

Striking a Balance: News Regulation in the Digital Age

Jarrold Bayliss-McCulloch sets out an approach to news regulation that balances a variety of competing interests.*

News and media commentary play a vital role in a democratic society, and no regulation should endanger that role.¹ However a free press also wields great power; power to influence political processes that go to the heart of a democracy, and power to cause harm both to individuals and organisations, if unchecked. As a result, a level of regulation is necessary to ensure that media news and commentary meets appropriate journalistic standards in fairness, accuracy and transparency, and that news publishers are publicly accountable for the content they produce. This paper considers the need for cross-platform ethical standards in the “converged” news media environment of the digital age and sets out a preferred approach to news content regulation that seeks an appropriate balance between the legitimate commercial interests of big media and the public interest in access to quality, accurate and transparent news journalism.

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The challenges of news regulation in the digital age

Striking an appropriate regulatory balance for news content is more of a challenge in today's digital age than ever before, as digitisation of news content is “blurring the traditional distinctions between broadcasting and other media across all elements of the supply chain, for content generation, aggregation, distribution and audiences”,² creating a new and radically different media ecosystem³ to which our regulatory frameworks must adapt. The transformations are not only about the way traditional media oper-

ates and is delivered. They also relate to consumer behaviour and interaction, as traditional one-to-many forms of news communications such as print, radio and television, with predictable forms of content delivery and platforms, give way to user-generated content and social media, empowering individuals to take on media-like roles in the online environment.

There are new and different voices with varying degrees of professionalism and commercialism: online opinion papers, blogs, citizen journalists and social media sites are all contributing to the discourse.⁴ Media organisations have been outspoken about the challenges involved with adapting to this new media environment, and any increased regulation that may come with it, as they try to develop new revenue streams to fund the ongoing production of quality content.⁵ Certainly there is a need for sensitivity in this context, understanding that a regulatory burden that is too onerous may discourage investment and create financial difficulties for Australian media organisations navigating the complex waters of new media technologies and revenue models. The challenges however are equally great for regulators who have a weighty responsibility to ensure that quality content is produced and made available across platforms, even as the nature of the relationship between content provider and delivery platform and audience and producer changes.

In this context, traditional vertical, silo-based approaches to regulation can no longer be justified.⁶ International jurisdictions such as Malaysia, the European Union, the United Kingdom, South Africa, Korea, Japan and Taiwan have already recognised this, moving toward converged legislative frameworks that favour a platform-neutral approach,⁷ and now Australia seems ready to follow suit. In this broader context, the Convergence Review (**Review**) recently advocated a “technology-neutral approach [to news content regulation] that can adapt to new services, platforms and technologies,”⁸ and similarly, the core recommendation of the recent Independent Inquiry into the Media and Media Regulation (**Inquiry**) is to establish a single platform-neutral regulatory body overseeing all news producing media.⁹ The notion of cross-platform consistency represents a welcome shift in thinking in a media environment where the same content can now be simultaneously delivered across a range of platforms. There remain, however, significant questions

1 The Hon R Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation*, February 2012, www.abc.gov.au/digital_economy/independent_media_inquiry, at 7.

2 Australian Communications and Media Authority [hereinafter ACMA], *Digital Australians—Expectations About Media Content in a Converging Media Environment: Qualitative and Quantitative Research Report* (2011), 7.

3 See Hitchens, L “Media Regulatory Frameworks in the Age of Broadband: Securing Diversity” *Journal of Information Policy* 1 (2011): 217-240.

4 *Ibid.*, 222.

5 See, for example, News Ltd CEO Kim Williams’ Speech to Melbourne Press Club, November 28, 2012, transcript online at <http://www.theaustralian.com.au/news/a-bright-future-for-australian-journalism/story-e6frg6n6-1226525782027>, accessed 11 January 2013.

6 Hitchens, above n 3, at 220.

7 ACMA, *Converged legislative frameworks - International Approaches*, Occasional Paper, July 2011, available at <http://engage.acma.gov.au/convergence-international-approaches/>.

8 Australian Government, *Convergence Review, Final Report*, March 2012, xvi.

9 Finkelstein, above n 1.

10 Weaknesses in the current regulatory framework were discussed extensively in the Inquiry: *Ibid.*, 8.

around what that platform-neutral approach should look like when it comes to the regulation of news media content.

There are compelling reasons why a revised regulatory structure is needed to achieve the degree of responsible journalism desirable in a democracy in the digital age, which are apparent by reference to the inadequacies of the current regulatory framework.¹⁰

All news media are subject to basic external regulation including the laws of defamation and contempt. Beyond that, regulation currently differs by platform, with broadcasters subject to statutory regulation overseen by the Australian Communications and Media Authority (**ACMA**), while newspapers are subject to less onerous mechanisms of self-regulation, and online news is not extensively regulated at all. Of the existing self-regulation measures, only one or two newspapers have appointed an ombudsman or reader's representative and online news publications are not covered. The Australian Press Council (**APC**), which currently handles complaints from the public and monitors professional standards, is regularly criticised on the basis that it lacks the necessary funds and powers to carry out its functions effectively, and is subject to the voluntary support of the publishers it is intended to regulate; if a media organisation becomes dissatisfied with the APC it can simply leave and set up its own complaints handling body.¹¹ Problems with the regulation of news media were recognised by the Senate Select Committee on Information Technologies in 2000,¹² when it found deficient 'the efficiency and effectiveness of self-regulation...' and stated that '[s]elf-regulation in the print media industry appears to be failing the community.' These partially ineffective self-regulatory measures may be contributing to the low levels of trust and public confidence in the media identified in the course of the Inquiry.

Media outlets place great faith in the law of defamation as a check on journalistic practices.¹³ However, legal proceedings against the media in cases of serious wrongdoing are protracted, expensive and adversarial, and offer redress only for narrowly defined legal wrongs, rather than complaints about accuracy or unfairness. The Inquiry cited a recent example of Mark French, a professional cyclist, who sued the publisher of the Herald Sun over an article published six years earlier that suggested Mr French was a drug cheat.¹⁴ Following a trial lasting six days, Mr French was awarded \$175 000 in damages and the publishers were ordered to pay his legal costs. In the course of that trial, Mr French paid \$893 000 in costs. Even if he recovers two-thirds of those costs, Mr French, a successful litigant, will be out-of-pocket by more than \$100 000.

The challenges presented by a convergent media landscape provide an opportunity to reconsider current regulatory measures in favour of more practical, efficient and effective cross-platform measures that provide positive outcomes for those who suffer harm due to poor media conduct, and promote responsible journalistic practices to improve information flows in our democratic society.

A preferred approach to news standards regulation in the digital age

A technology-neutral approach

The two recommendations put forward by the Inquiry and the Review reflect agreement that there should be a single cross-platform body responsible for news and commentary standards. This is a sound starting point in a converged media environment, where boundaries between platforms are increasingly blurred and losing their regulatory significance. Such a body would also be well-placed to adapt to future changes in the media environment, with flexibility to respond to the emergence of new platforms and delivery mechanisms.

Statutory regulation vs self-regulation

Beyond this, the conversation becomes more controversial. What level of regulatory control should this body have across all media platforms? There are two main options: move the traditionally highly regulated broadcast news and commentary into a self-regulatory structure together with print and online media, or make print and online media subject to statutory regulation.¹⁵ Each has its critics.

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The Inquiry advocated the latter option; cross-platform statutory regulation. In international terms, this would be a strong and decisive outcome, certainly stronger than the current situation in Australia, or in Britain.¹⁶ This proposal though has attracted heavy criticism from media figures, including News Limited CEO Kim Williams, who labels it "preposterous."¹⁷ "It can never be the role of government regulators to oversee editorial positions," he argues, seeing the recommended News Media Council as a "grave threat to press freedom."¹⁸ Williams raises a valid concern that must be considered whenever statutory regulation of media is proposed; the danger of undue political influence if the regulatory body is not constituted with a high level of government independence, and the risk that a future government could influence such a body to suppress or bypass legitimate media scrutiny. This is to be avoided in a democracy, where the media is the primary source of information for the people's political decision making. But is the risk of political influence in such a body really as great as media figures are portraying? Would it not be possible to retain an independent

11 See for example, the West Australian in 2012.

12 Parliament of the Commonwealth of Australia, report by the Senate Select Committee on Information Technologies, In the Public Interest: Monitoring Australia's Media, April 2000, (accessed 17/01/2013), http://www.aph.gov.au/senate/committee/it_ctte_completed_inquiries_1999-02/selfreg/report/a01.pdf

13 APN News & Media, Submission to the Independent Media Inquiry, 2011, 1; 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; Finkelstein, above n 1, at 147.

14 French v Herald and Weekly Times (2010) 27 VR 171, cited in Finkelstein, above n 1, at 152.

15 These two options were each identified in the Convergence Review.

16 For example, Britain's Press Complaints Commission is a non-statutory industry body.

17 The Australian, "News to challenge media regulation", 13/07/2012, online, accessed 11/01/2013, <http://www.theaustralian.com.au/media/news-to-fight-media-regulation/story-e6frg996-1226425441232>

18 Ibid.

regulatory structure while eliminating the potential for government influence over the body? The Inquiry clearly states that the government would have no role in the body, apart from providing partial funding. If the government has no role in terms of appointments, the scope for undue political influence would be limited. Even if there were to be an element of political influence over the decision making of that body, its contemplated role is limited. It is not a pre-censorship body, designed to review articles prior to publication and prevent them from ever being published or to pre-empt the editorial process in any way. It is simply designed to promote responsible journalism pre-publication and offer practical post-publication options for redress on inaccuracy, unfairness and related issues, to complement the functions of parallel laws like the law of defamation and deliver more practical outcomes for victims of media inaccuracies, thereby saving time and money for complainants and media publishers in the process. The APC is already supposed to be doing this, but it has not been altogether effective.

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Conversely, if the power of the media in influencing political decision making for voters is so great that even the remote possibility of government influence is reason enough to oppose statutory regulation (as news media organisations have argued) then that same power makes a strong regulator with the necessary “teeth” to enforce standards of accountability, accuracy and transparency against a powerful core of media organisations vitally important in a media market with one of the highest levels of ownership concentration in the world. This raises the question as to whether a pure self-regulatory structure, while removing the threat of political influence entirely, could be sufficiently strong and independent of its financial sponsors to hold them accountable for the content they produce, and guarantee the desired level of quality in Australian news standards. The history of the APC would suggest that the answer to this question is no.

Striking a balance: self-regulation with statutory reserve powers

As a result, the Review sought to strike a balance between self-regulation and statutory regulation by recommending that a cross-platform self-regulatory structure enforce standards for all news and commentary, supported by a statutory reserve power for the news communications regulator to set standards. This position acknowledges that self-regulated bodies have not been wholly effective in the past, but also seeks a compromise with industry, allowing industry to demonstrate the effectiveness of platform-neutral, self-regulatory arrangements with the threat that government will step in if self-regulation is ineffective.

At first glance, this may seem like a futile exercise. After all, 36 years of APC history have exposed the weaknesses of news content self-regulation, raising issues of media accountability. To offer any chance of success, the new self-regulatory body would have to look very different from the APC, and be actively structured in a way that promotes independence from the influence of large media organisations. The Review went some way toward this goal, recommending that the body would be run by a board of directors,

a majority of whom would be independent from the members of the industry. The Review also recommended that the body wield stronger powers, including a flexible range of remedies and credible sanctions, not dissimilar from those proposed for the Inquiry's statutory body, including the power to order members to prominently publish the body's adverse findings on a relevant media platform.

These steps are encouraging, but may not be sufficient to ensure true media independence, particularly when all funding for the body is provided by industry and some of the body's directors may owe their allegiances to large media organisations. As a minimum, a preferable structure would be one in which all Directors of the non-statutory regulatory body are independent from the media organisations which the body is appointed to regulate. This would likely be an unpopular position with industry, but is a necessary measure if the body is to be a truly powerful force in regulating news content and ensuring quality, accurate and transparent reporting. With this safeguard in place, a non-statutory regulatory body, which engages with the media industry in developing appropriate standards and enforcing them, is perhaps to be preferred over a statutory body which would be imposed upon the vast majority of media organisations against their will.

Who should be regulated?

In a vibrant and diverse media ecosystem, the regulatory imposition of news content standards might vary “depending upon the media involved and the extent to which they represent the mainstream media voice.”¹⁹ In this regard, the Inquiry set a low threshold, proposing that the regulator should have jurisdiction over any publisher that distributes more than 3,000 copies of print per issue or a news internet site with a minimum of 15,000 hits per year. These are admittedly arbitrary figures that have attracted much criticism for expanding the regulatory net too far beyond the mainstream.

The Review proposed a higher threshold which would apply mandatory standards to Content Service Enterprises that bring in more than \$50 million of revenue a year from professionally produced local content and reach more than 500,000 Australians a month, while also allowing for “content providers that are not of sufficient scale and scope... to opt in to the relevant obligations, or to seek accreditation as a provider that has robust and transparent self-regulatory arrangements” to “enhance the brands of such providers.”

In the context of an increasingly competitive multi-platform media environment, there is much to be said for an approach that incentivises membership to an industry standards body for smaller news publishers. As Hitchens explains:

“for the blogger, citizen journalist, or the small independent online journalism endeavour, adherence to the code [or other standards imposed by the regulatory body] could in fact become a marketing or promotional tool. Unlike the established media that is able to trade off reputations established through other delivery platforms, gaining a presence and an identity may be more difficult for the independent sector.”²⁰

The idea of setting a high threshold for mandatory subscription, and incentivising the smaller organisations to voluntarily submit to the Code, is an elegant solution in this environment.

In order for this to work in practice however, three elements of the scheme must be calibrated. First, the mandatory threshold must be set at an appropriate level to ensure that media services

¹⁹ Hitchens, above n 3, at 233.

²⁰ Ibid.

with substantial potential to influence the public are subject to mandatory standards. Second, voluntary membership must have the appropriate cost / benefit characteristics to make membership attractive for small and medium publishers who fall below that mandatory threshold. Third, the standards required by the scheme must encourage responsible journalism but should not be so onerous that they unnecessarily burden a publisher's ability to do business, regardless of size.

On the first point, the Review arguably sets the bar too high. A publisher does not need to generate \$50 million a year in revenue from professional content in order to wield substantial influence in Australia, nor does it need to reach 500,000 Australians a month. A specialised news blog focusing on a niche industry may reach only 100,000 Australians a month and produce minimal revenue, but may have substantial ability to influence its target industry and the lives of those who participate in it. Loyal blog readers from the industry may not care whether the site has accreditation with a regulatory body, providing little incentive for the blog owner to pay a membership fee to join the regulatory body. And yet its power may be significant; factual inaccuracies published on such a blog could ruin somebody's professional image, if not corrected. This is one scenario where the proposed regulatory structure could be extremely effective in requiring mandatory compliance.

On the second point, membership fees for the body should be built around a tiered structure, based on characteristics such as revenue and monthly or annual audience, so that small and medium publishers are not at a structural disadvantage if they are required to, or elect to, join the scheme. A level of government funding may be required in order to ensure fees can be set at an appropriate level for all member organisations, so that all media organisations, whether large or small, are not disadvantaged by membership of the regulatory body. A level of government funding would be justified on the basis that high media and news reporting standards are a public good from which all citizens derive a benefit.

Finally, the standard required under codes imposed by the regulatory body should not be so onerous that they overly burden media organisations, and could also follow a tiered structure based on a publisher's revenue and audience size. Standards should be developed in consultation with the industry, bearing in mind that the primary aim of the regulation is not to require organisations to develop a new, costly and complex system of internal checks and balances prior to the production of news content; it is to encourage responsible journalistic behaviour from the outset, including appropriate due diligence and fact checking, and then effective post-publication correction mechanisms to quickly and inexpensively deal with any failures or errors. This should not impose any undue burden on news media organisations, which are in the business of providing quality journalism. In fact, established news media organisations should welcome a more extensive self-regulatory system that encourages their smaller and more manoeuvrable competitors across multiple platforms to embrace the journalistic standards that they claim to have held for many years, levelling the playing field and promoting quality news content across all platforms and publishers.

Conclusion

Just as the media environment has undergone radical changes in recent years, so too the regulatory environment must adapt to ensure strong news media standards in a modern converged media environment. The new model for news content regulation must allow media companies, large and small, to adapt to difficult and transitory market conditions and adequately preserve freedom of press which is so vital in a working democracy, while supporting

quality, accurate and transparent journalism that Australians can depend on, now and in the future.

Such a model should be technology-neutral, built around a centrally managed cross-platform non-statutory regulatory body. That body should be funded primarily by industry, but with supplementary government assistance if necessary to ensure that as many media organisations as possible can afford to participate in the scheme. Otherwise the body should be completely independent from government and free from its influence. Its directors, although engaging with the media industry to develop relevant standards, should similarly be free from the influence of the media organisations they regulate, in order to ensure the regulatory body delivers an appropriate level of public accountability. The standards imposed by this body should be reasonable, not unduly onerous and determined in consultation with industry, to ensure that the scheme does not pose unnecessary financial challenges for Australian media organisations while they continue to adapt to the changing market forces and dynamics of a converged media ecosystem. Should the body fail in its purpose in some respects, as the APC has done, statutory reserve powers should be available to ensure appropriate standards are upheld.

The Government response to recent proposals of the Inquiry and the Review remains to be seen. Given the hostile reception many of the recommendations have received from large media organisations, significant progress is unlikely in this election year. Perhaps the outcome, when it does eventuate, will be a mere shadow of the bold regulatory regimes proposed in the Inquiry and the Review. Regardless, it is encouraging to see analysts, regulators and large media organisations alike remaining conscious of the importance of responsible journalism across platforms and delivery methods in today's diverse media ecosystem, and of the imperative to ensure our regulatory structures provide the right incentives to support this noble endeavour, now and in the future.

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