

How Do You Solve the Media Puzzle?

Thomas Jones, Sarah Godden and Lisa Lucak take a look at the report of the Independent Media Inquiry and critically review its recommendations including its justifications for reform.

On 28 February 2012 the Independent Inquiry into the Media, led by the Honourable Mr Ray Finkelstein QC, reported to the Commonwealth Government (the **Report**). The inquiry was convened by the Minister for Broadband, Communications and the Digital Economy, Senator Conroy in response to calls for an investigation into the media; calls provoked, at least in part, by the News of the World phone hacking scandal.

The Report provides a detailed and scholarly analysis of the role of the media in Australia, and will inform analysis of media markets for some years to come, irrespective of whether its recommendations are adopted. The Report contains almost 500 pages of analysis of the economic, social and legal issues facing the media, and will therefore be a useful tool for both policy makers and industry regulators such as the Australian Competition and Consumer Commission (the **ACCC**).

Despite its exclusive focus on news media, the Report (with some important differences) is broadly consistent with the approach taken by the Convergence Review (the final report of which was released on the date this article was submitted for publication).¹ In particular, it recommends regulation by function, rather than platform, and states that:

*'[i]n 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.'*²

More controversially, the Report recommends the creation of a new statutory authority, the News Media Council, to regulate converged news media on all platforms. The Convergence Review did not support this recommendation.

The perceived problem

The Report identifies three major problems that it says existing regulation has failed to address:

- market failure;
- public distrust of the media; and
- direct harm to individuals.

Market failure

The Report concludes that market failure in the production and supply of news adversely affects democracy by potentially compromising informed debate on important political and social issues.

Market failure is an economic concept used to describe an inefficient allocation of resources, which may prevent a market operating in a way that benefits consumers. Market failure may occur for many reasons, including:

- structural aspects such as externalities associated with the production or consumption of goods and services;

¹ Commonwealth of Australia, Convergence Review: Final Report, (2012).

² The Hon R Finkelstein QC, Report of the Independent Inquiry into the Media and Media Regulation (the Report), (2012) 157.

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- the existence of natural monopoly; and
- the consumption of common property.

In a free market economy, market failure, among other things, is generally accepted to be a necessary pre-condition before government or regulators will intervene.

'[i]n 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.'²

The Report identifies several causes of market failure in relation to news, including:

- externalities;
- information asymmetry; and
- concentration of ownership of the mainstream news services.

These causes of market failure are explained below.

Externalities

Externalities arise when individuals or organisations do not bear the cost of the consequences of their actions on others (negative externalities) or when they do not obtain a commensurate reward when their actions generate a benefit to others (positive externalities). Externalities result in persons which do not bear the full cost of their actions over-allocating resources to activities, producing negative

externalities and under-allocating resources to activities that produce positive externalities.

The Report asserts that the production of news generates 'external' benefits to society beyond the private benefits accruing to producers and consumers of news, that is, positive externalities. For that reason, the Report concludes that the harm caused when the press is not properly regulated extends far beyond direct consumers of news. It extends to the community as a whole, which relies on the media, among other things, for democracy to function properly. The existence of this externality is characterised by the Report as a classic form of market failure.³

Information asymmetry and information failure

The Report concludes that the markets for the supply and consumption of news are also prone to information asymmetry because consumers may not have sufficient information to evaluate the quality or accuracy of a news story. The general reader may have trouble determining the accuracy of the information provided, the reliability of sources quoted, and whether the relevant facts were interpreted objectively.

Concentration of ownership

The Report also asserts that concentrated ownership of the mainstream news services leads to market failure if the resultant market structure causes a lack of effective competition. This is particularly acute in rural and regional cities or towns with only one newspaper. Ownership concentration and imperfect competition can be detrimental to effectively functioning democracy if these conditions lead to:

- a lack of diversity in the views that are voiced;
- public opinion unduly influenced by a handful of media owners or journalists; and
- a decline in journalistic and editorial news standards in the absence of effective competition.

³ The Report, above n 2, 267.

Lack of trust in the media

The Report concludes that consumer trust in the print media, particularly, reporting of political issues is low. Many consumers, it asserts, believe that news is not reported accurately, that fairness and diversity is lacking and that newspapers have too much power. The Report maintains that distrust 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.'⁴

The Report also identifies that distrust of the media is prevalent among politicians and political parties as well as the general public. It cites evidence where it maintains reporting of political issues has transgressed fundamental principles of fairness, accuracy and balance, in particular:

- bias in the reporting of government affairs;
- attempts to influence government policy by repetition of issues with little or no new information;
- commercially-driven opposition to government policy;
- selective use of opinions opposed to government policy;
- unfair pursuit of individuals based on inaccurate information;
- failure to separate news from comment;
- inappropriate use of expert and lay opinion; and
- excessive use of pejorative adjectives in reporting on opinions and issues with which the media outlet does not agree.

These are strong claims which, notwithstanding the obvious thoroughness of the Report, involve a significant exercise of judgement on the part of the authors of the Report.

Individual harm

Somewhat less controversially, the Report concluded that news media, through, unreliable or inaccurate reporting, breaches of privacy, and failure to properly consider the defenceless in the community, can directly cause harm to individuals and organisations.⁵

The proposed solution

Is online different?

The Report draws attention to what are described as the special problems with online publications. The Internet is 'a medium which is largely unmanaged and uncontrolled',⁶ essentially allowing almost anyone to publish their views.⁷

The Report suggests that if there is going to be continued regulation of the media, it is inappropriate to apply different standards to material published online and offline.

The failure of self-regulation?

The Report notes that ordinarily the preferred regulatory option of an industry including the media is self-regulation.⁸ However, in the case of newspapers, self-regulation by a code of ethics and through the Australian Press Council (APC) has, according to the Report, proven ineffective. The reasons given for this include the characteristics of the industry identified above under 'market failure', and in particular widespread distrust of the media. According to the Report, doing nothing would simply perpetuate a self-regulation system that is only marginally effective and has not adequately measured up to community standards.⁹

The Report therefore makes two major recommendations.

The News Media Council

The first, and most controversial recommendation, is the establishment of an independent statutory body called the News Media Council, to take over the functions of the APC and some functions of the Australian Communications and Media Authority. The News Media Council would:

- enforce standards of conduct based on existing codes developed by the media or in consultation with the media, including non-binding aspirational principles and more detailed standards, with minimum standards of fairness and accuracy;
- regulate current affairs coverage on all platforms: print, online, radio and television;
- have statutory powers to investigate contraventions; and
- have the power to require a news media outlet to publish an apology, correction or retraction.

According to the Report, doing nothing would simply perpetuate a self-regulation system that is only marginally effective and has not adequately measured up to community standards.⁹

The Report cites the likely benefits of statutory regulation through the News Media Council as:

- an independent and transparent body charged with hearing complaints about wrongs perpetrated by the media;
- improved journalistic standards
- improved accountability of the media to its audience;
- timely and efficient treatment of complaints; and
- enhanced flow of information.

The Report and the final report of the Convergence Review make similar findings about the need for platform-neutral regulation of news content and standards in journalism. However, the reports differ primarily in the way they approach the question of the degree of regulation. While the Convergence Review agrees with 'much of the analysis and some of the findings of the Independent Media Inquiry' in its final report, it 'recommends an approach based on an industry-led body for news standards' rather than a statutory body.¹⁰ Despite the significance difference in the nature of the regulatory body, the fact that both reports recommend platform-neutral regulation of news and commentary suggests that aspect of the recommendation could be adopted in some shape or form.

At first blush, the ability of the proposed News Media Council to develop standards of conduct and investigate contraventions of those standards and order the publication of corrections seems similar to the ACCC's power to issue infringement notices. Both processes hand significant power to the regulators to determine if there has been a breach of a legal standard, and to impose penalties on entities in breach; a function traditionally given to the judiciary and later extended to tribunals and other quasi-judicial bodies. While the proposed power of the regulator would be subject to judicial review, which is generally available in respect of decisions of that kind, some will argue it is another example of a regulator being 'judge, jury and executioner'.

4 Twentieth Century Fund, A Free and Responsive Press: The Twentieth Century Fund task force report for a national new council (Century Foundation Press, 1979) 3.

5 The Report, above n 2, section 9.

6 The Report, above n 2, 283.

7 Any remaining doubt about this has been removed by the High Court judgment in Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 (20 April 2012).

8 The Report, above n 2, 209.

9 The Report, above n 2, 285.

10 Commonwealth of Australia, Convergence Review: Final Report, (2012) 153 (Appendix I).

Productivity Commission Review

The second major recommendation in the Report is that, within two years, the Productivity Commission conduct an inquiry into the health of the news industry and whether there is a need for government support. The Report also recommends that the inquiry consider the policy principles on which any such support should be given to both maximise effectiveness and eliminate any chance of political patronage or censorship.¹¹ This recommendation offers the government an opportunity to defer making any significant decisions on the state of the media industry and provides an easy 'out'; ordering a further inquiry.

The Report has also been criticised for not providing sufficient or compelling evidence to justify increased regulation.

Other recommendations

The Report also makes a number of other recommendations for future action, including:

- monitoring the adequacy of news services in regional areas;
- providing more funding to the Community Radio Content Development Fund (administered by the Community Broadcasting Foundation) to assist community radio stations in local regional communities to establish and maintain a news website dedicated primarily to the reporting of local news;
- strengthening the news capacity of the ABC in the event that a gap emerges in investigative and public service journalism from reduced efforts of newspapers and other media;
- creating incentives for private and philanthropic investment in news, such as allowing philanthropists to claim a tax deduction for a portion of donations for the establishment of new not-for-profit news ventures and funding of their operations;
- providing subsidies to investigative and public interest journalism; and
- subsidising the professional development of journalists by providing education funding. An example given by the Report is the establishment of a Centre for Investigative Journalism at a tertiary institution, or as a collective scheme at several tertiary institutions.

Given the varying roles the media must fulfil, it is unsurprising that some of these recommendations seem at odds with the hard-core economic rationale for reform based on market failure identified elsewhere in the Report.

Response

The response by journalists to the Report has been generally negative, with a number of common criticisms.

Erosion of the 'fourth estate'

One of the recurring criticisms is that the proposed News Media Council, would be Government-funded. Many in the industry maintain that the media – and particularly the news media – must be allowed to remain entirely independent of Government if it is to fulfil its function of questioning and challenging political decisions and public processes. Government funding of an industry regulator would, it is argued, limit the media's power to fulfil this mandate and is inconsistent with the notion of a free press.

Perhaps unsurprisingly, many journalists believe that instead of creating a new regulator, the existing APC should remain. They argue that the APC has successfully represented the interests of the public in acting on complaints but could be made more effective with better funding.

Lack of evidence

The Report has also been criticised for not providing sufficient or compelling evidence to justify increased regulation. The Report draws on a range of polls and reports which indicate that the public no longer holds the media in high regard. Journalists have responded that there is no evidence that public esteem of the media is lower now than it has been in the past.

Regulation of online content

The proposed extension of regulation to online media has also been subject to criticism. The proposed threshold at which online news sites, including blogs, become subject to scrutiny by the News Media Council is 15,000 hits per year. This threshold is criticised as arbitrary and as clearing the way for government-funded action against amateur website operators who comment on news and current affairs and who generate as few as 42 hits per day. In contrast, the Convergence Review proposed that a threshold for regulation of media organisation is set initially at 500,000 monthly users and specifically intended to exclude user-generated content including blogs.¹²

A positive response

While most commentary on the Report has been negative¹³, there have been several positive responses which argue that the Report has successfully provided for the establishment of an informed, unbiased third party regulator, which will likely improve news media.¹⁴ These commentators argue that the proposed News Media Council is not intended to increase the power of the government or impose some form of censorship, rather it is intended to make the news media more accountable, to those covered in the news and to the general public.

Conclusion

While the Report's recommendations may be controversial, they clearly reflect a great deal of thought and consideration of evidence on the part of the authors. The recommendations should therefore be given careful consideration, particularly in a world where convergence of platforms and media surely makes the challenge of self-regulation even greater than it was in a traditional print media world. Of course, Government-funding brings risks, but regulators such as the Australian Securities and Investments Commission and the ACCC provide ample evidence that independence can be preserved if the Government chooses to go down that path.

The Report's recommendations will need to be considered with the recommendations made by the Convergence Review. However, the coincidental timing of the two reports should not mean that the Convergence Review simply supersedes the Report before adequate attention is given to it by regulators, the industry and the public. Analysis of both reports should lead to a measured and thoughtful policy response to the future regulation of the media in a converged and information-hungry world.

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An earlier version of their article 'How do you solve the media puzzle' can be found on the Corrs website at <http://www.corrs.com.au/publications/corrs-in-brief/finkelstein-report-how-do-you-solve-the-media-puzzle>.

¹¹ The Report, above n 2, 11.

¹² Convergence Review Final Report above n 1, 12.

¹³ 'Separation is Crucial', The Mercury, 3 March 2012; David Crowe, 'Media Fears for Freedom as Watchdog Unleashed', The Australian, 3 March 2012; 'Media Inquiry a Case of Bad Regulation' The Australian Financial Review, 5 March 2012; Jennifer Oriel, 'Truth Falls Victim to Finkelstein', The Australian, 28 March 2012.

¹⁴ Sam North, 'Finkelstein's 'monster' not so big and scary', The Sydney Morning Herald, 13 March 2012; Rodney Tiffem, 'Media Review Gets Unfairly Bad Press', The Australian Financial Review, 20 March 2012; Joel Fitzgibbon, 'Finkelstein's Media Proposals are Modest and Sensible', The Australian, 22 March 2012.