# Charters of editorial independence

## The cases for and against charters of editorial independence

**Paul Chadwick explains how charters can work to deliver news independent of a proprietors' interest**

The debate about charters of editorial independence has been blighted by misconception and confusion, some of it promoted by opponents, some the result of the failure of journalists adequately to explain to those outside the media precisely what editorial independence means.

Charters are not some crude demand for staff-controlled newspapers, but rather an attempt to give workable form to a system whereby some proprietors give up part of their property rights in recognition of the unique public service role of their assets, newspapers.

The slow emergence of the John Fairfax Group newspapers from receivership has sharpened interest in charters because the journalists have adopted one and have asked the bidders to endorse it.

### What is a charter?

Charters of editorial independence are written agreements between the editorial staff of a media outlet and its owner. They jointly define their relationship so that the proprietor is separated from power over the day-to-day preparation and presentation of news and opinion.

The staff's independence of the owner is supposed to free them to aim for high standards of journalism. Charters are intended to avoid the appearance of the reality of journalism being slanted to suit the owner's views or interests.

No uniform model or minimum standards for charters exist. They vary from a broad statement of principles to a detailed set out procedures which may include selection of an editor and protection for him or her from pressure from an owner or the owner's delegates.

Charters are usually proposed for quality newspapers, perhaps in recognition of their special 'agenda setting' role. But the relevance of charters is not confined to the Fairfax group, nor to the print medium. The arguments in favour apply with equal force to every journalistic operation in any media group.

Media outlets in Australia are increasingly being absorbed into large chains or networks. Economic forces encourage this trend and government regulators have been reluctant to halt or reverse it. In the case of television networks, government policy encouraged it. This being so, charters may help to ameliorate the potential adverse effects of such concentration, which have been summarised most recently by the Victorian Government's Mathews Committee report on print media ownership (*Communications Law Bulletin*, Vol. 11, Nos 1 and 2).

### The justification

To those outside journalism, journalists' claim to independence can be puzzling. Are they not attempting to usurp the property rights of the owner? If he or she paid for the thing, goes the argument, why shouldn't it have to publish whatever he or she wishes and deny space to what the owner dislikes?

The usual reply is that because the products of a media outlet are news and opinion, it is uniquely more than a mere business. Its 'moral existence', being of critical importance to the healthy functioning of a democracy, must be separated from the influence of its 'material existence' as a product from which owners derive profit.

Charters are in a sense an attempt to take most proprietors at their word. Most say they will give editors and journalists independence and that readers need not fear that the news and opinion which their products provide will be slanted to suit the owner's prejudices or business interests. Charters codify that promise.

Such guarantees also make commercial sense, especially for owners of quality newspapers. The late Robert Holmes a Court argued that "any proprietor today who does not seek integrity for his product, who seeks to impose influence founded in self interest of any kind, will simply be an unsuccessful publisher. The resultant loss of credibility and consequently readership is a self regulating factor". Bidders for Fairfax echoed this view.

Most charters provide for the owner to lay down the overall philosophy of the paper. For example, its commitment to parliamentary democracy, private property rights and whatever else the owner wishes. This is not incompatible with granting editorial independence; that philosophy forms the boundary within which editor and staff are independent.

### Role of journalists and editors

But what are the editors and journalists being granted independence for? A charter needs to specify the journalistic principles they are supposed to be free to pursue. The Australian Journalists' Association's code of ethics, or the Press Council's statement of principles offer useful guidance here.

Charters do not, and cannot, address the vexed question of accountability of journalists for their errors or unfairness in day-to-day coverage. That is a separate issue which, if charters are to confer greater independence on them, journalists have an obligation to tackle more effectively than they have in the past.

A workable charter needs to spell out precisely the rights of the editor (or editor equivalent in other media). That person embodies the journalistic or public interest side of the equation, while the owner and management represent the private business aspect of the paper's personality. This does not mean they should be in conflict. On the contrary, a successful paper requires that they understand each other's roles and work together. But if the public interest role or journalistic principles do happen to conflict with the business interest, it is the editor who must represent the former.

Some charter models create a committee of eminent independent persons, separate to the board of directors, who would adjudicate such disputes between editor and management. The charter must state that their decision will be final and their findings will be published by the paper.

This guarantee of publicity is vital. It is the sanction journalists hold over all others in society whom they scrutinise.

Because credibility is an important commercial concern, it can be expected that an owner or management will not lightly force the editor to appeal to the independent 'editorial guardians' and thus trigger embarrassing disclosure of their pressure.

But what if the editor is 'tame', a creature of the proprietor appointed precisely because he or she can be relied on not to encourage reporters to scrutinise the company and, if they do turn up something unpleasant, relied on not to publish?

A workable charter needs to make provision for staff to go around a pliant editor to appeal directly to the editorial guardians. But such provisions must be carefully drafted and responsibly used by staff, for they imply the potential for, in effect, a vote of no confidence in the editor. For precisely this reason, no editor is likely to ignore staff intimations that he or she should resist proprietorial pressure.

## Conclusion

It is clear that charters involve processes too subtle for legislative treatment, even if conferring independence by statute were desirable, which it is not. Nor do they seem to be enforceable at common law, not so much because, say, contract law or company law or industrial law are, in theory, incapable of handling such matters but because it would be impracticable to try to litigate these sorts of issues.

Charters do have considerable potential to improve the professionalism and public standing of journalism, so long as it is recognised that in themselves they provide no guarantees.

They are fragile instruments which depend for their success on the attitudes of the people adopting them. A proprietor determined to sign one then ignore it will probably succeed, but the aim is to construct a system which would make it too uncomfortable for the proprietor lightly to renege.

**Frank Devine argues Charters will undermine newsroom culture and arm those pushing private agendas.**

One of the main reasons I recoil from the idea of charters of editorial freedom is that they threaten the robust, creative culture of newsrooms.

At its best, a newsroom establishes its hierarchy in much the same manner as a university at its best. Frequent publication and persuasiveness in discourse are the means by which the talented (or merely resourceful) advance themselves in rank and, as often or not, the esteem of their peers. The editor achieves god-like position only if he possesses god-like qualities, but he is not living up to his responsibilities if his authority is less than that of ship's captain.

The editor's inner circle of assistants and associates, chief of the reporting staff, back bench people, editorial writers and section editors have usually achieved high office by virtue of skill and experience, and hold their place through daily proof of entitlement. Theirs is a relatively hazardous existence. The best of them crave the job of editor, whose professional life — if he is fulfilling his duty — is even more hazardous.

In addition, the more civilised newsrooms possess two or three resident gurus, men or women of uncommon talent, integrity, commonsense, charm or assertiveness who wield special influence outside the convential chain of command.

The flow of energy from these various sources, the officer corps of the newsroom, is what powers a newspaper if manifests itself in camaraderie and conflict, a grand daily game promising daily triumphs and daily defeats for the participants.

When they feel in firm command, editors tend to mould this plasma into a general shape and let nature take its course The decision-making processes of the healthiest newsrooms are officer corps communal, without the actual decisions being collective.

## The effect of charters

Charters of editorial independence would, I fear, disrupt natural processes and diminish newsroom energy. The charter can too readily become the purpose, instead of aids to achievement of the purpose. Self-appointed guardians of the sacred scripture can elbow their way into the officer corps with none of the qualities of character, intellect or professional skill that membership requires. Charters of editorial independence seem to me devil-sent opportunities for bush lawyers and commissars to flourish.

To some journalists — rarely the most talented — such charters can easily be interpreted as promising freedom from the editor. As an editor I have suffered immeasurably more trouble defending the truth against the private agendas of my editorial colleagues than against proprietors and managers.

Motivation for pushing private agendas ahead of the interests of readers have, in my experience, ranged from wanting to do a favour for important mates to ideological commitment. The motivations of owners and managers in such circumstances are easier to identify because they are, in effect, operating outside their usual territory. Journalists have a home ground advantage and more opportunity to camouflage their intentions, since gathering information and writing it up for publication or broadcast is what they are supposed to do.

**FAIRFAX PAPERS' CHARTER OF EDITORIAL INDEPENDENCE**

The Age, Sunday Age,
Sydney Morning Herald,
Australian Financial Review,
Sun-Herald

1. That the proprietor/s publicly declare a commitment to the fundamental and longstanding principle of editorial independence;
2. That the proprietor/s acknowledge that journalists, artists and photographers must record the affairs of the city, state, nation and the world fairly, fully and regardless of any commercial, political or personal interests, including those of any proprietors, shareholders or board members;
3. That editorial staff shall not be required to work other than in accordance with the Australian Journalists' Association's Code of Ethics;
4. That full editorial control of the newspapers, within a negotiated, fixed budget, be vested with the editors of (the five papers), and that the editors alone shall determine the daily editorial content of the newspapers.
5. That the editors alone shall hire, fire and deploy editorial staff.
6. That the editors shall not sit on the board of the owning company or companies, or any non-publishing subsidiary companies, and shall not be directly responsible to the board but to its appointed management;
7. That the editors must at all times carry out their duties in a way that preserves the independence and integrity of (the five papers).

Charters of editorial independence strike me as providing the private agenda operators with a pernicious last line of defence. You won't publish my bit of propaganda, you bastard? You're just a lackey of the bosses. What has become of editorial independence?

## Independence or integrity

My other objection to charters is that they are misnamed. Who gives a damn about editorial independence? Independence from what, for what?

The prize is surely not editorial independence but editorial integrity. For journalists to assert that they are the sole custodians of integrity and owners and managers a constant threat to it is hubristic and contentious.

Is it the assertion by preponents of charters of editorial independence that owners and managers consciously want to produce periodicals lacking integrity? Surely not, since this would be bad business, resulting in readers and advertisers eventually boycotting the unreliable, untruthful newspaper or magazine.

Is it implied that owners and managers wouldn't recognise integrity if they tripped over it? That is not my observation. Sound morals and a high level of commitment to the common good are, to my perception, no less common amoung people who run businesses than amoung journalists.

Are charters of editorial independence intended to head off occasional interventions by owners and managers to have events portrayed the way they see them, or not portrayed at all? If so, I doubt the efficacy of charters.

Certainly a document espousing general principles will not have as much impact on a reasonable owner or manager as the lucid, specific arguments of an editor. On an unreasonable person, I can't see it having any effect.

"You will find I usually get my way", a tycoon for whom I almost went to work once told me with almost disarming frankness.

Preserving editorial integrity is a case-by-case, day-by-day mission in my view. It involves constant struggle with one's newsroom colleagues and, not infrequently, with oneself. In reality, struggles with owners and managers are infrequent. They tend, however, to be macro-struggles, with blood sometimes shed. Swords are more valuable than scriptures in these circumstances.

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# Orders forbidding publication

**Michael Chesterman discusses some recent decisions giving 'teeth' to non-publication orders**

The media nowadays are frequently told by an official body having legal authority — a court, a tribunal, a Royal Commission — that they must not publish material which they have in their hot little hands, even though this material is indisputably good copy. The basis for such an order differs from case to case. Probably the two most common types of 'non-publication order' (as I will call them here) are those based on the following grounds:

(i) that publication would be in breach of an obligation of confidentiality; or
(ii) that the material in question is a report of public proceedings before an official body which the body considers should not be published, on grounds (for instance) of jeopardy to the conduct of these proceedings.

Recent cases have reached conclusions on a number of important issues which are common to both of these types of non-publication order. Generally speaking, they have made non-publication orders more effective. In this sense they have favoured suppression at the expense of publication. This article contains a brief outline of some propositions which seem to have been established.

## Proposition 1

A publisher which is not formally bound by a non-publication order may, in some circumstances at least, be nonetheless liable to criminal penalties if, with knowledge of the order, it publishes the forbidden material.

In relation to interlocutory injunctions on grounds of confidentiality, this proposition was established in April of this year by what we may assume to be the last of the *Spycatcher* decisions — *Attorney-General* v *Times Newspapers* (1991). The House of Lords here held the *Sunday Times* to be guilty of criminal contempt of court on account of having published extracts from *Spycatcher* at a time when, to its knowledge, the *Observer* and the *Guardian* were restrained from so doing by an interlocutory injunction granted to the Attorney-General in confidentiality proceedings. Their Lordships vowed that they were not in any way guilty of elevating an *in personam* order (that is, an order that operates against particular persons) to the status of an order *in rem* (an order that has a general application). It was simply a matter of imposing contempt liability on a person who knowingly impeded the administration of justice in particular proceedings by acting to frustrate the clear purpose of an order made in those proceedings. But the effect in the context of confidentiality proceedings would appear to be the same — once a widely publicised injunction is granted against one intending publisher all other potential publishers are effectively bound.

The judgments of the House of Lords are formally limited to the circumstances of an interlocutory injunction made to preserve the *status quo* until a final ruling can be made. They give no real help on the crucial question of whether a similar form of 'frustration of the purpose' of a final injunction granted on confidentiality grounds might not equally constitute contempt. If this were the case, an injunction against one publisher could effectively suppress material indefinitely.

I know of no Australian case in which this form of conduct has been held to constitute contempt. But there is a clear possibility that the lead given by the House of Lords will be followed here. In my view, it is a decision with dangerous implications.

In the case of reporting prohibitions, the proposition being discussed is of less significance because most commonly such prohibitions are imposed by a court or other legal authority under statutory provisions which state that non-compliance with the order is a criminal offence. The implication is that the world at large is bound by the order, though only those persons who are or should be aware of the order will have the necessary knowledge required by the criminal law to constitute an offence. However, in those relatively few situations where an order is made by a court under a common law power, the prevailing view, at least in New South Wales, is that the order is only binding on those persons present in court when the order was made (*Attorney-General for NSW* v *Mayas* (1988)). Yet, as