest of the American people and not solely on the basis of personal crotchet, the protection of a pet cause or even editorial policy ... The problem of a free press is not solely one of the rights of personal utterance; it is also a problem of what the public has a right to expect.

- 2.65 Hocking argued that not only was there the established freedom to speak, but that the indispensability and ubiquity of the press had created an imperative need among the public so strong that people no longer had the ‘freedom not to listen’.

⁸² Ibid 151.

⁸³ Ibid 154.

⁸⁴ Ibid 156.

Through the news columns ... there is being brought to the reader a part of his life, something to actualise and make graphic his membership in the living world ... It is a need, not a convenience. It has become a need largely through what the press itself has made possible; contemporary man exists in an immeasurably extended environment ... Communication has lost its right not to serve them; it is bound by its own success⁸⁵.

- 2.66 The functions of the press, therefore, were 'clothed with a public interest'⁸⁶. In words that provided the basis for an entirely new theory of the press, he stated⁸⁷:

The news content of the press enters at once into the thought processes of the public ... The fullness and unbent integrity of the news thus becomes a profound social concern. That which is a necessary condition of performing a duty is a right; we may therefore speak of the moral right of a people to be well served by its press.

[S]ince the citizen's political duty is at stake, the right to have an adequate news services becomes a public responsibility as well. The phrase 'freedom of the press' must now cover two sets of rights, and not one only. With the rights of publishers and editors to express themselves there must be associated a right of the public to be served with a substantial and honest basis of fact for its judgment of public affairs.

- 2.67 The report of the Hutchins Commission as a whole, and the work of Hocking in particular, have long been recognised as providing the intellectual foundation for the development of what became known as the social responsibility theory of the press. According to this theory, it is the duty of the press (broadcast and print) to provide 'a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning'⁸⁸. 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'⁸⁹.

⁸⁵ Ibid 164–167.

⁸⁶ Ibid 167.

⁸⁷ Ibid 167–170.

⁸⁸ Ibid 21.

⁸⁹ Ibid 23–28.

- 2.68 The social responsibility theory was discussed in *Four Theories of the Press*⁹⁰, published in 1956. The four theories were Authoritarianism, Libertarianism, Social Responsibility and Soviet Communist theory (the latter now better defined as Totalitarian theory). The authors of this widely-cited (and also widely-criticised book) sought to place each theory in the social systems and guiding philosophies of the different types of social systems or governments in which the press operates.
- 2.69 In particular, the authors wrote, it was necessary to look at certain basic beliefs and assumptions which these different societies held. These basic beliefs and assumptions concerned the nature of humankind, the nature of society and the state, the relation of individuals to the state, and the nature of knowledge and truth⁹¹.
- 2.70 The two non-democratic models (Authoritarian and Totalitarian) both involve the press being a direct instrument of state rule, where only state-approved content is disseminated. The key difference between them is that the Authoritarian model concentrates on censorship, on the suppression of politically-unpalatable information, while the Totalitarian model also involves mobilisation, the active use of the media to transform society in directions the state wants. Authoritarian theory, the oldest and through history the most pervasive, reflected societies which held that all persons were not equal, that some were wiser than others and it was those persons whose opinions should therefore be preferred; societies in which fealty to the monarch or ruler or tyrant was demanded of all and where the people were told what their rulers thought they ought to know. Totalitarian theory shared many of these characteristics, but contained one important additional dimension: the education of the people in the 'correct' truth. Thus the press in Soviet Communist countries carried the responsibility for interpreting decisions and events to the people in terms of Communist Party doctrine, admitting of no deviation from this 'truth'.
- 2.71 Another philosophy which has often been charged with leading to state control and media subservience is development journalism—a view that the Western media emphasis on negative news does not help in the task of development, and that their news priorities do not capture the important tasks of social and economic developments. Despite the

⁹⁰ Fred S Siebert, Theodore Peterson and Wilbur Schramm, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility and Soviet Concepts of What the Press Should Be and Do* (University of Illinois Press, 1956).

⁹¹ Ibid 2.

plausibility of such claims and their noble sentiments, it has sometimes led to censorship and covering up of corruption and incompetence.

- 2.72 The two democratic models, Libertarian and Social Responsibility theories, are of more relevance to Australia, and there is a lineage connecting the two. Libertarian theory was developed in the period of the Enlightenment, when there was a plethora of competing small presses, and their main product was opinion rather than what we would recognise as news. The theory was informed by a liberal belief that truth would emerge from the clash of competing opinions, and by a belief in the 'self-righting' capacities of public debate to ensure that in rational and reasoned discourse, error would be vanquished. It was analogous to the free market theories of Adam Smith where an 'invisible hand' would lead to optimal economic outcomes for all because each individual could be relied upon to behave rationally in his own interests⁹².
- 2.73 However, Libertarian theory was to prove inadequate in the face of new forces created by industrialisation of the press and by the realities of 19th and 20th century media economics⁹³. Its most serious limitation was its incapacity to provide a response to the issues of monopoly, the sharp increase in entry costs for newspapers, and the different ingredients of commercial and market success. It turned out that in the 'marketplace of ideas' there was inequality, abuse of power, intellectual squalor, avid interest in scandal, an insatiable appetite for entertainment and other debasements and distortions undreamed of by Milton. While there was still talk of media as a check on government, it could also be charged that the media could seek to bully government.
- 2.74 While it is changes in the media which have largely been focused upon as causing Libertarian theory to decline in applicability, the changes in government were equally radical and far-reaching. The growth of the welfare state, the increasing public role in health and education, the growing complexity of economic management, the size of urban societies and increasing globalisation and environmental issues—all these have made government larger and more complicated. This is not just an increase in size however. Keane has coined the term

⁹² Adam Smith, *The Wealth of Nations*, Book IV, Chapter II, originally published 1776; selected edition Tom Butler-Bowdon (ed) (Capstone Publishing Company, 2010) 240.

⁹³ Fred S Siebert, Theodore Peterson and Wilbur Schramm, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility and Soviet Concepts of What the Press Should Be and Do* (University of Illinois Press, 1956) 77–78.

'monitory democracy' to refer to 'the growth of power-monitoring and power-controlling devices that have begun to extend sideways and downwards throughout the whole political order'⁹⁴. The extent to which the various agencies of officialdom now report on themselves and each other has meant that while the state has become larger, it has also generated more checks and balances.

- 2.75 A further limitation of Libertarian theory was its incapacity to provide a workable solution to the challenge posed by broadcasting. Governments in Australia, as in other democracies governed essentially by libertarian principles, found it necessary to intervene in the regulation of broadcasting, partly for the orderly management of the broadcasting spectrum, which governments regarded as public property and finite at that, but also because of the perceived cultural power of broadcasting. To regulate the spectrum and control the activities of broadcasters, licensing and licence conditions were introduced. This amounted to a rejection of Libertarian theory.
- 2.76 On top of these economic and technological challenges to Libertarian theory, the intellectual climate of the 20th century was radically different from that of the 17th and 18th centuries when Libertarian ideals flourished. The new intellectual climate placed higher store in collectivist, societal values and less on individualistic values⁹⁵. In this climate, publishers began to acknowledge that their right to exercise freedom of the press brought with it responsibilities to society. At the same time, democratic societies remained committed to the principles of free expression that underpinned Libertarian theory. This commitment was retained as Social Responsibility theory emerged. The essential new element that Social Responsibility theory brought was that of reciprocity between the press and society. It became accepted that in return for the privileges that the press had acquired (these are described in Section 5 of this report) it owed society a responsibility to discharge the functions for which the privileges had been granted. Chief among them was to provide reliable information that allowed the citizen to participate in the political and economic life of the nation, and provide a forum for the exchange of ideas.

⁹⁴ John Keane *The Life and Death of Democracy* (Pocket Books, 2009) xxvii.

⁹⁵ *Ibid* 82.

2.77 A few individual publishers had been aware of these issues before the Hutchins Commission was set up. Joseph Pulitzer wrote in 1904⁹⁶:

Nothing less than the highest ideals, the most scrupulous anxiety to do right, the most accurate knowledge of the problems it has to meet, and a sincere sense of moral responsibility will save journalism from a subservience to business interests, seeking selfish ends, antagonistic to public welfare.

On the other hand, many rejected the moral strictures these responsibilities implied. A former publisher of *The Wall Street Journal* countered:

*A newspaper is a private enterprise owing nothing whatever to the public, which grants it no franchise. It is therefore affected with no public interest. It is emphatically the property of the owner, who is selling a manufactured product at his own risk.*⁹⁷

2.78 This opposition of views encapsulates a key weakness of social responsibility theory. For all its eloquence, it lacks a theory of media institutions. It is essentially a plea for the media to take upon itself the task of acting responsibly. The expectation is that the media will pursue professional objectives over and above the pursuit of profit. What institutional incentives drive news organisations to be socially responsible? What sanctions are there if they are not so inclined? To some extent the social responsibility theory answers the question—responsible for what?—namely improving the citizenry’s capacity for informed choice and participation. But it is quite silent on the questions—responsible to whom, and by what means?

Developments in Social Responsibility theory

2.79 In recent decades several variants and critiques of the four theories have appeared. In 2009, Christians *et al* synthesised these critiques and offered a fresh perspective⁹⁸. Their analysis provides a deeper understanding of how the press came to occupy so central a position in the life of democratic political cultures. The authors acknowledge that today’s journalistic,

⁹⁶ Joseph Pulitzer, ‘The College of Journalism’, (1904) 178(570) *North American Review* 641.

⁹⁷ Fred S Siebert, Theodore Peterson and Wilbur Schramm, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility and Soviet Concepts of What the Press Should Be and Do* (University of Illinois Press, 1956) 73.

⁹⁸ Clifford Christians, Theodore L Glasser, Denis McQuail, Kaarle Nordenstreng and Robert A White, *Normative Theories of the Media: Journalism in Democratic Societies* (University of Illinois Press, 2009).

audience and political–actor requirements ‘tend to converge on a model of practice that still seems quite close to the social responsibility version of press theory as enunciated by the [Hutchins] Commission’.

- 2.80 Reflecting on the emergence of the social responsibility theory, the authors note that the media responded to this challenge by seeking moral grounding in terms of their importance as defenders of democracy, a purpose in fact attributed to the media by the wider democratic society. Maintaining this identity as defenders of democracy had become central in the media’s normative position, leading to a process of external evaluation, mainly from the academy, about how the media was performing in this role.
- 2.81 However, the authors argue, having gained a moral claim to autonomy and non-interference by government for the purpose of carrying out this mission, the media had become ambivalent about accepting the society’s insistence on being accurately informed about public affairs. In any case, successive governments expressed concern about the news media’s performance, prompting them to establish inquiries (including royal commissions, parliamentary and government inquiries) which led to the establishment of press councils, complaints commissions and ombudsmen. Christians *et al* further argue, in the tradition of CP Scott, that the public service ethic is not only inseparable from the media’s existence, but had become a central obligation.
- 2.82 In their view, the media had begun to disappoint public expectations, mainly by failing to expose the concentrations of power that privileged the few at the expense of the many, and by failing to serve the interests of newly diverse societies. Indeed this critique goes further and asserts that the media have become part of the political-economic hegemony that it exists, in part, to scrutinise. With this context as the background, the authors propose the emergence of a citizen participation theory which they say has contributed to the development of pluralising enterprises such as community media, public-access media and communications policies which favour forms of public participation in the media. They say that this movement is grounded in the ideas of public dialogue and the public sphere as propounded by Habermas⁹⁹ among others. They conclude that a new criterion of media

⁹⁹ Jurgen Habermas, *Democracy and the Public Sphere* (Luke Goode ed) (Pluto Press, 2005).

performance is emerging, being the extent to which the media contributes to human and community development.

- 2.83 They go further to pose the question: What means exist for seeing that the media carry out this and other functions? The authors conclude:

It is not only the substance of media roles in a democracy that is problematic but ... the lack of any accountability, constraint, or sanction in the case of nonfulfillment.

The authors argue that some forms of accountability are 'quite compatible' with press freedom, and posit what they call the central question of accountability: 'To whom are the media accountable, and by what means is accountability achieved?'

- 2.84 Muller also contends that holding the news media to account is not inimical to press freedom. He put it this way. The development and monitoring of standards of journalistic practice is built on a belief in the value of a free press; it is not predicated in a belief that press freedom should be curbed. Ethical journalism extends freedom of the press because it creates credibility and so strengthens the trust the public needs to have for it to support journalists in the necessarily unsettling and disputed work of investigating those in positions of power and authority¹⁰⁰.

- 2.85 The prominent American journalistic critic Jay Rosen has also taken up the theme of how accountability impinges on the relationship between the news media and society. In the 1990s he proposed 'civic' or 'public' journalism as an alternative model. For Rosen, public journalism posits 'citizens as participants, politics as problem-solving, democracy as thought-deliberation'¹⁰¹. Under this model, new journalistic practices are required. Journalists are to intervene in public affairs not on behalf of particular viewpoints, but to invigorate public

¹⁰⁰ Denis Joseph Andrew Muller, *Media Accountability in a Liberal Democracy—An Examination of the Harlot's Prerogative* (PhD Thesis, University of Melbourne, 2005). See also Claude-Jean Bertrand, *An Arsenal for Democracy: Media Accountability Systems* (Hampton Press, 2003). 'The core of the problem is that good journalism is almost necessarily 'unauthorised', edgy, controversial and aberrant' Margaret Simons, Submission to the Independent Media Inquiry 2011, 12.

¹⁰¹ Jay Rosen, *Getting the Connections Right: Public Journalism and the Troubles of the Press* (Twentieth Century Fund, 1996) 13, 50, 69.

engagement¹⁰². The rise of the internet in which the means of media production are widely and cheaply available has given Rosen's ideas renewed currency¹⁰³.

2.86 Muller reflects on the changes in the relationship between society and its institutions brought about by '[t]he rise in public demand for accountability and the consequent creation of mechanisms of accountability across a wide range of activities in both the public and private sectors of the economy'¹⁰⁴. He thinks this should be extended to the media with a social contract.

2.87 This extends the scope of social responsibility theory by positing a social contract between the media and society. The theory holds that the media should shoulder the obligations to discharge its public functions and acknowledge that society has a right to hold them accountable for their performance. They are accountable both for what they publish and for how they behave. This view imports an element of accountability into the relationship between society and the media. It assumes mechanisms to articulate the obligations and make judgments about whether they have been met. It also assumes to penalise failure and make amends.

2.88 Increased calls for accountability in institutions extend beyond the news media. Mulgan has analysed the demand for increased accountability worldwide: a growing democratic assertiveness, an unwillingness to accept previously tolerated levels of secrecy and unaccountability¹⁰⁵. He noted that globalisation had led to greater interconnectedness of social interaction across national boundaries, and that the new social movements spawned by the internet were bringing pressure to bear on those in power¹⁰⁶:

The contest between the powerful and those who wish to call them to account is being transferred to a new, larger and unpredictable battleground.

¹⁰² C Edwin Baker, 'The Media that Citizens Need' (1998) 147 *University of Pennsylvania Law Review*, 317, 355.

¹⁰³ Margaret Simons, *The Content Makers*, (Penguin, 2007), 207–212; Matthew Ricketson (ed), *Australian Journalism Today*, (Palgrave Macmillan, 2012) 9.

¹⁰⁴ Denis Joseph Andrew Muller, *Media Accountability in a Liberal Democracy—An Examination of the Harlot's Prerogative* (PhD Thesis, University of Melbourne, 2005) 248.

¹⁰⁵ Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, (Macmillan, 2003) 4-5.

¹⁰⁶ *Ibid.*

Overall considerations

2.89 When, in 21st century Australia, one comes to consider issues of press regulation it is impossible to ignore the philosophers, journalists, politicians and lawyers who have grappled with the most central issues of a good society and of a functioning democracy. There is almost unanimous agreement on the importance of a free press for the vitality of democracy. While there are several justifications for why we need free speech and a free press, and while problems and qualifications have been raised about each, together they form a compelling case.

2.90 Moreover, although people use different language, there is broad agreement when analysts talk of the roles that the news media play in contemporary democracies. American communications scholar Michael Schudson's description captures the key ones¹⁰⁷:

- information: the news media can provide fair and full information so citizens can make sound political choices
- investigation: the news media can investigate concentrated sources of power, particularly governmental power
- analysis: the news media can provide coherent frameworks of interpretation to help citizens comprehend a complex world
- social empathy: journalism can tell people about others in their society and their world so that they can come to appreciate the viewpoints and lives of other people, especially those less advantaged than themselves
- public forum: journalism can provide a forum for dialogue among citizens and serve as a common carrier of the perspectives of varied groups in society
- mobilisation: the news media can serve as advocates for particular political programs and perspectives and mobilise people to act in support of these programs.

¹⁰⁷ Michael Schudson *Why Democracies need an unlovable press* (Polity Press, 2008) 12; See also Henry Mayer, 'What Should (and Could) We Do About the Media?' in G Major (ed), *Mass Media in Australia*, (Hodder and Stoughton, 1976), 164–264; Rod Tiffen, *Scandals: Media, politics & corruption in contemporary Australia*, (University of New South Wales Press, 1999); Margaret Simons, *The Content Makers*, (Penguin, 2007), 207–212; and Matthew Ricketson (ed), *Australian Journalism Today*, (Palgrave Macmillan, 2012).

There is also agreement that the news media wield considerable power, and that its influence can be profound¹⁰⁸. There is disagreement about the extent, scope and source of this power, but there is no doubt that it exists. Embattled politicians have their own perspective. Thus RH Crossman, once editor of the *New Statesman* and a former minister in the Wilson Government in the United Kingdom whose diaries were the source for the popular BBC television series *Yes Minister*, put it most dramatically when he wrote in 1965 that power had shifted from those who controlled the means of production to ‘those who control the media of mass communication’¹⁰⁹.

- 2.91 There is broad agreement that with such power comes responsibility¹¹⁰. Many echo CP Scott’s appreciation of the material and moral basis of newspapers. What is lacking, at least in Australia, is a robust discussion on what institutional mechanisms are necessary to ensure the press adheres to its responsibilities.
- 2.92 Immediately that this topic is raised the issue that must be addressed is whether any mechanism will unnecessarily restrict free speech. It could not be denied that whatever mechanism is chosen to ensure accountability speech will be restricted. In a sense, that is the purpose of the mechanism. Here then is a dilemma. While nearly everyone agrees on the importance of free speech and that it cannot be unlimited, there is dispute not only about when limits should be applied, but who should do it and how.
- 2.93 There is particular concern when the government seeks to regulate the media. The concern is that if government regulates the media it will do so in its own interest by limiting or preventing the media from carrying out its fourth estate function on the operations of government¹¹¹. There is another view. Greenawalt has pointed out that ‘owners and editors

¹⁰⁸ A proposition from which Mr Hywood (Fairfax Media) did not demur: Oral Submission to the Independent Media Inquiry, Sydney, 16 November 2011, 72 [41–45], (Mr Hywood); see also Paul Chadwick ‘Media and Accountability’ (AN Smith Lecture in Journalism delivered 17 November 1999) 5: ‘When media do fulfil their purposes they wield public power’.

¹⁰⁹ R H S Crossman *The Politics of Socialism* (Atheneum, 1965) 44.

¹¹⁰ That the media has responsibilities was accepted by Mr Hywood (Fairfax Media): Oral Submission to the Independent Media Inquiry, Sydney, 16 November 2011, 74 [10–22], (Mr Hywood). However, Mr Hywood’s view of the nature of that responsibility may differ from that discussed here. Certainly, Mr Hywood would accept that the media is required to be accurate; but he would reject any responsibility to be impartial or balanced: see 63 [32–39]; see also Paul Chadwick ‘Media and Accountability’ (AN Smith Lecture in Journalism delivered 17 November 1999) 6: ‘In a democracy, no public power is legitimate unless it is accountable’.

¹¹¹ Vincent Blasi, ‘The Checking Value in First Amendment Theory’ (1977) 3 *American Bar Foundation Research Journal* 521; Frederick Schauer *Free speech: a philosophical enquiry* (Cambridge University Press, 1982); Richard A Epstein, ‘Property,

of newspapers and television stations and other private individuals with huge influence over the dissemination of ideas will also have their own objectives to pursue'. He goes on to say 'private influence is a far cry from outright suppression. No private enterprise can prevent others from speaking.'¹¹²

- 2.94 This is the situation this Inquiry must address: how to accommodate the increasing and legitimate demand for press accountability, 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.

Speech, and the Politics of Distrust,' in Geoffrey R Stone, Richard A Epstein, and Cass R Sunstein (eds), *The Bill of Rights in the Modern State* (University of Chicago Press, 1992) This view was expressed by various persons who made submissions and/or gave evidence to the Inquiry; see, for example, Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011, 74 [27]-[33], (Mr Hywood).

¹¹² Kent Greenawalt 'Free Speech Justifications' (1989) 89 *Columbia Law Review* 119, 137.

3. Newspaper industry structure and performance

Introduction

- 3.1 The impact of the internet on the viability of newspapers has become a major issue, especially over the past five years, as revenue streams from advertising have been diverted from newspapers to the internet. This has led to concerns about the eventual impact on the supply of news, especially the kind of news that is essential to the healthy functioning of a democratic society.
- 3.2 This Inquiry was asked to consider this issue, and this section explores the threats and opportunities facing newspapers. The focus of the analysis is on the impact that changing market conditions are having on the sustainability of newspapers as a major player in the delivery of news and related services. It reveals that the changes taking place are significant, but that they are more nuanced than the public debate generally suggests. However, it begins with an analysis of the market in which newspapers operate.
- 3.3 Newspapers have been a prominent feature of Australian society since the founding of the first newspaper, *The Sydney Gazette and New South Wales Advertiser*, in 1803. As its name implies, the first newspaper saw itself operating in a dual market: providing news and information to readers, and as a medium of advertising to consumers. Over time, the industry grew to become a powerful economic force employing many thousands as well as a powerful medium of influence in society.
- 3.4 The invention of the telegraph in 1844 helped transform newspapers into the primary means of disseminating and receiving information around the country and the world. Other technological developments, however, have threatened the industry's wellbeing. The primacy of newspapers was challenged by the arrival of radio and the free-to-air broadcast of news bulletins in the 1920s. It was further challenged by the arrival of television in Australia in the 1950s. While those technologies led to some fundamental restructuring and consolidation of the industry, newspapers successfully adapted to the changes and have remained a major and highly-profitable medium for the distribution of news and advertising to the present day.

- 3.5 Today, new technological changes are having an impact on media delivery platforms. The development of new products and services on the internet is posing considerable challenges to newspaper publishing and will undoubtedly lead to further restructuring of the industry. Once again newspapers will need to adapt to the changed competitive environment and offer their customers products and services more closely attuned to consumer needs.

Historical industry structure

- 3.6 For a variety of reasons, the Australian newspaper industry became increasingly concentrated throughout most of the past century. At the opening of the 20th century, competition in the industry was vibrant with several titles vying for customers in each of the major cities. Shortly after Federation, the six state capital cities between them had 21 daily newspapers with 17 independent owners. The zenith came in 1923 when there were 26 capital city dailies and 21 independent owners¹. The trend towards increasing concentration began with the impact of the Depression, which led to several closures and weakened other titles. It was then that the Melbourne-based Herald and Weekly Times company led by Sir Keith Murdoch began acquiring titles interstate. In subsequent years, concentration in the industry increased progressively with both the number of titles and number of owners declining significantly. By 1960, the number of capital city dailies had declined by almost half to 14, and the number of independent owners had declined to seven, one-third of the number in 1923.
- 3.7 Competition from radio and television as sources of news and current affairs began to intensify in the second half of the 1960s. It was then that it became legal to broadcast live telephone interviews and the spread of portable tape recorders facilitated the recording of interviews. These developments greatly assisted the gradual growth of radio news, public affairs and talkback programs. Just as importantly, the development of transistor radios and car radios greatly increased the medium's accessibility and boosted audiences. Similarly, television's capacity to produce and broadcast news and current affairs programs was boosted by new technologies and related infrastructure developments such as the laying of coaxial cables between major cities, portable television cameras, introduction of colour television, and the introduction of ENG (Electronic News Gathering) which allowed faster and

¹ Henry Mayer *The Press In Australia* (Lansdowne Press, 1964) 31.

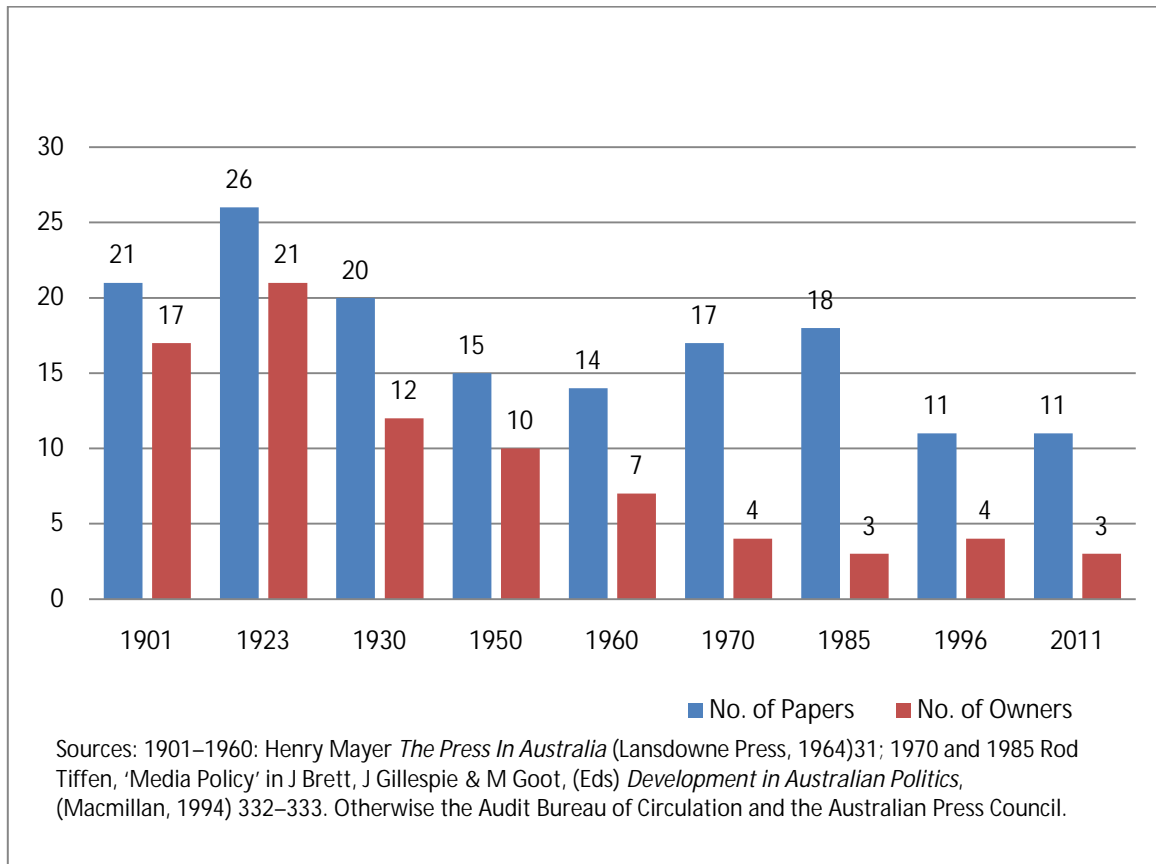
easier editing. Eventually, the combined effects of increased competition from broadcasting and changes in a variety of social factors² created severe pressures on the industry.

- 3.8 In 1984, there were 56 newspapers published daily. By 1992 this number had declined to 49 including the closure of all afternoon newspapers in the late 1980s. A further title (*The Goulbourn Post*) reduced its publication frequency in the early 1990s; currently it is published three times a week. After a tumultuous period of buying, selling and consolidation in the late 1980s–early 1990s, the industry experienced a period of relative stability with no further closures of daily newspapers occurring up to the present day.
- 3.9 Today, Sydney and Melbourne are the only cities with competing locally-produced daily newspapers. The other state capitals and major urban and regional centres have only a single daily newspaper. The metropolitan and national segments of daily press consist of 11 titles³, eight of which already existed in the 1930s, plus two new nationally circulating papers and one based in the national capital, Canberra. These 11 titles have just three owners. Details of the changes in the number of metropolitan/national daily newspapers and the number of related owners are provided in Figure 3.1. It is worth noting that although the number of titles increased by four between 1960 and 1985, the number of owners continued to fall.

² These include increased urban sprawl with changed commuting patterns, increased use of cars to travel to work, the increasing number of women in the labour force, and a tendency towards a society that was becoming more income-rich but time-poor also impacted on the way people accessed and consumed news.

³ This count of the number of metropolitan and national daily press titles does not include the News Ltd-owned *Northern Territory News*. It is also excluded from subsequent discussion of related concentration ratios.

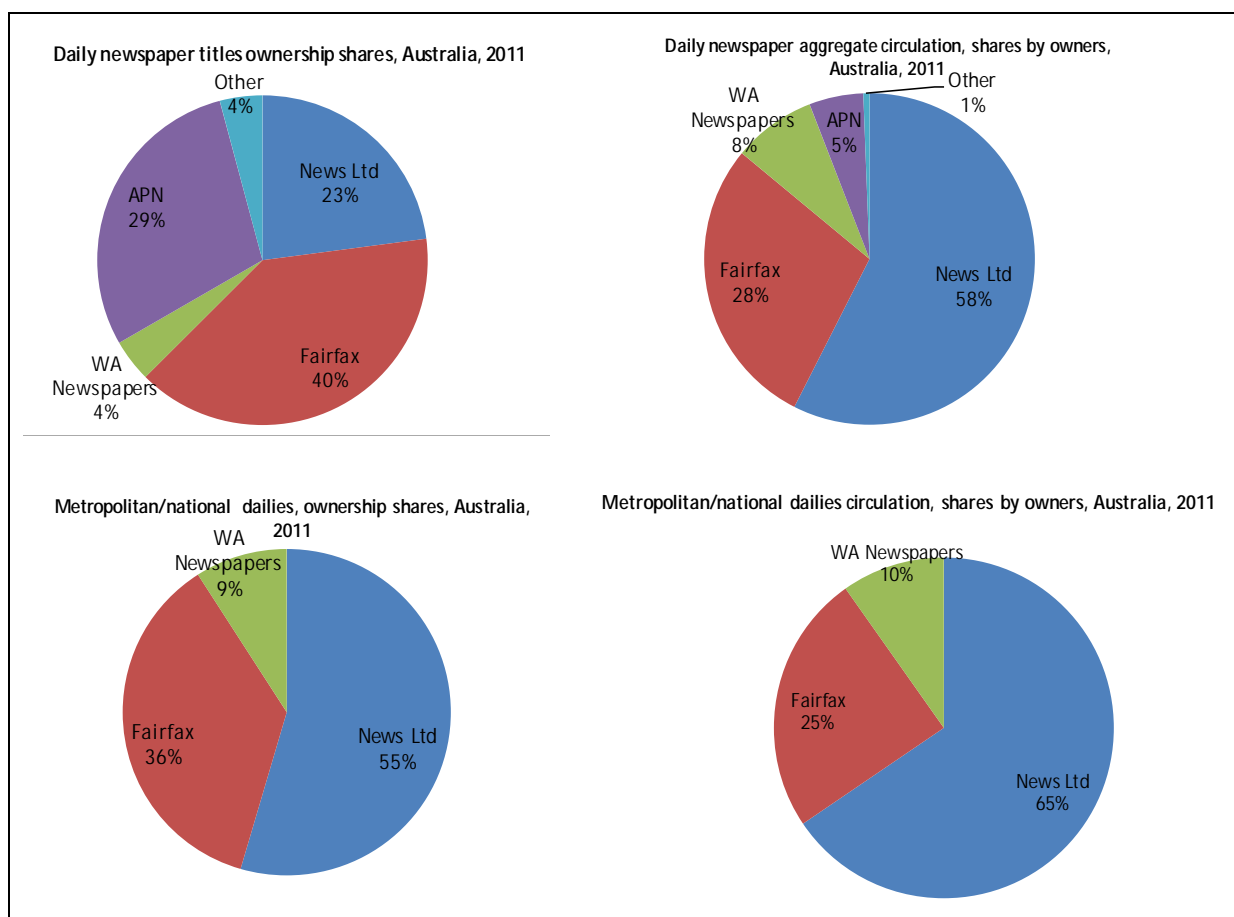
Figure 3.1: Number of metropolitan and national daily newspapers and owners



- 3.10 Outside the capitals, there is a long-established provincial daily press consisting of 37 newspapers of varying size and quality, but with little impact or news gathering capacity beyond their own area. Nearly all these began as locally owned enterprises, but by 2008 only two remained so.
- 3.11 Overall the industry comprises four major publishers and is highly concentrated. Measured by circulation, News Limited is by far the largest with 65 per cent of total circulation of metropolitan and national daily newspapers, or 58 per cent of circulation when counting all daily newspapers. Fairfax Media, the second largest group, controls 25 per cent of metropolitan and national daily circulation, or 28 per cent of all daily newspaper circulation. WA Newspapers which owns two titles in Western Australia, most importantly Perth's morning paper *The West Australian* is the third largest in aggregate circulation (eight per cent). APN, owned by an Irish company owns many provincial daily newspapers in New South

Wales and Queensland but controls only five per cent of aggregate daily circulation. Figure 3.2 provides details of the share of circulation and newspaper titles held by major owners.

Figure 3.2: Share of Australian daily newspaper titles and circulation



Source: Based on Audit Bureau of Circulation and Australian Press Council data.

3.12 Australia's newspaper industry is among the most concentrated in the developed world. An international collaborative research project on media concentration led by Professor Eli Noam of Columbia University has been analysing concentration in major media industries around the world. The project has generated data on the newspaper industry in 26 countries⁴ including Australia. One of the measures used is the proportion of daily newspaper circulation controlled by the leading firms in the industry. Australia is the only country in which the leading press company accounts for more than half of daily circulation,

⁴ These 26 countries are simply those with a team participating in the research project, and on which there is sufficient data.

while in 20 of the 26 countries it is under 40 per cent. With a share of 86 per cent, Australia also ranks highest by a considerable margin when considering the share of the top two companies. The share of the top two companies exceeds 60 per cent in only six of the 26 countries (see Table 3.1).

Table 3.1: Newspaper concentration—international comparisons

<i>Country</i>	Share of total daily newspaper circulation held (per cent)		
	Top 1	Top 2	Top 4
Australia	58	86	99
Switzerland	45	62	76
Israel	44	64	91
Ireland	44	57	70
Portugal	41	77	94
France	41	61	82
Turkey	38	53	78
South Africa	36	64	96
United Kingdom	34	54	74
Taiwan	32	56	96
Netherlands	30	58	90
Brazil	30	52	70
China	30	51	60
Sweden	29	45	67
Canada	28	54	77
Finland	27	43	57
Russia	24	47	76
Korea	24	44	70
Germany	22	31	41
India	22	29	42
Mexico	20	34	56
Japan	19	35	48
Spain	18	36	59
Italy	16	31	43
United States	10	14	22
Poland	61

Source: International Media Concentration Research Project, <<http://internationalmedia.pbworks.com>>

Functions of newspapers

- 3.13 In broad terms, newspapers are engaged in the collection and reporting of news which is 'packaged' together with other information for printing on paper and subsequent distribution to customers. Consumption of the printed information engages the attention of consumers in the search for, and actual reading of, articles or other items of interest. This enables newspapers to generate a somewhat 'captive' potential audience for advertising messages and to sell space for this purpose on its printed pages. In this sense, therefore, newspapers operate in a dual market by selling news and other information to consumers by subscriptions or single copy sales, and by selling to advertisers exposure of advertising messages to their readership. The earnings of newspapers both from circulation sales and from advertising are closely linked to the size and demographics of the readership.
- 3.14 There are two general categories of advertisements sold by newspapers: classified advertisements and display advertisements. Classified advertisements are typically brief messages presented in a dedicated section of the newspaper and grouped together under specific headings or classifications (hence the name) much like a services directory. Prices of classified advertisements reflect the number of words used, including a minimum fixed rate for a base unit up to a given threshold number of words plus a variable rate for words in excess of the threshold. A display advertisement is typically a stand-alone item that occupies an identifiable space often spanning two or more columns. It may be located anywhere in the newspaper. Its layout and contents are determined by the advertisers and may include logos, graphics and pictures. Pricing varies with both the size and location of the advertisement, with prominent pages in a newspaper attracting a premium.
- 3.15 Like other information products, newspapers have a high 'first copy' production cost and very low marginal cost of production of additional copies. Space or additional pages for content including advertising can also be expanded at relatively low cost. This made it possible for newspapers to bundle readily available low-cost information such as weather, public notices, puzzles and crosswords and so help increase or retain readership, with consequential benefits for the sale of advertising. Special sections, features and inserts are also typically used to increase audience reach and provide more attractive, sometimes specialised, platforms for advertisers.

- 3.16 In both the news/information and the advertising markets, newspapers compete with each other and with other media, including other print media, radio, television and the internet. Each outlet enjoys a degree of comparative advantage over its competitors in supplying a diversity of news and information services in response to consumer demand which can vary considerably depending on the immediate needs of consumers and their interests and circumstances.
- 3.17 The increasing range of news and advertising services accessible on the internet is changing the relative comparative advantages of the old and new media, and the consequential adjustment process is having a significant impact on established media structures. For newspapers, the internet is the latest in a series of major threats to their operation as a medium for the distribution of news and advertising. Earlier technological innovations such as radio and television also had significant impacts on newspaper operations and circulation. The turmoil caused by their entry necessitated major adjustments to newspaper operations, but eventually led to a more settled media landscape within which the competing media used their comparative strengths to differentiate themselves in market. For consumers, the competing media increased the opportunity for a closer matching of their needs with the expanded range of products on offer. On each occasion, while some consumers shifted their consumption to the new media, many changed their consumption patterns to encompass the old and new media in a complementary fashion. Some evidence is emerging that a similar process may be under way for the internet.

Demand for media products

- 3.18 From the consumer perspective, consumption of a media product involves an opportunity cost which comprises both the cost of acquiring the product and the value of the foregone benefits that would otherwise have accrued from allocating scarce disposable time to the next most valuable alternative activity. When access to media content does not involve a pecuniary charge (for example, watching free-to-air television or accessing free content on the internet) the opportunity cost equals the foregone benefits of the alternative activity. The opportunity cost determines the amount of consumption undertaken.

- 3.19 Lancaster's consumer theory⁵ provides a useful model for the analysis of consumer demand for newspapers. The theory conceives products as bundles of attributes and consumers' choices as being determined by their interest in some or all of the attributes. When a sufficient variety of products is available, consumers will choose the product that best matches their needs after appropriately adjusting for price. However, because of commercial production imperatives, markets typically supply only a limited variety of products. In such a situation, to satisfy their needs, consumers may be forced to buy products having features additional to those they seek, even though they place little value on the extra features.
- 3.20 Newspapers are a classic example of a range of products sold as a bundle. In addition to news, newspapers provide a range of other information—including features, special-interest sections on things such as travel, fashion, leisure, lifestyle and technology, magazine inserts, and, of course, advertising. Because of the very high up-front cost of producing and distributing a newspaper, additional features that help expand readership can be added at relatively low marginal cost. Publishers have an incentive to expand the readership of their newspapers so long as the additional marginal cost of production and distribution is less than the additional revenue generated from extra copy sales and more importantly from higher advertising rates that can be charged because of the extra readership.
- 3.21 Because of their diverse interests, consumers purchasing a newspaper may be motivated by different reasons. One may value national and international news analysis, features and the financial pages highly, while another may place a high value on the sports pages, local news and classified advertising (for example, if searching for employment). However, even if their needs are limited to particular parts of the content, consumers have no choice but to buy the whole newspaper, provided of course that they value the desired content more than the price of the newspaper. Expansions of the variety of content help increase the perceived value of the newspaper and thus encourage conversion of marginal non-buyers to buyers.
- 3.22 Advertisers target their messages to readers with particular attributes. How well the audience matches the desired attributes will determine the choice of advertising medium and the quantity of advertising purchased after appropriately adjusting for price. When possible, there would be a strong preference for advertisers to deliver their messages only to

⁵ Kelvin J Lancaster, 'A New Approach to Consumer Theory', (1966) 74(2), *The Journal of Political Economy*, 132.

people with the desired attributes. For some advertisers, niche audiences with desirable characteristics are more valuable than large audiences with diverse characteristics. But like consumers, advertisers have little choice other than to deliver their advertisements to large audience bundles even though they are targeted at only a component of the bundles.

- 3.23 Because newspapers operate in a dual market with a single product, many of its production, distribution, overheads and management costs are joint or common costs of operating in the two markets. Because they are inseparable, common business practices apply practical but arbitrary formulas such as relative proportions of total revenue or total payroll to allocate the common or joint costs to the distinct activities. Assertions that news does not pay for itself are incorrect to the extent that joint and common costs are not taken into account. It is true that historically, the cover price has not been sufficient to cover the full cost of preparing and distributing a newspaper, including its advertising content. But because readers are valuable to newspapers both as buyers of the content and as an audience for advertising messages, it makes sense for publishers to maximise readership by keeping cover prices low. The pricing decision necessarily takes account of the cover price effects in both the consumer and advertising market and will seek to maximise the joint returns to the publishers. The shortfall in revenue is simply part of the cost of creating the audience access which is then sold to advertisers. It may be convenient to call it a subsidy, but that cost is rightfully attributed to, and recovered from, advertising sales.

Media competition

- 3.24 Different media compete with each other to attract audiences and to sell advertising. The level of competition between the various traditional media reflects the degree to which they are substitutable from the point of view of both consumers and advertisers.
- 3.25 While products offered by different media may have some common attributes, consumers are attracted to, and engage with, the individual media differently. Actual consumption is determined by several factors and the extent of substitution between media is likely to be affected by the prevailing needs of consumers in the circumstances at the time of consumption. For example, while news is offered by newspapers, radio, and television, traditional consumption patterns differ considerably:

- both radio and television news is available at predetermined times, and the audience has no control (other than switching off) over the stories supplied
- television news is typically consumed in a fixed locality and requires both aural and visual attention
- radio can be mobile and requires only aural attention, meaning that it can be consumed concurrently with doing something else (driving, cooking, walking)
- newspapers are portable and offer a wide range of stories with the reader choosing which and how they are consumed and the time of consumption.

3.26 In their traditional printed form, newspapers are the least capable of the media in providing updates on developing news events in between publication of editions. Radio and television are both able to provide timely coverage of breaking stories.

3.27 The internet has revolutionised access to news, having none of the limitations of radio, television and newspapers. It is available on both fixed and portable devices, offers the widest range of stories from many sources and enables the consumer to choose the time and manner of consumption. Breaking news is covered almost instantly with the consumer being provided with access to both current and past coverage at will. Major traditional media have sought to exploit the benefits offered by the internet by establishing their own websites for the distribution of news and other services. In doing so, the digital versions of their products are significantly closer substitutes from the point of view of consumers, thus intensifying the level of competition between them.

3.28 As for consumers, the various media offer different mixes of attributes sought by advertisers. Ultimately, advertisers seek to maximise the benefits they derive from each unit of advertising expenditure. Consequently, substitution between media is affected by their capacity to supply access to audiences with the desired demographic and geographic characteristics, by the size of the audience, and by the level of interest and engagement the audience has with the content.

3.29 A now somewhat dated research study of media substitution conducted on behalf of the Federal Communications Commission of the United States⁶ rejected the sometimes expressed view that various media are entirely distinct. The study summarised its findings on news as follows:

... there is clearest evidence of substitution between Internet and broadcast TV, both overall and for news; between daily and weekly newspapers; and between daily newspapers and broadcast TV news. There is also evidence of substitution between cable and daily newspapers, both overall and for news consumption; between radio and broadcast TV for news consumption; and between the Internet and daily newspapers for news consumption. There is little or no evidence of substitution between weekly newspapers and broadcast TV, or between radio and either Internet or cable. There is also some indirect evidence of substitution in the greater use of national media by groups less targeted by local media.

3.30 A later study⁷, which specifically addressed shifts in news consumption from traditional media to online news media, concluded that while 'some migration from offline to online news consumption had occurred' the shift had been 'less than some believe'⁸. The analysis in this study predicted a 12 per cent shift of adult consumers from offline to online news consumption and a further 25 per cent with complementary use of offline and online media whose consumption of offline news media was predicted to decline by between 25 and 50 per cent⁹.

3.31 The situation in the United States is complicated by the severe impact of the Global Financial Crisis on the local economy. A recent Federal Communications Commission (FCC) report lists some 200 newspapers, large and small, that have closed or eliminated their print editions since 2007¹⁰. The combined effect of a deep recession and loss of advertising revenue to the

⁶ Joel Waldfogel, 'Consumer Substitution Among Media' (Federal Communications Commission, Media Ownership Working Group 2002).

⁷ Douglas Ahlers, 'News Consumption and the New Electronic Media' (2006) 11(1) *The International Journal of Press/Politics* 29.

⁸ *Ibid* 29.

⁹ *Ibid* 35.

¹⁰ Steven Waldman and the Working Group on Information Needs of Communities), *The Information Needs of Communities*, (Federal Communications Commission, 2011).

internet produced a sharp and continuing drop in revenue for newspapers, precipitating 'a more than 25 per cent reduction in newsroom staffs, affecting reporters, editors, online producers, photographers, artists and videographers'¹¹.

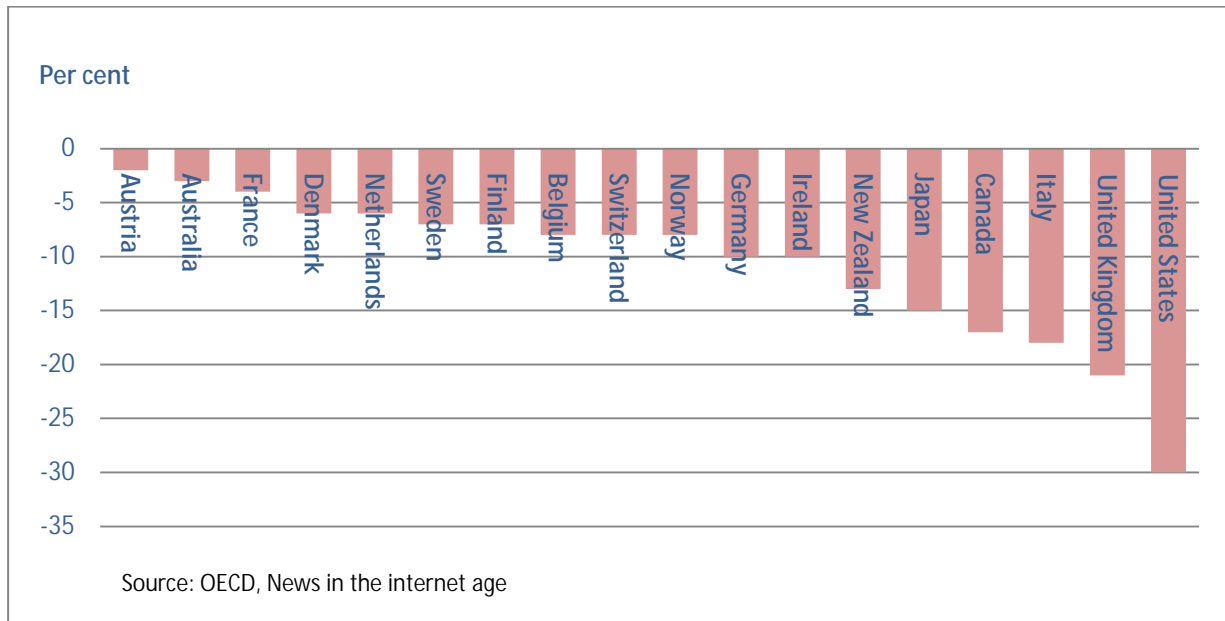
- 3.32 The closures in the United States have no immediate resonance in Australia, although some of the smallest papers have suffered relatively large drops in circulation and may be at some risk. The majority of the American closures have been of afternoon papers and the industry there seems to be in the midst of a structural adjustment similar to that which occurred in Australia in the late 1980s and early 1990s. As noted by Hal Varian¹² the financial difficulties faced by the United States newspaper industry largely reflect a long-term decline in circulation that began before the growth of the internet. However, the sharp drop in advertising spending which followed the GFC and the emergence of the internet as an important advertising medium in competition with the established media has aggravated the situation.
- 3.33 Estimates of the decline in newspaper publishing markets in OECD countries indicate that the United States newspaper industry was the worst affected, suffering a decline of 30 per cent in the period 2007–09¹³. The Australian market suffered the second lowest decline (three per cent) of all OECD countries. OECD estimates of newspaper market decline in selected OECD countries are presented in Figure 3.3.

¹¹ Pew State Of News Media 2010, 'Newspapers—Summary Essay: Newsroom Cutbacks', cited in FCC Ibid.

¹² Hal Varian, 'Newspaper Economics: Online and Offline', (Presentation at Federal Trade Commission Workshop on 'How Will Journalism Survive the Internet Age?', Federal Trade Commission Conference Centre, Washington DC, 9 March 2010, revised March 13 2010).

¹³ Organisation for Economic Co-operation and Development, *News in the Internet Age* (OECD Publishing, 2010).

Figure 3.3: Decline in newspaper publishing markets, OECD countries, 2007–09



3.34 There has been little by way of published quantitative analysis on the impact of the internet on newspapers and other established media published in Australia. As noted by Garden¹⁴, it has almost become fashionable among popular commentators and even some academics to use simple correlations between access to news sites on the internet and declines in the circulation of newspapers to predict the impending demise of the latter. As Garden points out, such proclamations are seldom supported by detailed analysis of all the relevant facts.

Industry performance

3.35 It is helpful to examine the performance of the newspaper industry since the middle 1980s to the present day. The analysis is limited by the availability of data. To the extent permitted by the available data, the focus of the analysis is on aggregate industry circulation and revenues.

Circulation

3.36 Newspaper circulation relative to population began to decline noticeably in the late 1950s coinciding with the introduction of television, but other factors such as changing commuting,

¹⁴ Mary Garden, (2010), 'Are predictions of newspapers' impending demise exaggerated?', (2010) 20 *Asia Pacific Media Educator*, 37.

advertising and reading habits were also at play. Windschuttle¹⁵ summarises the trend as follows:

In 1933 there were about 30 papers sold for every 100 people aged fifteen or more. This rose to 52 per 100 in the late 1940s early 50s. It had dropped to 46 by 1961 and declined steadily to less than 42 in 1976. On calculations based on sales per household, the decline has been even more dramatic. In 1933 there was one paper per day per Australian household. This rose to 1.5 per household in 1947 before beginning a long term decline after 1954. By 1976, sales per household were just less than one, that is, below the 1933 level.

- 3.37 Australia's rapid population growth after World War II masked the impact of lower rates of household consumption on total newspaper circulation which continued to grow until the late 1970s before entering into a steady decline (see Table 3.2). The sustained economic growth experienced in the same period generated solid growth in advertising expenditure with newspapers being one of the main beneficiaries.

Table 3.2: Trends in metropolitan and national newspaper circulation

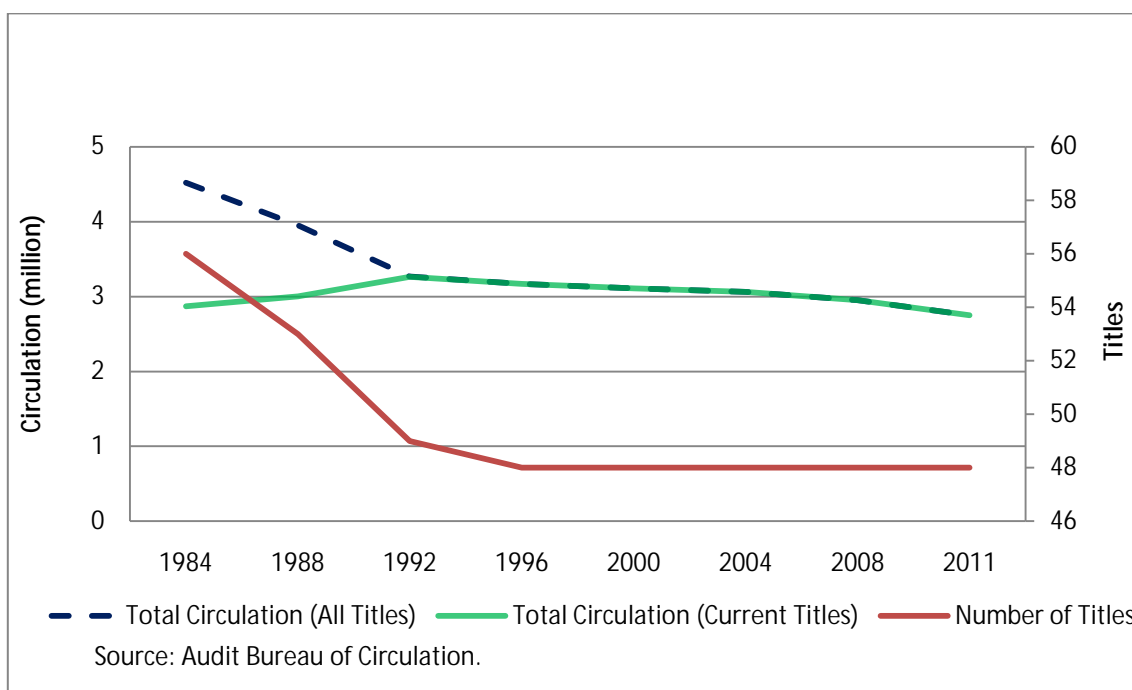
Year	No of titles	Total circulation (thousands)	Population (millions)	Newspaper sales per 100 people
1947	14	2905	7.53	38.6
1954	14	3317	8.99	36.9
1961	14	3351	10.48	32.0
1967	17	3781	11.80	32.1
1977	17	4047	14.07	28.8
1987	18	3525	16.11	21.9
1996	11	2531	17.89	14.1
2000	11	2488	19.17	13.0
2011	11	2198	22.75	9.7

Source: Murray Goot Newspaper Circulation in Australia 1932–1977 (Media Centre Papers 11, La Trobe University Centre for the Study of Educational Communication and Media, 1979) and Audit Bureau of Circulation.

¹⁵ Keith Windschuttle, *The Media*, (Penguin, 1985) 37.

3.38 The resulting pressures on newspapers induced by falling circulation eventually led to a major restructuring of the industry and the closure of all metropolitan afternoon newspapers with a dramatic effect on total circulation in the second half of the 1980s. The effects are illustrated in Figure 3.4. The figure provides two separate plots of daily newspaper circulation in the period 1984–2011, namely overall total circulation of all published daily titles and a second series which includes only the aggregate circulation of the 48 newspapers that are still published daily. The overall total circulation has declined dramatically—down by more than one-third—in the 27 years, from 4.52 million to 2.75 million. If the growth in population is taken into account, the extent of the decline in market demand is much more apparent. In the same 27-year period Australia’s population grew by around one-third. At the start of the period, total paid daily newspaper circulation was equal to 29 per cent of the population¹⁶, but by the close of the period the proportion had declined to 12.1 per cent—significantly less than half.

Figure 3.4: Australian daily newspapers—circulation and number of titles



3.39 In 1987 the combined copy sales of afternoon titles was around 1.2 million and with their closure, much but not all of the circulation was lost to the industry. Some of the circulation

¹⁶ Note these figures are for the total population, not the adult population as is sometime used in these ratios.

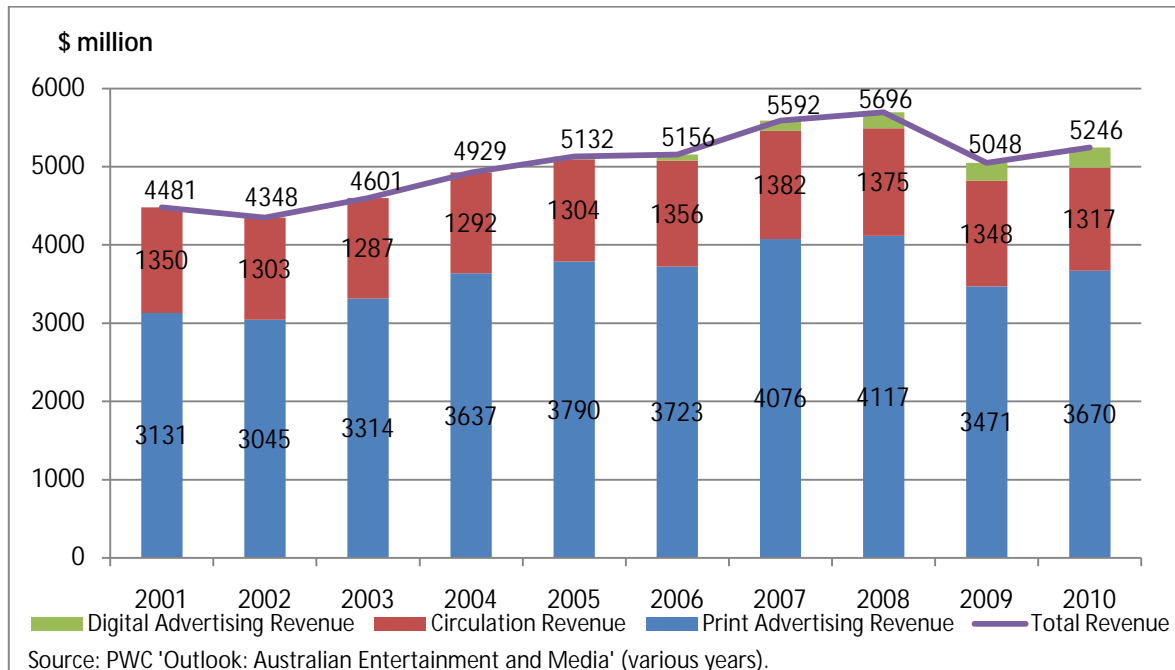
shifted to the remaining titles and produced an improvement in their aggregate copy sales in the period 1984–1992. From then on, however, aggregate circulation resumed its long-term decline, modestly at first (Compound Annual Growth Rate [CAGR] of -0.5 per cent 1992–2004) and subsequently accelerating to a CAGR of -1.5 per cent in the period 2004–11. It is likely that at least part of the accelerating decline since 2004 stems from the impact of the internet.

- 3.40 The inescapable conclusion from this is that declining circulation over the past 27 years is part of an underlying long-term trend that began half a century earlier. The turmoil of the late 1980s to early 1990s with several closures of major metropolitan dailies, including all afternoon newspapers, reflects the industry’s adjustment to changed demand for its products. It is interesting to note that most of this adjustment occurred before use of the internet became widespread and consequently could not be due to it. In more recent years, however, the growth of the internet as an important player in the advertising market and a popular medium for access to news sources is undoubtedly intensifying pressure for further industry restructuring.

Revenues

- 3.41 Daily newspapers have traditionally derived their revenues primarily from the sale of advertising (typically over 70 per cent of total revenue) and from subscription and single-copy sales. Other newspapers (mainly free to readers) rely primarily on the sale of advertising. In more recent times, newspapers have been deriving a small proportion of their total revenue from digital subscriptions and online advertising. In 2010, total revenue of the newspaper market was \$5.2 billion, of which \$3.7 billion (70 per cent) was derived from print advertising, \$1.3 billion (25 per cent) from circulation sales, and approximately \$260 million (5 per cent) from digital advertising and subscriptions.

Figure 3.5: Newspaper industry sources of revenue 2001–10

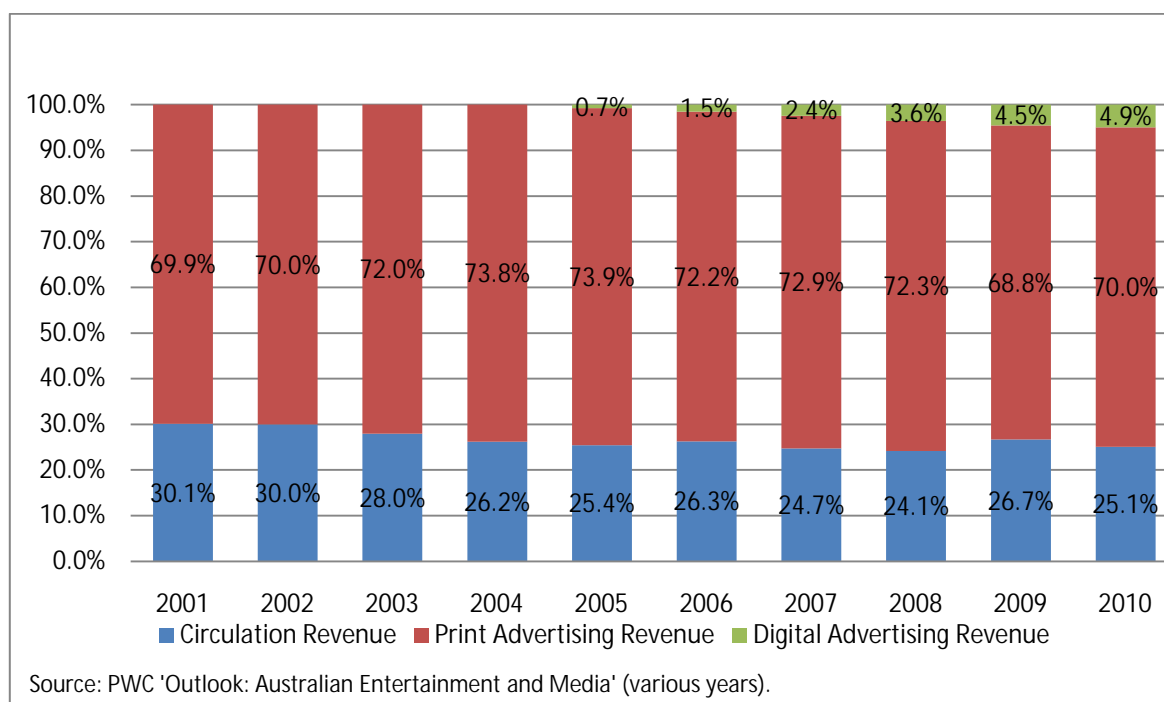


3.42 Figure 3.5 shows the major contributors to total revenue of newspapers in the period 2001–10. Overall total revenue displays a steadily increasing trend throughout the period. Total revenue increased from approximately \$4.5 billion in 2001 to \$5.2 billion in 2010 after peaking at \$5.7 billion in 2008. The decline in advertising revenue experienced in 2009 appears to have been largely due to general economic conditions with growth virtually resuming the underlying long-term trend in 2010. The CAGR of total revenue over the nine-year period is 1.8 per cent. Virtually all the growth was derived from print advertising which, notwithstanding a significant drop in 2009, also recorded a CAGR of 1.8 per cent over the period. There was little change in circulation revenues throughout the period. Digital advertising started from a very low base and grew steadily at a relatively rapid rate between 2005 and 2010. By the end of the period it was contributing almost five per cent of total industry revenue.

3.43 The contribution to total revenue from each of the main sources in the period 2001–10 is shown in Figure 3.6. Although the share of total revenue contributed by print advertising was virtually the same at the two extremities of the period, it changed significantly in the intervening years, reaching a high of 73.9 per cent in 2005 and a low of 68.8 per cent in 2009, the only year it was below the starting point. The share contributed by circulation shows a

slow declining trend throughout the period but this is primarily an effect of the absolute growth in advertising revenue. (As indicated above, in absolute terms circulation revenue changed very little over the period).

Figure 3.6: Newspaper industry revenue sources 2001–10 (shares)



3.44 The financial performance of newspapers needs to be considered in the light of conditions in the advertising market generally. Overall, the advertising market has a relatively high degree of correlation with broad measures of economic activity. Aggregate advertising expenditure generally mirrors changes in the level of economic activity. For example, a report by the former Bureau of Transport and Communications Economics (BTCE)¹⁷ analysed long-term trends in advertising expenditure in main media and found that its rate of growth was virtually the same as the rate of growth of gross domestic product (GDP) and slightly lower than that of private consumption expenditure. Comparisons of data on advertising expenditure in main media and GDP over the past decade show a continuing correlation between the two measures¹⁸.

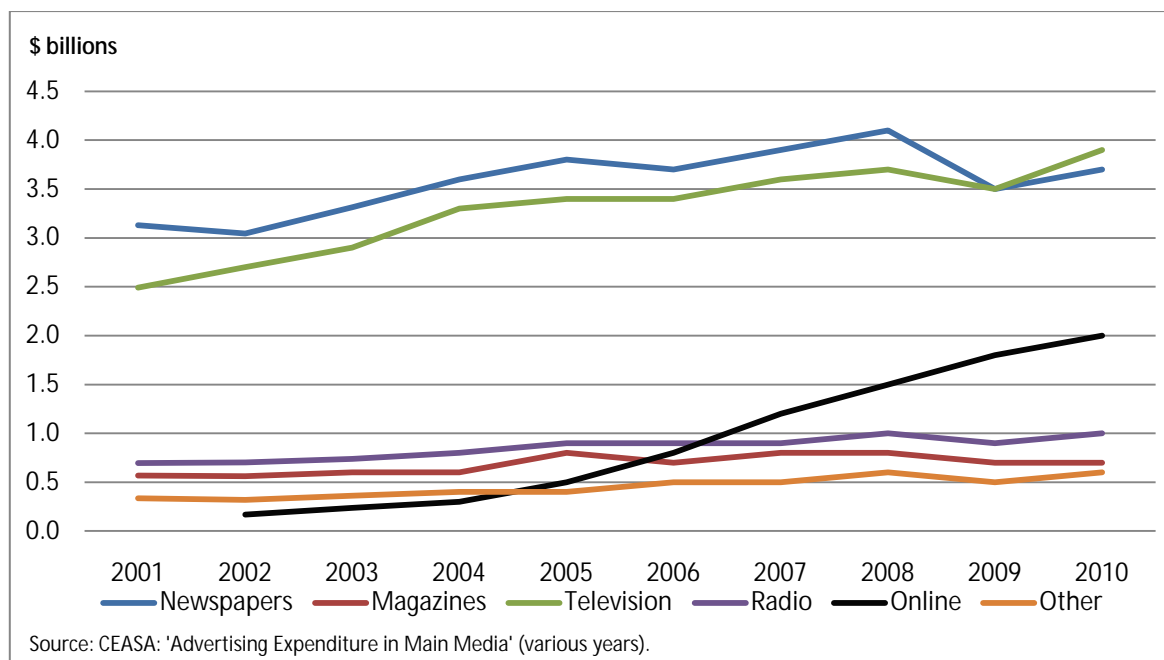
¹⁷ Bureau of Transport and Communications Economics, *Elements of Broadcasting Economics*, Report No 83, (Australian Government Publishing Service, 1993).

¹⁸ Commercial Economic Advisory Service of Australia 'Advertising Expenditure in Main Media' (various years).

Online advertising

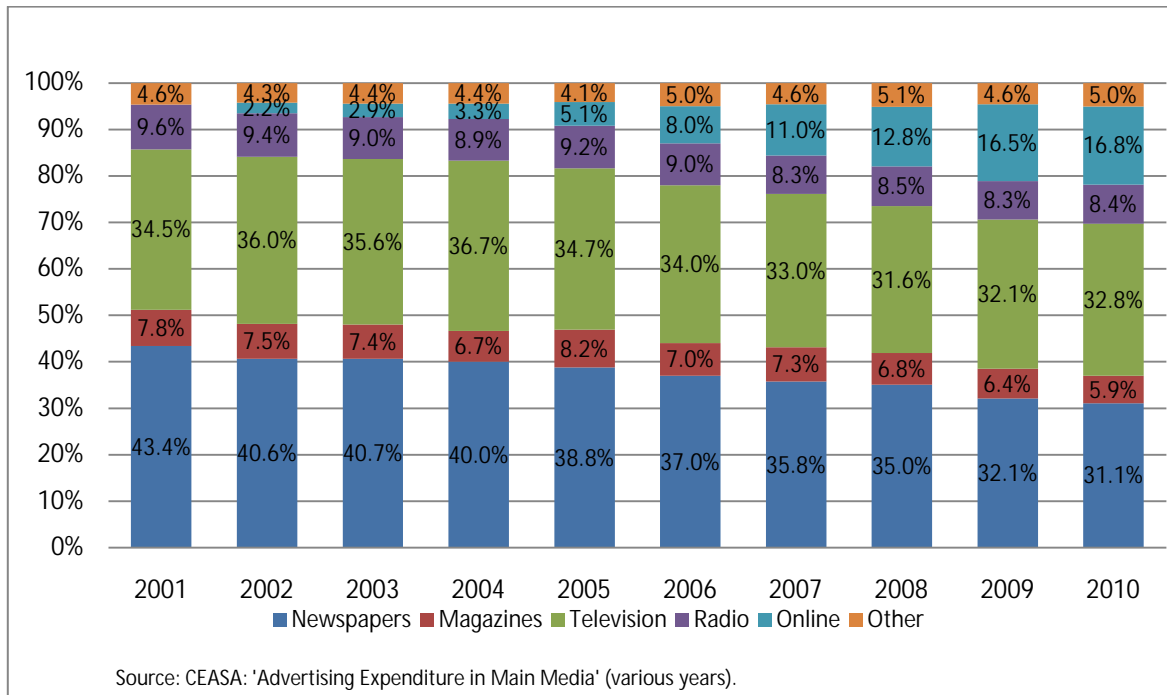
- 3.45 Within the advertising market newspapers are just one of the main players and compete with other media for a share of market. The other main players in the advertising market are television, radio, magazines, and online advertisers.
- 3.46 The performance of the various sectors of the advertising industry in the period 2001–10 is shown in Figure 3.7. It is evident from the figure that newspapers and television (including both free-to-air and subscription television) have retained their historical position as the largest two players in the advertising market throughout the period. Both suffered a noticeable decline in revenue in 2009 due to the effects of the Global Financial Crisis and to an apparent shift of revenue to online advertisers, which have rapidly increased their market share to become the third-largest player in the market. In 2010, both newspapers and television recorded an increase in revenue, partially recovering the reductions sustained the previous year.

Figure 3.7: Advertising revenue, main media 2001–10



- 3.47 Care should be exercised in interpreting the data. It should be noted that the aggregate online advertising revenue includes the online advertising earnings of newspapers and other media. While the online advertising curve clearly illustrates the strong growth of the sector in recent years, it also shows that the traditional main media have so far been reasonably effective competitors, holding on to much of their established position in the market. Some of them, newspapers in particular, have also moved into the online market that is beginning to contribute significant amounts of revenue. As illustrated in the two preceding figures, newspapers derive a small but growing contribution to earnings from online advertising, reaching almost five per cent in 2010. However, the growth in their combined print and online advertising revenue has not kept pace with overall market growth in the period 2001–10. While the total advertising revenue of newspapers grew at a CAGR of 2.6 per cent over the period, the overall advertising market grew at a CAGR of 5.7 per cent. In other words, newspapers have been losing some of their market share to other media.
- 3.48 The effect of the rapid growth of online advertising has impacted most on newspapers (print advertising only), television and magazines, with each of those media suffering significant loss of market share, particularly after 2005. As shown in Figure 3.8, the share of the overall market accruing to print advertising in newspapers fell 12.3 percentage points from 43.4 per cent at the beginning of the period to 31.1 per cent of the total market at the end. Television, radio and magazines were also affected with each suffering small, but significant, losses of market shares. In the case of television, the overall results mask two opposing trends within the industry. Free-to-air television broadcasters sustained a substantial loss of market share of around five percentage points over the period, more than half of which was counterbalanced by a significant growth of advertising on subscription television particularly in the second half of the period.

Figure 3.8: Main media shares of advertising market 2001–10



3.49 Clearly, online advertising is on an upward trajectory and has already emerged as a major player causing a profound structural adjustment within the advertising industry. Its impact on newspapers is akin to that produced by the introduction of television a little more than half a century ago. The supply of 'free' news and entertainment programs by television affected consumer demand for newspapers. Similarly, the large audiences attracted by television enabled the new medium to compete strongly with newspapers in the sale of advertising. The impact on newspapers, however, was attenuated by restrictive licensing which constrained the supply of television services throughout the country and a less than rapid household penetration rate.

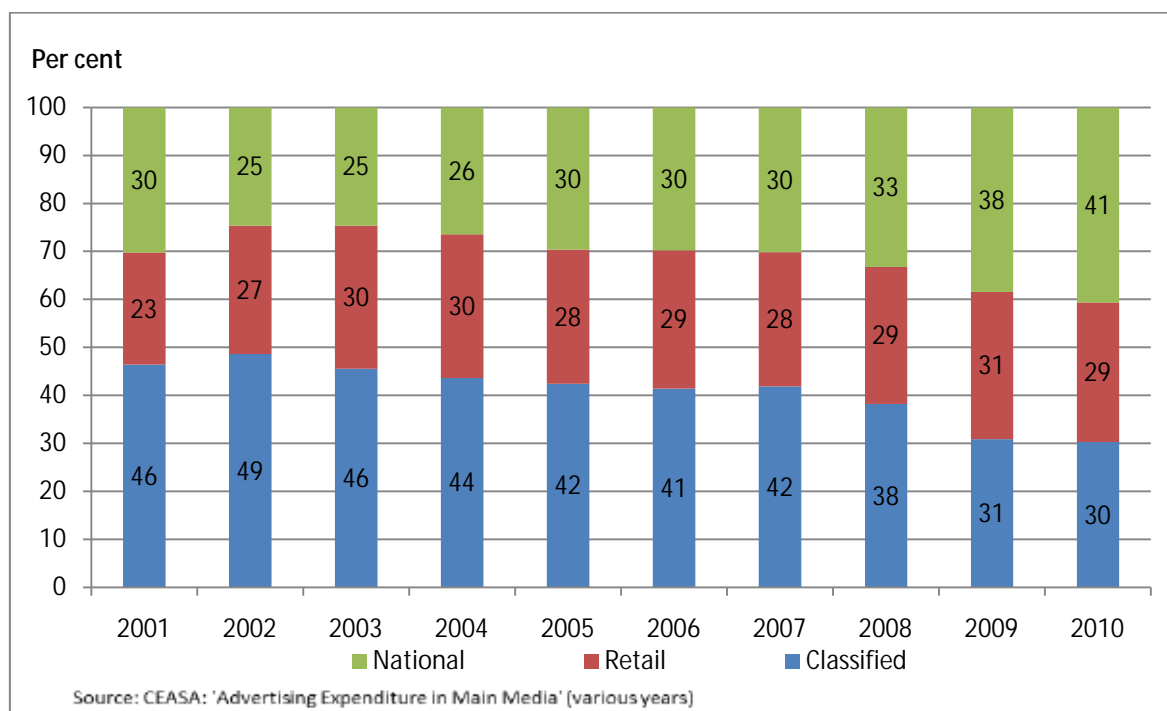
Advertising revenue trends

3.50 It is evident from Figure 3.8 that the advertising market share held by newspapers has been declining throughout 2001–10, but the rate of decline accelerated from about 2006, coinciding with the emergence of the internet as a major advertising medium. As newspapers supply different forms of advertising, it is useful to examine whether the loss of competitiveness is evenly spread across all their activities or is concentrated in particular subsectors. The available data allow analysis of performance in three broad sub-sectors:

national advertising, retail advertising, and classified. For the purpose of this analysis, revenues earned from the sale of online advertising have not been taken into account.

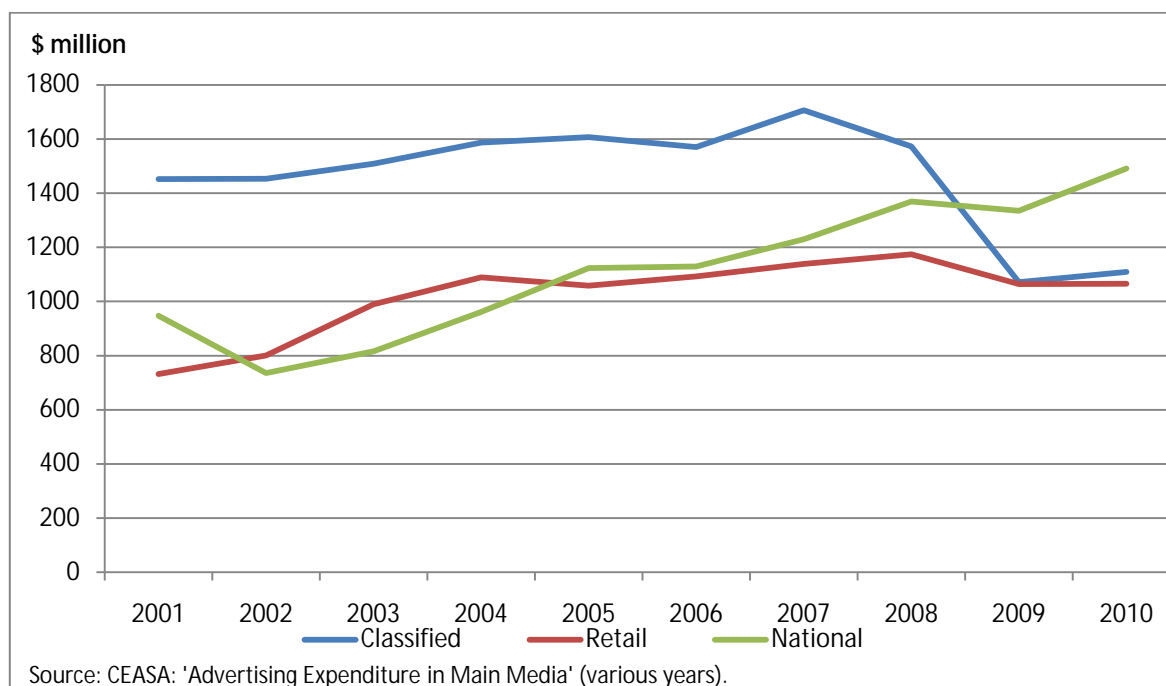
3.51 First the importance of each of the subsectors to overall advertising revenue generated by newspapers is considered. Details of the proportional contribution of each of the subsectors for each year in the decade ending 2010 are provided in Figure 3.9. At the beginning of the decade, classified advertising was by far the most important contributor to advertising earnings of newspapers, generating a little less than half of the total revenue. From 2004, the share of total advertising revenue earned from classifieds began to decline at a moderate rate before experiencing a sharp decline in 2008 and 2009. By the end of the period, the proportional contribution of classifieds to total advertising revenue had shrunk to 30 per cent. The share of revenue contributed by retail advertising increased significantly in the early part of the decade, rising to 30 per cent in 2003 and then remaining at approximately that level for the remainder of the decade. In contrast to classifieds, the share of revenue contributed by national advertising grew throughout the period to become the largest contributor to total revenue.

Figure 3.9: Subsector contributions to newspaper advertising revenue



3.52 The diminishing contribution of classifieds to newspaper advertising revenue appears to be largely due to a dramatic decline in earnings in that subsector in 2008 and 2009. This is illustrated in Figure 3.10. As noted earlier the overall advertising market experienced a sharp decline in 2009 because of the Global Financial Crisis. While all three newspaper advertising subsectors were affected by the industry-wide decline, classifieds suffered a much sharper setback than the other subsectors. Figure 3.10 also shows that the increase in the relative share of national advertising in newspaper revenues is not due solely to the shrinking share contributed by classified, but is also a reflection of steadily increasing earnings from that subsector. In overall terms, the increased earnings from national advertising have helped newspapers weather the impact of reduced earnings from classifieds, as well as to realise a return to revenue growth in 2010.

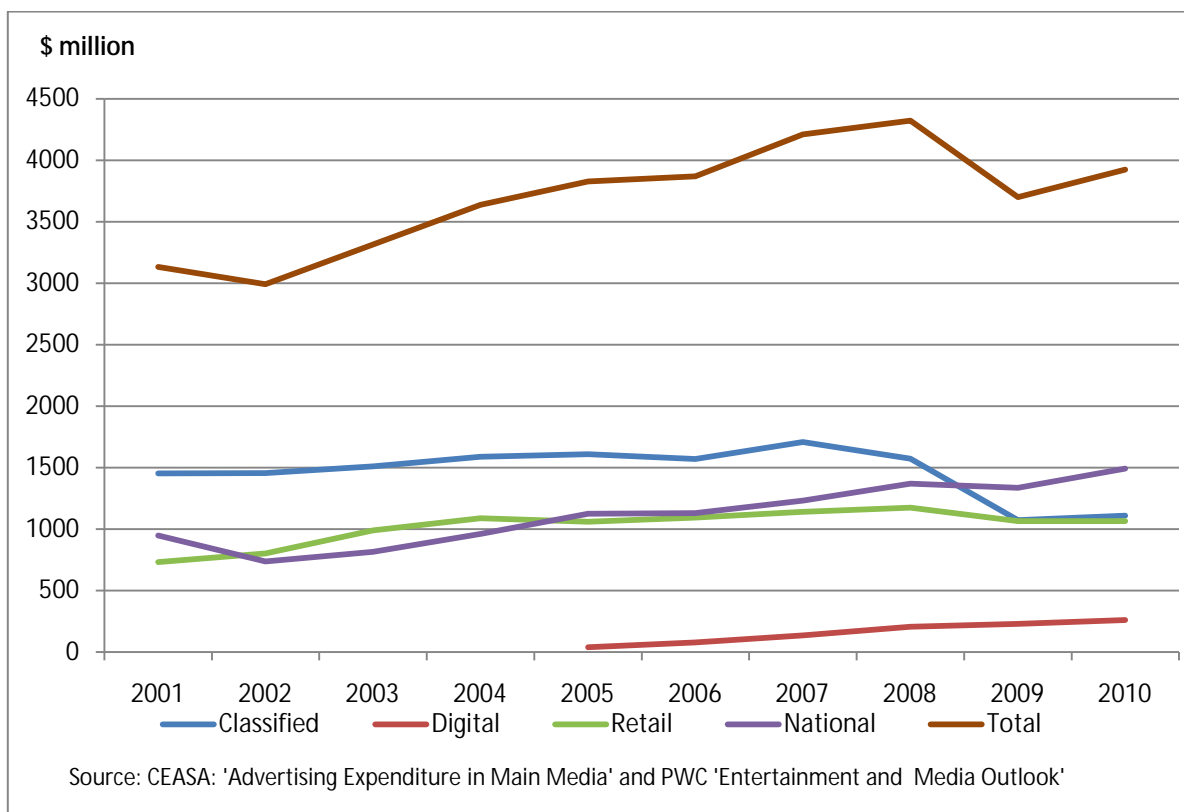
Figure 3.10: Components of newspaper advertising revenue



3.53 It has already been noted that newspapers have been generating a significant, albeit relatively small, level of revenue from online advertising. Online advertising has also contributed to total earnings of the industry and to the capacity of newspapers to weather the sharp recent decline in classifieds sales. As is evident from the details provided in Figure 3.11, the aggregate increase in revenues from national, retail and online advertising

enabled total advertising revenue of newspapers to register a small net increase despite the significant drop in classifieds in 2008. In 2009, online advertising was the only component of newspaper advertising revenue to record growth. However, in absolute terms the increase in earnings from online advertising was very small compared to the sharp drop in classified.

Figure 3.11: Newspaper advertising revenue—print and online



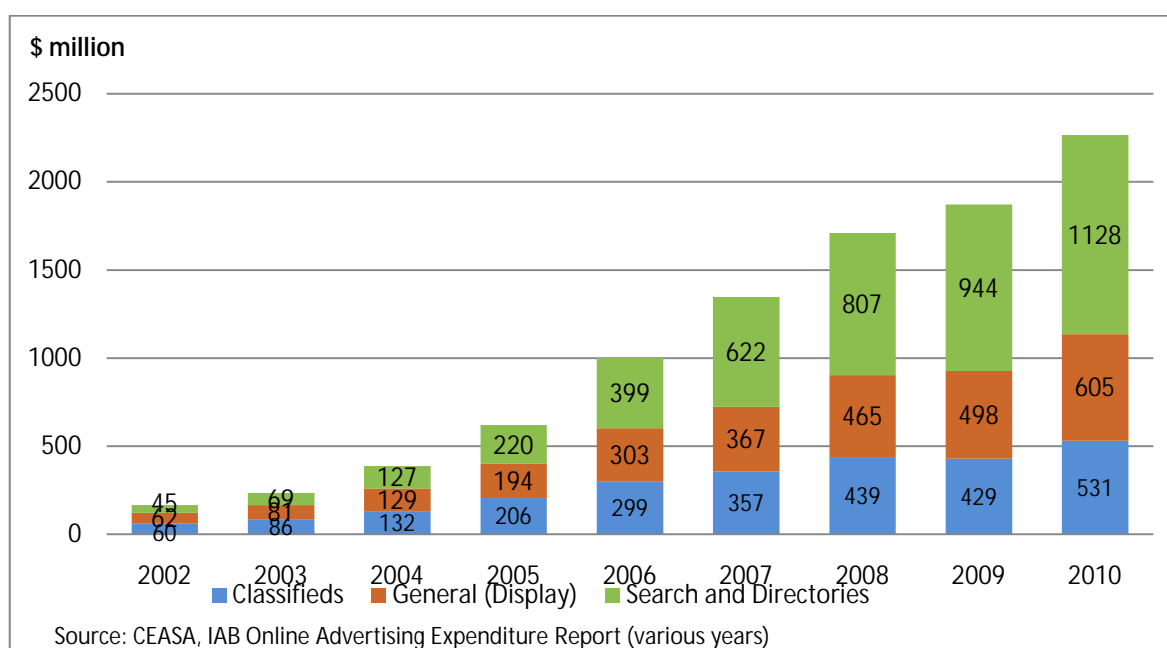
Impact of internet on newspaper advertising revenue

- 3.54 There has been much speculation that the emergence of the internet as a major advertising medium is draining much of print classified advertising to online providers. The rapid growth in online advertising expenditure at a time when to varying degrees other media, and particularly newspapers, are experiencing hard times tends to lend some support to the speculation. Do the available data also support such speculation?
- 3.55 Figure 3.12 gives details of online advertising as well as the contribution derived from its three main components: general display; classified, and search and directories. As these

categories do not fully correspond to similar offline categories, it is not possible to identify definitive flow patterns of revenues from offline to online. Nonetheless, the data are useful in identifying generic flows and draw some indicative conclusions.

3.56 The rapid growth of online advertising is clearly evident from the data displayed in Figure 3.12. All three components are displaying rapid growth. Care should be exercised when interpreting the magnitude of the growth rates as they are clearly influenced by the low starting base of each of the data series. Nonetheless, from the relative magnitude of the growth rates it is evident that search and directories advertising is growing more rapidly than the other two components. Its CAGR over the eight-year period was 49.6 per cent. Of the three components, classifieds grew the least rapidly with a CAGR of 31.3 per cent, almost two percentage points lower than for general (display) advertising.

Figure 3.12: Online advertising expenditure

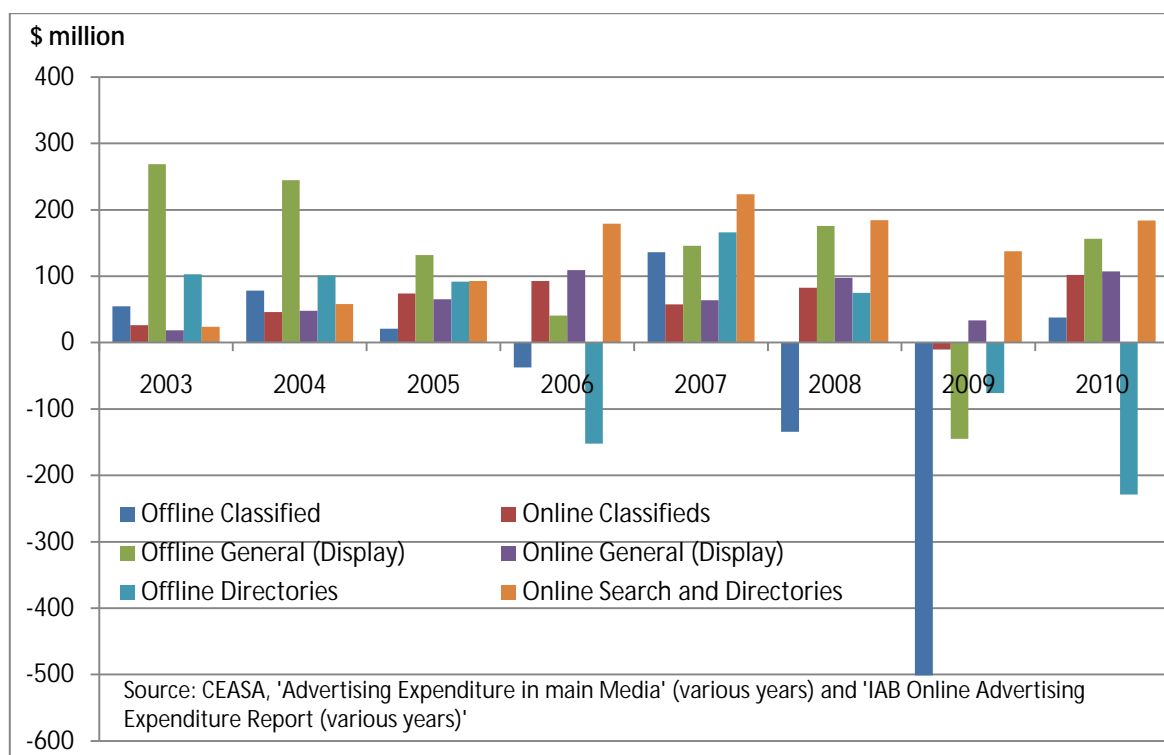


3.57 Data on annual changes in offline advertising are examined to delve a little deeper into the likely origins of the components of online advertising. For the purpose of this analysis annual changes in online advertising expenditure have been considered for each of its three main components and compared to changes in the closest broadly-corresponding categories of offline advertising. Thus, online general display advertising is compared with offline general

(comprising national and retail) display advertising, online classifieds with offline classifieds and online search and directories with offline directories. The results are plotted in Figure 3.13.

3.58 No obvious direct flow or trend of a shift of advertising revenue from offline to online is apparent from the data. Apart from minor occasional changes in individual categories, the data broadly show concurrent increases in all online and corresponding offline categories until 2007. Negative changes in offline classifieds and offline directories categories in 2006 were reversed the following year, suggesting factors other than a flow from offline to online may have been at play.

Figure 3.13: Annual changes in online and offline advertising expenditure



3.59 In 2008, there was a decline of \$134 million in offline classifieds occurring concurrently with an increase of \$83 million in online classified advertising. The combined online and offline classifieds expenditure was \$52 million lower than that for the previous year. Thus the possibility that the increase in online classifieds represents a shift from offline cannot be discounted. In 2009 the sharp drop in offline advertising concurrent with a small decline in

online classifieds appears to be largely due to a significant collapse in demand for classified advertising due to the Global Financial Crisis. Indeed the size of the decrease (\$501 million, or 32 per cent) in offline classifieds was larger than the total value of online classified advertising in that year. Given the magnitude of the decrease in offline classifieds and the small decrease in online classifieds (2.2 per cent) the likelihood of some shift of revenue from offline to online cannot be discounted. Such an outcome would be consistent with online classifieds having a competitive advantage relative to offline.

- 3.60 In 2010, both offline and online classified expenditures increased: offline by \$38 million (or 3.4 per cent) and online by \$102 million (or 23.8 per cent). This would reinforce the likelihood of online advertising having a competitive edge on their offline counterparts. The tentative conclusion that may be drawn from this is that some shift of classified advertising is likely to be occurring. However, the recent sharp drop in offline classifieds is likely to have been related to macro-economic factors rather than to a large shift of revenue from offline to online.
- 3.61 The possibility of a shift in advertising revenue from offline to online is conceivable with regard to search and directories. Offline directories advertising has declined substantially in 2009 and in 2010 (a decline of \$305 million over the two years), concurrently with a larger increase of \$321 in online search and directories over the same period. In 2009, in particular, it is also possible that some of the growth in online search and directory advertising may have been a migration from the offline classified which, as noted, dropped sharply in that year. Any such shift, however, would have been relatively small. Overall, more observations over a longer period would be needed to make a more definitive conclusion on the apparent shift of revenue from offline to online search and directories.
- 3.62 For general display advertising, in 2009 offline revenue declined by \$145 million concurrently with an increase in online revenue of \$34 million. In all other years, both offline and online revenues recorded concurrent growth. In the period 2003–06, there is an apparent slowdown in the growth of offline display advertising revenue in contrast with a gradual increase in the growth of online display advertising. A mixed picture emerges in 2007 and subsequent years. But generally the overall trends suggest that, within a growing market for display advertising, online is capturing an increasing share by growing faster than offline display advertising in newspapers.

3.63 In summary, the available data do not lend much support to the speculation of a wholesale shift of classified advertising from newspapers to the internet. The sharp drop in newspaper classified advertising in 2009 is likely largely to have been a direct consequence of a slowdown in economic activity. However, there are clear signs that online advertising has become a significant player in the overall advertising market and is gaining an increasing share of the overall market at the expense of other players. Because the advertising market as a whole is growing, the effect of the rapid growth in online advertising is less noticeable because the overall growth in revenue masks the impact on other players. But the pressure is building.

Changing market for newspapers—the internet challenge

3.64 As noted earlier, newspapers supply an indivisible bundle of information products to consumers including local, national and international news, sporting news, financial market information, weather information, a variety of feature stories and columns, various special-interest sections and magazines, and different forms of advertising. The bundles offered by weekday and weekend editions tend to differ in response to changes in the way consumers use newspapers as a source of news and for leisure reading. Although individual consumers may be interested in only one or a small number of the components of the bundle, they are unable to access those components without acquiring the whole bundle.

3.65 The price consumers are prepared to pay for a newspaper reflects only the value they place on the components of the bundle of interest to them. Consequently, to maximise readership, the price of newspapers needs to be kept relatively low and typically does not reflect the cost of production. The resultant revenue shortfall is made up from the sale of advertising. The pricing decision, therefore, requires a judgment by management about the point where the additional revenue generated by a marginal increase in the cover price will not be outweighed by the loss of advertising revenue as charge rates decline to reflect the lower readership.

3.66 Newspapers compete with each other and with other media operating in the same market. The internet is significantly adding to competition as technological innovations expand the range of products available online. The extent of competition increases as substitutes that

more closely match the needs of consumers become available. Traditional media such as radio and television, although not perfect substitutes for newspapers, have demonstrated their capacity to compete with them in the supply of news and current affairs programs, sports coverage and special-interest programming. To the extent that those programs meet the needs of consumers, the electronic media will act as close substitutes for newspapers. For others seeking more extensive or more in-depth coverage of news or the flexibility to 'consume' the news at a time of their choosing, radio and television will not be close substitutes for newspapers.

3.67 Consistent with declining circulation, available data show a decline in newspaper readership. Roy Morgan newspaper readership survey data reported by ACMA show that in 2010–11, an average 72 per cent of Australians (aged 14 years or over)¹⁹ had read a newspaper (excluding local and community newspapers) in the seven days preceding the survey, and 43 per cent had read a local or community newspaper. The corresponding rates in 2006–07 were 82 per cent (that is, 10 percentage points higher) for newspapers (excluding local and community newspapers) and 43 per cent (seven percentage points higher) for local and community newspapers. Readership is positively correlated with age. In 2010–11, the rate was highest for those aged 65 or more years (86 per cent) and lowest for those aged 14–17 (52 per cent). Also, older people had recorded the lowest decline in readership rates since 2006–07. The rate of decline was inversely correlated with age and was highest for the 14–17 age group (–17 percentage points for newspapers other than local and community newspapers, and –14 percentage points for local and community newspapers).

3.68 The available data also show a greater tendency for a decline in newspaper readership among internet users. Roy Morgan research data on newspaper readership of internet and non-internet users is contained in another recent publication by ACMA²⁰. It shows that internet users are somewhat less likely to read newspapers generally. The differences are highlighted in Figures 3.14 and 3.15.

¹⁹ Australian Communications and Media Authority 'Digital Australians—Expectations about media in a converging media environment' (2011).

²⁰ Australian Communications and Media Authority, 'Communications report 2009–10 series : Report 4—Changing business models in the Australia communication and media sectors: Challenges and response strategies', (2011).

Figure 3.14: Internet users—newspaper readership and online access to news

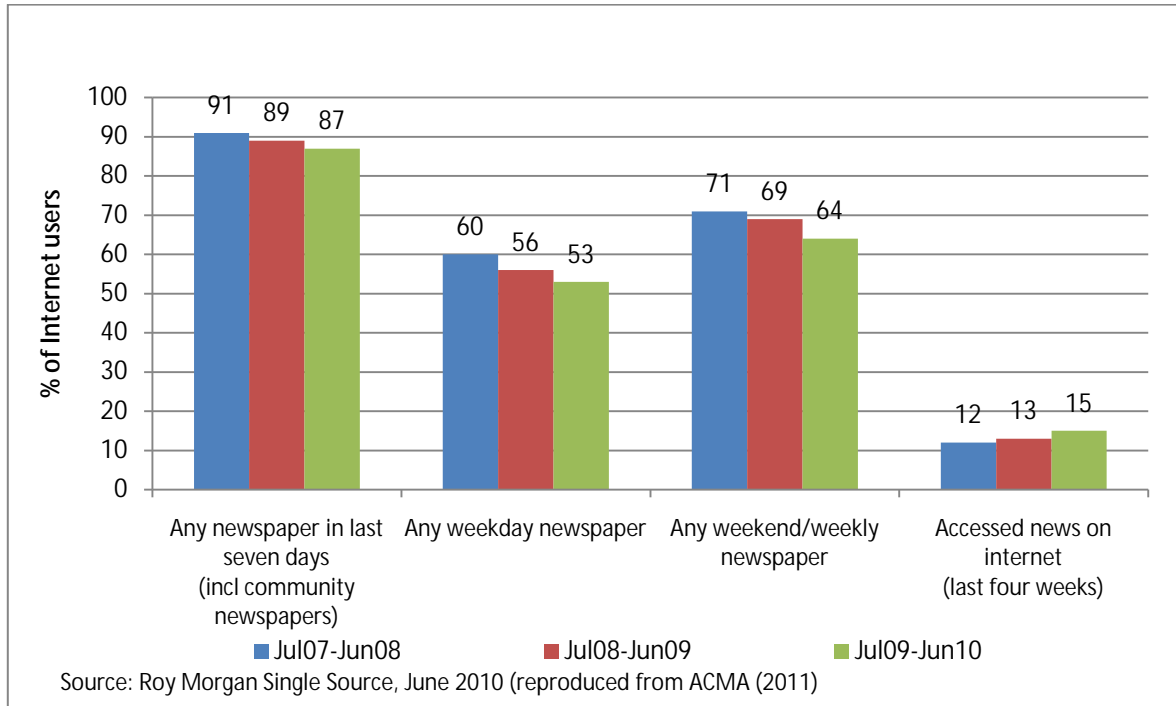
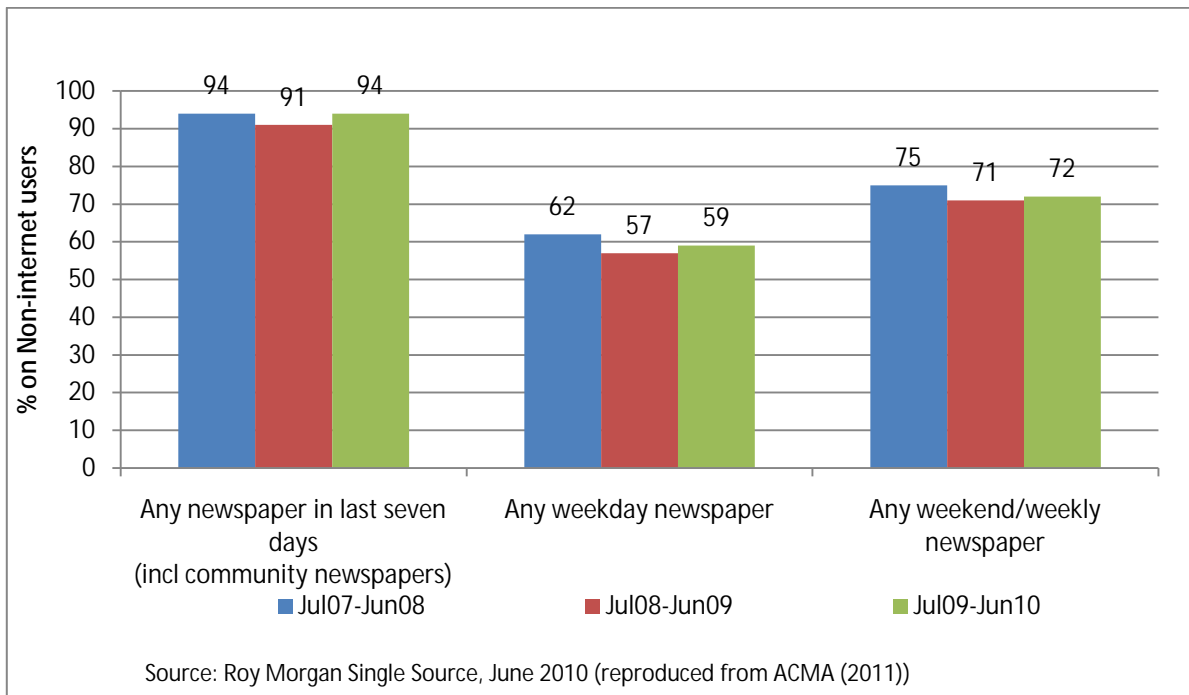


Figure 3.15: Non-internet users—newspaper readership



Impact of online sources of news

- 3.69 The internet has greatly expanded the sources of news and information available to consumers as well as increased opportunities for consumers to engage or interact with news sources. Before the internet, consumers' access to news was largely confined to the few traditional news media distributed in their local geographic market. The global nature of the internet eliminates the geographic boundaries of local markets and opens up potential access to news sources, both traditional and new, anywhere in the world.
- 3.70 Automatic search tools simplify the search process for stories of interest and access is confined only by the disposable time and personal interests of consumers (and, in some cases, by paywalls that require payment for access to certain news sources). Furthermore, consumers are not confined to the information contained in a single published article or electronic media news clip and can pursue their interests more widely or at greater depth by searching for coverage of the same story in other media or obtain more details on the same topic from other sources.
- 3.71 In traditional media, consumer interaction with the news, apart from letters to the editor or calls to talkback radio, was severely limited. On the internet consumers generally have the opportunity to post comments on a story directly after the story itself or engage in discussion with other readers through postings on social networks, blogs or specific discussion groups. Individuals are also offered many opportunities to contribute to news-making itself via posting of facts, audio or video on topical issues, local events or breaking stories.
- 3.72 For many people, the internet has become an important means to access news and information, and in the process has significantly changed the way they consume news and other information services. Consumption can be adapted to closely match needs generally or specifically at any given time. Search tools can be used to eliminate wading through unwanted stories to get to the items of interest. Because consumers are able to readily identify items of interest, they tend to consume only those elements of the information bundle presented to them that are of interest to them and discard the rest without looking at it. This ability to limit consumption to exactly what is wanted has significant implications for online media's capacity to create audiences for advertising messages and earn revenue from advertisers.

- 3.73 Access to news online is a popular activity among Australian internet users. Already by 2004, a survey on internet usage found about one-third of Australians were using the internet to access news²¹. Among internet users, access to news was a regular activity for 35 per cent and exceeded use of the internet for entertainment-relaxation (29 per cent), but lagged behind other regular uses such as personal contact (emailing/messaging) (82 per cent), and search for other information (59–63 per cent) and e-commerce (39 per cent). Newspaper websites, news aggregators and broadcasters' websites were the most used sources of news.
- 3.74 Nielsen Online²² also found access to news (and weather updates) to have been among the most common consumer uses of the internet. In 2008, it was the third-highest ranked activity (72 per cent) after email (98 per cent) and banking transactions (72 per cent).
- 3.75 Another way of tracing the social role of newspapers is asking people not only from what sources they get their news, but which ones they value the most in terms of their importance as a source of news. Evidence from a recent survey which collected data on the main source of news used by people²³ ranked commercial television news first, closely followed by internet news sites. Newspapers were ranked well behind in third place (see Table 3.3). The survey did not distinguish between internet news sites operated by traditional offline media and others.

Table 3.3: Main source of news

Medium	Proportion indicating medium as main source of news Per cent
Commercial television	31
Internet news sites	30
Daily newspaper	13
ABC TV	8
ABC radio	5
Commercial radio	5

Source: Essential Media poll, November 2011.

²¹ An Nguyen, Elizabeth Ferrier, Mark Western and Susan McKay, 'Online news in Australia: patterns of use and gratification', (2005) 15 *Australian Studies in Journalism*, 5.

²² Nielsen Online, 'The Australian Internet and Technology Report' (2008), quoted in Australian Communications and Media Authority, 'Telecommunications Today Report 6: Internet Activity and Content' (2008).

²³ Essential Media, 'Media Usage' *Essential Report 7* November 2011 <www.essentialmedia.com.au/category/essential-report-111107-7th-november-2011/>.

3.76 The importance of the various media as a source of news has been an issue of interest in a major academic research project investigating the social, political and economic impact of the internet and other new technologies. Details of the study and the results of three consecutive surveys of internet users in 2007, 2009 and 2011 were provided in a submission to the Inquiry by Scott Ewing and Julian Thomas of the ARC Centre of Excellence for Creative Industries and Innovation at the Institute for Social Research, Swinburne University of Technology. The findings highlight the growing importance of the internet as a source of news. The results of the first survey, conducted in 2007, indicate that the internet was already considered as an important or very important source of news by more than two-thirds of internet users. By 2011 more than three-quarters did so (see Table 3.4 for details). In these surveys, radio was ranked second, followed by newspapers. Television was in fourth place. It should be noted that these are surveys of internet users rather than the population generally. However, given the high proportion of Australians accessing the internet²⁴, the findings are likely to be indicative of the general population as well.

Table 3.4: Internet users—importance of media for news and information

Medium		2007	2009	2011
		Per cent of internet users		
Television	Important	24.1	28.8	29.9
	Very important	8.5	8.9	8.9
	Total	32.6	37.8	38.8
Newspapers	Important	32.9	28.4	31.0
	Very important	13.8	10.6	12.1
	Total	46.7	38.9	43.1
Radio	Important	31.4	29.9	35.8
	Very important	14.5	15.1	13.0
	Total	45.9	45.0	48.8
Internet	Important	31.9	32.2	35.8
	Very important	36.7	41.2	40.5
	Total	68.6	73.4	76.3

Source: Source: ARC Centre of Excellence for Creative Industries and Innovation, Submission to the Independent Media Inquiry, 2011, 7.

²⁴ According to Australian Bureau of Statistics data, 79 per cent of Australians accessed the internet in the year ending June 2011—Australian Bureau of Statistics, ‘Household Use of Information Technology, Australia, 2010–11’ 8146.0 (15 December 2011).

3.77 The surveys also collected information on the type of news and information sought by internet users. Details are provided in Table 3.5. The results are presented in terms of both internet users and total population to take account of the growth in the proportion of the population using the internet in the periods between the surveys. The results indicate significant growth in all the activities listed. What is striking about the results is that by 2011 almost 60 per cent of the Australian population used the internet as a source of local news and as much as two-thirds for national and international news. Over 70 per cent used the internet to check the weather.

Table 3.5: News and information-related uses of the internet

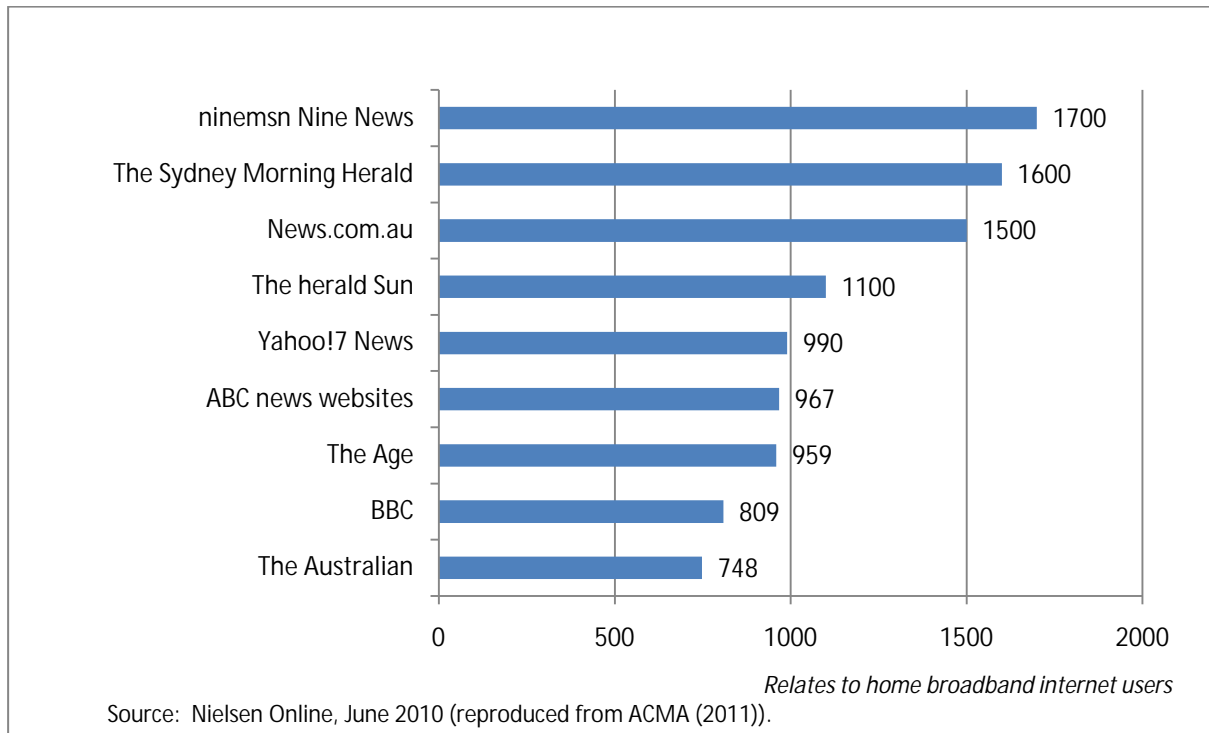
	Internet users			Total population		
	2007	2009	2011	2007	2009	2011
Look for:	Per cent			Per cent		
Local news	56.8	65.8	66.1	41.2	53.0	57.4
National news	65.7	73.3	76.4	47.7	59.1	66.3
International news	64.1	69.9	74.7	46.5	56.3	64.8
Weather details	62.6	73.8	81.1	45.4	59.5	70.4

Source: ARC Centre of Excellence for Creative Industries and Innovation, Submission to the Independent Media Inquiry, 2011, 8.

3.78 Accessing news and information online is a popular internet activity. Available data show that in June 2010 some 6.1 million people used the internet at home to access news and current affairs sites²⁵. The data also show that the sites of established media organisations were the most popular sites visited for access to news and current affairs. Details are shown in Figure 3.16.

²⁵ Nielsen Online, 'The Australian Internet and Technology Report' (2008), quoted in Australian Communications and Media Authority, 'Telecommunications Today Report 6: Internet Activity and Content' (2008).

Figure 3.16: Online news sites accessed in Australia June 2010



3.79 ACMA's²⁶ 'Digital Australians' online survey reported that access to online news content was second only to watching broadcast television as a media activity regularly engaged in by respondents. In the month preceding the survey, 52 per cent of respondents had visited a news website. More males (57 per cent) than females (47 per cent) had done so and there were no significant age differences between them²⁷. Some 22 per cent of respondents had also accessed news through social networking sites²⁸—those aged 18-29 years were much more likely (36 per cent) to have done so than those aged 45 years or more (14 per cent)²⁹. Overall, 59 per cent of respondents had accessed news from news websites or social networking sites³⁰. Furthermore, 37 per cent of those visiting Australian television or radio broadcasters' websites indicated access to news as the main reason for visiting³¹. Of those

²⁶ Australian Communications and Media Authority 'Digital Australians—Expectations about media in a converging media environment' (2011).

²⁷ Ibid 26.

²⁸ Ibid.

²⁹ Ibid 12.

³⁰ Ibid 26.

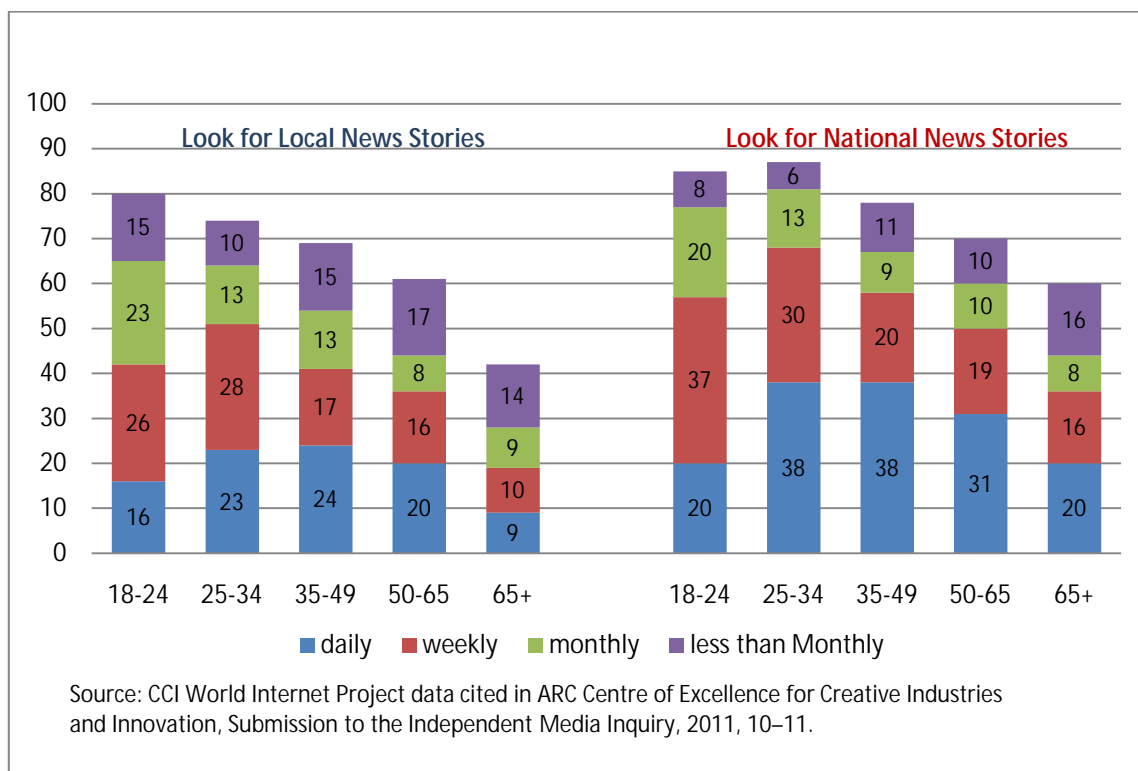
³¹ Ibid 39.

visiting news websites, 88 per cent had a preference for Australian websites—37 per cent had mainly visited an Australian newspaper website and 51 per cent other Australian news websites³².

The Ewing and Thomas surveys found that older internet users were the least likely to use the internet to obtain news. Only 41 per cent of internet users aged 65 or more use the internet as a source of local news and less than half of them (19 per cent) do so one or more times a week. At the other end of the scale, 79 per cent of 18–24 year olds use the internet to look for local news. The most frequent users of the internet for local news are people aged 25–34 years with nearly a quarter of them (23 per cent) doing so daily and a further 28 per cent searching weekly. A greater proportion of internet users in all age groups use the internet to search for national news, and they do so more frequently than for local news. Younger groups have a significantly higher propensity than others to search for national news and to do so more frequently than others. The highest rates are reported for by those aged 25–34 years (86 per cent overall; 38 per cent daily; and 30 per cent weekly). The proportion of those aged 65 or more looking for national news online is one-and-a-half times that for local news, with one in five doing so daily. Details are provided in Figure 3.17.

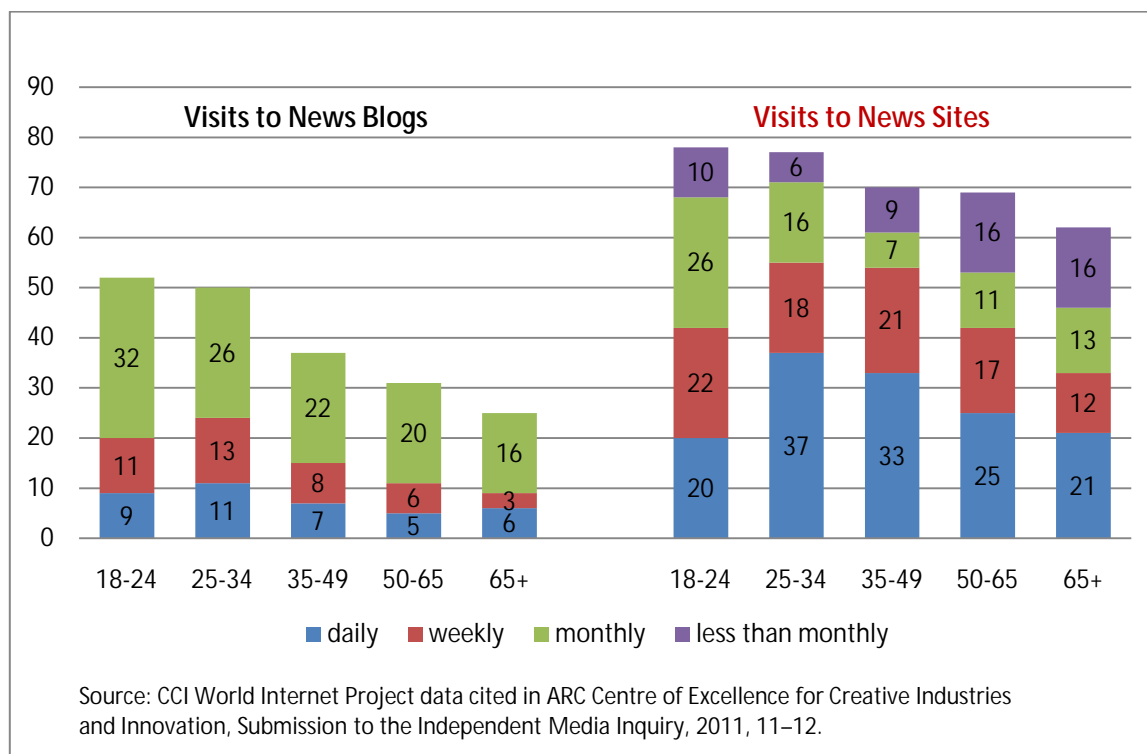
³² Ibid 27.

Figure 3.17: Frequency of online search for news by age



3.80 Internet users generally are much more likely to visit the websites of news organisations than news blogs for online news. More than 60 per cent of internet users in each age group reported visiting websites of news organisations, with the proportion rising to more than three-quarters for those aged 18–34. More than half of those aged 25–34 and 35–49 visited the news websites at least weekly. In contrast, significantly fewer people in each age group reported visiting news blogs. In each case, visits to news blogs were seldom more frequent than weekly. Only around one in 10 of those in the 18–24 and 25–34 age groups reported daily visits to news blogs. Details are provided in Figure 3.18.

Figure 3.18: Frequency of visits to blogs and news sites by age



Time devoted to news consumption

3.81 While Ewing and Thomas provide very useful information on the nature and frequency of online news activities, they shed less light on the amount of time users devote to reading news online. Their survey findings, together with other data considered earlier on readership of newspapers and access to online news websites, imply that many Australians regularly engage in both activities, suggesting that for some at least they are undertaken as complementary activities. The surveys collected information on the relationship between time spent reading a newspaper (offline) and frequency of visiting news site operated by a professional news organisation. Their findings suggest that access to online official news sites does not dramatically alter offline reading of newspapers. For example, they found that people who never visited an official news site spent an average of 2.8 hours per week reading newspapers, compared with 3.0 hours and 2.9 hours per week respectively for those visiting professional news websites daily or weekly. Those making less than one visit per month spent an average of 3.4 hours per week reading offline newspapers and those making monthly visits spent 2.4 hours per week reading newspapers.

- 3.82 Online audience reach measured by the number of ‘unique’ visitors to a website is not a comparable measure to offline readership. Typically counts of unique visitors do not differentiate between a person spending a few fleeting moments on a website and another who systematically reads several pages. Thus, simple counts of visitors reveal little information of value to potential advertisers. What is lacking is information on how much time people spend in reading and engaging with the online content.
- 3.83 Overseas data suggests that although large numbers of people visit news sites, they spend very little time looking at online news. A study published recently by the Pew Research Center’s Project for Excellence in Journalism examined the behaviour of visitors to the top 25 popular news websites in the United States³³. It found: ‘Even the top brand news sites depend greatly on ‘casual users,’ people who visit just a few times per month and spend only a few minutes at a site over that time span.’ Only a small core visited regularly: ‘More than 10 times per month ... and spend more than an hour there over that time. Among the top 25 sites, [those] visiting at least 10 times make up an average of just 7% of total users’.
- 3.84 Google’s Chief Economist, Hal Varian³⁴ notes that in June 2009, there had been 70 million unique visits to United States’ news websites (generally and not just those associated with newspapers), involving 3.2 billion web page views in 600 million sessions. This was equivalent to an average of 8.5 sessions and 49 pages per person for the whole month. However, he also noted that on average a person spent 38 minutes a month on online news consumption — or a little more than 70 seconds per day. Thus the average duration of a session is approximately 4.5 minutes during which fewer than six pages are viewed, with the reader spending an average 46 seconds on each. In contrast, the average time spent reading a newspaper in the United States is about 25 minutes per day. In other words, the average offline reader in only two days spends one third more time on reading a newspaper than an online consumer spends on news websites in a whole month.

³³ Kenny Olmstead, Amy Mitchell and Tom Rosenstiel (2011), ‘Navigating News Online: Where people go, how they get there and what lures them away’, *Journalism.org* (9 May 2011) <www.journalism.org/analysis_report/navigating_news_online>.

³⁴ Hal Varian, ‘Newspaper Economics: Online and Offline’, (Presentation at Federal Trade Commission Workshop *How Will Journalism Survive the Internet Age?*, Federal Trade Commission Conference Centre, Washington DC, 9 March 2010, revised March 13 2010).

Meeting advertisers' demand online

3.85 The low level of engagement with online news is critical to the value which advertisers place on online audiences and why they are worth much less to them than their offline counterparts. To advertisers, the number of pages viewed and the amount of time spent on a news site can be more important than the number of visitors. Their primary objective is to generate the best return possible from their advertising expenditure and naturally value a high chance of their message being exposed to readers more than a low chance of exposure. As Varian³⁵ explains in a post on Google's Public Policy Blog:

Not surprisingly, advertisers are willing to pay more for their share of reader's attention during 25 minutes of offline reading than during the 70 seconds of online reading.

3.86 Varian³⁶ also proffers a partial explanation for the low amount of time people spend reading news online:

There's a reason for the relatively short time readers spend on online news: a disproportionate amount of online news reading occurs during working hours. The good news is that newspapers can now reach readers at work, which was difficult prior to the internet. The bad news is that readers don't have a lot of time to devote to news when they are supposed to be working. Online news reading is predominately a labor time activity while offline news reading is primarily a leisure time activity. One of the big challenges facing the news industry is increasing involvement with the news during leisure hours, when readers have more time to look at both news content and ads.

3.87 Placement of advertisements where they have the greatest chance of reaching the target audience has always been a major consideration of advertisers and has much influence on the choice of medium, and location within the medium, in advertising campaigns. While news content has been the main incentive for consumer purchases of newspapers, not all advertisements are suitably located next to it. The diffused interest among consumers for news information is difficult to convert to advertising appeal. Products and services often appeal only to certain sections of the population. Consequently advertisers would tend to

³⁵ Hal Varian, 'Newspaper Economics: Online and Offline', *Google Public Policy Blog* (16 March 2010) <<http://googlepublicpolicy.blogspot.com/2010/03/newspaper-economics-online-and-offline.html>>.

³⁶ Ibid.

value more highly the placement of an advertisement next to content that appeals to the target audience for their product rather than to a larger diffused audience.

- 3.88 To improve matching of audience interests with the needs of advertisers, traditional newspapers have sought to maximise their earnings by providing special content which acted as a self-activated filter for segmentation of diffused audiences into narrower special-interest groups more likely to appeal to advertisers. Thus news content of traditional newspapers is typically organised in various categories and is augmented by other content organised in special-interest sections as part of the newspaper and as inserts distributed with it. While the news content may have been the main incentive to buy a newspaper, the consumer was supplied with a bundle of information the components of which appealed to different sub-groups of the overall audience. From a consumption perspective the different components of the bundle were likely to be consumed separately and at different times. The news pages may have been perused over breakfast, while special-interest sections may have been put aside for later reading depending on the needs and circumstances of consumers.
- 3.89 On the internet, people usually access only the specific content they need at the time access takes place. Other content is accessed as and when required. As a result, the offline one-to-one relationship between the newspaper bundle and the reader is broken and different pieces of information are sourced separately and perhaps from a variety of sources. This unbundling of the information traditionally supplied by newspapers not only provides readers with a more efficient way to satisfy their needs but also provides a more efficient mechanism for the targeting of advertising to specific audiences.
- 3.90 While in the offline world advertisers can only estimate likely reach of target audience from demographic characteristics of potential readers of the co-located content, in the online world not only can they measure how many people have looked at the page with their message, but can also get a count of how many visitors have actually clicked on the advertisement.
- 3.91 As noted earlier, 'search and directories' has been the fastest growing category of online advertising in recent years. The development of internet search engines has been a great boon for both consumers and advertisers. For consumers, search engines greatly facilitate the identification of content of interest including specific advertisements. For advertisers, the

search process has become a very efficient means for the delivery of advertising messages alongside related content sought by consumers or on websites dedicated to the promotion of specific products to which consumers are likely to turn to when seeking to purchase those products. There are three main problems for newspapers emanating from this.

- 3.92 First, search engines have become the primary port of call for consumers looking for specific information on the internet and thus, as a consequence, they exercise a high level of control on the flow of traffic on the web. The Information Needs of Communities Report by the United States Federal Communications Commission (FCC)³⁷ says:

The majority of ad spending online goes to entities that do not create content—search engines, summarizes, and aggregators. The earlier media system rewarded both the distributors and the creators of content; the new one primarily rewards those who find and distribute content.

- 3.93 Second, news stories are seldom exclusive to newspapers, meaning that similar content is likely to be available on a multitude of websites. Most offline news media, including television and radio, maintain a website and compete with newspapers online as they do offline. The electronic media are much better set up to follow news as it develops and report on it with on-the-spot coverage, which may be more appealing to consumers. Also, although regular readers of online news may go directly to their favourite news site, including those of newspapers, the attention of casual readers is likely to be dispersed among the many options available to them.
- 3.94 Third, the seeking of information about a news event is often likely to reflect a consumer's desire to be informed about the event rather than an underlying interest in any potentially related products or services. In any case, as noted in discussing offline newspapers, the capacity of news content to generate audiences highly valued by advertisers is low. Even when they go to a newspaper website for information, the interest of visitors may be quickly satisfied by reading the headlines or brief summaries of the topics of interest.
- 3.95 A look at the commodities that are intensively-advertised highlights the potentially low correlation between consumer interest in them and news content. Table 3.6 lists the

³⁷ Steven Waldman and the Working Group on Information Needs of Communities), The Information Needs of Communities, (Federal Communications Commission, 2011) 131.

commodities that were ranked in the top 10 in order of their display advertising expenditure in the main media. In all, 13 commodities were ranked in the top 10 spenders in the seven years from 2004 to 2010 inclusive. Although the rankings changed somewhat from year to year, seven commodities were ranked in the top 10 each year, one was included six times and each of the other five were included four or fewer times. The interesting thing to note is the correlation between the top-rating commodities and typical 'special-interest' sections such as Motoring, Entertainment and Leisure, Real Estate, and Travel usually found in newspapers.

Table 3.6: Top 10-ranked commodities for advertising expenditure

	2010	2009	2008	2007	2006	2005	2004	Times in top 10
Commodity	Top 10 ranking							no.
Retail	1	1	1	1	1	1	1	7
Motor Vehicle	2	2	2	2	2	2	2	7
Entertainment & Leisure	3	3	3	4	3	3	3	7
Real Estate	5	6	5	6	6	4	8	7
Travel & Accommodation	6	5	6	7	8	8	6	7
Food	7	7	8	9	7	7	5	7
Communications	8	8	9	10	10	9	7	7
Finance	4	4	4	5	4	6		6
Media	10	9	10				10	4
Government				3	5	5	4	4
Toiletries/cosmetics					9	10	9	3
Recruitment			7	8				2
Insurance	9	10						2

Source: Commercial Economic Advisory Service of Australia 'Advertising Expenditure in Main Media' (various years).

- 3.96 As a result of the unbundling of online news from other special content, the capacity of news content to act as the conduit for the generation of special-interest audiences in newspapers has been severely eroded in the online environment. Consequently, in the online environment, newspapers are likely to face increasingly intense competition for display advertising revenue from search engines and specialist advertising sites. As we have seen above, display advertising has been the fastest growing component of internet advertising.

3.97 However, while online news sites are unable to extract an advantage from the traditional relationship between news content and specialist content, they have a long and successful history in producing specialist content that appeals to audiences. Either independently or in partnership with other interests, they could use that experience to their advantage in the establishment or development of specialist content websites and use them to secure online advertising. To the extent that they succeed in establishing such sites, they have a further advantage of long-established relationships with advertising agencies that could be continued online. Fairfax Media's drive.com.au is an example of a successful transfer of offline experience to online.

Charging for access to online content

3.98 The inability to extract advantage from the traditional relationship between news and other content online will also have implications for the ability of newspapers to fund news production. To the extent that advertising revenues of newspapers decline, so will their capacity to treat part of the cost of producing news content as an input cost to the creation of audiences for advertising. In turn, to remain viable newspapers will be under pressure to reduce production costs or increase revenue from the sale of news content or both.

3.99 One possibility being explored at the moment is to charge for access to content online. Pundits consider this to be difficult at least in the current environment where many alternative news sources are available free of charge. Charging will be particularly difficult for generic news of the kind that is generated regularly by a variety of producers from access to readily available, non-exclusive, information. In a situation with many competitors each supplying an undifferentiated commodity, prices will naturally be driven down towards marginal cost and for information products it is typically close to zero. Highly-differentiated content on the other hand would normally command a scarcity premium. For such content, charging for access could work provided that the producer can retain control over the related property right. But it may not be an easy proposition given the current level of piracy and unauthorised use of content on the internet.

3.100 In the current environment widespread resistance to paying for access to news is not surprising. Generic news is widely and easily available from a variety of readily-accessible sources. Consequently, a user confronted by a payment request for a news story will more

often than not visit an alternative site where the same story is available free of charge. Ewing and Thomas³⁸ report a low willingness to pay for an online version of a newspaper. Seven in 10 of the respondents to their 2009 and 2011 surveys indicated they would not consider paying for an online version of a newspaper, and less than one in 10 indicated a willingness to pay a typical hard-copy cover price (\$1.50 was suggested) for the online version. There was some preparedness to pay a lower amount, and this varied by age of respondents. Those aged 25–34 and 50–64 were the most likely to have been prepared to pay, with just under one-third in each group being prepared to pay something. More than half of those prepared to pay something, however, indicated they would pay an amount of 50 cents or less. Preparedness to pay was also found to be positively correlated with frequency of access.

- 3.101 These findings have mixed implications for future production of news. Free access to news has been available to consumers ever since radio stations began to broadcast news bulletins. Television not only expanded the supply of free news, but also enhanced the viewer's experience with video reporting. While both broadcast media had an impact on the demand for newspapers, the impact was limited because both the breadth and depth of news coverage in newspapers could be easily differentiated from the limited and brief coverage of broadcast news. Therefore, people wanting more than the limited coverage provided by broadcast news could not avoid the need to buy a newspaper. For generic news, differentiation on the basis of breadth and depth of coverage is virtually impossible on the internet, where readers can pursue their interest in news items well beyond the details and commentary contained in published stories. But differentiation on the basis of exclusive content remains a possibility.
- 3.102 There are many instances already on the internet where access to content is provided only on payment of a prescribed fee. Many commercial research organisations charge for access to their content which in many respects has similarities to analysis in news features. More closely similar to newspapers, organisations such as *Crikey* charge for access to their news content. The main reason these organisations are able to charge for content is that it is generally not available elsewhere. Such a model is also likely to be adaptable to exclusive content in newspapers.

³⁸ ARC Centre of Excellence for Creative Industries and Innovation, Submission to the Independent Media Inquiry, 2011, 12–13.

Conclusion

3.103 That newspapers are facing enormous challenges from the internet is not in question. What the debate is generally about, and it was no different among participants in this Inquiry, is how newspapers deal with the current challenges and how they will be transformed by that process. A range of different views were presented to the Inquiry. For their part, representatives of newspapers acknowledge the difficulties confronting them, but at the same time are confident their strategies will successfully transform and adapt their companies as major players in the new environment. Other participants draw attention to the potential dangers to society that may result from a press weakened by the process of change. Several submissions, but none from the main newspaper companies, called for government assistance to promote new media initiatives to heal weaknesses they perceive are likely to emerge.

3.104 In considering the current state of the press in Australia, the Inquiry has given considerations to not only the submissions received but also to an extensive range of other local and international evidence. From this information the Inquiry has concluded that, despite the intense pressures facing it, the Australian press is in no immediate danger of collapsing. The main media companies appear to be reasonably capable of dealing with the pressures facing them at least over the medium term. Nonetheless, some potential pressure points are becoming evident. These issues will be further considered later in this report.

4. Media standards

Introduction

4.1 Most newspapers steadfastly maintain that there is no need to strengthen the means by which they are to be held publicly accountable for their performance. The accountability mechanisms that are in place are sufficient, they say.

4.2 Mr Hywood, chief executive of Fairfax Media, in his opening statement to the Inquiry, said¹:

Fairfax does not believe there are problems with the integrity, accuracy, bias or conduct of the media which warrant further regulation.

4.3 Mr Cronin of West Australian Newspapers said:²

I would also like to address some of the errors of fact and erroneous assumptions that have been bandied about. One of these, put forward as far as I can see without a scintilla of evidence, is that journalists routinely are inaccurate and biased, they lack integrity and ignore accepted press principles.

4.4 On the other hand, both he and Mr Hartigan, former chief executive of News Limited, acknowledged that the press is 'not perfect'³. Many who made submissions to the Inquiry also think the press is not perfect, and argued that its performance was often wanting. Both claims cannot be correct.

4.5 The purpose of this section is to test the validity of the different assertions. That task will be undertaken by looking at how the media behave in both gathering and publishing material. It will then move to examining the level of public trust or confidence in the media. The analysis will be derived from public opinion polls, case studies and submissions to the Inquiry.

4.6 First, though, it should be said that there is much to celebrate about the Australian news media. Journalists have distinguished themselves through brave, vivid reporting from the

¹ Oral Submission to the Independent Media Inquiry, Sydney, 16 November 2011, 63 [6]–[9] (Mr Hywood).

² Oral Submission to the Independent Media Inquiry, Perth, 6 December 2011, 27 [17]–[22] (Mr Cronin).

³ Oral Submission to the Independent Media Inquiry, Sydney, 16 November 2011, 64 [3] (Mr Hywood); Oral Submission to the Independent Media Inquiry, Sydney, 17 November 2011, 178 [20] (Mr Hartigan).

front lines of two world wars. More recently, outstanding work done by journalists—in reporting, photography, feature writing and headline writing—has been recognised annually in the Walkley awards, Australia’s equivalent of America’s Pulitzer Prize⁴.

- 4.7 In the 21st century there continues to be much to celebrate. Enterprising and insightful reports, photographers and camera crews are present wherever Australian troops are deployed—whether in Iraq, Afghanistan, East Timor or the Solomon Islands. A large media gallery is a permanent feature of the national parliament for the purpose of scrutinising government. The reporting of natural disasters such as the 2011 Queensland floods and the 2009 Victorian bushfires ensures that the wider Australian community is comprehensively informed about the hardships confronting their fellow citizens, and in those cases—as in many others—be inspired by media reporting to give generously in response.
- 4.8 It was also clear from the evidence given by the editors and journalists who appeared before the Inquiry that the major Australian newspapers are staffed by people committed to their craft. In many respects they serve the community well. But, as with all large and powerful institutions, there are matters of concern.

Public opinion, confidence and perceptions of the media

- 4.9 Media proprietors often defend their adherence to standards by reference to their readers. So, rejecting any suggestion of bias against the government on the part of News Limited, Mr Hartigan said such claims were an insult to readers, who were capable of making up their own minds⁵.
- 4.10 Often, however, readers are not in a position to make an appropriately informed judgment. They expect news stories they read to be accurate. Usually only the authors/publishers, and the subjects of the story, know the extent to which a story lives up to that expectation. Over

⁴ A searchable database of Walkley Award winners can be found at <www.walkleys.com/past-winners>. In 1999, a panel of academics and journalists chaired by Matthew Ricketson selected a list of The Best Australian Journalism of the Twentieth Century. The list was published in the Media supplement of *The Australian* on 9 December 1999, 6–7, in an article headlined ‘Century’s top 100’. It was discussed on ABC Radio National’s *The Media Report* on 9 December 1999 <www.abc.net.au/radionational/programs/mediareport-1999/the-best-australian-journalism-of-the-20th-century/3566498>.

⁵ Oral Submission to the Independent Media Inquiry, Sydney, 17 November 2011, 172 [19]–[23] (Mr Hartigan).

time, though, the public develop perceptions about the media that have an important influence on their opinion of the media.

- 4.11 There is a substantial body of evidence from public opinion polls about the Australian public's perception of media standards and performance. Those polls cover a period of 45 years, from 1966 to 2011. The findings of a total of 21 surveys, some asking multiple questions about the media, are analysed below under five topic headings: trust; performance; bias; influence/power; and ethics. These surveys comprise virtually all major surveys conducted in that period that have considered the public's perception of the media. Overall, the findings indicate significant concerns in the minds of the public over media performance.
- 4.12 The discussion of the findings on each of the five topics is, in some instances, augmented by examples of recent cases of journalistic failures. Those cases show that departures from media standards continue to occur⁶.
- 4.13 Two points must be acknowledged. First, the quality—and therefore the usefulness—of public opinion polling is dependent upon a number of factors, including the reliability, validity and fairness of the questions; the size and representativeness of the sample, and the soundness of judgment about whether people know enough about the topic to have a genuine opinion on it. The data reported here was derived from surveys that were of a competent professional standard. Second, only a few of the surveys replicated identical questions, and this posed difficulties for identification of trends. Moreover, some questions that looked superficially similar were in fact different. Consequently, considerable care had to be exercised to avoid confusing any resultant impressions of changes or inconsistencies in public opinion with differences due solely to the fact they were answers to different questions. For all that, some clear trends of public opinion emerged, and they are summarised below.

⁶ Information about the polling data that is used in this analysis and the method of analysis is contained in Annexure F to this report.

Trust

- 4.14 The level of public confidence in journalists as a professional group and the media as an institution is low, much lower than it is for other professions and institutions.
- In a 1992 survey by Schultz⁷ which asked journalists why they thought they were held in such low esteem by the public, they put it down largely to sensationalist or inaccurate reporting.
 - A 2004 survey by Muller⁸ found that nearly three-quarters of voters held the view that journalists wrote stories they thought would be best for sales and ratings, even if it meant exaggerating the truth.
 - Respondents to a question on how much trust they had in a range of major organisations and institutions in the most recent survey (2010) of the Australian Elections Study (a major academic research project), rated television and the press second-last and last respectively.
 - Journalists have consistently received a very low rating in annual Roy Morgan Research surveys (29 conducted since 1983) of how the public rates people in various occupations for honesty and ethical standards. In the latest survey (2011), journalists rated fourth-last in a list of 30, ahead only of real estate agents, advertising people and car salesmen.
- 4.15 Yet, while public trust in the institution of the media and the profession of journalism as a whole is low, there are significant differences in the level of trust people say they have in different media organisations.
- The ABC (regardless of platform—television, radio or online) is consistently identified in surveys as the most trusted media organisation. Over the decades, the ABC has been consistently identified as a trusted source of news and information by between two-thirds and four-fifths of people, whereas other media organisations struggle to get even half the people to say they trust them.

⁷ Julianne Schultz, *Reviving the Fourth Estate: Democracy, Accountability and the Media* (Cambridge University Press, 1998) 249.

⁸ Denis Joseph Andrew Muller, *Media Accountability in a Liberal Democracy—An Examination of the Harlot's Prerogative* (PhD Thesis, University of Melbourne, 2005) 76.

- In the most recent survey on this topic, carried out by Essential Media in December 2011, 72 per cent of respondents said they trusted ABC television news and current affairs, and 67 per cent said they trusted ABC radio news and current affairs. No other media organisational grouping—commercial television, commercial radio, newspapers or online platforms—achieved above 46 per cent.
 - The pattern is broadly similar when the focus of the question is just on television news and current affairs, although all television channels tend to do better out of this focused line of questioning. In a survey of this kind by Essential Media in 2010, 84 per cent of respondents said they trusted the ABC, while between 52 per cent and 62 per cent said they trusted the commercial channels.
- 4.16 Another survey done by Essential Media in 2010 asked a subtly different question and obtained very different results. Instead of asking *how much* people trusted different kinds of media, it asked *how often* people felt they could trust them. Four-fifths of the respondents to this survey, carried out for the Media, Entertainment and Arts Alliance (MEAA), the journalists' trade union, indicated they felt they could always or usually trust news and information from television, radio, newspapers and online news sources.
- 4.17 This survey also explored trust in online news sources among respondents who indicated they had used online news sources. Their level of trust of online news sources associated with established media such as the ABC and major newspaper sites was far higher than their trust in blogs or social media networks.
- 4.18 Results from various surveys reveal a low level of trust in newspapers and in their coverage, especially of political news:
- in a 1974 survey by the Saulwick Poll, a majority (54 per cent) of respondents said they had little or no faith in newspapers
 - in a 1976 survey also by Saulwick an even larger majority (59 per cent) said the presentation of political news in newspapers could not be trusted
 - in a 2011 survey by Essential Media a small majority (53 per cent) said they did trust newspapers as a source of political news and information, ahead of commercial

television (45 per cent) but a long way behind ABC television (76 per cent) and ABC radio (69 per cent).

- 4.19 In an effort to illustrate why the public might hold these attitudes, the Inquiry examined the coverage of some recent issues. Several illustrate inadequate scrutiny of claims reported in news stories. One relates to coverage by several regional newspapers of claims about the impact on club revenues of the proposed introduction of mandatory pre-commitment technology for poker machines. Throughout May 2011, a number of local papers, including the *Northern Star*, the *Blacktown Advocate*, the *Townsville Bulletin*, the *Gold Coast Bulletin*, the *Port Macquarie News*, the *Toowoomba Chronicle* and the *Southern Courier* reported claims by club interests and other opponents of mandatory pre-commitment that the introduction of such technology would reduce club revenues by 40 per cent. According to a *Media Watch* analysis⁹, not one of those papers questioned the basis for the claim which was in fact a distortion of a Productivity Commission estimate that problem gambling accounted for 40 per cent of total poker machines revenues.
- 4.20 Another example is an item published by the *Daily Telegraph* on 11 May 2011 purporting to show the impact on a family's budget of the federal government's carbon pricing scheme, before its consideration in parliament and before a carbon price had been set. The item contained estimates of the extra annual cost of food (\$390), power (\$300) and petrol (\$150) to the family in question. Since the carbon price was at that stage unknown, there was simply no basis for assessing the cost impacts on food, power or petrol. Also the story omitted any reference to the widely mooted income tax cuts¹⁰.

Performance

- 4.21 In terms of broad measures of performance, the available survey data show that the proportion of those satisfied with media performance is higher than the proportion of those that are dissatisfied.

⁹ ABC 'A well-orchestrated campaign', *Media Watch* 27 June 2011.

¹⁰ ABC 'Beware the unsourced figure' *Media Watch* 16 May 2011.

- Answering a question about whether the news media as a whole did a good or poor job, in a 1989 survey by Saulwick more respondents (35 per cent) said they did a good job than a poor job (23 per cent) and 38 per cent said they did a fair job.
- In a 2000 survey by AC Nielsen 57 per cent of respondents said they were satisfied with the quality of journalism in Australia and 37 per cent said they were dissatisfied. A majority also said that television, newspapers and radio all ‘provided a thorough analysis of issues’, with television doing best.

4.22 However, on more specific questions of media performance, the results were less positive.

4.23 A basic criterion of media performance is accuracy. Public perceptions of the performance of Australia’s media on this criterion are not flattering. These are the findings of several surveys.

- Only 35 per cent of respondents to a 2011 survey by Essential Media agreed that ‘the media usually report the news accurately’. As with trust, however, perceptions varied for different media.
- A 1976 survey by Saulwick found 66 per cent of respondents believed ABC television presented political news accurately; 51 per cent believed commercial television did so. Only 39 per cent believed newspapers presented political news accurately. In a subsequent survey in 1990 by Saulwick 76 per cent of respondents said television (undifferentiated between ABC and commercial) presented news accurately, but only 50 per cent said the same of newspapers.
- Ten years earlier, a 1966 survey by Western and Hughes¹¹ asked a more general question about which medium gives the most complete news coverage. The results were: 55 per cent newspapers, 25 per cent television, and 14 per cent radio.

Similarly, survey findings on perceptions of how well the media perform their public watchdog role are not very laudatory, even among journalists:

- Information about how well the public thought the media performed its watchdog role—that is, scrutinising public officials and holding the powerful to account—was

¹¹ John Stuart Western & Colin A Hughes, *The Mass Media in Australia: Use and Evaluation*, (University of Queensland Press, 1971) 119.

collected in two surveys conducted in 2004 by Muller¹² and 2011 by Essential Media. In both cases the results were no better than mediocre. Just over 50 per cent in the first and 45 per cent in the second agreed with a statement that the media did a good job of this.

- Journalists themselves were far from sanguine about the Australia media's performance in discharging its watchdog—or fourth estate—function. In a 1992 survey by Schultz¹³, 89 per cent of journalists professed themselves adherents of the fourth estate ideal personally, but only 43 per cent said the media in Australia actually lived up to it.
- Another survey in 2006 by Roy Morgan Research for the MEAA gave some insight into why journalists might have felt that the fourth estate ideal had become compromised:
 - 53 per cent felt they were unable to be critical of the media organisation for which they worked
 - 38 per cent said they had been instructed to comply with the commercial position of their company
 - about one-third felt obliged to take account of the political position of their proprietor when writing stories.

4.24 There is also some evidence suggesting a potential decline in journalistic diligence in reporting. A 2010 study by *Crikey* and the Australian Centre for Independent Journalism on the influence of the public relations industry on news reporting¹⁴ found that in a one-week period in 2009, 55 per cent of the news reports carried by major metropolitan newspapers had been driven by some form of public relations (such as a media release or the activities of a public relations professional). Of 2203 news articles that were examined, 24 per cent were found to have been largely republished press releases with little or no additional journalistic work. Political stories were found to be influenced least by public relations.

¹² Denis Joseph Andrew Muller, *Media Accountability in a Liberal Democracy—An Examination of the Harlot's Prerogative* (PhD Thesis, University of Melbourne, 2005) 311.

¹³ Julianne Schultz, *Reviving the Fourth Estate. Democracy, Accountability and the Media* (Cambridge University Press, 1998) 249.

¹⁴ Wendy Bacon, Michelle Loh, Alex Taylor and Sasha Pavey, 'Spinning the Media: Key findings in a week in the life of the media' 15 March 2010 *Crikey.com.au* <www.crikey.com.au/2010/03/15/spinning-the-media-key-findings-in-a-week-in-the-life-of-the-media/>.

Bias

- 4.25 To deal with the difficulties of identifying and measuring bias the polls reported here attempted to measure bias as diversions from fairness and diversity of opinion, on a scale presenting bias as a polar opposite to 'balance'. On this basis:
- bias is much more commonly perceived to exist in the conduct of newspapers than in television or radio
 - the ABC is perceived to be the least biased media organisation in Australia, and
 - there is perception of persistent bias against the Labor Party particularly in polls conducted in the earlier years of the period covered by this analysis.
- 4.26 A 2000 survey by AC Nielsen rated radio (undifferentiated between ABC and commercial) best at providing 'a balanced presentation of views'. Newspapers did least well with a rating of 57 per cent. ABC television was rated much higher than commercial television.
- 4.27 A 2011 survey by Essential Media found that only 21 per cent of respondents agreed with the statement that the media usually report all sides of a story, and 69 per cent disagreed. In a separate survey by Schultz in 1992¹⁵, journalists had a much more positive view with about three-quarters saying the level of objectivity in their organisations was about right.
- 4.28 Concerning political bias, when asked in a 1966 survey by Western & Hughes whether newspapers were generally fair to Labor, 55 per cent said yes, but 72 per cent said they were fair to the Liberal and Country parties¹⁶. This pattern of response was repeated for commercial television and radio. ABC television and radio were seen to be even-handed.
- 4.29 A 1976 survey by Saulwick, which explored the topic of political bias in some depth, found 58 per cent of respondents believed newspapers were biased in their presentation of political news, of which 62 per cent indicated the bias was against Labor. Even 42 per cent of non-Labor voters said the newspapers were biased against Labor. In contrast, only 17 per cent felt the ABC TV political news was biased and their opinions on the direction of the bias for or

¹⁵ Julianne Schultz, *Reviving the Fourth Estate. Democracy, Accountability and the Media* (Cambridge University Press, 1998).

¹⁶ John Stuart Western & Colin A Hughes, *The Mass Media in Australia: Use and Evaluation*, (University of Queensland Press, 1971).

against Labor were equally divided. A majority (52 per cent) said that political news on commercial television was unbiased; most of those perceiving bias felt it was anti-Labor (a view shared by 39 per cent of non-Labor respondents).

- 4.30 The perception that newspapers are generally not balanced in their coverage also tends to be reflected in complaints to the APC with the top three categories being invariably complaints about accuracy (25–30 per cent of total complaints), balance (20 per cent) and fair and honest presentation (15–20 per cent)¹⁷.
- 4.31 In December 2011, the Australian Centre for Independent Journalism published a report on media coverage of climate change policy in Australia. In *A Sceptical Climate*, the Centre analysed 10 Australian newspapers in the period from February to July 2011. It analysed 3,971 articles, including comment pieces, editorials, features and news stories. It looked at the use of language in an article, the framing of the article and the first three sources quoted.
- 4.32 Its headline finding was that, overall, negative coverage of government policy outweighed positive coverage by 73 per cent to 27 per cent. Broken down by reference to major media outlets, the Centre found that negative coverage across News Limited papers (82 per cent) far outweighed positive coverage (18 per cent). For Fairfax Media papers, the ratio was 57 per cent positive coverage to 43 per cent negative coverage.
- 4.33 One of the conclusions reached in the report was this¹⁸:

The two biggest News Ltd tabloids—the Herald Sun and the Daily Telegraph—have been so biased in their coverage that it is fair to say they ‘campaigned’ against the policy rather than covered it.

- 4.34 It went further¹⁹:

¹⁷ Letter from Australian Press Council to the Independent Media Inquiry, 6 December 2011. See also Annexure G to this report.

¹⁸ Wendy Bacon, *A Sceptical Climate*, Media Coverage of climate change in Australia 2011, (Australian Centre for Independent Journalism, 2011) 62.

¹⁹ *Ibid* 67.

Evidence in this report suggests that many Australians did not receive fair, accurate and impartial reporting in the public interest in relation to the carbon policy in 2011. This suggests that rather than an open and competitive market that can be trusted to deliver quality media, we may have a case of market failure.

- 4.35 The response of News Limited journalists and management was far from muted and while it was critical of the Centre's work it dwelt more on the wide context than the specifics of the charges. Chris Mitchell, editor-in-chief of *The Australian* said²⁰:

The carbon tax is one of the biggest concerns for business in this country and it is only proper that a newspaper such as ours reports those concerns.

- 4.36 The editor of the *Herald Sun* was more forthright²¹:

Newspapers have a role to play in informing people but they must also campaign against those things the public don't want.

- 4.37 It is worth pausing at this point to affirm that there is nothing wrong with newspapers having an opinion and advocating a position, even mounting a campaign. Those are the natural and generally expected functions of newspapers. Notable examples include *The Australian* on problems in remote Indigenous communities, *The Age* on the Reserve Bank's note printing companies that led to bribery charges being made and *The West Australian* on compensation claims by soldiers returning from the war in Afghanistan²².

- 4.38 However, to have an opinion and campaign for it is one thing; reporting is another, and in news reporting it is expected by the public, as well as by professional journalists, that the coverage will be fair and accurate.

- 4.39 Nonetheless, there is a widely-held public view that, despite industry-developed codes of practice that state this, the reporting of news is not fair, accurate and balanced.

²⁰ Nick Leys, 'Newspaper reject carbon tax criticism', *The Australian*, (Melbourne) 2 December 2011

²¹ *Ibid.*

²² Kerry McCallum, *Public opinion about Indigenous issues in Australia: local talk and journalistic practice* (Australian Journalism Monographs No 8, Griffith University Centre for Public Culture and Ideas, 2007); Nick McKenzie, 'The Reserve Bank of Australia payoff scandal' in Matthew Ricketson (Ed) *Australian Journalism Today* (Macmillan, 2012), 85–91; Joseph Catanzaro, 'Secret toll of the war', *The West Australian* (Perth), 16–17 July 2011, 1 & 4–5; and Joseph Catanzaro, 'Real cost of the war', *The West Australian* (Perth), 23–24 July 2011, 3.

- 4.40 For instance, the Inquiry heard from Professor Robert Manne who, earlier in 2011, had written an extensive critique of *The Australian* newspaper in *Quarterly Essay* entitled ‘Bad News: Murdoch’s *Australian* and the Shaping of the Nation’ that examined seven case studies of the newspaper’s coverage of issues.
- 4.41 One of his case studies concerned coverage of climate change policy and his findings mirrored those of the Australian Centre for Independent Journalism. Professor Manne’s research found that articles unfavourable to action on climate change outnumbered favourable articles by a ratio of four to one.
- 4.42 In his response to Professor Manne’s work, Paul Kelly who is *The Australian*’s editor-at-large, did not refute Manne’s statistics²³. Instead, he argued that Manne’s position was based on a ‘rejection of debate’ about the science of climate change:

One reason for the public’s backlash making carbon pricing so unpopular was the precise attitude [Manne] took. While pretending to be rational his rejection of debate was really faith-based dogmatism and the Australian public didn’t like being told what to think by patronising experts.

Influence/power

- 4.43 Surveys in 1971, 1974 and 1980 by Saulwick all showed the media to be perceived as among the four biggest centres of power in Australia, alongside trade unions, big business and the federal government.
- 4.44 Two surveys conducted by the same researchers 14 years apart—in 1976 and 1990—each showed approximately two-thirds of respondents said the daily newspapers have too much influence. Even a majority of journalists in a separate survey said they thought the media had too much influence over voters’ intentions and over the political agenda. In the 1990 survey, 75 per cent of respondents said television also had too much influence. However, there was no distinction made between ABC and commercial television.

²³ Paul Kelly, ‘Robert Manne throws truth overboard’, *The Australian*, (Melbourne) 14 September 2011.

- 4.45 A 2000 survey by AC Nielsen asked voters whether the media exercised its power responsibly or irresponsibly. A small majority (52 per cent) said they exercised it responsibly and 43 per cent said they exercised it irresponsibly.
- 4.46 The extent to which a newspaper might have influence over political affairs is highlighted by the report of Victoria's Office of Police Integrity into events preceding the resignation of the Chief Commissioner of Police, Simon Overland.
- 4.47 The report focused on a media campaign against Mr Overland that was 'heavily promoted' ²⁴ by a police officer and ministerial adviser, Tristan Weston. In its findings, the OPI said that Mr Weston had 'frequently used the media' ²⁵ to make his attack and had supplied information to the media. While the OPI was primarily concerned with analysing Mr Weston's conduct, it recommended that the media's role in the affair also warranted consideration.
- 4.48 The OPI identified 10 newspaper articles for analysis, five of which were published in the *Herald Sun*. It found that Mr Weston, along with Police Association secretary Greg Davies, ran a concerted campaign to destabilise Mr Overland, by planting items with selected journalists. Of the 10 stories analysed by the OPI, five were found to contain inaccuracies.
- 4.49 The Inquiry has itself considered the stories identified by the OPI. That consideration suggests there is a basis for concluding that for the majority of them (seven) the sourcing of information and assertions was poor. In half the stories, there is a basis for concluding that assertions were poorly or inadequately verified ²⁶.
- 4.50 The *Herald Sun* published an editorial on 28 October, the day after the OPI's report was released, in which it argued the OPI report proved the newspaper was innocent of pursuing a vendetta against Mr Overland. It said the report showed Mr Weston had pursued the vendetta. What the editorial did not say, which is apparent from the OPI's report, is that the *Herald Sun* allowed itself to be an insufficiently questioning player in the campaign by Mr Weston and others. That is, its journalistic standards, particularly on independence, fairness and accuracy, were wanting.

²⁴ Office of Police Integrity, *Crossing the Line* (Parliamentary Paper 76, Victorian Parliament, 2011) 7.

²⁵ *Ibid* 8.

²⁶ A fuller examination of the articles is in Annexure H to this report.

- 4.51 Comments made by Mr Tony Fitzgerald QC in his report on corruption in Queensland are relevant²⁷:

The media is able to be used by politicians, police officers and other public officials who wish to put out propaganda to advance their own interests and harm their enemies. A hunger for “leaks” and “scoops” (which sometimes precipitates the events which they predict) and some journalists’ relationship with the sources who provide them with information, can make it difficult for the media to maintain its independence and a critical stance. Searches for motivation, and even checks for accuracy, may suffer as a result ... This places an extra responsibility on the journalist. Both the journalist and the source have a mutual interest: both want a headline. Yet if the journalist is so indiscriminating that the perspective taken serves the purposes of the source, then true independence is lost, and with it the right to the special privileges and considerations which are usually claimed by the media because of its claimed independence and “watchdog” role. If the independence and the role are lost, so is the claim to special consideration.

- 4.52 The following is a tragic example of the kind of reporting that Mr Fitzgerald had in mind. It concerns a mother whose children died in a house fire in a country town. On 30 May 2010, the Victoria Police issued a media release stating:

*Police are investigating the suspicious deaths of two boys in Mooroopna this evening ... A 29-year-old Mooroopna woman is currently assisting police with their enquiries.
Homicide Squad detectives are en route to the scene.*

- 4.53 The news media immediately took up the story. The *Herald Sun*, in an article headlined ‘Dad will never recover from the Mooroopna death of his two sons, says devastated grandmother’, reported: ‘The deaths of the two brothers ... is believed to have come after a bitter separation’. Mr Holmes, host of the ABC television program *Media Watch* commented on this piece. He asked ‘Believed? Is that a basis for reporting?’²⁸

²⁷ S R Hampson Report of a Commission of Inquiry Pursuant to Orders in Council Queensland (Government Publisher, 1989) 141–142.

²⁸ ABC, *Media Watch*, 7 June 2010.

- 4.54 In a segment about the event aired on 7 June 2010, Mr Holmes said it appeared the problem stemmed from the police but was amplified by the news media. He was critical of a *Herald Sun* columnist whose condemnation outstripped the known facts. The article stated ‘I don’t care what difficulty you are going through as a parent, how depressed you might be or how much you hate your former partner. Get professional help. But protect your kids at all costs ... Sometimes mums kill their kids before killing themselves, leaving notes saying that they didn’t want their babies to live without them’²⁹.
- 4.55 Mr Holmes turned out to be right. Within a few days it had become clear that the two boys’ death was a tragic accident. The columnist wrote a further article ‘We should all acknowledge that our initial collective suspicion may be adding to her unimaginable grief . . . many people quickly reached a conclusion about what had happened . . . Maybe we need to be a little less quick to judge others’³⁰. In the space of three days the columnist had switched from quickly drawn conclusions to suggesting society as a whole had been hasty in its judgment.

Ethics and intrusions on privacy

- 4.56 Community concerns about media intrusions on individual privacy are widespread. A 2004 parallel survey of voters and journalists by Muller³¹ found sharp differences in attitudes between the two sets of respondents on a number of specific ethical questions. The biggest differences were on privacy and deception. On privacy, 92 per cent of voters but only 38 per cent of journalists said it was never right to take a picture of someone in their backyard from outside the property without their knowledge and consent. On deception, 85 per cent of voters but only 38 per cent of journalists said it was never right to obtain access by pretending to be someone other than a journalist. The survey also asked whether it was right to pretend to be sympathetic to a person’s situation in order to obtain an interview. In their responses, 68 per cent of journalists said it was right and 28 per cent said it was never right. In sharp contrast, 70 per cent of respondents said it was never right and 29 per cent said it

²⁹ Susie O’Brien, ‘Seeking help crucial for parents’, *Herald Sun*, (Melbourne) 1 June 2010.

³⁰ Susie O’Brien, ‘Dead boys’ mother is a victim too’, *Herald Sun*, (Melbourne) 4 June 2010.

³¹ Denis Joseph Andrew Muller, *Media Accountability in a Liberal Democracy—An Examination of the Harlot’s Prerogative* (PhD Thesis, University of Melbourne, 2005).

was. Large proportions of respondents to an earlier (1974) survey by Saulwick considered interviewing people against their will to be an invasion of privacy: for celebrities it was 56 per cent and for private citizens it was 76 per cent.

- 4.57 In May 2010 after the resignation of a New South Wales Government Minister who had been 'outed' by a commercial television channel, Essential Media asked people whether it was appropriate to reveal details of a political figure's private life. A majority (54 per cent) said it was justified in at least some circumstances, specifically where the conduct had an impact on the politician's work or taxpayers' resources or where the politician had acted in a way that was clearly at odds with their publicly expressed views. Thirty-eight per cent said such disclosures were never justified.
- 4.58 In a survey taken in July 2011 by Essential Media in the immediate aftermath of the British phone-hacking scandal involving the now-defunct *News of the World*, 51 per cent of respondents said they were now more concerned about the conduct of Australian newspapers, but 38 per cent said it had made no difference to their views.
- 4.59 A recent prominent example of an invasion of privacy involving a public figure was the publication on the front pages of News Limited papers in March 2009 of fake photographs said to be of Pauline Hanson who was at the time a candidate for election to the Queensland parliament. The journalistic failings were well catalogued in a *Media Watch* episode on 23 March 2009. Essentially, in the rush to print, the journalists at *The Sunday Telegraph* carried out only very rudimentary verification. An apology was later published. In his evidence to the Inquiry, Mr Littlemore QC, who had represented Ms Hanson, referred to this as a rare case in which it was not necessary to issue a statement of claim for defamation before the dispute between the parties was resolved.³²
- 4.60 While there is substantial disapproval of media infringements of individual privacy, complaints to the APC concerning privacy represent only about 10 per cent of total complaints³³. In his evidence Mr Chadwick, the ABC's Director of Editorial Policies, calculated that historically privacy complaints to the APC, ABC and the Australian Communications and

³² Oral Submission to the Independent Media Inquiry, Sydney, 17 November 2011, 227 [21] (Stuart Littlemore QC).

³³ Letter from Australian Press Council to the Independent Media Inquiry, 6 December 2011.

Media Authority (ACMA) have been around five per cent of total complaints. On that basis he concluded that³⁴:

... invasion of privacy is not a serious offence, a constant offence, a major offence, committed by the Australian media.

- 4.61 In 2008 the ALRC completed a two-year long investigation into privacy. A year earlier as part of its inquiry process, the ALRC released an issues paper which included discussion of the self-regulatory model for the print media, some criticisms of it and proposals for reform before expressing this view³⁵:

In the ALRC's view, freedom of expression is a fundamental tenet of a liberal democracy. Appointing an independent government body to oversee the media is a measure of last resort. Such an approach should be taken only where there is substantial evidence that self-regulation and co-regulation in the media industry have failed. Based on the relatively low rate of privacy-related complaints, investigations and findings of breach, as well as the small number of submissions calling for a change in regulatory model, the ALRC does not consider that the appointment of a government body, such as a Media Complaints Commission, is warranted.

- 4.62 In its final report, *For Your Information*, the ALRC noted 'particular concerns' relating to the reporting of certain types of personal information by media organisations, including personal information about children and young people, sensitive personal information, including health information and personal information connected to legal proceedings³⁶. Then referring to the present self-regulatory model for print media it stated³⁷:

The ALRC has ongoing concerns about the capacity of a self-regulatory system to preserve the tenuous balance between the public interest in freedom of expression and the public interest in adequately safeguarding the handling of personal information.

³⁴ Oral Submission to the Independent Media Inquiry, Melbourne, 9 November 2011, 223 [5]–[7] (Paul Chadwick).

³⁵ Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper No 72 (2007) vol 1, 1109 [38.105].

³⁶ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 2, 1462 [42.90].

³⁷ *Ibid* 1472 [42.128].

- 4.63 Several submissions to the Inquiry expressed similar concerns. Four warrant particular mention.
- 4.64 The first is from a group of academic researchers currently engaged on a three-year Australian Research Council (ARC)-funded research project examining 'Vulnerability and the News Media'. The report on the study is due later this year, but the group agreed to provide its preliminary findings to the Inquiry. The research spans a content analysis of national, metropolitan, regional and suburban newspapers during 2009, an analysis of APC adjudications concerning complaints about how the news media dealt with people during 'moments of vulnerability' and six focus group interviews conducted across four states during 2010 and 2011.³⁸
- 4.65 The research identified two main types of vulnerability stemming from a person's identity or from a person's circumstances. The first concerned particular groups in society (such as Indigenous Australians, those from diverse ethnic or religious backgrounds, physically or intellectually disabled people or those suffering from a mental illness) who have most often been misrepresented or stereotyped in media coverage. The second comprised people who are in a vulnerable state because of an event in their life, such as the death of a family member, their involvement in a natural or man-made disaster, or their suffering physical or sexual assault.
- 4.66 In their submission, the research group observed that vulnerable people are typically ignorant of media practices and of complaint procedures³⁹. When offered a chance to respond, vulnerable people are not in an appropriate state of mind or emotional position to comprehend the offer or to take advantage of it. As to the apparent under-representation of privacy complaints to the APC, the research group offered this view:

Making a complaint to the Press Council requires knowledge that the complaints mechanism exists and a relatively high level of literacy about the steps involved in that process. Vulnerable sources may well have a desire to complain, but not the energy or competence at the time to do it. This relies on third-party support to make the complaint—which is not always available.

³⁸ A table showing respondents' experience of the news media is at Annexure I to this report.

³⁹ ARC Linkage Grant LP0989758 'Vulnerability and the News Media' Research Project, Submission to the Independent Media Inquiry, 2011, 4.

4.67 Research by the Centre for Advanced Journalism at the University of Melbourne examined the effect on survivors of being covered by the media, as well as ethical issues arising for the media in covering the 2009 Victorian bushfires. The research revealed many news media practitioners treated the survivors with respect, but there were some serious lapses. These included one instance of a reporter disguised as a volunteer obtaining access to a relief centre and after lights-out attempting to obtain interviews with survivors surreptitiously. It should be added, in fairness, that this was an isolated though egregious case.

4.68 The third submission was from the South Australian Commissioner for Victims' Rights, Michael O'Connell⁴⁰. He wrote:

Media insensitivity towards victims of crime, especially violent crime, can cause a 'second injury'. In spite of media assertions that reporting on victims' plight humanises their coverage of crime, victims' opinions (influenced by their dealings with the media) can differ. Rather, insensitive (sometimes dehumanising) reporting and coverage often re-victimises victims.

4.69 Mr O'Connell provided the Inquiry with a list of grievances he had received from crime victims' about the news media. Those grievances included the following.

- Photographs or footage of crime scenes, including dead bodies.
- Interviews at inappropriate times, such as when the victim is in shock and unaware of the consequences of his or her replies.
- Unwillingness to respect victims' requests, especially filming funeral corteges.
- Approaching people for interviews before they have been informed of the death of a relative.
- Publishing gruesome details, such as the precise nature of injuries sustained by a murder victim.
- Inappropriate or aggressive questioning.
- Intrusion into a victim's privacy, including, for example, publishing an image of the victim's home even though the crime took place elsewhere.

⁴⁰Michael O'Connell, Commissioner for Victims Rights, Submission to the Independent Media Inquiry, 2011, 2.

- Relying on speculation to challenge a victim’s credibility.
 - Blaming the victim for the crime, especially victims of sexual assault.
- 4.70 The commissioner acknowledged some crime victims have told him they found telling their story to the media to be cathartic and others who praised the work of individual journalists and photographers.
- 4.71 Fourth, the Australian Privacy Foundation⁴¹, a national non-profit body advocating on privacy issues, submitted that ‘there are all-too-frequent instances of seriously and unjustifiably privacy-invasive actions by the media’ and cited numerous instances in recent years concerning ordinary citizens as well as high profile people.
- 4.72 To this might be added two more recent instances.
- 4.73 On Saturday 19 November 2011, *The Sydney Morning Herald* led the paper with two reports and a large photograph on its front page about a fire at a nursing home at Quakers Hill, Sydney, that had killed four of the home’s 96 elderly patients the previous day. Another news report and six more photographs were published on page 10. The photograph on the front page showed an elderly man lying in his bed, but the bed was on the street as the residents had been evacuated from the home. His mouth was agape and his eyes closed. At least two readers wrote to complain. Published on 21 November, the first letter asked why the newspaper hadn’t used more photographs of the emergency services personnel rather than ‘the frail, elderly residents who had been pulled to safety and deserved some privacy’. The second letter empathised with relatives reading or watching coverage of the fire on television: ‘News is one thing, compassion another. Surely the two can be mixed more sensitively’.
- 4.74 On 3 August 2011, New South Wales police were called when a young woman, Madeleine Pulver, reported that an intruder had placed a collar bomb around her neck. The bomb turned out to be a hoax. The following day her father made repeated calls to the media to respect her privacy. Some newspapers had already obtained images from Facebook of Ms Pulver and printed them. Reporters from broadcast television stations then camped

⁴¹ Australian Privacy Foundation, Submission to the Independent Media Inquiry, 2011, 2.

outside her house for up to four days. A Sydney newspaper published photos of her walking her dog.

Summary and conclusions

- 4.75 There is considerable evidence that Australians have a low level of trust in the media as an institution and in journalists as a professional group. The instances and accusations of journalistic failures described above (and this is but a small sample) help explain this lack of trust. However, levels of trust in different media organisations and different types of media vary. The most trusted by far is the ABC, and it enjoys high levels of public trust. Newspapers, by contrast, attract comparatively low levels of trust. These trends have been consistent over many decades. The APC, which the newspaper industry established to oversee standards, has been in existence for the best part of four decades.
- 4.76 Australia's journalists, while reasonably in touch with public opinion about the reasons for their poor public standing, seem more satisfied than is the general public with their standards of objectivity and the general quality of their work. Interestingly they acknowledge that the media's role in enhancing the democratic process, particularly by their watchdog role, has become compromised by the media's own material interests. Evidence that those functions are compromised is to be found in the fact that about one-third of working journalists say they feel obliged to take account of their proprietor's political position when writing stories.
- 4.77 A new factor to emerge in recent years has been the comparatively high levels of trust placed in online news sources among that substantial and swiftly growing minority who mainly get their news that way. These people tend to trust their online platforms more than they trust conventional news platforms, even though much of the online content originates with the same news organisations as supply the conventional platforms. Why this should be so is not yet clear.
- 4.78 While the public is reasonably satisfied with the performance of the media, this does not translate into trust or esteem for it as an institution, or for journalism as a profession.

- 4.79 Trust appears to be allied to perceptions about accuracy and bias. Television—and especially ABC television—is more widely perceived to be accurate than other media. Newspapers are generally not perceived to be as accurate. Similarly with perceptions about bias: the picture is mixed, but generally television and radio are seen to be less biased than newspapers.
- 4.80 A further factor affecting public trust is the evident gulf between the media’s ethical standards and those of the public. In particular, there is a wide difference in what the media and the public consider ethically acceptable concerning privacy and deception.
- 4.81 Across each of the areas which have been identified, it is relatively easy to identify failings in journalistic standards. One proponent of the status quo of self-regulation suggested that ‘while it is trivially easy to demonstrate inaccuracies or biases or ethical lapses in the press, the proper solution to such failures seems to be working quite well’⁴². The last assertion will be subject of detailed consideration later. It is sufficient at this juncture to make the following points. The ease of identifications of failings comes from the fact that they are not rare or infrequent. While some might be trivial, many are not. Their persistent recurrence over the years indicates that existing measures to deal with the problem need improvement.

⁴² Institute of Public Affairs, Submission to the Independent Media Inquiry, 2011, 3–4.

5. The legal position of the media: privileges of the media, and restrictions on speech

- 5.1 A central challenge for liberal democracies such as Australia is to strike a balance between freedom of speech—to which a free press is integral—and other rights and freedoms. These include people’s right to a fair trial, the right not to have their reputations wrongfully harmed, and the right to protect their confidential information.
- 5.2 This section describes how Australia strikes this balance at the present time. It involves imposing certain restrictions on free speech and hence on the operations of the media, but it also involves the conferring of certain privileges on the media, privileges that are not enjoyed by other members of the community. Those privileges are granted in recognition of the special role the media fulfils in a democratic society; it is a manifestation of the general acceptance of the social responsibility theory of the media.
- 5.3 During the Inquiry and indeed for many years past, the media have expressed concern at the number and scope of restrictions on speech. For example, Fairfax Media said in its written submission that there are over 200 pieces of state and federal legislation which regulate on a daily basis the media’s right to publish in Australia¹.
- 5.4 The Right to Know coalition, which counts most major media outlets among its members, has as one of its principal concerns the media’s inability to access information. In 2007, the coalition commissioned an audit, *The State of Free Speech in Australia*², that inquired into restrictions on media access to information imposed by:
- exemptions in freedom of information laws
 - security and secrecy laws
 - public interest immunity claims
 - practices such as control of access to public servants and news conferences.

¹ Fairfax Media, Submission to the Independent Media Inquiry, 2011, 3.

² Independent Audit into the State of Media Freedom In Australia, *Report of the Independent Audit into the State of Free Speech in Australia* (2007) <www.smh.com.au/pdf/folreport5.pdf>.

It also inquired into restrictions imposed on freedom of speech itself. In this latter category the report considered anti-terrorism laws, suppression orders and laws of privacy and defamation.

5.5 More recently, the Media, Entertainment and Arts Alliance (MEAA) published its 2011 report on the state of press freedom in Australia: *Public Good, Private Matters*³. The report surveyed access to court information, suppression orders, secrecy laws, freedom of information, journalists' privilege, whistleblower protection, privacy, terrorism laws, classification and defamation.

5.6 These surveys are particularly valuable. They provide detailed analysis by experienced commentators of what the media itself considers to be the major limitations on press freedom.

5.7 There are also two prominent international surveys of press freedom.

- Freedom House publishes its Freedom of the Press index annually. The index measures the degree of press freedom in each country and restrictions on freedom imposed by the law, the government and economic factors. In its 2011 edition, Australia was ranked equal 32nd in the world for press freedom⁴.
- Reporters Without Borders publishes its Press Freedom Index annually. It measures the degree of freedom that journalists and news organisations enjoy in each country. In its 2011–2012 index, Australia was ranked 30th in the world for press freedom, down from 18th in 2010, with the compilers referring to the media being subjected to 'investigations and criticism by the authorities, and were denied access to information'⁵.

³ Media Entertainment and Arts Alliance, *Public Good, Private Matters: The State of Press Freedom in Australia 2011* (2011) <http://issuu.com/meaa/docs/press_freedom_report_2011>.

⁴ Freedom House, *Freedom of the Press 2011* (2011) <www.freedomhouse.org/report/freedom-press/2011/australia>.

⁵ Reporters Without Borders, *World Press Freedom Index 2011–2012* (2012) <http://en.rsf.org/IMG/CLASSEMENT_2012/C_GENERAL_ANG.pdf>.

Privileges of the media

5.8 Some privileges are found in legislation. Others exist in the practices of institutions and in the reality that journalists have access to people and places beyond the practical reach of the community at large.

5.9 Not only are the privileges granted in recognition of the role the media play in furthering democracy, they are conferred to ensure there is in Australia a free press. This was emphasised in the News Limited submission⁶:

The rights referred to are not privileges but components of free speech. They are designed to ensure a journalist is able to pursue their craft without interference.

5.10 With the privileges should come responsibilities. As the directors of West Australian Newspapers acknowledged in their editorial policy⁷:

[t]he rights and privileges extended to the newspapers' journalists by the nation's political and judicial institutions bring with them a duty to report the workings of those institutions fairly and accurately in the public interest.

5.11 Likewise, Dr Muller said that the privileges enjoyed by the media demand that the media be publicly accountable⁸.

5.12 Moreover, in its submission the Australian Press Council (APC) suggested that making the press subject to a credible system for setting, monitoring and applying good standards of media practice (that is, making the press accountable) would be likely to enhance the willingness of governments to grant rights and privileges to the media⁹.

⁶ News Limited, Submission to the Independent Media Inquiry, 2011, 17.

⁷ West Australian Newspapers Limited, *Editorial Policy of West Australian Newspapers* (2009) <www.dbcde.gov.au/__data/assets/pdf_file/0009/142992/West_Australian_Newspapers-Part_3.pdf>.

⁸ Denis Muller, Submission to the Independent Media Inquiry, 2011, 12.

⁹ Australian Press Council, Submission to the Independent Media Inquiry, 2011, 23 [H7].

To whom the privileges are available

- 5.13 The privileges are not dependent on the medium. The privileges are afforded to ‘journalists’, ‘information providers’, ‘media organisations’ and ‘media’, which are typically defined functionally. None of the definitions is restricted to news publishers.
- 5.14 There is nothing on the face of the definitions that would exclude online journalists and media organisations from their reach. Those privileges are capable of applying to bloggers, tweeters and other users of the new media.

Nature of the privileges

Protection against disclosing sources

- 5.15 One of the most important (and recently granted) privileges is that a journalist is not required to identify his/her sources of information in legal proceedings. The privilege is recognised in Commonwealth and New South Wales statutes¹⁰. Those statutes provide:

If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.

- 5.16 The privilege may be displaced if the court is satisfied that the public interest in disclosing the identity of the source outweighs any likely adverse effect on the source and ‘the public interest in the communication of facts and opinion to the public by the news media’ and the ability of the news media to access sources of facts.
- 5.17 Where the privilege applies its effect can be to deny relevant and important information to the court. The creation of the privilege recognises that the ability of the journalist to get the facts can be more important than the administration of justice in a particular case.
- 5.18 The statutory privilege is only available in the Commonwealth and New South Wales courts. In other jurisdictions, the common law ‘newspaper rule’ provides a measure of protection

¹⁰ *Evidence Act 1995* (Cth) s 126H; *Evidence Act 1995* (NSW) s 126K. See also *Privacy Act 1988* (Cth) s 66(1A); *Broadcasting Services Act 1992* (Cth) s 202(4).

against the disclosure of sources during the interlocutory phases of a defamation proceeding¹¹ though it has been said that the rule does not confer any right or entitlement to protection on journalists and newspapers.

Exemption from misleading and deceptive conduct prohibition

5.19 Journalists and media organisations are exempt from certain consumer protection laws. A central plank of modern consumer protection legislation is the creation of a cause of action against a person who has caused loss or damage by a misleading or deceptive statement¹². Under this law:

- It is irrelevant whether or not the statement was intentionally misleading and whether or not it was made negligently is irrelevant.
- A person who has acted honestly and reasonably may contravene the prohibition. So also will a person who passes on information provided by another if he or she adopts the information when conveying it¹³.
- The prohibition against misleading or deceptive conduct is wide-reaching. It applies to corporations and to individuals. It applies to speech whether written or oral. It applies to public statements and to private statements.

5.20 'Information providers' (that is, persons who carry on a business of providing information) are exempt¹⁴.

5.21 The effect is to exempt the media from claims for misleading or deceptive conduct about news, information, opinion and comment¹⁵. The exemption is wide enough to include newspaper and magazine publishers as well as online publishers. It is wide enough to cover journalists as well.

¹¹ See, e.g., *Liu v The Age Company Ltd* [2012] NSWSC 12 at [164].

¹² *Competition and Consumer Act 2010* (Cth) sch 2 ch 2 s 18.

¹³ *Gardam v George Wills & Co Ltd* (1988) 82 ALR 415.

¹⁴ *Competition and Consumer Act 2010* (Cth) sch 2 ch 2 s 19. 'Information providers' are also exempt from the 'false or misleading representations' provisions in *Competition and Consumer Act 2010* (Cth) sch 2 ch 2 ss 29–37.

¹⁵ *ACCC v Channel Seven Brisbane* (2009) 239 CLR 305.

- 5.22 The exemption came into existence in the following way. In 1983, *The Weekend Australian* published an article and a cartoon under the headline 'Mutinous elements threaten to destroy Australian cricket'. The cartoon showed Kim Hughes, then the captain of the Australian cricket team, with a knife in his back next to a photo of Jeff Thomson, a fast bowler in the team. Mr Thomson and his management company sued *The Weekend Australian* alleging the article was misleading and caused Mr Thomson to suffer loss. The newspaper argued that the publication of opinion and news did not fall within the prohibition against making misleading and deceptive statements. The Full Federal Court held the article was capable of contravening the law¹⁶.
- 5.23 The result was thought to be undesirable. When the proposed legislation introducing the exemption was before parliament, the minister said the exemption was to ensure that if a newspaper article contained 'inaccurate information' the publisher should not be liable for misleading or deceptive conduct, leaving the publisher liable for defamation¹⁷.

Exemption from Privacy Act

- 5.24 Most mainstream media are exempt from the obligations imposed by the *Privacy Act 1988* (Cth)¹⁸.
- 5.25 The Privacy Act (Cth) obliges 'organisations' to comply with the National Privacy Principles¹⁹. Those Principles include the following²⁰.

1.1 An organisation must not collect personal information unless the information is necessary for one or more of its functions or activities.

1.2 An organisation must collect personal information only by lawful and fair means and not in an unreasonably intrusive way.

[...]

¹⁶ *Global Sportsman v Mirror Newspapers* (1984) 2 FCR 82.

¹⁷ Commonwealth, *Parliamentary Debates*, Senate, 16 October 1984, 1707 (Don Grimes).

¹⁸ See also *Health Records Act 2001* (Vic) s 17; *Health Records and Information Privacy Act 2002* (NSW) s 15.

¹⁹ *Privacy Act 1988* (Cth) s 16A(2): 'To the extent (if any) that an organisation is not bound by an approved privacy code, the organisation must not do an act, or engage in a practice, that breaches a National Privacy Principle.'

²⁰ *Privacy Act 1988* (Cth) sch 3.

2.1 [Subject to certain exceptions], an organisation must not use or disclose personal information about an individual for a purpose other than the primary purpose of collection.

[...]

3. An organisation must take reasonable steps to make sure that the personal information it collects, uses or discloses is accurate, complete and up-to-date.

[...]

6.1 [Subject to certain exceptions], if an organisation holds personal information about an individual, it must provide that individual with access to the information on request by the individual.

[...]

6.5 If an organisation holds personal information about an individual and the individual is able to establish that the information is not accurate, complete and up-to-date, the organisation must take reasonable steps to correct the information so that it is accurate, complete and up-to-date.

[...]

10.1 [Subject to certain limited exceptions], an organisation must not collect sensitive information about an individual.

- 5.26 'Sensitive information' includes information about an individual's racial or ethnic origin, political opinions, religious beliefs, sexual preferences or criminal record. It also includes health information about an individual.
- 5.27 'Media organisations' need not comply with the National Privacy Principles if two conditions are satisfied²¹. First, that the otherwise contravening act was engaged in 'in the course of journalism'. Second, that the act was performed at a time when the organisation was 'publicly committed to observe standards' about privacy. Those standards must be published by an organisation representing the media organisations.
- 5.28 The APC has published a Statement of Privacy Principles. The APC privacy principles state:

²¹ *Privacy Act 1988* (Cth) s 7B(4).

In gathering news, journalists should seek personal information only in the public interest. In doing so, journalists should not unduly intrude on the privacy of individuals and should show respect for the dignity and sensitivity of people encountered in the course of gathering news.

Generally, journalists should identify themselves as such. However, journalists and photographers may at times need to operate surreptitiously to expose crime, significantly anti-social conduct, public deception or some other matter in the public interest.

Personal information gathered by journalists and photographers should only be used for the purpose for which it was intended. To the extent lawful and practicable, a media organisation should only disclose sufficient personal information to identify the persons being reported in the news.

A media organisation should take reasonable steps to ensure that the personal information it collects is accurate, complete and up-to-date.

Where individuals are a major focus of news reports or commentary, the publication should ensure fairness and balance in the original article. Failing that, the media organisation should provide a reasonable and swift opportunity for a balancing response in the appropriate section of the publication.

Media organisations should not place any gratuitous emphasis on the categories of sensitive personal information ... except where it is relevant and in the public interest to report and express opinions in these areas.

It is immediately apparent that the APC principles impose far less of a burden on its members than the National Privacy Principles. Yet its members need not comply with the national principles.

- 5.29 The 'journalist exemption' was considered by the Federal Privacy Commissioner in 2007 in a case in which a person's name and address were printed in an article. The Commissioner found the exemption did not apply. One reason was lack of evidence that the publisher was publicly committed to observing any standards of privacy.

5.30 The ALRC recently reviewed the law of privacy and recommended that the exemption be retained, though it also recommended that acts that fall within the exemption should nevertheless be subject to a proposed statutory cause of action for a serious invasion of privacy²².

Defences to criminal offences

5.31 There are defences to certain criminal offences that are only available to the media.

5.32 Among the allegations being investigated by the Leveson Inquiry is stalking by journalists and photographing the targets of stories. In Victoria, stalking is an offence. The media, however, are not liable if they act without malice and in the normal course of the business of publishing news and current affairs²³.

5.33 Civil remedies are also available for stalking. For example, a victim can obtain an intervention order preventing any stalking. But a civil intervention order cannot be made against a person who acted without malice and in the normal course of the business of publishing news and current affairs²⁴.

5.34 The Commonwealth *Criminal Code*²⁵ creates the offence of treason and urging violence. A person will be guilty of treason if he/she intentionally engages in conduct that materially assists an organisation to engage in armed hostilities against the Australian Defence Force. A person will commit an offence if he/she intentionally urges another person to overthrow by force or violence the lawful authority of the government of the Commonwealth. To both charges, a journalist or media organisation has a defence in the case of a publication in good faith of a report or commentary about a matter of public interest. In considering the defence, the court is required to consider the whole context of the publication, including whether the acts were done in the dissemination of news or current affairs²⁶.

²² Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 1, 54–55, 89 <www.alrc.gov.au/publications/report-108>.

²³ *Crimes Act 1958* (Vic) s 21A(4A).

²⁴ *Personal Safety Intervention Orders Act 2010* (Vic) s 61(4).

²⁵ *Criminal Code Act 1995* (Cth) pt 5.1.

²⁶ *Criminal Code Act 1995* (Cth) s 80.3(3)(c).

Exemptions for reporting of financial products

- 5.35 The media enjoy exemptions under the *Corporations Act 2001* (Cth) for reporting on financial products.
- 5.36 The *Corporations Act 2001* (Cth) restricts the advertising of financial products to retail clients. Advertisements for financial products may only be made if certain information is included, including information about the 'product disclosure statement' that must be made available for the product. Those restrictions do not apply to news reports or genuine comment in the media about the products²⁷.

Court reporting

- 5.37 There are a range of privileges for court reporting. The media have a right to publish reports of judicial decisions, which is otherwise unlawful unless done with the consent of the Council of Law Reporting²⁸.
- 5.38 In New South Wales, 'news media' are granted access to information in court proceedings that is not otherwise accessible²⁹, such as transcripts from closed courts and information in the brief of evidence in a criminal case. That information is otherwise only available with the leave of the court.
- 5.39 Journalists who are preparing reports for a 'public news medium' are entitled to be present to hear cases involving children³⁰ or sexual offences³¹ when the public is otherwise excluded.
- 5.40 News media organisations have a right to be heard on applications for suppression orders³².
- 5.41 Journalists are granted the right to enter and remain in areas located outside court premises for the purposes of making reports³³.

²⁷ *Corporations Act 2001* (Cth), 1018A.

²⁸ See, e.g., *Council of Law Reporting in Victoria Act 1967* (Vic) s 10.

²⁹ *Court Information Act 2010* (NSW) s 10; *Criminal Procedure Act 1986* (NSW) s 314. The Court Information Act is not yet in force despite being assented to in May 2010. This has been criticised in the Media Entertainment and Arts Alliance report, *Public Good, Private Matters: The State of Press Freedom in Australia 2011* (2011) 4.

³⁰ *Children (Criminal Proceedings) Act 1987* (NSW) s 10; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104C.

³¹ *Criminal Procedure Act 1986* (NSW) s 291C.

³² *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 9(2).

Privileged access to information and events

- 5.42 Journalists have privileges of access to some information. In Victoria, for example, media organisations may apply to the Chief Commissioner of Police for copies of ‘agency photographs’ of a person found guilty of a crime³⁴. Where a photograph is provided no action for defamation or breach of confidence lies against the organisation for its publication³⁵.
- 5.43 In New South Wales, journalists receive confidential information about emergency incidents³⁶.
- 5.44 The media is permitted to use protected logos and images for the purpose on major sporting events³⁷ and may also fly an aircraft near venues when covering ‘major events’³⁸.
- 5.45 The law of copyright grants the owner of certain original works including literary works (work expressed in print or writing) the exclusive right to reproduce and publish the work. Media organisations may reproduce literary works without infringing copyright if the reproduction is a ‘fair dealing’ with the work for the purpose of reporting news³⁹. What amounts to a ‘fair dealing’ is a matter of impression that must be assessed in each case, and will be determined by how the work was used by the media organisation and its purpose for doing so.
- 5.46 The media have access to special facilities when reporting on the Commonwealth Parliament. There is a parliamentary press gallery in Parliament House. Membership is granted by the presiding officers of the parliament. Members may access a dedicated gallery and a media workroom⁴⁰.

³³ *Court Security Act 2005* (NSW) ss 6(2), 9(2)(d).

³⁴ *Police Regulation Act 1958* (Vic) s 118R.

³⁵ *Police Regulation Act 1958* (Vic) s 118Y.

³⁶ See, e.g., *Fire Brigades Regulations 2008* (NSW) reg 23.

³⁷ *Major Sporting Events Act 2009* (Vic) s 36(2).

³⁸ *Major Sporting Events Act 2009* (Vic) s 125(2).

³⁹ *Copyright Act 1968* (Cth) s 42.

⁴⁰ Department of the House of Representatives (Cth), *House of Representatives Practice* (2005) 122–123; Department of the Senate (Cth), *Odgers’ Australian Senate Practice* (2008) 80–82.

5.47 The media enjoy privileged access to people, places and information including government departments, cultural and sporting events, shareholder meetings, press conferences and other events, because of the nature of the work that they do. In her evidence, Dr Simons said⁴¹:

Journalists do have particular rights and privileges. Most of them are not written down. I think the most significant one is the sort of unspoken social licence, which allows me to ring up somebody like yourself and try and throw questions at you, or to doorknock a politician or something of that sort. Now, if the average member of the public did that—well, first of all they tend not to—but if they tried they wouldn't get very far. Because I am a journalist, I do those sorts of things quite regularly.

Put more directly, because of their position, journalists, as representatives of news media outlets, have access to people and places that are beyond the reach of their readers.

Freedom of speech: protections and restrictions

Protections of speech

5.48 In Australia, there are important protections of speech that are grounded in law.

5.49 First, there is indirect constitutional protection for what is usually referred to as 'political speech'.

5.50 In *Lange v Australian Broadcasting Commission*⁴² the High Court confirmed that the Commonwealth Constitution protects freedom of political communication. The basis of the decision is that the Constitution established a system of representative government and that freedom of political communication was a necessary and indispensable part of that system. The freedom is not a personal right conferred on individuals. It is a limitation on the power of the parliament and the executive. The implied freedom is not absolute. It does not invalidate legislative or executive action that imposes reasonable limits on political communication.

⁴¹ Oral submission to the Independent Media Inquiry, Sydney, 17 November 2011, 153 [23]–[32], (Dr Simons).

⁴² *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520. This implication was first drawn in *Nationwide News v Wills* (1992) 177 CLR 1 and *Australian Capital Television Ltd v The Commonwealth* (1992) 177 CLR 106.

5.51 This implied freedom of speech has sometimes meant that laws that restrict political speech are either invalid or are confined in their operation.

- In *Lange*, the ABC broadcast a *Four Corners* program in 1989 that was critical of Mr Lange, a former prime minister of New Zealand. He alleged the program was defamatory because it suggested he was guilty of abuse of public office. The ABC argued that by reason of the constitutional protection it was a defence to a defamation action that the publication was an honest and reasonable publication about political matters. The High Court agreed, and expanded the common law defence of qualified privilege.
- In *Coleman v Power*⁴³, a protestor in a public place said of a police officer standing next to him: 'This is Constable Power, a corrupt police officer.' The protestor was charged with using insulting words. The High Court held that the criminal law could regulate political statements that used insulting words only where the words used were intended, or likely, to provoke a violent response⁴⁴. The protestor was not convicted.
- In *Bennett v President, Human Rights and Equal Opportunity Commission*⁴⁵, the Federal Court invalidated a 'catch-all' Commonwealth secrecy regulation that attempted to preclude a Commonwealth employee from disclosing any information about public businesses or anything of which the employee has official knowledge. The Federal Court accepted that the purpose of the provision was to further the effective working of government but held that its width was such that even the most scrupulous public servant would find it an almost impossible demand. The Federal Court also said that the regulation unreasonably impeded the flow of information to the community, information which could only serve to enlarge the public's knowledge and understanding of the operation, practices and policies of the government.

5.52 In other cases, laws that restrict speech have been consistent with the constitutional protection of political speech. For example:

- In *Levy v Victoria*⁴⁶, the High Court held that the implied freedom of political communication did not invalidate Victorian regulations that required persons protesting

⁴³ *Coleman v Power* (2004) 220 CLR 1.

⁴⁴ *Coleman v Power* (2004) 220 CLR 1 [102] (McHugh J), [193] (Gummow and Hayne JJ), [252]–[253] (Kirby J).

⁴⁵ *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334.

⁴⁶ *Levy v Victoria* (1997) 189 CLR 579.

against duck shooting to keep a certain distance away from duck hunters. The attack on the regulations failed because they protected individual and public safety.

- In *Hogan v Hinch*⁴⁷, the High Court considered the validity of suppression orders made under the Serious Sex Offenders Monitoring Act which preclude a person from identifying a sex offender. Mr Hinch published the name of a sex offender as part of a campaign to have the law changed. The High Court held that the law did restrict political communication but was reasonable. The main purpose of the Act was to establish an intrusive monitoring regime for sex offenders. This required the offender to have an identified and fixed place of residence. Identifying the offender would frustrate that purpose.

5.53 Second, some protection for freedom of expression is also conferred by the *Charter of Human Rights and Responsibilities Act 2006* in Victoria and the *Human Rights Act 2004* of the Australian Capital Territory. Both contain a right to freedom of expression as one of the rights protected against legislative or executive action by the government of the state or territory respectively. Some limited protection against legislative action is provided by requiring all laws to be interpreted in a way that is compatible with, among other rights, the right to free expression⁴⁸. Additional protection against executive action is provided by requiring public authorities to act compatibly with, amongst other rights, free expression and to take the right into account when making decisions⁴⁹. These provisions have, to date, had limited impact.

Restrictions on speech

5.54 That there must be some restrictions on speech is not a seriously debateable proposition.

5.55 When the restrictions are examined several things become apparent.

- Many do not inhibit speech that furthers the political process.

⁴⁷ *Hogan v Hinch* (2011) 275 ALR 508.

⁴⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32; *Human Rights Act 2004* (ACT) s 30. Even without these provisions, legislation is interpreted as far as possible not to infringe on ordinary freedom of expression: see, e.g., *Evans v New South Wales* (2008) 168 FCR 576, which held that regulations that attempted to prohibit conduct causing ‘annoyance or inconvenience to participants in a World Youth Day event’ were not authorised by the Act.

⁴⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38; *Human Rights Act 2004* (ACT) s 40B.

- Some are enforceable by action brought by the state, others by action at the suit of an individual. In the latter event, the cost of enforcement may be so great that the existence of the restriction is often of little practical value.
- Restrictions on speech do not single out the press. There is not a single law that is directed specifically to publications by the media. The restrictions are imposed by laws of general application which by their nature may affect the media more substantially than other groups or individuals.
- More often than not, the laws that restrict speech seek to strike a balance between protecting free speech and protecting some other legitimate right or interest. It has been pointed out elsewhere that restrictions on free speech generally serve six socially important functions: protection of individual interests against false or misleading statements, protection of community standards, protection against violence and disorder, protection from external aggression, protection of the administration of justice and the protection of private property⁵⁰.

5.56 Most restrictions in this category protect against violence, disorder and external aggression.

Official secrets

5.57 It is well accepted that official secrecy has a necessary and proper province in our system of government. But a surfeit of secrecy does not⁵¹. Secrecy provisions deprive citizens of the information created, collected or received by government on their behalf. They also curtail the freedom of expression of those who have that information⁵². Two particular secrecy provisions in Commonwealth law bear mention.

- Section 70 of the *Crimes Act 1914* makes it an offence for a current or former Commonwealth officer to disclose information which it is his/her duty not to disclose⁵³. Alan Kessing, a former officer of the Australian Customs Service, who provided to

⁵⁰ See the discussion in Section 2 of this report.

⁵¹ *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 [98]-[99]; Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), 21; Media Entertainment and Arts Alliance, *Public Good, Private Matters: The State of Press Freedom in Australia 2011* (2011) 48.

⁵² Justice Susan Kenny, 'Secrecy Provisions: Policy and Practice' (Speech delivered at the National Information Law Conference, Canberra, 24 March 2011).

⁵³ *Crimes Act 1914* (Cth) s 70(1).

journalists reports about security lapses at Sydney Airport⁵⁴ was prosecuted under this provision. In this way, the provision is used by government to seek to prevent leaks.

- Section 79 of the Crimes Act 1914 makes it an offence to disclose 'official secrets'. The provision has particular application to defence and security information but also applies to information a person has by virtue of being a Commonwealth officer and which it is his or her duty to keep secret. The provision binds Commonwealth officers and also applies to subsequent disclosure of official secrets by third parties including the media. Section 79 is used by the Commonwealth to give teeth to confidentiality undertakings given by journalists who have access to budget papers ahead of their public release.

5.58 These are only two examples of the 506 secrecy provisions found in Commonwealth regulation⁵⁵. In its report on Secrecy Laws, the Australian Law Reform Commission (ALRC) recommended that many should be replaced with provisions that criminalise disclosure only if it harms essential public interests.

Treason and sedition offences

5.59 There are criminal offences for treason and 'urging violence'; what used to be called sedition. Part 5.1 of the Commonwealth *Criminal Code* contains offences relating to 'urging violence'. Section 80.2 makes it an offence for a person to urge another person to overthrow by force or violence the Constitution or a Commonwealth, state or territory government.

5.60 There has not been a prosecution for sedition for many years. A prominent early case was the prosecution, in 1950, of William Burns for publishing an article urging resistance to Australia's involvement in the Korean War. According to one account, the phrase written by Burns that received the most attention during the prosecution read: 'Not a Man, Not a Ship, Not a Plane, Not a Gun for the Aggressive, Imperialist War on Korea and Malaya.'⁵⁶

5.61 Following criticism of the effect of the law on freedom of expression and recommendations by the ALRC, a defence was introduced permitting publication in good faith of a report or

⁵⁴ *Kessing v R* (2008) 73 NSWLR 22.

⁵⁵ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), 22. Those provisions are summarised in Appendix 5.

⁵⁶ Roger Douglas, 'The Ambiguity of Sedition: The Trials of William Fardon Burns' (2004) 9 *Australian Journal of Legal History* 227, 230.

commentary about a matter of public interest. In considering whether the defence is available, the court is required to look at the whole context of the publication including whether it was done in the dissemination of news or current affairs⁵⁷.

Restrictions to protect community standards

5.62 There is a series of laws that restrict speech so as to protect community standards.

5.63 For instance, there are restrictions on some discriminatory speech and on speech that vilifies others in legislation such as the *Racial Discrimination Act 1975* (Cth)⁵⁸ and the *Racial and Religious Tolerance Act 2001* (Vic)⁵⁹.

Thus, s 18C of the Racial Discrimination Act makes it unlawful for a person to act in a way that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people because of the other person's race, colour or national or ethnic origin.

Some measure of protection is given to the media through a 'media defence'. It is not unlawful if a publication is done reasonably and in good faith and is 'a fair and accurate report of any event or matter of public interest' or 'a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment'⁶⁰.

5.64 A recent case under the Racial Discrimination Act is *Eatock v Bolt*⁶¹. The Federal Court found that an article by the journalist and commentator Andrew Bolt published in the *Herald Sun* contained statements that were offensive to a group of Aboriginal people. The Court held the media defence was not available because the article contained factual errors, distortions of the truth and used inflammatory and provocative language⁶².

⁵⁷ *Criminal Code Act 1995* (Cth) s 80.3(3).

⁵⁸ *Racial Discrimination Act 1975* (Cth) s 18C.

⁵⁹ *Racial and Religious Tolerance Act 2001* (Vic) ss 7–8.

⁶⁰ *Racial Discrimination Act 1975* (Cth) s 18D.

⁶¹ *Eatock v Bolt* (2011) 197 FCR 261.

⁶² *Eatock v Bolt* (2011) 197 FCR 261, [378]–[384], [424]–[425] (Bromberg J). In *R v Keegstra* [1990] 3 SCR 697, the Supreme Court of Canada held that a prohibition on 'hate speech' was a valid limit on freedom of expression under the Canadian Charter of Rights and Freedoms.

Classification laws

- 5.65 Classification laws were introduced in the early 1970s⁶³. Instead of laws that censored or banned publications, publications were to be classified to allow consumers to make an informed choice, though some restrictions on distribution would be placed on publications if necessary. All films and computer games, and some publications (but not news or current affairs publications), must be submitted to the Classification Board for classification before they may legally be made available in Australia. The level of classification (unrestricted, category 1 restricted, category 2 restricted or refused classification) that is given to the publication determines the type of restrictions, if any, that might apply to the sale or distribution of the publication. A publication that is refused classification may not be distributed.
- 5.66 Classification laws are intended to strike a balance between adults being able to read, hear and see what they want, minors being protected from material likely to harm or disturb them and everyone being protected from exposure to unsolicited, offensive material. Classification laws restrict speech by prohibiting the distribution of a publication.
- 5.67 In 1995, an article in a student newspaper—*Rabelais*—entitled ‘The Art of Shoplifting’ was refused classification. A challenge to the refusal was dismissed⁶⁴.
- 5.68 The Classification Review Board has refused classification of books that promote jihad, terrorism and euthanasia⁶⁵.
- 5.69 There have been attempts to classify news and current affairs content. In 2010, the website for *The Sydney Morning Herald* published an article about anti-government protests in Iran that included a graphic video showing the death of a woman. ACMA referred the video to the Australian Classification Board which considered the video warranted a PG classification⁶⁶.

⁶³ For the present law, see *Classification (Publications, Films and Computer Games) Act 1995* (Cth) and related state and territory legislation.

⁶⁴ *Brown v Classification Review Board* (1998) 82 FCR 225.

⁶⁵ Independent Audit into the State of Media Freedom In Australia, *Report of the Independent Audit into the State of Free Speech in Australia* (2007), vi–viii <www.smh.com.au/pdf/foireport5.pdf>.

⁶⁶ Media Entertainment and Arts Alliance, *Public Good, Private Matters: The State of Press Freedom in Australia 2011* (2011) 38 <http://issuu.com/meaa/docs/press_freedom_report_2011>.

5.70 There are various state and territory laws that prohibit the distribution or publication of obscene or indecent material. For example, s 578C of the *Crimes Act 1900* (NSW) provides that '[a] person who publishes an indecent article is guilty of an offence.' The section was used in 2008 as the basis for a police investigation into an exhibition of Bill Henson photographs that depicted naked 12- and 13-year-old girls⁶⁷.

Restrictions on reporting judicial proceedings

5.71 There are several restrictions to protect the administration of justice. They are of two main kinds. First, there are restrictions on what may be published, beyond the 'bare facts', about an accused in a pending criminal trial. Second, courts have powers to suppress publication of evidence or the identity of parties and order that proceedings be heard in private.

5.72 Beyond these restrictions, the media have raised concerns about the different regimes in different jurisdictions that govern access to court information (such as affidavits, transcripts and submissions). These are legitimate concerns but do not themselves directly restrict freedom of speech.

Contempt of court

5.73 To be contemptuous the publication must have, as a matter of practical reality, a tendency to interfere with the administration of justice. Publication of matters such as prior convictions, confessions, identifying photographs, evidence, and criticisms of an accused are likely to fall foul of this rule.

5.74 Although contempt can arise in both criminal and civil trials, the absence of juries in most civil matters means the rule mainly affects the media coverage of criminal trials. In effect, the media may only publish the 'bare facts' of a matter and not any facts that will be in issue in the trial.

5.75 There have been many prosecutions of newspapers for contempt⁶⁸. In proceedings against a publisher, it is a defence to show that the publication was a matter of public concern and any

⁶⁷ See, e.g., David Hume and George Williams, 'Australian Censorship Policy and the Advocacy of Terrorism' (2009) 31 *Sydney Law Review* 381, 402–403.

⁶⁸ See, e.g., *Attorney-General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695; *Western Australia v Armstrong* [2007] WASCA 204.

prejudice to the administration of justice was only incidental and an unintended by-product of the publication⁶⁹.

- 5.76 The publishers' position may have been strengthened by the High Court's decision in *Dupas v R*⁷⁰ which concerned an application to stay a criminal trial because of extensive, prejudicial, pre-trial publicity about the accused. The High Court placed substantial weight on the view that juries perform their task conscientiously and, when properly directed, can decide cases unaffected by news reports.

Suppression orders

- 5.77 In both civil and criminal cases there is power to order that the hearing take place in private, that evidence not be published or that parties be referred to by pseudonyms⁷¹. These are commonly referred to as 'suppression orders'. Each order imposes a restriction on free speech. Whether it is justified depends on the particular facts of each case. Typically, orders are made in cases involving blackmail, trade secrets, secret documents or secret communications, national security, children in the care of the state or mentally ill patients and cases involving children or sexual assault. Few raise political speech issues but the orders do inhibit speech.
- 5.78 Statistics about suppression orders are difficult to obtain⁷². One commentator has asserted that suppression orders are becoming more frequent⁷³. Some statistics were collected in a report commissioned by the Right to Know coalition in 2008 though it acknowledged the figures were incomplete and to some extent unreliable. It reported that in the period from 1 January 2006 to 30 June 2008, the New South Wales Supreme Court made 54 suppression orders while the Victorian Supreme Court made 177. The higher Victorian figure may be explained, in part, by the number of terrorism and 'gangland' trials heard during the period. The report concluded that 'in almost all cases ... the judge clearly did consider whether an

⁶⁹ *Attorney-General (NSW) v X* (2000) 49 NSWLR 653.

⁷⁰ *Dupas v R* (2010) 241 CLR 237.

⁷¹ See, e.g., *Federal Court of Australia Act 1976* (Cth) s 50.

⁷² Prue Innes 'Review of Suppression Orders and the Media's Access to Court Documents and Information' (Report, 13 November 2008), 25 <www.australiasrighttoknow.com.au/files/docs/Reports2008/13-Nov-2008ARTK-Report.pdf>.

⁷³ Peter Bartlett 'The Year in the Law' in Media Entertainment and Arts Alliance, *Public Good, Private Matters: The State of Press Freedom in Australia 2011* (2011) 4 <http://issuu.com/meaa/docs/press_freedom_report_2011>.

order was appropriate and the legal basis for making it' and '[the authors] found no case where it could be concluded that an order prohibiting some form of publication was not reasonable'⁷⁴.

5.79 In February 2011, Mr John Hartigan, then chief executive of News Limited, said he was aware of more than 500 suppression orders having been made in the previous 12 months (270 of which were made in Victorian courts)⁷⁵.

5.80 It has been suggested that there be established a national register of suppression orders. This would provide a convenient means for the media to check whether a suppression order is in place. It would also provide a means of scrutinising trends in the making of those orders. That would provide a means of testing whether suppression orders are made too often.

'Super injunctions'

5.81 There is a current controversy in the United Kingdom about the grant of so-called 'super injunctions'. A super injunction is an interim injunction (that is, one imposed before trial) which restrains a person from publishing information which is said to be confidential or private and from publicising or informing others of the existence of the order⁷⁶. The development of the law of privacy in the United Kingdom has been a particular spur to the grant of super injunctions.

5.82 Super injunctions came to prominence in the *Trafigura* case. *Trafigura*, a British company, obtained a super injunction against *The Guardian* to suppress reporting of the findings of a draft report into its dumping of toxic waste in Africa. The injunction was circumvented by widespread reporting of the issue on WikiLeaks and Twitter.

5.83 A committee on super injunctions was established in April 2010 by the Master of the Rolls, one of the most senior judicial officers in the United Kingdom. In its report, the committee

⁷⁴ Prue Innes 'Review of Suppression Orders and the Media's Access to Court Documents and Information' (Report, 13 November 2008), 38 <www.australiasrighttoknow.com.au/files/docs/Reports2008/13-Nov-2008ARTK-Report.pdf>.

⁷⁵ John Hartigan, 'Without Open Justice the Public is Denied', *The Australian*, 14 February 2011 <www.theaustralian.com.au/media/without-open-justice-the-public-is-denied/story-e6frg996-1226005368802>.

⁷⁶ See *Ntuli v Donald* [2011] 1 WLR 294; [2010] EWCA Civ 1276 at [43]–[55] (Maurice Kay LJ).

said that super injunctions were rarely sought or granted⁷⁷, but acknowledged 'There is a clear danger that the use of super-injunctions, unless kept within strict bounds, could be thought to create, or to have created, a form of permanent secret justice.'⁷⁸

- 5.84 Richard Ackland has claimed that two super injunctions have been granted by the New South Wales Supreme Court⁷⁹. It has also been reported that Australian media have received threats from UK lawyers following the grant of super injunctions in the United Kingdom⁸⁰. The nature of those threats has not been specified.

Restrictions on commercial speech

- 5.85 Restrictions are placed on commercial speech—for example advertisements—for the protection of consumers.
- 5.86 A well-known prohibition is to be found in the *Australian Consumer Law* where misleading or deceptive statements are proscribed⁸¹. (This prohibition does not apply to 'information providers'⁸².)
- 5.87 By reason of the proscription, a newspaper cannot accept an advertisement advising its readers they will receive a 'free' mobile phone if one of the conditions of the offer is a requirement to sign up to a call plan⁸³. And, it is impermissible for an advertiser to say about

⁷⁷ Master of the Rolls, *Report of the Committee on Super-Injunctions* (20 May 2011), 24 [2.27].

⁷⁸ *Ibid* 24 [2.26].

⁷⁹ Richard Ackland, 'Not so super: Attorney-General must stay alert to mighty gag orders', *The Sydney Morning Herald* (online), 28 October 2011 <www.smh.com.au/opinion/politics/not-so-super-attorneygeneral-must-stay-alert-to-mighty-gag-orders-20111027-1mm4f.html>.

⁸⁰ Media Entertainment and Arts Alliance, *Public Good, Private Matters: The State of Press Freedom in Australia 2011* (2011) 6 <http://issuu.com/meaa/docs/press_freedom_report_2011>.

⁸¹ *Competition and Consumer Act 2010* (Cth) sch 2 ch 2 s 18.

⁸² See [5.19]-[5.23] above. This exempts the media from claims for misleading or deceptive conduct in relation to news, information, opinion and comment, as distinct from claims made in advertising. Dr Lidberg observes that the Australian Competition and Consumer Commission has a de facto role in regulating the media, through its supervision of 'advertorials': Dr Johan Lidberg, Submission to the Independent Media Inquiry, 2011, 7.

⁸³ *ACCC v Nationwide News* (1996) 36 IPR 75. This was contrary to s 53(g) of the *Trade Practices Act 1974* (Cth), now *Competition and Consumer Act 2010* (Cth) sch 2 ch 2 s 29(m).

passive smoking that ‘there is little evidence and none which proves scientifically that cigarette smoke causes disease in non-smokers’⁸⁴.

- 5.88 The consumer laws do not apply to non-commercial speech. Accordingly, misleading comments about legislative changes to taxation or tariff laws or to a proposed land resumption are beyond their reach⁸⁵. So also are statements by an academic in the course of a lecture for which he is not paid⁸⁶.

Restrictions on speech to protect private rights

- 5.89 This category is for the protection of private rights and is enforced by private action.

Defamation

- 5.90 The obvious example is the law of defamation. Many media outlets place great faith in the law of defamation as a check on journalistic practices⁸⁷. Unless it is contended that every (or, at least, most) defamatory articles are the subject of legal proceedings—and that could not seriously be maintained—then the assumption must be that the *possibility* of being sued for defamation is a sufficient check on publishers and journalists. To test that assumption it is necessary to consider the law of defamation (which is a mixture of the general law and substantially uniform defamation legislation in each state and territory) and the practicalities of a private person who has been defamed bringing an action to vindicate his/her reputation.
- 5.91 Defamation protects a person against injury to his/her reputation arising through the publication of adverse or disparaging comments. Whether a statement is disparaging is judged by reference to community standards. Not every comment about a person that

⁸⁴ *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1. This was contrary to s 52 of the *Trade Practices Act 1974* (Cth), now *Competition and Consumer Act 2010* (Cth) sch 2 ch 2 s 18.

⁸⁵ *Village Building Co Ltd v Canberra International Airport Pty Ltd (No 2)* (2004) 208 ALR 98.

⁸⁶ *Pilmer v Roberts* (1997) 80 FCR 303.

⁸⁷ APN News & Media, Submission to the Independent Media Inquiry, 2011, 1; Delimiter, Submission to the Independent Media Inquiry, 2011, 3; Newspapers Publishers Association, Submission to the Independent Media Inquiry, 2011, 22; Seven West Media, Submission to the Independent Media Inquiry, 2011, 8.

causes harm is defamatory. For instance, to say of an airline that, through no fault of its own, it is a terrorist target is not defamatory⁸⁸.

- 5.92 The right to sue for defamation serves two basic purposes: to enable the individual to protect his/her reputation and, through the various defences, to preserve the right of free speech⁸⁹.
- 5.93 Defamation does not impose an absolute restriction on speech. Statements which are true⁹⁰, a fair report⁹¹, or subject to absolute privilege⁹² or qualified privilege⁹³ are not actionable. The media is most interested in the doctrine of qualified privilege and the ability to publish fair reports.
- 5.94 The object of qualified privilege is to protect inaccurate publications made reasonably and in good faith. A defence of qualified privilege⁹⁴ is available to the media if three things are shown. First, that the readers had an interest or apparent interest in having information on the particular subject. Second, that the statement is published to the readers in the course of giving information on that subject. Third, that the conduct of the media defendant in publishing the statement was 'reasonable' in all the circumstances. This will involve an assessment of matters such as the source for the story, whether the story distinguished suspicions, allegations and proven facts, whether a reasonable attempt was made to obtain the other side of the story and publish a response from the defamed person and whether any steps were taken to verify the information⁹⁵.

⁸⁸ *Sungrature Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1. It should be noted, however, that most corporations are now unable to sue for defamation under the uniform defamation legislation.

⁸⁹ United Kingdom, *Report of the Committee on Defamation*, Cmnd 5909 (1975) [19]. In *Lange*, the High Court stated that the 'purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech': (1997) 189 CLR 520, 568. The Law Council of Australia submits that Australian defamation law does not sufficiently protect freedom of speech: Law Council of Australia, Submission to the Independent Media Inquiry, 2011, 7.

⁹⁰ *Defamation Act 2005* (Vic) s 25.

⁹¹ *Defamation Act 2005* (Vic) s 29.

⁹² *Defamation Act 2005* (Vic) s 27. Absolute privilege may arise where the defamatory matter was published in the course of proceedings of a parliamentary body or judicial body.

⁹³ *Defamation Act 2005* (Vic) s 30. Qualified privilege may arise where the defendant shows that the recipient had an interest in receiving the information and the defendant's conduct was reasonable in the circumstances.

⁹⁴ *Defamation Act 2005* (Vic) s 30.

⁹⁵ The Law Council submits that Australian defamation law actively encourages press to seek out response to criticism before publishing, and that Australian media organisations 'almost invariably' seek prior comment: Law Council of Australia, Submission to the Independent Media Inquiry, 2011, 9.

- 5.95 The primary criticism made by the media about the defence is that the standard of reasonableness has been interpreted strictly, leading to ‘unrealistic and highly technical’ requirements being imposed to satisfy the defence⁹⁶. Because the touchstone is reasonableness, courts have balanced the nature of the defamatory publication against the steps taken by the outlet to make proper inquiries and held that where the publication is sufficiently serious the defence will not be made out even where the media obtains information from a reputable and reliable source and goes to some significant lengths to contact the subject of the story for reply⁹⁷.
- 5.96 There is also a defence of ‘honest opinion’⁹⁸. To succeed the defendant must show that the words in question were an expression of an opinion as opposed to a statement of fact, that the opinion was expressed on a matter of public interest and that it was based on ‘proper material’. In addition the opinion must have been honestly held at the time of publication. A statement will be based on ‘proper material’ if the material on which it is based is substantially true or if it was published on an occasion that attracts absolute or qualified privilege (or another applicable defence).
- 5.97 The Right to Know coalition contends that the defence is too technical and does not reflect the way in which members of the community express their opinions on blogs, forums and opinion sites⁹⁹. In particular, the coalition asserts that recent decisions have required the defendant to show that the facts on which the opinion was based would lead a reasonable person to form the opinion that was expressed¹⁰⁰. This is criticised as not protecting ‘free speech’ but ‘reasonable speech’.

⁹⁶ Australia’s Right to Know, Submission to The New South Wales Department of Attorney General and Justice, *Review of the Defamation Act 2005* (NSW), 2011, 20
<www.ipclrd.lawlink.nsw.gov.au/ipclrd/ipclrd_consultation/ipclrd_stat_reviews.html#Review_of_Defamation>.

⁹⁷ *Morgan v Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374; *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227. See also Kim Gould, ‘Statutory qualified privilege succeeds, but too early for the media to go ‘dancing in the streets’’ (2011) 16 *Media and Arts Law Review* 241.

⁹⁸ *Defamation Act 2005* (Vic) s 31.

⁹⁹ Australia’s Right to Know, Submission to The New South Wales Department of Attorney General and Justice, *Review of the Defamation Act 2005* (NSW), 2011, 22
<www.ipclrd.lawlink.nsw.gov.au/ipclrd/ipclrd_consultation/ipclrd_stat_reviews.html#Review_of_Defamation>.

¹⁰⁰ *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.

5.98 The Right to Know coalition summed up the problem this way¹⁰¹:

The difficulty lies in the fact, often the expression of opinion by a lay person is expressed in terms that when dissected and analysed in proceedings applying all due technicality are found by the Court to be statements of fact rather than comments or are not based on properly articulated Uniform Acts. This remains a reflection of the fact the law of defamation is an arcane art in which form (and technicality) is preferred over substance.

5.99 The defence of ‘fair report’¹⁰² protects the publication of defamatory statements if the defendant can show the statements were made in a fair report of any proceeding of public concern. Such proceedings typically involve the courts, parliaments, public inquiries, meetings of shareholders of public companies and other like occasions.

5.100 The Right to Know coalition has expressed concern about the unduly technical approach by the courts regarding what constitutes a ‘fair’ report.

5.101 In 2006 the states and territories adopted uniform defamation legislation. The legislation contains an ‘offer of amends’ procedure¹⁰³. If a publisher makes an offer to publish a reasonable correction of a defamatory statement and the offer is made as soon as practicable after the publisher becomes aware the statement is or may be defamatory, a defence may be available. The Right to Know coalition says that the offer of amends procedure has led to ‘a majority of complaints’ being resolved¹⁰⁴.

5.102 A successful plaintiff in a defamation action will be able to recover damages for economic loss that he/she has suffered plus damages for injury to reputation and feelings. The uniform defamation legislation has capped those damages at \$324 000¹⁰⁵.

¹⁰¹ Australia’s Right to Know, Submission to The New South Wales Department of Attorney General and Justice, *Review of the Defamation Act 2005 (NSW)*, 2011, 23
<www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld_consultation/lpcld_stat_reviews.html#Review_of_Defamation>.

¹⁰² *Defamation Act 2005 (Vic)* s 29.

¹⁰³ *Defamation Act 2005 (Vic)* ss 12–19.

¹⁰⁴ Australia’s Right to Know, Submission to The New South Wales Department of Attorney General and Justice, *Review of the Defamation Act 2005 (NSW)*, 2011, 6
<www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld_consultation/lpcld_stat_reviews.html#Review_of_Defamation>.

¹⁰⁵ Attorney-General (Vic), ‘*Defamation Act 2005—Declaration under section 35(3)*’ in Victoria, *Victoria Government Gazette*, No G 25, 23 June 2011 G25, 1351–1352.

Defamation law as a check on media excess: an assessment

5.103 According to one source, in 2011 the highest damages award was \$150 000 and the average in New South Wales was \$71 286. As that source says ‘The costs of achieving relatively modest outcomes for injury to reputation, etc. have slowed the defamation business to a trickle’¹⁰⁶. One response has been for the plaintiff to issue proceedings in multiple proceedings—one in each jurisdiction in which the publication was made—in order to circumvent the cap on damages for non-economic loss¹⁰⁷.

5.104 While the right to sue is there to protect persons who have been falsely harmed, in reality very few defamation actions are brought. As Professor Manne explained¹⁰⁸:

I must say about defamation too that it's easy to talk about it, but how does an individual take on the size of News Limited?

5.105 Defamation claims are usually brought in a State Supreme Court. Where a media defendant is involved, it is common for it to engage both senior and junior counsel. Then the media defendant often raises many preliminary disputes which take time to resolve¹⁰⁹. When it comes to the trial, it is often lengthy¹¹⁰. This is because many witnesses are called and lengthy cross-examination is permitted. The result is that a defamation claim is a very costly piece of litigation.

5.106 This suggests that defamation is not an effective check on journalistic excesses. Three reasons stand out. First, a person aggrieved by a story published by the media ordinarily wants speedy redress. There is little point in receiving an apology, correction or opportunity to reply months or years after the event. The legal system is not designed to provide quick

¹⁰⁶ Justinian, Law Press of Australia, *Hateful blogging* (28 December 2011) <www.justinian.com.au/bloggers/hateful-blogging.html>.

¹⁰⁷ Media Entertainment and Arts Alliance, *Public Good, Private Matters: The State of Press Freedom in Australia 2011* (2011) 4.6.

¹⁰⁸ Oral submission to the Independent Media Inquiry, Melbourne, 8 November 2011, 43 [34]–[36], (Professor Manne).

¹⁰⁹ In the defamation matter *Hore-Lacy v Cleary*, there were three interlocutory hearings over more than two years about the pleadings ([2006] VSC 341; [2006] VSC 241; [2008] VSC 215). In *Buckley v Herald and Weekly Times*, there were five interlocutory hearings over about three years about pleading ([2008] VSC 459), multiple proceedings ([2008] VSC 475; [2009] VSC 59) and discovery ([2009] VSC 65; [2010] VSC 413).

¹¹⁰ The trial in *Li v Herald and Weekly Times* [2007] VSC 109 occupied 18 days. The trial in *French v Herald and Weekly Times* (2010) 27 VR 171 occupied six days, while *French v Triple M Melbourne* occupied 16 days. The trial in *Popovic v Herald and Weekly Times* [2002] VSC 174 lasted for 16 days.

results. The national standards used by the Productivity Commission in its annual reviews of the performance of Australia's courts indicate that most cases take between six and 12 months to resolve. Defamation cases take much longer if they go to trial¹¹¹.

5.107 Second, defamation proceedings are too expensive to run. A successful plaintiff whose case runs to judgment will often incur costs of \$500 000 or more. Only around 50 per cent can be recovered from the defendant.

5.108 In a recent Victorian case, Mark French, a professional cyclist sued the publisher of the *Herald Sun* over an article published six years earlier that suggested Mr French was a drug cheat¹¹². The trial lasted six days. Mr French was awarded \$175 000 in damages and the publishers were ordered to pay his legal costs. Mr French has paid \$893 000 in costs. If he recovers two-thirds of those costs, Mr French, a successful litigant, will be out-of-pocket by more than \$100 000.

5.109 It is also necessary to bear in mind the risk a plaintiff faces if his/her action is unsuccessful. Not only would the plaintiff bear his/her own costs, he/she would also be liable to pay the defendant's costs. In *Li v Herald and Weekly Times*¹¹³, the plaintiff lost after an 18-day trial and was ordered to pay more than \$350 000 for the defendant's costs. In its accounts for the period ended 26 June 2011, Fairfax Media made a provision of more than \$6 million for defamation costs.

5.110 Third, legal proceedings are complicated. Defamation, in particular, is a complex area. These complexities would deter many people from bringing an action.

Copyright

5.111 Another instance of a restriction on speech to enforce private rights is the law of copyright. The *Copyright Act 1968* prohibits without the consent of the owner the reproduction of an original literary, artistic or musical work. However, media organisations may reproduce literary works without infringing copyright if the reproduction is a 'fair dealing' with the work

¹¹¹ The time between commencement of the proceeding and judgment in *Hore-Lacy v Cleary* was five years; in *French v Herald and Weekly Times* was four years; in *French v Triple M Melbourne* was three years; and in *Popovic v Herald and Weekly Times* was two years.

¹¹² *French v Herald and Weekly Times* (2010) 27 VR 171.

¹¹³ *Li v Herald and Weekly Times* [2007] VSC 109.

for the purpose of reporting news¹¹⁴. What amounts to a 'fair dealing' is a matter of impression that must be assessed in each case, and will be determined by how the work was used by the media organisation and its purpose for doing so.

- 5.112 In 1980, *The Age* and *The Sydney Morning Herald* wanted to publish extracts from Commonwealth documents relating to the 'East Timor crisis', United States military bases in Australia and the presence of the Soviet Navy in the Indian Ocean. The Commonwealth obtained an injunction to restrain their publication on the basis that it owned the copyright in the documents. The 'fair dealing' defence was not available because the documents had been leaked; any dealing with the documents was not 'fair' in those circumstances.

Confidential information

- 5.113 Courts will restrain the publication of confidential information. Confidential information is particular information that has some quality of confidence, secrecy or privacy about it, which is communicated in circumstances that show it is confidential, secret or private. It could be a trade secret, government information or other personal or private information. An action will lie against a person who makes unauthorised use of such information. In some cases, the court will intervene if the confidential information was 'improperly or surreptitiously obtained'¹¹⁵.
- 5.114 While there is no 'public interest defence' to a breach of confidence claim, where the information would disclose iniquity (a crime, civil wrong or serious misdeed of public importance), it is unlikely the court will intervene to restrain the publication¹¹⁶.
- 5.115 In *AMI Australia Holdings v Fairfax Media*¹¹⁷, AMI—the supplier of a product for treating sexual dysfunction—sought an injunction to restrain Fairfax Media from publishing an article based on information leaked to journalists by a former employee. The information concerned payments of commissions to AMI employees, information about the side effects of its product and misleading statements given to prospective patients about the length of

¹¹⁴ *Copyright Act 1968* (Cth) s 42.

¹¹⁵ *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50 (Mason J).

¹¹⁶ *AMI Australia Holdings v Fairfax Media* [2010] NSWSC 1395, [20] (Brereton J).

¹¹⁷ *Ibid.*

treatment. The court said that the information, if true, would have been so potentially injurious to public health as to override any obligation of confidence¹¹⁸.

5.116 It is sometimes said that the action for breach of confidence does some, or all, of the work that a tort of privacy might perform¹¹⁹. In the United Kingdom, extensions in the law relating to confidential information mean the action can cover misuse or wrongful dissemination of any private information¹²⁰. This has been achieved by doing away with the requirement that the information should have been imparted in confidential circumstances. Now there is almost an automatic protection for private information.

Privacy and other restrictions

5.117 Australian law does not yet recognise a tort of privacy. It was partly for this reason, and partly to ensure the consistent and uniform development of the law in this area, that the ALRC recommended the enactment of a statutory right of action for serious invasions of privacy.

5.118 Beyond an action for breach of confidence, some protection for an individual's right to privacy exists in legislation that prevents the disclosure of information obtained from unlawful surveillance of private activities¹²¹, the identities of victims of sexual assault¹²² and the identities of children involved in certain proceedings¹²³.

5.119 There is also a range of privacy legislation that controls the collection, use and disclosure of personal information though that legislation is fragmented across jurisdictions and is inconsistent¹²⁴.

¹¹⁸ Ibid [54] (Brereton J). However, Brereton J found that the imputation was in substance in false.

¹¹⁹ See, for example, Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 3, 2535–356 [74.1]. Note, however, that in 1981 the Law Commission (UK) described as 'limited' the connection between the general protection of privacy and the law of breach of confidence: England and Wales, Law Commission, *Breach of Confidence*, Cmnd 8388 (1981) [1.4], [2.3].

¹²⁰ *Campbell v MGN Ltd* [2004] 2 AC 457.

¹²¹ See, for example, *Surveillance Devices Act 1999* (Vic) s 11.

¹²² See, for example, *Crimes Act 1900* (NSW) s 578A.

¹²³ *Children (Criminal Proceedings) Act 1987* (NSW) s 15A; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105.

¹²⁴ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 1, chs 2–3 <www.alrc.gov.au/publications/report-108>.

- 5.120 For completeness, there are two further restrictions on free speech for the purpose of protecting private rights that should be noted. One is the right of an owner of private property to control what takes place on their property. Thus, an owner may prohibit a person from distributing leaflets on the property.
- 5.121 The other concerns organisers of sporting events. They are increasingly making use of contracts to impose conditions on the press to restrict what may be published about the sporting event. The restrictions are usually imposed to protect the exclusivity of broadcast rights granted to a media outlet¹²⁵.

¹²⁵ This restriction on speech was a focus of the submission made by the Newspapers Publishers Association.

6. The regulation of broadcasting

- 6.1 In the newly converged news media environment, it is neither practicable nor sensible to discuss regulation of print and online platforms in isolation from the regulation of television and radio. The old boundaries have become blurred: newspapers publish online and in doing so sometimes draw on television footage. Broadcasters publish online and sometimes republish newspaper content. It follows that a description and assessment of broadcast regulation is essential to this Inquiry's work.
- 6.2 In marked contrast to the self-regulating regime of the print and online media, television and radio are subject to extensive statute-based regulation. The reasons for this difference lie in the history of broadcasting.
- 6.3 This section will examine that history and the reasons for the difference. It will then be easier to form views about whether those differences should be retained, altered, or removed. For example, submissions to the Inquiry, particularly from the advocacy group Avaaz and from Senator Brown, the leader of the Greens, suggest there should be a 'fit and proper person' requirement introduced for the print media, similar to a previous requirement that applied to broadcasters.
- 6.4 Another area of importance is the regulation of standards. ACMA is required to deal with complaints that a broadcaster has breached standards. The efficacy of that system will be examined to see what can be learnt.
- 6.5 It is also important to look at broadcasting, particularly public broadcasting, to see whether government funding of the public broadcasters has compromised their independence in news presentation. If it has, that would suggest a need to be wary before going down a similar path with print media regulation.
- 6.6 A final issue is whether government regulation of broadcasting has a 'chilling effect' on speech. This is explored by examining the experience of broadcasters in the United States under the 'fairness doctrine'.

Licensing of broadcasting in Australia

- 6.7 The Commonwealth government has consistently regulated broadcasting from the early 1900s¹. In 1905, the Commonwealth regulated wireless telegraphy, requiring a person to obtain permission before transmitting or receiving messages².
- 6.8 In 1924, with the introduction of radio broadcasting, Commonwealth regulations³ created two classes of radio licences—class A licences that were financed by receiver licence fees, and class B licences that were financed by other means (in effect, the commercial broadcasters). The class A licensed broadcasters were nationalised in 1928, and in 1932 the Commonwealth established the Australian Broadcasting Commission (the ABC), modelled on the British Broadcasting Corporation (the BBC) established in 1927⁴.
- 6.9 In 1942, following a parliamentary committee of inquiry, the Commonwealth consolidated all broadcast regulation into the *Australian Broadcasting Act 1942* (the Broadcasting Act)⁵. Initially, the minister could grant licences to broadcasters on such conditions determined by the Minister⁶. From 1956, the Minister was required to obtain a recommendation from the Australian Broadcasting Control Board before granting a licence⁷. The Minister could suspend or revoke a licence on the ground (among others) that he considered it advisable in the public interest to do so⁸.

¹ There is a useful chronology of broadcast regulation until 1976 in Australia in, Inquiry into the Australian Broadcasting System, Parliament of Australia, *Australian broadcasting: a report on the structure of the Australian broadcasting system and associated matters* / Postal and Telecommunications Department, No 358 (1976) Attachment 3.

² *Wireless Telegraphy Act 1905* (Cth) s 6. This Act is enacted under s 51(v) of the Constitution, which gives the Commonwealth government power to make laws about 'postal, telegraphic, telephonic, and other like services'.

³ *Wireless Telegraphy Regulations 1924* (Cth).

⁴ This background is usefully summarised in David J Brennan, 'Printing in England and Broadcasting in Australia: A Comparative Study of Regulatory Impulse' (2000) 22 *Adelaide Law Review* 63, 73–74.

⁵ This Act was renamed the *Broadcasting Act 1942* (Cth) in 1951, renamed the *Broadcasting and Television Act 1942* (Cth) in 1956, and re-named the *Broadcasting Act 1942* (Cth) in 1985.

⁶ *Australian Broadcasting Act 1942* (Cth) s 44(1). In 1956, this became s 81(1) of the *Broadcasting and Television Act 1942* (Cth). The 1956 Act renamed the 1942 Act as the Broadcasting and Television Act by s 1(3) of the 1956 Act, and renumbered its provisions (s 61 and Schedule 1 of the 1956 Act).

⁷ See *Broadcasting and Television Act 1942* (Cth) s 83 (added and renumbered by the *Broadcasting and Television Act 1956* (Cth)).

⁸ See *Australian Broadcasting Act 1942* (Cth) s 49(1)(b); from 1956, *Broadcasting and Television Act 1942* (Cth), s 86(1)(d) (as renumbered).

- 6.10 In 1953, the Commonwealth began issuing licences for television broadcasting⁹.
- 6.11 In 1976, following a departmental inquiry¹⁰, the Australian Broadcasting Tribunal was established, to perform the licensing and public inquiry functions of the former Australian Broadcasting Control Board¹¹.
- 6.12 In 1977, the Commonwealth created the Special Broadcasting Service Corporation (SBS), because it was considered that the ABC was not dedicating sufficient attention to the user interests of autonomous cultural groups and ethnic minorities¹². SBS initially assumed responsibility for two ethnic radio stations (2EA and 3EA), and commenced television broadcasting in Sydney and Melbourne in October 1980.
- 6.13 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'¹³. Those amendments were designed to codify in a consistent way the facts that were relevant in the exercise of the Australian Broadcasting Tribunal's discretionary licensing power¹⁴.
- 6.14 The general shift during the 1980s toward market forces and deregulation paved the way for further developments in broadcasting law¹⁵. The *Broadcasting Services Act 1992* was seen as

⁹ See *Television Act 1953* (Cth). Television licensees were brought within the Broadcasting Act by the *Broadcasting and Television Act 1956* (Cth).

¹⁰ Inquiry into the Australian Broadcasting System, Parliament of Australia, *Australian broadcasting: a report on the structure of the Australian broadcasting system and associated matters / Postal and Telecommunications Department*, No 358 (1976), 157–158 (recommendations 2 and 7).

¹¹ See *Broadcasting and Television Amendment Act* (No 2) 1976 (Cth) s 5.

¹² Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (The Guildford Press, 1996), 225.

¹³ These amendments were made by the *Broadcasting and Television Amendment Act 1981* (Cth).

¹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1981 (Ian Sinclair). These amendments were prompted by the High Court's decision in *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45, which held that the Australian Broadcasting Tribunal could take into account broad public interest factors in deciding whether to approve a transfer of a commercial broadcasting licence.

¹⁵ Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (The Guildford Press, 1996), 223.

moving to a more market-based, less interventionist approach to broadcasting regulation¹⁶, as the following passages from the Act show:

The objects of the Broadcasting Services Act include providing a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is 'efficient, competitive and responsive to audience needs'¹⁷. Parliament intends that the regulation of broadcasting services will enable public interest considerations to be addressed in a way that 'does not impose unnecessary financial and administrative burdens' on providers of broadcasting services¹⁸.

Under the Broadcasting Services Act, broadcasting licences are issued by the regulator [now the Australian Communications and Media Authority (ACMA)], instead of the Minister. The Act conceives the role of the regulator 'as an oversight body ... rather than as an interventionist agency hampered by rigid, detailed statutory procedures, and formalities, and legalism as has been the experience with the [Australian Broadcasting Tribunal]'¹⁹.

Current system—licensing, program standards and industry codes

6.15 The Broadcasting Services Act requires that a person obtain a licence to provide 'broadcasting services'²⁰. Some broadcasting services require an individual license, including commercial broadcasting services, commercial radio services and subscription television broadcasting services²¹. The Act also touches on 'national broadcasting services', which are radio and television broadcasting services provided by the ABC and SBS under special

¹⁶ Professor Ian Ramsay, *Reform of the Australian Broadcasting Authority's Enforcement Powers*, Report to the Australian Broadcasting Authority (2004) 22.

¹⁷ *Broadcasting Services Act 1992* (Cth) s 3(b).

¹⁸ *Broadcasting Services Act 1992* (Cth) s 4(2)(a).

¹⁹ Explanatory Memorandum, *Broadcasting Services Bill 1992* (Cth) 13.

²⁰ The different kinds of broadcasting services that require a licence are listed in the *Broadcasting Services Act* (Cth) s 11.

²¹ *Broadcasting Services Act 1992* (Cth) s 12(1). Other broadcasting services are provided under a class licence, such as subscription radio broadcasting services, and subscription and open narrowcasting services (*Broadcasting Services Act 1992* (Cth) s 12(2)). Class licences are a standing authority for any operator to enter the market and provide a service, as long as the operator has access to service delivery capacity and abides by the conditions relevant to the particular category of class licence <www.acma.gov.au/WEB/STANDARD..PC/pc=PC_90180>. Class licences are determined by a notice in the Gazette, made under s 117 of the *Broadcasting Services Act 1992* (Cth). See also Commercial Radio Australia, Submission to the Independent Media Inquiry, 2011.

legislation²². As explained later, the provision of news and current affairs over the internet falls outside the definition of ‘broadcasting services’.

- 6.16 In broad outline, similar rules apply to the grant of commercial television broadcasting licences and commercial radio broadcasting licences²³, and to the grant of licenses for subscription television broadcasting services²⁴.
- In each case, a company is treated as a suitable licensee unless ACMA is satisfied that allowing a particular company to provide or continue to provide the relevant service under a licence would lead to a significant risk of: an offence against this Act or the regulations being committed; a breach of a civil penalty provision occurring; or a breach of the conditions of the licence occurring²⁵.
 - ACMA must renew a commercial television broadcasting licence or a commercial radio broadcasting licence on application by the licensee unless ACMA is satisfied that the applicant is not suitable, having regard to the same factors as apply to the grant of a licence²⁶.
 - This test of suitability is much narrower than the former ‘fit and proper person’ test²⁷.
- 6.17 Commercial television broadcasting licences, commercial radio broadcasting licences and subscription television broadcasting licenses are subject to standard conditions set out in the

²² *Broadcasting Services Act 1992* (Cth) ss 11(a), 13. National broadcasting service also includes broadcasting services provided under the *Parliamentary Proceedings Broadcasting Act 1946* (Cth) s 13(1)(c), but do not include subscription broadcasting services or subscription or open narrowcasting services provided by the ABC or SBS (s 13(2)).

²³ *Broadcasting Services Act 1992* (Cth) pt 4.

²⁴ *Broadcasting Services Act 1992* (Cth) pt 7.

²⁵ *Broadcasting Services Act 1992* (Cth) ss 41(1)–(2), s 98(1)–(2). In deciding whether such a risk exists, ACMA takes into account the factors in *Broadcasting Services Act 1992* (Cth) ss 41(3), 98(3) (respectively), such as ‘the company’s record in situations requiring trust and candour’ (*Broadcasting Services Act 1992* (Cth) ss 41(3)(b), s 98(3)(b)). An applicant for a television subscription broadcasting licence must be a company registered under the *Corporations Act 2001* (Cth) s 95(1)(a).

²⁶ *Broadcasting Services Act 1992* (Cth) 47.

²⁷ Paul Mallam, Sophie Dawson and Jaclyn Moriarty, Thomson Reuters, *Media and Internet Law and Practice*, [18.2790].

Broadcasting Services Act²⁸, and to any additional conditions imposed by ACMA²⁹. Additional conditions must be relevant to the broadcasting services to which they relate³⁰.

- There are some standard conditions relating to the broadcast of political matter. For example, broadcasters must give reasonable opportunities to all parties to broadcast political matter during an election³¹. Broadcasters must also keep records of any matters relating to political subject or current affairs that are broadcast³². Otherwise, the standard conditions say little about how broadcasters are to report news³³.
- Breach of a standard condition of a licence is an offence, and is also a breach of a civil penalty provision³⁴. Breach of a condition may be grounds for a licence to be suspended or cancelled³⁵.

6.18 Separately from licence conditions, ACMA has power to determine standards. Breach of these standards is also a breach of the licence conditions³⁶.

- ACMA must determine standards relating to children's programs and Australian content that must be observed by commercial television broadcasters³⁷.
- ACMA is required to develop a standard if it is satisfied that there is convincing evidence that an industry code of practice (discussed later) is not providing appropriate community safeguards for a relevant matter³⁸.

²⁸ *Broadcasting Services Act 1992* (Cth) sch 2, pts 2, 3 and 6, respectively.

²⁹ *Broadcasting Services Act 1992* (Cth) ss 42–43 (commercial television and commercial radio broadcasters), 99 (subscription television broadcasters).

³⁰ *Broadcasting Services Act 1992* (Cth) ss 44(1), 100(1). On the scope of the power to attach conditions, see *Star Broadcasting Network Pty Limited v Australian Broadcasting Authority* (2003) 79 ALD 637, [18]–[23].

³¹ *Broadcasting Services Act 1992* (Cth) sch 2 item 3A. Licensees are required to comply with the 'special conditions' in *Broadcasting Services Act 1992* (Cth) sch 2 pt 2 (items 3 to 6): see e.g. *Broadcasting Services Act 1992* (Cth) sch 2 item 7(1)(j) (commercial television broadcasting licences), item 8(1)(i) (commercial radio broadcasting licences), item 10(1)(i) (subscription television broadcasting licences).

³² *Broadcasting Services Act 1992* (Cth) sch 2 item 5.

³³ Note that there is a local news obligation imposed on commercial television broadcasters who broadcast using a satellite (*Broadcasting Services Act 1992* (Cth) sch 2 item 7D).

³⁴ *Broadcasting Services Act 1992* (Cth) ss 139–140.

³⁵ *Broadcasting Services Act 1992* (Cth) s 143.

³⁶ *Broadcasting Services Act 1992* (Cth) sch 2 item 7(1)(b) (commercial television broadcasting licences), item 8(1)(b) (commercial radio broadcasting licences), item 10(1)(b) (subscription television broadcasting licences).

³⁷ *Broadcasting Services Act 1992* (Cth) s 123.

³⁸ *Broadcasting Services Act 1992* (Cth) s 125(1).

6.19 The Broadcasting Services Act formalised and gave legislative recognition to ‘codes of practice’. (Previously, there were some industry codes that operated in parallel with legislative requirements³⁹.) The use of codes was intended to place responsibility directly on industry to provide an appropriate balance between the public interest in maintaining community standards of taste and decency, and broadcasters’ desire to provide competitive services⁴⁰.

- Industry groups representing the various sectors of the broadcasting industry are to develop codes of practice, which ‘may’ relate to the matters listed in the Broadcasting Services Act. These matters include ‘promoting accuracy and fairness in news and current affairs programs’⁴¹.
- ACMA must register a code of practice if satisfied that: the code provides appropriate community safeguards for the matters covered by the code; the code 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 code⁴².
- 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 practice⁴³. A failure to comply with a remedial direction is an offence and a breach of a civil penalty provision⁴⁴.

6.20 The national broadcasters (ABC and SBS) have also adopted codes of practice relating to programming matters, as required by their legislation, which are notified to ACMA⁴⁵. The

³⁹ In 1956, the Television Advertising Board was set up by four commercial stations to produce codes governing the acceptability of television advertising: see Michael Blakeney and Shenagh Barnes, ‘Industry Self-Regulation: An Alternative to Deregulation? Advertising—A Case Study’ (1982) 5 *University of New South Wales Law Journal* 133, 139. The issue of self-regulation was considered in, Australian Broadcasting Tribunal, *Self-regulation for broadcasters?: a report on the public inquiry into the concept of self-regulation for Australian broadcasters*, (1977).

⁴⁰ Explanatory Memorandum, Broadcasting Services Bill 1992 (Cth) 72.

⁴¹ *Broadcasting Services Act 1992* (Cth) s 123(2)(d).

⁴² *Broadcasting Services Act 1992* (Cth) s 123(4)(b).

⁴³ *Broadcasting Services Act 1992* (Cth) s 141(6).

⁴⁴ *Broadcasting Services Act 1992* (Cth) ss 142, 142A.

⁴⁵ *Australian Broadcasting Corporation Act 1983* (Cth) s 8(1)(e); *Special Broadcasting Service Act 1991* (Cth) s 10(1)(j).

ABC and the SBS are also under separate duties to ensure that the reporting of news and information is accurate and impartial⁴⁶.

6.21 The broadcasters' codes cover many of the topics dealt with in print media codes (although they also cover other matters, such as classification, which are not relevant to this Inquiry). The obligations imposed on broadcasters under these codes are broadly similar to the 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. Commercial and subscription television broadcasters are required to report news fairly and accurately, while commercial radio broadcasters are required to make reasonable efforts to present significant viewpoints when dealing with controversial issues of public importance⁴⁷. The ABC and SBS are under stricter obligations to provide 'balance' in news reporting.
- Broadcasters are required to make reasonable efforts to correct significant errors of fact at the earliest opportunity. There is no formal right of reply (although a remedial direction from ACMA could achieve this in practice). Commercial radio broadcasters are required to make reasonable efforts to present significant viewpoints when dealing with controversial issues of public importance.
- Broadcasters should not disclose a person's private affairs unless there is a public interest in doing so.

6.22 The relevant provisions of the codes are set out in Annexure J to this report.

6.23 The activities to which codes apply under the Broadcasting Services Act do not include broadcasters' online activities. The major commercial television broadcasters (Channels 7, 9 and 10), and the ABC and SBS, operate websites that provide news and current affairs,

⁴⁶ *Australian Broadcasting Corporation Act 1983* (Cth) s 8(1)(c); *Special Broadcasting Service Act 1991* (Cth) s 10(1)(c). These duties are not enforceable in court proceedings: *Australian Broadcasting Corporation Act 1983* (Cth) s 8(3); *Special Broadcasting Service Act 1991* (Cth) s 10(2).

⁴⁷ This standard arose out an inquiry by the former Australian Broadcasting Tribunal into whether there should be a right of reply: see Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (The Guildford Press, 1996), 247.

among other material. These websites fall outside the definition of 'broadcasting services'⁴⁸, and therefore are not subject to the complaints mechanism described later. The Broadcasting Services Act contains some regulation of online publications, but is directed at the publication and availability of adult material rather than at editorial standards⁴⁹.

6.24 Nonetheless, for the most part broadcasters voluntarily apply the same editorial principles in the codes to their online news services.

- ninemsn is a joint venture between Microsoft Corporation (Microsoft) and Nine Entertainment Co Pty Ltd⁵⁰, which operates various websites including Nine News online. These websites include editorial content written specifically for the sites by ninemsn news journalists, some content from Nine News, and content from third-party sources⁵¹. In its submission to the Inquiry ninemsn says that it requires all journalists and content producers to abide by a formal code of conduct which is supported by detailed editorial guidelines⁵². ninemsn also says that it applies the same editorial standards to its online and offline content:

*We have noted that the most popular news sites in Australia are also the most popular off-line news sources. In practise the editorial standards of these sites are of least concern because the standards applied to their news content offline and on-line will be equivalent. For example, complaints about content which are aired on Channel Nine (and subject to broadcasting legislation) are referred to the ninemsn news team and any necessary corrective action taken. This is critical to maintaining the value of the Nine News brand.*⁵³

- Seven West Media's submission states that editorial policies apply across all its platforms, including online services⁵⁴. Seven West Media's submission also states that

⁴⁸ The definition of 'broadcasting services' in the *Broadcasting Services Act 1992* (Cth) excludes 'a service that makes programs available on demand on a point-to-point basis, including a dial-up service' (para (c) of the definition in s 6(1)).

⁴⁹ See *Broadcasting Services Act 1992* (Cth) sch 5 (online services), particularly cl 60 (matters that should be dealt with by industry codes). Schedule 7 makes similar provision in relation to 'content services'.

⁵⁰ ninemsn, Submission to the Independent Media Inquiry, 2011, p 1.

⁵¹ Ibid.

⁵² Ibid 2.

⁵³ Ibid 6.

⁵⁴ Seven West Media, Submission to the Independent Media Inquiry, 2011, 9.

generally the same standards should apply to online content as to offline content (although it also says there is a need for some adjustments)⁵⁵.

- The SBS code of practice expressly provides that it applies to SBS's online news services⁵⁶. The ABC code of practice refers in terms only to television and radio programs; however, Mr Chadwick gave evidence that the ABC applies the same standards to its online news services⁵⁷.

Reasons for different treatment of broadcasters

6.25 Several different reasons have been given from time to time why broadcasters, unlike the print media, are required to obtain a licence and comply with other requirements that regulate the content of what is broadcast.

6.26 One reason is that the airwaves are a public resource, and therefore the government is entitled to licence their use for broadcasting on the terms it sees fit. This reason may explain why it is feasible to licence use of the spectrum by broadcasters, but it does not justify the regulation of the content of what is broadcast⁵⁸. In 2000, the Productivity Commission recommended that licences granting access to spectrum should be separated from content-related licences that grant permission to broadcast⁵⁹. In December 2011, the Convergence Review concluded in its Interim Report that there was no reason to require a licence to provide a content service, although a person might be required to be licensed to use scarce public spectrum⁶⁰.

⁵⁵ Ibid 10. See also, DMG Radio (Australia), Submission to the Independent Media Inquiry, 2011.

⁵⁶ Special Broadcasting Service, *SBS Codes of Practice 2006 (incorporating amendments as at August 2010)* (2010) 4: 'the principles and policies of SBS programming are the same for Television, Radio and Online.'

⁵⁷ Oral submission to the Independent Media Inquiry, Sydney, 18 November 2011, 248 (Paul Chadwick). This is borne out by the ABC's complaints data, which includes complaints about online news: for example, the list of complaints upheld in December 2011 included a complaint about a story on ABC News Online on 25 November 2011 <www.abc.net.au/contact/upheld/s3393856.htm>. The list of complaints upheld in August 2011 included a complaint about a story on ABC News Online on 20 July 2011: <www.abc.net.au/contact/upheld/s3290806.htm>.

⁵⁸ Eric Barendt, *Broadcasting Law: A Comparative Study* (Oxford University Press, 1993) 4. In effect, licensed broadcasters receive two licences—they are automatically allocated a separate apparatus licence giving them a right to use the spectrum.

⁵⁹ Productivity Commission, *Broadcasting*, Report No 11 (2000) 192–193 (recommendation 6.1).

⁶⁰ Australian Government, *Convergence Review—Interim Report*, (2011) 4.

- 6.27 A related reason is scarcity of spectrum. If there are more potential broadcasters than frequencies to allocate, then there cannot be an unabridged right of every individual to speak, write or publish⁶¹. However, changes in technology (such as cable television and digital television) have greatly reduced the force of this view⁶². Information provided by ACMA suggests that scarcity in the broadcasting services band spectrum for terrestrial broadcasting in the major markets is largely a result of government policy. In any event, there is a question whether content regulation is the proper response to scarcity.
- 6.28 A third reason is that the broadcast media should be regulated because of their distinctive power to influence public attitudes. This appears to underpin the Broadcasting Services Act. The extrinsic materials state that a high level of regulation applies to commercial broadcasting services because they are considered to exert a strong influence in shaping views in Australia⁶³. There is an empirical question whether the broadcast media (particularly television) is more influential than the print media. Some submissions to this Inquiry contend that it is the print media, particularly newspapers, not the broadcast media, that shape the political agenda⁶⁴. Even if broadcast media do exert influence, it does not seem right to subject more persuasive media to greater regulation than those imposed on less effective media⁶⁵.

⁶¹ Eric Barendt, *Broadcasting: A Comparative Study* (Oxford University Press, 1993) 5, citing *Red Lion Broadcasting Co v Federal Communications Commission* 395 US 367 at 388 (1969); see also Cass R Sunstein, *Democracy and the Problem of Free Speech* (Simon and Schuster, 1995) 110.

⁶² Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Legal & Regulatory—Asia Pacific, 3rd ed, 2007) [14.20]. The Productivity Commission stated in 2000 that digital transmission has the potential to free substantial portions of the broadcasting spectrum, because the digital signal is compressed and the spectrum used for buffers in analog signals is greatly reduced: Productivity Commission, *Broadcasting*, Report No 11 (2000) 223.

⁶³ Explanatory Memorandum, Broadcasting Services Bill 1992 (Cth) 12. See also Department of Communications and Transport, *Broadcasting Reform: A New Approach to Regulation* (1993) 36; Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Legal & Regulatory—Asia Pacific, 3rd ed, 2007) [14.25]. The special influence of broadcasting was also cited as a reason for government regulation in Inquiry into the Australian Broadcasting System, Parliament of Australia, *Australian broadcasting: a report on the structure of the Australian broadcasting system and associated matters / Postal and Telecommunications Department*, No 358 (1976) [130].

⁶⁴ See for example, Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011, 43, (Professor McKinnon), Oral submission to the Independent Media Inquiry, Melbourne, 8 November 2011, 38, (Professor Manne). See also Mark Pearson, Jeffrey E Brand, Deborah Archbold and Halim Rane, *Sources of News and Current Affairs: A Research Report in Two Stages Conducted by Bond University for the Australian Broadcasting Authority*, Sydney, (2001) 9, 90–115 <http://epublications.bond.edu.au/hss_pubs/96>. That research report found that certain newspapers, particularly *The Australian* and *Sydney's Daily Telegraph*, are perceived as the dominant agenda-setters in the daily news cycle, along with the morning AM program on ABC radio. Sunday morning television programs were also seen to play an important role.

⁶⁵ Eric Barendt, *Broadcasting Law: A Comparative Study* (Oxford University Press, 1993) 7.

6.29 It is doubtful whether the reasons given for regulating the broadcast media would support imposing similar requirements on the press. Still less does the regulation of broadcasters support imposing a 'fit and proper person' test for newspaper publishers. The fit and proper person test was imposed under the former Broadcasting Act, the purpose of which was to ensure that commercial broadcasting was conducted in the interests of the public⁶⁶. There is no longer a 'fit and proper' test imposed on broadcasters, but rather a narrower test directed at whether a broadcaster will comply with the Broadcasting Services Act and its licence.

Complaints-handling procedure for broadcast media

Current regulator—ACMA

6.30 Since 2005, complaints have been dealt with by ACMA. ACMA was formed by merging the former Australian Broadcasting Authority (ABA) and the Australian Communications Authority. The convergence of different communication technologies was the principal reason for this merger. It was 'becoming increasingly difficult for two separate regulators, one of which [was] primarily focused on infrastructure and carriage issues, with the other focused chiefly on content issues [the ABA], to provide a holistic response to convergence.'⁶⁷

6.31 ACMA performs a wide variety of functions, set out in the *Australian Communications and Media Authority Act 2005* (Cth) (ACMA Act)⁶⁸. In addition to its 'broadcasting, content and datacasting functions'⁶⁹, ACMA has 'telecommunications functions' (such as regulating telecommunications in accordance with the *Telecommunications Act 1997* (Cth) and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth)⁷⁰), 'spectrum management functions' (such as managing the radiofrequency spectrum in accordance with the *Radiocommunications Act 1992* (Cth)⁷¹), and additional functions⁷².

⁶⁶ Paul Mallam, Sophie Dawson and Jaclyn Moriarty, Thomson Reuters, *Media and Internet Law and Practice*, [18.1270]; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45, 53 (the Court).

⁶⁷ Explanatory Memorandum, Australian Communications and Media Authority Bill 2004 (Cth) 1.

⁶⁸ There is a helpful overview of ACMA's functions in, Australian Communications and Media Authority, Annual Report 2010–11 (2011) 25.

⁶⁹ *Australian Communications and Media Authority Act 2005* (Cth) s 10.

⁷⁰ *Australian Communications and Media Authority Act 2005* (Cth) s 8(1)(a).

⁷¹ *Australian Communications and Media Authority Act 2005* (Cth) s 9(a).

⁷² *Australian Communications and Media Authority Act 2005* (Cth) s 11.

6.32 Relevantly, ACMA's broadcasting, content and datacasting functions include the following:

- to allocate, renew, suspend and cancel licences and to take other enforcement action under the Broadcasting Services Act⁷³
- to monitor compliance by broadcasters with codes of practice⁷⁴, and
- to monitor and investigate complaints concerning broadcasting services (including national broadcasting services) and datacasting services⁷⁵.

6.33 ACMA has a variety of other broadcasting, content and datacasting functions, such as designing and administering price-based systems for the allocation of commercial television broadcasting licences and commercial radio broadcasting licences⁷⁶. and conducting or commissioning research into community attitudes on issues relating to programs and datacasting content⁷⁷.

Complaints under the Broadcasting Services Act

6.34 The Broadcasting Services Act deals in fairly spare fashion with complaints against licensed broadcasters, and complaints against national broadcasters.

6.35 In the case of licensed broadcasters, a person may complain directly to ACMA if he or she believes that the broadcaster has committed an offence against the Broadcasting Services Act or the regulations; has breached a civil penalty provision, or breached a condition of a licence or a class licence⁷⁸.

- If the complaint relates to program content or compliance with a registered code of practice, the person must complain first to the broadcaster, and may complain to ACMA if he or she has not received a response within 60 days, or if he or she considers the

⁷³ *Australian Communications and Media Authority Act 2005* (Cth) s 10(1)(c).

⁷⁴ *Australian Communications and Media Authority Act 2005* (Cth) s 10(1)(j).

⁷⁵ *Australian Communications and Media Authority Act 2005* (Cth) s 10(1)(m).

⁷⁶ *Australian Communications and Media Authority Act 2005* (Cth) s 10(1)(f).

⁷⁷ *Australian Communications and Media Authority Act 2005* (Cth) s 10(1)(h).

⁷⁸ *Broadcasting Services Act 1992* (Cth) s 147.

response inadequate⁷⁹. This requirement to complain first to the broadcaster means the complaints process is described as 'co-regulatory'⁸⁰.

- 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 can deal with. ACMA must notify the complainant of the results of its investigation⁸¹.

Sanctions that can be imposed on licensed broadcasters

6.36 The Broadcasting Services Act contains a range of sanctions for a licensed broadcaster found to be in breach of the Act, a licence condition or a registered code of practice⁸².

6.37 As an ultimate sanction, ACMA may suspend or revoke a broadcaster's licence. However, suspension or cancellation of a licence is a severe penalty which affects consumers as well as the licensee, and that it is unlikely in practice that a commercial licence would be suspended or cancelled for breach of licence conditions⁸³. A commercial radio licence was suspended in 2003 for failing to provide audited returns as required⁸⁴.

6.38 A lesser but still important sanction is for ACMA to impose an additional condition on a licence⁸⁵.

- Notably, the former Australian Broadcasting Authority imposed additional conditions on commercial radio broadcaster Radio 2UE following the 'Cash for Comment' inquiry in 2000⁸⁶, and imposed an additional condition on certain regional commercial television broadcasters requiring them to broadcast minimum amounts of local content within

⁷⁹ *Broadcasting Services Act 1992* (Cth) s 148.

⁸⁰ The concept of co-regulation, and how it differs from self-regulation and command regulation, are discussed in Section 10 of this report.

⁸¹ *Broadcasting Services Act 1992* (Cth) s 149.

⁸² On how those sanctions are used, see Australian Communications and Media Authority, *Broadcasting Services Act 1992—Enforcement Guidelines of the ACMA*, F2011L01778, 26 August 2011, made under s 215(4) of the *Broadcasting Services Act 1992* (Cth).

⁸³ Professor Ian Ramsay, *Reform of the Australian Broadcasting Authority's Enforcement Powers*, Report to the Australian Broadcasting Authority (2004) 36–37.

⁸⁴ Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Legal & Regulatory—Asia Pacific, 3rd ed, 2007) [14.360] n 269.

⁸⁵ Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Legal & Regulatory—Asia Pacific, 3rd ed, 2007) [14.305].

⁸⁶ The 'Cash for Comment' affair is discussed in Lesley Hitchens' 'Commercial Broadcasting—Preserving the Public Interest' (2004) 32 *Federal Law Review* 79.

their local broadcast areas⁸⁷. In 2010, ACMA imposed an additional condition on 2Day commercial radio to provide further protection for children participating in radio programs broadcast by the licensee⁸⁸.

- Previously, breach of a licence condition (including an additional condition) was only a criminal offence. This greatly reduced the effectiveness of this sanction. For example, imposing a further condition was an ineffective response arising out of the ‘Cash for Comment’ inquiry, because at the time the only sanction for breach of that condition was that it resulted in a criminal offence, and a breach could not be proved under the stricter principles of criminal law⁸⁹.

6.39 In 2004, Professor Ian Ramsay provided a report on the enforcement powers of the then regulator (the Australian Broadcasting Authority), and found that it lacked the necessary ‘mid-level’ sanctions⁹⁰. The Broadcasting Services Act was amended in 2006 to confer power on the regulator (by then ACMA) to increase the range of sanctions available for breach of licence conditions and breaches of codes of practice⁹¹.

- A breach of a licence condition is now a civil penalty provision, as well as being a criminal offence⁹². This is intended to make the sanction of a further licence condition more effective.
- ACMA has power to issue remedial directions, requiring a licensed broadcaster to take action to avoid breaching licence conditions, or breaching a registered code of

⁸⁷ Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Legal & Regulatory—Asia Pacific, 3rd ed, 2007) [14.580]; see also Australian Communications and Media Authority, Annual Report 2010–11 (2011) 12. Since 1 January 2008, ACMA must ensure that there is a licence condition requiring regional commercial television broadcasters to broadcast a minimum level of local content: see *Broadcasting Services Act 1992* (Cth) s 43A (added by the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth)).

⁸⁸ Australian Communications and Media Authority, Annual Report 2009–10 (2010) 101.

⁸⁹ Professor Ian Ramsay, *Reform of the Australian Broadcasting Authority’s Enforcement Powers*, Report to the Australian Broadcasting Authority (2004) 42–44.

⁹⁰ *Ibid* 49–50.

⁹¹ *Communications Legislation Amendment (Enforcement Powers) Act 2006* (Cth). This Act also added powers for ACMA to seek injunctions (*Broadcasting Services Act 1992* (Cth) pt 14C) and infringement notices (*Broadcasting Services Act 1992* (Cth) pt 14E). However, those provisions are not engaged by breaches of content-based licence conditions or breaches of codes of practice.

⁹² *Broadcasting Services Act 1992* (Cth) s 140A, added by the *Communications Legislation Amendment (Enforcement Powers) Act 2006* (Cth).

practice⁹³. Breach of a remedial direction is both a criminal offence and attracts a civil penalty, and may be reason for a licence to be suspended or revoked⁹⁴. During 2009–10, ACMA issued remedial directions to three regional radio broadcasters for failing to broadcast the required minimum levels of local content⁹⁵.

- ACMA may accept enforceable undertakings on a number of matters, including an undertaking that a person will either take action, or will refrain from taking action, in order to comply with a registered code of practice⁹⁶. If a person fails to comply with the undertaking, ACMA can apply to the Federal Court for orders that the person comply with the undertaking, pay to ACMA any financial benefit that is attributable to the breach, or pay compensation to a person who has suffered damage as a consequence of the breach⁹⁷. This power has been exercised somewhat more frequently, with ACMA accepting between one and four enforceable undertakings a year between 2008–09 and 2010–11⁹⁸. In 2009, the Federal Court imposed financial penalties on Radio 2UE for the failure by John Laws to comply with its disclosure standard, which included a breach by Radio 2UE of an enforceable undertaking⁹⁹.

6.40 The Broadcasting Services Act does not explicitly allow ACMA to require a licensed broadcaster to issue an apology or retraction (whereas it can recommend that the ABC or SBS do so). There may be an issue whether a licensed broadcaster could give an enforceable undertaking that it would issue an apology or retraction. In practice, however, it is most unlikely that a broadcaster would give this sort of undertaking¹⁰⁰. ACMA takes the view that it cannot order a broadcaster to make an apology or correction, or to acknowledge on air a breach finding.

⁹³ *Broadcasting Services Act 1992* (Cth) s 141(1) and (6).

⁹⁴ *Broadcasting Services Act 1992* (Cth) ss 142, 142A, 143, respectively.

⁹⁵ Australian Communications and Media Authority, Annual Report 2009–10 (2010) 38, 101.

⁹⁶ *Broadcasting Services Act 1992* (Cth) s 205W(1)(d)–(f).

⁹⁷ *Broadcasting Services Act 1992* (Cth) s 205X.

⁹⁸ Australian Communications and Media Authority, Annual Report 2008–09 (2009) 73 (3 enforceable undertakings); Australian Communications and Media Authority, Annual Report 2009–10 (2010) 101 (1 enforceable undertaking); Australian Communications and Media Authority, Annual Report 2010–11 (2011) 107 (4 enforceable undertakings).

⁹⁹ *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2)* (2009) 178 FCR 199.

¹⁰⁰ In a similar field, broadcasters have argued against being required to broadcast the results of a regulator's findings, arguing that it interferes with freedom of speech, intrudes on the independence of media owners, and could have consequences for defamation proceedings: see Professor Ian Ramsay, *Reform of the Australian Broadcasting Authority's Enforcement Powers*, Report to the Australian Broadcasting Authority (2004) 120.

Complaints about the ABC and SBS

- 6.41 The Broadcasting Services Act also makes provision for ACMA to deal with complaints that the ABC or SBS breached their code of practice.
- Again, a person is required to complain first to the broadcaster, and may complain to ACMA if the person has not received a response within 60 days or if the person considers the response to be inadequate¹⁰¹.
 - ACMA must investigate the complaint, unless it is satisfied that the complaint is frivolous or vexatious or not made in good faith, or the complaint is not relevant to the code of practice¹⁰².
- 6.42 If ACMA is satisfied that a complaint against the ABC or SBS was justified, and that it should take action, ACMA may recommend that the ABC or SBS take action to comply with the code of practice and take any other action specified by ACMA¹⁰³. This other action may include broadcasting an apology or retraction¹⁰⁴. If the ABC or SBS does not take action that ACMA considers appropriate within 30 days, ACMA may give the minister a written report on the matter, which must be tabled in parliament¹⁰⁵.

Internal complaints handling

- 6.43 The Broadcasting Services Act requires in most cases that a complaint be made first to the broadcaster (including a national broadcaster)¹⁰⁶.
- 6.44 The industry codes make some provision for dealing with complaints. The commercial television broadcasting code and the commercial radio codes provide that complaints will be dealt within 30 working days, as far as possible¹⁰⁷. Commercial television broadcasters and

¹⁰¹ *Broadcasting Services Act 1992* (Cth) s 150.

¹⁰² *Broadcasting Services Act 1992* (Cth) s 151.

¹⁰³ *Broadcasting Services Act 1992* (Cth) s 152(1).

¹⁰⁴ *Broadcasting Services Act 1992* (Cth) s 152(2).

¹⁰⁵ *Broadcasting Services Act 1992* (Cth) s 153.

¹⁰⁶ See [6.35]-[6.41] above.

¹⁰⁷ Australian Communications and Media Authority, *Commercial Television Industry Code of Practice* (January 2010) 38 [7.12]; Australian Communications and Media Authority, *Commercial Radio Australia—Commercial Radio Codes of Practice and Guidelines* (September 2011) 17 [5.5].

commercial radio broadcasters are required to provide data of complaints to a peak industry body, which passes that information on to ACMA¹⁰⁸. The subscription broadcast television code provides that licensees will deal with complaints within the shortest practicable period¹⁰⁹. Licensees will maintain a record of complaints received and make a summary available to ACMA annually or on request¹¹⁰.

- 6.45 In 2008, a Senate committee investigated the effectiveness of broadcast codes of practice, including complaints-handling procedures¹¹¹. The committee made several recommendations about how to improve internal complaints-handling, such as accepting complaints by email or electronically¹¹². This recommendation has been taken up in industry codes¹¹³. The committee also recommended that broadcasters should seek to respond within 15 working days¹¹⁴.
- 6.46 The ABC has had, since 2007, a Director of Editorial Policies whose role is to oversee the development and implementation of the ABC's standards for those who make content for the ABC. The Director oversees a separate Audience and Consumer Affairs unit that handles complaints internally¹¹⁵. Audience and Consumer Affairs would normally represent the ABC if the complaint is taken further to ACMA¹¹⁶.

¹⁰⁸ Australian Communications and Media Authority, *Commercial Television Industry Code of Practice* (January 2010) 39 [7.20]–[7.21]; Australian Communications and Media Authority, *Commercial Radio Australia—Commercial Radio Codes of Practice and Guidelines* (September 2011) 18 [5.11].

¹⁰⁹ Australian Communications and Media Authority, Australian Subscription & Radio Association—Subscription Broadcast Television Codes of Practice (2007) 11 [5.1].

¹¹⁰ *Ibid* 11 [5.1].

¹¹¹ Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, *The effectiveness of the broadcasting codes of practice* (2008) ch 5.

¹¹² *Ibid* 48 [5.34] (recommendation 12).

¹¹³ The industry codes make some provision for receiving complaints by email and electronically: see Australian Communications and Media Authority, *Commercial Television Industry Code of Practice* (January 2010) 37 [7.5.3]; Australian Communications and Media Authority, *Commercial Radio Australia—Commercial Radio Codes of Practice and Guidelines* (September 2011) 16 [5.1(a)], (permitting online complaints 'where the licensee has technological capacity').

¹¹⁴ Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, *The effectiveness of the broadcasting codes of practice* (2008) 50 [5.46] (recommendation 15).

¹¹⁵ Audience and Consumer Affairs is a unit of the ABC separate from the content-making divisions of the ABC: Australian Broadcasting Corporation, *Complaints handling procedures* (April 2011) 5 [3.1] <www.abc.net.au/corp/pubs/documents/20110408/ComplaintsHandlingPRC.pdf>. See also, Oral submission to the Independent Media Inquiry, Sydney, 18 November 2011, 262 [6], (Mr Chadwick).

¹¹⁶ Australian Broadcasting Corporation, *Complaints handling procedures* (April 2011) 14 [5.3.28].

- 6.47 The ABC publishes on its website a summary of upheld complaints (going back to July 2008)¹¹⁷, and a summary of resolved complaints where the division takes adequate and appropriate steps to remedy the cause of complaint within 30 days of the ABC receiving the complaint (going back to May 2011)¹¹⁸. In addition to the statistics contained in the ABC's annual report¹¹⁹, the ABC has recently begun to publish on its website quarterly statistics about complaints¹²⁰. The ABC also conducts editorial 'quality assurance projects', where the ABC takes a sample of its content (whether or not anyone has complained about it) and determines whether it met the ABC's standards¹²¹.
- 6.48 The ABC deals with a large number of complaints each year—for example, during 2010–11 the Audience and Consumer Affairs finalised 22 875 complaints¹²². A Senate committee concluded in 2008 that the high number of complaints was not only because people feel ownership of the ABC, as the national broadcaster, but also because the ABC (unlike commercial broadcasters) accepted complaints made online and by email¹²³. The committee supported that feature, and also the fact that the ABC has a dedicated section for handling complaints¹²⁴.
- 6.49 At SBS, internal complaints are handled by an ombudsman¹²⁵. The ombudsman is responsible for hearing complaints from viewers about accuracy and balance in news reporting as well as program classifications.

¹¹⁷ Australian Broadcasting Corporation, *Complaints upheld* (2011) <www.abc.net.au/contact/upheld.htm>.

¹¹⁸ Australian Broadcasting Corporation, *Resolved complaints* (2011) <www.abc.net.au/contact/resolved.htm>.

¹¹⁹ Australian Broadcasting Corporation, *Annual Report 2011* (2011) 107–108.

¹²⁰ Australian Broadcasting Corporation, *Quarterly Summary: 1 July to 30 September 2011* (2011) <www.abc.net.au/corp/pubs/documents/201112/stat_report_jul-sep_2011.pdf>.

¹²¹ Oral submission to the Independent Media Inquiry, Sydney, 18 November 2011, 257, (Mr Chadwick). Quality assurance reports are at www.abc.net.au/corp/pubs/edpols.htm ('Quality Assurance Reports & Papers').

¹²² Australian Broadcasting Corporation, *Annual Report 2011* (2011) 108.

¹²³ Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, *The effectiveness of the broadcasting codes of practice* (2008) 47–48 [5.26]–[5.33].

¹²⁴ *Ibid* 53 [5.61]–[5.62].

¹²⁵ Special Broadcasting Service, *SBS Codes of Practice 2006 (incorporating amendments as at August 2010)* (2010) 22–23 [8.8]. The SBS Ombudsman can refer a complaint to a complaints committee: *Ibid* 23 [8.9].

ACMA's complaint-handling procedure

- 6.50 The Broadcasting Services Act does not explicitly state what process ACMA should follow in determining whether a broadcaster is in breach of the Act or its licence or a registered code of practice (or in the case of the ABC and SBS, a code of practice). ACMA has provided the following information about the nature of complaints and its complaint-handling procedures.
- 6.51 In the last three years, ACMA has investigated around 190 complaints per year¹²⁶. It receives a significantly higher number of complaints (around 1500 matters per year)¹²⁷, but the remainder are outside ACMA's jurisdiction.
- 6.52 In 2010–11, approximately a quarter of matters investigated related to accuracy and/or fairness in news and current affairs programs. Of these, around a third (so around eight per cent of all complaints) were complaints made to ACMA by individuals or organisations who were the subject of the broadcast, or had a direct interest in the material broadcast¹²⁸.
- 6.53 Each quarter, FreeTV Australia and Commercial Radio Australia report to ACMA the number of complaints received by broadcasters about matters covered by the respective codes of practice. In 2010–11, there were a total of 2786 complaints made to commercial television broadcasters. Of these, there were 624 complaints about television current affairs programs (including 100 complaints relating to bias/inaccuracy), and 661 complaints about television news programs (including 357 complaints about bias/inaccuracy). The information provided by commercial radio broadcasters is not sufficiently detailed to enable a similar analysis to be done for radio complaints.
- 6.54 ACMA's investigations are almost always assessed on the papers. After receiving a complaint, ACMA notifies the broadcaster that a complaint has been made, and obtains a copy of the broadcast. Normally the broadcaster will make a submission about how the broadcast complied with the relevant requirement. In some cases, for example allegations of factual inaccuracy, ACMA might research independent resources.

¹²⁶ The figures are 2008–09: 194 investigations; 2009–10: 189 investigations; and 2010–11: 197 investigations.

¹²⁷ The figures are 2008–09: 1464 complaints; 2009–10: 1676 complaints; 2010–11: 1512 complaints.

¹²⁸ A summary of the broadcasting investigation outcomes in 2010–11 is contained in Australian Communications and Media Authority, Annual Report 2010–11 (2011) 195–213.

- 6.55 ACMA prepares a report of its investigation. If a breach finding is proposed, ACMA provides a draft of the investigation report to the broadcaster for its comment. There is no internal appeal network—informal reconsideration of an investigation decision takes place on a case-by-case basis, depending on the individual circumstances.
- 6.56 On average, an investigation by ACMA takes four months to finalise. ACMA identifies two reasons for this.
- First, the procedure set out in the Broadcasting Services Act means that ACMA rarely deals with urgent complaints. As noted, the Act requires complaints about codes of practice to be made to broadcasters in the first instance. ACMA may only investigate these matters if the broadcaster does not respond within 60 days, or if any response is considered by the complainant to be inadequate.
 - Second, investigations by ACMA must comply with administrative law requirements, particularly procedural fairness. ACMA takes the view (with some justification) that this requires the broadcasters to be given an opportunity to put their case in response to the complaint, and then again in response to a potential finding of a breach.
- 6.57 It appears that ACMA is less concerned to provide the complainant with opportunities to comment. ACMA observes that although investigations are triggered by a complaint, the complainant is not a 'party' to the investigation.

Criticisms of ACMA's complaints-handling procedure

- 6.58 The relevance of complaints-handling under the Broadcasting Services Act for this Inquiry is twofold: one, whether that mechanism provides any guidance on the appropriate mechanism for handling complaints against the print media; two, what if anything should be done with ACMA's complaints-handling power over broadcasters.
- 6.59 There have been a number of criticisms of the handling of complaints under the Broadcasting Services Act.
- In 2000, a Senate committee reviewed the operation of Australia's media. The Committee found substantial evidence to question the efficiency and effectiveness of self-regulation and co-regulation in Australia's information and communications

industries (including, but not limited to, the broadcasting industry). The Committee observed that, in the television and radio industries, co-regulation had attracted widespread criticism¹²⁹. These criticisms included the time taken to deal with complaints (not only by the regulator but also the initial response by the broadcaster)¹³⁰, inadequate monitoring of the system by the regulator¹³¹, and the lack of meaningful penalties¹³².

- Also in 2000, the Productivity Commission commented that the current system of codes of practice was closer to self-regulation than co-regulation¹³³. The Commission recommended that requirements as to accuracy and fairness in news reporting should be a licence condition, and not just a requirement in a code of practice, to enable persons affected to complain directly to the regulator¹³⁴.
- In 2004 Professor Ramsay found that there was a 'significant deficiency' in the remedies available to the regulator (at that time, the Australian Broadcasting Authority)¹³⁵. The Broadcasting Services Act was amended in 2006 to confer further enforcement powers on ACMA.
- In 2008, a different Senate committee reviewed the effectiveness of the broadcasting codes of practice, particularly the classification of programs. The Committee stated that a common criticism of ACMA was that it does not take effective action against broadcasters found to be in breach of codes of practice, and that '[i]t may be that regulation relating to broadcasting codes and program content would be better managed in a smaller, more focussed organisation'¹³⁶. The Committee was critical of the

¹²⁹ Senate Select Committee on Information Technologies, *In the Public Interest: Monitoring Australia's Media*, (2000) [6.1].

¹³⁰ *Ibid* [3.45]–[3.50], in the chapter discussing commercial television. These criticisms of the co-regulatory approach would seem to apply equally to all broadcasting. The Productivity Commission recommended improvements to the complaints handling mechanisms of broadcasters—for example, accepting complaints by email and fax, and publicising the complaints mechanism: see Productivity Commission, *Broadcasting*, Report No 11 (2000) 476 (recommendation 13.6).

¹³¹ Senate Select Committee on Information Technologies, *In the Public Interest: Monitoring Australia's Media*, (2000) [3.58]–[3.59].

¹³² *Ibid* [3.60]–[3.66].

¹³³ Productivity Commission, *Broadcasting*, Report No 11 (2000) 453.

¹³⁴ *Ibid* 461–462 (recommendation 13.4).

¹³⁵ Professor Ian Ramsay, *Reform of the Australian Broadcasting Authority's Enforcement Powers*, Report to the Australian Broadcasting Authority (2004) 9.

¹³⁶ Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, *The effectiveness of the broadcasting codes of practice* (2008) 12 [2.29].

existing complaints process, stating that it was not ‘user friendly’, and that very little evidence provided to the Committee apart from the broadcasters themselves suggested that the current system adequately met the needs of complainants¹³⁷. The Committee made a number of recommendations about how the complaints mechanisms of broadcasters should be improved (for example, by keeping a log of complaints, and permitting complaints by fax or email)¹³⁸.

- In 2008, the Australian National Audit Office (the Audit Office) conducted a performance review of ACMA. The Audit Office identified deficiencies with the timeliness and management of commercial broadcasting investigations¹³⁹. Nearly one quarter of investigations exceeded ACMA’s target of 24 weeks. The average time for completing investigations in 2006–07 was 18 weeks¹⁴⁰. In addition, the Audit Office found that ACMA: lacked documented procedures for conducting broadcasting investigations; had not fully investigated all prima facie breaches of the code about complaints handling by broadcasters; had decided not to investigate five cases (despite legal advice to the contrary), without documenting the reasons for these decisions; had not documented in most investigations its consideration of past decisions or precedents; had not assessed whether complainants should be given the opportunity to comment on draft investigation findings; had not informed all complainants of the results of the investigation (as required by the Broadcasting Services Act); and had applied inconsistent records management practices¹⁴¹.

An assessment of ACMA’s complaints-handling procedure

6.60 Whatever the position may be, these criticisms indicate that the Broadcasting Services Act does not provide an appropriate model for dealing with complaints, whether against broadcast media or any other. Most significantly, an ACMA investigation of a broadcasting complaint takes months to finalise (four months on average, but any given complaint could take much longer). Where the complaint is that a statement about a person is inaccurate,

¹³⁷ Ibid 67 [5.3], 44–45 [5.18].

¹³⁸ Ibid 48 [5.31]–[5.35].

¹³⁹ Australian National Audit Office, Regulation of Commercial Broadcasting: Australian Communications and Media Authority, Audit Report No 46 (2008) 70 [3.40].

¹⁴⁰ Ibid.

¹⁴¹ Ibid 70–71 [3.41].

that period is much too long. Moreover, there is delay built into the process by requiring a complainant in most instances to complain first to the broadcaster before going to ACMA. In addition, despite ACMA's enforcement powers being expanded in 2006, it does not have the power to require a broadcaster to publish a finding that there has been a breach of some standard.

- 6.61 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 on the same footing, and which requires licensees to broadcast findings of a breach.

Two further issues

- 6.62 Two further issues arose in the context of the discussion about broadcasting regulation. The first was whether government funding of the public broadcasters has compromised their independence in news presentation. The second was whether government regulation of broadcasting has had a 'chilling effect' on free speech.

Government funding and the independence of public broadcasters

- 6.63 Several witnesses, including Mr Hywood from Fairfax Media¹⁴² and Mr Chadwick¹⁴³, contend that the provision of government funding to the APC would inevitably compromise the independence of that body. In contrast, Professor McKinnon, a former chair of the APC, disagreed¹⁴⁴, as did others¹⁴⁵.

¹⁴² Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011, 82 [19]–[21], (Mr Hywood).

¹⁴³ Oral submission to the Independent Media Inquiry, Melbourne, 9 November 2011, 220–221 [45]–[1], (Mr Chadwick) ('Whose bread I eat, his song I sing').

¹⁴⁴ Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011, 48 [27]–[35] (Professor McKinnon). Professor McKinnon also pointed out that, if there is a concern about funding bringing influence or control, that concern ought to flow to the media proprietors who currently fund the APC: Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011, 49 [12]–[13] (Professor McKinnon).

¹⁴⁵ Australian Press Council, Submission to the Independent Media Inquiry, 2011, 20 [G.19]–[G.20]. For further analysis of international trends, see Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Freepress, 2011) <www.savethenews.org/sites/savethenews.org/files/public-media-and-political-independence.pdf>.

6.64 The position of the ABC¹⁴⁶ and the BBC provide counter-examples to the contention that government funding necessarily compromises independence. Both the ABC and the BBC are funded by public money (in the case of the BBC, television licence fees)¹⁴⁷, but have a strong tradition of independence from government.

- The BBC is established by Royal Charter, so its independence comes from practices and custom rather than law¹⁴⁸. Editorial independence is one of the founding principles of the BBC¹⁴⁹. Its journalism was founded on the professional ethics of impartiality and objectivity¹⁵⁰. The government has consistently made sparing use of its powers to intervene which has contributed to a broad political consensus that the independence of broadcasting be respected¹⁵¹.
- The ABC is established by statute. Its Act recognises the independence of the ABC¹⁵², although there are specific powers for the minister to give directions to the ABC in the national interest¹⁵³.

6.65 Still, the relationship between the ABC and the government comes under stress from time to time¹⁵⁴. One notable example of stress arising in the relationship between the ABC and the

¹⁴⁶ The same points could be made about SBS—the minister has limited powers of direction, but cannot give a direction in relation to the content or scheduling of programming: *Special Broadcasting Services Act 1991* (Cth) s 11(3).

¹⁴⁷ Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (The Guildford Press, 1996) 70.

¹⁴⁸ The use of the Royal Charter was to keep some distance between the BBC and Parliament. This was not a possibility in Australia. Instead, the establishment of the ABC as a statutory authority (rather than a division of the public service) promoted its independence: K S Inglis, *This is the ABC: The Australian Broadcasting Commission 1932–1983* (Black Inc., 2006) 18–20.

¹⁴⁹ Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (The Guildford Press, 1996) 69.

¹⁵⁰ Georgina Born, *Uncertain Vision: Birt, Dyke and the Reinvention of the BBC* (Secker & Warburg, 2004) 381. Objectivity and impartiality are contestable terms: *Ibid* at 381–382.

¹⁵¹ Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (The Guildford Press, 1996) 69.

¹⁵² *Australian Broadcasting Corporation Act 1983* (Cth) s 8(1)(b) (it is a duty of the ABC Board ‘to maintain the independence and integrity of the Corporation’) and *Australian Broadcasting Corporation Act 1983* (Cth) s 27(1) (the ABC ‘shall develop and maintain an independent news service for the broadcasting of news and information’).

¹⁵³ *Australian Broadcasting Corporation Act 1983* (Cth) s 78.

¹⁵⁴ There have been perceptible attempts to exert influence, ranging from informal warnings to movements to control financing: Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (The Guildford Press, 1996) 225.

government was in 2003, when the ABC came under sustained criticism from Minister Alston for its reporting on the Iraq war.

- The Minister made 68 complaints of bias in the ABC's reporting. An internal investigation found that two of the 68 complaints were substantiated. An independent panel found that 17 of the complaints had merit, although there was no evidence of anti-Coalition bias as alleged by the minister. In 2005, the then Australian Broadcasting Authority found that 21 of the 68 complaints were substantiated, but did not accept the complaint of systematic bias¹⁵⁵.
- At the time of these complaints, there was also a disagreement between the then government and the ABC as to the level of funding. The minister said that the complaints were not connected with this funding disagreement¹⁵⁶. At the same time, he did say that the ABC was accountable to parliament, and that if parliament thought that the ABC had lost the plot, they could be defunded¹⁵⁷.
- No doubt different people would take different views about the rights and wrongs of this episode. However, there is no suggestion that the minister's complaints caused the ABC to 'tone down' its reporting, even though its budget was a matter of intense debate between the ABC and the government of the day.

6.66 The experience with the ABC also suggests that the procedure for appointing its members is relevant to maintaining the independence of that body from government. Currently, applications to be members of the ABC Board are assessed by an independent nomination panel established at arm's length from the government¹⁵⁸.

6.67 In summary, the position of the ABC and the BBC suggests that it is possible to create a body that is publicly-funded but still independent from the government. It is not always easy to

¹⁵⁵ K S Inglis, *Whose ABC? The Australian Broadcasting Corporation 1983–2006* (Black Inc., 2006) 547–550.

¹⁵⁶ Ibid 553. Some witnesses took a different view—Mr Cronin from *The West Australian* stated Minister Alston 'threatened them [the ABC] with further cuts, and I think in fact there were further cuts in about 2001. So if you want to know whether governments see funding as a source of power, then there it is': Oral submission to the Independent Media Inquiry, Perth, 6 December 2011, 53 [24]–[27], (Mr Cronin).

¹⁵⁷ K S Inglis, *Whose ABC? The Australian Broadcasting Corporation 1983–2006* (Black Inc., 2006) 546.

¹⁵⁸ The current government policy is explained at Department of Communications, Broadband and the Digital Economy, Australian Government, *The merit-based appointment process* (13 October 2011) <www.dbcde.gov.au/television/abc_and_sbs_board_appointments/the_merit-based_appointment_process>.

maintain this independence, and governments may attempt from time-to-time to use their control over funding to influence the behaviour of the broadcasters. But, by and large, that pressure has been resisted quite successfully.

6.68 The same question about operational independence can be asked about the APC under its present arrangements.

- The APC is funded by newspaper proprietors. It states that it does not receive sufficient funding to perform its complaints-handling functions properly, and does not have sufficient funding to perform other functions (such as the report on the state of the press) at all¹⁵⁹. Accordingly, the true issue is whether the potential negative impact of government funding on the performance of the APC's functions would be greater or lesser than the existing system.
- Secondly, newspapers themselves already receive money from government, in the form of advertising dollars. Representatives of newspapers have said to this Inquiry that structures are in place to ensure that the receipt of advertising money from the government (or indeed anyone providing advertising dollars) does not undermine editorial independence¹⁶⁰. The question is why similar structures or corporate cultures could not exist in the APC (or other complaints body).

Government regulation and the 'chilling effect'—fairness doctrine in the United States

6.69 It has been submitted that government regulation of speech causes a 'chilling effect', where otherwise beneficial speech is not made for fear of upsetting the government¹⁶¹. The submission can be tested against the history of the fairness doctrine in the United States.

¹⁵⁹ See the discussion in Section 8 of this report.

¹⁶⁰ See for example, Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011, 95, (Mr Hywood).

¹⁶¹ See for example, Oral submission to the Independent Media Inquiry, Melbourne, 9 November 2011, 226, (Mr Chadwick).

On the chilling effect, see Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect' (1978) 58 *Boston University Law Review* 685. Famously, the Supreme Court referred to the 'chilling effect' of libel laws on freedom of speech under the First Amendment in finding a constitutional defence to libel of a government official: *New York Times v Sullivan* 376 US 254 (1964) 300.

- 6.70 For many years commercial radio and television broadcasters in the United States were required to comply with what is referred to as the 'fairness doctrine'. This doctrine was imposed by the Federal Radio Commission, and its successor the Federal Communications Commission (the FCC), in the exercise of statutory powers to regulate broadcasting in the public interest¹⁶².
- 6.71 The fairness doctrine imposed two main requirements.
- First, it was expected that a broadcaster spend adequate time in its programming on the treatment of controversial matters of general importance.
 - Second, the broadcaster was required to undertake such treatment in a fair manner, by giving suitable opportunity for the depiction of other views. Related to fairness were requirements to provide equal opportunity for political candidates, and some obligations dealing with personal attacks and political editorials¹⁶³.
- 6.72 Not surprisingly, a legal challenge was mounted against these means of regulating editorial freedom. The challenge failed. In the *Red Lion* case¹⁶⁴ the Supreme Court described licensees of spectrum as 'public trustees', because spectrum was a scarce resource¹⁶⁵ and therefore a unique medium¹⁶⁶. For those reasons the Supreme Court held that regulation did not offend the constitutionally-entrenched free speech. It was not, however, only scarcity that justified regulation. The Supreme Court also said:

There is nothing in the First Amendment which prevents the government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airways¹⁶⁷.

¹⁶² See Thomas W Hazlett and David W Sosa, 'Chilling' the Internet? Lessons from FCC Regulation of Broadcasting' (1998) 4 *Michigan Telecommunications and Technology Law Review* 35 41–42.

¹⁶³ Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (The Guildford Press, 1996) 34. See also Charles D Ferris and James A Kirkland, 'Fairness—The Broadcaster's Hippocratic Oath' (1985) 34 *Catholic University Law Review* 605, 606–607.

¹⁶⁴ *Red Lion Broadcasting Co v Federal Communications Commission* 395 US 367 (1969).

¹⁶⁵ *Ibid* 388–389.

¹⁶⁶ *Ibid* 390.

¹⁶⁷ *Ibid* 389.

6.73 The FCC reversed its position on regulation when it was under the chairmanship of Mark Fowler (chair from 1981–1987) and Dennis Patrick (chair from 1987–1989). In its 1985 Fairness Doctrine Report, the FCC concluded that the former fairness doctrine no longer served the public interest. The Commission explained that:

(T)he interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the market place today and that the intrusion by government into content of programming occasioned by the enforcement of the [fairness] doctrine unnecessarily restricts the journalistic freedom of the broadcasters. Furthermore, we find that the fairness doctrine, in operation, actually inhibits the presentation of controversial issues of public importance to the detriment of the public and degradation of the editorial prerogatives of broadcast journalists¹⁶⁸.

6.74 The repeal of the fairness doctrine in 1987 means that, in principle, it should be possible to compare the behaviour of broadcasters before and after its repeal to determine whether the fairness doctrine did cause broadcasters to censor themselves. Some commentators have argued that there is evidence that the fairness doctrine did have a chilling effect.

- A former chair of the FCC states that a 1985 study and evidence given in a 1987 proceeding before the Commission demonstrated that the effect of the fairness doctrine was actually to suppress controversial speech¹⁶⁹.
- Empirical work is said to show that there was a marked increase in ‘informational programming’ on American radio stations after the abolition of the fairness doctrine¹⁷⁰.

6.75 Other commentators have challenged these empirical claims. For example, it has been suggested that the increase in ‘informational programming’ on AM radio stations was caused by the expansion of FM radio stations, which broadcast in stereo and are therefore better for

¹⁶⁸ 102 Book 1 F.C.C.2d 145 at 147 (¶15).

¹⁶⁹ Dennis Patrick, National Press Club, ‘Abolishing the Fairness Doctrine, A Policy Maker’s Perspective’ (Speech delivered at the National Press Club, Washington, DC, 18 July 2007) <<http://iep.gmu.edu/iepfiles/documents/Patrick.Speech.07.18.07.pdf>>.

¹⁷⁰ See Thomas W Hazlett and David W Sosa, ‘Was the Fairness Doctrine a ‘Chilling Effect’? Evidence from the Postderegulation Market’ (1997) 26 *Journal of Legal Studies* 279, especially at 299.

music¹⁷¹. Others point out that major broadcasters are seeking to attract as broad an audience as possible, and therefore have a commercial incentive not to broadcast controversial or marginalised speech¹⁷².

6.76 This debate in the United States bears out Schauer's argument that the 'chilling effect' is less an empirical claim and more a value judgment as to which potential harms are to be preferred¹⁷³. In the United States, free speech is given primacy among rights, and therefore the potential harm caused by restrictions on speech is thought to outweigh the potential harm caused by speech that is not restricted¹⁷⁴. In Australia free speech does not necessarily have the same primacy. For example, in Australia great weight is given to preventing prejudice to a fair trial, so restrictions are placed on what the media can publish about matters that are *sub judice*. The United States strikes this balance differently.

6.77 Concerning fairness, in Australia the ABC and SBS are under comparable duties to be impartial or balanced over time¹⁷⁵. The ABC Code of Practice states that the ABC 'aims to present, over time, content that addresses a broad range of subjects from a diversity of perspectives reflecting a diversity of experiences', while the SBS Code of Practice states that it should report 'a wide range of significant views'. However, no one has suggested (and it appears to the Inquiry that no one could suggest) that these obligations to report impartially or with balance have prevented either of the national broadcasters from reporting fearlessly.

6.78 The Inquiry heard evidence from Paul Murray (a former editor of the *West Australian* and now working for Fairfax radio) that there is little difference between the fairness obligations imposed on Australian broadcasters and what would be required by journalist ethics:

¹⁷¹ Gregory P Magarian, 'Substantive Media Regulation in Three Dimensions' (2008) 76 *George Washington Law Review* 845, 883 n 203. An increase in radio programs does not mean there was an expansion in the viewpoints presented, and causation is also difficult to establish: *Ibid*.

¹⁷² Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (The Guildford Press, 1996) 37–38.

¹⁷³ Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect' (1978) 58 *Boston University Law Review* 685, 687–688.

¹⁷⁴ *Ibid* 704. This is part of a broader American approach that seeks to formulate free speech rules in a way that prevents free speech rights from being eroded in times of national stress: see Vincent Blasi, 'The Pathological Perspective and the First Amendment' (1985) 85 *Columbia Law Review* 449, 482.

¹⁷⁵ *Australian Broadcasting Corporation Act 1983* (Cth) s 8(1)(c): the reporting of news and information must be 'accurate and impartial according to the recognized standards of objective journalism'; *Special Broadcasting Services Act 1991* (Cth) 10(1)(c): the reporting of news and information must be 'accurate and is balanced over time and across the schedule of programs broadcast'.

I have a foot in both camps. I write two columns a week for The West. ... I feel no more constrained in my commentary on radio than I do in my commentary for the newspaper. It is very similar. I mean, what constrains me is the general upbringing that I have had in journalism that there are standards that we live up to¹⁷⁶.

Mr Murray said that the 'chilling effect' did not come from requirements of fairness and balance, but rather anti-vilification laws and the laws of defamation and contempt¹⁷⁷.

- 6.79 It should also be remembered that the 'chilling effect' is only a concern when speech is not made that otherwise could (and should) be made¹⁷⁸. Prohibitions on misleading and deceptive commercial speech 'chill' speech in one sense, but there is no social loss from any speech that is deterred. With news and current affairs, the challenge is to frame any restrictions on speech with as much clarity as possible, to reduce the possibility that self-censorship will lead to otherwise beneficial speech not being made.

¹⁷⁶ Oral submission to the Independent Media Inquiry, Perth, 6 December 2011, 103 [20]–[27], (Mr Murray).

¹⁷⁷ Ibid 103 [37]–104 [4].

¹⁷⁸ Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect' (1978) 58 *Boston University Law Review* 685, 689–690, 693.

7. Self-regulation: journalistic codes and ombudsmen

- 7.1 Australia has no laws that regulate print and online news media specifically. Like everyone else, however, they are subject to the laws of the land¹. Beyond that, they regulate themselves. This self-regulation is both internal and external. Internal regulation includes the adoption of standards or codes of ethics which are enforced by the editor and, in a handful of newsrooms, the appointment of an ombudsman or readers' editor. External self-regulation involves the Australian Press Council (APC).
- 7.2 This section will examine internal regulation and ombudsmen. It also looks at the market as a mechanism of accountability. The following section will deal with the APC.
- 7.3 There is evidence, however, of dissatisfaction with the way self-regulation works, and several reasons have been advanced for the need for additional regulation of the print media in particular. Some of the reasons are structural:
- commercialisation—where the need for short-term profits can trump responsible reporting
 - concentration—where the publishers are in a position to make their news publications serve their own interests rather than the public interest
 - declining news quality—where in recent years the trend has been to reduce numbers of journalists and increase the production of 'infotainment' with the result being 'cheap fun instead of public service'².
- 7.4 Behavioural reasons are also behind the call for regulation³. Particular attention is drawn to:
- violations of the privacy of individuals
 - injury to the reputation of individuals and institutions
 - partisanship in politics.

¹ See the discussion in Section 5 of this report.

² Claude-Jean Bertrand, *An Arsenal for Democracy: Media Accountability Systems*, (Hampton Press, 2003) 4–6.

³ See the discussion in Section 4 of this report.

The market as a mechanism of accountability

7.5 In their submissions, the newspapers argue that the marketplace is the ultimate mechanism of accountability and nothing more is required. For example:

- News Limited's submission states that '[t]he test of a media outlet's relevance is in fact a test each outlet must pass every day because consumers can and do decide with great frequency what media they will consume. The Australian market allows for media outlets that are relevant to a wide audience to be popular and for those that lack relevance to lose readers'⁴.
- Fairfax Media points to the 5.3 million readers who have looked at www.smh.com.au or www.theage.com.au at least once in September 2011 and states: 'If there is a problem with our content, or if the public has a low opinion of our journalism, this is not showing up in our readership numbers'⁵.
- Mr Cronin, the group editor-in-chief of West Australian News, told the Inquiry that any power newspapers wield is determined 'by the people because if we abuse that power, and various newspapers at various times may have slipped off the pedestal, if you like, we get punished by the readers. The power only exists as long as the readers give you the power. If the readers decide that you are misusing the power, that you are publishing unreliable information, that your comments are unreasonable and outrageous, they just stop buying the paper. That is where the control lies'⁶.

7.6 The Australian newspaper market is far from the ideal truly competitive market which imposes considerable discipline on suppliers of products. In highly concentrated markets, and the Australian newspaper market is one such market, that discipline is dissipated and consumers have little choice and little power to influence what is supplied. Furthermore, newspapers operate in a dual market serving both readers and advertisers with only about a quarter of their income coming from circulation sales. In seeking to best serve the commercial interests of their shareholders, newspaper managers will regularly need to

⁴ News Limited, Submission to the Independent Media Inquiry, 2011, 1.

⁵ Fairfax Media Limited, Submission to the Independent Media Inquiry, 2011, 3.

⁶ Oral Submission to the Independent Media Inquiry, Perth, 6 December 2011 36 [31]–[40] (Mr Cronin). See also Australian Associated Press Pty Limited, Submission to the Independent Media Inquiry, 2011, 16.

balance the conflicting interests of readers and advertisers in their dual market. It is unlikely that resolution of those conflicts will always favour the interests of readers. Newspapers themselves regularly champion regulation in favour of consumers in markets where similar asymmetries apply. 'Truth in advertising', product warranties and financial product disclosures statements are some common examples.

7.7 In addition, production of news is costly and it would be unnatural for newspaper proprietors not to have a tendency to minimise costs by reducing quality to the minimum level acceptable to readers. Because of information asymmetry, readers are seldom in a position to know or judge the quality of news stories—assess the reliability of the data or sources used, distinguish between facts and opinion, identify bias in the way the story is reported; or ascertain other aspects of a story's quality. However, there is an expectation by readers and society generally that news should be factual, reliable, accurate and unbiased. Newspapers and journalists share these expectations and give expression to them in codes of ethics.

7.8 Their adoption of these codes is not only a form of self-regulation, but is also an expression of their conviction that the application of such regulation is not an undue constraint on the freedom of the press or a restraint on their market operations. The main flaw in the present arrangements is an apparent insufficient diligence in the application of the codes. Consequently, any action that may be necessary to improve the diligence with which the codes are applied should not lessen any current role of the marketplace has as a mechanism of accountability.

7.9 Thus, the idea that the market can act as the primary mechanism of accountability can be put to one side. In a sense it already has been put aside by the media. Over time they have adopted other forms of regulation, all appropriately described as self-regulation⁷.

Codes of ethics

7.10 Christians contends that journalists' fierce independence and their inflexible views on autonomy 'preclude in the press a general appreciation of accountability'. What is needed,

⁷ Self-regulation refers to regulation by non-state actors. The 'self' may be the newspapers itself or it may be collective industry regulation.

he argues, is a 'generally accepted body of principles' that can guide the journalist and the publisher thus creating the 'soil from which accountability can grow'⁸.

The journalists' code

- 7.11 Such a 'generally accepted body of principles' is to be found in the code of ethics developed by the journalists' union which was the first in Australia aimed at practitioners and has been the most important in shaping later codes.
- 7.12 Through the 1920s and 1930s members of the journalists' union [then the Australian Journalists' Association (AJA), now the Media, Entertainment and Arts Alliance (MEAA)] discussed the need for a code of ethics⁹. L. J. McBride, a journalist, said there was only one other profession that allowed entry without qualification or challenge. 'That profession is leniently described as the most ancient of all. We journalists, in that sense, have one standard in common with the immoral immortals'¹⁰. The union's code was drafted by a distinguished barrister, later Justice Barry of the Victorian Supreme Court, and was incorporated into the union's constitution and rules in 1944. Its eight clauses included the need to report with 'scrupulous accuracy', to use 'fair and honest means' to gather news, to not allow personal interests to influence what was written, and for the journalist to respect all confidences received 'in the course of his calling'.
- 7.13 The AJA wanted newspaper proprietors to join with them in promulgating the code but they refused, 'contending that the AJA was trying to interfere in their business'¹¹. The struggle was less about standards than about who had the authority to set them. As RAG. Henderson, an editorial executive with John Fairfax and Sons Ltd, wrote: 'The maintenance of ethical standards is a matter between newspapers and their readers and it cannot be considered a function of an organisation such as yours (the AJA)'¹².

⁸ Clifford Christians, 'Self Regulation: A Critical Role for Codes of Ethics', in Everette E Dennis, Donald M Gillmor and Theodore T. Glasser, (Eds), *Media Freedom and Accountability*, (Greenwood Press, 1989).

⁹ Clem Lloyd, *Profession: Journalist*, (Hale & Iremonger, 1985) 171.

¹⁰ Ibid 171.

¹¹ Geoffrey E Sparrow (Ed), *Crusade for Journalism: Official History of the Australian Journalists' Association*, (The Association, 1960) 132.

¹² Clem Lloyd, *Profession: Journalist*, (Hale & Iremonger, 1985) 229.

- 7.14 In 1946 and 1947 the proprietor of Australian Consolidated Press, Sir Frank Packer, and two of his senior editorial executives, Brian Penton and David McNicoll, challenged in the federal Arbitration Court decisions of the AJA's NSW ethics committee to fine them over breaches of the code. Packer also applied to deregister the union. McNicoll claimed the union's rules were 'tyrannical and oppressive'. The arguments were unsuccessful. An appeal to the High Court was dismissed¹³.
- 7.15 Part of the tension between the AJA and the publishers can be explained by the existence of socialists in the union movement and Packer's strong opposition to communism. But there was, in addition, a real tension between proprietors and journalists over standards. In the 1940s, Crayton Burns, a political journalist observed:
- Employers rarely instruct a journalist specifically to do something unethical; they merely expect results and take no excuses. There are some who are not very squeamish how the reporter, photographer or commentator gets results. The men who get the results also get the rewards*¹⁴.
- 7.16 When the AJA revised its code in 1984 it inserted a clause: 'They shall respect private grief and personal privacy and shall have the right to resist compulsion to intrude on them'. This acknowledges not simply the tension between disclosure and privacy but points to the limits of the journalist's ability to act autonomously. As was noted in a subsequent review of the code: 'It is managements that embed conflicts of interest into the work practices of a media organisation, so deeply in some cases it seems that no ethical issue registers. Journalists who pay for interviews use their employer's chequebook. A corporation's conflicts of interest dwarf those of individual journalists'¹⁵.
- 7.17 Following a review in the mid-1990s the current code (the MEAA's) was adopted by members in 1999. It restates the established obligations on journalists, and adds some more. They are required to commit themselves to honesty; fairness, independence; respect for the rights of others. This requires them to report and interpret honestly, strive for accuracy and fairness and disclose all essential facts. They are not to 'place unnecessary emphasis on

¹³ *Consolidated Press Ltd v Australian Journalists' Association* (1947) 73 CLR 549.

¹⁴ Clem Lloyd, *Profession: Journalist*, (Hale & Iremonger, 1985) 230.

¹⁵ 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) xiii.

personal characteristics, including race ethnicity, nationality, gender, age, sexual orientation, family relationships, religious belief, or physical or intellectual disability'. They must 'respect private grief and personal privacy'. Also they must do their 'utmost to achieve fair correction of errors'.

- 7.18 The MEAA code only applies to union members and not all practising journalists are members. Moreover, union membership is declining, as it is in other trade unions. Union membership was 12 000 in the mid 1980s¹⁶, since then memberships has declined. Aside from dwindling membership of the union, those working in senior editorial positions are exempt from membership of the MEAA, and hence beyond the reach of its code.
- 7.19 The MEAA has a complaints procedure to deal with code breaches. A national ethics panel administers the process. If a complaint is lodged, the chair of the national ethics panel convenes a complaints committee of three members, one of which must be a public member. When a complaint is received, the committee must convene a hearing within eight days. Both parties can call and cross-examine witnesses. The rules of natural justice are observed and the formalities of legal procedure are followed when necessary. 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, fine of up to \$1000, suspension from membership for up to one year, and expulsion.
- 7.20 A review of the 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 unenforceable¹⁷ unless the powers of suspension or expulsion were exercised. They almost never were.
- 7.21 The review recommended changes to improve the complaints committee's processes, but it remains largely ineffective despite the best efforts of its members. Mr Christopher Warren, the national secretary, in his submission to the Inquiry said: 'It is also clear from letters of complaint which are received by the Alliance that in many cases the public are confused about where to complain, what sort of behaviour constitutes a breach of ethics and what

¹⁶ Geoffrey E Sparrow (ed), *Crusade for Journalism: Official History of the Australian Journalists' Association*, (The Association, 1960) 157; *Clem Lloyd, Profession: Journalist*, (Hale & Iremonger, 1985) 306.

¹⁷ 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) 82.

sanctions can be brought to bear in cases where journalists have behaved unethically'. Mr Warren indicated that since the revised code was adopted in 1999 only three members had been censured or rebuked. No one has been expelled in that time; the last expulsion occurred nearly 40 years ago.

Publishers' codes of ethics

- 7.22 In 1993 the editor-in-chief of the 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 within the HWT group and for News Limited, Fairfax Media and West Australian Newspapers¹⁸. Also influential in shaping those codes were the values and ideals of the MEAA code. As newspapers developed their online activities they extended the reach of their codes to cover material published online.
- 7.23 ninemsn, a joint operating venture between the Microsoft Corporation and the Nine television network, is one of Australia's leading website and news publishers operating on a network of more than 80 websites. It requires all journalists to abide by its code of conduct, which is supported by detailed editorial guidelines¹⁹. *Crikey* is a leading alternative online news website. In 2011 it introduced a code of conduct for its journalists and freelance contributors that was modelled on the MEAA code²⁰.
- 7.24 Professor Mark Pearson, on behalf of a research team examining media coverage of vulnerable persons, has provided the Inquiry with a table setting out the contents of several ethical codes. The table also includes codes that have been adopted by broadcasters. The table is at Annexure J.

¹⁸ John Hurst and Sally White, *Ethics and the Australian News Media*, (Macmillan, 1994) 287–97. A co-author of this book, Sally White, was commissioned by the editor-in-chief of the HWT, Steve Harris, to assist in drafting the professional practice policy.

¹⁹ ninemsn, Submission to the Independent Media Inquiry, 2011, 2.

²⁰ Private Media 'Private Media Code of Conduct', *Crikey.com.au* <www.crikey.com.au/code-of-conduct/>.

What do the codes require?

7.25 There are several recurring themes that emerge from the journalists' and publishers' codes.

Keeble has written that the common values are:

- fairness
- separation of fact and opinion
- the need for accuracy linked with the responsibility to correct errors
- condemnation of deliberate distortion and suppression of information
- maintaining of confidentiality of sources
- upholding journalists' responsibility to guard the citizen's freedom of expression
- recognise the duty to defend the dignity and independence of the profession
- protecting people's right to privacy
- respecting and seeking out the truth
- avoiding discrimination on grounds of race, sexual orientation, gender, language, religion or political opinions
- avoiding conflicts of interest²¹.

The value of codes

7.26 Many differing views have been expressed about the value of standards or codes of ethics. One is that they can be an effective component in a broad strategy to institutionalise ethical behaviour²². First, they bring to the attention of journalists that there are rules to be observed. Second, they can be a convenient means of getting out of an embarrassing situation—for example, by refusing an offer of free meal at a restaurant the subject of a review. Third, they can reassure the public that news organisations are concerned with accuracy, fairness and honesty²³.

²¹ Richard Keeble, *Ethics for Journalists*, (Routledge, 2001) 14.

²² Claude-Jean Bertrand, *An Arsenal for Democracy: Media Accountability Systems*, (Hampton Press, 2003) 59.

²³ William A Henry III, 'Freedom and accountability: A Search for Solutions', in Everette E Dennis, Donald M Gillmor and Theodore T. Glasser, (eds), *Media Freedom and Accountability*, (Greenwood Press, 1989) 153, 169.

- 7.27 A different view is that too often codes serve as a marketing tool. In reality, so it is said, they cannot change corporate culture and the demands of commerce, yet give the impression that high standards are required. Another view is that if codes are voluntary, they are difficult to enforce and they can never cover all the problems that may confront a journalist²⁴.
- 7.28 It has also been said there is tension between proprietors, editors and journalists regarding the extent to which the codes should be promoted in newsrooms. It is to be acknowledged that the great majority of journalists are ethical or strive to be so. Journalism schools around the country devote considerable time to teaching ethics. But the competitive pressure in the newsroom to get the story sometimes pushes journalists in different directions from their codes of ethics²⁵. One study found that the reason behind 21 of 61 admitted breaches of standards was 'pressure from superiors'. The same study found only seven per cent of respondents used codes of ethics in day-to-day decision-making, while one in five respondents said they never used it²⁶.
- 7.29 Similar findings were revealed in research commissioned by the Australian Broadcasting Authority, the predecessor of the Australian Communications and Media Authority (ACMA). Academic researchers were asked to conduct a study in which 100 news producers were surveyed and 20 key news producers and media experts were interviewed about, among other things: the attitudes and characteristics of news producers; influences on their decision-making including ownership, their role as gatekeepers and agenda-setters; their ethics, and the industry's credibility. The researchers found that uppermost in the minds of interviewees were the commercial pressures of increasing ratings, in radio and television, and circulation, in newspapers, and that many news producers were eager to give audiences what market research tells them audiences want²⁷.

²⁴ Itai Himelboim and Yihiel Limor 'Media perception of freedom of the press: A comparative international analysis of 242 codes of ethics' (2008) 9(3) *Journalism* 235, 240.

²⁵ Communications Law Centre, UTS, Submission to the Independent Media Inquiry, 2011, 3, submitted that the APC codes contain standards relating to core corporate governance and responsibility. See also discussion in, Dr Glen Fuller, Submission to the Independent Media Inquiry, 2011.

²⁶ John Hurst and Sally White, *Ethics and the Australian News Media*, (Macmillan, 1994) 318 nn 1-2.

²⁷ Mark Pearson, Jeffrey E Brand, Deborah Archbold and Halim Rane, *Sources of News and Current Affairs*. (Australian Broadcasting Authority, 2001) 7 <http://epublications.bond.edu.au/hss_pubs/96>.

- 7.30 Putting to one side adherence, there is limited consensus about how the standards in codes should be interpreted and applied. Many explanations have been advanced for this, including the highly individualistic culture of the profession²⁸ and its strong competitive ethos²⁹. In this culture, how a story is obtained, and how people, events, organisations and ideas are portrayed is decided by what is likely to be favourably received by editors and audiences rather than by ethical considerations.
- 7.31 There is also the difficulty of converting the abstract expression of values, standards and ideals into concrete decision rules. It is not enough merely to formulate broad principles and incorporate them in general rules.
- 7.32 This is borne out, by way of example, in the research into the reporting of the 2009 Black Saturday bushfires in Victoria³⁰. That research found:
- There was no consensus among journalists on how to respond to official roadblocks. Responses ranged from acceptance of the roadblocks as legitimate instruments of law to resolute intolerance and exhaustive efforts to defeat them.
 - There was no consensus among journalists on whether to use deception to obtain access to closed areas. Responses ranged from declining offers from residents to obtain for journalists wristbands which would have enabled them to be taken up disguised as residents, to efforts at pretending to be residents or volunteers in order to obtain entry.
 - There was no consensus on how to treat private property within the fire ground. Responses ranged from not going on private property at all, to treating the entire area as if private property had ceased to exist.
 - There was no consensus on whether, once in the fire ground, media practitioners should declare themselves to the authorities or conceal their role.
 - There was no consensus about obtaining prior consent before using images and content from social media sites such as Facebook.

²⁸ Clifford G Christians, Kim B Rotzoll, Mark Fackler, Kathy Brittain McKee and Robert H Woods Jr, Eds, *Media Ethics: Cases and Moral Reasoning*, (Pearson, 7th edition, 2005).

²⁹ Ian Richards, *Quagmires and Quandaries: Exploring Journalism Ethics*, (UNSW Press, 2005).

³⁰ Dr Denis Muller and Michael Gawenda, *Black Saturday: In the Media Spotlight*, (Cussonia Press, 2011).

- There was no consensus about whether it was right or wrong to induce survivors to cry for the camera.
- There was some consensus that a survivor's refusal to be interviewed also implied a refusal to be photographed or captured on film.
- There was some consensus on how to treat survivors: most practitioners accepted that no means no.
- There was some consensus that detail about causes of death should be confined to that which was strictly necessary to an understanding of the story.

7.33 Another difficulty referred to in submissions is that there is a multiplicity of codes, with journalists being potentially subject to the journalists' code, a publisher's code, and APC codes. This multiplicity 'makes life unnecessarily complicated for professionals and for the public'³¹.

7.34 If codes are to be a branch of any media accountability system, it is necessary to develop a framework of doctrines, practice and institutions that will take into account the active forces at work, and make possible the realistic achievement of the objectives sought³². So far this has not been done.

Ombudsmen and readers' editors

7.35 An internal mechanism more advanced than the simple adoption of a code of ethics is the ombudsman or readers' representative. The idea of a press ombudsman originated in Sweden. The general idea is that there be an in-house advocate to whom a complaint, comment or question can be directed.

³¹ Dr Denis Muller, Submission to the Independent Media Inquiry, 2011, 3. See also Media, Entertainment and Arts Alliance, Submission to the Independent Media Inquiry, 2011, 8–9; ARC Linkage Grant LP0989758, Submission to the Independent Media Inquiry, 2011, 6; Hunter Institute of Mental Health submission, Submission to the Independent Media Inquiry, 2011, 4. In contrast, the AAP submitted that it was not possible to have a 'one size fits all' code applicable to all publishers, 'given the wide variety of practices that fall under the umbrella of journalistic practices': Australian Associated Press Pty Limited, Submission to the Independent Media Inquiry, 2011, 9–10.

³² Thomas I Emerson, *The System of Freedom of Expression*, (Random House, 1970) 4. See also the discussion in, Department of Media and Communications - University of Sydney, Submission to the Independent Media Inquiry, 2011, 7-9.

7.36 The precise role of an ombudsman differs from paper to paper. Henry writes that³³:

There are virtually as many definitions of the job as there are tenants of it. Some ombudsmen are drawn from the ranks of reporters or editors, others come from entirely outside the news organisation. Some have indefinite and presumptively long tenure, others are hired via non-renewal contracts. Some report to the editor, some to the publisher. Some are free to research and write whatever they please. Most endure in-house bargaining, if not outright veto-power from on high ... Some are mandated simply to represent the general public, with specific emphasis on aggrieved targets of coverage. Some consider themselves in-house press critics and feel free to take on a topic whether or not there has been a consequential complaint from outside. Some are glorified public relations counsellors whose primary duty is to placate complainants rather than to serve as an avenging angel on their behalf.

7.37 On 15 October 2001 the President of the Organisation of News Ombudsmen (ONO) in an address to the World Newspaper Congress in Vienna³⁴ said:

The ombudsman should work independently and be able to investigate cases where the newspaper is criticised. And he or she should be able to comment on the newspaper's ethics in regular columns.

It is well-documented in practice, that this can be a simple and yet effective way of self-regulation. Done well this form of self-scrutiny will in the end make the newspaper more trustworthy. Editorial independence is unchanged. The editor-in-chief still has the final decision in any case. But it gives openness, frank discussions and a more accountable newspaper or broadcaster.

7.38 These views suggest that the most useful role for the ombudsman or readers' representative is to look within their news organisation on behalf of the reader to see whether standards

³³ William A Henry III, 'Freedom and accountability: A Search for Solutions', in Everette E Dennis, Donald M Gillmor and Theodore T. Glasser, (Eds), *Media Freedom and Accountability*, (Greenwood Press, 1989) 153, 171.

³⁴ Jacob Mollerup (Address to the World Newspaper Conference and World Editors Forum, Vienna, 15 October 2001) cited in Organization of News Ombudsmen, Submission to the Independent Media Inquiry, 2011, 2.

have been met and if not to say so, and to look outside their news organisation to see what is developing as potential ethical issues for journalism³⁵.

- 7.39 News ombudsmen can be found in a number of countries, including Argentina, Belgium, Canada, Estonia, France, Kenya, Switzerland, Turkey and the United Kingdom, as well as in 13 American states³⁶. While the concept has been around for some time, it is somewhat surprising that the appointment of an ombudsman or reader's representative is not more widespread.
- 7.40 It is interesting to observe what effect the appointment of an ombudsman can have. In 2003 *The New York Times*, having resisted the idea for some years, appointed what it called a public editor following the publication of numerous fictitious articles by one of its journalists. The public editor (Daniel Okrent) was appointed for a fixed term and given a fortnightly column in the paper's Review section where he could write as he saw fit about readers' complaints and the newspaper's practices without anyone other than a copy editor seeing his work prior to publication³⁷.
- 7.41 Mr Okrent soon found himself struggling to cope with the 'flood of grievance that previously had had no effective outlet'³⁸; many of the 500–1000 messages his office received weekly identified the newspaper's shortcomings, but others came from readers able to identify all bias except their own while others still came from what Mr Okrent terms the 'crisis management commandos' in public relations who 'sometimes fight cinders with fire'³⁹. Mr Okrent wrote that he encountered both cooperation and resistance from within the newspaper, leading him to conclude, like the gadfly journalist I.F. Stone before him, that; 'persuading others to virtue is not an endearing profession'⁴⁰. On Mr Okrent's retirement the newspaper hired a replacement and the public editor role remains in place.

³⁵ Sally Begbie, 'Defining the Digital News Ombudsman' (Presented to the Organisation of News Ombudsman Conference, Oxford, 13 May 2010) cited in Organization of News Ombudsmen, Submission to the Independent Media Inquiry, 2011, 5.

³⁶ 'Regular Members', ONO: Organization of News Ombudsmen <<http://newsombudsmen.org/membership/regular-members>>.

³⁷ Daniel Okrent, *Public Editor #1*, (Public Affairs Books, 2006) 1–2.

³⁸ *Ibid* 34.

³⁹ *Ibid* 35.

⁴⁰ *Ibid* 10.

- 7.42 A good early example of the value of a news ombudsman is when *The Washington Post* ombudsman was asked to investigate how the newspaper had come to publish a fictitious article about an eight-year-old heroin addict. The article headlined 'Jimmy's World' had won a Pulitzer prize and the newspaper was forced to return the award. The newspaper published the ombudsman's account of his investigation that was remarkable for the amount of space the newspaper gave to its public shame (the account ran to 13 967 words) as well as the frankness of his conclusions: 'It was a complete systems failure, and there's no excuse for it'⁴¹.
- 7.43 In England, despite the large number of national daily newspapers, only two have ombudsmen or readers' editors: *The Guardian* and its sister Sunday newspaper, *The Observer*. The editor of *The Guardian*, Alan Rusbridger, has written that appointing the newspaper's first readers' editor, in 1997, was 'single most liberating act of my editorship. It freed me from dealing with stroppy callers; it cut the legal bills; it enabled reporters to immediately have a means of clarifying or correcting their mistakes; and it gave readers the sort of complaints service they regard as commonplace in their dealings with any other organisation'⁴². Since *The Observer* followed suit in 2001, its readers' editor, Stephen Pritchard, has responded to 60,000 complaints and queries⁴³.
- 7.44 In Australia, between 1989 and 1991, *The Sydney Morning Herald* experimented with a readers' editor. Initially the position was described as an ombudsman but the person appointed, George Masterman QC, declined the title following a request from the Swedish Ombudsman's office that the term be confined to offices investigating government departments. The office was then called by the name of the project, 'Who is right?' It dealt with complaints from readers and where necessary resulted in the publication of a correction. If the complaint raised broader issues about news gathering or newspaper production, a report was prepared for publication. As events turned out, Mr Masterman was too independent for the liking of the *Herald's* journalists who had not been consulted by management about the new role. Following a series of disagreements over adverse findings,

⁴¹Bill Green 'The Players: It Wasn't a Game' *Washington Post* April 19 1981 (reprint)
<<http://academics.smcvt.edu/dmindich/Jimmy%27s%20World.htm>>.

⁴²Alan Rusbridger 'Hacking away at the truth' (Orwell Lecture delivered at University College, London 10 November 2011)
The Guardian <www.guardian.co.uk/media/2011/nov/10/phone-hacking-truth-alan-rusbridger-orwell>.

⁴³Stephen Pritchard, 'Holding ourselves accountable', (2008) 19(4) *British Journalism Review* 63.

a committee representing journalists black-banned several of Mr Masterman's reports and tried to suppress them from publication. Mr Masterman terminated his contract⁴⁴.

7.45 At present, there is one readers' editor in Australian newspapers. In August 2011 *The Sydney Morning Herald* and its sister paper *The Sun-Herald* appointed a readers' editor, Judy Prisk. In the first of her weekly columns Ms Prisk informed readers she would be 'an advocate in the newsroom for our readers'. A long-time member of the newspaper's staff, Ms Prisk wrote:

*You will ask the questions and I will do my best to answer them by speaking to editors, reporters, photographers and the production team. Sometimes we may have to agree to disagree, but you will have your say. And many of your thoughts and comments will find their way into the column*⁴⁵.

7.46 The editor-in-chief of *The Age*, Mr Paul Ramadge, told the Inquiry a readers' editor will be appointed in early 2012⁴⁶.

7.47 In the world of broadcasting, SBS has had an ombudsman (initially called an Audience Affairs Manager) since 2005⁴⁷.

7.48 To sum up, there is general agreement in the codes on the values and standards that publishers and journalists should observe. This is one of their strengths because it shows consistency in the values accepted by the media. On the other hand, there are few effective institutional measures for enforcing the codes. This is their weakness.

7.49 An ombudsman could be an effective accountability mechanism. It is more radical than the adoption of codes of ethics. But an ombudsman or readers' representative is unlikely to be truly effective unless given power to require something to be done about a valid complaint. Few of the ombudsmen referred to have been given such a power. More to the point, few organisations have deemed it appropriate to appoint an ombudsman or readers' representative.

⁴⁴ Denis Muller, 'Why journalists are mistrusted and what can be done about it', in Matthew Ricketson (ed) *Australian Journalism Today* (Macmillan, 2012) 96.

⁴⁵ Judy Prisk 'It's about you, and I'm on your side' *The Sydney Morning Herald* 24 August 2011 <www.smh.com.au/national/its-about-you-and-im-on-your-side-20110823-1j87z.html>.

⁴⁶ Email from Paul Ramadge to the Independent Media Inquiry, 30 January 2012.

⁴⁷ See Section 6 of this report.

7.50 The result is a gap between the important ideals espoused in codes and actual practices. What a character in Tom Stoppard's play about journalism, *Night and Day*, said in a debate with a Fleet Street journalist about freedom of the press more than three decades ago is still apposite: 'I'm with you on the free press. It's the newspapers I can't stand'⁴⁸

⁴⁸ Tom Stoppard, *Night and Day*, (Faber, 1978) 60.

8. Self-regulation and the press council

- 8.1 Many countries have established press councils as a way of providing a check on newspapers that is outside the individual newspaper houses, although not always independent of them. This section of the report briefly traces the history of press councils and describes their functions. It then recounts the history of the British Press Council, summarises current trends in press council development and describes the Australian experience.
- 8.2 The first press council can be traced back to 1916 when the Swedish government formed the Press Fair Practices Commission. Many European countries followed suit, with the British Press Council, which was established in 1953, being the best-known.
- 8.3 Press councils were also established in the United States. The first was the Minnesota Press Council, which was set up in 1971 by the Minnesota Newspapers' Association. The first nationwide press council was the National News Council established by a number of private foundations in 1973. Unlike their European counterparts, the United States press councils did not have a long life.
- 8.4 There are now more than 87 press councils around the world. For the most part they have been set up by the media. However, some have been established by private organisations and a few (about 14) have been created, or their powers supplemented, by law. In Western democracies they tend to be independent of government, although in some democracies, such as India, the government appoints the members. They also tend to be funded independently of government, although in Germany the press council receives 30 per cent of its funding from government. So there are few universal rules about how a press council should operate, even in mature democracies.
- 8.5 Speaking generally, however, press councils are responsible for reviewing what is published by the media, mostly in response to complaints. They do this by reference to some set of standards or principles, which it is part of their job to promulgate. Their purpose is to maintain public trust in the media by improving the quality of journalism and providing some degree of public accountability. Nowadays, most councils are not limited to the print media, but deal with programs on television, radio and the online editions of newspapers as well.

- 8.6 In addition to these core functions, most press councils also exist to promote free speech. Precisely what this means is not clear. Sometimes it is taken to require the promotion of standards and to maintain trust in the media industry. Sometimes it is taken to require active support of the press's right to communicate in whatever way it sees fit.
- 8.7 While the objects of a press council would give it important functions to perform, there are editors and journalists who object even to this voluntary system of regulation. Some contend that it is but the first step toward government regulation. Another view is that a press council is unnecessary: if a publication exceeds its proper boundaries the public will simply move to another publication.
- 8.8 Then there is the oft-repeated argument that a press council will inhibit editorial freedom. But the fact that so many press councils have been set up voluntarily seems to contradict this view.
- 8.9 The same might be said in response to another argument: that they serve no purpose. They are not needed, so it is said, by a responsible newspaper and are ignored by an irresponsible one.

The British Press Council

- 8.10 The British Press Council, in addition to being so well-known, has been used as a model in several countries, including Australia¹. It was used as a model for the Australian Press Council (APC), no doubt because of the similarities in the culture of the two countries and the similar nature of their political institutions. For this reason it is relevant to reflect on why it was formed and how it has performed.
- 8.11 The British Press Council has had a chequered history. Its origins are in the first Royal Commission on the Press, which was chaired by Sir William Ross and reported its findings in 1949. It has been the subject of at least eight later commissions and inquiries and now another inquiry (the Leveson Inquiry) established in the aftermath of the *News of the World* scandal.

¹ The following discussion is taken mainly from David Calcutt QC *Review of Press Self-Regulation*, Cm 2135 (1993) and David Calcutt QC (Chair) *Report of the Committee on Privacy and Related Matters*, Cm 1102 (1990).

- 8.12 The Royal Commission that started it all was appointed in response to public and parliamentary criticism of declining press standards and fears of monopolistic tendencies in the control of the press. The Royal Commission recommended the establishment of a General Council of the Press, which was to derive its authority from the press, not from statute. The General Council was to seek agreement on what constituted sound professional practice to 'build up a code of conduct in accordance with the highest professional standards'. It would discourage intrusions into privacy and encourage newspapers to correct factual errors and make space for views contrary to their own. Importantly, it was to consider complaints about the conduct of the press.
- 8.13 The Royal Commission wanted the General Council to encourage 'the growth of the sense of public responsibility and public service amongst all those engaged in the profession of journalism'.
- 8.14 Nothing much happened to implement the recommendations until 1952 when a private member's bill was introduced into parliament to set up a statutory press council. The newspapers' response was immediate. A General Council of the Press was established by the industry in 1953. Its stated objectives were to protect freedom of the press, and to maintain professional standards. Contrary to the Commission's recommendations, the Council was not to consider complaints, it did not have an independent chair and it had no lay member.
- 8.15 In 1961 the second Royal Commission into the Press was set up under the chairmanship of Baron Shawcross. It was to examine the economic factors affecting the production and sale of newspapers, magazines and periodicals and what effect those factors had on diversity and the accurate presentation of news. The report, which was published in 1962, criticised the General Council's failure to implement the recommendations of the first Royal Commission. The report stated that the press should be given a second opportunity voluntarily to adopt those recommendations. If it did not take up that opportunity, the report recommended that a statutory body be established.
- 8.16 Once again only a few of the recommendations were adopted. The General Council adopted a new constitution which provided for 20 professional members, five lay members and a lay chairman. It also changed its name to the Press Council. It did not set up a Complaints Committee until 1967.

- 8.17 In 1972 the Younger Committee looked into the Press Council's performance on privacy issues. The Committee recommended that the Press Council should have more lay members. The Press Council did not accept this recommendation. The Younger Committee also recommended that the Press Council should insist that its adjudications on complaints be prominently published. The recommendation was not implemented.
- 8.18 The third Royal Commission on the Press, the McGregor Commission, was established in 1974 and reported in 1977. The Royal Commission investigated a wide range of topics including the activities of the Press Council. The Royal Commission reiterated its belief in self-regulation, but was critical of the performance of the Press Council. In particular, it said that the Press Council did not deal with complaints satisfactorily. Certain reforms were suggested. Among them were that the Press Council should publish a written code of conduct for journalists, and monitor the press's compliance with the code. The Royal Commission made it clear that unless matters improved, a statutory press council should be set up.
- 8.19 The Press Council rejected these suggestions. Not surprisingly, complaints about the press continued, with particular emphasis on the press's growing intrusion into people's privacy.
- 8.20 In 1989 two private members' bills were introduced into the British parliament. One related to the protection of privacy, the other to providing a right of reply. The government responded by appointing a Committee, chaired by Mr (later Sir) David Calcutt QC, to inquire into privacy and other matters. The inquiry was limited to the press: other media were outside its scope. The Calcutt Committee reported in 1990. It made a number of recommendations, including that a new Press Complaints Commission be established with greater powers than the Press Council and that if this did not work more effectively than the Press Council, a statutory press tribunal for handling complaints should be introduced.
- 8.21 The new body was established and began functioning in 1991. It had 16 members, 12 of whom were editors or senior journalists.
- 8.22 Two events led to Sir David being asked to review press self-regulation. The first was the publication of photographs of the Duchess of York topless. The second was the publication of tapes of a conversation between the Prince of Wales and the then Lady Camilla Parker Bowles.

- 8.23 Sir David found that the new Press Complaints Commission was not an effective regulator of the press: it was not operating a code of practice which enabled it to command not only the press but also public confidence; it did not balance fairly the press and the individual; it was not truly independent. Sir David recommended that there should be statutory regulation of the press. That, said Sir David, would have the likely effect of making a positive contribution to the development of the highest standards of journalism. He also recommended that the statutory press tribunal have power to conduct its own inquiries, draw up a code of practice, impose fines and costs, and award compensation.
- 8.24 Running parallel with Sir David's review was an inquiry by the National Heritage Committee on Privacy and Media Intrusion, which had been set up in July 1992. The Committee published its report in 1993. It also recommended the establishment of a statutory tribunal with power to impose fines and order compensation. Another of its recommendations was for the appointment of a statutory press ombudsman with power to supervise the wording and position of retractions and apologies and impose fines and order the payment of compensation.
- 8.25 The government's response to the National Heritage Committee's report was contained in a paper setting out the government's policy on privacy. The government rejected the suggestion that there should be statutory regulation of the press. The paper stated that the government 'believes that, in principle, industry self-regulation is to be preferred'. It also stated that the same approach applied to the suggestion that there should be a statutory ombudsman. As to the criticism of Press Complaints Commission, the paper said the government 'looks to it [the PCC] to make further improvements to ensure self-regulation can be made to work and to carry public confidence'.
- 8.26 Later several House of Commons committees held hearings into privacy and the media. For example, the Select Committee on Culture, Media and Sport reported in 2003, 2007 and 2009. The Select Committee made a number of recommendations for reform of the PCC, but on each occasion reaffirmed its belief in self-regulation.
- 8.27 It is difficult to pinpoint the real reason the British Government refused to introduce mandatory regulation. Paul Chadwick, a noted media ethics commentator, in 1996 suggested that governments may not intervene because 'media concentration has reached the point

where no legislature would have the courage to enact a statutory scheme of journalism ethics and then to enforce it against the largest media outlets'². It is difficult to disagree with his assessment.

- 8.28 Indeed, Mr Chadwick's view receives ample support from statements on the reasons that the *News of the World* scandal was not discovered earlier. On 8 July 2011, the British Prime Minister, David Cameron, said:³

Throughout all this, all the warnings, all the concern, the government at the time did nothing.

And frankly, neither did the opposition.

To be fair, it is difficult for politicians to call for more regulation of the media, because if we do so, we're accused of wanting to stifle a free press or even free speech.

But the deeper truth is this: there is a less noble reason.

Because party leaders were so keen to win the support of newspapers, we turned a blind eye to the need to sort this issue, get on top of the bad practices, to change the way our newspapers are regulated.

[...]

Over the decades, on the watch of both Labour leaders and Conservative leaders, politicians and the press have spent time courting support, not confronting the problems.

- 8.29 Alan Rusbridger, the editor in chief of *The Guardian* newspaper, went further in his 2011 George Orwell lecture⁴:

The simplest explanation [for the lack of action] is a combination of fear, dominance and immunity. People were frightened of this very big, very powerful company and the man who ran it. And News International knew it. They had become the untouchables of British public life.

[...]

² Paul Chadwick 'Ethics and Journalism in Codes of Ethics' in Margaret Coady and Sydney Bloch (Eds) *Codes of Ethics and the Professions*, (Melbourne University Press, 1996) 244, 263.

³ David Cameron 'David Cameron's speech on phone hacking—the full text' *The Guardian* 8 July 2011 <www.guardian.co.uk/politics/2011/jul/08/david-cameron-speech-phone-hacking/print>.

⁴ Alan Rusbridger 'Hacking away at the truth' (Orwell Lecture delivered at University College, London 10 November 2011) *The Guardian* <www.guardian.co.uk/media/2011/nov/10/phone-hacking-truth-alan-rusbridger-orwell>.

It is a company intensely interested in its political muscle—an influence which politicians now readily admit they routinely courted because they felt they had no alternative. There became an unspoken reciprocity about the business and regulatory needs of Mr Murdoch and the political needs of anyone aspiring to gain, or stay in, office.

- 8.30 On 13 July 2011 the British Prime Minister announced a two-part inquiry investigating the role of the press and police in the phone-hacking scandal. Lord Justice Leveson was appointed as Chairman of the Inquiry. The first is examining the culture, practices and ethics of the media, in particular, the relationship of the press with the public, police and politicians⁵. The second part will enquire into the extent of any unlawful or improper conduct by News International and other newspapers.
- 8.31 It will be interesting to see what recommendations the Leveson Inquiry will make. Looking at the matter from afar, it would not be surprising if statutory regulation were top of the list. That is the view of Mr Rusbridger, who said in November 2011 that the existing Press Complaints Commission ‘was simply not up to the task of finding out what was going on in the newsrooms it was supposed to be regulating’, and recommended that a regulator ‘with teeth’ be established, with power to investigate professional or ethical standards and to impose fines⁶. It is true that those statements were made in response to a major scandal (phone hacking) that does not appear to have any counterpart in Australia. However, the description of the limited powers of the Press Complaints Commission do have resonance here.
- 8.32 On the other hand there are strong voices opposing significant change. One is a figure no less important than the Lord Chief Justice of England and Wales, Lord Judge. In a speech on press regulation delivered on 19 October 2011, Lord Judge said⁷:

⁵ The Leveson Inquiry, *Background* <www.levesoninquiry.org.uk>.

⁶ Alan Rusbridger ‘Hacking away at the truth’ (Orwell Lecture delivered at University College, London 10 November 2011) *The Guardian* <www.guardian.co.uk/media/2011/nov/10/phone-hacking-truth-alan-rusbridger-orwell>.

⁷ The Rt Hon. The Lord Judge, ‘13th Annual Justice Lecture, ‘Press Regulation’’ (Delivered 19 October 2011) 8.

The Press Complaints Commission is now 20 years old. Not long after its 10th Birthday the Media Committee of the House of Commons pointed out that the PCC has neither authority nor resources 'other than what is ceded voluntarily to it by the press industry'. Membership is not obligatory. The Commission has no investigative power. In reality it has no disciplinary power. When it works, as most of the time it does, it is because the press itself is prepared to comply with its rulings, not because it is under legal compulsion to do so. Its main role, and I do not seek to diminish it with faint praise, is to provide a sort of ombudsman/mediation service between the newspaper and an individual or group which is aggrieved by an article. It cannot award compensation. To criticise the PCC for failing to exercise powers it does not have is rather like criticising a judge who passes what appears to be a lenient sentence, when his power to pass a longer sentence is curtailed.

Nevertheless the PCC has been subjected to a number of criticisms ... Even if they are fully justified, the criticisms of themselves do not automatically exclude self-regulation or a form of self-regulation in the future. In other words, it does not follow that we should jump from the present system to government regulation or regulation by a government appointed body which would give ultimate power to government.

- 8.33 To be fair, Lord Judge did go on to make suggestions about how a new self-regulating PCC (or an improved version of the existing PCC) should be structured to be more effective. A number of his suggestions hark back to ideas of the past that were either not implemented by the PCC or ignored by government.
- 8.34 The current chairman of the Press Complaints Commission, Lord Hunt, also disapproves of statutory regulation. He said, with the benefit of 35 years' experience in parliament, that even if a simple bill were proposed only to establish a framework for regulation, one could not predict what would emerge once parliament had the opportunity to debate the bill and move amendments⁸.
- 8.35 James Harding, editor of *The Times*, expressed the same view. Although he agreed that the press needed an independent regulator⁹:

⁸ Evidence to the Leveson Inquiry, 31 January 2012 PM, 65–66 [14]–[8] (David James Fletcher Lord Hunt of Wirral).

⁹ Evidence to the Leveson Inquiry, 17 January 2012 AM, 103 [11]–[21] (James Paul Harding).

What I don't like is the prospect of that being enacted by Parliament, because my concern is that once you have that legislation on the statute book, any future infringements by the press, and future failings by the press—and there will be—there will be—whatever we come up with here, there will be shortcomings—it gives the politicians the opportunity to say, 'Well Lord Justice Leveson's work was good but we're going to ratchet it up a little bit through this amendment or through that small act of legislation'.

- 8.36 In other words, according to Mr Harding, 'there is a big political difference between amending an existing piece of legislation and putting new legislation on the statute book'¹⁰.
- 8.37 It is a little surprising to see important people speak in favour of a system that has not operated effectively in the 60 years of its life.

The New Zealand Press Council

- 8.38 The New Zealand Press Council was established in 1972, although the earliest demands for press regulation date back to 1947. As has occurred elsewhere, the New Zealand Press Council was brought to life to avoid statutory intervention.
- 8.39 In 2007 a review of the Press Council was conducted by Sir Ian Barker and Professor Lewis Evans. Their report was commissioned by the members of the Press Council.
- 8.40 The report records that the Press Council was established to deal with complaints about press (newspapers, magazines and periodicals) conduct; promote freedom of speech, and maintain the 'highest professional standards' of the New Zealand press.
- 8.41 The report considered many criticisms that had been made of the Press Council. One was that the Press Council was not independent, or perceived to be not independent, of publishers. The Press Council members comprised a chairperson unconnected with the press, five persons representing the public, two members appointed by the Newspaper Publishers' Association, two members appointed by the Journalists' Union and one member appointed by the Magazine Publishers' Association. Another criticism was that the Press Council had no power to investigate complaints properly or obtain information to further an investigation. A

¹⁰ Evidence to the Leveson Inquiry, 17 January 2012 AM, 106 [19]–[23] (James Paul Harding).

third complaint was that the Press Council lacked power to impose sanctions. It was said that the Press Council took far too long to hand down its decisions. Another complaint was that there was no right of appeal from Press Council decisions.

8.42 Many of the complaints were accepted as fairly based. The report recommended that¹¹:

- the Press Council should become an independent legal entity
- the Press Council should be more amply resourced to enable it to better perform its functions
- more efficient complaints handling procedures should be established including the setting up of a 'fast track' Complaints Committee, and
- time limits should be introduced for handling complaints.

8.43 The possibility of statutory regulation of the press was not considered in the report. That is not surprising given that the report was essentially an internal review of procedures.

8.44 In October 2010 the New Zealand Law Commission (NZLC) was asked to review the adequacy of the regulatory environment in which New Zealand's news media is operating in the digital era. It is to report at the end of 2012. Its review is to deal with the following questions¹²:

- how to define 'news media' for the purposes of the law
- whether, and to what extent, the jurisdiction of the Broadcasting Standards Authority and/or the Press Council should be extended to cover currently unregulated news media and, if so, what legislative changes would be required to achieve this end, and
- whether the existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective in the new media environment and, if not, whether alternative remedies may be available.

8.45 The NZLC has issued a discussion paper that raises a number of issues relevant to this Inquiry, including what is meant by 'news media', whether self-regulation or statutory regulation of standards is preferable, and what shape any regulation might take.

¹¹ Ian Baker and Lewis Evans, *Review of the New Zealand Press Council* (Press Council of New Zealand, 2007) 4–5.

¹² Law Commission (New Zealand), *The News Media Meets 'New Media': Rights Responsibilities and Regulation in the Digital Age* (2011) 27 New Zealand Law Commission Issues Paper 3.

8.46 While the NZLC has not expressed any concluded views on these issues, it has reached some preliminary views. The NZLC's preliminary definition of 'news media' is that:

For the purposes of the law the 'news media' includes any publisher, in any medium, who meets the following criteria:

- *a significant proportion of their publishing activities must involve the generation and/or aggregation of news, information and opinion of current value*
- *they disseminate this information to a public audience*
- *publication must be regular*
- *the publisher must be accountable to a code of ethics and a complaints process¹³.*

8.47 The NZLC's preliminary proposal is that there should be a new, independent regulator for all news media, regardless of the format or delivery platform:

The new regulator ... would have the following features:

- *It would be independent of both government and the news industry.*
- *Appointments to the regulator would be by an independent panel. The regulator would comprise industry and non-industry representatives, the latter being the majority.*
- *The regulator would be responsible for working with the various sectors of the industry and consulting with the wider public to devise the set of principles by which it adjudicates. As is already the case under the current broadcasting regime, we envisage there being a number of different codes based on these principles but appropriate to different news producers and publishing environments—for example, bloggers may devise their own codes.*
- *The regulator would be recognised by statute and funded by contributions from members and subsidised by the state¹⁴.*

8.48 There were two options for whether participation in the new regulatory regime would be voluntary or compulsory.

¹³ Ibid 8.

¹⁴ Ibid 9.

Option one:

- Membership should be entirely voluntary. Publishers who wish to have the legal standing of news media would join, because only by being subject to this complaints body would they meet the statutory requirements of 'news media'.

Option two:

- Membership should be compulsory for some categories of news publishers who meet a proposed set of criteria including for example:
 - those for whom publication is undertaken as a business or commercial activity
 - those who are providing broad or general news services to a wide public.
- Membership would be voluntary for others.¹⁵

8.49 The principles underlying the NZLC's preliminary views were as follows:

- A free press is critical to a democracy. The Bill of Rights guarantee of freedom of expression must lie at the basis of any news media regulation. It requires that sanctions be proportionate, that accountability rather than censorship should be the guiding principle, and that any regulation should be free of state control.
- The news media should exercise their freedom responsibly and be accountable when they fall below the appropriate standard. The privileges and exemptions conferred on the news media by law should be conditional on a guarantee that there will be responsibility and accountability.
- Media regulation should be truly independent, both from government, and also from the industry itself.
- Any regulatory system should foster rather than stifle diversity and growth in the generation of news and current affairs in New Zealand.
- The system of regulation should be flexible and platform neutral, although standards may sometimes need to take account of different modes of delivery or types of publisher.

¹⁵ Ibid 10.

- Any system of media regulation should not inhibit the freedom of speech of individuals who are not part of the news media. There should remain a right for individuals to speak out, however unorthodox or even wrong their views may be.¹⁶

8.50 The NZLC also put forward two alternative mechanisms, other than a Press Council, for dealing with ‘harms arising from speech abuses’¹⁷, accepting that pursuing civil remedies in court may not be an option for many people. The first suggested option is a ‘Communications Tribunal’¹⁸. Such a tribunal would be confined to cases involving a breach of the law (for example, defamation, breach of privacy, etc).

65. [It] would operate at a level lower than the court system and which could administer speedy, efficient and relatively cheap justice to those who have been significantly damaged by unlawful communications.

[...]

68. It would not have the power to impose criminal sanctions. Only the courts should be able to enter convictions and impose criminal sanctions such as fines and imprisonment.

69. Sanctions and remedies available to the Tribunal would include the ability to award monetary compensation up to a prescribed level; to order publication of an apology or correction; to order that a right of reply be granted; to order that the defendant cease the conduct in question (a type of injunction); and to make takedown orders against either the perpetrator or an innocent avenue of communication such as an ISP. It might also make a declaration that statements made about the victim are untrue. Failure to comply with an order would be an offence.¹⁹

8.51 A second option is a Communications Commissioner:

72. The role of this person would be to provide information and where possible assist in resolving problems in an informal manner, for example through mediation. Where appropriate, he or she could also make recommendations to responsible authorities and individuals with the aim of preventing problems or improving the existing situation. In

¹⁶ Ibid 9.

¹⁷ Ibid 14.

¹⁸ Ibid.

¹⁹ Ibid.

cases of serious harm, the Commissioner may refer a complainant to the police. In other cases, many of the harms that we have discussed could be resolved informally by a person with some authority contacting a website administrator to draw their attention to objectionable material, identifying the harm the post is causing, or how it may be in breach of the law.

[...]

73. A Commissioner would need some limited powers of investigation and inquiry, but we do not envisage he or she would have powers of enforcement. Any matters that required enforcement powers should be left to the police or other authorities. However, we believe the role would have the independence and authority to liaise effectively with publishers.²⁰

8.52 The NZLC has sought public comment on these preliminary views and options for reform.

Ireland

8.53 In September 2002 the Minister for Justice, Equality and Law Reform established the Legal Advisory Group on Defamation. A key task for the group was to review domestic and international material with a view to making recommendations for changes to the law of defamation. The group was also asked to consider whether there should be statutory regulation of the press and to make specific proposals in that regard.

8.54 The group's report was published in March 2003. It noted that self-regulation was the norm in other jurisdictions. The group identified the main argument advanced in favour of self-regulation to be 'that statutory controls were inimical to press freedom and that self-governance was the only method whereby that freedom could be secured'²¹. The group, however, 'was somewhat sceptical as to whether it necessarily follow[ed] that any statutory intervention would run counter to [press freedom]'²² stating that 'it should be possible to construct a statutory model which would respect fully the autonomy of the press while, at

²⁰ Ibid 15.

²¹ Legal Advisory Group on Defamation (Ireland) *Report of the Legal Advisory Group on Defamation* (2003) 14.

²² Ibid.

the same time, providing an important element of independence and transparency which would secure public confidence in any process which might be established²³.

8.55 Hence, the group recommended that²⁴:

- a statutory press council be established
- the council should have a number of functions, including the preparation of a code of conduct and the investigation of complaints
- it would be appropriate for the council to participate in general public debate about the broad range of matters which would fall within its general jurisdiction.

8.56 The suggestion that there be a statutory press council was strongly attacked. In submissions made to the Irish government it was pointed out that self-regulation was internationally acknowledged as the preferred means of print media regulation. One submission asserted that self-regulation 'is a preferable option and one that should almost always be possible in established democracies'²⁵.

8.57 The Irish government decided not to introduce a statutory council. However, there is statutory recognition of the Irish Press Council (a self-regulatory body) and the Press Ombudsman (who is appointed by the Irish Press Council) in the context of defamation law²⁶.

South Africa

8.58 Whether or not there ought be statutory regulation of the media was also considered in a recent review of the South African Press Council. This was also an internal review, in the sense that it was set up by the Press Council itself.

8.59 The Press Council had been established in 2007, replacing the Press Ombudsman. The review was instigated because there had been calls for a statutory Media Appeals Tribunal, and parliament had been asked to investigate the regulation of the press. The review was the

²³ Ibid.

²⁴ Ibid 18

²⁵ Article 19 Global Campaign for Free Expression, 'Submission on the Report of the Legal Advisory Group on Defamation' (2004) 4 <www.article19.org/data/files/pdfs/analysis/ireland-report-to-lag-on-def.pdf>

²⁶ See *Defamation Act 2009* (Ireland) pt 6 s 44, sch 2.

means by which the Press Council could provide itself with information to deal with its critics as well as identify reforms that should be instituted.

8.60 The review was published in August 2011. It is an important document but reference will only be made to its discussion of self-regulation, which the report describes as the 'first and most fundamental question'²⁷ it was confronted with. The report concluded that self-regulation was to be preferred over statutory intervention. It is instructive to look at the reasons. They were²⁸:

- international consensus is in favour of self-regulation
- self-regulation was consistent with freedom of speech as a fundamental legal right;
- the International Federation of Journalists, one of the world's most powerful journalist associations, opposed statutory regulation
- Mr Miklos Haraszti, an authoritative commentator in the field of media self-regulation, had written:

*Can governmental regulations make the press more professional or ethical? No. True ethics standards can be created only by independent media professionals, and can be obeyed by them only voluntarily. Whether passed in good will or not, any attempt to impose standards on journalists by law will result in arbitrary limitation of their legitimate freedoms, and restriction of the free flow of information in society.*²⁹

8.61 In February 2011 the British Parliamentary Select Committee on Culture, Media and Sport reached the same conclusion.

We do not believe that there is a case for a statutory regulator for the press, which would represent a very dangerous interference with the freedom of the press. We continue to believe that statutory regulation of the press is a hallmark of

²⁷ Press Council (South Africa) *Review of the Press Council of South Africa* (2011) 15 <www.presscouncil.org.za/pages/review.php>.

²⁸ Ibid 22.

²⁹ Marcus Haraszti, *The Media Self-Regulation Handbook* (Organization for Security and Cooperation in Europe, 2008) 15 cited in Press Council (South Africa) *Review of the Press Council of South Africa* (2011) 22.

*authoritarianism and risks undermining democracy. We recommend that self-regulation should be retained for the press, while recognising that it must be seen to be effective if calls for statutory intervention are to be resisted.*³⁰

- 8.62 Of the 25 countries deemed to have the greatest freedom of the press, 21 have systems of self-regulation.
- 8.63 This is a weighty list of reasons. It is, though, rather one-sided. The South African report says that after looking into the matter ‘there is no convincing argument for the State to get involved in media regulation’³¹. This rather absolute conclusion is difficult to reconcile with the failure of self-regulation in the United Kingdom, the reason for the repeated calls for statutory regulation in that country, the recommendation that there be statutory regulation of the press in Ireland and the failure of self-regulation in English speaking countries.

The Australian Press Council

- 8.64 The APC was established in 1976 as a voluntary non-profit association³². Subsequently, it became an incorporated association. The history of its establishment is not without interest.
- 8.65 The idea of a press council was first mooted in Australia in 1942, during the Second World War. An Australian Newspaper Board was established in 1944, but only met once between 1944 and 1953.
- 8.66 In 1954 the Australian Journalists’ Association (AJA) attempted to establish a press council partly in response to the formation of the British General Council of the Press and partly in response to a series of local press mergers. The attempt failed. During the next few years various proposals for self-regulatory or statutory bodies were discussed by the AJA and federal and state Labor parties. This was to no avail. O’Malley explained that ‘during the

³⁰ Culture, Media and Sport Committee (United Kingdom) *Self Regulation of the Press*, House of Commons Paper 375, Session 2006–07 (2007) cited in Culture, Media and Sport Committee (United Kingdom) *Press standards. privacy and libel* House of Commons Paper No 362-I, Session 2009–10 (2010) 117.

³¹ Press Council (South Africa) *Review of the Press Council of South Africa* (2011) 25 <www.presscouncil.org.za/pages/review.php>.

³² The following discussion is drawn mainly from Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996); See also Denis Joseph Andrew Muller, *Media Accountability in a Liberal Democracy—An Examination of the Harlot’s Prerogative* (PhD Thesis, University of Melbourne, 2005) 149–171.

ensuing years, the absence of a Labor government federally, or in any major state, ensured that the issue remained on the sidelines, and it was only the prospect of a federal Labor government that was to promote the issue back into the realms of possibility³³.

8.67 In its March 1969 issue of *The Journalist* the AJA reported that its General Secretary considered a Press Council should be set up and that the AJA had, in fact, made frequent applications to state and federal governments³⁴. This view was supported by Nigel Bowen, the then Attorney-General. Speaking at the Fifth Summer School of Professional Journalism on 7 February 1969 Bowen stated:

If all journalists observed the AJA Code of Ethics there could be few genuine cases of complaint by politicians, or anyone else.

However, I should point out there is a gap. If your work is altered by the proprietors and appears in a form which would breach the code, it seems there is no remedy.

*This leads me to suggest that it is worth considering whether we should not follow the United Kingdom and have a Press council in Australia, with representatives of the proprietors, and a lay chairman.*³⁵

8.68 Justice Else-Mitchell of the NSW Supreme Court supported a council with a statutory basis and judicial powers. Citing the need for a new approach to the law of defamation, and noting the years of waiting before a verdict is obtained, Justice Else-Mitchell said that some in the legal profession would call it ‘instant justice, but speed of redress was the essence of any just legal system—justice delayed is justice denied’³⁶.

³³ Pat O’Malley, ‘Regulating Contradictions: The Australian Press Council and the ‘Dispersal of Social Control’’ (1987) 21(1) *Law & Society Review* 89, 91 cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 6.

³⁴ *The Journalist*, March 1969, cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 9.

³⁵ Nigel Bowen (Speech delivered at the Fifth Summer School of Professional Journalists, 7 February 1969) cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 9.

³⁶ *The Mercury* (Hobart), 2 December 1969, 2 cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 9.

8.69 The first approach reviving discussion of a press council appears to have been made in a letter from the AJA to B Osborne, Secretary of the Australian Newspaper Council (ANC)³⁷. Written on 24 May 1971 this letter requested a meeting between an AJA deputation, the ANC, John Fairfax & Sons Ltd and Regional Dailies Ltd to discuss the question of establishing a Council of the Press to mirror Britain's Press Council. The ANC advised that its members were almost unanimously opposed to a Press Council³⁸. However, most felt that, as long as no commitment was involved, no harm could be caused by such a meeting³⁹.

8.70 At the meeting the AJA asserted its single aim was to protect the highest standards of newspaper performance and practice. Probably closer to the truth were two paragraphs in the front page article of the March 1972 issue of *The Journalist*:

The AJA directed the attention of Press proprietors to the provisions of the AJA Code of Ethics, and the machinery for investigation by the AJA of complaints of code breaches.

*No comparable machinery exists for investigation of complaints by the public against the newspapers, without recourse to the law courts.*⁴⁰

8.71 The proprietors stood firm against a council. The only individuals who stood out were Ranald Macdonald and Graham Perkin from David Syme & Co. Macdonald could see the sense of a Press Council and openly spoke in its favour. Perkin, editor of *The Age*, stated:

*My great fear is that unless the newspaper industry establishes some form of self-surveillance ... then we will one day, perhaps soon, have surveillance forced upon us by Government.*⁴¹

³⁷ Letter from Syd Crosland to the Australian Newspapers Council, John Fairfax & Sons Ltd and Regional Dailies Ltd, 24 May 1971 cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 10.

³⁸ Sir Frank Packer pointed out the failure of the Newspaper Board and termed any meeting as 'unnecessary': Letter from Sir Frank Packer to Australian Newspapers Council, 20 December 1971 cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 23.

³⁹ Letter from Australian Newspapers Council to the Australian Journalists Association, 29 June 1971 Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 10.

⁴⁰ *The Journalist*, March 1972, 1 cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 10.

⁴¹ Pat O'Malley, 'Regulating Contradictions: The Australian Press Council and the 'Dispersal of Social Control'' (1987) 21(1) *Law & Society Review* 89, 92 cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 10.

8.72 Rupert Murdoch was opposed. He said:

*The Press Council was invented as a fig-leaf by a frightened British Press establishment at a time of genuine concern. Surely we do not need such hypocrisy in Australia?*⁴²

8.73 Two years were to pass before the AJA tried again. Devoting its April 1975 issue of *The Journalist* to the push, the paper opened the debate by stating:

*The AJA hopes the industry will not be held back by those few who may cling to the shibboleth that the Press should not be accountable to the public.*⁴³

8.74 Following a discussion paper on the idea of establishing a press council, Dr Moss Cass, the Minister for the Media, issued a media release on 8 August 1975 setting out options for press reform. The paper concluded that the establishment of an Australian Press Council 'is desirable and practicable'⁴⁴. For debate only and not part of the formal recommendation, Dr Cass suggested the following five options be open 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 performance⁴⁵.

8.75 Two days later, the Minister issued another media release which reflected the response of many media proprietors:

⁴² *The Sydney Morning Herald*, 16 November 1972 cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 10.

⁴³ *The Journalist*, April 1975, 1 Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 10.

⁴⁴ Dr Moss Cass, (media release, 8 August 1975) 5 cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 10.

⁴⁵ *Ibid.*

Events in the past 48 hours have convinced me that there is an urgent need for media reform in Australia.

In the past two days my proposal for an Australian Press Council has been subjected to bizarre distortion and hysterical over-reaction.

I can't quite believe it.

I propose a voluntary press council, with no government involvement of any kind, at any level.

When I released this document...I expressly stated that I had not yet considered or looked at the five options...they are listed simply to demonstrate the range of ideas which are worth considering.

If some proprietors...are incapable of reading or understanding that, then press freedom really is in danger.⁴⁶

8.76 On 6 November 1975 the ANC published a statement which read:

The Australian Newspapers Council has begun moves to establish a National Press Council. The ANC believes that the maintenance of a free Press is essential for Australia. The public must be seen to be fairly treated by the Press⁴⁷.

8.77 The APC was established on 22 July 1976. The constituent bodies were the ANC, AJA, Regional Dailies of Australia and the Australian Provincial Press Association. Fairfax declined to join a meeting to discuss the council's work:

We believe that the very existence of a Press Council will do harm rather than good through giving the impression that it would be able to exercise a degree of supervision and influence which in fact it cannot achieve⁴⁸.

8.78 The inaugural APC comprised an independent chair, three public members, three AJA representatives and six industry members.

⁴⁶ Ibid.

⁴⁷ Australian Newspaper Conference, (press release, 6 November 1975) 1 cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Twentieth Anniversary Papers, 1996) 11.

⁴⁸ Gavin Souter, *Company of Heralds*, (Melbourne University Press, 1981) 642 cited in Denis Joseph Andrew Muller, *Media Accountability in a Liberal Democracy—An Examination of the Harlot's Prerogative* (PhD Thesis, University of Melbourne, 2005) 151.

8.79 The composition of the APC has changed since its inception. The first major change was in 1980 when News Limited withdrew from the council. Although no reason was given, it seems that News Limited was dissatisfied with the council's unfavourable adjudication (No 75) against News Limited's Adelaide papers⁴⁹ for biased reporting of the 1979 South Australian election. The removal hurt financially, as News Limited's subscription to the APC had to be absorbed by the remaining members, and it hurt the public standing of the APC as a major Australian publisher was no longer a member.

8.80 In 1982 John Fairfax Ltd joined. The Fairfax papers had always cooperated with the APC, publishing not only adjudications concerning itself, but those of other publications.

8.81 Four years later, however, the APC nearly collapsed. On 3 December 1986 News Limited launched a takeover bid for The Herald & Weekly Times. At the time the Hon Hal Wootten QC was in the chair. Wootten convened a meeting of the APC to consider the implications of the bid. He had a draft statement advocating that a tribunal be established to prevent further concentration of press ownership. According to Wootten:

What happened can be understood in the light of the constitution of the council, which consists of 14 members and the chairman. Of the 14, four are public members unconnected with the press. They all strongly supported me. Three members came from the AJA. Two of them supported me; the third, who works for the HWT, did not, [and of the seven publishers' representatives, one abstained, the rest] all opposed. The vote was seven all, and as I did not think it proper to use [my] vote to launch the council on a course strongly opposed by half the council, the draft was rejected.⁵⁰

8.82 The result of the events of December 1986 included the resignation of Wootten (he was replaced by Professor David Flint, AM), the withdrawal of the AJA, the re-affiliation of News Limited and a restructure of the APC. Professor Flint explained the background:

⁴⁹ Australian Press Council *Annual Report* No 4, 21–27 cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* Twentieth Anniversary Papers, 1996) 13.

⁵⁰ Paul Chadwick, *Media Mates: Carving up Australia's Media*, (Macmillan Australia, 1989) 99–100 cited in Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* Twentieth Anniversary Papers, 1996) 14.

After Hal resigned and I became Chairman, I went to see Michael Duffy, the then Minister for Communications. Mr Duffy was apparently grave when I came into his office. I took this demeanour to mean one of two things: either that the Minister believed I had come to tell him that the Press Council was about to be folded up or that we were looking for government funding. On hearing that the Council did not intend either, but was going to restructure, relief appeared on Michael Duffy's face.⁵¹

8.83 In 1994 there was a Senate inquiry into the rights and obligations of the media. In October, the inquiry issued its initial report, making a recommendation that legislation be enacted giving courts a discretion to excuse a journalist from answering questions about the identity of a confidential source⁵². The case for shield laws had been building momentum in the early 1990s as there was a rash of cases where journalists had been punished for protecting their sources.

8.84 The Senate inquiry noted the APC dealt with the print media publishers and not with the ethical behaviour of individual journalists (which was left to the judiciary committee of the MEAA which by then had incorporated the AJA)⁵³. The inquiry recommended that steps be taken to establish closer links between the MEAA and the APC:

Cooperation between these two bodies would surely provide greater opportunity to enhance accountability in the print media⁵⁴.

8.85 For some time, the MEAA refused to join the APC. This reluctance was at odds with its stated recommendation that the APC should be comprised of equal numbers of representatives from the public, publishers and the union. In the event it rejoined in 2005, although on a new footing⁵⁵.

⁵¹ Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* Twentieth Anniversary Papers, (1996) 14

⁵² Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Rights and Obligations of the Media: First Report, Off The Record: Shield Laws for Journalists' Confidential Sources*, (1994), 109–113.

⁵³ *Ibid* 137.

⁵⁴ *Ibid* 139.

⁵⁵ Denis Joseph Andrew Muller, *Media Accountability in a Liberal Democracy—An Examination of the Harlot's Prerogative* (PhD Thesis, University of Melbourne, 2005) 153.

The APC today

Membership⁵⁶

8.86 The Association 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’. There are eleven members in this category, comprising seven publishers, three associations of publishers and the principal union representing workers in the industry⁵⁷. 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). There are thirteen members in this category.

8.87 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.

8.88 Fifteen members are rostered to attend any particular meeting of which, in addition to the chair, six are public members, five represent publishers, two are independent journalists and one represents the union.

8.89 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

⁵⁶ Australian Press Council, Submission to the Independent Media Inquiry—Part 1 (2011) 5.

⁵⁷ The Media, Entertainment and Arts Alliance.

- 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.

8.90 These obligations stem from the constitution and decisions by the APC. In July 2011 they were embodied in a Summary of Rights and Obligations of Constituent Bodies which was agreed by the constituent bodies and the APC.

8.91 The APC staff comprises an Executive Secretary (who is the chief executive officer), the recently established position of Director of Standards, a part-time administrative officer and a short-term research officer. The position of Case Manager was recently discontinued and two new positions created that are expected to be filled in early 2012—namely Director of Complaints, and Complaints and Communications Officer.

Activities⁵⁸

8.92 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
- 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.

8.93 In its standards role, 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. The APC also convenes conferences and seminars on aspects of media standards. The Standards of Practice are applied by the APC when considering complaints and are used as the basis for statements by APC representatives about good media practice.

⁵⁸ Ibid 6.

- 8.94 The APC's mandate to consider complaints extends to all print publications and related digital outlets, such as websites, of its constituent bodies. The APC currently receives about 450 complaints each year (excluding those outside its jurisdiction). In 2010–11, the APC's involvement led to a correction, apology or some other form of remedial action by the publisher in 134 cases. If a complaint cannot be resolved by agreement, the complainant can ask for adjudication by the APC. In 2010–11, 71 per cent of adjudicated complaints were upheld⁵⁹.
- 8.95 In its policy role, the APC issues statements on matters within its areas of interest, including through submissions to parliamentary committees, commissions and other public bodies. It also undertakes research and convenes or participates in conferences and seminars on policy issues. In recent years, the APC has focused on issues such as freedom of expression, freedom of information, privacy and the protection of whistleblowers. The APC's role in policy matters is to express views on media standards and related matters in the public interest, not as an industry advocate for the media or any other particular interest.

Statement of Principles

- 8.96 The APC has developed a General Statement of Principles, which it applies when providing advice or adjudicating on individual complaints⁶⁰. 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.

⁵⁹ Australian Press Council, 'Latest data on complaints to the Australian Press Council' (media release, 18 August 2011). Australian Press Council, 'APC Update Issue 3' (23 February 2012).

⁶⁰ Australian Press Council *General Statement of Principles* <www.presscouncil.org.au/general-principles/>.

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

Complaints procedure

- 8.97 The APC only deals with complaints against publications and not against individual journalists.
- 8.98 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 rights⁶¹. 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.
- 8.99 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.
- 8.100 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 stage⁶².
- 8.101 In the 2010–11 year, by way of example, this type of ‘mediation’ resulted in 16 apologies (either public or private), 26 retractions, 28 corrections, 28 actions similar to corrections and 36 publications of a response by the complainant⁶³.
- 8.102 If a complaint is to be adjudicated it is referred to the complaints committee. The meeting is chaired by the APC chair or vice-chair and is attended by about five other APC members. The

⁶¹ Australian Press Council, Making a Complaint <www.presscouncil.org.au/making-a-complaint/>.

⁶² Australian Press Council, Handling of Complaints <www.presscouncil.org.au/handling-of-complaints/>.

⁶³ Australian Press Council, ‘Preliminary data on outcome of complaints to the Australian Press Council, 2010–11’ (2011) <www.presscouncil.org.au/uploads/52321/ufiles/APC_Preliminary_Complaints_Outcomes_2010-11.pdf>.

total size is usually seven members. A majority of the members, including the chair or vice-chair, must be public members; in other words, independent of the press⁶⁴.

8.103 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.

8.104 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.

8.105 In July 2007 the APC implemented new rules and processes to clarify and apply its publication requirements. Now an adjudication must be published in full (unless the APC agrees otherwise), be headed 'Press Council Adjudication', be accompanied by the APC's logo and must clearly be differentiated from other material on the page. The position in the publication must also be approved in advance by the APC.

8.106 The APC has provided the Inquiry with the following data about the number of complaints which it has received and considered.

⁶⁴ See Australian Press Council, Handling of Complaints <www.presscouncil.org.au/handling-of-complaints/> See also Oral submission to the Independent Media Inquiry, Melbourne, 9 November 2011, 179 [45]–[47] (Professor Disney).

Table 8.1: Type of complainant to the APC (*per new complaint*)

	2010–11	2009–10	1988–2010
Individuals	324	308	5090
Associations/organisations	22	24	592
Companies/businesses	23	9	245
Institutions/public bodies	11	8	288
Local councils/councillors	18	11	286
Religious groups	4	10	130
Indigenous groups	5	2	95
Other ethnic community groups	14	18	129
Other lobby groups*	22	13	54
Politicians, electoral candidates	14	11	250
Political parties	1	1	81
Unions	2	0	60
Solicitors (for clients) [^]	0	1	120
Publications	3	1	42
Anonymous	0	0	17
Total	463	417	7479

Notes

The numbers in this table relate to the numbers of different complaint forms received during the years in question. The categories will be revised for future tables.

* Since 1996, most complaints made by solicitors for clients have been recorded as if they had been submitted by the client.

[^] This new category was introduced in 2006–07 to distinguish those individuals who represent community-based campaign groups.

Source: Letter from Australian Press Council to the Independent Media Inquiry, 6 December 2011.

8.107 The APC has also provided data about the outcomes of complaints. These figures are provided on a ‘per issue’ basis, so the numbers are greater than the numbers of complaints received (because a single complaint may raise more than one issue).

Table 8.2: Outcome of complaint to the APC (*per issue in complaints closed during year*)

	2010–11	2009–10	1988–2010
Not considered by Council			
Outside jurisdiction or referred elsewhere	53	34	453
Dismissed at initial stage	76	87	1343
Not pursued by complainant through ADR*			
Outcome of ADR or adjudication			
Some remedy provided by ADR	134	130	1837
Complaint fully or partly upheld and adjudication published [^]	60	23	747
Complaint dismissed on adjudication	25	31	891
Total[†]	570	512	8902

Notes

* Alternative Dispute Resolution. In many cases, the complaint was not pursued because the complainant was satisfied with the response obtained by the Council from the publisher. In other cases, however, the discontinuance may not reflect full satisfaction by the complainant even though he or she did not choose to pursue the matter to mediation or adjudication. The numbers in each of these categories are not precisely quantifiable.

[^] The 71 per cent of complaints that went to adjudication were upheld. This compares with 43 per cent in 2009–10, 49 per cent in 2008–09 and an average of 46 per cent over the preceding decade.

[†] The total number of issues for which data is recorded in this table differs from the totals shown in Tables 4 and 5 because those tables are based on issues raised in complaints received during the year whereas this table also includes complaints carried forward from the previous year (50) and excludes those still open at the end of the year (46).

Source: Letter from Australian Press Council to the Independent Media Inquiry, 6 December 2011.

8.108 The figures only represent formal complaints—that is, complaints where the complainant submits a complaint form or letter of complaint. However, the APC also deals with informal complaints, which might involve a telephone call about a matter that the Executive Secretary

considers raises an obvious breach of the Standards of Practice that the publisher is likely to address immediately by way of an apology or retraction. The APC estimates that informal complaints (which deliver an immediate outcome satisfactory to the complainant) are substantially more numerous than the number of formal complaints.

The effectiveness of the APC

8.109 It is not easy to assess the effectiveness of the APC. There are several difficulties with its structure.

- For example, it seems that the inclusion of representatives of the public is not always as effective as it could be. Including members of the public does confer a legitimacy and transparency on the APC's adjudications. However, it would be desirable if public members had skills that were relevant to the adjudicative function. The Inquiry has been told that some public members of the APC (such as legal academics) have brought considerable relevant expertise, but that other members have been able to contribute little⁶⁵.
- A significant problem is that the APC's structure makes its ability to carry out its functions (or to carry them out effectively) dependent upon the will of its constituent bodies. They can exert both formal and informal pressure⁶⁶. They can even impose sanctions if dissatisfied with the APC's conduct, by reducing funding or even withdrawing altogether.

8.110 Although the data about the APC's handling of complaints is incomplete in some respects, it has been possible to arrive at several general conclusions about the effectiveness of the procedure.

8.111 In part, the conclusions are based on the view provided to the Inquiry by three former chairpersons of the APC. Professor Dennis Pearce AO was chair between 1998 and 2000. The main issues he addressed were the timeliness of handling complaints, and the prominence of APC adjudications⁶⁷. During his term, News Limited had withdrawn from the APC because it

⁶⁵ Oral submission to the Independent Media Inquiry, Perth, 6 December 2011, 111–112 [36]–[32] (Mr Murray).

⁶⁶ For a discussion of the working and culture of the Press Council see Margaret Simons, *The Content Makers*, (Penguin, 2007) 270-279.

⁶⁷ Oral submission to the Independent Media Inquiry, Melbourne, 9 November 2011 190 [5]–[13] (Professor Dennis Charles Pearce AO).

took the view that an APC adjudication was wrong and would not be published. Professor Pearce said that this could happen at any time, because the APC 'is dependent on being set up and funded and managed by the industry.'⁶⁸ He agreed that the APC would never be effective unless it had secure and adequate funding⁶⁹. The problem, he said, is that the press have an incentive not to give the APC too much money, because it would only be able to criticise them better⁷⁰. Professor Pearce suggested the APC should have a power to require publication of a correction⁷¹, because there were limits on what the APC could achieve through persuasion alone⁷². However, he described giving the APC an own motion power to investigate and prevent wrongdoing as 'an extraordinary intervention in the freedom of the press'⁷³.

- 8.112 Professor Flint was chair between 1986 and 1996. In his submission he said that the APC does not require any further funding and that too much funding leads to bureaucracy⁷⁴. He opposes statutory regulation of the press as being inconsistent with democracy⁷⁵, and opposes government funding of the APC because governments use funding as a means of control⁷⁶. In his evidence, Professor Flint observed that government funding to the APC would place pressure on that body when dealing with complaints that concerned members of the government of the day⁷⁷. He considers that the APC is faster than a statutory regulator, and has the advantage in the marketplace ideas of being a body independent of government⁷⁸. He is opposed to the APC being given power to award compensation, because it would, in effect, become a court⁷⁹.

⁶⁸ Ibid 190 [35]–[36].

⁶⁹ Ibid 199 [46].

⁷⁰ Ibid 191 [27]–[30].

⁷¹ Ibid 195 [6]–[9], 203 [26]–[30].

⁷² Ibid 199 [13]–[16].

⁷³ Ibid 207 [41]–[42].

⁷⁴ Professor David Flint AM, Submission to the Independent Media Inquiry, 2011, 5–6; See also Oral submission to the Independent Media Inquiry, Sydney, 18 November 2011 286 [23]–[31] (Professor Flint).

⁷⁵ David Flint, Submission to the Independent Media Inquiry, 2011 5–6.

⁷⁶ David Flint, Submission to the Independent Media Inquiry, 2011, 5–6; See also Oral submission to the Independent Media Inquiry, Sydney, 18 November 2011 287 [24]–[42] (Professor Flint).

⁷⁷ Oral submission to the Independent Media Inquiry, Sydney, 18 November 2011 287 [36]–[42] (Professor Flint).

⁷⁸ Ibid 291 [38]–[46].

⁷⁹ Ibid 295 [44]–[46].

- 8.113 Professor Kenneth McKinnon, AO was chair from 2000 to 2009. In his submission, Professor McKinnon said that the APC was good at handling individual complaints, and that editors hate having complaints upheld and therefore take care not to breach the APC's standards⁸⁰. He said the APC is a 'frugal, under-funded organisation'⁸¹ that does not have sufficient funding to do more than handle complaints. His opinion is that the limited view that proprietors have had of the APC's role and its funding will not be adequate for the future⁸². Professor McKinnon opposes the work of the APC being performed by a statutory authority. He considers that the present feeling of the print media that it is involved in complaints-handling would be lost. He also considers that statutory processes would lead to increases in cost, time and rigidity⁸³.
- 8.114 Professor McKinnon also gave evidence. He said the APC, 'if properly resourced and with a rather stronger brief'⁸⁴, would handle complaints more effectively than a statutory body. He said that the APC should have funding to conduct research comparing Australia's newspapers with some reasonably set standards, as he did with the previous State of the Press report⁸⁵. He did not see any difficulty with the APC receiving government funding if structured in a way that ensured the APC's independence in how it was spent⁸⁶. He observed that proprietors who currently fund the APC are equally interested in influencing its actions⁸⁷.
- 8.115 Perhaps the most compelling evidence concerning the effectiveness of the APC is that contained in its own submission together with the evidence given by Professor Disney AO, the current chair. This submission and the evidence 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.

⁸⁰ Professor Ken McKinnon, Submission to the Independent Media Inquiry, 2011, 3.

⁸¹ Ibid 2.

⁸² Ibid 9.

⁸³ Ibid 4.

⁸⁴ Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011 44 [28]–[29] (Professor McKinnon).

⁸⁵ Ibid 46–47 [45]–[9].

⁸⁶ One possibility was funding through an intermediary body, Ibid 49 [2]–[13].

⁸⁷ Ibid 49 [11]–[13].

- The inability to properly investigate a complaint for lack of binding powers. This is not an idle complaint. Take the case of an allegation that a newspaper has published inaccurate material. In a proceeding before the complaints committee the complainant has the task of satisfying the committee that the material is inaccurate. In some cases the lack of necessary forensic machinery to establish such an allegation can lead to a complaint being dismissed. The position could be otherwise if machinery were available.
- 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.

Professor Disney suggested ways the membership of the APC could be secured. One way is through legislation. The press has certain statutory privileges. For example, the Commonwealth Privacy Act's main restrictions do not apply to 'media organisations' which have committed themselves to a publicly-available set of standards about protection of privacy⁸⁸. Most newspapers satisfy this requirement by virtue of their membership of the APC. Another example is the *Consumer and Competition Act 2010* (Cth). It provides that the prohibition of engaging in misleading or deceptive conduct in trade and commerce does not apply to a person who carries on a business of providing information⁸⁹. These privileges could be made conditional on membership of the APC.

- Insufficient powers of enforcement, including an inability to direct where and how APC adjudications should be published, and to direct the publication of apologies, retractions or corrections as the case may require.
- The appearance of lack of independence from the publisher members.
- Insufficient streamlining of complaints procedures. A fast track process for many complaints is required.

⁸⁸ *Privacy Act 1988*(Cth), s 7B(4), read with s 7(1)(ee).

⁸⁹ *Competition and Consumer Act 2010* (Cth), sch 2 pt2-1(19). Licensed broadcasters are taken to be 'information providers': see 19(6).

8.116 Other submissions were critical of the existing system of self-regulation, largely for the reasons identified by the APC itself⁹⁰.

8.117 To be fair, under the chairmanship of Professor Disney, 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. The APC has summarised these steps.

Strengthening the council's Standards of Practice by:

- establishing a major Standards Project and a new position of Director of Standards
- focusing the project on developing standards which are more specific and draw on extensive consultation with both the media industry and the community
- convening roundtable consultations on media standards with over 100 community leaders and media representatives
- establishing a regular national meeting of online editors to discuss standards of special relevance to their work
- arranging for regular, informal meetings about media standards to occur between community leaders and editors of major newspapers.

Strengthening promulgation of Standards and monitoring their impact by:

- launching a new website, logo, brochure and electronic *APC Update* service
- planning regular 'impact monitoring' by independent experts to assess levels of industry compliance with particular standards
- inaugurating from 2012 an annual public conference on standards of practice in print and online media
- requiring publications to include a prominent notice that they are bound by the council's standards.

⁹⁰ Dr Lidberg from Monash University considers the existing system of regulating journalist standards (including broadcasting) is 'complex, toothless and unsatisfactory': Dr Johan Lidberg, Submission to the Independent Media Inquiry, 2011, 9. See also, Ian Turnbull, Submission to the Independent Media Inquiry, 2011, 3 and discussion in, Professor Denis Cryle, Submission to the Independent Media Inquiry, 2011.

Strengthening complaints-handling processes by:

- requiring publications to inform readers on a frequent basis, usually in every issue, how they can make complaints directly to the council
- investigating complaints more fully rather than relying solely on assertions by the complainant and publication
- establishing a review of the requirement in certain circumstances that complainants waive their rights to take legal action
- asking publications to acknowledge the council's involvement when they publish an apology or retraction after mediation by the council
- finalising adjudications more quickly by scheduling more frequent meetings of the complaints committee and reducing the need for further consideration by the full council, as well as establishing a fast-track process where appropriate
- improving the rigour of adjudications, thereby increasing the proportion of adjudicated complaints which are upheld from below 45 per cent to above 70 per cent
- establishing a new position of Director of Complaints
- initiating a thorough review of the complaints-handling process by the new vice-chair (a former Financial Services Ombudsman).

Strengthening publication of adjudications by:

- requiring publications to use a specified format, including the council's logo, when publishing adjudications
- ensuring prominent publication of adjudications by requiring publications to obtain specific agreement to the proposed positioning of the adjudication.

Strengthening sanctions by:

- resolving that, where appropriate, adjudications may include a censure or reprimand or an explicit call for an apology, retraction or other remedial action
- agreeing to review initial experience of this approach to see whether the council should be empowered to require remedial action, not merely call for it

- establishing new systems for publicising adjudications much more widely than only in the publications to which they relate
- considering referral of exceptionally grave or persistent breaches of its standards to a special panel which is appointed by the council, headed by a retired judge, and able to impose fines up to a specified level.

Strengthening independence and funding by:

- reaffirming that only one-third of council members can be publishers and less than one-half of the Complaints Committee can be from the industry
- persuading publishers to reverse the 20 per cent funding cut which they made in 2009
- obtaining funding from publishers on a rolling biennial basis to reduce the council's vulnerability to withdrawal by disaffected publishers
- seeking further commitments from publishers to substantial improvements in the amount and security of funding so that the council can fulfil its responsibilities
- seeking funding from non-media sources (including governments) for up to two-thirds of the Standards Project and securing 15 per cent from The Myer Foundation;
- raising the option of government funding to help expand membership amongst online publishers.

Strengthening incentives for publishers to become, and remain, council members by:

- intensifying promotion of the APC logo as a hallmark of publishers which commit to good standards of practice, cooperate with an independent complaints handling process and publish its adjudications
- developing a low-fee schedule for small and online-only publishers
- calling for clarification of the extent to which statutory rights and privileges for journalists and media organisations, such as under the Privacy Act, depend on being subject to an appropriate regulatory system.

8.118 The APC submission rightly makes the point that, if implemented, these reforms would improve its effectiveness. But, as its submission also acknowledges, the degree of improvement will depend upon the extent to which the APC obtains adequate funding, and the print and online publishers becoming and remaining constituent bodies, subject to the

APC's jurisdiction. It is also important to note that the APC accepts that to implement the reforms to enable it to become an effective regulator, government (that is, statutory) support is required.

8.119 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.

8.120 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. For instance Fairfax Media, which contributes 24 per cent of the APC funds, is of the opinion that the APC has no need for more. Mr Hywood, the chief executive and managing director of Fairfax Media, made this point to the Inquiry. He said:

We believe [the APC] does have sufficient funding to carry out its primary task [of adjudicating and mediating complaints]. It is what it chooses to do. Basically we believe that there might be judgments from Mr Disney about whether or not he has sufficient funding. We believe that we fund it adequately to fulfil its task. We are having a media inquiry here. There has not been to this point, until this media inquiry, within the industry a high level of concern that the Press Council does not have sufficient funding.⁹¹

8.121 Similarly, senior representatives of *The West Australian* said that the APC had sufficient funding to perform its complaints function, and that it had not demonstrated any need for further funding⁹².

8.122 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. Speaking with almost one voice, the media regard the establishment of any compulsory or coercive means of enforcing APC adjudications (for example, by imposing an obligation to publish the adjudication in a particular place, or conferring a power to require a retraction or

⁹¹ Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011, 68 [16]–[26] (Mr Hywood).

⁹² Oral submission to the Independent Media Inquiry, Perth, 6 December 2011, 50–51 [44]–[12] (Mr Tony McCarthy); see also 39 [19]–[20] (Mr Cronin) The APC does not need a 'massive bureaucracy'.

an apology) as a grave attack on freedom of the press⁹³ and, by implication, on the freedom of the nation itself.

Conclusions about self-regulation

8.123 While self-regulation via the APC has played an important role in maintaining standards of journalism, 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 clear impression is left that the media will not tolerate, let alone finance, an effective industry regulator. The principal basis for resisting reform is that it is an attack on a free press.

8.124 It may, on one view, be reasonable for publishers to be suspicious of proposals, even well-intentioned proposals, that would interfere with editorial independence, substitute an outsider's judgment for that of the editor and take up good journalistic time in hearings of complaints⁹⁴.

8.125 Mr Chadwick is a person who distrusts a statutory body to handle complaints against the press. He said:

[A]ll roads from a purpose-built statutory tribunal to govern media content lead back through a parliament, through a party room, to a cabinet where people nurse resentments, real and imagined, about the media that are going to be regulated.

*This is a reality and that is why I oppose that kind of purpose-built, tailored statutory regulation on media content, notwithstanding the risks and notwithstanding the kind of tardiness [by the press] that we have just been exchanging on.*⁹⁵

⁹³ For example, Mr Hywood (Fairfax Media) said 'I am the CEO of the company. I don't tell an editor where to publish a story an[d] when to publish a story, and I would clearly object to that power being provided to an outside agency': transcript of hearing, Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011 71 [15]–[18] (Mr Hywood); Paul Murray (former editor of *The West Australian*) said that compelling an editor to publish a correction or retraction on a particular page was inimical to a free press: Oral submission to the Independent Media Inquiry, Perth, 6 December 2011, 113 [7]–[8] (Mr Murray).

⁹⁴ Twentieth Century Fund, *A Free and Responsive Press: The Twentieth Century Fund task force report for a national news council* (Century Foundation Press, 1979) 4.

⁹⁵ Oral submission to the Independent Media Inquiry, Melbourne, 9 November 2011, 220 [21]–[30] (Mr Chadwick).

- 8.126 Mr Chadwick does not have any vested interest in the outcome (as he works for the ABC, which is already governed by statute and subject to a statutory regulator).
- 8.127 The other view, which is the better view, is that there must be some effective means of raising standards of journalism and of making the media publicly accountable. What the media have lost sight of is that they accepted the idea of press regulation by having set up the APC to make a positive contribution to the development of journalistic standards. Logically it follows that that regulation should be effective. Indeed one would not expect that the media is only prepared to accept regulation that is ineffective.
- 8.128 One might wonder if the effect on freedom of the press is any different in substance whether the underpinning for the complaints body is statutory or, as with the APC, contractual. The real objection to statutory backing is about how the power might be misused in the future—that, even if the law when originally enacted does not interfere with press freedom, inevitably the law will soon change to have that effect.

9. Rights of reply, correction, and apology

- 9.1 The news media have considerable discretion in what they publish, how they publish it, and whose views they give prominence to. They are also inevitably dealing with events where there are multiple interpretations and contested versions.
- 9.2 This discretion by the media can have adverse consequences. Specifically, some will think there is a lack of diversity in the news, when some views and some events are not reported. This has given rise to calls for access to media as a legal right.
- 9.3 It can also lead to where irresponsible or partial reporting can cause wrongful harm to individuals, groups or organisations, including the more vulnerable members of the community. The issue here is whether the corollary of this freedom is that the news media should be required to make good the wrongful harm they can cause, beyond the redress which the law currently provides.
- 9.4 This section considers whether there is justification for imposing upon newspapers an obligation to publish material to redress wrongful harm which a publication may cause. The conclusions apply not just to newspapers but to all news media.

What the codes of ethics say about redress

- 9.5 There are important reasons to safeguard press freedom—that is, the right to publish or not publish what the editor thinks fit. The question is whether this freedom must be absolute, or whether there may be times when it may be appropriate to require a newspaper to publish particular material.
- 9.6 Many media codes of ethics accept that in certain circumstances it is appropriate that a newspaper give a fair opportunity for a reply and, where appropriate, the publication of a correction. For example¹:
- General principles 2 and 3 of the APC's General Statement of Principles state:

¹ See the discussion in Section 7 of this report.

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 publication².

- Clause 1 of the MEAA Code of Ethics provides that journalists should do their 'utmost to give a fair opportunity for reply', and Clause 12 says they should do their utmost 'to achieve fair correction of errors'³.
- *The Sydney Morning Herald* Code of Ethics provides that journalists will 'do their utmost to offer the right of reply', and that '[m]aterial errors in the paper and its related publications will be corrected or clarified publicly as soon as is practicable'⁴.
- The News Limited Editorial Code of Conduct provides as follows:

1.3 Try always to tell all sides of the story in any kind of dispute.

[...]

2.1 Serious factual errors should be admitted and corrected at the first opportunity, subject to legal advice where appropriate. Individuals or organisations that have been criticised in News group publications should be given a fair opportunity to respond⁵.

9.7 And as News Limited observed in its submission:

As reflected in 1.3 of the News [Limited Editorial] Code [of Conduct], it is standard journalistic practice that person or persons who are 'attacked' would be given the opportunity to provide their views or version of events as part of the original story. The right of reply would form part of the story.⁶

² Australian Press Council *General Statement of Principles* <www.presscouncil.org.au/general-principles>.

³ Media, Entertainment and Arts Alliance *Media Alliance Code of Ethics* <www.alliance.org.au/code-of-ethics.html>.

⁴ *The Sydney Morning Herald Code of Ethics*, <www.smh.com.au/ethicscode>.

⁵ News Limited, Group Editorial Development *Professional Conduct Policy: The policy of our newspapers* (2006).

⁶ News Limited, Submission to the Independent Media Inquiry, 2011, 10.

- 9.8 Notwithstanding the general agreement among journalists, editors and proprietors of the desirability of a right of a reply (the word ‘right’ is a misnomer but the expression is well understood) and the need to correct errors, there is no mechanism by which those remedies can be enforced.
- 9.9 This makes it necessary to consider whether there ought to be any enforceable right of reply or duty of correction, retraction or apology, or even some broader right of access to the media for individuals or groups to express an opinion or to publish facts and ideas.
- 9.10 When considering this issue, it is necessary to distinguish between a right of access on the one hand and rights of reply, correction, retraction or apology on the other⁷. Each has distinct, although overlapping, justifications and advantages and disadvantages.
- First there is the question whether there should be a right of access for an individual or group who has been the subject of a specific and direct attack by a particular media outlet (such attacks would include, but not be limited to, defamatory publications). In essence, this kind of access right is a right of reply, to enable the attacked person or group to put their side of the story, or to have a correction, retraction or apology published. This will be referred to as a ‘right of reply’.
 - Second, there is the question of a more general right of access for individuals and groups in order to ensure that matters of public interest are fully aired by requiring diverse viewpoints to be published. This will be referred to as a ‘right of access’.

A right of reply

Justifications for a right of reply

- 9.11 A right of reply has two principal justifications:
- the protection of the rights of the individual or group that has been the subject of adverse reporting, and

⁷ See, e.g., Jerome Barron, ‘The Right of Reply to the Media in the United States—Resistance and Resurgence’ (1993) 15 *Hastings Communications and Entertainment Law Journal* 1, 2–3.

- the right of the public to receive accurate information, and/or to maximise diversity of information on issues of public interest.
- 9.12 As for the first justification, the law provides a remedy in defamation by way of damages. This is of little use to most people⁸. A compulsory right of reply could in part be regarded as a practical method of achieving what is sought by a claim in defamation: that is, to protect a person's reputation⁹.
- 9.13 Importantly, a right of reply could go beyond defamation law, and enable a response to a publication that does not meet the technical legal rules of defamation law.
- 9.14 A right of reply can be justified not only on the same basis that defamation law is justified—as protecting the value of a person's reputation—but simply as an aspect of basic fairness to the individual or group concerned.
- 9.15 In addition, a right of reply ensures that audiences are made aware of competing versions of events and different opinions. As Barron has argued, a right of reply 'permits the introduction of new material and ideas into the discussion [and] stimulates debate'¹⁰.
- 9.16 One justification for free speech is the 'marketplace of ideas' theory¹¹. An enforceable right of reply is consistent with that theory as it ensures that the ideas available in the 'marketplace' reflect not just one point of view or opinion, but several. It enables members of the public to make up their own minds about the facts or opinions being reported.

⁸ See the discussion in Section 5 of this report.

⁹ However, a right of reply is only a starting point—it depends on the person affected having the necessary ability to put their side of the case. In the case of people in a state of vulnerability or people with mental illness, that may well not be the case: ARC Linkage Grant LPO989758, Submission to the Independent Media Inquiry, 2011, 3; Hunter Institute of Mental Health, Submission to the Independent Media Inquiry, 2011 3–4.

¹⁰ Jerome Barron, 'The Right of Reply to the Media in the United States—Resistance and Resurgence' (1993) 15 *Hastings Communications and Entertainment Law Journal* 1, 2. This justification, however, is not without its critics, who point out that 'a right of reply alone is insufficient to bring about this second goal of a genuine marketplace of ideas'; rather, a broader right of access is required: see, e.g., Stephen Gardbaum, 'A Reply to the Right of Reply' (2008) 76 *Geo Wash L Rev* 10651 1069–70. Barron himself acknowledged this in his ground-breaking article 'Access to the Press: A New First Amendment Right' (1967) 80 *Harv L Rev* 1641, 1660. This is not, however, a basis for rejecting a right of reply.

¹¹ See the discussion in Section 2 of this report.

- 9.17 A right of reply is also consistent with the democratic participation justification for freedom of expression¹² in that it ensures that on matters relevant to democratic decision-making, the public is more accurately informed about such matters. As Justice Scalia put it: '[g]iven the premises of democracy, there is no such thing as *too much* speech'¹³.
- 9.18 Finally, codes of conduct generally recognise the need to allow a person the subject of adverse reporting to put his/her side of the story¹⁴. This shows there is no significant opposition to a right of reply at a moral level. Indeed, Professor Disney pointed out that, to some extent, the APC's adjudications operate as a right of reply¹⁵, and Mr Reid (Editorial Director of News Limited) said that often a right of reply is given where a complaint has been made, often after mediation by the APC¹⁶.

Arguments for and against an enforceable right of reply

- 9.19 It is to be expected that views will differ on whether an enforceable right of reply is desirable. Certainly, there is a difference of opinion among academics, and even those who might support a right of reply as a matter of principle do not necessarily want an enforceable right of reply¹⁷. Likewise, submissions to the Inquiry concerning an enforceable right of reply were mixed¹⁸.
- 9.20 To a large extent the objections to an enforceable right of reply track the objections more generally to regulation of the press, namely that it is an unwarranted encroachment on editorial independence. However, the weight of this objection seems to be reduced if an

¹² See the discussion in Section 2 of this report.

¹³ *McConnell v Federal Electoral Commission* 540 U.S. 93, 259 (2003).

¹⁴ Oral Submission to the Independent Media Inquiry, 2011, Sydney 17 November 2011, 158 [13]–[18] (Dr Simons).

¹⁵ Oral Submission to the Independent Media Inquiry, 2011, Sydney 18 November 2011, 324 [2]–[10] (Professor Disney).

¹⁶ Oral Submission to the Independent Media Inquiry, 2011, Sydney 17 November 2011, 188 [25]–[33] (Mr Reid).

¹⁷ See, for example, Oral Submission to the Independent Media Inquiry, 2011, Melbourne 9 November 2011 249–250 [44]–[11] (Mr Berg).

¹⁸ In evidence at the hearings, while the principle that individuals deserve an opportunity to respond to adverse reporting was accepted, views differed on whether a right of reply ought to be mandated. Dr Martin Hirst, for example, considered that there should not be an enforceable right of reply (Melbourne 8 November 2011 27 [21]–[25]) as did Mr Reid (Sydney 17 November 2011, 188 [26]–[33]); whereas Professor Robert Manne considered that a right of reply administered through the APC was appropriate (Melbourne 8 November 2011 44–45 [47]–[6]). Mr Chadwick observed that he had previously supported an enforceable right of reply, but had 'changed his mind' (Oral Submission to the Independent Media Inquiry, 2011, Melbourne 9 November, 226–227 [47]–[17] (Mr Chadwick)).

enforceable right of reply is introduced in a self-regulation or co-regulation scheme adopted by the media, and is only enforceable to the extent the media allows it to be.

9.21 The principal arguments for an enforceable right of reply are:

- As the right can provide a remedy for harm to a recognised interest (namely, reputation), it is important that the right be enforceable and not simply left to the goodwill of the publisher. This is particularly important given the reach of the modern news media and the structural disadvantages experienced by individuals vis-à-vis the media¹⁹. Media organisations exercise virtually unreviewable power²⁰, limited only by laws that are rarely an accessible option for ordinary people (if they ever were). Mr Chadwick—who has subsequently changed his mind on this question—once stated that a right of reply would ‘diminish the distorting effect of the ‘gatekeeper’ role exercised by those who operate the few mass media outlets which are available’²¹.
- He also said that the right serves the public interest by maximising the available speech on a given issue, thereby enhancing freedom of expression²². The fact that he has changed his mind does not weaken the force of his original argument. Although the internet is available as an alternative means of communicating with the public, it is the mainstream media that have migrated to online platforms that are the most viewed news and current affairs sites.
- Where, as in Australia, newspaper ownership is concentrated, to the point of monopoly in some cities and regions, it is important that a newspaper that publishes adverse material about a person can be required to publish a reply because there may be no other effective publication option available to the person concerned.
- An enforceable right of reply can be regarded as less of a limit on freedom of expression than a defamation suit²³. It does not fine or punish a person for publication and does not

¹⁹ See Kyu Ho Youm, ‘The Right of Reply and Freedom of the Press: An International and Comparative Perspective’ (2008) 76 *George Washington Law Review* 1017, 1059.

²⁰ *Miami Herald Publishing Co v Tornillo* 418 US 241, 250 (1974), summarising the arguments of the appellee (respondent) and supporting advocates of an enforceable right of access in that case.

²¹ Paul Chadwick, ‘Media Ownership and Rights of Access’ (Speech delivered to Free Speech Forum, 8 December 1996) 7.

²² *Ibid.*

²³ Jerome Barron, ‘The Right of Reply to the Media in the United States: Resistance and Resurgence’ (1993) 16 *Hastings Communications and Entertainment Law Journal* 1, 15.

operate as a prior restraint. Rather, it requires the publication of a different perspective on reported events.

9.22 The principal arguments against an enforceable right of reply are:

- It is a limitation on freedom of speech (either of the editor²⁴ or of the media proprietor). The freedom of speech is as much a freedom not to speak, or not to speak certain words, as it is a freedom to speak. As Justice Powell put it:
*Compelled access ... both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.*²⁵
- It has a chilling effect on speech, in that the media may choose not to publish adverse material about a person, even where the material is true or is published in the public interest, if the media outlet thinks that it will be required to publish a reply.
- It is a form of penalty, because a newspaper or broadcaster 'cannot proceed to an infinite expansion of its column space' or broadcast time to accommodate replies that a regulator determines should be published²⁶. If a media outlet is required to publish a reply, it will necessarily have to omit something else—either more of its own speech, or revenue-generating advertising. (This argument, of course, has no relevance to the internet).
- Codes of ethics are sufficient to ensure that a person who is the subject of adverse reporting is given an opportunity to put his or her side of the story.
- Self-regulation is the appropriate mechanism for providing a right of reply; statutory intervention will leave the decision in the hands of government regulators, who will inevitably have an incentive to intervene in favour of their own and other vested interests in enforcing any right (unless enforcement is left to the courts, rather than to a statutory authority).

²⁴ The role of the editor was given particular prominence in *Miami Herald Publishing Co v Tornillo* 418 US 241, 258.

²⁵ *Pacific Gas & Electric Co v Public Utilities Commission of California* 475 US 1, 9 (1986).

²⁶ *Miami Herald Publishing Co v Tornillo* 418 US 241, 257 (1974).

Should there be an enforceable right of reply?

- 9.23 The arguments in favour of an enforceable right are the more persuasive.
- 9.24 There can be no doubt that requiring a person to publish speech with which they do not agree is an interference with that person's freedom of expression. But the benefits to be gained for society as a whole through the enhancement of the democratic process, and to individuals and organisations may outweigh the harm caused by this interference.
- 9.25 In this context, it is not unimportant to remember that the media commonly publish speech with which they may not agree, in the form of advertisements. And there has been no suggestion that the media would decline to carry a paid political advertisement²⁷. Often, then, a right of reply will require a publisher to do for free what it would otherwise do for a fee.
- 9.26 More important, however, is to look at the potential for the right of reply to have a chilling effect on speech. Claims of a chilling effect are difficult to demonstrate empirically²⁸. Many countries have had (and many still have) statutory provisions for a right of reply. Assessments of a number of those regimes have concluded that they have not had a chilling effect on press freedom. As one scholar put it, analysing the French regime²⁹:

These fears [of a chilling effect] seem quite unfounded. Not only is the right infrequently invoked—thus consuming an infinitesimal portion of space in any newspaper or magazine—but it appears to have had no discernible effect on journalistic vigour. On the positive side, its presence ... may well have been a contributing stimulus to the generous amount of space in the French press devoted to Letters to the Editor, guest opinion columns, and other modes of voluntarily granted direct and mediated access. It has certainly helped to provide a livelier and more diverse reading bill of fare for the public.

²⁷ The evidence suggests the contrary: when one newspaper (not an APC member) declined to publish an APC adjudication (that it had agreed to the APC undertaking), the APC took out a paid advertisement containing the adjudication: Oral submission to the Independent Media Inquiry, Perth, 6 December 2011 87 [11]–[18] (Mr Christian).

²⁸ See the discussion in Section 6 of this report.

²⁹ Franklyn Haiman, *Citizen Access to the Media: A Cross-Cultural Analysis of Four Democratic Societies* (1987), 12, quoted in Kyu Ho Youm, 'The Right of Reply and Freedom of the Press: An International and Comparative Perspective' (2008) 76 *George Washington Law Review* 1017, 1059.

- 9.27 The opposite view was expressed by the United States Supreme Court. It concluded that ‘a government enforced right of access *inescapably* ‘dampens the vigour and limits the variety of public debate’³⁰. There was no evidence for this conclusion, and the court appeared to focus on a broader notion of a right of access, rather than the narrower right of reply. Postulation of the chilling effect as a basis for rejecting a right of reply appears to be an assumption about how people would behave, rather than an empirically-tested hypothesis.
- 9.28 In any event, 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. The inquiry received a submission that media organisations would commonly offer an opportunity to respond before publication³¹. In those circumstances, it could be expected that the harm that could follow to the media from offering a person an opportunity to respond after publication would be outweighed by the rights that are being vindicated.
- 9.29 Further, while an enforceable right of reply is an interference with editorial freedom, it is not censorship. It should be remembered that such a right would only be enforced after an independent process found there was merit in the complaint, and so would exclude baseless complaints. In such a situation, a right of reply increases speech on a given topic and:
- If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.*³²
- 9.30 Mr Chadwick, presently the Director of Editorial Policy at the ABC and a noted media law commentator, wrote in 1995 that a ‘statutory scheme [for a right of reply], properly designed, would be consistent with free speech principles’³³. He no longer holds that view

³⁰ Miami Herald Publishing Co v Tornillo 418 US 241 (1974), 257, quoting New York Times Co v Sullivan 376 US 254 (1963), 279.

³¹ See, e.g., Law Council of Australia, Submission to the Independent Media Inquiry, 2011, 9–10: media organisations ‘almost invariably seek prior comment (and if they obtain comment, publish it) from persons who are to be the subject of an attack’.

³² Whitney v. California 274 U.S. 357, 377 (1927) per Justice Brandeis.

³³ Paul Chadwick, ‘Media Ownership and Rights of Access’ (Speech delivered to Free Speech Forum, 8 December 1996) 6.

and believes the potential harm to free speech justifies his change of mind on this issue, as noted above³⁴; but, as before, that does not diminish the strength of his earlier argument.

9.31 Mr Chadwick also observed in his 1995 paper that '[i]f technology does produce diversity and plenty, let the sun set on the right of reply. But not until then. It is needed in the meantime'³⁵. Technology has not produced that 'diversity and plenty' in an accessible way. It is the mainstream media that dominate the supply of news and the 'cacophony' of other voices on the internet³⁶ would do little to offer redress to a person who has been the subject of adverse reporting.

Constitutional validity of a statutory right of reply

9.32 A statutory right of reply might be challenged on constitutional grounds. Subject to the terms of the particular legislation, the following points may be made.

- First a right of reply could be supported by a combination of the external affairs power, the corporations power and the telecommunications power.
- Second, it is unlikely that a statutory right of reply, in so far as it was to apply to political and government matters, would violate the implied freedom of political communication. For one thing, a requirement to publish a reply may not properly be characterised as a 'burden' on freedom of political communication. In any event, the implied freedom of political communication is not absolute. It is subject to limitations that are 'reasonably appropriate and adapted to serve a legitimate end [in a manner] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'³⁷. Provided it is properly drafted, a right of reply would serve legitimate ends and would do so in a manner that is compatible with the maintenance of the constitutionally prescribed system of government. Of particular relevance is that a right of reply would add to the speech available to voters in the discharge of their constitutional functions.

³⁴ Oral Submission to the Independent Media Inquiry, Melbourne 9 November 2011, 226–227 [47]–[17] (Mr Chadwick).

³⁵ Paul Chadwick, 'Media Ownership and Rights of Access' (Speech delivered to Free Speech Forum, 8 December 1996) 7.

³⁶ See discussions in oral submissions to the Independent Media Inquiry: Melbourne, 9 November 2011, 183 [35]–[46] (Professor Julian Disney); Melbourne, 9 November 2011, 251 [33]–[45] (Dr Chris Berg), Perth, 6 December 2011, 11[5]–[6] (Dr Joseph Fernandez).

³⁷ *Lange*, as modified in *Coleman v Power* (2004) 220 CLR 1 [93] (McHugh J).

How might a right of reply work?

9.33 There are a number of matters to be considered. Broadly, they are:

- *Timeliness*: For a right of reply to be an effective reply to adverse reports it needs to occur in reasonably quickly after the original story; there is usually little point to reply months later.
- *Cost*: It needs to involve minimal cost to the person or group concerned as well as to the media outlet.
- *Scope*: The right ought to extend to any comment about a person or group that is likely to cause wrongful harm and the person or group asserts on reasonable grounds is false or misleading. It is not appropriate, in the context of a timely publication requirement, to require that the person or group establish to any legal standard that the commentary is false or misleading. And in any event, one purpose of the right of reply is to provide both sides of the story; it does not depend on identifying, in advance, which of those sides is correct.
- *Place of publication*: Different rules may be appropriate for different media.
 - (a) In a newspaper, the reply would need a degree of prominence commensurate with the prominence of the original report. It could be published on a regular corrections page, if one exists, or on the letters to the editor page, or in the same section of the paper as the original publication.
 - (b) On the internet (regardless of whether video, audio or text) the reply could be embedded on the page that contain the offending report, so that anyone who in future reads, views or listens to the original report will have the opportunity to read, view or listen to the reply.
 - (c) Different rules would be appropriate for television and radio.
- *Exclusions*: Where a person or group has already been given the opportunity to comment on a report (whether or not they chose to exercise that opportunity) there should be no further right of reply.

International and comparative examples of a right of reply

9.34 A legally enforceable right of reply is not new. Legislation providing for such a right has been enacted and/or proposed in various countries and recognised under regional international human rights law. Some countries have a constitutional recognition of a right of reply. For example:

- France, Denmark, Germany and South Korea have right of reply laws that apply to the media generally³⁸, and Ireland has a right of reply scheme applicable to broadcasters only³⁹
- Turkey, Brazil, Portugal, Slovenia and Croatia have constitutional recognition of a right of reply⁴⁰
- Florida had a right of reply statute, although it was declared unconstitutional by the United States Supreme Court⁴¹.

The United Kingdom

9.35 In the UK bills to provide for a right of reply have been introduced into Parliament over the years, though none has passed⁴². One example is the Right of Reply Bill introduced in 1988 as a private member's Bill by Tony Worthington, then a member of the Opposition⁴³. The bill was intended to give members of the public a right of reply to correct inaccuracies about them in the press or broadcast media as well as to establish a Press Commission to replace the self-regulatory regime then in place.

Ireland

9.36 The Irish right of reply, applicable to broadcasters, is found in s 49(2) of the *Broadcasting Act 2009*. That section provides that 'any person whose honour or reputation has been

³⁸ Kyu Ho Youm, 'The Right of Reply and Freedom of the Press: An International and Comparative Perspective' (2008) 76 *George Washington Law Review* 1017, 1034–1043.

³⁹ *Broadcasting Act 2009* (Ireland), s 49.

⁴⁰ Kyu Ho Youm, 'The Right of Reply and Freedom of the Press: An International and Comparative Perspective' (2008) 76 *George Washington Law Review* 1017, 1030–1032.

⁴¹ *Miami Herald Publishing Co v Tornillo* 418 US 241 (1974).

⁴² Right of reply bills were introduced into the UK Parliament in 1983, 1984, 1988, 1989, 1992 and 2005.

⁴³ See United Kingdom, *Parliamentary Debates*, House of Commons, 21 December 1988, vol 144 col 455.

impugned by an assertion of incorrect facts or information in a broadcast shall have a right of reply'. Section 49(3) devolves to the Broadcasting Authority of Ireland responsibility for preparing a scheme for the exercise of the right of reply. The scheme prepared by the BAI⁴⁴ which provides only for the correction of incorrect facts or information, and not to opinion has the following aims:

- to provide 'speedy redress without having recourse to legal proceedings which may prove time-consuming and costly' (legal proceedings are not barred by recourse to the right of reply; however publication of a right of reply may result in reduced damages in a defamation action)
- to ensure that the process for the exercise of a right of reply are transparent, fair and understood
- to ensure the process is efficient, effective and timely, and
- to provide for the broadcast of a right of reply that is proportionate to the nature of the correction.

9.37 An elaborate procedural process has been set up which deals with times for making and responding to a request for a reply, procedures to review a refusal to grant the request and matters to be taken into account by the review body.

9.38 The scheme, while admirable in its aims, nonetheless involves an extended period of time between the original broadcast and publication of a reply, particularly where the broadcaster does not accept a request for a right of reply. The delay may be several months (and, if court proceedings are instituted, potentially much longer). This is a significant flaw in the regime.

The United States

9.39 Various rights of reply statutes have been proposed, most of which were not enacted⁴⁵. However, a limited right of reply statute was enacted in Florida. There, Florida Statute § 104.38 (1973)⁴⁶ provided as follows:

⁴⁴ Broadcasting Authority of Ireland, *Right of Reply Scheme* (May 2011), <www.bai.ie/pdfs/201105_rightofrepliescheme.pdf>.

⁴⁵ See, for example, the measures described in Jerome Barron, *Freedom of the Press for Whom?* (Indiana University Press, 1973), 53.

Newspaper assailing candidate in an election; space for reply

If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree.

9.40 The Florida statute has a number of inappropriate features:

- It was to be enforced through the criminal law. As a consequence it was enforceable only through the courts and not through an administrative process. This would inevitably involve cost and delay and would not necessarily produce the desired goal of regulation (namely of publication of a reply).
- There are no exceptions provided to the requirement for publication.

9.41 On one view, put into an Australian constitutional context, the Florida statute is not 'reasonably appropriate and adapted' to give effect to a right of reply.

International law

9.42 There is no express requirement of a right of reply in human rights treaties to which Australia is a party. However, an enforceable right of reply has been recognised in other international instruments and jurisprudence⁴⁷.

⁴⁶ As noted the Florida statute was declared unconstitutional by the Supreme Court in *Miami Herald Publishing Co v Tornillo*. That case goes to the underlying merits and validity of enacting a right of reply statute. It does not go to the question of the merits of the form of the Florida statute, if a statute in similar terms were to be enacted in Australia.

⁴⁷ As explained in Castan Centre for Human Rights, Submission to the Independent Media Inquiry, 2011, 12–13. See also Kyu Ho Youm, 'The Right of Reply and Freedom of the Press: An International and Comparative Perspective' (2008) 76 *George Washington Law Review* 1017, 1021–1029.

In addition to the materials identified in the Castan Centre submission, it is interesting to note that there is a UN Convention on the International Right of Correction, which deals with the right of contracting states to have adverse reporting corrected. That Convention does not, however, impose obligations on states parties to ensure that corrections

9.43 For example, Article 14 of the American Convention on Human Rights provides:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred⁴⁸.

9.44 The Inter-American Commission on Human Rights has held that the right of reply must be subject to strict scrutiny to ensure that it does not infringe freedom of expression and that as a consequence it relates only to statements of fact and not to opinion⁴⁹.

9.45 The European Court of Human Rights has recognised the existence of a right of reply as an aspect of the right to freedom of expression under Article 10 of the European Convention in Human Rights (ECHR). In *Melnychuk v Ukraine*, the European Court observed that⁵⁰:

... as a general principle, newspapers and other privately owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals. However, there may be exceptional circumstances in which a newspaper may legitimately be required to publish, for example, a retraction, an apology or a judgment in a defamation case. Consequently, there will be situations when a positive obligation may arise for the State to ensure an individual's freedom of expression in such media ...

9.46 In *Vitrenko v Ukraine*, the European Court affirmed the duty of states to provide for a right of reply, saying⁵¹:

are in fact published; the obligation is only on states to ensure that media organisations receive any correction. The Convention has 23 states parties of which only one (France) is a Western liberal democracy.

⁴⁸ *American Convention of Human Rights 'Pact of San Jose, Costa Rica'* opened for signature 22 November, OAS 36 (entered into force 18 July 1978) art 14(1–2).

⁴⁹ *Santana v Venezuela*, case 453.01, Inter-Am CHR, Report No 92/03, OEA/Ser.L/V/II.118 (2003), quoted in Kyu Ho Youm, 'The Right of Reply and Freedom of the Press: An International and Comparative Perspective' (2008) 76 *George Washington Law Review* 1017, 1025–6.

⁵⁰ No 28743/03, European Court of Human Rights (5 July 2005), quoted in Castan Centre for Human Rights, Submission to the Independent Media Inquiry, 2011, 12. In relation to the ECHR and the practice of the European Court, see Law Council of Australia, Submission to the Independent Media Inquiry, 2011, 4–5.

the Court bears in mind the positive obligation on the State to ensure that persons subjected to defamation have a reasonable opportunity to exercise their right to reply by submitting a response to defamatory information in the same manner as it was disseminated.

- 9.47 While the European Court referred expressly to a reply to defamatory publications, in 1974 the Committee of Ministers of the Council of Europe adopted a right of reply resolution that extended to publication of incorrect information about a person⁵²:

In relation to information concerning individuals published in any medium, the individual concerned shall have an effective possibility for the correction, without undue delay, of incorrect facts relating to him which he has a justified interest in having corrected, such corrections being given, as far as possible, the same prominence as the original publication.

- 9.48 The resolution was updated in 2004 to take into account technological developments, in particular the internet, concerning which the Committee of Ministers observed that ‘the right of reply is a particularly appropriate remedy in the online environment due to the possibility of instant correction of contested information and the technical ease with which replies from concerned persons can be attached to it’⁵³.

Right of reply: Conclusion

- 9.49 An enforceable right of reply is a desirable reform for the media. There are no significant moral or policy objections to such a right and while there are arguments against making a right of reply enforceable, the advantages of enforcement outweigh the disadvantages of leaving the matter in the hands of the very body that published the adverse material in the first place.

⁵¹ No 28743/03, European Court of Human Rights (5 July 2005), quoted in Castan Centre for Human Rights, Submission to the Independent Media Inquiry, 2011, 12.

⁵² *Resolution (74) 26 on the Right of Reply—position of the individual in relation to the press* (Adopted by the Committee of Ministers on 2 July 1974 at the 233rd meeting of the Ministers’ Deputies) 82.

⁵³ *Recommendation (2004) 206 addendum 16 of the Committee of Ministers to member states on the right of reply in the new media environment* (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers’ Deputies).

9.50 The creation of a right of reply should be viewed in the context that the right is recognised in most codes. So, in many situations, there will be no need to resort to enforcement because the media will publish the reply⁵⁴. An enforceable right will only be needed in those cases where the media behaves contrary to their own codes.

A right of access

9.51 A right of access is a much broader right. The right does not depend upon publication of adverse material about a person or group. Any justification for a right of this kind must depend on different principles. Ultimately, it is not recommended that any right of access be created. However, the idea cannot be dismissed out of hand.

9.52 In an important article in 1969, Barron argued for right of access to the media.⁵⁵ He made a sustained attack on editorial freedom as an absolute principle, on four premises⁵⁶.

- The privately-controlled free and open market place of ideas is a romantic myth.
- More often than not, the private market kills ideas before they have the opportunity to compete.
- In any event, the broadcast media have a greater impact on the public than do newspapers (at the time Barron wrote communication via the internet had not been heard of).
- Importantly, he adopted what was said by Meiklejohn namely that ‘what is essential is not that everyone shall speak, but that everything worth saying is said’⁵⁷. On this view editorial freedom might have to be abridged so that a sufficiently informed public debate can take place.

⁵⁴ For example, Mr Reid (News Limited) said that he was comfortable with the APC settling a letter to the editor because they do it already: Oral submission to the Independent Media Inquiry, Sydney, 17 November 2011, 187 [25]–[33] (Mr Reid). Mr Hywood (Fairfax Media) said that Fairfax newspapers published APC findings, but said that the APC should not have power to determine the placement of those findings: Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011, 71[15]–[18], (Mr Hywood).

⁵⁵ Jerome Barron, ‘Access to the Press—A new first amendment right’ (1966–1967) 80 *Harvard Law Review* 1641.

⁵⁶ Summarised by Bezanson in *Herbert v Lando Editorial Judgment* 441 US 153 (1979).

⁵⁷ Alexander Meiklejohn, *Political Freedom* (Oxford University Press, 1965) 26.

9.53 Barron’s conclusion was that a narrowly tailored right of public access to the print media is as important as the protection of free speech itself. This view is reflected, to some extent, in the codes of ethics adopted by journalists and the media as part of their self-regulation. It is necessary, though, to look at issues in greater depth.

Justifications for a right of access

9.54 A right of access has two principal justifications:

- the protection of the rights of an individual or group that wishes to express a view on matters in the public interest, and
- The right of the public to receive accurate information, and/or to maximize diversity of information on issues of public importance.

9.55 As for the first justification, a common analysis is that freedom of speech simply requires that individuals or groups that wish to express their views are not, by law, prevented from doing so, regardless of whether they are able to publicise their views. However, this ‘negative’ approach—the right is freedom from government interference—is not the only possible approach. As Liebling puts it, on this approach, ‘[f]reedom of the press is guaranteed only to those who own one’⁵⁸. An alternative view of freedom of expression would recognise that to be effective, a person or group may require access to means of mass communication. On this basis a right of access to the mainstream media might be justified.

9.56 This argument assumes that the power to inform the public and to shape public opinion resides in large measure in the mainstream media⁵⁹, and that this power is open to abuse, particularly when media ownership is concentrated in a few hands. What is news is what those outlets choose to publish; what views the public hears on matters of public interest are the views those outlets choose to publish. According to Barron⁶⁰:

⁵⁸ A J Liebling ‘Do you belong in Journalism?’ *The New Yorker*, 14 May 1960. AJ Liebling was an American journalist who worked principally with *The New Yorker*.

⁵⁹ *Miami Herald Publishing Co v Tornillo* 418 US 241, 250 (1974), summarizing the appellant’s respondent’s arguments in that case.

⁶⁰ Jerome Barron, ‘Access Reconsidered’ (2008) 76 *George Washington Law Review* 826, 830–1.

Government is not the only obstacle to the uncensored emergence and dissemination of ideas. Private sources can easily 'determine not only the content of information but its very availability'.

So it is contended that minority or unpopular viewpoints need access to mass media channels of communication in order to effectively place their views before the public. The enforceable right of access is intended to 'equalize opportunities for expression'⁶¹.

9.57 In addition to protecting the rights of the individual or group who wishes to speak, a right of access would, as would a right of reply, enhance the right of readers/viewers/listeners to have access to competing information, versions of events and opinions.

9.58 To reach the goal of maximising public access to diverse facts, ideas and viewpoints, a right of access would be more effective than a right of reply. A right of reply is reactive, triggered only if a media outlet chooses to publish adverse material about a particular person or group. In contrast, a right of access would operate to require the media to cover issues not being covered, or to provide a variety of perspectives on issues that were being covered, and so would be more effective in ensuring that the public has access to diverse issues, opinions and ideas⁶².

Arguments for and against an enforceable right of access

9.59 There is likely to be considerable disagreement on whether an enforceable right of access is desirable. Even those who might support a right of access as a matter of principle do not necessarily support an *enforceable* right of access.

9.60 To a large extent the objections to an enforceable right of access track the objections more generally to legal regulation of the press. First, a right of access that is broader than a more tailored right of reply would have a greater chilling effect than any such effect produced by a right of reply. The FCC took the view that its fairness doctrine had such an effect, resulting in broadcasters eschewing controversy and serving up instead bland programming. The FCC

⁶¹ Jerome Barron, 'Access to the Press: A New First Amendment Right (1967) 80 *Harvard Law Review* 1641, 1670.

⁶² See Stephen Gardbaum, 'A Reply to the Right of Reply' (2008) 76 *George Washington Law Review* 1065, 1069–70; Barron himself acknowledged this in his ground-breaking article 'Access to the Press: A new First Amendment Right' (1967) 80 *Harvard Law Review* 1641, 1660.

chairman at the time the doctrine was abandoned, Dennis Patrick, said that fairness complaints had been filed in thousands of FCC proceedings, involving significant legal costs for broadcasters along with the potential for loss of licence⁶³. By 1985, the FCC concluded that⁶⁴:

the Fairness Doctrine—in stark contravention of its purpose—operates as a pervasive and significant impediment to the broadcasting of controversial issues of public importance.

9.61 Academic studies in the United States have diverged as to whether the FCC was correct in its conclusion. It is likely (and this is simply a matter of judgment) that there may be a chilling effect if there were an enforceable right of access. And the greater the likelihood of that effect, the less strong may be the justification for the right.

9.62 An additional, and powerful, argument against a right of access is that there are practical difficulties in defining and enforcing such a right. The practical difficulties include the following:

- In what circumstances would a right of access be granted to a person or group?
- To whom should a right of access be granted where there are numerous persons or groups who wish to put forward their views on a particular issue?
- In what part of a particular publication should the right be exercised?
- Who is to bear the cost (including any indirect cost) of requiring a media outlet to publish additional material?

9.63 Barron has, to some extent, grappled with some of these practical issues. He wrote:

⁶³ Dennis Patrick, 'The Fairness Doctrine' (Speech delivered at the National Press Club, Washington DC, 18 July 2007).

⁶⁴ Federal Communications Commission, *Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 145 (1985) quoted in Dennis Patrick, 'The Fairness Doctrine' (Speech delivered at the National Press Club, Washington DC, 18 July 2007).

One relevant factor ... would be the degree to which the petitioner seeking access represents a significant sector of the community. But this is perhaps not a desirable test—'divergent' views, by definition, may not command the support of a 'significant sector' of the community, and these may be the very views which, by hypothesis, it is desirable to encourage. Perhaps the more relevant consideration is whether the material for which access is sought is indeed suppressed and under-represented by the newspaper. Thus, if there are a number of petitioners seeking access for a particular matter or issue, it may be necessary to give access to only one.

9.64 Further, to the extent that persons other than the editor or media proprietor will be charged with deciding whether a particular person is to be given access to put forward a specific view on an issue, there is real possibility of subjective decision-making.

Should there be an enforceable right of access to the media?

9.65 The practical obstacles to the implementation of any general right of access to the media are almost insurmountable. While it may, at a theoretical level, be possible to craft a regime that deals with what ideas and which people ought to have access, whatever solution is arrived at would be so contestable and, ultimately, so subjective, that implementation of a right of access is not desirable.

9.66 This is particularly so where:

- There is no monopoly in the provision of news. The public has access to radio, television, newspapers and the internet for diverse information, opinions and ideas.
- The internet, local or niche print publications and community television are available to disseminate many minority or unpopular viewpoints. This significantly enhances the public's ability to access those ideas, although the internet is far from a complete answer to current dominance by the mainstream media of internet news and current affairs.
- There is the real potential for a chilling effect.
- The financial cost especially to the print media of providing access could be significant.

9.67 Unless circumstances change significantly, and they may not, there should not be any enforceable right of access to the media.

10. Theories of regulation

Introduction

- 10.1 Regulation is usually understood to refer to the imposition of rules or principles designed to influence behaviour¹.
- 10.2 This Inquiry is required to consider whether the current systems of self-regulation of the media should be replaced with something new.
- 10.3 It is not possible to carry out that task adequately without some understanding of the principles that lie behind regulation.

Why regulate?

- 10.4 Broadly speaking, there are two main rationales for regulation: to prevent or respond to market failure and to pursue social and equity objectives². Each of these has various sub-rationales or aspects.
- 10.5 Classic forms of market failure include:
- Existence of a monopoly.
 - Public goods. A public good is defined by Ogus³:

¹ Of course there is a considerable debate in the literature about the meaning of the term ‘regulation’—see the discussion in Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 2–5; however, the definition given is sufficient for this report.

² See, for example, Anthony I Ogus, *Regulation: legal form and economic theory* (Hart, 2004), quoted in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 18–26; Department of Treasury and Finance (Victoria), *Victorian Guide to Regulation* (ed 2.1, 2011) 9–10; Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 5–11. There are of course other rationales; but it is not necessary to canvass them in detail here; for a general discussion see Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) ch 2.2.

³ Anthony I Ogus, *Regulation: legal form and economic theory* (Hart, 2004), quoted in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007).

[A] commodity the benefit of which is shared by the public as a whole or by some group within it. More specifically, it combines two characteristics: first, consumption by one person does not leave less for others to consume; and, secondly, it is impossible or too costly for the supplier to exclude those who do not pay for the benefit.

Because of these characteristics, public goods will be under-produced without government intervention⁴.

- Externalities: these arise when individuals or firms do not bear the cost of the consequences of their actions on others (negative externality), or do not gain a reward when their actions generate a benefit to others (positive externality). By not bearing the full cost of their actions individuals will tend to over-allocate resources to activities that produce negative externalities and under-allocate resources to activities producing positive externalities.
- Information failure: this occurs when all participants in a market do not have access to all the available information or where one party to an exchange has more information than the other (asymmetric information).

10.6 Social and equity objectives include seeking to reduce or manage the risk of harm to the health, safety or welfare of individuals or the community.

10.7 In any given context, the reason for regulation—that is, the problem sought to be addressed by the imposition of rules or standards—needs to be articulated and evaluated before (1) a decision to regulate is taken and (2) a mode of regulation is selected. So, if the concern is with a market, economists work from an assumption that ‘competitive markets combined with the basic legal institutions of modern developed market economies represent the null hypothesis against which the case for additional regulation and alternative forms of additional regulation must be tested’ and that ‘the case for government regulation must start, but not stop, with the identification and quantification of one or more market imperfections’⁵.

10.8 Hence, while market failure or a social goal establishes a necessary condition for intervention, it is not a sufficient condition for action. Costs and benefits will result from any

⁴ Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 9.

⁵ Paul Joskow, ‘Market Imperfections versus Regulatory Imperfections’ (2010) 8(3) *CESifo DICE report 3/2010* 3, 4.

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.

10.9 The alternative to existing structures is not some self-fulfilling ideal of a 'benevolent, costless and perfectly informed regulator'⁶, but rather some other, more realistic institution, the feasibility and efficiency of which require careful examination. For example:

- An appropriate cost-benefit analysis of a likely market failure could conclude that the market might be more robust than believed.
- In some cases, even where a problem is identified, a decision by the government not to intervene can lead to a better outcome for social welfare. For example, voluntary warranties for manufactured products can deal with information failure.

10.10 Potential government or regulatory imperfection need to be considered. It cannot be assumed that regulation will always be successful in achieving its objectives. In particular⁷:

- regulators will always be imperfectly informed about relevant matters, and will often be less well-informed than the entities they regulate
- regulatory processes involve bureaucratic costs
- the regulatory process is potentially susceptible to interest group capture and political influence
- where there are overlapping regulatory regimes, regulated entities will seek to exploit gaps in the jurisdictions of the different regulators and to move to the jurisdiction of the regulator they perceive to best reflect their interests
- absent proper resources, regulators will be unable to properly perform their function.

10.11 Demsetz's (1969) classic paper warns of the dangers of 'implicitly presenting the relevant choice as between an ideal norm and an existing 'imperfect' institutional arrangement'⁸. He labels this tendency in public policy the 'nirvana approach' to economics, where one seeks

⁶ Ibid 5.

⁷ Ibid 5–6.

⁸ Harold Demsetz, 'Information and Efficiency: Another Viewpoint' (1969) 12 *Journal of Law and Economics* 1, 1.

‘to discover discrepancies between the ideal and the real and if discrepancies are found’, the conclusion is that the real is inefficient⁹.

10.12 Demsetz points out that the ‘nirvana approach’ suffers from three main fallacies¹⁰:

- the ‘grass is always greener’ fallacy—the assumption that the government can improve on the market outcome
- the ‘free lunch’ fallacy—failure to recognise that regulation is not costless, and
- the ‘people could be different’ fallacy—failure to recognise that people will continue to respond to the underlying incentives, even where regulation is introduced.

10.13 To avoid these fallacies, Demsetz argues that public policy analysis ought to involve a ‘comparative institution approach’, which involves attempting to assess ‘which alternative real institutional arrangement seems best able to cope with the economic problem’¹¹.

Modes of regulation: governmental regulation vs self-regulation

10.14 Debates about regulation often speak of regulation (meaning statutory or governmental regulation, sometimes referred to as ‘command and control’ regulation¹²) vs self-regulation (sometimes referred to as ‘consensus regulation’¹³) as if there is a simple dichotomy between the two. However, this dichotomy is misleading. Regulation is better thought of as a spectrum from ‘pure’ self-regulation at one end to full governmental regulation at the other, with a variety of co-regulatory possibilities (sometimes referred to as ‘hybrid regulation’¹⁴ or ‘enforced self-regulation’¹⁵) in between¹⁶.

⁹ Ibid.

¹⁰ Ibid n 2.

¹¹ Ibid.

¹² Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 80–85.

¹³ Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 92–96.

¹⁴ Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 105–6.

¹⁵ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), quoted in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 106–7.

Self-regulation	Various forms of co-regulation	Governmental regulation
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10.15 Some approaches insert ‘quasi-regulation’ into this spectrum, between self-regulation and co-regulation. Quasi-regulation refers to regimes where government seeks to influence or persuade entities to behave in particular ways, but where there is no enforcement regime¹⁷. Still other approaches insert education and information into the spectrum before self-regulation¹⁸, while others include no regulation¹⁹ as part of the spectrum²⁰.

No regulation	Education & information	Self-regulation	Quasi-regulation	Co-regulation	Governmental regulation
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10.16 Ayres and Braithwaite adopt a different picture of regulatory options, the ‘pyramid of regulatory strategies’²¹.

¹⁶ See, for example, Ian Bartle and Peter Vass, ‘Self-regulation and the regulatory state—A survey of policy and practice’ (Research Report 17) Centre for the Study of Regulated Industries (The University of Bath, 2005) 1, 19. Bartle and Vass point out that a one-dimensional classification scheme is in some respects inadequate to capture the complexity of regulation. However, they point out too that in order to understand the variety of regulatory regimes in practice it is necessary to reduce the complexity to a single dimension.

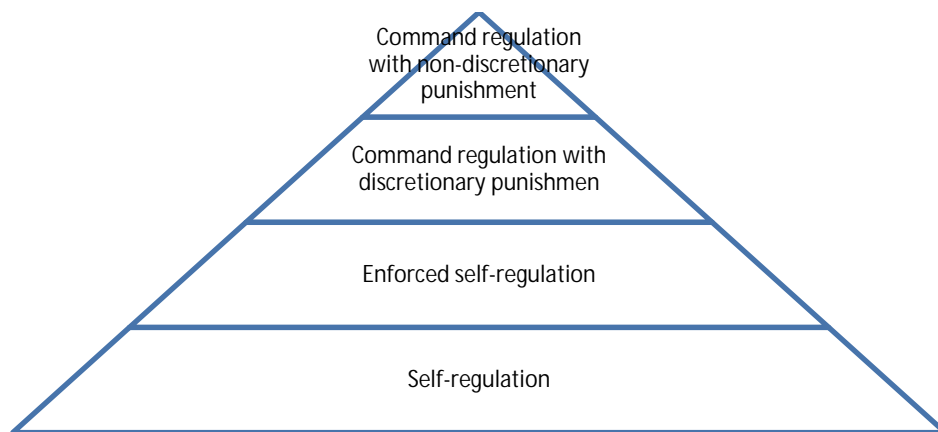
¹⁷ Department of Treasury and Finance (Victoria), *Victorian Guide to Regulation* (ed 2.1, 2011) 16.

¹⁸ Ian Bartle and Peter Vass, ‘Self-regulation and the regulatory state—A survey of policy and practice’ (Research Report 17) Centre for the Study of Regulated Industries (The University of Bath, 2005) 20.

¹⁹ It should be borne in mind that no market is completely unregulated by government. Markets (indeed society as a whole) operate in the context of a set of governance institutions—the ‘basic institutions of capitalism’ such as property rights, liability rules, contract law, etc: Paul Joskow, ‘Market Imperfections versus Regulatory Imperfections’ (2010) 8(3) *CESifo DICE report* 3/2010 3, 4. A reference to ‘no regulation’ thus needs to be understood as ‘no regulation specific to the particular industry’ or societal group.

²⁰ Others include ‘meta-regulation’, namely the regulation of self-regulation (see, e.g., Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge University Press, 2002)). It is unnecessary for present purposes to explore this concept here.

²¹ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), quoted in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 198.



The use of a pyramid rather than a spectrum reflects a normative view that fully-fledged command regulation backed by penal sanctions should be used relatively rarely as a regulatory tool, and that self-regulation should be used more often.

10.17 In considering different forms of regulation along the spectrum (or within the pyramid) there are several matters to be considered:

- Who sets the rules or norms of behaviour?
- Who oversees compliance with the rules?
- What are the consequences for breach of the rules and how are they enforced?
- Is participation in the regulatory regime required by law, or is it voluntary?

10.18 The following general points can be made.

10.19 Government regulation occurs when the state or an agency of the state makes the rules, oversees compliance with the rules and provides enforceable consequences for breach of the rules, and (generally) where participation in the regulatory regime is mandated by law. (Government regulation may also involve regulation by reward, rather than punishment, for example by financial incentives such as tax deductions²².)

10.20 Co-regulation occurs when the rules are developed, administered and enforced by a combination of government agencies and regulated entities²³. Depending on the particular

²² Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 101–103.

²³ *Ibid* 31–32.

mix of government and non-government involvement, a co-regulatory regime may be closer to the self-regulation end of the spectrum (where government involvement is minimal) or closer to the governmental regulation end of the spectrum (where government involvement is significant). Sometimes regimes that are co-regulatory are described as self-regulation because the involvement of the state is minimal compared to the involvement of regulated entities.

Co-regulatory mechanisms can include legislation that²⁴:

- delegates the power to industry to regulate and enforce codes
- enforces undertakings to comply with a code
- prescribes a code as a regulation but the code only applies to those who subscribe to it (prescribed voluntary codes)
- does not require a code but has a reserve power to make a code mandatory
- requires industry to have a code and, in its absence, government will impose a code or standard, or
- prescribes a code as a regulation to apply to all industry members (prescribed mandatory codes).

10.21 Self-regulation (admittedly ‘a term with multiple meanings, no one of them being authoritative’²⁵) is when the rules are developed, administered and enforced by one regulated entity or by a group of regulated entities and where there is no formal involvement of government, although in many contexts the state is present in the background as an incentive for both the existence and the effective operation of self-regulation. An absence of government funding is not an essential aspect of self-regulation, though it may be a common feature.

²⁴ Australian Communications and Media Authority, *Optimal Conditions for effective self- and co-regulatory arrangements* (2011) 5.

²⁵ Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 26.

Advantages and disadvantages of different modes of regulation

10.22 Each mode has advantages and disadvantages; and the appropriate mode of regulation for a particular industry or social problem will vary according to context.

10.23 The advantages of governmental regulation, in contrast to self-regulation, are²⁶:

- Government regulation is generally better resourced than self-regulation.
- Government regulation involves both compulsion and legal enforceability, thus offering a mechanism to deal with unwilling subjects, in contrast to self-regulation where participants can choose not to comply with the rules or to leave the regulatory system altogether.
- Government regulation has universal coverage, applying effective overarching controls on behaviour, and does not (generally) require the subjects of regulation to opt in or permit them to opt out.
- Government regulation involves democratic accountability coupled, in the Australian context, with judicial oversight of the regulator²⁷.

10.24 In contrast, there are advantages of self-regulation over governmental regulation²⁸:

- Self-regulation utilises the knowledge and expertise of the regulated entities, which is greater than the knowledge and expertise of public officials.
- Self-regulation is generally more flexible, adaptable and practical than governmental regulation, which tends to be more difficult to alter (particularly if it is in legislative form).

²⁶ See, e.g., New Zealand Law Commission, *The news media meets 'new media': rights, responsibilities and regulation in the digital age*, Issues Paper No 27 (2011) 118 <www.lawcom.govt.nz/sites/default/files/publications/2011/12/ip27-all-web-v2.pdf>; Anthony I Ogus, 'Rethinking Self-Regulation' (1995), 15(1) *Oxford Journal of Legal Studies* 97, quoted in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 93–95; Ian Bartle and Peter Vass, *Self-Regulation and the Regulatory State—A Survey of Policy and Practice* (Centre for the Study of Regulated Industries, Research Report 17, 2005) 7–8.

²⁷ Bearing in mind that judicial review of executive action cannot be excluded under Australian constitutional law: *Commonwealth Constitution s 75(v)* and *Kirk v Industrial Relations Commission* (2010) 239 CLR 531.

²⁸ Ian Bartle and Peter Vass, *Self-Regulation and the Regulatory State—A Survey of Policy and Practice* (Centre for the Study of Regulated Industries, Research Report 17, 2005) 2–3, 7–8, 36–37; OECD, *Alternatives to Traditional Regulation* (2009) 6; Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 29–30.

- Self-regulation imposes a lower regulatory burden on the regulated entities than government regulation.
- Self-regulation may result in ‘ownership’ of the rules by the regulated entities and hence a greater commitment to those rules and a greater likelihood that a culture of compliance will develop.
- The financial cost of self-regulation is borne by the regulated entities rather than the state.
- Self-regulation allows the market to work without government interference.

10.25 There are, however, also criticisms of self-regulation, in particular that²⁹:

- Self-regulation may lead to collusion and anti-competitive conduct.
- Self-regulation may 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).
- Self-regulation may not meet, or be seen to meet, relevant objectives.
- Self-regulation may not be adequately funded.
- Self-regulation may not have effective systems of transparency and may generally lack public accountability—as Ogus puts it, self-regulation involves ‘the acquisition of power by groups which are not accountable to the body politic through the conventional constitutional channels’³⁰.

10.26 Co-regulation offers a path between self-regulation and governmental regulation and so allows the regulatory regime to obtain some advantages from both ends of the spectrum. Ayres and Braithwaite describe it as ‘a response to the delay, red tape, costs and

²⁹ Ian Bartle and Peter Vass, *Self-Regulation and the Regulatory State—A Survey of Policy and Practice* (Centre for the Study of Regulated Industries, Research Report 17, 2005) 3; Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 30.

³⁰ Anthony I Ogus, ‘Rethinking Self-Regulation’ (1995), 15(1) *Oxford Journal of Legal Studies* 97, quoted in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 94.

stultification of innovation that can result from imposing detailed government regulation on business, and to the naiveté of trusting companies to regulate themselves³¹.

10.27 Co-regulation has the advantage of permitting a degree of government control and oversight of an area of behaviour, while retaining a strong role for industry. However, co-regulatory entities may remain vulnerable to ‘industry capture’³².

10.28 Ayres and Braithwaite’s concept of ‘enforced self-regulation’ can be seen as a subset of co-regulation, involving government in requiring that there be regulation, but otherwise retaining the core features of self-regulation, namely that the regulated entities both set and make decisions about their enforcement.

Designing a regulatory system

10.29 Regardless of what mode of regulation is chosen from along the spectrum, it is also necessary to give some thought to the design of any regulatory system. The literature is broad, but in summary any system, whether involving self-regulation, co-regulation or governmental regulation, should have the following features³³:

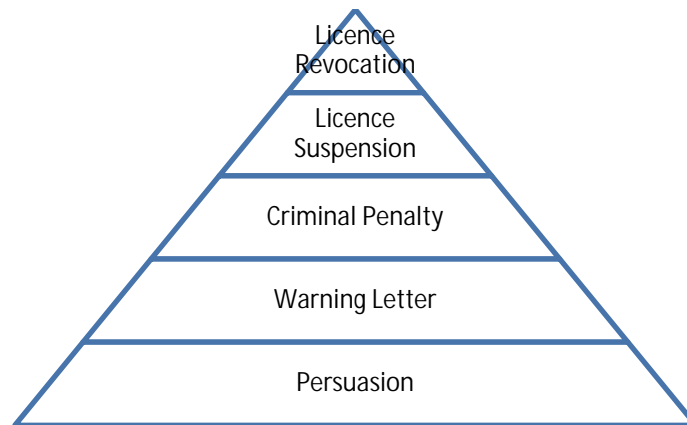
- clearly-specified objectives
- an organisational structure involving suitable personnel
- adequate ongoing funding (and, where relevant, transparency of funding)
- transparency and objectivity in decision-making processes
- appropriate mechanisms for implementation or enforcement of decisions
- visibility to the public, by promotion and explanation of its role and activities
- periodic reviews of its performance, and
- appropriate accountability mechanisms.

³¹ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), quoted in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 106.

³² Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 33.

³³ *Ibid* ; Ian Barker and Lewis Evans, *Review of the New Zealand Press Council* (2007) 11.

10.30 In considering implementation and enforcement, Ayres and Braithwaite suggest an 'enforcement pyramid', again reflecting a normative view, as follows³⁴:



10.31 Haines explains the enforcement pyramid in these terms³⁵:

[M]ore persuasive measures precede punitive approaches to non-compliance The rationale behind such an approach is the basic premise that in the majority of circumstances the intent of the regulated individual or organisation is honourable, that most want to comply most of the time. Enforcement strategies should capitalise on this goodwill and not undermine it by creating defiance and counterproductive behaviour.

Final observations

10.32 Regulatory theory is a well-developed area, but its application to concrete problems is not always easy.

10.33 ACMA in its occasional paper *Optimal Conditions for effective self- and co-regulatory arrangements*³⁶ correctly observes:

³⁴ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), quoted in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007).

³⁵ Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar Publishing, 2011) 17.

³⁶ Australian Communications and Media Authority, *Optimal Conditions for effective self- and co-regulatory arrangements* (2011) 11.

It is generally acknowledged that there is no one-size-fits-all model for self- or co-regulation regulation because each approach needs to be designed to address particular policy problems identified within the context of the market circumstances. Ultimately, the identification of a suitable regulatory arrangement should be decided on a case-by-case basis. It needs to be informed by a clear identification of the issue or problem to be solved, the scale of the problem, and consideration of possible regulatory and non-regulatory options to address the issue, including self- and co-regulation as possible regulatory responses.

11. Reform

11.1 These are the salient features of the existing media standards regulation landscape in Australia:

- The print media regulate themselves, principally through the self-application of codes, overseen by the Australian Press Council (APC).
- The print media's online publications are also self-regulated by the same methods.
- At least two non-print media online publishers (crikey.com.au and ninemsn) and perhaps others are only regulated by the self-application of a code of conduct.
- Generally, online publishers are not subject to any form of regulation, other than having to comply with the laws of the land.
- Online publishers that are situated wholly outside Australia (and there are many) are either not subject to Australian laws or, if they are, those laws cannot easily be enforced.
- Broadcasters are regulated by statute and by codes of conduct acceptable to ACMA, but this regulation does not extend to online streaming of their programming or other online publications. (The major broadcasters voluntarily apply the same standards to their online activities.) The Australian Media and Communications Authority (ACMA) is the regulator.

11.2 In considering reform, the following questions are considered:

- Is there a problem and, if so, what is its cause?
- What are the social costs of the problem and who bears them?
- What regulatory mechanisms are available to mitigate the problem and is any one better than the others?
- What is the cost of implementing the proposed regulation?
- What are the likely benefits of implementing the proposed regulation?

They are based in part on the Principles of Best Practice Regulation developed by the Australian Governments¹ and Joskow's² recommendations for analysis of regulation.

Is there a problem?

- 11.3 This question should be considered against the background of the importance of the production of news for the effective functioning of our democratic system³. It necessarily follows that maintaining the established standards of the publishers and the journalists who present the news is vitally important. It is also important that access to news should not be unduly restricted.
- 11.4 The first problem is market failure. This has several aspects. The production of news generates 'external' social benefits to society beyond the private benefits accruing to producers and consumers of news. This alone connotes the presence of market failure⁴ which regulatory principles dictate as a necessary condition to be satisfied before regulation is contemplated. As an information product, news is also prone to the additional market failure of information asymmetry in that consumers may not have sufficient information to evaluate the quality of a news story. The general reader is seldom in a position to know whether the information provided in a story is accurate, whether the sources quoted are reliable, and whether all the relevant facts have been interpreted objectively.
- 11.5 Market failure also arises from the concentration of ownership of the mainstream news services. In some cities and towns there is only one newspaper. The obvious dangers of concentration are:
- a lack of diversity in the views that are given voice
 - the possibility that a handful of people (media owners or journalists) will unduly influence public opinion
 - a decline in standards because of the absence of effective competition.

¹ Council of Australian Governments, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies* (2007) 4 <www.finance.gov.au/obpr/docs/COAG_best_practice_guide_2007.pdf>.

² Paul Joskow, 'Market Imperfections versus Regulatory Imperfections' (2010) 8(3) *CESifo DICE report 3/2010* 3, 6–7.

³ See the discussion in Section 2 of this report.

⁴ The existence of an externality is a classical example of market failure.

- 11.6 This adversely affects democracy. If everything that is worth saying is not said satisfactorily informed debate on important political and social issues will be at risk. The privately-controlled free and open market will be impaired. Many ideas will be killed before they are heard. Democracy is the loser.
- 11.7 The second problem is the general distrust of the media. Individually consumers are not in a position to assess the quality of what is published. The trust in newspapers' coverage of political views is low: many believe the news is not reported accurately, fairness and diversity of opinion is lacking, and there is a general belief that newspapers have too much power⁵. This adversely affects society as a whole. 'A free society cannot endure without a free press and the freedom of the press ultimately rests on ... trust in its work'⁶.
- 11.8 It would be easy to say that the public's distrust may be one of the causes of a decline in sales of news media and the general decline in the number of news programs published by broadcasters. But as the ninemsn submission points out, there is no significant research that conclusively links drops in readership to specific issues of quality.
- 11.9 The distrust is not just in the minds of the general public. The political classes distrust the media as well. To be sure, news media often publish material that political parties do not want to hear. When the political contest is close the criticism from politicians is more severe. Some would dismiss this criticism by saying all that has occurred is the press has struck a raw nerve. But there is strong evidence of problems with the reporting of political issues. Professor McKinnon, a former APC Chair, has pointed out several examples of transgressions of the fundamental principles of fairness, accuracy and balance⁷:
- bias in the reporting of government affairs
 - obsessive attempts to influence government policy by day-after-day repetition of issues with little or no new information of news value
 - opposition to government policy which is commercially-driven
 - the unfair pursuit of individuals based on information that is inaccurate

⁵ See the discussion in Section 4 of this report.

⁶ Twentieth Century Fund, *A Free and Responsive Press: The Twentieth Century Fund task force report for a national news council* (Century Foundation Press, 1979) 3.

⁷ Professor Ken McKinnon, Submission to the Independent Media Inquiry, 2011, 5–6 [26].

- the failure to separate news from comment
- treating expert and lay opinion as being of equal value or deliberately selecting opinions opposed to government policy while ignoring opposite views
- overuse of pejorative adjectives in reports of issues with which the media outlet does not agree.

11.10 More directly the news media can cause wrongful harm to individuals and organisations by unreliable or inaccurate reporting, breach of privacy, and the failure to properly take into account the defenceless in the community⁸.

11.11 Here are a few striking instances:

- A minister of the Crown has his homosexuality exposed. He is forced to resign.
- A chief commissioner of police is the victim of false accusations about his job performance fed to the news media by a ministerial adviser. Following publication of the articles, he is forced to resign.
- A woman is wrongly implicated in the deaths of her two young children in a house fire. Her grief over her children's death is compounded by the news media coverage.
- Nude photographs said to be of a female politician contesting a seat in a state election are published with no checking of their veracity. The photographs are fakes.
- A teenage girl is victimised because of her having had sexual relations with a well-known sportsman.

11.12 Self-regulation has not been successful in dealing with irresponsible reporting. Certainly codes of ethics have improved the position, but not sufficiently. The failings of APC—lack of awareness of its existence, lack of funding, lack of enforcement powers, lack of reach—are problems that such bodies face in many democracies.

⁸ See the discussion in Section 4 of this report. See also Australian Privacy Foundation, Submission to the Independent Media Inquiry, 2011, 2 [3.1]; Hunter Institute of Mental Health, Submission to the Independent Media Inquiry, 2011, Attachment B. The ARC Linkage Grant LP0989758 said that relatively few complaints were made to the APC by people in situations of vulnerability during 2008–10; however, this could be because people in that situation are not in a position to pursue a complaint effectively: ARC Linkage Grant LP0989758 'Vulnerability and the News Media' Research Project, Submission to the Independent Media Inquiry, 2011, 8 [9.1].

- 11.13 In addition, there are special problems with online publications. The internet is a medium by which almost anybody can publish their views and is a medium which is largely unmanaged and uncontrolled. If there is to be continued regulation of the print media it would be inappropriate to apply two different standards to material they publish both online and offline or to apply different treatment to their online competitors.
- 11.14 The regulation of broadcast news and current affairs has also not been satisfactory. To compound matters, ACMA's complaints-handling procedures and enforcement provisions have structural limitations that prevent speedy disposition of complaints and should be reformed.
- 11.15 Problems with the regulation of the media were recognised by the Senate Select Committee on Information Technologies in its report *In the Public Interest: Monitoring Australia's Media* published as long ago as April 2000⁹. The committee found deficient 'the efficiency and effectiveness of self-regulation and co-regulation in Australia's information and communications industry.' The committee's report stated that '[s]elf-regulation in the print media industry appears to be failing the community. In the television and radio industries, co-regulation has attracted widespread criticism.' There has been little improvement in the past 12 years.
- 11.16 That self-regulation and co-regulation have not worked satisfactorily is not the only problem. Even if instances of breaches of standards were few there is still something missing. What is missing is a system that, as Professor Sampford put it in his submission, 'can be seen as a form of risk management—a kind of 'institutional insurance' against the misuse or abuse of power.' Accordingly, Professor Sampford said, it is not necessary to show abuse to justify the implementation of effective regulation—although the probability of abuse and its seriousness are matters that ought to be taken into account when deciding what to do¹⁰.

⁹ Senate Select Committee on Information Technologies, *In the Public Interest: Monitoring Australia's Media*, (2000) <www.aph.gov.au/senate/committee/it_ctte/completed_inquiries/1999-02/selfreg/report/contents.htm>.

¹⁰ Institute for Ethics, Governance and Law submission, Submission to the Independent Media Inquiry, 2011, 4.

What are the social costs of the problem and who bears them?

- 11.17 In the context of the press, and of the media more generally, the costs of the harm produced by an ineffectively self-regulated free press are borne not by the media and their consumers, but by other sections of the community. This includes those subjected to adverse reporting, who have no meaningful redress at law, and the community as a whole insofar as it depends upon the media for news and public affairs reporting in order for democracy to function properly. As a consequence, media outlets have little interest in reducing those costs.
- 11.18 It is not possible to quantify the costs of the harms and risks identified. However, given the in-built limits on the effectiveness of the self-regulatory model adopted by the press, there is reason to consider that the costs associated with market imperfections and with the social harms caused by the media will be significantly reduced (although not eliminated) by more effective regulation.
- 11.19 Further, to the extent that the media currently does not bear the costs of the harms it causes, an improved structure could to some extent transfer the costs associated with that harm from consumers and other affected individuals to the media. Assuming that media outlets are rational actors, this shift in cost-bearing ought to provide an incentive for them to act to avoid causing unjustifiable harms and so reduce the costs of the market imperfections in that way. If media outlets continue to cause unjustifiable harm, it is proper that they bear the costs of doing so rather than simply shifting those costs to the victim.
- 11.20 There is enough information to conclude that the harms imposed on society are not trivial and warrant examining whether steps should be taken to reduce them.

What are the options for regulation?

- 11.21 Several regulatory options have been canvassed in the submissions made to the Inquiry:
- do nothing (that is, maintain the self-regulation status quo)—this is the view of editors and publishers who are all of a mind that any government involvement spells the death of free speech
 - provide funding to, and enhance the jurisdiction and powers of, the APC—several submissions, including those made by the APC, support this option

- establish an independent statutory body to take over the functions of the APC and provide it with adequate funding and powers—this option is supported by a number of academic commentators
- establish an independent statutory body to take over the functions of both the APC and the news and current affairs standards functions of ACMA and provide it with adequate funding and powers
- license publishers of print and online news, the criterion being that the publisher is a ‘fit and proper person’—an option with a surprising number of supporters, most but not all of whom are members of the advocacy group Avaaz.

What options should be rejected?

- 11.22 Ordinarily, the preferred option would be self-regulation. But in the case of newspapers, self-regulation by code of ethics and through the APC has not been effective.
- 11.23 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.
- 11.24 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.
- 11.25 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.
- 11.26 Licensing the press should also be rejected, because in a democratic society the government should not be involved in controlling who should publish news. Nor should it be involved in setting and evaluating press practices. These would be the inevitable consequences of licensing, which could eventually end up being just a dressed-up version of censorship. Whatever may be the justification for licensing broadcasters (and many hold the justifications to be false), it cannot be transported to the press.

Factors that should influence the choice of a better model

- 11.27 The mechanism needs to have the backing of law to be effective. Any group that wields, or has the potential to wield, enormous power should be required to observe appropriate standards without provision to 'opt out'. In this respect the media, like any social institution, should be accountable for its performance, as are most other powerful groups in society.
- 11.28 Publishers and editors naturally fear that any enforcement mechanism that is not self-imposed is a restriction on a free press or, if it is not an immediate restriction, would be the first step on the path to curtailing press freedom. Those fears can be accommodated with the development of an appropriate regulatory mechanism not involving risks to free speech or to an independent press.
- 11.29 That is, statutory intervention need not be 'a hallmark of authoritarianism [that] risks undermining democracy', contrary to the view of the House of Commons Culture, Media and Sport Select Committee in its 2007 report on the same issue¹¹. Rather, the setting of obligatory minimum standards for a free functioning press will better serve society and will enhance democracy.
- 11.30 As Sir Louis Blom-Cooper QC, a former Chair of the British Press Council, put it as recently as 29 November 2011: it is 'a total nonsense' to suggest that regulation of the press should be non-statutory. 'It all depends on what the statute seeks to achieve and what it contains.'
- 11.31 Does effective regulation need to be enforceable? Experience on this is mixed, and the answer is: 'It depends'. There is some evidence that simply having a regulatory requirement can, independently from enforcement, lead to improved standards and that scrutiny, with no further regulatory action, may also lead to some, albeit small, improvement on performance. But experience also shows that with little or no enforcement, regulatory requirements are routinely ignored. Thus, commonly, adequate enforcement is an important component of a robust regulatory regime¹².

¹¹ Culture, Media and Sport Committee (United Kingdom) *Self Regulation of the Press*, House of Commons Paper 375, Session 2006-07 (2007) 26 [54], 35 [8] <www.publications.parliament.uk/pa/cm200607/cmselect/cmcumeds/375/375.pdf>.

¹² Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar Publishing, 2011) 21-2.

11.32 Giving due weight to the importance of freedom of expression and freedom of the press, a move to full governmental regulation would be a step too far. A sufficient improvement would be an independent system of regulation that allows the regulated parties to participate in the setting and enforcement of standards (as is presently the case), but with participation being required, rather than voluntary. This may be termed enforced self-regulation.

11.33 Enforced self-regulation has the following benefits:

- It has no state involvement in appointing members of the regulatory body, in the setting of standards or in decisions regarding breach of standards, thus minimising the risk of potential attempts for state interference with, or control of, speech.
- It retains almost all the benefits of self-regulation, but ensures a more robust and effective operation of the system.
- Governmental funding of the statutory body (which is ordinarily what would follow) ensures adequacy of funding, which promotes independence from those it regulates.

11.34 Another aspect of a new model of regulation flows from the internet-induced convergence of industries involved in the production of news, which is creating disparity in the regulatory treatment of competitors using different delivery platforms. In this environment, there are considerable benefits for media organisations, consumers and government in the establishment of a 'one stop shop' regulatory arrangement that applies to all news producing media, regardless of delivery platform:

- It is fairer that all providers of news and public affairs content be subject to a single set of standards consistently administered by the same body and with the same sanctions (allowing for some minor variations to accommodate platform-specific differences).
- It is more satisfactory for consumers to have one body to which they may complain regardless of the platform concerned¹³.

¹³ For an illustration of the potential complexity for consumers where there are multiple regulators across different platforms, see Lara Fielden, 'Regulating for Trust in Journalism: standards regulation in the age of blended media' (Speech delivered at the Media Regulation—New Ideas: A City University London and Reuters Institute for the Study of Journalism Event, 1 November 2011) <<http://inform.wordpress.com/2011/11/04/regulating-for-trust-in-journalism-standards-regulation-in-the-age-of-blended-media-lara-fielden/>>.

- It is a more efficient use of government resources to set up and maintain a single regulator for news and current affairs reporting standards than to have different regulators for different entities.

11.35 The notion of a single regulator is consistent with Competition Agreement Principles. Under the existing self regulation arrangements, membership of the APC is voluntary, as is compliance with the APC's rulings, with consequential implications for effective competition across the newspaper industry. One competitive effect is the advantage to be gained from not having to comply with APC standards. Furthermore, there is differential regulatory treatment of news producers in different media industries and delivery platforms. The establishment of a single regulator with a substantially uniform set of rules¹⁴ applicable to all news producers irrespective of the delivery platform, provides for consistency of regulatory treatment and potential improvement to competition.

11.36 The cost of an adequately resourced single regulator should not be considerably higher than the funding currently dedicated to the existing arrangements (that is, the APC and ACMA). The proposed strengthening of press regulatory arrangements will necessarily require some additional resources. Overall, the establishment of a single regulator for all news media should generate some offsetting efficiencies. Consequently, only a marginal addition to current total costs is likely to be required. Government funding should be provided for any new single regulator to cover the full cost of the press regulatory function that is currently funded by voluntary contributions of newspaper publishers.

11.37 There will likely be some indirect costs associated with statutory regulation. However, given that almost all of the entities to be regulated by any new framework are already regulated, either by ACMA or by the APC, these indirect costs are not likely to be significantly greater than the indirect costs already incurred as a consequence of regulation.

11.38 It will be important that any new regulatory framework be reviewed and evaluated periodically. This could occur in one of two ways:

- There could be parliamentary oversight with a periodic review of standards and performance by a parliamentary committee.

¹⁴ There may be some differences in the rules to take account of differences in the delivery platforms.

- Alternatively, there could be a statutory mechanism for periodic review by an independent person such as a retired judge or academic, an exercise not dissimilar to this Inquiry (and to the review of the NZPC undertaken in 2009).

A strengthened APC would not be sufficient

11.39 Some of the existing problems could be addressed by strengthening the APC.

11.40 To create a more effective APC the following steps would be required. Some would involve new legislation and others amendments to existing legislation:

- The APC constitution would have to be amended so that membership would be open to any provider of news, regardless of platform.
- to encourage all publishers of print and online news to become members of the APC, legal privileges offered to providers of news under Federal legislation, including exemption from privacy and consumer legislation, and possibly protection of journalists' sources, should only be available to members or those employed by members.
- To ensure that broadcasters become members a condition to that effect would need to be included in their broadcast licences.
- ACMA's power to supervise the news and current affairs standards of broadcasters would need to be removed.
- If members of the APC do not agree to provide sufficient funding, the shortfall would need to be met by government. To prevent members deliberately withholding the necessary funds, government funding should be recovered by a levy on members.
- The APC's constitution would need to be amended to give it proper powers of investigation and enforcement. These powers would be enforceable by private law action.
- The APC should have express power to institute own motion investigations.
- The APC should be given statutory power to require the production of documents from third parties and the attendance of persons to appear and answer questions.

- 11.41 However, there would still be several significant disadvantages with this option. The most obvious is that while membership of the APC can be ‘encouraged’ it cannot be guaranteed. Most likely many publishers of news, especially publishers on the internet, will remain outside the system or, as in the past, will leave it when convenient. Second, many of the necessary changes depend on the will of the APC members to implement them. The submissions made to the Inquiry suggest it is unlikely that all the suggested changes would be adopted.
- 11.42 Providing government funding to, and enhancing the jurisdiction and powers of, the APC, would not be effective by itself:
- While a positive step, simply providing government funding to the APC would not by itself be adequate to ensure that the APC is in fact able properly to carry out its functions. It also requires greater powers.
 - While conferring statutory powers on a private entity might give the ‘toothless tiger’ some teeth, it is fraught with legal difficulties in the Australian constitutional system and for that reason is not desirable.
- 11.43 Indeed, a strengthened APC would be an odd mixture of a private body with some statutory powers being partly funded by government. This hybrid is not the preferred option, although it would be preferable to the status quo.

The recommended model

- 11.44 To rectify existing and emerging weaknesses in the current regulatory structures it is recommended that there be established an independent statutory body which may be called the ‘News Media Council’, to oversee the enforcement of standards of the news media. It is envisaged that the body would take over the functions of both the APC and the news and current affairs standards functions of ACMA.
- 11.45 The News Media Council should be free from the influence of the executive. This will require certain structural arrangements.
- 11.46 There should be an independent body to appoint the members of the News Media Council. Currently appointments to the APC are made by the council itself. That is not a particularly

independent process. On the other hand, appointments made by an independent committee—that is, a committee that is independent from government—would be, and would be seen to be, independent. The committee could, for example, consist of three senior academics from tertiary institutions appointed by the Australian Vice-Chancellors Committee (now called Universities Australia) the Commonwealth Ombudsman and the Solicitor-General for the Commonwealth.

- 11.47 The News Media Council should consist of a full-time independent chair and 20 part-time members.
- 11.48 One half of the members appointed to the News Media Council should be selected from the public at large, being persons who have not had previous connection with the media. Public advertisements should call for candidates. The other half should be appointed from the media or from those who have worked in the media. The media representatives should exclude managers, directors and shareholders of media organisations. The candidates should be nominated by the media and MEAA.
- 11.49 One half of the members should be men and one half should be women.
- 11.50 The chair should be a retired judge or other eminent lawyer. That person need not be a practising lawyer.
- 11.51 Members should be entitled to reasonable remuneration.
- 11.52 Standards of conduct which would govern the news media should be developed by the News Media Council. The standards could be based on already existing codes which have been developed either by the media or in consultation with the media. Two kinds of standards should be developed: non binding aspirational principles and more detailed standards that are similar to the MEAA's code and the APC's standards. While the setting of standards should be left to the News Media Council, they should incorporate certain minimum standards, such as fairness and accuracy. The same standards need not apply across delivery platforms. Some aspects will need to be platform specific. The standards should be reviewed at least every three years to ensure that they are working as intended and that they remain current and appropriate to the changing media environment.

- 11.53 Funding should be by the government out of the consolidated revenue and not be recovered through a levy on the media. This is preferable to funding from the industry. One of the concerns identified by the APC is that it is not seen to be independent of the press because it is funded by the press. This is not an unreasonable view.
- 11.54 In the absence of appropriate protections, the same could be said of funding provided by the government. There are, however, some means by which the executive can be held to account if the parliament, for party political reasons, does not provide the News Media Council with sufficient funds. A process should be developed that would involve the following steps:
- The News Media Council is to identify the funds it claims it needs for a three-year period in a submission to the Auditor General. Triennial funding permits long-term planning and hinders the capacity for government interference.
 - The claim should be verified by the News Media Council's auditors as representing the News Media Council needs for that period.
 - The claim should be assessed by the Auditor-General who should then certify what ought to be provided.
 - If the executive decides that less than the amount certified by the Auditor-General is to be provided, the responsible minister should explain to parliament the reasons for not providing the certified amount.

General structure

- 11.55 The News Media Council requires clearly defined functions. It is not recommended that one of them be the promotion of free speech. There are ample bodies and persons in the community who do that more than adequately.
- 11.56 The principal function of the News Media Council should be to promote the highest ethical and professional standards of journalism. It would carry out that function 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.

11.57 The first two activities are, in substance, what the APC now does. The third, reporting on the state of the news media, was once, but now no longer is, one of its activities because of lack of funds. This is a serious omission. The importance of the news media has been emphasised again and again. Yet there is in this country little serious analysis of the news media industry. Such analysis as there is, is sporadic and often lacking in depth. A body such as the News Media Council will be well placed to fill the gap. The reason for the last two activities, the educational roles, is self-evident.

11.58 The jurisdiction of the News Media Council is an important issue. As noted, not all news media are currently regulated. Moreover, there are several regulators (self and statutory) that overlap in the platforms they oversee. The News Media Council should have supervision of the standards of all news media on all platforms. In an era of media convergence, where many organisations transmit the same story on more than one platform, it is logical that there be consistent regulation affecting them all. It would also have the advantages of promoting consistency, providing more predictability for journalists and news organisations, and also building expertise and experience among the persons who oversee the regulation.

11.59 It is not easy to define who should be 'the media' that ought to be the subject of the News Media Council's jurisdiction. It is no longer enough to say, as one might have in the past, that the news media consists of newspapers, magazines and broadcasters. New technology makes it necessary to reassess this understanding.

11.60 The meaning could be defined by function or form. Typically, apart from subject matter, frequency and regularity of publication would be a criterion. But online websites operate continually. Further, most of the media are in the business of entertainment and have little connection to the democratic process.

- 11.61 What is of concern to this Inquiry is the news media. The news media are those that gather, analyse and disseminate news, often with their own opinions added.
- 11.62 A news medium has been defined as '[an] entity that gathers information of potential interest to the public, uses its editorial skill to turn raw materials into a distinct work and distributes that work to an audience'¹⁵. This definition, however, does not include analysis and opinion.
- 11.63 The NZLR's discussion paper¹⁶ refers to the definition of 'news activity' in the *Privacy Act 1993* (NZ). A 'news activity' is defined in the Act as:
- (a) *the gathering of news, or the preparation or compiling of articles or programmes of or concerning news, observations on news, or current affairs, for the purposes of dissemination to the public or any section of the public:*
 - (b) *the dissemination, to the public or any section of the public, of any article or programme of or concerning—*
 - (i) *news:*
 - (ii) *observations on news:*
 - (iii) *current affairs.*

And for the purposes of the Act a 'news medium' means:

any agency whose business, or part of whose business, consists of a news activity ...

- 11.64 As the discussion paper indicates, in order to qualify as a 'news activity', the purpose behind the gathering of information must be the 'public dissemination' of that information. The definition also makes clear that analysis and opinion falls within the definition.
- 11.65 The NZLC has suggested its own definition of 'news media' which is found in Section 8 of this report. It is worth repeating¹⁷:

¹⁵ *National Security Archive v United States Dept of Defense* 880F 2d 1381, 1387 (1989).

¹⁶ New Zealand Law Commission, *The news media meets 'new media': rights, responsibilities and regulation in the digital age*, Issues Paper No 27 (2011) 84 [4.101]–[4.103] <www.lawcom.govt.nz/sites/default/files/publications/2011/12/ip27-all-web-v2.pdf>.

¹⁷ *Ibid* 93 [4.169].

For the purposes of the law the “news media” includes any publisher, in any medium, who meets the following criteria:

- a significant proportion of their publishing activities must involve the generation and/or aggregation of news, information and opinion of current value;*
- they disseminate this information to a public audience;*
- publication must be regular;*
- the publisher must be accountable to a code of ethics and a complaints process.*

This is a useful definition which could be adapted with changes.

- 11.66 The first change should be to remove the requirement that the publisher be accountable to a code of ethics. The point of the proposed News Media Council is to create that accountability.
- 11.67 The second change arises from the fact that there are many newsletter publishers and bloggers, although no longer part of the ‘lonely pamphleteer’ tradition, who offer up-to-date reflections on current affairs. Quite a number have a very small audience. There are practical reasons for excluding from the definition of ‘news media’ publishers who do not have a sufficiently large audience. If a publisher distributes more than 3000 copies of print per issue or a news internet site has a minimum of 15 000 hits per annum it should be subject to the jurisdiction of the News Media Council, but not otherwise. These numbers are arbitrary, but a line must be drawn somewhere.
- 11.68 In addition, it would be appropriate to permit non-news entities which see value in the role of the News Media Council to opt into the system. That, however, would likely be a small part of the overall regulatory system.
- 11.69 Another aspect of jurisdiction concerns how the News Media Council will exercise its power over all internet publishers. Foreign publishers who have no connection with Australia will be beyond its reach. However, if an internet news publisher has more than a tenuous connection with Australia then carefully drawn legislation would enable the News Media Council to exercise jurisdiction over it.

Complaints-handling procedures

11.70 The News Media Council should deal with complaints, in the following manner.

- A complainant should be required to waive any possible future action they might have arising out of the grievance.
 - It is desirable that the News Media Council not deal with complaints in which litigation is pending or which may ultimately be presented to a court. This will encourage parties to deal sensibly with complaints.
- There should be a filtering process carried out by a senior officer of the News Media Council. The process is to determine whether or not a complaint is frivolous or vexatious. If it is, it need not be pursued. It may be appropriate to allow for an appeal to the chair by a complainant whose complaint is not to be pursued.
- The News Media Council should, in the first instance, attempt to resolve a complaint through discussions with the media outlet. This can be done informally and, ordinarily, the process should commence immediately upon receipt of the complaint.
 - It is not proposed that the complainant should first present his/her complaint to the media outlet. That may sometimes be an effective means of resolving a complaint, but it would take time and often a complainant is at a disadvantage when dealing with an experienced editor.
 - However, if the organisation has an effective internal complaints handling procedure, the Council should have a discretion whether to refer a complainant to the organisation in the first instance. Specifically, the ABC and SBS have dedicated complaints handling sections¹⁸, and one newspaper has a readers' editor.
- 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).

¹⁸ In the case of the ABC and SBS, the News Media Council would have jurisdiction over them only for complaints about standards of reporting news and current affairs (which is currently overseen by ACMA). The ABC handles a very large number of complaints each year, in the order of more than 20 000.

- Complaints should, as a general rule, be dealt with on the papers and not by a hearing.
- There should be a strict timetable for handling complaints. Timetables ought to be designed to ensure a resolution within days or weeks, not months. For example, there could be a requirement that the media outlet concerned has two days to respond to a complaint and the panel then has a further two days to resolve the complaint and make a decision. These timeframes could be extended by the chair where appropriate.
- 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.

11.71 The News Media Council would require a rule-making power to further develop its own rules and practices for complaints-handling. The rules should exclude lawyers from hearings (although a complainant might be permitted to have lay assistance), impose strict timetables on procedural steps, forbid cross examination without leave and make other provision for the speedy and efficient resolution of a complaint.

11.72 If the News Media Council uncovered information suggesting a breach of the criminal law, it should have the power to refer that information to the appropriate law enforcement agency.

11.73 The News Media Council's powers for own motion investigations would be similar, except there would be no need for strict timeframes.

Remedial powers

11.74 The News Media Council should have the following remedial powers for complaints and own-motion investigations:

- To require publication of a correction.

- To require withdrawal of a particular article from continued publication (via the internet or otherwise).
- To require a media outlet to publish a reply by a complainant or other relevant person.
- To require publication of the News Media Council's decision or determination;
- To direct when and where publications should appear.

11.75 When a media outlet publishes a correction, apology, reply or determination as required by the News Media Council both it and the News Media Council should be protected from legal proceedings based on the publication—in other words, a form of privilege should attach to the publication.

11.76 There should be no power to impose fines or award compensation. Powers of this kind are likely to involve constitutional difficulties. In any event, inevitably they will make the complaints-handling process more complex and time-consuming. One of the main advantages of the proposed News Media Council will be lost. The incentive to resolve a complaint quickly will also be lost.

Enforcement of determinations

11.77 It is necessary, if the News Media Council is not to be a 'toothless tiger'¹⁹, to have a means of enforcing its decisions. There should be a legal requirement that if a regulated media outlet refuses to comply with a News Media Council determination the News Media Council 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. This will be both a deterrent to breaching standards and, in the event of a complaint being made, will act as an incentive for media outlets to resolve the complaint through discussion.

¹⁹ The Press Council in Britain has been referred to as 'a tame bulldog with rubber teeth' (Henry Mayer, *The Press In Australia* (Lansdowne Press, 1964) 245).

Appeals, merits review and judicial supervision

- 11.78 In order to preserve the ability of the News Media Council to act swiftly, 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.
- 11.79 It would, however, be neither desirable nor possible to preclude all judicial supervision of determinations. In any event, because enforcement may need to be by way of court order, judicial supervision would be built into the process. In the course of enforcement proceedings a collateral challenge to a determination may be available and this would provide a sufficient mechanism for judicial supervision.

Other attributes of the proposed model

- 11.80 The proposed News Media Council will be an independent body that would not compromise editorial independence and would provide an effective means of resolving disputes between members of the public and the media. It would, in addition, foster democratic institutions by improving the quality of information that is available to the public.
- 11.81 An advantage of the proposed News Media Council is that it will provide a detached and independent appraisal of claims that the media has acted unfairly or breached applicable standards.
- 11.82 It is not appropriate to give the News Media Council responsibilities in addition to the promotion of the ethical and professional standards of journalism. With additional responsibilities the body would require differently-qualified members, would need additional staff and would become more bureaucratic and cumbersome. In a nutshell, it would not be the efficient and streamlined body that is envisaged.

The cost of implementing statutory regulation

- 11.83 Whichever statutory option is adopted (an improved APC or a new News Media Council) there will be transaction costs. Those transaction costs will be greater than the costs presently incurred. First, the new body will have a greater coverage than the APC. Second, it should be assumed that the new body will receive more complaints. Third, the new body will

be required to carry out own motion investigations, which may well involve the media incurring costs.

11.84 If a broader set of remedies is adopted, including a right of reply, corrections, apologies, retractions and 'take down' notices, there will be additional cost to the media; but the additional cost is not likely to be significant. At the same time, as the burden of funding press regulation will shift from the media to the government, the major publishers are unlikely to face additional net costs.

11.85 In addition, there will be a cost to government by either subsidising an improved APC or carrying the cost of a new News Media Council. Those costs are not likely to be significant. The current cost of operating the APC is approximately \$1 million per annum²⁰. Professor Disney says he needs an additional \$1 million per annum. Even if the actual costs are greater (as is likely) they will not be significant. At the same time, the work of ACMA will be reduced, so savings will be made.

The likely benefits of statutory regulation

11.86 The establishment of the News Media Council will achieve the following:

- The creation of an independent and transparent body for hearing complaints will right wrongs perpetrated by the media.
- The improvement of journalistic standards.
- Making the media, which exercises enormous power, accountable to their audiences and to those covered by the news.
- Enabling the public to have confidence that journalistic standards will be upheld and that complaints will be resolved without fear or favour.
- Enabling complaints that might otherwise have been resolved through lengthy and expensive litigation to be dealt in a timely and efficient manner.
- Enhancing the public flow of information and the exchange of views.

²⁰ Australian Press Council, Submission to the Independent Media Inquiry, 2011, 22 [G18].

12. Changing business models and government support

- 12.1 The Australian newspaper industry is in the midst of a far-reaching process of transformation as it seeks to adjust to increasing competitive pressures from online suppliers of news and advertising. By changing the way people consume news and look for information, including advertising, the internet is inducing fundamental changes to the structure of the newspaper industry and to the traditional newspaper business models. Failure to adjust to the forces of change and develop new business models better suited to market exigencies in the changing competitive environment can have serious consequences for the long-term viability of newspapers and news media generally.
- 12.2 The changing structure of the newspaper industry has been a key issue of consideration for the Inquiry. More specifically, under its terms of reference the Inquiry was required to consider the 'impact of ... technological change on the business model that has supported the investment by traditional media organisations in quality journalism and the production of news, and how such activities can be supported, and diversity enhanced, in the changed media environment.' This section deals with these matters.
- 12.3 The growth of the internet has quickened the pace of underlying long-term structural changes evidenced by the decline in newspaper circulation over recent decades. The pressure to change has been compounded by the impact of the global financial crisis and the current weakness in consumer expenditure. Newspapers in other developed countries with mature newspaper industries are confronted by similar, and in most cases greater, pressures for structural adjustment.
- 12.4 Although serious, the situation in Australia is not as grave as that of newspapers in countries such as the United States and the United Kingdom. In the United States, the combined effect of a deep recession and a dramatic collapse of advertising revenue have forced the closure of many daily newspapers and deep cutbacks in those remaining. The impact there appears to have been worse on metropolitan dailies than smaller community papers which are 'less

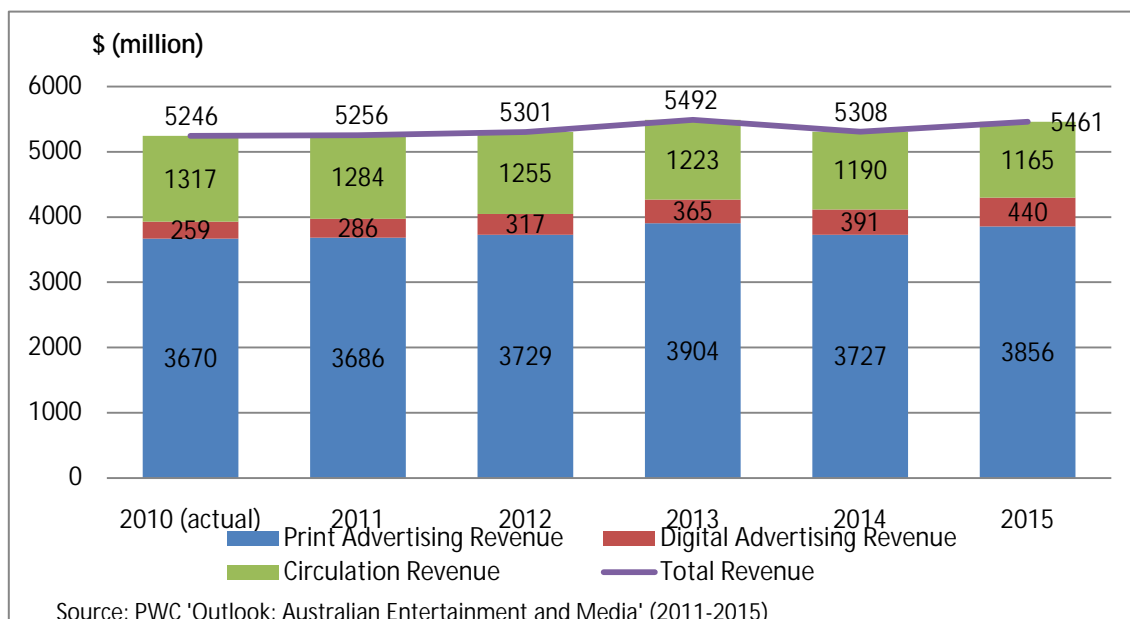
dependent on classified ads, operate in less complex markets, and tend to be closer to their readers and advertisers¹.

- 12.5 In Australia, while the 2009 economic downturn in the wake of the global financial crisis depressed advertising revenues², the impact was relatively mild when compared to the acute depression in major users of advertising—such as the real estate, motor vehicle and employment markets—which occurred in the United States. For Australian newspapers, a substantial drop in advertising revenue in 2009 was followed by a modest increase in 2010. The latest indications, however, suggest newspaper earnings from advertising have again softened in 2011.
- 12.6 The expectation from revenue projections for the newspaper industry by PWC in 2010 for the period 2011-2015 (see Figure 12.1) is for a modest compound average growth rate, in the order of 0.8 per cent, in newspaper revenues over the period. This is well below the equivalent rate of 1.8 per cent even for the previous decade, which included the sharp drop in revenue experienced in 2009 (11.4 per cent below the level in the previous year). The PWC projections anticipate a modest but initially weak recovery in the level of print advertising revenue in 2011-2015, and gradually increasing revenues from digital advertising — their combined growth being sufficient to offset the anticipated decline in circulation revenue. A small and slowly increasing amount of revenue was also anticipated from digital subscriptions. Overall, the projections suggest that newspapers are in a period of consolidation, and while they are unlikely to see a return to the good times of yesteryear, they are also unlikely to be facing imminent demise.

¹ Suzanne M Kirchoff, 'The U.S. Newspaper Industry in Transition' (Research Paper No R40700, Congressional Research Service, Report for Congress, Washington DC, 2010) 10 <www.fas.org/sgp/crs/misc/R40700.pdf>.

² See the discussion in Section 3 of this report.

Table 12.1: Newspaper Revenue Projections 2011–15



12.7 More recent data rather indicates that the PWC projections for print advertising for 2011 were optimistic. In the first six months of 2011 total advertising in main media was \$6774 million—equal to an increase of 0.8 per cent in the amount (\$6718 million) registered in the corresponding period in 2010. Total print advertising in newspapers in the first half of 2011 was \$1648 million, 7.6 per cent lower than for the corresponding period a year earlier, reducing its share of the overall advertising market by 2.2 percentage points³. The overall drop of \$136 million in newspaper advertising was made up of \$75 million from metropolitan and national dailies, \$44 million from suburban newspapers and \$17 million from the regional press (dailies and non-dailies). Classified advertising contributed \$51 million of the overall decline (including \$10 million by the regional press). The extent to which the decline in print classified advertising revenue represented a transfer to online activities of newspapers cannot be determined from the available data. Commercial television and radio fared better than newspapers with radio doing better than the overall market. Television advertising increased by 0.3 per cent and radio by 2.4 per cent. The internet was the big winner with an increase in revenue of \$191 million (equivalent to 18 per cent) including a

³ Commercial Economic Advisory Service of Australia, 'Advertising Expenditure in Main Media, Six months ended 30 June 2011' (2011).

\$48.5 million increase in classified advertising revenue, most of which is likely to have been at the expense of newspapers.

- 12.8 A more recent update by Goldman Sachs⁴ cites Standard Media Index data reporting a decline of 1.5 per cent in 'agency' advertising in the five months to November 2011 and assessed that this 'implied that the overall ad market (that is, including agency, direct and classifieds) is tracking at -2.0% to -4.0%'. Goldman Sachs advised the data suggested 'potential downside risk to our total ad market forecast of -2.0% for [first half 2012]'. These developments point to a substantially weaker result for newspaper advertising in 2011 than predicted by the PWC projections.
- 12.9 Recent weakness in advertising is consistent with indications of declining consumer demand and confidence. The government's 'Mid-Year Economic and Fiscal Outlook 2011–12' noted that deterioration in global conditions had contributed to a weaker near-term economic outlook and downward revisions of GDP and employment growth forecasts. It added that conditions were expected to remain uneven and that cautious household spending behaviour was 'creating significant challenges for some sectors'. Although revised downward, 'real GDP is forecast to grow by 3¼ per cent in both 2011-12 and 2012-13, (after) downgrades of ¾ of a percentage point in 2011-12 and ½ of a percentage point in 2012-13 compared with Budget'. Despite the firm longer-term economic outlook, consumer confidence seems perplexingly low. Appearing before the Senate economics committee, Dr Parkinson, the Secretary of the Treasury, is reported to have observed that most Australians seemed to be 'in the grip of unjustified economic gloom'.⁵
- 12.10 It was noted in Section 3 of this report that advertising revenue is closely correlated with economic performance. There is no reason to believe that this long-term relationship will be broken in the foreseeable future. Thus, given the firm economic growth outlook, the current weakness in the advertising market is not likely to persist indefinitely. However, the carve-up of the advertising market between offline and online media is changing with considerable implications for the share earned by newspapers.

⁴ Goldman Sachs, 'Domestic Media Sector: Update', (15 December 2011).

⁵ Tim Colebatch, 'Treasury chief denounces subsidies, sweeping cuts', *The Age* (Melbourne), 18 February 2012.

- 12.11 Newspapers have been slow to adjust to their long-term decline in circulation⁶. Until the internet emerged as a major source of news and information, and more recently of advertising, the pressures to adjust were weak. Nonetheless, the main newspaper publishers made early moves to establish an online presence and their websites fast became very popular sources of news on the internet. However, their popularity on the internet has been difficult to convert to advertising revenue because of online readership and advertising consumption patterns. Although contributing almost five per cent to newspaper revenues in 2010 online earnings have so far not been large enough to offset the reductions in offline revenues.
- 12.12 While low entry costs have aided the establishment of many new media sources on the internet, very few of them have the capacity and resources for significant coverage of news. With the growing influence of the internet as an advertising medium and the consequential reduced capacity of newspapers to use advertising revenue to support news production efforts, there is a fear that the civic watchdog, or Fourth Estate, function of news organisations will be permanently weakened with consequential damage to democracy and society's wellbeing.

The internet's benefits for journalism and democracy

- 12.13 It should not be assumed that the internet's effects on journalism and democracy are necessarily malign. On the contrary, because the internet eliminates most of the production, distribution and retailing costs of printed newspapers, it makes it far more possible for new news and opinion websites to establish themselves. In the United States, there has been a 'flood of innovative web start-ups'⁷. While the start-up costs for new print publications have been prohibitive and inhibited new enterprises emerging, the streamlining of the relationship between content producers and consumers has led to many new websites and web-based services. Among the most important such websites that have grown up in Australia over the last decade are *Inside Story*, *Australian Policy Online*, *Online Opinion*, *The Drum*, *The Conversation*, and *New Matilda*.

⁶ Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011, 105[15]-[17] (Mr Allen).

⁷ Steven Waldman, *The Information Needs of Communities: The changing media landscape in a broadband age*, Federal Communications Commission (USA) 5.

- 12.14 In the print world, apart from an occasional letter to the editor or the publication of an op-ed article, members of the general public had little opportunity to actively participate in content creation. Widespread access to the internet has turned anyone with a computer into a potential content creator. Many have taken the opportunity and there has been a great upsurge in 'user-generated content'. The editor of *The Guardian*, Alan Rusbridger, declared that 'I have seen the future and it is mutual'⁸. From people taking newsworthy photos on their mobile phone to contributing blogs which are taken up by mainstream media, the digital world offers much greater participation, and more chances for interactions that increase the sum of public knowledge.
- 12.15 To date, however, not counting the web services of established traditional media, only one significant homegrown internet news service, *Crikey*, has been established. A second, *The Global Mail*, has just begun operations.⁹
- 12.16 There is a further way in which the internet has been a boon both to the news media and to democracy. It has made what is on the public record far more readily available to anyone seeking information. There are data bases and official documents, media releases and speeches, and not least online versions of newspapers, including archives of past editions. These are a great aid to public debate and to general institutional accountability. The information that used to only be physically available in bureaucratic offices is now often available from a desktop computer or mobile device. It makes it much easier to put together what is on the public record. Reporters may want to go beyond this, but at the very least it means they begin such further inquiries from a much more substantial knowledge base.
- 12.17 In many ways then the internet has greatly expanded the diversity of both traditional and new sources of news and information and has significantly changed consumer consumption behaviour. There is a potential for interested and informed people to access information on a scale that has never existed before. Nevertheless especially in terms of the diffusion of newsworthy information on a mass scale, there are some worrying other trends as well.

⁸ Alan Rusbridger, 'I've seen the future and it's mutual', (2009) 20(3) *British Journalism Review* 19.

⁹ *The Global Mail*, Submission to the Independent Media Inquiry, 2011. See also <www.theglobalmail.org/>.

The challenge of the web

- 12.18 The industry performance analysis undertaken by the Inquiry reveals moderate concern about the ability of Australian newspapers to adjust to the changed market environment. While traditional paper-based newspapers are never again likely to return to their historically high levels of returns on investment, their current financial status, although under pressure, is not desperate. There is reason to believe that newspapers are well placed to adjust their operations in response to the evolving digital environment provided they are prepared to develop and adopt appropriate strategies to manage the necessary changes.
- 12.19 Certainly the industry is facing intense competitive pressure from online advertising which is not only eroding its major traditional form of revenue but is also altering the way consumers relate to advertising and how they go about seeking information about products and services they are interested in. Although some Australian newspapers sought to establish an early presence on the web, like many of their overseas counterparts their initial actions were primarily defensive and most were slow to identify and react to the real threat of online services. This approach is acknowledged and encapsulated in the Fairfax Media submission¹⁰ to the Inquiry:

Fairfax websites were the first news sites in Australia. And the most successful. A position we still hold today. This clearly marks us as very different from our American counterparts where online news media leadership was captured by others such as Yahoo, CNN and the television networks. We embraced the internet and by putting our journalism on the net for free we effectively turned a large print audience into a larger digital audience. This was absolutely the right move.

We were however much less successful in translating our classified position. We tried to defend print and grow digital classifieds. We did well in real estate with domain.com.au. And we still have positions in jobs and cars.

But by and large the newspaper companies defensive tactics didn't work well and resulted in the success of Seek and Carsales in Australia. ...

¹⁰ Fairfax Media, Submission to the Independent Media Inquiry, 2011, 15.

Fortunately good journalism has proven it has the capacity to adapt. The issue was straightforward—can a traditional newspaper based media company remake its business model? Fairfax has no doubt it is doing just that and the evidence supports this.

12.20 Rupert Murdoch¹¹ is blunt about the need to adapt to the new environment:

Some newspapers and some news organizations will not adapt to the digital realities of our day—and they will fail. We should not blame technology for these failures. The future of journalism belongs to the bold, and the companies that prosper will be those that find new and better ways to meet the needs of their viewers, listeners, and readers. And they should fail, just as a restaurant that offers meals no one wants to eat or a carmaker who makes cars no one wants to buy should fail.

12.21 Until the arrival of the internet the provision of news was largely the domain of newspapers and their electronic media competitors. The number of news providers was limited by the high cost of entry into print media in the case of radio and television by the technical constraints on the intensity of use of the airwaves. On the internet there are few constraints on those wishing to produce and publish news and consumers have almost unrestricted access to a multitude of local and international sources. This greatly-expanded diversity of both traditional and new sources of news and information has significantly changed consumption behaviour.

12.22 It was observed in Section 3 that accessing news and information online is a popular internet activity, with the sites of established media organisations being those most visited. The challenge for newspapers is to find ways to convert that popularity into a source of revenue to support news production. Faced with ongoing long-term decline in circulation and a declining share of the advertising pie, newspapers are anxious to increase earnings from their online reach which is generally significantly larger than their offline readership. This will not be an easy task.

12.23 Newspapers face three main challenges when competing in the online advertising market.

¹¹ Rupert Murdoch, 'From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?' (Speech delivered at Federal Trade Commission Workshop *How Will Journalism Survive the Internet Age?* Federal Trade Commission Conference Center, Washington DC, 1 December 2009) 3 <www.ftc.gov/opp/workshops/news/docs/murdoch.PDF>. See also discussion in, WorkDay Media, Submission to the Independent Media Inquiry, 2011.

- 12.24 First, while newspaper websites are popular sources of news on the internet, much of the internet traffic goes to sites that do not produce their own content (for example, search engines and social media) and these sites compete with newspapers to provide advertisers with access to audiences. The greatly-expanded supply of access to audiences naturally results in significantly-reduced online advertising rates.
- 12.25 Second, online advertising is becoming increasingly disconnected from content. Websites such as Google and Yahoo, in addition to their search facilities, compile 'aggregated' summaries of popular content from newspapers and other news sources from around the world with links to the original stories. Other specialised aggregator websites provide a mix of links to news stories with some original content. In addition, specialist commodity advertising sites offer advertisers direct access to consumers specifically interested in a particular commodity (e.g. real estate and cars). Indeed, the key online advertising sites, seek.com, REA Group and carsales.com, which do not provide a news service, between them have a combined market capitalisation of around \$5 billion¹². This is much the same as the capitalisation of Fairfax Media at its peak, immediately prior to the global financial crisis. Since then its capitalisation has fallen to approximately \$1.8 billion.
- 12.26 Third, the internet is changing the way news is accessed and consumed. Aided by the use of search engines, online consumption is focused on access to specific content or items of interest from a variety of sources including newspapers. In addition, readers of news on the internet are substantially less engaged with the content and spend much less time on the activity. Because of this, access to an online reader as a means of reading the news is considerably less valuable to advertisers than is a hard copy of the newspaper.
- 12.27 Overall, the combination of these factors acts to reduce the attractiveness of newspapers as a medium for online advertising. In turn this reduces the capacity of newspapers to fund the production of content to the extent they traditionally did offline and places greater pressure on them to seek to make money from online content. But there, too, there are difficulties.

¹² Stephen Mayne, Submission to the Independent Media Inquiry, 2011.

- 12.28 Hal Varian¹³, Google's chief economist, points out that while news is highly valued by many, the large number of generic sources available to readers makes it difficult to charge for content that is not highly differentiated. In his view: 'the best thing that newspapers can do now is experiment, experiment, experiment'.
- 12.29 All indications are that newspapers are experimenting. While there is a sense of urgency to find appropriate solutions, the general approach seems to be measured and balanced. Their well-established print publishing and advertising base is a major strength of newspapers which they can use to their advantage in support of their transition to the new environment. The Congress Research Service (CRS) report 'The U.S. Newspaper Industry in Transition'¹⁴, notes:

While future growth is clearly online, there is still a huge interdependence between traditional print, with its tens of millions of readers, and emerging Internet products. Many so-called new media ventures rely partly on print advertising for their revenues. The political news publication Politico makes about 50% of its money from ads in its free print newspaper (published several times a week), even though it has more than 3 million online readers. Web aggregators such as the Huffington Post or Drudge Report rely on links to information and content from traditional print newspapers. The combination of a print and Web presence can give a paper a potent reach.

Paying for online news

- 12.30 Newspapers have always been seen as having a strong influence on the news products of other media. A research study on the sources of news and current affairs commissioned by the former Australian Broadcasting Authority (ABA)¹⁵ led by Mark Pearson concluded that:

¹³ Hal Varian, 'Newspaper Economics: Online and Offline', (Presentation at Federal Trade Commission Workshop How Will Journalism Survive the Internet Age?, Federal Trade Commission Conference Centre, Washington DC, 9 March 2010, revised March 13 2010).

¹⁴ Suzanne M. Kirchhoff, 'The U.S. Newspaper Industry in Transition' (Research Paper No R40700, Congressional Research Service, Report for Congress, Washington DC, 2010) 14 <www.fas.org/sgp/crs/misc/R40700.pdf>.

¹⁵ Mark Pearson, Jeffrey E. Brand, Deborah Archbold, and Halim Rane 'Sources of News and Current Affairs' (Research Report, Bond University, 1 May 2001) 93 <http://epublications.bond.edu.au/hss_pubs/96>.

Effectively, the day's news starts with the newspaper and all other media are essentially picking up the agenda from that point. Even though some media services operate on a 24-hour clock, the news cycle seems to restart only when the first headlines of the next day's papers are released on the wire services.

- 12.31 On the internet, once a news story is published on a freely accessible website its use by others is virtually impossible to constrain. Newspapers themselves aggregate copy from multiple sources, including wire services and other media. AAP subscribers, including online media, have access to 'approximately 1200 stories, 3000 images and 30 video and audio clips every day'¹⁶. News media generally have always fed off each other for news stories, and on the internet the process has become much easier, particularly for generic news. But the staffing of metropolitan newspaper newsrooms—in their hundreds compared to fewer than ten in a commercial television station's newsroom—dictates that newspapers still provide the most comprehensive news coverage.
- 12.32 Copyright law protects unauthorised reproduction of news stories but allows part of the story to be reproduced under fair-use provisions. While the summaries of popular content with links offered by some news aggregators is arguably within copyright rules, some internet news websites clearly go beyond those provisions when they reproduce complete news articles from other sources without attribution or compensation. A CRS report on 'The U.S. Newspaper Industry in Transition'¹⁷ says the practice is rife and cites 2009 data released by the Fair Syndication Consortium (comprising 1500 publishers, including many newspaper companies) indicating that 'from October 15, 2009, to November 15, 2009, more than 75 000 websites used at least one newspaper article online without permission'.
- 12.33 Developing and securing compensation for re-use of original stories by news aggregators and others might offer scope for some cost recovery for news production. Rupert Murdoch believes this is possible. Speaking at a United States Federal Trade Commission Workshop in 2009¹⁸, he said:

¹⁶ Australian Associated Press, Submission to the Independent Media Inquiry, 2011, 3 [2.4f]

¹⁷ Suzanne M Kirchhoff, 'The U.S. Newspaper Industry in Transition' (Research Paper No R40700, Congressional Research Service, Report for Congress, Washington DC, 2010) 16 <www.fas.org/sgp/crs/misc/R40700.pdf>.

¹⁸ Rupert Murdoch, 'From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?' (Speech delivered at Federal Trade Commission Workshop *How Will Journalism Survive the Internet Age?* Federal Trade Commission Conference Center, Washington DC, 1 December 2009) 3 <www.ftc.gov/opp/workshops/news/docs/murdoch.PDF>.

Right now we have a situation where content creators bear all the costs, while aggregators enjoy many of the benefits. In the long term, this is untenable. We are open to different pay models. But the principle is clear: To paraphrase a famous economist—there's no such thing as a free news story, and we are going to ensure that we get a fair but modest price for the value we provide.

12.34 The easy availability of alternative free sources of news on the internet makes it difficult for newspapers to charge for access to their general online content. So far most Australian newspapers have not sought to charge for their online content, preferring to grow their audiences and make them more attractive to advertisers. The *Australian Financial Review* has been an exception and restricts access to its content to those subscribing to its print edition and those with a subscription to the online version. Details of its online subscribers are not available. Anecdotal evidence indicates a small online subscriber base composed mainly of print edition subscribers and that the future of the paywall is under review because of the poor subscription growth¹⁹. On the other hand, Michael Gill, the former chief executive officer of the Financial Review Group, has vigorously defended its value²⁰. In any case, in December 2011 the *Australian Financial Review* lowered its subscription prices significantly for both print and online editions. In addition a sample of the newspaper's articles are available for free to non-subscribers²¹. *The Australian* has recently introduced a pay wall for its non-generic online content, but initially offering a free trial to those registering for access. Details of the take-up are not available. The success or otherwise of *The Australian's* move will be watched carefully by publishers.

12.35 Overseas, attempts by leading newspapers to establish paywalls have had mixed fortunes. *The Wall Street Journal's* paywall established in January 1997 is a notable early success. Access to specific articles was made exclusive to subscribers. Others were provided access to more general content on the website. Subscribers to the print edition were offered online

¹⁹ Alan Kohler, 'Fairfax calculates risk of a paywall-free presence' on *The Drum* (16 November 2011) <www.abc.net.au/news/2011-11-16/kohler-papers-paywalls-and-crunching-the-numbers/3673926>; Tim Dick, 'Australian to charge \$2.95 a week for all online content', *Business Day, The Sydney Morning Herald* (Sydney), 18 October 2011 <www.smh.com.au/business/media-and-marketing/australian-to-charge-295-a-week-for-all-online-content-20111018-1lufn.html>.

²⁰ Michael Gill, 'How the AFR's 'disastrous' paywall delivered the goods', *Inside Story*, 7 November 2011 <<http://inside.org.au/how-the-afr%E2%80%99s-%E2%80%9Cdisastrous%E2%80%9D-paywall-delivered-the-goods/>>

²¹ 'Financial Review lowers its subscription prices', *Australian Financial Review* 1 December 2011, 2.

access at a reduced fee. Its subscribers reached 200,000 in the first year²² and one million by 2007²³. The specialist nature of *The Wall Street Journal's* content and the demographics of its readership appear to have been contributing factors to its success.

- 12.36 A somewhat different but also apparently successful model was adopted by *The Financial Times*. The newspaper introduced a three-tier approach (sometimes referred to as a 'metered model') for access to its content in 2001. Online visitors were allowed some free access (initially 10 articles per 30 days but reduced over time) after which they were invited to become a registered user for free access with a limit of eight (initially 30) articles per 30 days. Higher levels of access require payment of an annual subscription.
- 12.37 Other experiments by 'generalist' newspapers have had much less success in attracting subscribers. In some cases, the introduction of a paywall turned away large portions of their online followers with consequential loss of advertising value²⁴.
- 12.38 *The New York Times*, a generalist newspaper, introduced a subscription-based service for exclusive access to selected daily columns in September 2005. The less than successful experiment was discontinued two years later. It made a second attempt at introducing a paywall at the end of March 2011. This time it adopted the metered model, allowing infrequent users free access to up to 20 articles per month. Subscribers of the printed edition have free access to the online version. Six months later, when announcing the release of its third-quarter results for 2011, The New York Times Company stated that its paid digital subscribers had reached 324,000²⁵.
- 12.39 The experience of *The Times* of London and the related *Sunday Times* is of some interest because it involves the introduction of a pay model in a market where some competitive sources of news are free. The newspaper is published by News International (other companies in the News Corporation group publish *The Wall Street Journal* and *The*

²² Janet Kornblum, 'WSJ reaches member milestone', *CNET*, 15 April 1998 <http://news.cnet.com/WSJ-reaches-member-milestone/2100-1023_3-210214.html?tag=mncol>.

²³ Robert MacMillan, 'WSJ.com hits 1 million subscribers', *Reuters*, 5 Nov 2007 <www.reuters.com/article/2007/11/05/us-dowjones-wsj-idUSTON51582320071105>.

²⁴ Tim Windsor, 'Will paid content work? Two cautionary tales from 2004', *Nieman Journalism Lab*, 10 February 2009, <www.niemanlab.org/2009/02/will-paid-content-work-two-cautionary-tales-from-2004/>.

²⁵ The New York Times Company, 'The New York Times Company Reports 2011 Third-Quarter Results' (Press Release, 20 October 2011) <<http://phx.corporate-ir.net/phoenix.zhtml?c=105317&p=irol-newsArticle&ID=1619457&highlight=>>>.

Australian) and is in competition principally with a similar generalist newspaper, *The Guardian*. The latter is committed to providing open access to its online content. *The Times* introduced a paywall in June 2010. A year later, according to press reports, paid digital-only subscribers had topped 100,000 with an additional 150,000 subscribers for combined print/digital package²⁶. The same reports noted that introduction of the paywall coincided with a large fall-off in circulation raising questions as to whether the digital subscribers were print readers migrating online and whether the gain in revenue from digital subscribers had been sufficient to offset related losses in print copy sales.

- 12.40 These initiatives by newspapers to make money from their content indicate that they are actively responding to the internet's 'innovative disruption'. While they are indications of the likely direction of change in newspaper business models, it is too early to pass judgment on their prospects for success.

Is market intervention needed?

- 12.41 In the almost crisis atmosphere currently prevailing in the United States, pundits and regulators are raising alarms that diminished capacity to use advertising revenue to fund news will have a detrimental impact on society generally. The concern is that to remain viable, newspapers will be under pressure to make deep cuts to operational costs and reporting staff, which will hurt the quality of journalism and weaken their Fourth Estate function. Some are calling for government intervention. But while a variety of measures to support journalism have been mooted, there has been little action in that direction by policy-makers.
- 12.42 Referring to the plight of newspapers in the United States, some submissions to the Inquiry voiced concern about potential risk to the future health of journalism in Australia as newspapers adjust their operations in response to the internet challenge. Conditions in Australia are less critical than those in the United States. A point highlighted in Section 3 is that although newspapers have been weakened by the economic downturn and the loss of market share to internet advertising, their revenue base does not appear to have been

²⁶ Lucia Moses, 'Times of London' Digital Subs Top 100,000 But digital gains come alongside print declines', *Adweek*, 30 June 2011 <www.adweek.com/news/press/times-london-digital-subs-top-100000-133118>.

gravely eroded. While there have been no closures of major daily newspapers, APN News & Media has recently announced a reduction in the frequency of publication of two paid, small regional dailies. The Tweed *Daily News* with a circulation of less than 4000, will now be published on Saturdays only with a reduced cover price²⁷, and the *Coffs Coast Advocate*, previously published four times a week, is now published as a giveaway on Wednesdays and Saturdays only.

- 12.43 Some of the submissions called for government intervention to support the creation of news. Notably none of the established newspapers felt there was a need for government support. The submission by Fairfax Media²⁸ states:

No one can deny that the traditional media business models have been severely challenged by the growth of the Internet. That said Fairfax does not support the proposition that independent journalism needs assistance by way of Government subsidy or tax breaks as have been suggested by some submissions ...

Media organisations need to transform themselves to account for the changing needs of audiences as the digital and online platforms continue to evolve. Existing revenue streams need to grow and new revenue sources need to be found and sustained.

- 12.44 Similarly, the News Limited²⁹ submission expresses confidence in market forces and sees no need for government intervention:

Digital and online platforms are having an increasing impact on traditional media business models including by:

- bringing competition from numerous new sources of media both within Australia and internationally;*
- developing user generated and social network content in competition with professional journalism;*
- commoditising advertising through a limitless supply of space.*

²⁷ APN also publishes the weekly giveaway (Thursday) *Tweed Border Mail* in the same region.

²⁸ Fairfax Media, Submission to the Independent Media Inquiry, 2011, 14 [9a], [9d].

²⁹ News Limited, Submission to the Independent Media Inquiry, 2011, 21 [16].

This is clearly putting pressure on our profits but competition is healthy and innovative. It is the source of an explosion of media diversity. Traditional media has responded competitively by investing in journalism and new means of distribution. The demand for news is not being extinguished. That demand will be met by market forces.

We do not believe there is a need for the Government to involve itself in the operation of these market forces.

12.45 The Seven West Media³⁰ submission also does not see any need for government assistance:

Barriers to entry for online operations are negligible and distribution costs similarly low. There is every reason to be optimistic about the future for media diversity and a healthy marketplace for ideas. There is no reason why the Government should be assisting entry into publishing ventures in the online or any other media sector.

12.46 The evidence before the Inquiry permits only tentative conclusions about the future health of journalism in Australia. The necessary restructuring to adjust to the digital environment will not be smooth sailing. Both threats and opportunities are present. Much will depend on the ability of established newspapers to develop viable business models that will enable them to continue playing a major role in the industry³¹. Their confidence that they will be able to do so is noted. Nonetheless, it would be prudent for policymakers to maintain a watching brief to ensure that future developments do not endanger the effectiveness of the role newspapers play in democratic functioning of society.

12.47 Currently, the development of effective paywalls seems to be offering the main prospect for plausible support to journalism in the digital age. News Corporation's strategy appears to be solidly set in that direction as Rupert Murdoch³² explains:

³⁰ Seven West Media, Submission to the Independent Media Inquiry, 2011, 17.

³¹ Oral submission to the Independent Media Inquiry, Sydney, 16 November 2011, 133[18]-[20] (Mr Allen).

³² Rupert Murdoch, 'From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?' (Speech delivered at Federal Trade Commission Workshop *How Will Journalism Survive the Internet Age?* Federal Trade Commission Conference Center, Washington DC, 1 December 2009) 10-11 <www.ftc.gov/opp/workshops/news/docs/murdoch.PDF>.

Quality content is not free. In the future, good journalism will depend on the ability of a news organization to attract customers by providing news and information they are willing to pay for. The old business model based on advertising-only is dead. Let's face it: a business model that relies primarily on online advertising cannot sustain newspapers over the long term. The reason is simple arithmetic. Though online advertising is increasing, that increase is only a fraction of what is being lost with print advertising. That's not going to change, even in a boom ... In the new business model, we will be charging consumers for the news we provide on our Internet sites.

- 12.48 As has been noted, information that sustains the democratic functioning of society has 'public good' characteristics that make it difficult for producers to recoup their investments from sales. Under the traditional model, advertising provided the mechanism for recoupment of the shortfall from sales. To the extent that advertising and alternative mechanisms are no longer able to play such a role in the digital environment, the provision of information is likely to fall short of the desired optimal level. This can have detrimental consequences for the democratic functioning of society. Of course, what is optimal is difficult to establish. But if it is assumed that Australian society has been reasonably well served by its media, then any substantial weakening of that service would be likely to be harmful.

Decline of newspapers as a problem for democracy

- 12.49 Are the current financial difficulties facing the press a problem for diversity of news sources or the quality of news available to the Australian public? To adequately answer this question, it is necessary to consider first how well the Australian public was served by the traditional media and use that as a basis for comparison with the prospective media landscape likely to emerge from the current process of structural change.
- 12.50 Current sources of news in Australia include:
- Newspapers (11 national and metropolitan dailies; 36 paid regional newspapers; more than 200 giveaway community papers; and many dozen newspapers in languages other than English).
 - Television (three main commercial networks and their regional affiliates, ABC, SBS and subscription television).

- Radio (more than 250 commercial radio stations with at least two in every area; several national ABC networks and local stations throughout Australia; 2 SBS networks, and more than 200 community radio stations including ethnic and indigenous services).
- Magazines (several weekly/monthly magazines).
- Internet (much opinion and comments but little additional journalism not linked to traditional media).

12.51 This potentially large number of sources, however, is not truly reflective of the level of diversity available in any one local area from major independent sources (including subscription TV but not community radio). At the local level, the state capital cities have the greatest diversity with up to 14 independent traditional sources (up to two newspaper publishers and up to 12 radio/TV services), major regional cities have 10 or fewer and smaller communities have eight or fewer. Very few community radio stations have the capacity to produce their own local news but may subscribe to and broadcast a national news service produced by the Community Broadcasting Association of Australia and distributed via satellite. Giveaway community newspapers are generally published weekly and usually contain some local news coverage.

12.52 Furthermore, when the seemingly large number of sources is considered in terms of independent reporting capacity, the list is reduced radically. If concentration of media ownership is also taken into account, the number of independent voices shrinks even further. Because of this, there is a real concern that any significant weakening of the Australian media's already limited independent reporting capacity could be damaging to the democratic functioning of our society. It is because of this concern that the Inquiry's Terms of Reference allude to potential support for 'quality journalism'.

12.53 What is meant by the term quality journalism? Mark Hollands, chief executive of the Newspaper Publishers Association, was sceptical of the term. 'The association is unaware of any editor who has a budget for 'quality journalism' and another for 'journalism'. In the view of the association, the phrase 'quality journalism' is subjective and meaningless'³³.

³³ Newspaper Publishers' Association, Submission to the Independent Media Inquiry, 2011, 50.

- 12.54 Eric Beecher, the publisher of *Crikey* and other niche online publications, acknowledged the subjective nature of the term but nevertheless asserted it was vital and integral to the functioning of a democratic society. ‘I would define it as the journalism that reports and analyses the institutions of democracy—governments, parliaments, the public service, courts, police and army, academia, business, science, education, media and other key institutions. It is the journalism that investigates and interrogates those institutions and their issues on behalf of society. It is the journalism that fertilises society with ideas, commentary and analysis. And it is journalism that needs to be conducted responsibly because it operates under a tacit public trust’³⁴.
- 12.55 In fact, the term ‘quality journalism’ is frequently used synonymously with ‘public interest’ or ‘investigative’ journalism. The FCC, in its report, uses the term ‘accountability journalism’³⁵. It refers in particular to the kind of journalism that requires diligent inquiry, is not reliant on handed-out information, and is concerned with substantial matters that are clearly in the public interest. Typically it is time-consuming and expensive. Journalism of this kind can be found in all parts of the news media, but it is not the only kind of journalism that is produced. As Eric Beecher writes: ‘Not all journalism is quality journalism in the context of the media’s role in a civil society’³⁶. This is because part of the nature of news is that it is ‘what is on society’s mind’³⁷ and alongside matters of civic significance, people are interested in more ordinary, amusing, or quirky events. The preamble of the Media, Entertainment and Arts Alliance (MEAA) code of ethics³⁸ encompasses the broad range of journalism’s role. It begins by saying ‘Respect for truth and the public’s right to information are fundamental principles of journalism. Journalists describe society to itself. They convey information, ideas and opinions, a privileged role. They search, disclose, record, question, entertain, suggest and remember.’
- 12.56 Among those who made submissions to the Inquiry on this issue, opinion was divided on the need for assistance to sustain quality journalism. As noted, the common view of major

³⁴ Eric Beecher, Submission to the Independent Media Inquiry, 2011, 1–2.

³⁵ Steven Waldman, ‘*The Information Needs of Communities: The changing media landscape in a broadband age*’ Federal Communications Commission (USA) 12 <www.fcc.gov/infoneedsreport>.

³⁶ Eric Beecher, Submission to the Independent Media Inquiry, 2011, 1-2.

³⁷ Mitchell Stephens, *A History of News* (Oxford University Press, 1988) 4.

³⁸ Media, Entertainment and Arts Alliance, *Media Alliance Code of Ethics* <www.alliance.org.au/code-of-ethics.html>.

mainstream news media organisations was that whatever difficulties they may be experiencing did not warrant support by government either for them or for prospective new entrants.

- 12.57 West Australian Newspapers provided some additional pertinent comments in its submission acknowledging that ‘the development of digital and online platforms has had a profound impact on traditional newspaper publishers’ including a sharp drop in the price of newspaper company shares which are now ‘selling for far less than they were ten years ago’³⁹. According to the company, newspaper publishers have realised that retaining readership of their journalism requires news and information to be available on ‘the reader’s platform of choice. This has required integration of newsrooms and has placed additional pressure on reporters and editors’⁴⁰. It also said that in spite of difficult economic conditions the company has remained committed to ‘recruiting and training journalists of the highest calibre to meet these challenges’⁴¹.
- 12.58 The Inquiry received 12 other submissions from a diverse range of people and organisations⁴² which, taken together, broadly asserted that the rise of new communication technologies had significantly affected the ability of major news media outlets’ ability to invest in quality journalism, and that this merited some form of government support or intervention.
- 12.59 Two other matters are also relevant to the quality journalism issue. First, the rise of the 24-hour news cycle and the spread of news media to social media sites such as Facebook and Twitter. These developments have substantially increased demands on journalists. Where in the past newspaper journalists would report daily, today many also provide audio and video reports as well as the article that appears in the next day’s newspaper. In addition, they will use Twitter both to gather and to present news. With the increased demands placed on journalists and the increased complexity of their job ‘the result is that there is more

³⁹ West Australian Newspapers, Submission to the Independent Media Inquiry, 2011, 9.

⁴⁰ Ibid.

⁴¹ Ibid 10.

⁴² The 12 submissions were from: the Media Entertainment and Arts Alliance, SBS, Senator Bob Brown, Eric Beecher, Peter Browne, *The Global Mail*, Stephen Mayne, Margaret Simons, Wendy Bacon, Bill Birnbauer, Brian McNair, Chris Nash and Penny O’Donnell and David McKnight,

recycling, less checking, more commentary and assertion ... a journalism of assertion has replaced a journalism of verification'⁴³.

- 12.60 The second relevant matter is the difficulty in measuring shifts in the quality of journalistic output. News media outlets almost always have more information available to them than they are able to print or broadcast. A drop in quality is not immediately apparent to consumers. At least in the short term, they will continue to be supplied with a product whose quality is not readily measurable against objective criteria such as the accuracy of the information, the reliability of sources and the fairness and accuracy of the reporting. More importantly, readers have no way of knowing what important public interest issues are not reported or are not effectively scrutinised because available resources are inadequate for the production of quality outputs.
- 12.61 While some submissions pointed to cuts in resources in some companies, the inquiry was not presented with evidence demonstrating a significant drop in quality journalism in Australia. It also did not have access to information that may have been used to evaluate whether reductions in resources that may have occurred weakened the capacity to sustain quality journalism. Nonetheless, affirmations of commitment to quality journalism in some of the publishers' submissions were noted.
- 12.62 The issue of quality journalism has been addressed in several independent studies both here and overseas. The first *State of the News Print Media in Australia* report, published in October 2006 by the Australian Press Council (APC), contained the results of an assessment of specific quality attributes of some 2500 articles from 14 Australian metropolitan, Sunday and regional newspapers. The researchers, Margaret van Heekeren and Lindsay Simpson, wrote: 'Newspapers are known as the media that offer the most in-depth coverage of news. One way of measuring this is to examine the range of views offered. As the United States study [*The State of the News Media, 2005*] states these are essential elements in trying to assess the quality of reporting'⁴⁴. Their assessment revealed that almost 40 per cent of the

⁴³ Rodney Tiffen, 'Spin doctors, news values and public interest' in Matthew Ricketson (ed), *Australian Journalism Today* (Palgrave Macmillan, 2012) 21. Dr Richard Stanton, Submission to the Independent Media Inquiry, 2011.

⁴⁴ Australian Press Council, '*State of the News Print Media in Australia*' (October 2006) 30.

articles cited only one source; less than one in 10 of the articles cited four sources. This, they wrote, 'may have implications for assessments of fairness and balance'⁴⁵.

- 12.63 In 2009, the Australian Centre for Independent Journalism (ACIJ) at the University of Technology Sydney, and *Crikey*, analysed the origins of news stories in 10 Australian daily newspapers over a five-day working week⁴⁶. The study identified articles across the Australian print media in which journalists put their bylines on stories that were republished press releases with little or no significant extra journalistic work. It found that nearly 55 per cent of stories analysed were driven by some form of public relations. In some newspapers the proportion was as high as 70 per cent, and the lowest was 42 per cent. One newspaper editor explained the phenomenon by referring to what he saw as a shift in personnel and resources from journalism to public relations over the past 30 years. Of 2203 articles, more than 500, or 24 per cent, had no significant extra perspective, source or content added by reporters.
- 12.64 Another study, conducted in 2009–11 by the Journalism and Media Research Centre (JMRC) at the University of New South Wales, and the Walkley Foundation, found further evidence of a fall-off in the quality of journalism⁴⁷.
- 12.65 While these studies are not conclusive, they are indicative of the possibility that problems may develop. Evidence from the United States illustrates the value of quality journalism. The FCC's report, 'The Information Needs of Communities'⁴⁸, gathered together several studies about the impact on quality journalism arising from technological changes that impinge on media companies' profitability. A summary of two of them follows.
- 12.66 A Pew Research Center forensic analysis of news media in Baltimore, 'revealed a profusion of media outlets. Between new media (blogs and websites) and traditional media (TV, radio, newspapers), researchers counted 53 different outlets—considerably more than existed 10 years ago. But when Pew's researchers analysed the content they were providing,

⁴⁵ Ibid.

⁴⁶ *Crikey* and the Australian Centre of Independent Journalism, 'Spinning the Media' (2010) <<http://media.crikey.com.au/wp-content/uploads/2010/03/Spinning-the-Media-ebook.pdf>>.

⁴⁷ Associate Professor David McKnight and Dr Penny O'Donnell, Submission to the Independent Media Inquiry, 2011.

⁴⁸ Steven Waldman, 'The Information Needs of Communities: The changing media landscape in a broadband age' Federal Communications Commission (USA) <www.fcc.gov/infoneedsreport>.

particularly regarding the city budget and other public affairs issues, they discovered that 95 per cent of the stories—including those in the new media—were based on reporting done by traditional media (mostly *The Baltimore Sun*). And those sources were doing less than they had done in the past. Several other studies have had similar findings.⁴⁹

12.67 The second example illustrates the kind of problem that can occur in the absence of what the FCC calls ‘accountability journalism’. It relates the story of how excessively high salaries were paid for many years to two public officials, the town manager and the police chief of the working-class town of Bell (outer suburb of Los Angeles). The median household income of the town’s population of 37,000 was around \$30,000 and the extravagant lifestyle of the two officials set them apart from the rest of the community. Although suspicions that they were paying themselves large salaries had been around for many years, citizens’ attempts to get press attention proved fruitless. The draining of municipal coffers continued until July 2010 when the *Los Angeles Times* eventually broke the story that the town manager’s salary was \$787,637 a year and that of the police chief \$457,000. The latter was about 50 per cent more than that of the Los Angeles police chief or county sheriff, and more than that of the president of the United States⁵⁰. This case is a vivid example of the prediction made by David Simon, a former crime reporter for *The Baltimore Sun* who created the television series *The Wire*, during his testimony to the United States senate: ‘It is going to be one of the great times to be a corrupt politician’⁵¹.

12.68 The effectiveness of the watchdog function of newspapers and their capacity for independent disclosure and for scrutiny of the operations of power in society, which are central to the democratic rationales of a free press, will be diminished if newspapers are unable to allocate adequate resources to investigative and public interest journalism. The resources needed for effective performance of the public scrutiny role of newspapers is often difficult to justify by the direct returns accruing to a newspaper or other media from the publication of the stories that are produced. But if the resultant benefits accruing to society are properly taken into account the investment of the necessary resources might well be more than justified. Herein lies the dilemma faced by media managers. When earnings

⁴⁹ Ibid 18.

⁵⁰ Ibid 46.

⁵¹ Ibid 12.

from other investments of resources are plentiful, accepting a low return from resources committed to investigative and other public interest journalism might be seen as a civic duty. But when times are tough the low returns are more likely to be seen as an unaffordable luxury. Citing the World Editors Forum (2009), the OECD (2010)⁵² notes:

There is a general scepticism among editors-in-chief about the sustainability of investigative reporting, as long and expensive pieces become more and more difficult for newspapers to fund.

- 12.69 The public generally has little direct say in the amount of resources invested and is not in a position to assess whether the level is optimal from the point of view of maximisation of social returns. It is impossible to know whether enough resources have ever been, or will ever be, devoted to the coverage of matters of importance to the public interest. Given the growing speed and complexity of society, more would be better than less and a diminished number of published stories would be directly indicative of a diminished commitment of resources. The United States FCC concludes⁵³:

Experts tell us that these days, much of reporters' time is taken up on reactive stories, describing what happened on a more superficial level, rather than digging deep into the causes and implications of a development. They have less time to investigate, to question, to take a story to the next level. Fewer newsrooms than ever can afford to deploy reporters to work on labour-intensive stories. That means not only fewer investigative stories, but, more commonly, less daily beat reporting about municipal government, schools, the environment, local businesses, and other topics that impact Americans' future, their safety, their livelihood, and their everyday life.

- 12.70 Several submissions argue that a similar process is likely to be under way in Australia. In its submission, the MEAA expressed concerns that recent staff cuts (at least 700 full time jobs have been lost since 2008) and changes to production processes (including the outsourcing of skilled roles) 'will inevitably lead to a decline in the quality of the newspapers'. In their submission, O'Donnell and McKnight cited findings from a survey they conducted which

⁵² World Editors Forum, *Trends in Newsrooms 2008 and 2009*, (2008 and 2009) cited in, Organisation for Economic Co-operation and Development—Working Party on the Information Economy, *The Evolution of News and the Internet* (11 June 2010) 61 <www.oecd.org/dataoecd/30/24/45559596.pdf>.

⁵³ Steven Waldman, 'The Information Needs of Communities: The changing media landscape in a broadband age' Federal Communications Commission (USA) 57 <www.fcc.gov/infoneedsreport>.

showed that ‘when asked to describe the main challenges in managing a newsroom the most important single challenge identified by editors (61 per cent) concerned tighter resources, fewer staff and work intensification’⁵⁴. And Eric Beecher argued⁵⁵:

... there are only four newspapers in Australia that make a significant investment in quality journalism: The Australian, The Sydney Morning Herald, The Age and the Financial Review. It is no secret that all of those four papers have seen their profitability fall substantially in recent years. All are owned by two public companies which are under constant shareholder pressure to improve their financial performance. Losing any of those four newspapers, or losing slices of their investment in journalism, would seriously diminish the absolute output of quality journalism in this country.

12.71 Schultz⁵⁶ and Minchin⁵⁷ trace the development of investigative journalism in Australia from the 1950s, pointing out that the media’s growing interest in it peaked in the 1980s. Both newspapers and television (ABC and commercial) and to a lesser extent ABC Radio National devoted substantial resources to investigative journalism. The exposure of cases of endemic crime and corruption led to the establishment of Royal Commissions and other formal Inquiries such as Costigan’s *Painters and Dockers Royal Commission*, the *Fitzgerald Inquiry* and subsequent establishment of the Criminal Justice Commission in Queensland, and opened a window on a long list of other matters of public interest. Investigative journalism continues to be an important part of the media landscape into the new millennium. Some of the submissions to the Inquiry have referred to recent examples of note, such as the 2005 Australian Wheat Board oil-for-wheat scandal, the Australian Federal Police’s wrongful arrest of Dr Haneef in 2007, the 2010 Reserve Bank-Securrency bribery scandal, and the 2011 *Four Corners*’ report on inhumane slaughter of live cattle exported to Indonesia.

12.72 The establishment of Sky News as a 24-hour news channel on subscription TV and the more recent (2010) establishment of ABC News 24, a free-to-air digital TV channel, have been a major positive contribution to news and current affairs coverage in Australia. On the

⁵⁴ Associate Professor David McKnight and Dr Penny O’Donnell, Submission to the Independent Media Inquiry, 2011, 7.

⁵⁵ Eric Beecher, Submission to the Independent Media Inquiry, 2011, 4

⁵⁶ Julianne Schultz, *Reviving the fourth estate: democracy, accountability, and the media* (Cambridge University Press, 1998) 166–229.

⁵⁷ Liz Minchin, ‘Digging in the Dirt: Australian Investigative Journalism from the 1980s to Today’, *Australian Screen Education Online*, No. 23 (2000) <<http://search.informit.com.au/documentSummary;dn=728293407535643;res=IELHSS>>.

negative side, are the 2008 closures of the Nine Network's current affairs program *Sunday* and of the *Bulletin* magazine.

12.73 Whether the level of resources committed to investigative and public interest journalism is declining and reducing the quality of what is supplied, is difficult to determine without a detailed study. From the available evidence, individual fears expressed to the Inquiry that investigative and public interest journalism will not be pursued online because it is uncommercial are likely an overreaction to current developments. As with paywalls, the emerging indications are that exclusive analysis and similar stories are more likely to be amenable to charging for access than generic news. If that is so, then newspapers might be wary of withdrawing from activities that may play a key role in the development of potentially feasible online business models.

12.74 Eric Beecher in his submission⁵⁸ points to the success of the online activities he is associated with:

There are business models that fund smaller, targeted online news organisations to produce quality journalism. The companies in which I'm involved publish a range of websites that cover politics, big and small business, investment, city and regional issues, property, power and influence, technology and the environment. Between them, they employ some 60 full-time editors, reporters, commentators and sub-editors. Each day those websites create and publish around 100 original stories.

Combined, they reach an unduplicated audience of around 1.2 million Australians a month. And they are commercial and mainly profitable, drawing revenue from advertising and subscriptions.

12.75 But he contends that 'it would be unrealistic to believe that the 'segmented digital audience model' [of his activities] can replace the 'mass media model' as the funding source of large-scale commercial quality journalism'⁵⁹. Yet, as a potential solution, he recommends funding assistance to projects and new ventures to help expand independent journalism which is by nature relatively small and segmented. As noted earlier, the major newspaper publishers

⁵⁸ Eric Beecher, Submission to the Independent Media Inquiry, 2011, 2–3. See also the perspective offered by, Delimiter, Submission to the Independent Media Inquiry, 2011.

⁵⁹ Ibid 3.

disagree and are confident they have a future in the digital world. While they may end up having a smaller, less prominent role in the online world than they have traditionally had, there is no reason to believe it will not be significant.

- 12.76 In a period of transformation, such as the one being experienced currently, adjustments can occur rapidly and how the market will eventually settle is difficult to predict. New technologies and digital applications facilitating access to news via tablets, e-readers and other mobile devices have the potential to transform the consumption of digital news and deepen the reader's engagement with it. These developments could well be potential revenue-generating streams for newspapers.
- 12.77 Low barriers to entry are facilitating new online journalism ventures and greater participation in the distribution of information, although these ventures remain small in scale compared to traditional newspapers. Eric Beecher's *Crikey* is a fine example. The final structure of online news reporting is far from settled and new ventures will continue to emerge in response to opportunities created by technological developments and other incentives. The Inquiry received a submission outlining the plans for *The Global Mail*, a new digital news venture funded by philanthropic interests that will be dedicated to the production of 'original long- and short-form articles with equal emphasis on Australian politics, the arts, business, the environment and public policy. *The Global Mail* will also dedicate resources to investigative journalism.' It is a good sign of interest in the market.
- 12.78 Other media, prominent in the coverage of matters of public interest, will also continue to play a major role. The ABC's Managing Director, Mark Scott⁶⁰ recently affirmed that 'for the ABC, the delivery of an outstanding quality news and current affairs service on free-to-air television is a key to our enduring offering'. Referring to the latest news initiative he added: 'ABC News 24 has been a great success ... (a)nd as we look to further improve the service, (it) will need to be a priority out of many claims for investment'. For commercial free to air and subscription television, news and current affairs reporting is an important component of their competitive strategy, including online. The Nine and Seven Networks have a prominent online presence in association respectively with Microsoft and Yahoo! Inc. Their joint venture portals, ninemsn and Yahoo!7 are both in the 10 most-visited Australian news sites. The

⁶⁰ Mark Scott, 'Trust and Relevance: Defining the Modern ABC' (Speech delivered at the National Press Club, Canberra, 31 August 2011) <www.abc.net.au/news/2011-08-31/scott-defining-the-modern-abc/2863920>.

owner of the Seven Network, Seven West Media, also owns the Perth daily, *The West Australian*.

- 12.79 This is not to suggest that the resources which newspapers devote to news gathering and reporting could ever be replaced by the resources which broadcasters would apply to those activities. Historically, newspapers have devoted much more time and resources to news reporting. There is little doubt this will continue into the future.

Local news

- 12.80 Coverage of local community news is much more modest, particularly in small communities in regional and remote areas. Local paid and giveaway newspapers are typically located in larger regional centres and are distributed from there to smaller towns within the region. Two-thirds of the 37 provincial paid newspapers have daily circulations of less than 20 000. Very few of them are independently published, the majority being under the ownership of News Limited, Fairfax Media or APN. Most of them have limited resources and consequently low capacity for in-depth coverage of local issues. Much of the content is in the form of generic news with little independent analysis.
- 12.81 Only the main urban regional centres have a locally produced television news service. The commercial television aggregation policy introduced in 1990, essentially involved permitting three local commercial television monopolies operating in adjacent areas to compete with each other in their “aggregated” or combined territories. The whole of mainland regional Australia was converted into four territorially large commercial television licence areas with three channels in competition with each other. This led to the creation of regional networks which in turn became affiliated with the three main metropolitan networks. As a result, in many instances, the local news services previously provided in the respective sub-markets by the local monopoly operators were replaced by a news service covering the aggregated market, with much reduced focus on, and relevance to, their smaller local communities.
- 12.82 An inquiry into the closure of local news services by the ABA⁶¹ concluded that ‘there has been a significant decline in local information (other than news) broadcast in the four

⁶¹ Australian Broadcasting Authority, ‘Adequacy of local news and information programs on commercial television services in Regional Queensland, Northern NSW, Southern NSW and Regional Victoria (aggregated markets A, B, C and D)’ (Inquiry

aggregated markets since aggregation' and that 'some regional commercial television broadcasters are not sufficiently responsive to audience needs for local content, particularly programs about matters of local significance.'⁶² As a result, the ABA imposed a licence condition on the operators requiring them to broadcast minimum amounts of material of local significance in each sub-market (based on a points scale and equivalent to about one hour per week). A subsequent analysis⁶³ concluded that 'although the issue of local news content has to some extent been addressed, it remains that there has been little, if any, remedy to the disappearance of local information programs on regional commercial television'. In 2006, an amendment to the Broadcasting Services Act codified the requirement for the broadcast of minimum amounts of material of local significance by commercial television stations in aggregated areas. The amendment also introduced a requirement for regional commercial radio stations to broadcast each day a minimum of 4.5 hours of material of local significance (including news)⁶⁴. The ABC's television service is largely organised on a state/territory basis. Its local radio service is based mainly in larger provincial centres and provides a local news service relating to the region. SBS television and radio services are national with no regular local news coverage. Where available, community radio services relate to localised communities. They are run by volunteers and have little if any capacity for regular coverage of local news.

- 12.83 Regional community radio stations found the 2006 amendment difficult to meet. A review in 2009 by the Productivity Commission found the provision did not give stations the 'flexibility to tailor their programs to suit the needs of listeners'⁶⁵ and recommended changes. The federal government has since introduced the Broadcasting Services Amendment (Regional Commercial Radio) Bill 2011 that seeks to balance the particular circumstances of regional stations with the public interest in maintaining local content in regional areas⁶⁶.

Report, Australian Broadcasting Authority, August 2002), 10
<www.acma.gov.au/webwr/_assets/main/lib310197/regionalnewsrpt.pdf>.

⁶² Ibid 11.

⁶³ John Michael Flynn, *A Case Study of North Queensland Commercial Television Before and After Aggregation* (Master of Arts (Research), Queensland University of Technology, 2008) 143
<http://eprints.qut.edu.au/16697/1/John_Michael_Flynn_Thesis.pdf>.

⁶⁴ *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth).

⁶⁵ Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services* (Research Report, 165 <www.pc.gov.au/__data/assets/pdf_file/0003/91344/social-economic-infrastructure.pdf>

⁶⁶ Australian Parliamentary Services (Cth), *Bills Digest*, No 94 of 2011–12, 25 January 2012.

12.84 To the extent that they are local, newspapers are critical to the coverage of matters of local interest. Further weakening of their already modest contribution to informing local communities would not be desirable.

Calls for assistance for news production

12.85 Several submissions and witnesses to the Inquiry argued the need for government intervention to ensure a sustainable adequate supply of news to Australian society. The key element of the typical scenario painted by those recommending intervention is a perceived risk of closure or severely reduced activity in news production by one of the major Sydney/Melbourne daily newspapers which would seriously deplete investment committed to investigative and public interest journalism.

12.86 It is difficult to predict the extent to which newspapers might resort to cutting back resources dedicated to investigative and public interest journalism as they seek to realign production costs with reduced revenues from print advertising. The Inquiry has received reports of layoffs and other cutbacks in staff levels at major daily newspapers which the MEAA⁶⁷ estimated at around 700 full time equivalent positions since 2008. But also according to the MEAA, some of the recent redundancies arose from outsourcing of some production activities to a separate entity (i.e., a re-allocation of resources rather than an actual reduction).

12.87 Taking account of these developments and bearing in mind that the major newspaper publishers confidently presented a positive assessment of their future prospects, the Inquiry is of the view that some caution needs to be exercised about the ability of newspapers to maintain a substantial commitment of resources to investigative and public interest journalism. That the industry is under considerable pressure to adjust to the rapidly evolving market environment is not in question. All the major players acknowledge the need to adapt their operations to the new reality and all of them have developed a strong online presence. It is too early to assess the potential development of paywalls for online content and prospects for generating subscription revenue from mobile and other digital applications. But given that the availability of general news from a multitude of online sources the realisation

⁶⁷ Media, Entertainment & Arts Alliance, Author, Submission to the Independent Media Inquiry, 2011, 7.

of online prospects is likely to depend heavily on the availability of exclusive content. Severe cutbacks in resources to investigative and public service journalism by newspapers would be likely to be counterproductive to efforts by a rational publisher to establish feasible and sustainable online operations.

Recommendations for future action

- 12.88 Although the Inquiry concludes substantial market intervention by the government at this time would be premature, it has considered a number of potential options that the government may be able to draw upon should action be needed. Briefly they are as follows:
- 12.89 A Productivity Commission Inquiry should include not only a thorough analysis of the news industry, but also an analysis of the principles that should guide any policy intervention. These would include not only principles to guarantee media independence and ensure consistency in applying principles to prevent partiality or censorship, but also a consideration of what interventions would be most cost-effective.
- 12.90 **Local and Regional Needs.** Although most attention is at a national level, often the shortcomings in journalistic surveillance and in the richness of the media environment are felt most at local levels, outside the major cities. This is one area, however, where a small investment by government could produce significant improvement. Small regional communities are poorly served for local news and the Inquiry is of the view that the situation could be ameliorated with some limited support by the government.
- 12.91 In the 2011–12 Budget the government committed itself to provide the Community Broadcasting Foundation (CBF) \$12.5 million over four years to increase specific community content production and establish ‘a new Community Radio Content Development Fund’. The Productivity Commission could give consideration to a small increase to that funding spread over the next three years to be allocated specifically to assist community radio stations in local regional communities to establish and maintain a news website dedicated primarily to the reporting of local news as part of their coverage of local affairs. The fund could be administered by the CBF and eligibility might be restricted to community radio services located in areas where a local newspaper is not published.

- 12.92 ***Strengthen the news capacity of the ABC.*** In the multichannel TV environment, further fragmented by the internet, national broadcasters have become more rather than less central. This has clearly been the case with the BBC.
- 12.93 The ABC is a major player in the Australian news market with extensive investment in television and radio news and current affairs production. As a public broadcaster, it is funded from consolidated revenue. It has a long and successful history in investigative and public service journalism. Should a gap emerge from reduced efforts of newspapers and other media, the ABC, with additional government funding, would be well-placed to fill it. The additional funding could be tied to specifically designated functions and conditional upon specific undertakings on its use.
- 12.94 ***Incentives for private/philanthropic investment in news.*** Philanthropic investment in news production is a much more common tradition in the United States. The sense of crisis in that country has spurred several non-profit journalistic enterprises. These have included normal web-based news services, as well as co-operatives such as *ProPublica*. Such efforts have been rare in Australia. One important recent example is the launch of *The Global Mail* a non-profit web-based news venture established with philanthropic funding. To encourage similar initiatives, philanthropists could be allowed to claim a tax deduction for a portion of donations for the establishment of new non-profit news venture and/or assist funding of their operations.
- 12.95 ***Subsidies to investigative and public interest journalism.*** Subsidies are commonly used to provide transparent targeted assistance to produce a specific output. For example, subsidies are currently provided to the production of Australian films. In that instance producers obtain a tax rebate equal to 40 per cent of eligible production expenditure. Although there would be problems which the Productivity Commission would have to address, a similar approach could be adopted for investigative and public service journalism. The government could establish a specific fund for the purpose and allocate an annual sum for distribution to eligible news organisations. The subsidy could be defined as a percentage of the wage bill of dedicated investigative journalism units established by publishers. It would be paid annually on the basis of eligible payroll cost in the preceding year. All publishers with a dedicated investigative unit would be eligible to receive a subsidy. The rate of subsidy would be determined by dividing the allocated amount of funding received from the government by

the total eligible payroll expenditure of recipients. The rate paid is thus inversely proportional to the level of activity. In other words, the greater the gap (and thus the greater the need), the larger is the incentive for news producers to engage in investigative journalism. The subsidy could be in the form of an actual payment to publishers or in the form of a tax rebate of the same value.

- 12.96 ***Subsidising the professional development of journalists.*** In a financially-embattled industry, there is often less investment in career development than in one which is booming. There is a strong public interest in quality journalism, so government might examine ways in which it can provide education funding for journalists. An example might be the establishment of a Centre for Investigative Journalism at a tertiary institution, or as a collective scheme at several tertiary institutions. There are many other examples.
- 12.97 As Annexure K makes clear, there is considerable experience in other democratic countries in policy interventions to support newspapers and quality journalism. The Productivity Commission should examine such interventions systematically to see which have given greatest value for money, and what types of policy initiatives are most likely to sustain quality journalism into the future, in an Australian environment.

Annexure A—Terms of reference

The terms of reference for the Independent Inquiry into the Media and Media Regulation are:

- (a) The effectiveness of the current media codes of practice in Australia, particularly in light of technological change that is leading to the migration of print media to digital and online platforms.
- (b) The impact of this technological change on the business model that has supported the investment by traditional media organisations in quality journalism and the production of news, and how such activities can be supported, and diversity enhanced, in the changed media environment.
- (c) Ways of substantially strengthening the independence and effectiveness of the Australian Press Council, including in relation to online publications, and with particular reference to the handling of complaints.
- (d) Any related issues pertaining to the ability of the media to operate according to regulations and codes of practice, and in the public interest.

Annexure B—Consultation

Inquiry website

The secretariat for the Independent Inquiry into the Media and Media Regulation maintained a website at www.dbcde.gov.au/media-inquiry. This site was the main source for information concerning the conduct of the inquiry and was referred to extensively in advertisements and tweets. Amongst other things, the site provided access to:

- the terms of reference for the inquiry and a short issues paper
- media releases
- public notices, including the schedules of the public hearings and details of how to attend
- copies of letters issued to stakeholders
- information on how to make a submission to the inquiry
- copies of submissions to the inquiry and transcripts of the public hearings
- policies on the publication of submissions, the use of twitter, privacy and the handling of confidential information.

Public notices

On 28 September an advertisement titled ‘Call for Submissions’ was published in *The Australian* and the *Australian Financial Review*. This call for submissions provided the date and terms of submission and introduced a short issues paper that set out some of the more important issues to be considered by the inquiry.

The notice also set out the first two hearings for the inquiry, identifying the weeks and cities in which they would be held.

Further advertisements were published in major newspapers in Melbourne (*The Age, Herald-Sun*), Sydney (*The Sydney Morning Herald, the Daily Telegraph*) and Perth (*The West Australian*) prior to public hearings being held in those cities.

Twitter

The inquiry had a twitter account @AusMediaInquiry which operated from 24 October 2011. This account was used to provide information and updates on the inquiry and to encourage the public to make submissions.

Hearings and meetings

The inquiry held public hearings in Melbourne, Sydney and Perth during November and December 2011.

On 5 December 2011 the Inquiry accepted an invitation from *The West Australian* newspaper to view its operations and attend an afternoon editorial conference.

On 16 December 2011 the Inquiry held a discussion with a number of academics who were attending the Freedom of Expression Roundtable convened by The University of Melbourne (Melbourne Law School).

Melbourne: 8–9 November 2011

Monash University Law Chambers

Dr Martin Hirst Mr Ivo Burum	School of Communication and Creative Arts, Deakin University
Professor Robert Manne	School of Social Sciences, La Trobe University
Mr Eric Beecher Ms Amanda Gome	Private Media
Mr Stephen Mayne	<i>The Mayne Report</i>
Professor Adrienne Stone	Centre for Comparative Constitutional Studies, Melbourne University
Professor Julian Disney AO Mr Colin Neave Dr Derek Wilding	Australian Press Council
Professor Dennis Pearce AO	Former Chair, Australian Press Council
Mr Paul Chadwick	Appearing in personal capacity
Mr Chris Berg	Institute for Public Affairs

Sydney: 16–18 November 2011

Marjorie Oldfield Lecture Theatre, University of Sydney

Christopher Warren Jonathan Este	Media, Entertainment and Arts Alliance
Professor Ken McKinnon AO	Former Chair, Australian Press Council
Mr Greg Hywood Mr Peter Fray Ms Gail Hambly	Fairfax Media
Mr Steve Allen	Essence Media & Fusion Strategy
Dr Margaret Simons	Public Interest Journalism Foundation, Swinburne University
Mr John Hartigan Mr Campbell Reid	News Limited
Mr Bruce Davidson Mr Tony Gillies Ms Emma Cowdroy	Australian Associated Press
Mr Stuart Littlemore QC	Appearing in personal capacity
Mr Paul Chadwick	Australian Broadcasting Corporation
Mr Paul Ferris Mr Ara Margossian	Avaaz
Professor David Flint AM	Former Chair, Australian Press Council
Professor Julian Disney AO Mr Colin Neave Dr Derek Wilding	Australian Press Council

Perth 6: December 2011

Duxton Hotel

Dr Joseph Fernandez	Department of Journalism, Curtin University
Mr Tony McCarthy Mr Bob Cronin AM Mr Brett McCarthy	West Australian Newspapers
Mr Bret Christian	Post Newspapers
Mr Paul Murray	Appearing in personal capacity

Melbourne: 8 December 2011

Monash University Law Chambers

Professor Charles Sampford	Institute for Ethics, Governance and Law, Griffith University
Mr David Sommerlad Mr John Dunnet	Country Press Australia
Mr Mark Hollands	Newspaper Publishers' Association
Professor Mark Pearson	Appearing in a personal capacity as well as representing the ARC Linkage Grant 'Vulnerability and the news media'

Melbourne: 16 December 2011

Melbourne Law School

Associate Professor Susan Brison	Dartmouth College
Assistant Professor Yasmin Dawood	University of Toronto
Associate Professor Katharine Gelber	University of Queensland
Professor Dieter Grimm	Humboldt University of Berlin
Assistant Professor Arun Thiruvengadam	National University of Singapore
Professor Adrienne Stone	University of Melbourne

Correspondence from the Inquiry

The inquiry sent letters to a number of individuals and organisations inviting them to participate in the inquiry.

Australian Press Council

Professor Julian Disney AO

Former Chairs of the Australian Press Council

Professor David Flint AM

Professor Ken McKinnon AO

Professor Dennis Pearce AO

Emeritus Professor Hal Wootten AC

Media, Entertainment and Arts Alliance

Mr Christopher Warren, Federal Secretary

Law Council of Australia

Dr Matt Collins, Deputy Chair, Media and Communications Committee

Editors, former editors and executives of media organisations

Ms Gay Alcorn
Editor, *The Sunday Age*

Mr Garry Bailey
Editor, *Hobart Mercury*

Mr Mark Baker
Senior Editor, *The Age*

Mr David Bancroft
Editor, *Daily Examiner*

Ms Sophie Black
Editor, *Crikey.com.au*

Mr Neil Breen
Editor, *The Sunday Telegraph*

Mr Roger Brock
Editor-in-Chief, *Newcastle Herald*

Mr Richard Bryce
Editor, *Shepparton News*

Mr Rod Case
Editor, *Bendigo Advertiser*

Mr Nick Cater
Editor, *Weekend Australian*

Mr Simon Chamberlain
Editor, *Daily Liberal*

Mr Peter Chapman
Editor, *Fraser Coast Chronicle*

Mr Bob Cronin
Group Editor-in-Chief, *The West Australian*

Mr Michael Crutcher
Editor, *Courier Mail*

Mr Matt Cunningham
Editor, *Northern Territory News*

Mr Andrew Eales
Editor, *Ballarat Courier*

Mr Steve Etwell
Editor, *The Chronicle*

Mr Rick Feneley
Editor, *The Sun-Herald*

Mr Steve Foley
Editor, *The Saturday Age*

Mr Peter Fray
Editor-in-Chief, *The Sydney Morning Herald*

Mr Mark Furler
Editor-in-Chief, *Sunshine Coast Daily*

Mr Graham Gardiner
Editor-in-Chief, *Blue's Country Magazine*

Mr Phil Gardner
Editor-in-Chief, *Herald & Weekly Times*
(incorrectly sent to Paul Gardner)

Mr Tony Gillies
Editor-in-Chief, *AAP Newswire*

Mr Martin Gilmour
Editor, *The Examiner*

Mr Peter Gleeson
Editor-in-Chief, *Gold Coast Bulletin*

Mr Ron Goodman
Editor, *Daily News*

Ms Annette Gregson
Editor, *Riverine Herald*

Mr Scott Hannaford
Editor, *The Sunday Canberra Times*

Mr Heath Harrison Editor, <i>The Border Mail</i>	Mr Murray Nicholls Editor, <i>Western Advocate</i>
Mr Lachlan Heywood Editor, <i>Townsville Bulletin</i>	Mr Julian O'Brian Editor, <i>The Advocate</i>
Mr Andrew Holman Editor, <i>The Cairns Post</i>	Ms Christine Ongley Editor, <i>News Mail</i>
Mr Stuart Howie Editor, <i>Illawarra Mercury</i>	Ms Meredith Papavasiliou Editor, <i>The Gladstone Observer</i>
Ms Kellie Hush Editor, <i>Grazia</i>	Mr Nick Papps Editor, <i>The Geelong Advertiser</i>
Mr Kieran Iles Editor, <i>Sunraysia Daily</i>	Mr David Pearce Editor, <i>Barrier Daily Truth</i>
Mr Damon Johnston Editor, <i>Sunday Herald Sun</i> (incorrectly sent to Damon Johnson)	Mr Frazer Pearce Editor, <i>The Morning Bulletin</i>
Mr Steve Kelly Editor-in-Chief, <i>Warrnambool Standard</i>	Ms Jennifer Pomfrett Editor, <i>The Daily Mercury</i>
Mr Alex Kidman Editor, <i>Gizmodo</i>	Mr Rod Quinn Editor, <i>The Canberra Times</i>
Mr David Kirkpatrick Editor, <i>Northern Star</i>	Mr Paul Ramadge Editor-in-Chief, <i>The Age</i>
Mr Christian Knight Editor, <i>The Armidale Express</i>	Ms Marisa Redmond Publisher, <i>Sugar</i>
Mr Alan Kohler Editor-in-Chief, <i>Business Spectator</i>	Mr Tony Rhead Managing Editor, <i>Central Western Daily</i>
Ms Megan Lloyd Editor, <i>Sunday Mail</i> (Adelaide)	Mr John Schalch Editor, <i>North West Star</i>
Mr Melvin Mansell Editor, <i>The Advertiser</i>	Mr Mark Serels Editor, <i>Kotaku</i>
Mr Brett McCarthy Editor, <i>The West Australian</i>	Mr Mark Scott Managing Director, ABC
Mr Nev McHarg Editor, <i>Gympie Times</i>	Mr Stuart Sherwin Editor, <i>Queensland Times</i>
Mr Paul McLoughlin Editor, <i>The Daily Advertiser</i>	Ms Anne Skinner Editor, <i>Kalgoorlie Miner</i>
Mr Chris Mitchell Editor-in-Chief, <i>The Australian</i>	Mr John Sommerlad Editor, <i>Northern Daily Leader</i>
Mr David Moase Editor, <i>The Coffs Coast Advocate</i>	Mr Michael Stutchbury Editor-in-Chief, <i>The Australian Financial Review</i>

Mr Scott Thompson
Editor, *Sunday Mail* (Brisbane)

Ms Liz Tickner
Editor, *Maitland Mercury*

Ms Pam Walkley
Editor, *Money Magazine*

Mr Jason Wallace
Editor, *Border Watch*

Mr Sam Weir
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Ms Judith Whelan
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Ms Sally White
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Annexure C—Issues paper

On 28 September 2011 the Independent Inquiry into the Media and Media Regulation released a short issues paper to assist the preparation of submissions.

The Media Inquiry is looking into various aspects of the media and media regulation. Its terms of reference were published on 14 September 2011 (see Annexure A). In the course of considering the matters raised in the terms of reference, it will be necessary for the Media Inquiry to consider, among other matters, the issues listed below.

The list of issues is not set out in any order of importance. Nor is the list intended to be comprehensive. The issues are, however, among the important matters that the inquiry will consider. The Media Inquiry will be greatly assisted by any comments it will receive.

It is not necessary for a respondent to deal with each and every issue. The Media Inquiry would in any event be assisted if persons choose to comment only on specific issues.

Access

- 1.1 One common justification for freedom of the press (nowadays referred to as freedom of the media) is that given by Mr Justice Holmes in his dissenting opinion in *Abrams v United States* 250 US 616, 624 (1919)¹. He said:

[T]he ultimate good desired is better reached by free trade in ideas—that the test of truth is the power of thought to get accepted in the competition of the market.

- 1.2 Does this 'marketplace of ideas' theory assume that the market is open and readily accessible?
- 1.3 Are there alternative or preferable justifications for freedom of the media?
- 1.4 Regardless of the justification, is it appropriate, especially in the search for the 'truth' on political issues, that persons holding opposing views have an opportunity to express their views in the media?
- 2.1 If a substantial attack is made on the honesty, character, integrity or personal qualities of a person or group, is it appropriate for the person or group to have an opportunity to respond?

¹ <http://supreme.justia.com/us/250/616/case.html>

- 2.2 What factors should be considered in determining (a) whether there should be an opportunity to respond? (b) how that opportunity should be exercised? Would those factors differ depending on whether the attack is published in the print or the online media?

Standards

- 3 Is it appropriate that media outlets conform to standards of conduct or codes of practice? For example, should standards such as those in the Australian Press Council's Statements of Principles (1999) apply to the proprietors of print and online media?
- 4 Is it appropriate that journalists conform to standards of conduct or codes of practice? If it is, are the standards in the Media Entertainment and Arts Alliance's Code of Ethics (1999) an appropriate model?
- 5 Do existing standards of conduct or codes of practice such as those mentioned in 3 and 4, as well as those established by individual print and/or online media organisations, fulfil their goals?
- 6 To what extent, if any, does the increased use of online platforms affect the applicability or usefulness of existing standards of conduct or codes of practice?
- 7 Can and should the standards of conduct or codes of practice that apply to the traditional print media also apply to the online media?

Regulation

- 8 Is self-regulation via standards of conduct or codes of practice necessary to maintain the independence of the media?
- 9.1 Is there effective self-regulation of (a) print media and (b) online media by the Australian Press Council?
- 9.2 What are the Australian Press Council's strengths and limitations as a regulator of those two forms of publication?

- 9.3 Is it necessary to adopt new, and if so what, measures to strengthen the effectiveness of the Australian Press Council, including in the handling of complaints from members of the public (for example, additional resourcing, statutory powers)?
- 9.4 As an alternative to strengthening the effectiveness of the Australian Press Council, would it be preferable to establish a statutory body to take over its functions?
- 9.5 Concerning any proposed new measures, which are specific to the print media and which the online media?
- 10 If self-regulation is not an effective means of regulation, what alternative models of regulation could be adopted that would appropriately maintain freedom of the media?
- 11 Would it be appropriate for such a model to include rules that would:
- (a) prohibit the publication of deliberately inaccurate statements
 - (b) require a publisher to distinguish between comment and fact
 - (c) prevent the unreasonable intrusion into an individual's private life
 - (d) prohibit the gathering of information by unfair means (for example, by subterfuge or harassment)
 - (e) require disclosure of payment or offers of payment for stories
 - (f) deal with other topics such as those currently covered in the Australian Press Council advisory guidelines?
- 12 If an alternative model was to be a statutory complaints tribunal, is it appropriate for that tribunal to have power to:
- (a) obtain information necessary to resolve a complaint
 - (b) require a publisher to do an act (for example, publish a correction of unfair or misleading reporting)
 - (c) impose sanctions for a failure to do that act?
- 13 Is there any reason why the regulation of the print media should be different from the regulation of broadcast or online media?

New media and business models

- 14 To what extent has the development of digital and online platforms had an impact on the traditional business model for media organisations, and to what extent is the further development of these platforms likely to affect the business model/s for media organisations over the medium to long term?
- 15 What are the other key factors that have an impact on the business models of media organisations, what is the magnitude of their impact to date, and to what extent are they likely to be significant over the medium to long term?
- 16 What is the impact to date on the level of investment in quality journalism and the production of news and what is the expected impact over the medium to long term?

Support

- 17 Is there need for additional support to:
 - (a) assist independent journalism
 - (b) assist the media to cater for minority audiences
 - (c) remove obstacles that may hinder small-scale publications
 - (d) promote ease of entry to the media market
 - (e) foster other aspect of the media's operations?
- 18 What are the best methods for providing that support?

Annexure D—Submissions

Submission process

Submissions to the Independent Inquiry into the Media and Media Regulation were sought by 31 October 2011. Extensions were granted to a number of individuals and organisations.

Submissions were published on the Inquiry's website provided that they were considered not to breach applicable laws, promote a product or a service, contain offensive language, or express sentiments that were likely to offend or vilify sections of the community.

The Inquiry reserved the right not to publish submissions which did not substantively comment on the issues raised by the terms of reference. Publication of a submission was not an endorsement of the content of the submission.

Short submissions

The Inquiry received and reviewed approximately 10 600 short submissions (defined as 500 words or less). These short submissions were not published on the Inquiry's website. The following are some general comments regarding them.

The majority of the submissions were facilitated by two advocacy organisations, Avaaz and NewsStand through the use of online forms. In relation to the submissions facilitated by Avaaz, approximately 9600 submissions made use of the following prepared text:

This media inquiry is a historic opportunity to reform Australia's press to better serve the public interest, our democracy, and bring an end to powerful media monopolies. In your findings, I urge you to demand a limit on media concentration and an adequately funded public interest media in Australia, call for a 'fit and proper person test' for the use of public airwaves or media subsidies to ensure that those with the power to influence public debate are suited to this important responsibility, and to call for the creation of one strong and independent regulator that can hold all media to the same standards of conduct, and enable people to more easily monitor and report press misconduct.

While the majority of the short submissions engaged at only a relatively high level with the Inquiry's terms of reference, the following issues of concern were strongly represented:

- quality of the media
- the need for action to be taken to address concerns with the quality, and
- ownership and diversity.

Relatively few submissions explicitly addressed a number of issues specifically identified in the Inquiry's terms of reference, such as:

- the effectiveness of the industry's codes of conduct (25 submissions)
- the effectiveness and independence of the Australian Press Council (34 submissions), and
- the impact on the industry of the emergence of online media (five submissions).

A significant number of the short submissions explicitly expressed dissatisfaction with the quality of media (762 submissions dissatisfied with media performance, four submissions satisfied). In most circumstances the media was referred to in a generic sense. However, on occasion particular newspapers, radio and television stations were identified as being of concern.

In the instances where the submission identified a particular cause for dissatisfaction, the broad area of concern most regularly identified related to accuracy, fairness and balance (460 submissions). In relation to balance, a recurring sentiment was that balance should be achieved in each news item as opposed to being achieved across a series of news items or through a variety of sources. Other areas of concern explicitly identified included: distinguishing fact and comment (61 submissions); clarity regarding whether items were advertising (28 submissions), and respect for privacy, sensibilities and community standards (26 submissions).

As previously noted, the majority of submissions that called for action to be undertaken to address concerns with the quality of the media did so a relatively high level. Of the 447 submissions that explicitly called for action to be undertaken to strengthen the regulatory regime or enforcement arrangements, only 64 submissions specifically detailed options for improving the current self-regulatory arrangements, of which only 34 explicitly identified the Australian Press Council. The improvements proposed to regulatory regime are summarised in the table below.

Statutory powers for the regulator and independence from publishers	17
Statutory powers for the regulator	2
Independence of the regulator from publishers	26
Increased penalties	20

In addition to calls for improvements to the regulatory regime, 150 submissions included a call for action to be taken to support a more diverse and public interest-orientated media. The majority of these submissions (92) did not specifically address the nature of the that support could be provided, while 39 submissions called for increased funding for public broadcasters and 19 submissions proposed public funding for private media organisations.

The terms of reference do not direct the Inquiry to consider media ownership. However, it is noted that 444 submissions raised media concentration levels as an issue of concern while 115 submissions called for a fit and proper person test to be part of media ownership arrangements.

Submissions received

The Inquiry received submissions from the following individuals and organisations.

Alison Anderson MLA	Australian Rural Publishers' Association
Alison Barry-Jones	Avaaz
Alun Breward	Barbara and Garth Pennington
APN News & Media	Barney McCusker
ARC Centre of excellence for Creative Industries and Innovation	Bill Birnbauer
ARC Linkage Grant 'Vulnerability and the News Media' Research Project	Brian Laurance
Associate Professor David McKnight & Dr Penny O'Donnell	Bruce Randolph
Associate Professor Paul Jones	Cancer Information & Support Society
Australian Associated Press	Castan Centre for Human Rights Law
Australian Greens Leader, Senator Bob Brown,	Chris Mitchell
Australian Press Council	Colin Rubenstein
Australian Privacy Foundation	Colin Sinclair
	Commercial Radio Australia
	Communications Law Centre, UTS

Country Press Australia	Ian Bersten
David C. Barrow	Institute for Ethics Governance and Law
David Fagan	Institute of Public Affairs
David Griffiths	Ivor Williams
David Robinson	James Hopkins
Delimiter	James Stewart
Department of Media and Communications, University of Sydney	John Corker
Des Owen	John Francis
DMG Radio (Australia)	John McNamara
Dr Glen Fuller	John Perry
Dr Helen Pringle	John Roy
Dr Ian F Turnbull	Jonathon Stormont
Dr Johan Lidberg	Kerry Wright
Dr Joseph Fernandez	Law Council of Australia
Dr Margaret Simons	Lawrence Reddaway
Dr Rhonda Breit	Matthew Moran
Dr Richard Stanton	Maurice Horsburgh
Dr Sarah Sorial	Media, Entertainment & Arts Alliance
Eili Knight	Megan Yarrow
Elizabeth McCormack	Melissa Sweet
Eric Beecher	Michael Ashley
Fairfax Media	Michael Good
Felicity Authur	Michael Hassett
Frank Ford	Michael O'Connell, Commissioner for Victims Rights
Gary Scanlan	Michael Patek
Greg Secomb	Neil Breen
Hon Doug Drummond QC	News Limited
Hon Jack Simpson	Newspaper Publishers' Association
Hunter Institute of Mental Health (Mindframe National Media Initiative)	NewsStand

ninemsn	Ronald Medlicott
Office of the Australian Information Commissioner	Rosemary O'Grady
Organisation of News Ombudsmen	Safwan Zabalawi
Pat Burrows	Sam Weir
Paul Whittaker	Samuel Lymn
Peter Bates	Save Albert Park
Peter Browne	SBS
Peter Mair	Scott Thompson
Phil Gardner	Seven West Media
Professor Brian McNair	Shane Dowling
Professor Chris Nash	Stable Population Party
Professor David Flint AM	Stephen Lewandowsky
Professor Denis Cryle	Stephen Mayne
Professor Ken McKinnon AO	Susan Forde, Michael Meadows, Kerrie Foxwell—Griffith Centre for Cultural Research
Professor Lesley Hitchens	The Global Mail
Professor Mark Pearson	Thomas Smit
Professor Wendy Bacon	Tom Clark
Property Review Australia	Victoria Marles
Public Interest Journalism Foundation	Warren John Phillips
Queensland Nurses Union	Warwick Brown
Ric Lucas	West Australian Newspapers
Robert McJannett	WorkDay Media
Roger Bates	Zachariah Matthews
Roger Wegener	Zoya Sheftalovich

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Annexure F—Public opinion poll data

Introduction

This appendix contains the public opinion poll data on which section four of the report was based. It begins with notes on sources and methods, and then presents the findings of the polls drawn upon.

A note on sources

The data in this appendix were assembled from the records of five professional polling organisations and five academic sources. The data come from 21 separate surveys taken over 45 years, 1966 to 2011.

The five professional polling organisations were:

- AC Nielsen
- Australian Nationwide Opinion Polls (ANOP)
- Essential Media
- Roy Morgan Research (Morgan Gallup Poll)
- Saulwick Poll (AgePoll; Herald Survey).

The five academic sources were:

- Mayer, H. (University of Sydney) *The Media: Questions and Answers* (1983)
- McAllister, I. et al (Australian National University, Queensland University of Technology, University of Leicester), *Australian Elections Study* (2010)
- Muller, D. J. A. (University of Melbourne), *Media Accountability in a Liberal Democracy* (2004)
- Western, J. S. and Hughes, C. A. (University of Queensland), *The Mass Media in Australia: Use and Evaluation* (1966)
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In addition, inquiries were made of Newspoll, another of Australia's major professional polling organisations, but it was found that they had no data relevant to this compilation.

A note on methods

AC Nielsen

These data were drawn from a single study commissioned by Fairfax Media as part of their regular polling. The survey was conducted by telephone among 1034 Australians aged 18 years and over on the weekend of 10–12 March 2000. This was a standard stratified random sample of the population of interest. A random sample of that size yields a sampling variance of about plus or minus 2.6 per cent. Nielsen advised that this was the only survey data they had that was relevant.

ANOP

These data were drawn from studies which typically were based on a national stratified random sample of 2000 voters, conducted using face-to-face interviews.

Essential Media

All but one of these data sets were drawn from the company's weekly online omnibus survey, based on samples of slightly more than 1000. Because online surveys typically are based on random sampling from a panel, it is problematic to apply standard variance calculations since the sample is not drawn from the total population of interest. However, as a general point, small differences in data—say of less than four points in a sample of this size—are likely to be within sampling variance, and should be read with caution. The data sets came from surveys conducted between January 2009 and December 2011. One data set was drawn from a survey conducted by the company for the Media, Entertainment and Arts Alliance in 2010.

Roy Morgan Research (Morgan Gallup Poll)

These data were drawn from national stratified random samples of approximately 2200 persons, conducted using face-to-face or telephone interviews. Sample sizes varied, but unless otherwise stated were of approximately 2200 persons.

Saulwick Poll (AgePoll; Herald Survey)

These data were drawn from national stratified random samples that until 1987 were of 2000 voters interviewed face-to-face, and after 1987 were of 1000 voters interviewed by telephone. A random sample of 1000 yields a sampling variance of plus or minus 3.16 per cent.

Thanks are due to Irving Saulwick, to Antonina Lewis of the University of Melbourne Archives, and to the staff of AC Nielsen, Essential Media, Roy Morgan Research, and Newspoll, all of whom gave valuable assistance to this research endeavour.

The academic studies were based on a wide variety of quantitative methods.

Mayer's research produced a directory and summaries of opinion polls on the media in Australia. It covered the period 1942 to 1980 and was published in 1983.

McAllister *et al's* Australian Election Study has been conducted since 1987. The 2010 study was the ninth in the series. It is based on data collected from a nationally representative sample of voters and among major party candidates standing for election.

Muller's study consisted of two parallel surveys, one among practising journalists and journalism students, and the other among voters in the State of Victoria in 2004. The sample of practitioners and students was self-selecting, the practitioners via a website with appropriate controls, and the latter via distribution of hard-copy questionnaires at RMIT University, Melbourne. The sample size for this survey was 168, of which 141 were practitioners. The sample of voters was a stratified random sample of 300. A sample of this size yields a sampling variance of plus or minus 5.8 per cent. These surveys were conducted in 2004.

Western & Hughes' study was based on a national stratified random sample of 1058, who were interviewed face-to-face. The study was conducted in 1966.

Schultz's study was part of an international research project in ten countries, called the Media and Democracy Project. In Australia, 600 journalists were invited to participate, based largely on the membership lists of the Media, Entertainment and arts Alliance, which was said to then represent about 95 per cent of journalists working in Australia. The original list of invitees was deliberative in order to ensure the inclusion of journalists working in a variety of settings, but then was self-selecting from among the invitees. The response rate was 41 per cent (n = 246). In addition, 50

potential respondents selected by the researcher on the basis of their standing as 'opinion-leading investigative journalists' were approached, and nearly 80 per cent of this sub-group participated (n = 39). For the purposes of this summary, the two respondent groups have been combined, it not being relevant to this report's purpose to separate them. Therefore the total sample is n = 285. The study was conducted in 1992 and the results published in 1998.

In summary, all these surveys were conducted according to accepted professional standards. It follows that the findings reported below in general may be relied upon with the confidence appropriate to the sample sizes.

Findings

The findings are organised into five topics, which were suggested by the content of the available data. The topics, in order of presentation, are:

1. Trust
2. Performance
3. Bias
4. Influence/power
5. Ethics

Under each topic heading, each study dealing with that topic is presented under the name of the polling organisation or the academic scholars who produced them, and the year it was done.

Trust

Essential Media

March 2010 to December 2011

People's trust in what they read or hear through the Australian media declined during the period March 2010 to December 2011, with the exception of the ABC, in which public trust either increased or remained unchanged.

On three occasions over that period, Essential Media asked:

Q: How much trust do you have in what you read or hear in the following media?

Responses were recorded on this scale: A lot of trust; some trust; not much trust; no trust at all.

Based on the proportion of respondents who said they had a lot of, or some, trust, the following declines were recorded:

- Commercial television news and current affairs—down 19 points (from 64 per cent to 43 per cent)
- Daily newspapers' news and opinion—down 16 points (from 62 per cent to 46 per cent)
- Commercial radio news and current affairs—down 9 points (from 54 per cent to 45 per cent)
- News and opinion websites—down 11 points (from 49 per cent to 38 per cent)
- Internet blogs—down 3 points (from 20 per cent to 17 per cent).

By contrast, trust in ABC TV news and current affairs was stable, moving up 2 points (from 70 per cent to 72 per cent), which was probably within sampling variance. However, trust in ABC radio news and current affairs was clearly up—gaining 5 points from 62 per cent to 67 per cent.

November 2010

In this survey, the questioning concentrated on television.

Q: How much trust do you have in the news and current affairs on the following TV channels?

Level of trust	ABC	Channel 7	Channel 9	Channel 10	Sky News
A lot	42%	8%	8%	7%	12%
Some	42%	53%	54%	55%	40%
Not much	9%	33%	31%	31%	17%
Don't know	6%	6%	6%	6%	31%

Once again the ABC stood out above commercial television for trustworthiness.

May 2011

Q: How much would you say you trust each of the following media sources (listed) to provide you with the news and information you want about Australian politics?

Summing 'a lot' and 'some' trust, the results were:

ABC TV	76%
SBS	70%
ABC radio	69%
Newspapers	53%
Commercial television	45%
Sky News	41%
Commercial radio	40%

July 2011

(survey taken in the immediate aftermath of the British phone-hacking scandal)

Respondents who read newspapers were asked about their trust in the newspapers they read.

Q: How much trust do you have in what you read in (paper of choice)?

This question was asked in respect of the newspaper the respondent said they read.

Level of trust	<i>The Australian</i>	<i>Daily Telegraph</i>	<i>The SMH</i>	<i>The Age</i>	<i>Herald Sun</i>	<i>Courier-Mail</i>
A lot	16%	7%	20%	23%	7%	9%
Some	53%	45%	54%	56%	47%	56%
Total trusting	69%	52%	74%	79%	54%	65%
Not much	19%	25%	19%	15%	32%	22%
None	8%	21%	6%	3%	12%	12%
Total untrusting	27%	46%	25%	18%	44%	34%
Don't know	5%	2%	1%	3%	2	1%

On these data, a majority of each newspaper's readers said they trusted what they read in it, although in the cases of the Sydney and Melbourne tabloids the majority was not very big. *The Age* was clearly the most trusted newspaper in the country among its own readers, 79 per cent of whom said they trusted what they read in it.

July 2010

The following results are from a survey conducted for the journalists' union, the Media, Entertainment and Arts Alliance (MEAA).

Q: Please rate your level of trust in the news and information from each source.

This was different from the 'trust' question asked in 2011, and contained a different scale:

Level of trust	News medium				
	Television	Radio	Newspapers	Magazines	Online
Always trustworthy	8	9	8	1	6
Usually trustworthy	72	75	70	38	75
Total trustworthy	80	84	78	39	81
Seldom trustworthy	15	12	19	46	16
Not trustworthy at all	4	3	4	15	3
Total untrustworthy	19	15	23	61	19

There was very widespread trust for all media types except for magazines, which clearly had a serious credibility problem. For the other media, approximately eight out of 10 respondents said they found them trustworthy.

Radio was the most trusted, followed by online news sources, television and then newspapers, although it should be noted that the levels of trust for these four platforms were similar, falling within a range of six percentage points. Magazines clearly have a serious credibility problem, being distrusted by 61 per cent.

It should also be noted that of those who accessed news online, by far the highest proportion used the sites of major newspapers (75 per cent) and/or the sites of mainstream news organisations such as news.com.au or ninemsn.com.au (63 per cent). This being so, it is interesting to observe that the level of trust in online sources may be higher than for the hard-copy versions of the newspapers and for the free-to-air versions of the television news. The differences are tiny and might be no more than sampling error, and further investigation would be needed to establish whether this was a real difference.

The next question in this survey asked those who accessed news online about their level of trust in various online sources.

The results were:

Source	Trustworthy	Not trustworthy
	%	%
ABC.net.au	87	14
Major newspaper sites	83	17
Local newspaper sites	82	18
International news sites (e.g. <i>New York Times</i> , <i>Guardian</i>)	82	18
Mainstream news organisations (e.g. <i>news.com.au</i> , <i>ninemsn</i>)	80	20
Search engines (e.g. Google, Yahoo)	72	28
Blogs and news aggregators (e.g. <i>Crikey.com.au</i>)	29	71
Social networks (e.g. Facebook, Twitter)	28	72

There was very widespread trust in the online news sources provided by recognised news organisations and the big search engine, but very little trust of blogs or social networks as sources of news.

It can be seen that once again the online versions on major newspapers engender a higher level of trust than did the hard-copy version. It should also be noted that the ABC site was clearly the most trusted, which is consistent with the findings of many surveys over many decades showing the ABC to be clearly the most trusted sources of news in Australia.

Those aged 18 to 29 were more likely to use online sites (54 per cent). There was little difference between men and women in their access patterns.

Saulwick Poll (AgePoll/Herald Survey)

Successive Saulwick Polls between 1974 and 1991 showed that the public had little confidence in the media as a whole, except for the ABC.

February 1974

Q: How much faith do you feel in newspapers?

A great deal	4%
Some	42%
Not very much	41%
None at all	13%

It can be seen that there was a lack of faith in newspapers among a majority voters, with a total of 54 per cent saying they had not much faith or none at all, and a total of 46 per cent saying they had at least some trust in them.

The word 'faith' in this context in may be taken as coterminous with 'trust' or 'confidence'.

April 1976

Q: Would you say the presentation of political news in the daily newspapers can or cannot be trusted?

Can be trusted	31%
Cannot be trusted	59%
Don't know	10%

Q: Would you say the presentation of political news by ABC TV can or cannot be trusted?

Can be trusted	67%
Cannot be trusted	13%
Don't know	21%

Q: Would you say the presentation of political news on commercial television can or cannot be trusted?

Can be trusted	48%
Cannot be trusted	35%
Don't know	17%

June 1991

Q: How much confidence would you say you had in the media?

A great deal	3%
A fair amount	36%
Not much	49%
None	12%
Don't know	2%

The question was broader than in 1974, asking about 'the media' and not just about 'newspapers', and the word 'confidence' is used instead of 'faith'. However, the pattern of responses was similar, only worse for the media: a clear majority (61 per cent) said they had not much confidence or none at all in the media, while a total of 39 per cent said they had at least some confidence in them.

Muller

In his 2004 parallel surveys of voters and journalists, Muller asked this forced-choice question:

Q: Which of these statements comes closest to your view:

Generally speaking, journalists write stories that tell the truth as best they know it, without regard for sales or ratings

Or

Generally speaking, journalists write stories they think will be best for sales and ratings, even if it means exaggerating the truth

Perceptions of voters and journalists were diametrically opposed. About three-quarters of journalists said they wrote the truth as best they knew it, and about three-quarters of voters said journalists wrote to boost sales or ratings.

	Journalists	Voters
	n = 168	n = 300
Generally speaking, journalists write stories that tell the truth as best they know it, without regard for sales or ratings	76%	24%
Generally speaking, journalists write stories they think will be best for sales and ratings, even if it means exaggerating the truth	16%	73%
Don't know	8%	3%

Morgan

Roy Morgan Research has tracked the standing of various professions, including journalism, since 1983. At the time of writing, the most recent survey had been conducted in March 2011 by telephone among a national stratified random sample of 638.

Q: As I say different occupations, could you please say—from what you know or have heard—which rating best describes how you, yourself, would rate or score people in various occupations for honesty and ethical standards (Very High, High, Average, Low, Very Low)?'

The results for media-specific occupations were:

Occupation	Score in 2011	Place in 2011	Score range since inclusion
Talkback radio announcers (included since 1999)	17 (down 2)	21st	14–19
Television reporters (included since 1989)	14 (down 2)	23rd	12–19
Newspaper journalists (included since 1983)	11 (unchanged)	27th	7–14

In this list of 30 occupations, newspaper journalists came fourth-last in 2011, followed only by real estate agents, advertising people, and car salesmen.

Schultz

In this study, journalists were asked why they thought their public standing was so low. Actual data on this were not given to the respondents; it was taken as given that their standing was low and that the respondents would be aware of this.

Q: Why do you think that the public's perception of journalists is so low?

Respondents were offered eight possible reasons. The scale used was not very specific, but the meaning was unambiguously clear. Results were:

Scale	Possible reasons							
	Unwillingness to reveal sources	Sensationalist reporting	Inaccurate reporting	Poor training	Journalists having pre-conceived ideas	Adversarial style	Lack of public knowledge of ethical codes	Power of media companies
Very	15%	65%	63%	29%	31%	28%	22%	35%
Quite	9%	26%	25%	40%	40%	37%	25%	35%
Slightly	38%	5%	10%	24%	26%	29%	35%	24%
Not at all	38%	4%	2%	6%	3%	6%	17%	5%

Journalists were of the view that sensationalist reporting and inaccurate reporting were by far the biggest reasons why the public had so low an opinion of them. Journalists having pre-conceived ideas about a story, their poor training and adversarial style were also seen as contributing factors.

These data indicate that journalists were in touch to a quite considerable degree with the connections in the public mind between accuracy and trustworthiness.

Australian Elections Study

This study, carried out by a collaboration of academics led by the Australian National University in 2010, asked voters about their level of trust in major organisations and institutions in Australia.

Television and the press rated second-last and last respectively, with 23 per cent of voters saying they had confidence in television and 17 per cent saying they had confidence in the press.

Performance

Essential Media

In **May 2011**, respondents were asked a series of questions about media performance. They were asked to agree or disagree with a series of statement. Results for statements about media performance on standard functions were:

Statement	Agree	Disagree
The media usually report the news accurately	35%	54%
The media usually report all sides of a story	21%	69%
The media does a good job of scrutinising politics and holding politicians accountable	45%	43%
The media does a good job of helping people to understand political and social issues	40%	48%

It can be seen that perceptions of the media’s standards of accuracy and comprehensiveness are negative, but perceptions of its performance as an agency of accountability and of helping people understand issues are positive.

It is difficult to reconcile the positive finding on helping people understand issues with the negative ones on accuracy and comprehensiveness. If people don’t think the media are giving a full and accurate account, how can they think they are helping people understand the issues?

AC Nielsen

This survey was carried out in **March 2000** for *The Age* and *The Sydney Morning Herald* as part of Nielsen’s regular polling for those newspapers. It showed that Australians were generally satisfied with the quality of Australian journalism.

Q: Generally speaking, are you satisfied or dissatisfied with the quality of journalism in Australia?

Very satisfied	3%
Satisfied	54%
Total satisfied	57%
Dissatisfied	27%
Very dissatisfied	10%
Total dissatisfied	37%
Don't know	6%

The proportions of voters who said the various media provided 'a thorough analysis of issues' were:

Radio news and current affairs	61%
Television news and current affairs	60%
Newspapers	56%

Ratings for which source of information was the most reliable:

Television	29%
Newspapers	27%
Radio	24%
Internet	8% (remembering that this was 2000)

However, it was almost a universally held opinion (96 per cent) that journalists distorted their reports in order to sell newspapers or boost ratings. This is consistent with the findings of Muller's research reported above.

Saulwick Poll (AgePoll/Herald Survey)

April 1976

Q: Would you say the presentation of political news in the daily newspapers is:

Accurate	39%
Not accurate	51%
Don't know	11%

Q: Would you say the presentation of political news by ABC TV is:

Accurate	66%
Not accurate	15%
Don't know	19%

Q: Would you say the presentation of political news on commercial television is:

Accurate	51%
Not accurate	33%
Don't know	16%

These findings are consistent with the general patterns of evidence from the same survey that were reported earlier under 'Trust'. The ABC was seen to be the most accurate, and was also the most trusted. Newspapers were seen to be the least accurate and were also the least trusted.

August 1989

Q: What sort of job would you say the media do?

A very good job	6%
A good job	29%
A fair job	38%
A poor job	16%
A very poor job	7%
Don't know	3%

More voters (35 per cent) said the media did a good job than said they did a poor job (23 per cent). This is broadly consistent with the findings from the Nielsen survey reported above, which showed a majority of Australians were satisfied, in general, with the standard of journalism in Australia. However, in neither case could it be said the endorsement was substantial.

October 1990

Q: Would you say the presentation of news in (daily newspapers, television) was:

Response	Newspapers	Television
Usually accurate	50%	76%
Usually not accurate	40%	19%
Don't know	11%	5%

Again, newspapers languish behind television in voters' perceptions about media accuracy.

Muller

In 2004, journalists and voters were asked a series of questions about how they assessed the performance of the media in carrying out the functions that are regarded as central to the media's role in a democratic society.

Respondents were offered the following scale on which to assess media performance on these criteria—very well, quite well, not very well, and not at all well.

The means in the table below were derived by assigning values of +2 for 'very well', +1 for 'quite well', -1 for 'not very well' and -2 for 'not at all well'. It follows that any positive mean indicates that journalists were seen to perform a particular function well, and any negative mean indicates that journalists were seen to not perform a particular function well. The midpoint on this scale was 0.0.

Function	Mean ratings	
	Journalists	Voters
	168	300
Sifting out truth from propaganda or public relations 'spin'	0.2	0.0
Reporting on the really important things that are going on	0.4	0.6
Reporting on what powerful people are doing	0.5	0.7
Keeping people entertained	0.9	0.6
Informing people in a way that helps them decide how to vote	0.2	0.1
Being independent of rich and powerful forces in society	-0.3	-0.1

The broad contours of responses from the two groups were similar. Journalists were seen by the public and by themselves as doing best at 'keeping people entertained' and worst at 'being independent of rich and powerful forces in society'. They were not seen to do well at 'sifting out

truth from propaganda or public relations spin' or at 'informing people in a way that help them decide how to vote'. On the remaining two criteria 'reporting on the really important things' and 'reporting on what the powerful are doing'—the public gave the journalists a better mark than the journalists gave themselves.

The scores suggest that the media's performance was considered to be mediocre on all these criteria. These findings are consistent with those of Nielsen and Saulwick, who found that the public gave the profession of journalism a bare pass for performance.

The fact that both the public and more so the journalists themselves said that journalists were not independent of rich and powerful forces in society reinforced those of Shultz's survey in which journalists showed a strong attachment to the Fourth Estate ideal but acknowledged it had been undermined by commercial considerations. The findings from that survey follow.

Shultz

Journalists were asked about the Fourth Estate ideal, specifically their personal attachment to it and their assessment of whether the ideal matched the reality in contemporary Australia.

Q: The Australian media defines itself as the Fourth Estate, and independent and critical watchdog of government. However, as the media companies exercise considerable commercial and political power, some argue that this role has become compromised. Do you personally favour the notion of the media as the Fourth Estate, or do you believe it should be thought of as just another business?

Agree Fourth Estate	89%
Neither	5%
Agree just another business	6%

Q: What do you think is the actual situation in Australia today?

Agree Fourth Estate is reality	43%
Neither	19%
Agree just another business is reality	39%

There is a large gulf between what journalists thought of as the Australian media idealised as the Fourth Estate and their perceptions of the actual situation. In the view of a substantial majority, the ideal had become compromised by the business aspect of the media's existence. In fact the

profession was divided almost equally on the point—43 per cent saying the Fourth Estate ideal was being lived out, and 39 per cent saying it had become compromised.

In the same survey, journalists were asked to assess the performance of the Australian media in reporting news and current affairs.

Q: How would you rate that the media are doing in reporting news of politics and current affairs?

Excellent	10%
Good	53%
Fair	33%
Poor	5%

Australian journalists had a generally positive view of the media's performance in reporting news and current affairs, with nearly two-thirds saying they did a good or excellent job. This is close to Nielsen's findings in 2000 that 57 per cent of voters were satisfied with the quality of journalism in Australia and 37 per cent dissatisfied. However, it is quite different from Saulwick's more general question about the sort of job the media do generally (not confined to news and current affairs), where only 35 per cent of voters said the media did a good or very good job.

Morgan

August 2006

A telephone survey of 374 working journalists, commissioned by the Media Entertainment and Arts Alliance and by *Crikey.com.au*, showed that 53 per cent said they felt they were unable to be critical of the media organisation for which they worked, and 38 per cent said they had been instructed to comply with the commercial position of their company. About one-third said they felt obliged to take account of the political position of the proprietor when writing stories.

Western & Hughes

1966

Q: Would you please say whether radio, television or newspapers does the following best ... Gives the most complete news?

Newspapers	55%
Television	25%
Radio	14%

In these early days of television, newspapers trumped the electronic media as the providers of the most complete news coverage.

Bias

The concept of bias is complex, but the surveys compiled here have generally offered it for assessment on the basis of two criteria: fairness and diversity. It is also presented as the polar opposite to 'balance'.

AC Nielsen

2000

Overall, people rated radio (undifferentiated between ABC and commercial) best at 'providing a balanced presentation of views'. The ratings on this quality were:

Radio news and current affairs	68%
Television news and current affairs	63%
Newspapers	57%

A large majority said ABC TV provided a more balanced coverage of news and current affairs than did commercial television networks:

ABC TV	70%
Commercial TV	16%
Neither	7%
Don't know	6%

These findings reinforce several findings reported earlier about the primacy of the ABC as the most trusted news source in Australia.

Saulwick

1976 and 1990

Q: Would you say the presentation of political news in the daily newspapers is:

Response	1976	1990
	n = 2000	n = 1000
Balanced	35%	34%
Biased	58%	57%
Don't know	8%	9%

In the **1976** survey, voters who said the daily newspapers were biased were then asked about the direction of the perceived bias. The results are given below, analysed by respondents' voting intention.

Direction of bias	Total	Voting intention	
		Labor	Non-Labor*
	n = 1148		
Biased for Labor	7%	2%	12%
Biased against Labor	62%	79%	42%
Don't know	32%	18%	46%

*Liberal, Country Party, Democratic Labor Party and Liberal Movement voters combined.

Nearly two-thirds of voters said they believed the daily newspapers were biased against Labor, and while a large majority of Labor voters said this, even a large plurality of non-Labor voters (42 per cent) also stated that the newspapers were biased against Labor.

Also in the **1976** survey, voters were asked whether the presentation of political news on ABC TV was balanced or biased:

Balanced	66%
Biased	17%
Don't know	18%

Those who said the presentation was biased were then asked about the direction of the perceived bias.

Direction of bias	Total	Voting intention	
		Labor	Non-Labor*
	n = 333		
Biased for Labor	36%	12%	52%
Biased against Labor	34%	61%	17%
Don't know	29%	26%	30%

*Liberal, Country Party, Democratic Labor Party and Liberal Movement voters combined.

Those who saw bias in the ABC TV's presentation of political news were almost equally divided about the direction of the perceived bias, and the perceptions seemed clearly to be influenced by the respondent's voting intention: they tended to see bias in favour of their political opponents.

The same questions were asked about the presentation of political news on commercial television.

Q: Would you say the presentation of political news on commercial television is balanced or biased:

Balanced	52%
Biased	34%
Don't know	14%

And again those who perceived bias, were asked about the direction:

Direction of bias	Total	Voting intention	
		Labor	Non-Labor*
	n = 683		
Biased for Labor	9%	4%	16%
Biased against Labor	61%	77%	39%
Don't know	30%	20%	45%

*Liberal, Country Party, Democratic Labor Party and Liberal Movement voters combined.

A clear majority of voters who perceived bias in the political news on commercial television said it was against Labor. Again, perceptions about the direction of bias were seen through the prism of people's voting allegiance, although nearly four out of 10 non-Labor voters said commercial television political coverage was biased against Labor, nearly as many as those who said the daily newspapers were biased against Labor.

There was a clear perception among voters that where bias existed in the commercial media—whether newspapers or television—it was against Labor.

October 1990

Q: Would you say television:

Presents news in a balanced way	54%
Presents news in a biased way	38%
Don't know	8%

Western & Hughes

1966

Q: ABC television—in your opinion is it generally fair to the ALP/Liberal and Country Parties?

	To Labor	To Lib/Country Parties
Yes	62%	64%
No	2%	1%
Don't know	36%	35%

Q: Are the commercial television stations generally fair to the ALP/Liberal and Country Parties?

	To Labor	To Lib/Country Parties
Yes	62%	68%
No	4%	1%
Don't know	34%	31%

Q: Do you think ABC Radio is generally fair to the ALP/Liberal and Country parties?

	To Labor	To Lib/Country Parties
Yes	48%	50%
No	3%	1%
Don't know	49%	49%

Q: The commercial radio stations—do you think they are generally fair to the ALP/Liberal and Country Parties?

	To Labor	To Lib/Country Parties
Yes	47%	51%
No	5%	3%
Don't know	48%	46%

Q: Do you feel the newspapers are generally fair to the ALP/Liberal and Country Parties?

	To Labor	To Lib/Country Parties
Yes	55%	72%
No	21%	..6%
Don't know	24%	22%

Q: Does radio, television or newspapers present the fairest and most unbiased news?

Television	31%
Radio	20%
Newspapers	20%
Don't know	29%

Perceptions about political bias in the media tended to go all the one way: to the extent people perceived bias, they perceived it to be against Labor. This is a consistent finding over many decades.

Shultz

Perceptions among journalists were quite different on this question of bias from those of the wider population. They were asked about the political coverage in their organisation.

Q: Is the political news in your news organisation presented with too much, too little or about the right amount of objectivity?

Too much	4%
Too little	20%
About the right amount	76%

Allowing for the unconventional nature of the question, it is clear that a large majority of journalists considered the political coverage of their organisations to meet appropriate standards of objectivity. In the eyes of the public, only the ABC approached this level of performance, and the general view of the public over many surveys is that there is systematic bias against Labor in the Australian media’s political coverage.

It is, however, difficult to reconcile the responses to this question with those of the journalists surveyed by Morgan in 2006 and referred to above, among whom about one-third said they felt obliged to take account of the political position of their proprietor when writing stories.

Influence/power

Saulwick Poll (AgePoll/Herald Survey)

April 1976 and October 1990

Q: Would you say the daily newspapers have or do not have too much influence?

Response	1976	1990
	n = 2000	n = 1000
Do have too much influence	66%	62%
Do not have too much influence	28%	30%
Don't know	7%	8%

There is a long-held perception among Australian voters that newspapers have too much influence. These two surveys, conducted 14 years apart, each show approximately two-thirds of voters are of this opinion. It may be supposed that this perception is allied to people’s level of trust: the less they trust a news source, the more likely they are to say it has too much influence. Trust, in turn, seems allied to people’s perceptions about how accurate and unbiased a news source is. This much may be deduced from the data presented so far in this compilation. As is shown below, ABC TV, which is

trusted by a large proportion of voters and is generally seen to be unbiased, is not seen as having too much influence. Newspapers, by contrast, are not trusted by as many people, are more likely to be seen as inaccurate and as biased. They are also seen to have too much influence.

April 1976

Q: Would you say ABC TV:

Does have too much influence	28%
Does not have too much influence	52%
Don't know	20%

Q: Would you say commercial TV:

Does have too much influence	47%
Does not have too much influence	39%
Don't know	13%

Q: Which groups do you think have too much power in Australia?

Group	March 1971	July 1974	April 1980
Trade unions	49%	66%	68%
Big business	24%	28%	30%
Federal government	23%	20%	25%
The press	21%	24%	25%

These four formed the top two tiers of groups said by voters to have too much power. Trade unions were clearly most widely considered to have too much power. In the second tier were big business, the federal government and the press. There was then a large gap to the next group, state governments, on 12 per cent, 13 per cent and 15 per cent over the three surveys.

It can be seen that the proportion of voters who thought the press was among the groups with too much power grew over the three surveys from 21 per cent to 25 per cent.

October 1990

Q: Would you say television:

Does have too much influence	75%
Does not have too much influence	20%
Don't know	5%

It appears that over the 14 years since the 1976 survey, voters increasingly perceived that television had too much influence, although it should be noted that the 1990 survey did not differentiate between ABC and commercial television. This makes a direct comparison impossible, because other data suggest that the public did not perceive the ABC to have too much influence, whereas commercial television was perceived to have.

AC Nielsen

2000

A bare majority (52 per cent) said that they believed the media in Australia exercised their power responsibly, but a substantial minority (44 per cent) said they exercised it irresponsibly.

Q: How responsibly do you think the media in Australia exercises its power?

Very responsibly	3%
Responsibly	49%
Total responsibly	52%
Irresponsibly	36%
Very irresponsibly	8%
Total irresponsibly	44%
Don't know	5%

ANOP

February 1977

Q: In your opinion, who is the most influential group in Australia?

Trade unions	42%
Federal government	21%
The media	10%
Multinationals	9%
Large Aust companies	7%

There was then a large gap. Again the media figure among the groups considered to be most influential in Australia.

Morgan

August 2006

A sample of 374 journalists was asked about their perceptions of the influence of media companies. About 60 per cent said the media companies had too much influence in determining how people vote, and 71 per cent said they had too much influence in determining the political agenda.

Ethics

Essential Media

July 2011 (after the phone-hacking scandal referred to earlier)

Q: Have the recent events in Britain concerning phone hacking by Rupert Murdoch's newspaper, made you more or less concerned about the conduct of Australian newspapers?

The results were:

More concerned	51%
Makes no difference	38%
Less concerned	5%
Don't know	6%

May 2010

(After the resignation of a minister of the New South Wales Government who had been 'outed' by a commercial television channel.)

Q: There have been some recent situations where a politician has resigned from their position or their party after some aspects of their sexual behaviour were made public by the media. Is it appropriate for the media to reveal details of a political figure's private life?

Yes, in all circumstances	12%
Yes, in some circumstances	42%
No, not at all	38%
Don't know	8%

The 42 per cent (457 respondents) who answered 'yes, in some circumstances' were then asked:

Q: Is it appropriate for the media to reveal details of a political figure's private life in any of the following circumstances?

Circumstance	Yes	No	Don't know
Where there is a public interest due to impact on the politician's work or taxpayers' resources	92	5	3
Where the politician has acted in a way clearly at odds with their publicly expressed views	88	8	4
Where a politician's personal choices are unusual or not considered mainstream	20	67	14

This subset of respondents clearly was of the view that where public trust had been abused in some way, intrusion on a public figure's private life was justifiable. However, mere lack of conventionality in personal choices was not sufficient.

Saulwick

August 1974

Q: Would you say that interviewing unwilling celebrities was an invasion of privacy or necessary in today's conditions?

Invasion of privacy	56%
Necessary in today's conditions	30%
Neutral	14%

Q: And what about interviewing unwilling private citizens?

Invasion of privacy	76%
Necessary in today's conditions	14%
Neutral	10%

It can be seen that a majority of voters considered any interview done or attempted against the wishes of the target to be an invasion of privacy, even when the target was a celebrity. Where the target was a private citizen, more than three-quarters of voters said it was an invasion of privacy.

Muller

2004

Q: Would you say it was always all right, never all right or all right in some cases:

	Journalists	Voters
	%	%
To take a picture of someone in their backyard from outside the property without their knowledge and consent		
Always all right	2	1
Never all right	38	92
All right in some cases	60	8
Don't know	1	--

	Journalists	Voters
	%	%
For a journalist to interview a person for a story without saying they were a journalist		
Always all right	1	1
Never all right	74	87
All right in some cases	26	10
Don't know	--	1
To obtain access to a place or person by pretending to be someone other than a journalist		
Always all right	1	2
Never all right	38	85
All right in some cases	61	13
Don't know	1	--
To use hidden microphones, tape-recorders or cameras to secretly record what people say or do		
Always all right	1	2
Never all right	43	76
All right in some cases	55	22
Don't know	1	--
To pretend to be sympathetic to a person's situation in order to obtain an interview		
Always all right	11	3
Never all right	28	70
All right in some cases	57	26
Don't know	4	1

These data show there is a very large gulf between journalists and the community on what is regarded as ethically acceptable. People in the community are far less likely than journalists to say that these ethical breaches are justifiable in some circumstances. The only question on which journalists and community remotely agree is the second one: that of declaring oneself as a journalist before interviewing someone for a story.

Annexure G—Analysis of Australian Press Council adjudications

Method

1. This analysis is based on a sample of 100 adjudications drawn from the archive of adjudications on the website of the Australian Press Council as it stood on 14–16 November 2011. At that time a search of the archives returned 240 matches to the request for ‘adjudications’. The first 100 were chosen. The most recent adjudications that came up were those for September 2011. The sample included every adjudication presented in the archive going back from that date until 100 had been accumulated. The earliest adjudication in the sample was dated March 2008. Thus the sample spanned a period of three-and-a-half years. However, it should be noted that the archive did not always list the adjudications either in numerical or date order, so not all the adjudications within that period were included. For example, there were some from October 2008 that fell outside the sample. However, the dates of the adjudications were not of themselves considered to be a relevant consideration. The relevant consideration was the representativeness of the sample.
2. On this criterion, the sample of 100 is robust. It represents a sampling fraction of 41.67 per cent of the adjudications available on the website. A sampling fraction of anything over 33.3 per cent is generally considered to be the equivalent of a census. Using the expedient of the ‘first 100’ means the sample is not strictly speaking random, but there is no reason to think that the pattern of complaints or of findings is not likely to be representative of the 240 available cases.
3. Sixty-five per cent of the sampled complaints alleged multiple breaches of the Press Council’s principles and standards. In this analysis, each breach is treated individually. For instance, if an item was alleged to have been inaccurate and unfair, it counts as one incidence of inaccuracy and one incidence of unfairness. Where the complaint is upheld on only one count, this is indicated.

Findings

4. There is a clear hierarchy in the pattern of complaint-type, as Table 1 shows:

- 4.1 In the first tier are unfairness and inaccuracy, each with an incidence of more than one-third.
- 4.2 In the second tier is bias/lack of balance, and dishonesty of one sort or another, each with an incidence of more than one-fifth. Manipulation and misrepresentation include digital manipulation of photos.
- 4.3 In the third tier are offensiveness/insensitivity, and misleading information.
- 4.4 In the fourth tier is breach of privacy.
- 4.5 In the fifth tier is derogatory/hurtful content, and conflict of interest.
- 4.6 In the sixth tier are sensationalism/gross exaggeration, ridicule, use of racist or inflammatory language.

Table 2: Ranking by incidence of complaint type; proportions upheld

Type of complaint	Incidence as % of total sample	Proportion of this type upheld (%)
Unfair	38	50
Inaccurate (including inaccuracy by omission)	34	59
Biased, lack of balance	22	55
Falsity/dishonesty/manipulation/misrepresentation	22	41
Offensive/insensitive	15	53
Misleading	12	25
Breach of privacy	8	38 (3 cases)
Derogatory/hurtful	5	20 (1 case)
Conflict of interest	5	20 (1 case)
Sensationalism/gross exaggeration	3	67 (2 cases)
Ridicule	3	33 (1 case)
Racist	3	33 (1 case)
Inflammatory	2	0

NOTE: Where percentage base is very small, the number of cases is given.

In addition to the complaints listed in Table 1, the following represented one per cent each (that is, there was one case of each):

- Unjustified assertions (upheld)

- Risk to safety (dismissed)
- Stereotypical labelling (upheld)
- Suppression (dismissed)
- Invasion of grief (upheld)
- Misogyny (upheld)
- Viciousness (upheld)
- Wrongful publication of names (dismissed)
- Homophobic vilification (dismissed)
- Irresponsibility (dismissed)
- Absence of consent (upheld)
- Unreasonableness (dismissed)

Table 2 sets out the full sample. Where a case was in some way unusual or complex, or where some explanation might assist in understanding the matter, a brief explanatory note is included. On occasions, the Press Council uses the term 'not upheld', although mostly it uses 'dismissed'. The terms are used in Table 2 as used by the Press Council.

Table 3: Full sample of complaints and outcomes

No	Nature	Outcome	Notes
1512	Misrepresentation	Upheld	
1511	Inaccurate; unfair	Upheld	
1510	Unfair; offensive	Dismissed	
1509	Inaccurate and unfair headline	Upheld	
1507	Misrepresentation	Upheld	

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1506	False assertion	Upheld	
1505	Unfair editing of comment	Dismissed	
1495	Unfair and inaccurate	Dismissed	
1504	Conflict of interest	Dismissed	Concerned publisher's interest which Council said was already well known.
1503	Failure of balance and completeness	Upheld	
1502	Unjustified assertions; unfair	Upheld	
1501	Inaccurate, unbalanced, unfair	Upheld	
1500	Unfair	Upheld	Failure to publish reply.
1499	Biased, false, unfair, offensive	Upheld as offensive	Finding of offensiveness related to publication of a reader's comment sent by SMS conveying a discreditable imputation.
1498	Offensive labelling	Upheld	Concerned terms used to describe asylum-seekers in 3 opinion columns.
1497	Breach of privacy; risk to safety	Dismissed	
1496	False; sensationalised	Upheld	Concerned reports about an exaggerated death toll in Tokyo from the Japanese tsunami and that the Fukushima nuclear power station was in meltdown in the immediate aftermath.
1494	Unfair prominence	Dismissed	Concerned prominence given to court proceedings involving local politician.
1493	Unfair; breach of privacy; unduly explicit horrific detail	Upheld on unfairness and horrific detail	Unfairness concerned the raking over of old convictions of dead man; details concerned the circumstances of his death.
1492	Misrepresentation; inaccurate; unfair	Upheld	
1491	Inaccurate; unbalanced; misleading	Upheld as inaccurate, unbalanced	
1487	Inaccurate and unfair headline	Dismissed	
1486	Unfair; conflict of interest; unbalanced	Upheld as unfair, unbalanced	Conflict of interest said to have arisen because the complainant and the reporter concerned had once been colleagues at the newspaper.
1485	Inaccurate; unfair	Upheld as inaccurate	

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1468	Offensive; ridiculed complainant; reinforced stereotype	Upheld	Photo of Indigenous man in his kitchen with caption referring to his being 'surrounded by squalor', accompanying a story about a WA Government report on living conditions in Roebourne. The next day the newspaper published 16 letters accusing the man of not taking responsibility for keeping his kitchen clean and tidy. A smaller version of the photo was re-published with the letters.
1461	Mocking and denigration	Dismissed	Concerned picture of Lord Monkton against a dark background that was alleged to have accentuated the bulging nature of his eyes.
1459	Inaccurate	Dismissed	Complainant said the inaccuracy lay in a statement made to the paper by another person, not in any action of the paper.
1452	Inaccurate, misleading	Upheld	
1453	Privacy invaded; sensibilities offended	Upheld	Concerned the publication of photos showing an identifiable naked man emerging from bushes near the newspaper's reporter and photographer during a police search. The man's genitals were masked. The man was taken to a mental hospital. The complainant, the advocacy group SANE, said the newspaper was aware of the man's mental state and exploited his vulnerability.
1484	Offensive	Upheld in part	Concerned publication of link to video of puppies being thrown into water.
1483	Inaccurate; misleading; unfair	Upheld as inaccurate, unfair	
1482	Unfair representation, conflict of interest	Dismissed	Alleged conflict arose from editor's chairing of a public meeting which was the subject of the report.
1481	Inaccurate, misleading, unfair, not balanced	Upheld on fairness and balance	Paper failed to get comment and then failed to publish denial.
1480	Inaccurate, unfair, not balanced	Upheld	
1479	Anti-Semitism	Dismissed	Complaint arose from two commentaries about Gaza and reference to 'Jewish lobby'.
1478	Inaccurate, unfair, not balanced	Dismissed	

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1477	Inaccurate	Upheld	Concerned erroneous reference to homophobic taunts as factor in boy's suicide
1476	Inaccurate	Upheld	
1475	Misquotation and misrepresentation by omission	Upheld	
1474	Misquotation and misrepresentation	Dismissed	With a rider that the complainant's letter should have been published.
1473	Historical inaccuracies concerning the Middle East; no balancing response; conflict of interest	Upheld on one inaccuracy	Item published in SMH and on National Times website. Conflict of interest alleged to have arisen because the author's university centre received funding for a range of sources including Dubai and Iran.
1472	Conflict of interest; inaccuracy and false allegations; inaccuracy and unfairness	Upheld on conflict; dismissed on inaccuracy and falsity in 2 nd article; upheld on inaccuracy and unfairness in 3 rd article. Web archive should be annotated.	Three articles were complained about. Re the 1 st , conflict arose from writer's friendship with woman alleging rape against the complainant. Alleged inaccuracy and falsity arose from 2 nd article. Inaccuracy and unfairness alleged in 3 rd article. Refusal to remove material on website archive also contested.
1471	Inaccuracy, unfairness	Not upheld	
1470	Privacy invaded; allegations falsely represented as facts	Upheld	Picture taken at complainant's front door and used against her wishes as part of a 'naming and shaming' article about a neighbourhood dispute.
1469	Dishonest, misleading, ridicule	Dismissed	
1467	Offensive letter about non-Jewish Poles under Nazism	Dismissed	
1466	Misleading by omission	Dismissed	
1465	Offensive cartoon	Not upheld	Cartoon listed words such as 'kill', 'maim' and 'rape' as if names on a war memorial. Council ruled free speech trumps offensiveness.
1464	Unbalanced, unfair, suppressed relevant facts, offensive	Dismissed except for offensive	Offensive sentence referred gratuitously to complainant's mother.

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1463	False, unfair, offensive	Dismissed except for offensive	Complainant was former wife of 1464 complainant and complaint arose from same article. Offensive comments related to her alleged criminal associations, for which the evidence was found to be inadequate.
1462	Manipulation of the truth; use of pejorative term	Acknowledged removal of offending content, with approval	Concerned report in Greek community newspaper about a speech to the Macedonian community. Pejorative term was 'Skopjan'. Offending content was removed from online and later versions of the article.
1458	Unbalanced, offensive	Dismissed	
1457	Bias, creation of false impression	Upheld in part	
1456	Inaccurate, not balanced	Upheld	
1455	Not balanced, offensive, invasive of grief	Upheld	Concerned disproportionate attention to the criminal history of two grandsons in a report that was substantively about their grandmother's funeral.
1454	Not balanced	Upheld	
1451	Unfair	Upheld	Newspaper failed to report that accused persons had entered a 'not guilty' plea in a court report, and failed to report with sufficient clarity and prominence at a later date the fact that the charges had been dropped.
1449	Unfair	Dismissed	
1448	Inaccurate	Dismissed	
1443	Sensationalising, fear-mongering, propagandising	Dismissed	Concerned articles over four days about swine flu
1442	Unfair, inaccurate	Upheld	
1438	Not balanced; inaccurate by omission	Dismissed	
1426	Unfair	Dismissed	
1428	Unfair; misleading	Upheld	
1422	Inaccurate; not balanced; misrepresentation	Upheld on inaccuracy and balance	
1415	False implication	Dismissed	Concerned article alleged to imply that the complainant was linked with missing funds. This implication was found not to exist.

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1447	Inaccurate; gross exaggeration	Upheld	Concerned article claiming more than 100,000 dogs and as many cats were euthanased annually in Victoria.
1446	Unfair	Dismissed	Concerned editing of a letter to the editor
1450	Dishonesty	Upheld	Concerned undisclosed digital manipulation of photos to create an image of two celebrities embracing.
1445	Misrepresentation	Dismissed	
1444	Racism, misogyny, viciousness	Upheld	Concerned publication of letter to the editor effectively comparing Viet Cong women to animals and supporting controlled genocide of their children.
1441	Unfair; inflammatory and derogatory	Upheld as unfair regarding a headline only	
1440	Unfair; invasion of privacy	Dismissed	Concerned article about alleged poor treatment of Indigenous patients at a regional hospital and included medical histories supplied by the patients' relatives.
1411	Inflammatory, inaccurate, derogatory	Dismissed	
1439	Inaccurate	Dismissed	
1437	Breach of privacy	Dismissed	Concerned publication of a letter complainant said was private. It had been written to the editor after publication of an earlier letter which the editor had footnoted. The letter had not been marked private and contents did not suggest it was.
1436	Misleading; not balanced	Dismissed	
1435	Bias, misrepresentation	Dismissed	
1434	Inappropriate publication of names of assault victims	Dismissed	Publication found to have been warranted in the public interest and names were a matter of public record.
1433	Misleading; unfair; not balanced	Dismissed	
1432	Inaccurate; not balanced	Dismissed	

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1431	Homophobic vilification; invasion of privacy	Dismissed	Concerned article about the financial affairs of complainant and his partner, who had at one time gone under the name of Lord Battenberg. He was referred to in the article as 'Battie' which the complainant said was Rap slang for a passive homosexual. Council found this was a pun without a sexual connotation. Privacy claim related to publication of photo of complainant's house.
1430	Derogatory and inaccurate labelling	Upheld	Concerned use of 'illegals' as a term for asylum-seekers.
1429	Irresponsible	Dismissed	Concerned publication of threats made by a former wife of an underworld figure to another person. Found to be a matter of public interest.
1425	Derogatory; likely to incite hatred	Dismissed	Concerned opinion piece couched in strong language concerning the issue of inadequate fuel-reduction as a factor in the Victorian bushfires, and alleged Greens influence over policy.
1424	Unfair; inaccurate	Upheld	
1427	Not balanced; unfair	Upheld	
1423	Inaccurate; material obtained unfairly	Dismissed	
1421	Inaccurate; insensitive	Dismissed	
1420	Misrepresentation	Upheld	Concerned digitally altered image showing a Palestinian soldier armed with a grenade launcher superimposed on a photo of damaged war graves in Gaza.
1419	Inaccurate; unfair; not balanced	Upheld	
1418	Inaccurate	Upheld in part	
1417	Racial vilification and anti-Semitic	Dismissed	Concerned commentary about Israelis said to be living on US expense accounts.
1414	Misleading and hurtful; failed to correct errors	Upheld	Concerned representation of young man after his death.
1406	Misrepresentation	Dismissed	Letter to editor edited. Council ruled the editing had not changed the meaning.
1404	Offensive	Dismissed	Concerned publication of photo of a burning person in Johannesburg riots.
1385	Deceptive and misleading	Dismissed	

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1413	Privacy invaded; absence of informed consent	Upheld	Concerned publication of a photo and comments by an inebriated young woman about drinking and behaving like a 'ladette'. Council found that publication was unfair despite the journalist's belief she had consented.
1412	Misleading	Dismissed	
1410	Unfair; unreasonable	Dismissed	

Annexure H—Analysis of articles highlighted in Victoria’s Office of Police Integrity ‘Crossing the Line’ report

The news articles highlighted in the OPI report

1. *Herald Sun*, ‘Cop’s suicide may have been avoided over email scandal,’ by Carly Crawford, 13 April 2011. The key news assertion in the article, according to the OPI report, was based on a ‘rumour’ that Tristan Weston had heard and which he retailed to the reporter. The OPI report says ‘as far as OPI has been able to ascertain, there is no truth to this “rumour”’. The sourcing of the news article is thin. No one is actually quoted backing up the key assertion in the news article. A Victoria Police spokesman declined to comment on the ‘claim’. No other source is quoted supporting the key news assertion, though a single unnamed government solicitor is mentioned tangentially. **Finding: The OPI report finds that the story contains inaccuracies.** Weston fed the story to Crawford who reported it without sufficient/any further checking.
2. *Herald Sun*, ‘Ombudsman to investigate big bonuses given to police public servants,’ by Mark Buttler and Anne Wright, 5 May 2011. The key news assertion is that police public servants have been paid hefty bonuses for a payroll system that ran well over budget. The OPI report says the reporter brought the story to Tristan Weston who told Mark Buttler that there was ‘definitely a budget blowout’ and was sharply critical of it. He did not provide the actual blowout figure— \$18 million—to the journalist, but it is reported in the lead paragraph without being sourced at all. Greg Davies is quoted later in the story criticising the payment of bonuses. A Victoria Police spokesman defended the payroll system and payment of bonuses for ‘exceptional service’, but did not mention any figures. **Finding:** The article’s sourcing for its key news assertion is thin. It does not appear the story is inaccurate but lacks context.
3. *Herald Sun*, ‘Hi-tech system may be scrapped—Forensic upgrade blow,’ by Carly Crawford, 6 May 2011. The key news assertion is that an overhaul of Victoria Police’s forensic information system has been delayed to the point where it may not run at all. The assertion is attributed to ‘sources’. Minister Peter Ryan is said to have ‘demanded answers last night’ but he is not quoted and nothing more is heard from him in the story. A Victoria Police

spokesman acknowledged the cost of the program 'is higher than initially planned' but said 'costs have remained within the funds allocated to the project'. The OPI report says Tristan Weston approached Carly Crawford and told her he had been told the project was 'running massively over budget' but according to the OPI report Weston had done 'the most perfunctory research, if any' on the project, which the OPI, after interviewing the executive sponsor of the Property and Laboratory Management (PALM) project, found was a complex project that was operating within its overall budget. **Finding:** The OPI report finds that the story contains inaccuracies. Weston fed the story to Crawford who ran it without sufficient/any further verification.

4. *Herald Sun*, 'Chief defiant as impasse reaches flashpoint—Overland's fate goes to cabinet,' by Carly Crawford, Grant McArthur and Anthony Dowsley, 9 May 2011. The key news assertion is that Sir Ken Jones was about to hand in his report on murders committed by parolees while on parole when he was asked to leave immediately by Simon Overland. This information is attributed to a 'senior police source' who the OPI report identifies as Tristan Weston. No other sources are quoted about this key news assertion. However, other sources are quoted in the article concerning other issues. 'Government sources' told the newspaper they were 'frustrated and unimpressed by Mr Overland's handling of Sir Ken's resignation'. Greg Davies from the Police Association is quoted criticising Overland in strong terms. **Finding:** Weston fed the story to Crawford without much checking of the accuracy of the information. The OPI's report shows the picture was more complicated than presented in the news story; that is, the parolee problem appears to have been caused by Corrections Victoria, not the police. The story, then, contains inaccuracies.
5. *Herald Sun*, 'Overland faces fight for more control to police the police—top cop's power grab,' by Carly Crawford, 18 May 2011. The key news assertion is that Simon Overland was seeking to expand the chief commissioner's powers to be able to promote or dismiss 'rogue officers'. The claim is not attributed to a particular source, but Victoria Police confirmed that it had raised the proposed changes with the government. A spokeswoman for the Police Minister said the government would not be pursuing the proposed amendments to the Police Regulation Act. The OPI report found Tristan Weston had shown Carly Crawford a confidential briefing document from Victoria Police about the proposed changes that were in the government's possession when he began working for the minister. **Finding:** Weston fed the story to Crawford, who checked it with Victoria Police. The story appears to be accurate.

6. *The Age*, 'Anti-terror squad to be axed,' by Dylan Welch, 17 May 2011 and *The Age*, 'Overland rejects warnings on anti-terror squad,' by Dylan Welch, 18 May 2011. These two articles are treated together in the OPI report. The key news assertions in the first article was that Simon Overland was disbanding a successful counter-terrorism unit; the key news assertion in the second article was that Overland was disbanding the unit despite an internal report warning that it would have adverse effects. For the first article, the claim is attributed to 'a police source close to the unit' (the Security Intelligence Group). The Police Association secretary, Greg Davies, is quoted criticising the decision and a spokeswoman for the Police Minister is quoted saying it is not appropriate for a government to comment on covert operations. A Victoria Police spokesman is quoted rejecting the claim that the unit's work would not continue. The second article quotes from a confidential Victoria Police document that had been supplied to the journalist by Tristan Weston. The article also quotes Simon Overland reaffirming that the unit's work would be continued, in an expanded unit. The report said, however, that Victoria Police management 'had little understanding of what' the SIG unit did. **Finding:** Weston fed confidential material to Dylan Welch, who was already working on the story. Welch appeared to have done some of his own verifying and also quoted Overland's defence of his decision.
7. *The Weekend Australian*, 'Turmoil as Overland's data guru packs bags,' by Stuart Rintoul, 21 May 2011. The key news assertion is that an important IT executive is leaving Victoria Police, plunging Overland into further turmoil. The OPI report found the executive was moving on for reasons of 'career progression' but that the article did not report this, instead suggesting the resignation aggravated the sense of crisis at Victoria Police. The OPI report found Tristan Weston learnt of the resignation from Police Association secretary Greg Davies, and used it to further his campaign to undermine Overland. However, it appears Rintoul's story was actually a follow up of an interview by Neil Mitchell on 3AW with the then deputy police commissioner, Ken Lay. The story does not appear to have derived from Weston or Davies despite the OPI's finding that it appeared to have come from one of them. Nevertheless, it seems the reporter did not make much effort to establish the reason for the IT executive's resignation. **Finding:** the story was misleading in suggesting the IT executive's resignation was linked to turmoil in the police commissioner's office.
8. *Herald Sun*, 'Holster snag in firearms roll-out,' by Carly Crawford, 24 May 2011. The key news assertion is that Victoria Police has been forced to replace new custom-made firearms

holsters after field trials found a dangerous design problem. This information is not attributed to any source. It simply says 'The *Herald Sun* has learned...' It does say the Police Association has been made aware of the problem, but does not say by whom. The OPI report checked with Victoria Police which confirmed the problems with the holsters but said the replacement cost would be around \$150 000, not the 'millions' referred to in the article. The OPI also said Carly Crawford had told them she had several sources for the story but declined to disclose them. **Finding:** Weston gave information to Crawford, but it is not clear how much she knew already. The story contains both accurate and inaccurate information and is poorly sourced. The OPI report found the story contained an important inaccuracy.

9. *Herald Sun*, 'Flak for top cop process,' by Carly Crawford, 9 June 2011. The key news assertion in the article is that the inquiry into Victoria Police command headed by Jack Rush will be asked to review the process by which Simon Overland became chief commissioner. The story's claims were not sourced. It simply said, twice, that the *Herald Sun* 'believes'. No one is quoted in the story. The OPI report found Tristan Weston told Carly Crawford 'there was a rumour going around' that Overland had not been the preferred candidate for the commissioner's job. He gave her the names of the selection panel (though one name was incorrect) and she rang them. **Finding:** Weston passed on a rumour to Crawford who followed it up by ringing members of the selection panel for chief commissioner. It is not clear if the story is accurate but it is not sourced

Annexure I—Media coverage of vulnerable people

The ARC-funded research project ‘Vulnerability and the News Media’ was conducted by a group of academic researchers—Professor Kerry Green, Professor Michael Meadows, Professor Stephen Tanner, Dr Angela Romano and Professor Mark Pearson—in association with the Hunter Institute of Mental Health, the Dart Centre for Journalism and Trauma-Asia Pacific, the Australian Press Council, the Australian Multicultural Foundation, the Journalism Education Association Australia, Special Olympics Australia and the Media Entertainment and Arts Alliance. The researchers made available to the Inquiry edited transcripts of the focus groups with vulnerable people whose circumstances brought them into contact with the news media. The table below presents the participants’ experience of their interaction.

Event that brought participant in contact with the news media	Issues arising for participants from the news media coverage	Impact on participants—in their own words
Survivor of rape	Hounding and constant contact and request for an interview.	‘I did have someone from the media call me but she was just a hungry animal. I found her quite a lovely, person but eager to get a story. I was in tears but she didn’t care. She was happy to throw my case all over the TV and magazines and I kept saying ‘No, no, no, you don’t understand, you know nothing about me, don’t do this’.
Murder of daughter	Generally positive experience; participant learnt to work with the news media. Positive impact of reporting victim impact statements. Building a trusting relationship with a journalist—positive. Accuracy and truth. Participant valued building a trusting relationship with a journalist, and welcomed the reporting of a victim impact statement.	‘But now I find the media pretty good. I do a lot of media work and TV work with them. I know who I speak to and who I don’t speak to, who is good and bad’. ‘A bloke from <i>The Age</i> rang me up. He was a very good reporter; he came out and said ‘You can have a chance of an impact statement, what would you like to say?’ So both my wife and I put our victim impact statement in and he put them on page three of <i>The Age</i> the next day. Very positive stories and we said to him he had the truth’.
Police officer working with victims of crime	Ordinary people become victims/survivors and have no idea how to deal with the news media.	‘The problem is that victims don’t understand [the news media] until they are a victim’.

Event that brought participant in contact with the news media	Issues arising for participants from the news media coverage	Impact on participants—in their own words
Suffered sexual abuse in childhood	The news media dismissed the participant’s experience and passed judgement rather than report the issue impartially.	‘I went to the media after the military and told them of what was happening internally there and the media just turned around and said, ‘Well she just has post-traumatic stress disorder’. It was all focused on my mental illness rather than dealing with the situations.’
Murder of brother	<p>Innuendo in the media. Unsubstantiated reporting. Factual mistakes. Apology by one media out and not another. Factual errors and innuendo in reporting of the case. One media outlet apologised but another did not.</p> <p>Participant not informed when daily media coverage is used in a book.</p>	<p>‘They said my brother [name] was a heavy gambler and gambled with [name] at Crown Casino, that wasn’t correct. He had misheard in court...I got an apology after making a complaint to the ABC’.</p> <p>‘Recently, that same comment appeared in <i>The Geelong Advertiser</i> and I’ve made a number of phone calls and he won’t answer the phone, he won’t return calls to me’.</p> <p>‘I hate it when they go to write a book and they don’t tell you. My friend went out one day and she said ‘You know [name] put you in a book’. Why can’t the media ring you up and have the decency to tell you that you’re in a media book, to prepare you. He was a <i>Herald Sun</i> writer, and he wrote 17 mistakes in it’.</p>

Event that brought participant in contact with the news media	Issues arising for participants from the news media coverage	Impact on participants—in their own words
<p>Murder of daughter; previously the participant's children had been sexually abused.</p>	<p>Accuracy in reporting is appreciated but distress over a decision by the news media to treat differently allegations of child sexual abuse.</p>	<p>'I found the media were very factual, facts were accurate and they were very sympathetic and did all the right things after and before the case'.</p> <p>'But prior to that [the murder] I had children in 1981 who had been abused. The media handballed that. I don't suppose they had to cover it in those days. The judge wasn't told that the man had been an abuser for 25 years so the judge just got a completely inaccurate picture to what the man was and the practice he applied with the inappropriate touching.</p> <p>None of that came out in the media. I felt very, very alone. And I found out, murder is popular but paedophilia is a difficult subject'.</p>

Event that brought participant in contact with the news media	Issues arising for participants from the news media coverage	Impact on participants—in their own words
Sexually abused by grandfather	<p>Graphic reporting of sexual assault cases.</p> <p>Lack of understanding about potential impact of such reporting on victims.</p> <p>Lack of understanding about sexual abuse victims' vulnerability in interviews.</p>	<p>'I had a conversation with a journalist recently about the fact that he had been reporting about abuse by a church. He had spoken to a couple of the survivors of that and he told me that they had said to him 'We want you to tell people what this guy did' so he included some details of the assault in his article which I found incredibly distressing and I felt were completely unnecessary to the story. His idea was that 'Yes, we need to tell people about the molesters'.</p> <p>'People don't need to see child pornography to know how bad it is. I don't see why you need to include these details which are very specific, very distressing details.</p> <p>'I said 'I don't think you realise that perhaps people who have been sexually abused or assaulted are very vulnerable and they don't necessarily have the boundaries, and we don't perhaps know how to protect ourselves as well as we could'. I understand that those people wanted it out there but I think on the balance that it's not necessary'.</p>
Murder of mother. Participant and her brother were sexually abused in childhood	<p>Language used by the news media was hurtful and demeaning.</p> <p>The importance of treating participants as survivors rather than reinforcing victimhood.</p>	<p>'One of the biggest things I find about the media when they talk about women is they portray the violence against women as a dispute. If it was a male it would be an assault. I feel that that's actually minimising what women endure and what they go through'.</p> <p>'You might have been a victim at the time but at the end of the day you've survived it and that would be nice if they highlighted the survival of the whole thing, not the fact that you've had the crap bashed out of you'.</p>

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Event that brought participant in contact with the news media	Issues arising for participants from the news media coverage	Impact on participants—in their own words
Victim of crime	Feeling that only negative aspects of victims' stories reported—for sales. Victims and survivors of crime treated as commodities.	'They just want that gruesome bit so that they can sell that newspaper or sell that magazine. They don't care about anything else'

Annexure J—Extracts from broadcasters’ codes of practice and media organisations’ ethical codes

Supplied in ARC Linkage Grant LP0989758 ‘Vulnerability and the News Media’ Research Project, Submission to the Independent Media Inquiry, 2011

Broadcasters codes of practice	
Code	Provision
<p><i>Commercial Television Industry Code of Practice (January 2010)</i></p> <ul style="list-style-type: none"> - <i>Developed</i> by FreeTV Australia - <i>Registered</i> by ACMA under Broadcasting Services Act, s 123(4) 	<p>SECTION 4: NEWS AND CURRENT AFFAIRS PROGRAMS</p> <p><i>News and Current Affairs Programs</i></p> <p>4.3 In broadcasting news and current affairs programs, licensees:</p> <p>4.3.1 must broadcast factual material accurately and represent viewpoints fairly, having regard to the circumstances at the time of preparing and broadcasting the program</p> <p>[...]</p> <p>4.3.5 must not use material relating to a person’s personal or private affairs, or which invades an individual’s privacy, other than where there is an identifiable public interest reason for the material to be broadcast</p> <p>[...]</p> <p>4.3.11 must make reasonable efforts to correct significant errors of fact at the earliest opportunity. A failure to comply with the requirement in clause 4.3.1 to broadcast factual material accurately will not be taken to be a breach of the Code if a correction, which is adequate and appropriate in all the circumstances, is made within 30 days of the licensee receiving a complaint or a complaint being referred to ACMA (whichever is later).</p> <p>4.4 in broadcasting new programs (including news flashes) licensees:</p> <p>4.4.1 must present news fairly and impartially;</p> <p>4.4.2 must clearly distinguish the reporting of factual material from commentary and analysis.</p> <p>4.5 In broadcasting a promotion for a news or current affairs program, a licensee must present factual material accurately and represent featured viewpoints fairly, having regard to the circumstances at the time of preparing and broadcasting the program promotion, and its brevity. A licensee is not required by this clause to portray all aspects or themes of a program or program segment in a program promotion, or to represent all viewpoints contained in the program or program segment.</p>

<p>Commercial Radio Codes of Practice and Guidelines (September 2011)</p> <ul style="list-style-type: none"> - <i>Developed</i> by Commercial Radio Australia - <i>Registered</i> by ACMA under Broadcasting Services Act, s 123(4) 	<p>CODE OF PRACTICE 2: NEWS AND CURRENT AFFAIRS PROGRAMS</p> <p>Purpose</p> <p>The purpose of this Code is to promote accuracy and fairness in news and current affairs programs.</p> <p>2.1 News programs (including news flashes) broadcast by a licensee must:</p> <ul style="list-style-type: none"> (a) present news accurately; [...] (c) distinguish news from comment; and [...] <p>2.2 In the preparation and presentation of current affairs programs, a licensee must use reasonable efforts to ensure that:</p> <ul style="list-style-type: none"> (a) factual material is reasonably supportable as being accurate; (b) substantial errors of fact are corrected at the earliest possible opportunity <p>A failure to comply with the requirement in Code 2.2(a) to broadcast factual material that is reasonable supportable as being accurate will not be taken to be a breach of the Code if a correction, which is adequate and appropriate in all the circumstances, is made within 30 business days of the licensee receiving a complaint or a complaint being referred to ACMA (whichever is later)</p> <p>2.3 In the preparation and presentation of current affairs programs a licensee must ensure that:</p> <ul style="list-style-type: none"> (a) the reporting of factual material is clearly distinguishable from commentary and analysis; (b) reasonable efforts are made or reasonable opportunities are given to present significant viewpoints when dealing with controversial issues of public importance, either within the same program or similar programs, while the issue has immediate relevance to the community. (c) viewpoints expressed to the licensee for broadcast are not misrepresented and material is not presented in a misleading manner by giving wrong or improper emphasis or by editing out of context. (d) the licensee does not use material relating to a person's personal or private affairs, or which invades an individual's privacy, unless there is a public interest in broadcasting such information.
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<p>ASTRA Subscription Broadcasting Television Code of Practice 2007</p> <ul style="list-style-type: none"> - <i>Developed</i> by the Australian Subscription Television and Radio Association - <i>Registered</i> by ACMA under Broadcasting Services Act, s 123(4) 	<p>2.2 NEWS AND CURRENT AFFAIRS PROGRAMS</p> <p>(a) News and current affairs programs, including news updates, broadcast by Licensees must:</p> <ul style="list-style-type: none"> (i) present news accurately, fairly and impartially; (ii) clearly distinguish the reporting of factual material from commentary, analysis or simulations; <p>[...]</p> <p>(b) In broadcasting news and current affairs programs to the extent practicable licensees:</p> <p>[...]</p> <ul style="list-style-type: none"> (vi) will make reasonable efforts to correct significant errors of fact at the earliest opportunity. <p>(c) In broadcasting news and current affairs programs licensees must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there are identifiable public interest reasons for the material to be broadcast.</p>
<p>ABC Code of Practice 2011</p> <ul style="list-style-type: none"> - <i>Developed</i> by the ABC - <i>Notified</i> to ACMA pursuant to ABC Act, s 8 	<p>IV. PRINCIPLES AND STANDARDS</p> <p>[...]</p> <p>2. Accuracy</p> <p>Principles: The ABC has a statutory duty to ensure that the gathering and presentation of news and information is accurate according to the recognised standards of objective journalism. Credibility depends heavily on factual accuracy.</p> <p>Types of fact-based content include news and analysis of current events, documentaries, factual dramas and lifestyle programs. The ABC requires that reasonable efforts must be made to ensure accuracy in all fact-based content. The ABC gauges those efforts by reference to:</p> <ul style="list-style-type: none"> • the type, subject and nature of the content; • the likely audience expectations of the content; • the likely impact of reliance by the audience on the accuracy of the content; and • the circumstances in which the content was made and presented. <p>The ABC accuracy standard applies to assertions of fact, not to expressions of opinion. An opinion, being a value judgement or conclusion, cannot be found to be accurate or inaccurate in the way facts can. The accuracy standard requires that opinions be conveyed accurately, in the sense that quotes should be accurate and any editing should not distort the meaning of the opinion expressed.</p> <p>The efforts reasonably required to ensure accuracy will depend on the circumstances. Sources with relevant expertise may be relied on more heavily than those without. Eyewitness testimony usually carries more weight than second-hand accounts. The passage of time or the inaccessibility of locations or sources can affect the standard of verification reasonably required.</p> <p>The ABC should make reasonable efforts, appropriate in the context, to signal to audiences gradations in accuracy, for example by querying</p>

	<p>interviewees, qualifying bald assertions, supplementing the partly right and correcting the plainly wrong.</p> <p>Standards:</p> <p>2.1 Make reasonable efforts to ensure that material facts are accurate and presented in context.</p> <p>2.2 Do not present factual content in a way that will materially mislead the audience. In some cases, this may require appropriate labels or other explanatory information.</p> <p>3. Corrections and clarifications</p> <p>Principles: A commitment to accuracy includes a willingness to correct errors and clarify ambiguous or otherwise misleading information. Swift correction can reduce harmful reliance on inaccurate information, especially given content can be quickly, widely and permanently disseminated. Corrections and clarifications can contribute to achieving fairness and impartiality.</p> <p>Standards:</p> <p>3.1 Acknowledge and correct or clarify, in an appropriate manner as soon as reasonably practicable:</p> <ol style="list-style-type: none"> a. significant material errors that are readily apparent or have been demonstrated; or b. information that is likely to significantly and materially mislead. <p>4. Impartiality and diversity of perspectives</p> <p>Principles: The ABC has a statutory duty to ensure that the gathering and presentation of news and information is impartial according to the recognised standards of objective journalism.</p> <p>Aiming to equip audiences to make up their own minds is consistent with the public service character of the ABC. A democratic society depends on diverse sources of reliable information and contending opinions. A broadcaster operating under statute with public funds is legitimately expected to contribute in ways that may differ from commercial media, which are free to be partial to private interests.</p> <p>Judgements about whether impartiality was achieved in any given circumstances can vary among individuals according to their personal and subjective view of any given matter of contention. Acknowledging this fact of life does not change the ABC's obligation to apply its impartiality standard as objectively as possible. In doing so, the ABC is guided by these hallmarks of impartiality:</p> <ul style="list-style-type: none"> • a balance that follows the weight of evidence; • fair treatment; • open-mindedness; and • opportunities over time for principal relevant perspectives on matters of contention to be expressed. <p>The ABC aims to present, over time, content that addresses a broad range of subjects from a diversity of perspectives reflecting a diversity of experiences, presented in a diversity of ways from a diversity of sources, including content created by ABC staff, generated by audiences and commissioned or acquired from external content-makers.</p>
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	<p>Impartiality does not require that every perspective receives equal time, nor that every facet of every argument is presented.</p> <p>Assessing the impartiality due in given circumstances requires consideration in context of all relevant factors including:</p> <ul style="list-style-type: none"> · the type, subject and nature of the content; · the circumstances in which the content is made and presented; · the likely audience expectations of the content; · the degree to which the matter to which the content relates is contentious; · the range of principal relevant perspectives on the matter of contention; and · the timeframe within which it would be appropriate for the ABC to provide opportunities for the principal relevant perspectives to be expressed, having regard to the public importance of the matter of contention and the extent to which it is the subject of current debate. <p>Standards:</p> <p>4.1 Gather and present news and information with due impartiality.</p> <p>4.2 Present a diversity of perspectives so that, over time, no significant strand of thought or belief within the community is knowingly excluded or disproportionately represented.</p> <p>4.3 do not state or imply that any perspective is the editorial opinion of the ABC. The ABC takes not editorial stance other than its commitment to fundamental democratic principles including the rule of law, freedom of speech and religion, parliamentary democracy and equality of opportunity.</p> <p>4.4 do not misrepresent any perspective</p> <p>4.5 do not unduly favour one perspective over another</p> <p>[...]</p> <p>6. Privacy</p> <p>Principles: Privacy is necessary to human dignity and every person reasonably expects that their privacy will be respected. But privacy is not absolute. The ABC seeks to balance the public interest in respect for privacy with the public interest in disclosure of information and freedom of expression.</p> <p>Standards:</p> <p>6.1 Intrusion into a person’s private life without consent must be justified in the public interest and the extent of the intrusion must be limited to what is proportionate in the circumstances.</p>
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<p>SBS Codes of Practice 2006 (as at August 2010)</p> <ul style="list-style-type: none"> - <i>Developed</i> by SBS - <i>Notified</i> to ACMA pursuant to SBS Act, s 10 	<p>2 NEWS AND CURRENT AFFAIRS</p> <p>2.2 Accuracy, Impartiality and Balance</p> <p>SBS is committed to achieving the highest standard of news and current affairs presentation. To this end, all reasonable effort must be made to ensure that the factual content of news and current affairs programs is accurate, having regard to the circumstances, and facts known, at the time of preparing and broadcasting the programs.</p> <p>SBS will take reasonable steps to ensure timely correction of significant errors of fact.</p> <p>The requirement for accuracy does not mean that an exhaustive coverage of all factual material relating to matters broadcast must be presented.</p> <p>While the emphasis in news is the reporting of factual information, news programs, as well as current affairs programs, may include comment and analysis.</p> <p>Reasonable effort should be made to ensure news and current affairs programs are balance and impartial, having regard to the circumstances at the time of reporting and broadcasting, the nature and immediacy of the material being reported, and public interest considerations.</p> <p>The commitment to balance and impartiality requires SBS to present - over time and across the schedule of programs broadcast on the relevant service (Television, Radio or Online)—a wide range of significant views, not misrepresenting them or unduly favouring one over another.</p> <p>It does not require SBS to present all viewpoints on an issue or to allocate equal time to different points of view. Neither does it preclude a critical examination of controversial issues or the expression of critical and provocative points of view.</p> <p>The decision as to whether it is appropriate for a range of views pr particular views to be included within a single story is a matter for editorial decision.</p> <p>In relation to news programme, for major issues that are matters of controversy, balance should be provided over the period in which the controversy is active. Balance will be provided through the presentation, as far as possible, of principle relevant viewpoints.</p> <p>SBS has a policy of self-identification (see Code 1.5) and does not arbitrate on the validity of territorial claims.</p> <p>SBS journalists will identify themselves and SBS before proceeding with an interview for broadcast.</p>
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Media organisations' ethical codes	
Code	Provision
<i>News Limited Code of Conduct—Professional Conduct Policy</i>	<p>Accuracy</p> <p>1.1 Facts must be reported impartially, accurately and with integrity.</p> <p>1.2 Clear distinction must be made between fact, conjecture and comment.</p> <p>1.3 Try always to tell all sides of the story in any kind of dispute.</p> <p>1.4 Do not knowingly withhold or suppress essential facts.</p> <p>1.5 Journalists should be reluctant to rely on only one source. Be careful not to recycle an error from one reference source to another. Check and check again.</p> <p>1.6 Direct quotations should not be altered except to delete offensive language, protect against defamation, or to make minor changes for clarity.</p> <p>1.7 Reports of new drugs or medical treatments must be considered with great caution. It is easy to raise false hopes or alarm among readers. Cross-check all claims with responsible and neutral sources.</p> <p>1.8 Photographs may be enhanced to improve reproduction, but must not be altered in a way which could mislead readers. Care must be taken to ensure accuracy in captions. The editor must approve any alteration or manipulation of a digital photographic image, and the alteration must be explained in the caption before publication and archiving.</p> <p>2. Mistakes</p> <p>2.1 Serious factual errors should be admitted and corrected at the first opportunity, subject to legal advice where appropriate. Individuals or organisations that have been criticised in News group publications should be given a fair opportunity to respond.</p> <p>2.2 No employee or contributor is allowed to commit the company to an admission of error, correction, or apology without reference to the editor. Senior editorial staff and/or company lawyers must be consulted about the wording of corrections and clarifications to determine their suitability and whether an “offer of amends” is an appropriate response in settlement of a complaint.</p> <p>2.3 News Limited supports self-regulation in the newspaper industry and participates in the activities of the Australian Press Council. Editors are expected to publish all Council adjudications on complaints by the public in respect of their newspapers.</p> <p>3. Misrepresentation</p> <p>3.1 Do not use false names when representing a News Limited publication.</p> <p>3.2 Do not try to get information or photographs by deception.</p> <p>5. Covert activities</p> <p>5.1 Journalists and photographers may at times have to operate surreptitiously to expose crime, significantly anti-social conduct, public deception or some other matter in the public interest.</p> <p>All such operations must be approved in advance by the editor. This approval will be given only where good cause exists to suspect crime or</p>

	<p>deception has taken place, and after all other means of gathering the facts have been exhausted.</p> <p>The editorial executive must be satisfied the importance of publishing the information sought outweighs any damage to trust and credibility which your newspaper might suffer by allowing employees to operate surreptitiously.</p> <p>Where appropriate, the nature and reasons for operating covertly should be disclosed to readers.</p> <p>5.2 News Limited does not condone illegal acts by employees.</p> <p>6. Confidential sources</p> <p>6.1 The sources of information must be identified, wherever possible. When an informant insists on anonymity, verification of the information offered must be sought from other, preferably attributable, sources.</p> <p>6.2 A promise of confidentiality to a source must, of course, be honoured. However, journalists must be aware of the possible consequences. For example, a judge may order the source to be identified. Defiance of this order could lead to conviction for contempt of court, with the consequence being imprisonment or a heavy fine.</p> <p>7. Harassment</p> <p>7.1 Do not harass or try to intimidate people when seeking information or photographs.</p> <p>7.2 Do not photograph people on their property without their consent unless the public interest in doing so is clear.</p> <p>7.3 If asked to leave private property, do so promptly.</p> <p>7.4 Do not persist in telephoning, pursuing, questioning, door-stopping or obstructing access after you have been asked by an authorised person to stop.</p> <p>9. Grief and distress</p> <p>9.1 Reporters and photographers must always behave with sensitivity and courtesy toward the public, and in particular towards those involved in tragic events.</p> <p>No one should be put under pressure to be photographed or interviewed. Initial approaches might best be made through friends or relatives. We should respect the wishes of the bereaved or grieving.</p> <p>9.2 Do not go into non-public areas of hospitals, welfare institutions, funeral parlours, churches, etc, without identifying yourself or without permission of the people affected or their intermediaries.</p> <p>9.3 Maintain sensitivity when recalling tragedy or crime. Anniversaries can be distressing reminders for survivors.</p> <p>17. Plagiarism</p> <p>17.1 Plagiarism is theft. It will not be tolerated.</p> <p>18. Interviews</p> <p>18.1 In general, News Limited expects employees and contributors to cooperate with the authorities in investigations. However, requests by police or other authorities for work-related interviews must be referred to the editor.</p>
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	<p>18.2 No employee of News Limited should speak in that capacity to another media organisation or at a public event without permission of the editor.</p> <p>20. Conflict of interest</p> <p>20.1 Staff may join and participate in any lawful political or community organisations or activities but must avoid any potential conflict of interest with their employment, and notify the editor if such a potential exists.</p> <p>20.2 The editor must be made aware as soon as possible if a reporter is assigned to a story that presents a possible or real conflict of interest.</p> <p>20.3 Any employee wishing to perform paid or unpaid work for a rival publication, radio or television outlet must receive written approval from the editor before doing so.</p> <p>20.4 Contributors must comply with provisions relating to conflicts and must declare any real or potential conflict of interest arising from material submitted for publication and supervisors must do their utmost to ensure no conflict exists. Any association which may have a bearing, or appear to have a bearing, on a contributor's view, must be identified with the published material.</p> <p>20.5 Failure to notify the editor of any real or potential conflict of interest may result in dismissal.</p>
<p><i>Sydney Morning Herald Code of Ethics</i></p>	<p>Honesty</p> <p>Herald staff will report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts. They will not suppress or distort relevant facts. They will do their utmost to offer the right of reply, and they will separate comment from news.</p> <p>Impartiality</p> <p>Staff will use fair, honest and responsible means to obtain material. They will identify themselves and the newspaper before obtaining interviews or images.</p> <p>Honest presentation</p> <p>Staff will present pictures and sound that are true and accurate. They will disclose manipulation that could mislead.</p> <p>Public activities</p> <p>Herald staff shall avoid any prominent activity in partisan public causes that compromises, or appears to compromise, the journalist or the newspaper. Membership of organisations or activity that may compromise the journalist's or the paper's reputation shall be declared to their section editor. Those responsible for coverage of news, current issues and opinion shall not be members of a political party nor stand as a candidate in an election for public office.</p> <p>Staff shall not produce material for use in the paper or its related publications when they are a member of an organisation with an active interest in that issue.</p> <p>Columnists and contributors writing on an issue where they have a direct or indirect interest are to declare that interest to readers after receiving approval from their section editor to write on that topic.</p> <p>If it is possible that the activities of a member of a journalist's immediate family may compromise the journalist or the Herald, the staff member shall inform their section editor.</p>

	<p>Respect Staff will respect private grief. They have the right to resist pressure to intrude.</p> <p>Plagiarism Staff will not plagiarise.</p> <p>Attribution Staff will seek to attribute information to its source. They will always declare the use of pseudonyms in their work. They will seek to avoid being compromised by a source and to use multiple sources wherever possible. Where a source seeks anonymity, the journalist shall first consider the source's motives and seek alternative attributable sources. Quotes not attributed to a named source will be used only with a section editor's approval. Where confidences are accepted the journalist will respect and protect them in all appropriate circumstances.</p> <p>Chequebook journalism Staff should seek to act always in the best interests of the public and the maintenance of good faith with the community we serve, rather than for the benefit of sectional interests.</p> <p>Complaints and corrections Complaints shall be dealt with promptly and respectfully. Material errors in the paper and its related publications will be corrected or clarified publicly as soon as is practicable. Findings by the Australian Press Council or the defamation courts involving the Herald will be reported promptly.</p>
<p><i>The Age Code of Conduct</i></p>	<p>Professional Practice—1 Staff should seek to act always in the best interests of the public and the maintenance of good faith with the community we serve, rather than for the benefit of sectional interests.</p> <p>Professional Practice—2 The public interest includes investigating and exposing crime, serious misdemeanour and seriously anti-social conduct, and investigating and exposing hypocrisy, falsehoods or double standards of behavior by public figures or institutions. It also includes protecting public health and safety.</p> <p>Professional Practice—3 Staff should seek to present only fair, balanced and accurate material.</p> <p>Professional Practice—4 Direct quotations should not be changed to alter their context or meaning.</p> <p>Professional Practice—5 Where a significant inaccuracy or distortion has been published, The Age should publish a correction or clarification promptly.</p> <p>Professional Practice—6 Photographs should be a true representation of events. Photographs should be used in context, captions should be fair and accurate, and digitally enhanced images and illustrations must be clearly labelled.</p>

	<p>Professional Practice—7</p> <p>Where they relate to The Age, judgments by the Australian Press Council and other such bodies, and the outcome of defamation actions, should be reported promptly.</p> <p>Professional Practice—8</p> <p>Editorial material should distinguish for the reader between that which is comment, that which is verified fact and that which is speculation.</p> <p>Professional Practice—10</p> <p>Sources promised confidentiality must be protected at all costs. However, where possible, the sources of information should be identified as specifically as possible.</p> <p>Professional Practice—11</p> <p>Only fair and honest means should be used to obtain material. Misrepresentation and the use of concealed equipment or surveillance devices should be avoided. The use of deceptive methods or subterfuge may be condoned only where the Editor is convinced that the potential story is of vital public interest and there is no other way of obtaining the story.</p> <p>In such cases, the journalist has the right to decline an assignment. If the journalist accepts the assignment, the nature of deceptive methods and the reasons for their use must be published with the story. Journalists deployed in this manner will be indemnified by The Age.</p> <p>Professional Practice - 14</p> <p>People should be treated with sensitivity during periods of grief and trauma and wherever possible, be approached through an intermediary.</p> <p>Professional Practice—15</p> <p>Care should be taken when producing and publishing material on the anniversary of traumatic events or crimes not to cause undue distress to the victims or their families.</p> <p>Professional Practice—22</p> <p>The Age does not condone chequebook journalism. It will disclose any instance when it has paid for information. Payment for information should be avoided, unless an appropriate senior editor believes there is a strong public interest and there is no alternative to payment. In cases where payment is deemed by the Editor to be in the public interest, the fact of payment should be published.</p> <p>Professional Practice—23</p> <p>The Age does not condone staff breaking laws in the course of performing their duties. Nor is the paper liable for any such action.</p> <p>Plagiarism</p> <ol style="list-style-type: none">1. Staff must not reproduce other people's material without attribution.2. The source of published material obtained from another organisation should be acknowledged.3. Bylines should be carried only on material that is substantially the work of the bylined journalist.
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<p><i>Media, Entertainment and Arts Alliance (MEAA) Code of Ethics</i></p>	<p>Clause 1 Report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts. Do not suppress relevant available facts, or give distorting emphasis. Do your utmost to give a fair opportunity for reply.</p> <p>Clause 2 Do not place unnecessary emphasis on personal characteristics, including race, ethnicity, nationality, gender, age, sexual orientation, family relationships, religious belief, or physical or intellectual disability.</p> <p>Clause 3 Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.</p> <p>Clause 4 Do not allow personal interest, or any belief, commitment, payment, gift or benefit, to undermine your accuracy, fairness or independence.</p> <p>Clause 5 Disclose conflicts of interest that affect, or could be seen to affect, the accuracy, fairness or independence of your journalism. Do not improperly use a journalistic position for personal gain.</p> <p>Clause 6 Do not allow advertising or other commercial considerations to undermine accuracy, fairness or independence.</p> <p>Clause 7 Do your utmost to ensure disclosure of any direct or indirect payment made for interviews, pictures, information or stories.</p> <p>Clause 8 Use fair, responsible and honest means to obtain material. Identify yourself and your employer before obtaining any interview for publication or broadcast. Never exploit a person's vulnerability or ignorance of media practice.</p> <p>Clause 9 Present pictures and sound which are true and accurate. Any manipulation likely to mislead should be disclosed.</p> <p>Clause 10 Do not plagiarise.</p> <p>Clause 11 Respect private grief and personal privacy. Journalists have the right to resist compulsion to intrude.</p>
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Annexure K—Subsidies and support for the news media

Introduction

1. Many governments have provided subsidies and other support to the news media. This appendix describes that support as well as other proposals that have been made to maintain a competitive news industry¹.

Australia

2. In 1825 legislation setting up a postal office in New South Wales enabled newspapers to be delivered at a heavily discounted rate. The colonial authorities recognised the contribution the press could make to an emerging society by promoting greater literacy and disseminating news and information². Further legislation enacted in 1835 was aimed at overcoming newspapers being delivered late, irregularly or ‘well fingered by those who had read them en route’: it enabled newspapers to be posted for free³. The subsidy ‘greatly aided’ newspaper production, according to one historian. In 1828 35 000 newspapers had been distributed inland from Sydney; two decades later the figure was 1.3 million⁴.
3. Early on, the revenue foregone by the Post Office in NSW was modest 430 pounds annually—but by 1890 it came to 40 000 pounds annually, which aggrieved the Post Office:

*It appears to us manifestly unjust that, without enjoying rateable advantages, any one portion of the community should contribute by taxation for the amusement, luxury or instruction of any other portion.*⁵

¹ For further discussion of press subsidies see, Daniel C Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge University Press, 2004) 162; Victor Pickard ‘Can Government Support the Press? Historicising and Internationalizing a Policy Approach to the Journalism Crisis’ (2011) 14(2) *The Communication Review* 73, 80-81.

² Julianne Schultz, *Reviving the Fourth Estate. Democracy, Accountability and the Media* (Cambridge University Press, 1998) 36.

³ Allan Brown, *Commercial Media in Australia: economics, ownership, technology and regulation*, (University of Queensland Press, 1986) 54-54.

⁴ R B Walker, *The Newspaper Press in New South Wales 1803-1920*, (Sydney University Press, 1976) 55.

⁵ Henry Mayer, *The Press In Australia* (Lansdowne Press, 1964) 18.

By 1962 the bulk rate concession for newspapers, periodicals and books was worth 2.5 million pounds annually according to the Postmaster-General's Department⁶. Two decades later, the estimated revenue foregone for subsidising newspapers only was \$4.2 million annually⁷.

4. Subsidised delivery of newspapers extended to the railways in 1874 when by ministerial arrangement the Post Office in NSW paid the Railways Commissioners so that newspapers could be delivered direct to the railways and freighted free of charge throughout the colony in New South Wales⁸. In 1881 the Southern Railway was extended to Albury which meant newspapers from Melbourne could reach places such as Junee, in NSW, before those arriving from Sydney if special early morning trains could be scheduled and freight provided free of charge to the newspaper companies. This spurred interstate rivalries as well as arguments about free trade and protection. Estimates of the revenue foregone ranged between 40 000 and 100 000 pounds annually, leading to the abolition of free carriage in 1901⁹. It was replaced by discounted rates: in 1902 owners of Sydney metropolitan daily newspapers paid a third of the standard price for their deliveries by rail¹⁰.
5. Development of the telegraph cable in the mid-nineteenth century rapidly improved speed of communications, first within Australia and then overseas. The cables were funded by governments and, to an extent, by private entrepreneurs. As with post and rail, the newspapers benefited from large discounts on the rates they paid for cable transmissions. Early charges of 10 shillings a word gradually dropped to one shilling a word by 1902. Where in 1872 the newspapers had been able to afford to receive 50 words a day, by 1908 the average newspaper could receive 700 words by telegraph¹¹.
6. The Commonwealth Press Union, formerly the Empire Press Union, is a peak body representing newspaper executives. It lobbied Imperial governments successfully for a flat

⁶ Ibid 70 n 5.

⁷ Allan Brown, *Commercial Media in Australia: economics, ownership, technology and regulation*, (University of Queensland Press, 1986) 36; See also K Wiltshire and C Stokes, *Government Regulation and the Printed Media*, (Committee for Economic Development of Australia, Monograph no M50, 1977).

⁸ R B Walker, *The Newspaper Press in New South Wales 1803-1920*, (Sydney University Press, 1976) 197.

⁹ Henry Mayer, *The Press In Australia* (Lansdowne Press, 1964) 19-20.

¹⁰ R B Walker, *The Newspaper Press in New South Wales 1803-1920*, (Sydney University Press, 1976) 197.

¹¹ Ibid 203.

penny-a-word rate for cable telegrams to newspapers in the early decades of the twentieth century. The rate remained unchanged for many years, and represented a 95 per cent discount. By the early 1960s, the revenue foregone by the British Post Office on international cables was about 750 000 pounds annually¹².

7. The biggest single cost of production for newspapers is newsprint. In Australia, the newsprint industry was established with substantial government assistance in the form of forest concessions in Victoria and Tasmania, capital investments in South Australia and Tasmania and, in Queensland, a subsidy to build a weir to supply water to a mill¹³.
8. Beginning in 1976 the federal government introduced a subsidy on the cost of transporting newsprint from Tasmania to the mainland. Under the freight equalisation scheme, the cost to newspaper companies of shipping newsprint from Australian Newsprint Mills in Tasmania or transporting it by land over comparable distances was equalised. According to the Department of Transport the value of the payments for newsprint shipments was \$2.9 million in 1976–77 and had risen to \$4.3 million by 1982–83¹⁴. This assistance continues under the Tasmanian Freight Equalisation Scheme.
9. Today, the federal government's most extensive commitment to the news media is to public broadcasting. It devotes close to \$1.2 billion annually to the two main public broadcasters in Australia. The Australian Broadcasting Corporation's funding from the federal government for the most recent financial year, 2010–11, was \$972.6 million. It earned a further \$183 million in that period from commercial activities mainly through its ABC Shops¹⁵. For the same financial year the Special Broadcasting Service (SBS) received \$211.7 million from government and earned \$98 million in revenue, primarily from advertising on its network¹⁶.

¹² Henry Mayer, *The Press In Australia* (Lansdowne Press, 1964) 56.

¹³ *Ibid* 63.

¹⁴ Allan Brown, *Commercial Media in Australia: economics, ownership, technology and regulation*, (University of Queensland Press, 1986) 33.

¹⁵ Australian Broadcasting Corporation *Annual Report 2010/11* (2012) 153 <www.abc.net.au/corp/annual_reports/ar11/>.

¹⁶ Special Broadcasting Service *SBS 2010-2011 Annual Report*, 68.

<www.sbs.com.au/aboutus/corporate/view/id/111/h/Annual-Reports> (2011) 68.

Austria

10. Austria has an extensive range of subsidies for its newspapers, focused on supporting the industry, preserving diversity and promoting quality. The Austrian Communications Authority (KommAustria) distributes federal press subsidies in consultation with the Press Subsidy Commission.
11. The policy justification for this extensive support is that Austria's press industry is vulnerable to neighbouring Germany's larger newspaper companies¹⁷.
12. In Austria there are general subsidies for daily and weekly newspapers and special subsidies for regional newspapers. The value of the general subsidies is the same for all eligible daily papers, but is cut if a publisher has multiple eligible papers. For weekly papers the amount is calculated according to the number of subscription sales and issues per year¹⁸. In 2006 Austria distributed 4.5 million euros in these subsidies, 54 per cent of which went to daily newspapers¹⁹.
13. The special subsidies are for the preservation of diversity in regional newspapers. To be eligible for this subsidy a paper must not be a market leader, sell fewer than 100 000 copies per issue and devote less than 50 per cent of their annual volume of pages to advertising. Each eligible paper receives the same base amount (500 000 euros) with the remaining money from the budget distributed according to sales and number of issues²⁰. A total of 6.6 million euros in special subsidies was distributed in 2006²¹.
14. Austria also funds 'measures to promote quality and secure the future of the press'. There are subsidies to daily and weekly newspapers for training new young full-time journalists (up to 33 per cent of the cost, capped at 20 000 euros per year) and employing foreign correspondents (up to 50 per cent of the cost, capped at 40 000 euros). There is

¹⁷ Peter Humphreys, *Mass Media and Media Policy in Western Europe*, (Manchester University Press, 1996) 91.

¹⁸ Isabel Fernandez Alonso et al (eds) 'Press Subsidies in Europe' (Proceedings of the 'Symposium Press Subsidies in Europe: Development, Pluralism and Transparency, Barcelona 2006, Institut de la Comunicacio, 2006) 90.

¹⁹ Ibid 92.

²⁰ Ibid 92.

²¹ Ibid 92.

reimbursement of costs of providing newspapers free of charge to schools²², and funding of up to 50 per cent of research projects contributing to the development of the press.

Examples of funded projects have been on self-regulation, copyright and electronic archives, regional media market research and changes in journalistic working conditions²³.

15. In 2006, Austria distributed 12.8 million euros of subsidies to its press sector. Of this, 4.5 million went in distribution subsidies (2.4 million to daily and 2.1 million to weekly publications), 6.6 million in the special subsidy for the preservation of diversity, and 1.7 million in 'measures to promote quality and secure the future'²⁴.
16. As noted above, most of these subsidies are available only to daily and weekly newspapers. To be eligible, a newspaper must:
 - provide political, economic and cultural information
 - predominantly consist of articles by the paper's own editorial staff
 - not be primarily an advertising vehicle or press organ of an interest group
 - not be local in its interest, with circulation to a single province
 - have been in production for more than six months
 - be sold at a market price.
17. Additional requirements of minimum numbers of sales (10 000 for daily, 5000 for weekly), issues (240 daily, 41 weekly) and journalists (six daily, two weekly). There are exemptions to some of these conditions for newspapers for non-German speaking national minorities.

Belgium

18. Belgium has a long history of support for the media to ensure 'the greatest possible diversity within the daily press'²⁵ and encourage the reading of the press among students in primary, secondary and specialised schooling.

²² Ibid 91.

²³ Ibid.

²⁴ Ibid 92.

²⁵ Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Freepress, 2011) 20.

19. Indirect support for the newspaper sector in Belgium takes many forms and is organised by the federal government. Since 1963, Belgian law has recognised the status of a professional journalist, which attributes certain advantages to the recipient—including a press card, a pass granting access to restricted areas and discounts for public transportation and air travel with Brussels Airlines. Newspapers and magazines are transported at a favourable rate. In 1990 the value of this assistance was estimated at around 54.5 million euros annually. All newspapers and magazines with informative content for the general public that appear at least 50 times a year are exempt from the Value Added Tax (VAT)²⁶.
20. Under a law passed in 1988, direct government support is provided by the cultural community governments of Belgium. The Flemish Community government provides an annual public subsidy of 1.4 million euros to improve the quality of press writing (900 000 euros) and promote reading of the press (500 000 euros)²⁷.
21. The Francophone Community provides direct subsidies (6.4 million euros in 2006) to newspapers published in French 'on paper with the help of a rotary press, with at least 200 paid editions per year, containing at least 16 pages of information, analysis and comment on political, economic, social, sporting, scientific and cultural matters, at national, international, community or regional level' and complying with sectoral collective agreements. These subsidies are directed at:
- the employment of fulltime professional journalists
 - titles or groups with low advertising revenue
 - the creation of new titles
 - encouraging the reading of the press
 - adaptation of new technologies²⁸

²⁶ Karen Raeymaeckers, Els De Bens, Steve Paulussen, Annelore Deprez and Yannis Tenret 'Media landscape: Belgium' 8 November 2010 *European Journalism Centre* <www.ejc.net/media_landscape/article/belgium/>.

²⁷ Isabel Fernandez Alonso et al (eds) 'Press Subsidies in Europe' (Proceedings of the 'Symposium Press Subsidies in Europe: Development, Pluralism and Transparency, Barcelona 2006, Institut de la Comunicacio, 2006) 60.

²⁸ *Decree of 31 March 2004 (France), Relative to aid assigned to the daily Francophone press and to development of daily Francophone press initiatives for schools* quoted in Ibid 61-62.

22. Additionally the Francophone community provides an annual funding package of around 420 000 euros for initiatives promoting press circulation in schools, including providing newspapers and funding the visits of journalists to schools.

Finland

23. Since the early 1970s, all newspapers in Finland are exempt from the VAT and enjoy reduced rates of delivery. This support is currently valued at around \$US400 million per year.
24. Traditionally, Finland used subsidies to keep politically-oriented newspapers afloat to ensure diversity. This system ended in 2008²⁹.
25. As of 2009 Finland provides³⁰:
- \$US700 000 in direct subsidies to minority language (Swedish, Sami and Romani) publications
 - \$US1.4 million in direct subsidies to 150 cultural and opinion journals.

France

26. France has the oldest and probably the most complicated system of press support in Western Europe³¹. Direct intervention in the press industry dates back to 1944 when the then Tripartite government, believing that a laissez-faire approach between the wars had led to domination of the press by capitalist financiers, provided aid to 'foster pluralism among newspaper titles'³².
27. According to the Directorate for Media Development, a dependent body of the Ministry of Culture and Communication, the main aims of France's press support system are threefold³³.

²⁹ Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Freepress, 2011) 29.

³⁰ Ibid 30.

³¹ Isabel Fernandez Alonso et al (eds) 'Press Subsidies in Europe' (Proceedings of the 'Symposium Press Subsidies in Europe: Development, Pluralism and Transparency, Barcelona 2006, Institut de la Comunicacio, 2006) 65.

³² Peter Humphreys, *Mass Media and Media Policy in Western Europe*, (Manchester University Press, 1996) 104.

³³ Isabel Fernandez Alonso et al (eds) 'Press Subsidies in Europe' (Proceedings of the 'Symposium Press Subsidies in Europe: Development, Pluralism and Transparency, Barcelona 2006, Institut de la Comunicacio, 2006) 65–66.

- Promoting circulation (21.7 million euros in 2005) by:
 - reduced national rail service costs
 - support for decentralised printing
 - support for distribution and promotion overseas
 - support for home delivery by means other than post
 - support for regional and local weekly publications
 - support for the national distribution of daily general and political information press.
 - Promoting diversity/pluralism (8 million euros in 2005) by:
 - additional support for national daily general and political information press with low advertising income
 - additional support for regional, provincial, local, general and political information press with low advertising income.
 - Modernising and diversifying media companies to incorporate a multimedia dimension (47.7 million euros in 2005) by:
 - support for the development of online services in newspapers
 - support for the modernisation of production and distribution of national daily general and political information publications.
28. A further category of subsidies is for specific projects that are determined by a committee with 50 per cent representation from government and 50 per cent from media companies. A second committee consisting of representatives of the Audit Office, Ministry of Culture and Communication, and the Ministry of Economics ensures that funding is used for its assigned purposes.
29. There is also indirect support in the form of³⁴:
- preferential postal rates
 - a lower rate for the VAT

³⁴ Ibid 66–67.

- tax relief
 - waiving of professional taxes for publishers
 - promotion of newspaper reading, including support for the development of online interactive blog-style content allowing students to express their views on current issues with the agreement that the best contributions will be published in print.
30. In 2008, the crisis in the news media's business model prompted the French government, after lengthy consultation, to announce additional measures for the current economic crisis that were to cost 600 million euros over three years. This includes:
- a ninefold increase in funding for home delivery of newspapers (now 70 million euros)
 - free weekly newspaper subscriptions for 18–24 year olds
 - extensive grants (20 million euros) for newspapers to develop their websites and to support online-only news outlets³⁵.

Italy

31. Subsidies were introduced in 1975 by a government concerned that the nation's press had come to be largely owned by major external corporations. The government aimed to promote pluralism in the industry. By calculating subsidies according to circulation, however, the biggest press owners were the main beneficiaries of the state's subsidy scheme, even though newspapers affiliated with political parties also benefited. In the 1980s Italy shifted to a system aimed more at newspaper cooperatives, cultural publications and party papers, but, according to one scholar, 'fairly indiscriminate indirect aid continued to flow to the Italian press industry at large'³⁶.
32. From 1990 a new scheme was introduced. To be eligible for subsidies, a newspaper must³⁷:
- be primarily informational and published as a periodical

³⁵ Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Freepress, 2011) 34.

³⁶ Peter Humphreys, *Mass Media and Media Policy in Western Europe*, (Manchester University Press, 1996) 104-105.

³⁷ *Law No. 250 of 7 (1990) art 3(3)* (Italy)

- have been established for at least three years, or have published an eligible publication for at least five years
- not generate advertising revenue exceeding 40 per cent of total operating costs.

33. Subsidies consist of³⁸:

- a fixed annual amount equal to 30 per cent of operating costs (capped per company)
- a variable contribution based on circulation figures.

34. The budget for these subsidies is set by the Minister of the Treasury.

The Netherlands

35. Between 1972 and 2005, press support in the Netherlands was heavily focused on providing assistance to struggling organisations to make them profitable. Decisions about assistance are made by the Press Fund, a board appointed by royal decree on the recommendation of the Minister for Culture. The board is provided with a budget approved by the Minister for Culture and drawn from a four per cent tax on advertising on both public service and commercial television³⁹.

36. Assistance is provided in the form of temporary loans, credit facilities or subsidies for reorganisation or restructuring purposes to make the publication profitable in the near future.

37. To be eligible a newspaper must⁴⁰:

- shape readers' political opinions by providing news, commentaries and background information about a range of aspects of contemporary society
- be compiled by 'an independent editing team on the basis of a statute expressing their editorial identity of that press product'⁴¹

³⁸ *Law No. 250 of 7 (1990) art 3(8) (Italy)*

³⁹ Lou Lichtenberg, 'State Aid to the Press in International Perspective: the Dutch Case' in Isabel Fernandez Alonso et al (eds) 'Press Subsidies in Europe' (Proceedings of the 'Symposium Press Subsidies in Europe: Development, Pluralism and Transparency, Barcelona 2006, Institut de la Comunicacio, 2006) 107, 109.

⁴⁰ *Ibid* 110.

⁴¹ *Ibid*.

- be available for sale, not a free newspaper
 - have its continued existence threatened, and be unable to obtain support elsewhere.
38. In the period 1972–2005 the Press Fund distributed a total of 55 million euros in grants and 19 million euros in loans⁴².
39. Between 1981 and 1990, the Netherlands also had a ‘Temporary Compensation Measure for Dailies’ which acted to ensure diversity in the marketplace. When this measure was discontinued in 1990 the most unsustainable newspapers rapidly disappeared. In 1990 the three major news organisations had a 45 per cent share of total circulation. This figure is now 90 per cent⁴³.
40. In 2007 the Press Fund changed to a more active policy of supporting research and innovation.
41. In 2009 the Ministry of Culture approved an increase in the Press Fund’s budget to 8 million euros with provisions to fund ‘experiments in cross platform and multimedia journalism as well as research into the quality of journalism’.
42. The Netherlands government also allocated new funds to support the hiring of up to 60 new young journalists in the sector⁴⁴.

Norway

43. Norway provides assistance to ensure diversity and competition in the industry. Norway’s population of 4.6 million is distributed over 431 local communities, almost half of which have their own newspaper⁴⁵.

⁴² Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Freepress, 2011) 45.

⁴³ Lou Lichtenberg, ‘State Aid to the Press in International Perspective: the Dutch Case’ in Isabel Fernandez Alonso et al (eds) ‘Press Subsidies in Europe’ (Proceedings of the ‘Symposium Press Subsidies in Europe: Development, Pluralism and Transparency, Barcelona 2006, Institut de la Comunicacio, 2006) 107, 111-112.

⁴⁴ Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Freepress, 2011) 45.

⁴⁵ Bjørn Tore Østeraas, ‘Press Subsidies in Norway’, in Isabel Fernandez Alonso et al (eds) ‘Press Subsidies in Europe’ (Proceedings of the ‘Symposium Press Subsidies in Europe: Development, Pluralism and Transparency, Barcelona 2006, Institut de la Comunicacio, 2006) 80, 80

44. Subsidies are directed specifically towards newspapers in a 'difficult market position'⁴⁶.
45. In 2006, direct subsidies were provided to 157 of Norway's 220 'paid-for' newspapers, totalling 36 million euros. This amounted to less than two per cent of the total revenue of the press.
46. The budget for the subsidy is determined annually by parliament. Rates for determining the grant received by each newspaper are set by the Ministry of Culture and Church. The Norwegian Media Authority administers the subsidies⁴⁷.
47. The largest and most important of the press subsidies is the 'production subsidy' which in 2006 was 32.5 million euros provided to 139 qualifying newspapers. To be eligible for this subsidy a newspaper must⁴⁸:
- provide general news (that is, not be focussed on a single issue)
 - adhere to the editors' code, set by the editors and publishers' association
 - grant editorial independence to its journalists⁴⁹
 - not pay dividends to owners
 - not have profits exceeding 220 000 euros per year
 - Not be a free newspaper or an exclusively online publication.
48. More than three in four of the production subsidies go to non-competitive newspapers. These are newspapers that are⁵⁰:
- the number two (or worse) newspaper in their market
 - unable to sustain themselves without the subsidy
 - have a circulation between 2000 and 80 000 copies

⁴⁶ Ibid 81.

⁴⁷ Ibid 82.

⁴⁸ Ibid 82–83.

⁴⁹ Peter Humphreys, *Mass Media and Media Policy in Western Europe*, (Manchester University Press, 1996) 107.

⁵⁰ Bjørn Tore Østeraas, 'Press Subsidies in Norway', in Isabel Fernandez Alonso et al (eds) 'Press Subsidies in Europe' (Proceedings of the 'Symposium Press Subsidies in Europe: Development, Pluralism and Transparency, Barcelona 2006, Institut de la Comunicació, 2006) 80, 83.

- be published three or more times per week.
49. The remaining production subsidies are divided among local newspapers with circulations of less than 6000.
50. There are additional subsidies for⁵¹:
- Sami and other minority language newspapers
 - compensation for rising mail postage rates
 - certain publications—‘pet publications of members of parliament’
 - support for distribution of newspapers in the remote province of Finnmark
 - media research.
51. All Norwegian newspapers are also eligible for an exemption on the VAT on their sales. The value of this indirect subsidy was 160 million euros in 2005.

Sweden

52. The system of press subsidies has existed since the beginning of the 1970s. They were introduced to ‘safeguard diversity in the daily newspaper market’⁵².
53. Subsidies are delivered by the Press Subsidies Council. This council consists of a 10-member board, seven of whom are appointed by political parties in the Swedish Parliament. It is chaired by a senior legal official such as a Justice of the Supreme Court⁵³.
54. The value of Sweden’s subsidies is around 62.3 million euros per year⁵⁴ and is divided into two types, an operational subsidy and a distribution subsidy. Seventy-four of the 168 daily newspapers in Sweden receive an operational subsidy. The size of the subsidy is based on how often and where the newspaper is published. A newspaper must be published at least

⁵¹ Ibid 84–85.

⁵² Åsa-Britt Karlsson, ‘Press subsidies in Sweden,’ in Isabel Fernandez Alonso et al (eds) ‘Press Subsidies in Europe’ (Proceedings of the ‘Symposium Press Subsidies in Europe: Development, Pluralism and Transparency, Barcelona 2006, Institut de la Comunicacio, 2006) 99, 99.

⁵³ Ibid 99.

⁵⁴ Ministry of Culture (Sweden), *Press Support*, 25 February 2011 <www.sweden.gov.se/sb/d/14476>.

once a week, and support ranges from 226 000 euros annually for these papers up to 1.7 million euros for papers published three to seven times a week and 5.1 million for newspapers in metropolitan areas⁵⁵. These subsidies represent about three per cent of total Swedish press revenues, and for some newspapers are a much higher percentage⁵⁶.

55. The distribution subsidies assist in the daily distribution of 900 million copies of 141 different newspapers. An additional feature of this subsidy is that it co-ordinates newspaper distribution around the nation, avoids inefficient parallel distribution by multiple companies and ensures the distribution of smaller papers⁵⁷.
56. These subsidies are funded through a 10 per cent levy on all advertising, except for newspaper advertising, which attracts a three per cent levy. This tax covers the cost of the subsidy system and has generated a surplus for the state⁵⁸.
57. To be eligible for subsidies, a newspaper must⁵⁹:
- contain general news content or contribute to general political opinion-building
 - generate more than half their news content themselves
 - not be limited to special areas such as sport or religion
 - be published in their own name
 - be published at least once per week and sell at least 2000 copies to subscribers
 - not be a free paper.

⁵⁵ Ibid.

⁵⁶ Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Freepress, 2011) 52.

⁵⁷ Åsa-Britt Karlsson, 'Press subsidies in Sweden,' in Isabel Fernandez Alonso et al (eds) 'Press Subsidies in Europe' (Proceedings of the 'Symposium Press Subsidies in Europe: Development, Pluralism and Transparency, Barcelona 2006, Institut de la Comunicacio, 2006) 99, 100.

⁵⁸ Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Freepress, 2011) 53.

⁵⁹ Åsa-Britt Karlsson, 'Press subsidies in Sweden,' in Isabel Fernandez Alonso et al (eds) 'Press Subsidies in Europe' (Proceedings of the 'Symposium Press Subsidies in Europe: Development, Pluralism and Transparency, Barcelona 2006, Institut de la Comunicacio, 2006) 99, 101.

58. In 2007 the online-only publication *Politiken.se* became the first online publication to be deemed eligible. It received a reduced amount of the operational subsidy (55 per cent of the weekly newspaper rate)⁶⁰.
59. Sweden's direct subsidies are important reasons for the internationally-strong position of the Swedish press. Swedish newspaper readership rates have traditionally been among the highest in the world⁶¹. It has been noted, however, by one scholar that pluralism in the Swedish press is rapidly declining both by closures and by mergers⁶².

The United States

60. In 1792, the year after the United States Congress enacted the First Amendment to the Constitution, it passed the Post Office Act that, as well as establishing an organised postal system, authorised a subsidy for newspapers sent through the mail, as most were in the eighteenth century. Newspaper proprietors could also send each other copies of their newspapers for free, creating the first collaborative news reporting network.

While the First Amendment forbade the federal government from abridging freedom of the press, the founders' commitment to broad circulation of public information produced policies that made a free press possible⁶³.

61. In 1863, under pressure from the magazine industry, the United States government created 'second-class mail' for regular publications that disseminated 'information of a public character, or be devoted to literature, the sciences, arts, or some special industry' and two decades later Congress reduced second-class postal rates by two-thirds, which led to the growth of the low-price mass-circulation magazine and, indirectly, to a magazine industry for which the United States is known worldwide⁶⁴. Between 1895 and 1900, the number of

⁶⁰ Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Freepress, 2011) 53.

⁶¹ *Ibid* 52.

⁶² Lennart Weibull, 'The Press Subsidy System in Sweden: A Critical Approach', in Nick Couldry and James Curran (eds), *Contesting Media Power: Alternative Media in a Networked World*, (Rowman & Littlefield, 2003) 89.

⁶³ Leonard Downie and Michael Schudson, The Reconstruction of American Journalism 20 October 2009 *Columbia Journalism Review* <www.cjr.org/reconstruction/the_reconstruction_of_american.php>.

⁶⁴ Steven Waldman and the Working Group on Information Needs of Communities), *The Information Needs of Communities*, (Federal Communications Commission, 2011) 338.

magazines with a 100 000-plus circulation quadrupled; by 1905 the number had nearly doubled again. This indirect form of taxpayer aid covered around 75 per cent of total delivery costs for newspapers and magazines; it has been particularly helpful for opinion and political magazines, which have always had difficulty attracting advertisers.

62. The United States was also quick to decide on the merit of using the press to publish public notices. The Acts of the First Session of Congress stipulated that 'all bills, orders, resolutions and congressional votes be published in at least three publicly available newspapers'. These notices have continued since; encompassing the range of government activities—from zoning changes and school district budgets to bankruptcy notices and seized-property auctions. For newspapers this has meant a steady income stream, amounting to between 5 and 10 per cent of total revenue in 2000 according to the National Newspaper Association in the United States⁶⁵.
63. Postal subsidies have declined in relative importance as other media—radio, television and online—have developed. By 1967 postal subsidies were worth around US\$400 million annually to the print media. The postal system was foregoing so much revenue that eventually Congress was prompted to pass another Act, in 1970, to help put the post office on a sustainable financial footing. Since then, postal subsidies for newspapers and magazine have declined dramatically but were still worth US\$270 million in 2007⁶⁶.
64. The emergence of the internet has also affected the requirement that public notices be published in newspapers. Around 40 states in America have introduced legislation to move their public notices to the web but so far most have not succeeded, partly because access to the internet is still not universal in some rural communities and among low-income groups⁶⁷.

⁶⁵ Matthew Weber, *Insult to injury: The disappearance of public notices in US newspapers*, (University of Southern California Annenberg Center on Communication Leadership & Policy, 2010) 2.

⁶⁶ Rahul Nilikantan, *Postal subsidies*, (University of Southern California Annenberg Center on Communication Leadership & Policy, 2010).

⁶⁷ Geoffrey Cowan and David Westphal, 'The Washington-Madison Solution' in Robert W McChesney and Victor Pickard, *Will the Last Reporter Please Turn Out the Lights: The collapse of journalism and what can be done to fix it* (The New Press, 2011) 135.

Government support of broadcasting

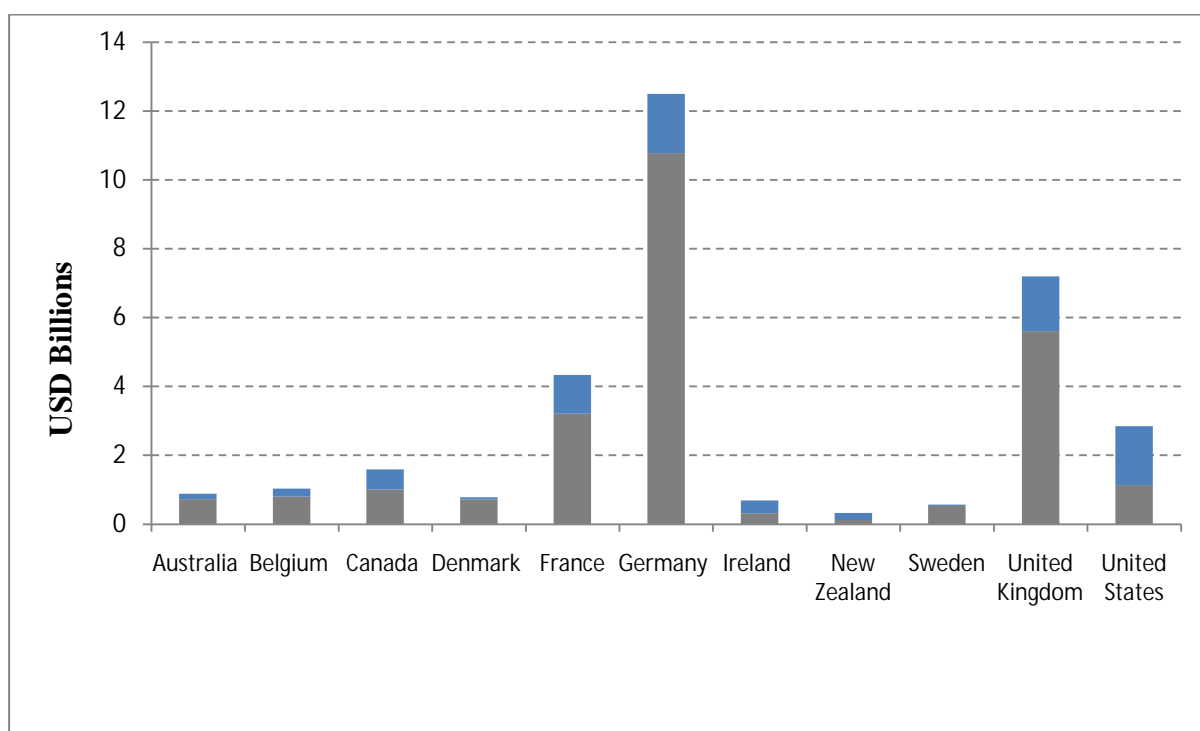
65. Government support for broadcast media is more widespread than for the newspaper sector, partly because spectrum has been considered a scarce resource that should be allocated to best serve the public interest and partly because governments soon became aware of the influence of broadcast media.

Funding public broadcasters

66. Government support for broadcast media is more widespread than for the newspapers⁶⁸.

67. The following table compares public funding and private funding in the broadcasting sector in a selection of countries.

Figure 19: Annual funding of public broadcasting (2008)



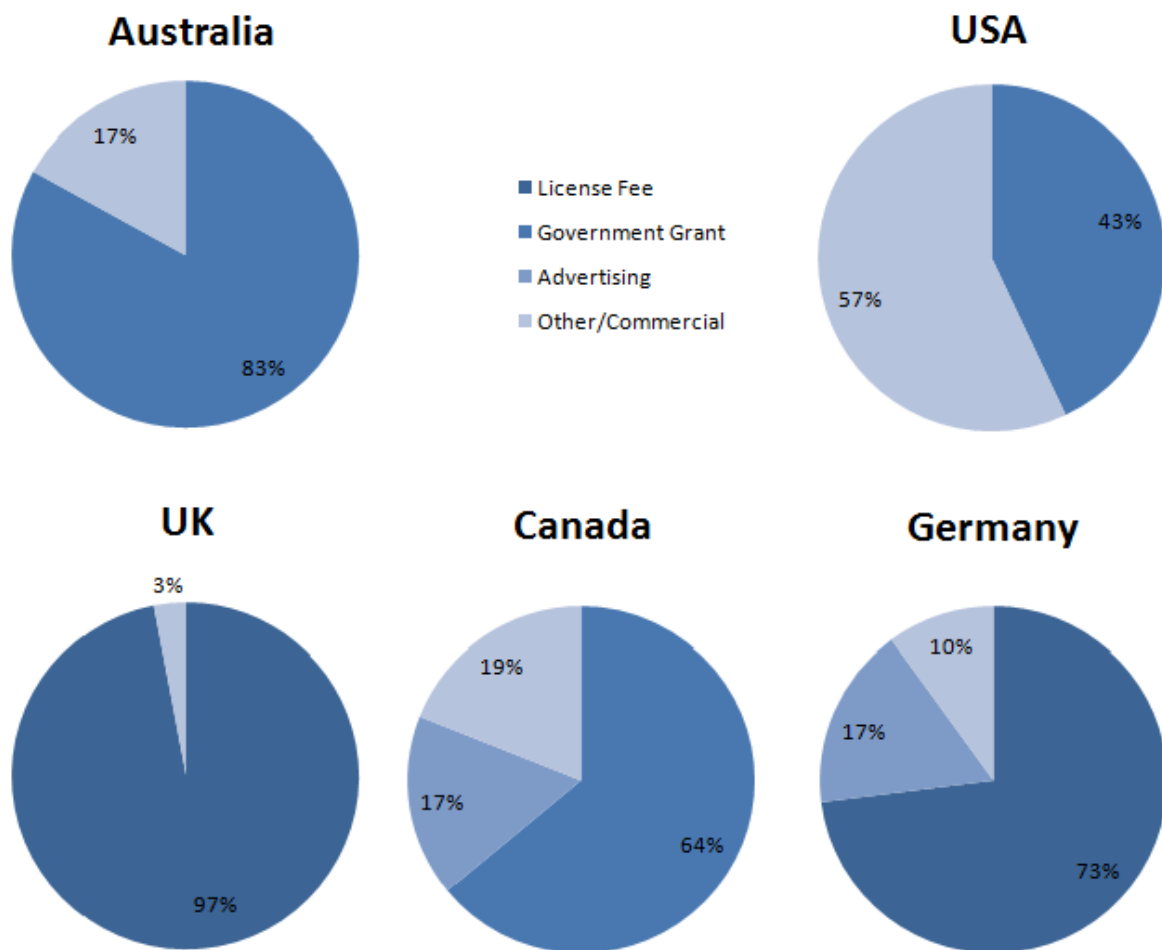
Source: Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (FreePress, 2011) 61.

⁶⁸ See further discussion in Toby Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (UNESCO, 2nd revised edition, 2011) 95.

Funding models

68. Public broadcasters generally receive their funding from a mix of public and commercial sources⁶⁹. Typically, public funding comes from license fees, other specific taxes or direct funding grants from consolidated revenue.

Figure 20: Sources of funding for public broadcasters (2008)



Source: Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Freepress, 2011)

⁶⁹ Ibid 18.

69. Licence fees are compulsory levies on television and radio users. They are extensively used internationally, particularly in Europe. There are differences between countries in the collection and distribution of licence fees.
70. In the United Kingdom, the licence fee is set by government⁷⁰, collected by the British Broadcasting Corporation (BBC)⁷¹, placed into consolidated revenue, and an almost equal amount provided back to the broadcaster⁷². According to the BBC's 2010–11 annual report, around three per cent of the value of the licence fee is expended in collecting it⁷³. Since 2006 the licence fee has been classified as a tax, and there have been arguments that this reclassification affects both the expectations of the auditing and control over the fee and the status of the BBC as a public body.
71. In France, the licence fee is bundled with the French residence tax and is incorporated into the general tax collection system. Combining the collection within the general system is an efficiency measure reducing the duplication of costs. This is also achieved by Poland's approach of having the fee collected by the Post Office⁷⁴.

⁷⁰ British Broadcasting Corporation 'The license fee' *Inside the BBC*, 2011 <www.bbc.co.uk/aboutthebbc/insidethebbc/whoweare/licencefee>.

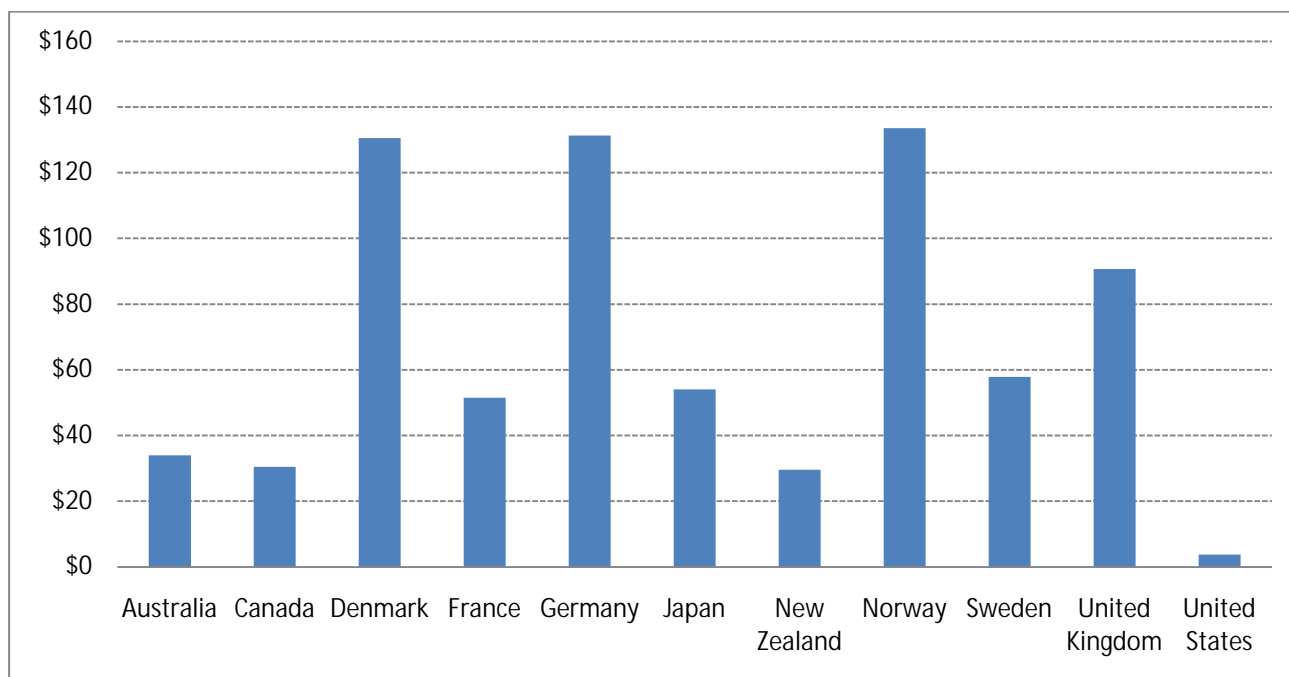
⁷¹ *Communications Act 2003* (UK) s 365(2).

⁷² Department for Culture, Media and Sport (UK), Broadcasting, *An Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation* (2006) s 75.

⁷³ British Broadcasting Corporation *BBC Annual Report and Accounts 2010/11* (2011).

⁷⁴ Toby Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (UNESCO, 2nd revised edition, 2011) 58.

Figure 21: Per-capita funding of public broadcasters (\$US 2008)



Source: Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Freepress, 2011) 61

72. France has also experimented with taxes on television advertising and the telecommunications sector to fund their national broadcaster. This additional funding has been required as a result of the phasing out of advertising on the public broadcaster since 2000. This taxation has been of limited success. In 2011 the European Commission took France (and Spain) to court over their taxes on the telecommunications sector⁷⁵. Another tax, on internet advertising, known colloquially as the 'Google tax' was proposed in 2010 but following substantial opposition the legislation was dropped in 2011⁷⁶.
73. In Thailand, the national broadcaster Thai PBS receives its annual funding from taxation on tobacco and liquor. A portion of this income, collected by the Excise and Customs department, is provided direct to the broadcaster, without becoming part of consolidated

⁷⁵ AFP 'France, Spain for court over telecom tax' *France 24*, 14 March 2011 <www.france24.com/en/20110314-france-spain-head-court-over-telecom-tax-european-commission>.

⁷⁶ Eric Pfanner 'France Drops Plans for "Google Tax"' *The New York Times* 23 June 2011 <www.nytimes.com/2011/06/24/technology/24iht-google24.html?_r=2>.

revenue. The amount is capped at two million baht (approximately \$A61 million), but can be adjusted by the Minister of Finance every three years⁷⁷.

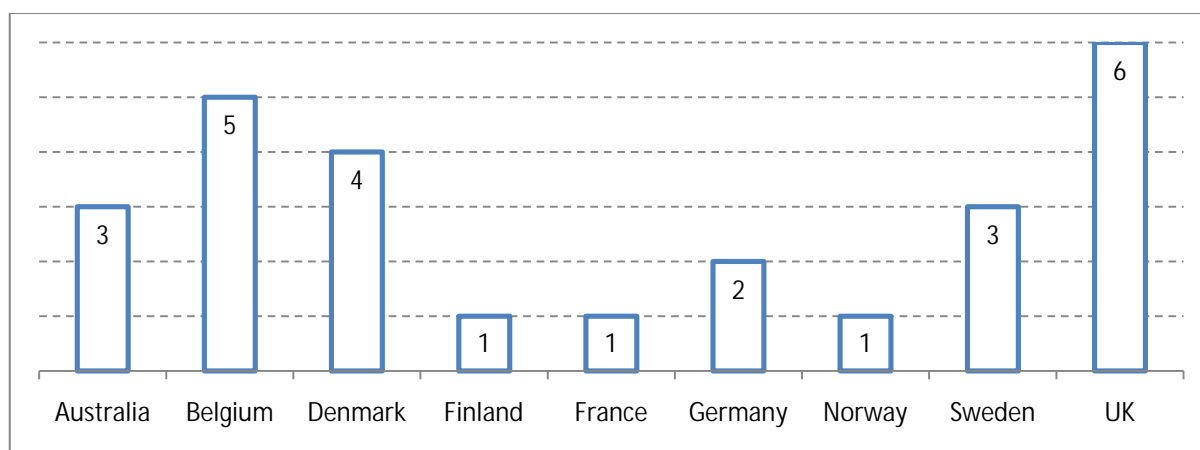
74. Alternatively, national broadcasters can be funded with direct grants from government. This approach is used in Australia and Canada.

75. A common feature of national broadcasting funding models is multi-year funding agreements. As articulated in the Council of Europe *Guidelines on the guarantee of public service broadcasting*:

*Payment of the contribution or licence fee should be made in a way which guarantees the continuity of the activities of the public service broadcasting organisation and which allows it to engage in long-term planning*⁷⁸.

76. Benson and Powers express the benefits slightly differently, claiming that funding for multi-year periods lessens ‘the capacity for government to directly link funding to either approval or disapproval of programming.’⁷⁹

Figure 22: Length of funding cycles for public broadcasters



Source: Toby Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (UNESCO, 2nd revised edition, 2011)

⁷⁷ Toby Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (UNESCO, 2nd revised edition, 2011) 72.

⁷⁸ Recommendation No. R (96) 10 Guidelines on the guarantee of public service broadcasting (Council of Europe) 1996.

⁷⁹ Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (Free Press, 2011) 12.

Other support models

77. There are a number of other potential models suggested for the support of the media. In many cases these models focus on supporting or encouraging the start-up of the small, independent, and citizen-driven news sources that are emerging online.

Options considered by Royal Commissions in the United Kingdom

78. The United Kingdom held Royal Commissions on the Press in 1947–49⁸⁰, 1961–62⁸¹ and 1974–77⁸². Each of these Commissions considered numerous options for subsidising the press. In each case they rejected these suggestions. The options fell into two broad categories: reducing the costs of production and relieving financial problems, and reducing competition.
79. To reduce the costs of production and relieve financial problems, there was a range of proposals:
- creation of a centralised printing plant to print newspapers under contract so smaller publications did not need to build infrastructure (1949, 1962, 1977)
 - direct government intervention in labour agreements in the sector (1949)
 - prohibitions or restrictions on ‘non-journalistic forms of competition’ such as promotions and giveaways (1949)
 - tax breaks, particularly for smaller-earning organisations (1949)
 - securing a national supply of newsprint (1949) and creating a differential price for newsprint to make it comparatively more affordable for smaller newspapers (1949, 1962)
 - paying a direct subsidy or ‘bounty’ to newspapers that are rising in circulation, to allow them to more quickly establish themselves at their ‘optimum size’ (1977)
 - a fund to help the launch or distribution of small magazines (1977)

⁸⁰ United Kingdom, Royal Commission on the press (1947-1949) *Report* Cmd 7700 (1949) 155-161.

⁸¹ United Kingdom, Royal Commission on the press (1961-1962) *Report* Cmnd 1811 (1962) 89-99.

⁸² United Kingdom, Royal Commission on the Press, *Final Report with Appendices* Cmnd 6810-1 (1977) 113-126.

- government intervention in the management of profits and finances of newspapers (1977), and
- direct subsidies for production or distribution (1977).

80. To reduce competition and commercial imperatives, there was another broad range:

- placing limits on the maximum advertising revenue and volume a publication can earn or carry (1949, 1962)
- placing a levy on advertising revenue so that once publications reach an 'optimal' circulation of two million the levy would ensure there was a greatly reduced commercial benefit for expanding further (1962)
- distribution of advertising revenue managed by a government agency to ensure that all publications would receive the same revenue per copy sold (1977)
- prohibiting individual and joint stock ownership of newspapers, in favour of them all being owned by a government corporation (1949)
- placing a limit on the potential profits of newspapers (1949)
- limiting the maximum size of newspaper circulation (1949;
- encouraging the ownership of newspapers by trusts, particularly under a model providing editorial independence (1949)
- enforcing higher selling prices to enable smaller newspapers to compete and still be profitable and reduce dependence on advertisers (1962)
- giving direct subsidies or requiring government to spread their advertising more evenly across the press (1962)
- giving subsidies to encourage cooperation between publications and publishers (1977), and
- placing limits on the maximum numbers of pages for newspapers (1977).

Encouraging private investment and philanthropic contributions in non-profit press organisations

81. Examples of philanthropically-funded non-profit press are beginning to emerge, especially in the United States, which has a well-developed philanthropic sector. In 2007 *ProPublica.org* was founded with a gift of \$US30 million from billionaire philanthropists Herb and Marion Sandler⁸³.

82. In Australia *The Global Mail* is an example. The online publication, funded for a guaranteed five years by philanthropist Graeme Wood, began in February 2012.

*The Global Mail is a philanthropically funded, not-for-profit news and features website. Our mission is to deliver original, fearless, independent journalism*⁸⁴.

83. Other press organisations funded by trusts include *The St Petersburg Times*, *The Christian Science Monitor*, *Harper's*, and *The Guardian*.

84. A role for government in non-profit journalism is in making investment and philanthropic contributions to these organisations more attractive. Several methods for doing this that have been suggested.

85. One is to make donations towards non-profit or low-profit journalism organisations tax-deductible or exempt. This provision exists in the United States and is seen by the Federal Communications Commission as effective. In its July 2011 report, the FCC noted:

*The fact that donations to non-profit media are tax-deductible serves as an incentive for citizens to lend financial support to organizations whose missions they value.*⁸⁵

⁸³ Paul E Steiger, 'Going online with watchdog journalism', *Nieman Reports*, Spring 2008 <www.nieman.harvard.edu/reportsitem.aspx?id=100064>.

⁸⁴ The Global Mail, *Our Mission* <www.theglobalmail.org/about>; Paddy Manning 'What if public-interest journalism had a white knight: a media start-up is born, packed with pedigree' *The Sydney Morning Herald* 31 December 2011 <www.smh.com.au/national/what-if-publicinterest-journalism-had-a-white-knight-a-media-startup-is-born-packed-with-pedigree-20111230-1pffl.html>.

⁸⁵ Steven Waldman and the Working Group on Information Needs of Communities), *The Information Needs of Communities*, (Federal Communications Commission, 2011) 328.

86. This is facilitated in the United States by legislation. Numerous states have implemented instruments enabling 'Low profit limited liability corporations' (L3Cs). This is a business form enabling tax-protected investment in companies producing a social good, but also generating small profits.
87. An example is the Vermont L3C legislation which defines an L3C corporation as one which satisfies the following criteria⁸⁶:
- 'significantly furthers the accomplishment of one or more charitable or educational purposes'
 - 'no significant purpose of the company is the production of income or the appreciation of property'
 - 'no purpose of the company is to accomplish one or more political or legislative purposes'
 - the name of the company 'shall contain the abbreviation L3C or l3c'.
88. An alternative model which may be more conducive to Australia's existing regulatory regime may be to grant a charitable or tax exempt status to a category of non-profit media organisation. The consequences of such recognition would likely be exemption from FBT and GST, plus tax deductible status.

Expanded role for existing public institutions

89. Len Downie, a former executive editor of *The Washington Post*, and Professor Michael Schudson, in their 2009 survey *The Reconstruction of American Journalism*, proposed an expanded role of existing public institutions as a potential means for funding the creation of quality journalism⁸⁷.
90. Their proposal included expanding the scope of national broadcasters to create a broader range of journalism, such as greater capacity for local news.

⁸⁶ *Corporations, Partnerships and Associations* 11.21 Vt Stat Ann § 3001(27) (2008).

⁸⁷ Leonard Downie and Michael Schudson, *The Reconstruction of American Journalism* 20 October 2009 *Columbia Journalism Review* <www.cjr.org/reconstruction/the_reconstruction_of_american.php>.

91. Alternatively or additionally, universities could be funded to be sources of local and accountability journalism. They could be funded to provide faculty positions for individual journalists and so could become laboratories for experiments in innovative ways of gathering and sharing news.

Direct funding programs

News vouchers

92. Internet news vouchers are a mechanism for providing public funding for private media while minimising the potential for improper government influence. Funding for organisations is tied to popular vote by readers. People who read a news article that helped their political understanding can click a box and vote for the article⁸⁸. Their votes would be sent to a National Endowment for Journalism that then rewards or recompenses organisations according to the number of votes they receive. Bruce Ackerman, a professor at Yale University, is the main proponent of this scheme which is a variation on the so-called 'Artistic Freedom Vouchers' and the 'Citizenship News Vouchers' put forward by an economist, Dean Baker, in 2003⁸⁹.
93. It is widely-acknowledged that such a scheme could be abused but, writes Ackerman, endowment funds would give news organisations a powerful incentive to commission investigative journalism aimed at broad public concerns and political commentary that sets news in a context.

Research and development (R&D) fund for journalistic innovation

94. Proposed by Pickard, Stearns and Aaron in their report *Saving the News: Toward a National Journalism Strategy*, an R& D fund would be aimed at encouraging new methods and business models for journalism. This could be achieved through creating a research

⁸⁸ Robert W McChesney and Victor Pickard, *Will the Last Reporter Please Turn Out the Lights: The collapse of journalism and what can be done to fix it* (The New Press, 2011) 299-305

⁸⁹ Dean Baker, *The Artistic Freedom Voucher: An Internet Age Alternative to Copyrights*, (Center For Economic and Policy Research, 2003) <www.immagic.com/eLibrary/ARCHIVES/GENERAL/CEPR_US/C031105B.pdf>.

institution, or funding cooperative partnerships between the newspaper industry and existing research institutions⁹⁰.

95. The model suggested by Victor Pickard et al is a 'taxpayer-supported venture capital firm'⁹¹ that invests an annual budget in new business models. A precedent for the fund is the Telecommunications Development Fund created by the United States Telecommunications Act of 1996 which focussed investment 'in small businesses that produce important public goods in the communications sector that were ignored by for-profit venture capital'.

Federal Writers Project

96. Also suggested by Pickard *et al.*, the Federal Writers Project is a reviving of a 1930s United States program that employed journalists who had lost their jobs in the great depression. The project would directly employ a large number of journalists and writers to produce significant works, especially in those areas under-reported or overlooked by commercial and public media⁹².

National Endowment for Journalism

97. Modelled on endowment schemes more commonly seen in cultural/arts policy, this would be a government-appointed but otherwise independent institution administering grants to support quality journalism. The endowment could be tailored to support specific goals such as increasing online journalism or increasing the number of stories of relevance to minority communities or other under-served regions. The endowment would be funded primarily from the federal budget, with some money from donations⁹³.

Options proposed in submissions

98. Submissions to the Inquiry proposed a number of options for public funding of the media.

⁹⁰ Victor Pickard, Josh Stearns and Craig Aaron, *Saving the News: Towards a national journalism strategy* (Freepress, 2009) 26.

⁹¹ *Ibid* 44.

⁹² *Ibid* 25–26.

⁹³ *Ibid* 26.

99. An often-cited list of recommendations came from Bill Birnbauer, a senior lecturer in journalism at Monash University. His recommendations to ‘increase media diversity in Australia and enhance the opportunities for non-profit online startups’⁹⁴ were:
- (a) to provide tax deductibility for donations made to non-profit investigative and quality journalism organisations⁹⁵
 - (b) direct public funding of organisations that produce investigative journalism through an independent funding mechanism such as the Australia Council⁹⁶
 - (c) create a non-profit organisation to compile, edit and publish university-based journalism students on a national website⁹⁷.
100. These recommendations were cited and supported in submissions by:
- (a) Senator Bob Brown⁹⁸
 - (b) The Public Interest Journalism Foundation⁹⁹
 - (c) Professor Wendy Bacon¹⁰⁰
 - (d) Dr Margaret Simons¹⁰¹.
101. Dr Margaret Simons additionally recommended the establishment of innovation clusters for news media, perhaps centred around universities¹⁰².
102. The Media, Entertainment and Arts Alliance also had a suite of recommendations in their submission to the inquiry¹⁰³.
- (a) additional support for the national broadcasters (ABC and SBS)
 - (b) tax breaks for non-profit ventures

⁹⁴ Bill Birnbauer, Submission to the Independent Media Inquiry, 2011, 2.

⁹⁵ Bill Birnbauer, Submission to the Independent Media Inquiry, 2011, 2.

⁹⁶ Bill Birnbauer, Submission to the Independent Media Inquiry, 2011, 2.

⁹⁷ Bill Birnbauer, Submission to the Independent Media Inquiry, 2011, 2.

⁹⁸ Senator Bob Brown, Submission to the Independent Media Inquiry, 2011, 3.

⁹⁹ Public Interest Journalism Foundation, Submission to the Independent Media Inquiry, 2011, 3.

¹⁰⁰ Wendy Bacon, Submission to the Independent Media Inquiry, 2011, 15.

¹⁰¹ Dr Margaret Simons, Submission to the Independent Media Inquiry, 2011, 8.

¹⁰² Dr Margaret Simons, Submission to the Independent Media Inquiry, 2011, 8.

¹⁰³ Media, Entertainment & Arts Alliance, Submission to the Independent Media Inquiry, 2011, 13–16.

- (c) reducing or abolishing GST on newspapers and magazines and advertising in news publications
 - (d) encouraging consumption and production of journalism in schools
 - (e) copyright reform to protect news content
 - (f) a new levy on internet service providers
 - (g) tax breaks for 'low-profit' ventures
 - (h) tax deductions for increased expenditure on news
 - (i) government advertising and public notices.
103. The submission from Peter Browne¹⁰⁴ aimed at finding funding proposals from overseas that could work well or be adapted to Australian circumstances. This included the following:
- (a) Realigning existing postal subsidies to increase the discount for news and current affairs publications and reduce the discount for special interest or advertising-heavy magazines.
 - (b) Tax credits for newspapers for each journalist employed and Citizenship News Vouchers would need to be targeted more widely than simply to non-profit news sources.
 - (c) If the range of legal structures available to media organisations was expanded this would improve their chances of surviving. A version of the L3C company structure would allow both commercial and philanthropic organisations to invest in media companies. Citing proposals from a 2010 senate inquiry, he said if the definition of a charity was expanded the news media could be included.
104. The submission from *The Global Mail* had a number of proposals specifically to support online, not-for-profit journalism by¹⁰⁵:
- (a) tax-deductible status for philanthropic and public donations
 - (b) relieving such organisations from state-based payroll taxes

¹⁰⁴ Peter Brown, Submission to the Independent Media Inquiry, 2011, 9-13.

¹⁰⁵ *The Global Mail* (Digital Global Mail), Submission to the Independent Media Inquiry, 2011, 8-9.

- (c) a government fund for innovative journalism projects and the information technology that supports them
- (d) compensation for the expenditure of establishing partnerships with international non-profit news organisations
- (e) funding support for the translation of reportage into other languages
- (f) assistance for establishing international reporting bureaux
- (g) government providing more data and information online.

105. The submission from Peter Mair provided a clear model for funding. This consisted of \$1 billion in annual funding, split 75 per cent for mass media and 25 per cent for 'specialist 'current affairs' magazine and internet publishers'¹⁰⁶ These funds would be distributed by a revamped press council and would be measured against 'guidelines protecting commercial objectivity and commercial balance in material presented to the community'¹⁰⁷. Mr Mair also called for public assistance to 'establish and promote micro-pricing options'¹⁰⁸ for news organisations.

106. The submission from the Griffith Centre for Cultural Research provided an examination of community broadcasting and press subsidy models in Australia and Europe and concluded with a recommendation for 'the establishment of a statutory body, funded by the Australian Government, which distributes seeding grants, production subsidies and operational subsidies to smaller and independently-owned publications, news websites and other media outlets which contribute to information diversity and public debate on current issues'¹⁰⁹.

¹⁰⁶ Peter Mair, Submission to the Independent Media Inquiry, 2011, 4.

¹⁰⁷ Peter Mair, Submission to the Independent Media Inquiry, 2011, 4.

¹⁰⁸ Peter Mair, Submission to the Independent Media Inquiry, 2011, 5.

¹⁰⁹ Dr Susan Forde, Professor Michael Meadows, Dr Kerrie Foxwell-Norton, Submission to the Independent Media Inquiry, 2011, 1.

Annexure L—Glossary

AAP	Australian Associated Press
ABA	Australian Broadcasting Authority, Former Commonwealth regulatory authority for broadcasting till 2005 when it merged with the ACA to form the ACMA
ABC	Australian Broadcasting Corporation
ACA	Australian Communications Authority, Former Commonwealth regulatory authority for telecommunications and radiocommunications till 2005 when it merged with the ABA to form the ACMA
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
AFP	Australian Federal Police
AJA	Australian Journalists' Association
ALRC	Australian Law Reform Commission
ANOP	ANOP Research Services Pty Ltd
APC	Australian Press Council
CEASA	Commercial Economic Advisory Service of Australia
Crikey	Australian online newspaper at www.crikey.com.au
DBCDE	Department of Broadband, Communications and the Digital Economy
Fairfax	John Fairfax & Sons
Fairfax Media	Fairfax Media Limited
FBT	Fringe Benefits Tax
FCC	Federal Communications Commission (United States)
GST	Goods and Services Tax
HWT	Herald & Weekly Times
Leveson Inquiry	Inquiry into the culture, practices and ethics of the media in Great Britain called in July 2011, chaired by Lord Justice Leveson. See www.levesoninquiry.org.uk

Licence Fee	An official licence required in many countries for the reception of television (and sometimes radio) broadcasts or possession of a television.
MEAA	Media, Entertainment and Arts Alliance
the minister	Minister for Broadband, Communications and the Digital Economy
News International	News International Newspapers Limited, previously publisher of <i>The Sun</i>
NZLC	New Zealand Law Commission
NZPC	New Zealand Press Council
OECD	Organisation for Economic Co-operation and Development
SBS	Special Broadcasting Service Corporation
Seven West Media	A company formed by the acquisition of Seven Media Group by West Australian Newspapers Holdings Limited, comprising Seven Television, Pacific Magazines, Yahoo!7, and <i>The West Australian</i> , and associated WA regional newspapers and radio stations
VAT	Value added tax
West Australia News	West Australian Newspapers Holdings Limited
