By Dianne Nicol and Jessica Lyndon

Media regulation in Australia

A free press is indispensable in facilitating information flows between citizens and government.[1] The High Court has explicitly recognised that disseminating news and information is vital to the maintenance of a free and democratic society.[2] However, with this freedom comes responsibility to meet fundamental standards of fairness, accuracy, truthfulness and transparency.[3] Over the past two years, there has been extensive debate in Australia and internationally about whether the media should be regulated to ensure compliance with these standards and, if so, what form this regulation might take.

Any regulatory intervention to maximise compliance with media standards must be balanced against the political consequences of strict oversight, particularly interference with freedom of the press. This article considers recent recommendations for reforming the framework for regulating the media in Australia resulting from inquiries by two separate committees, with a specific focus on regulating content.

In February 2011, the Gillard government announced

the establishment of a committee to review Australian media and communications regulation (the Convergence Review Committee). The Committee was primarily charged with assessing the effectiveness of the current regulatory framework in reaching appropriate policy objectives at a time when the print, broadcast and electronic media are rapidly converging. The terms of reference covered a broad range of issues, including media ownership laws, media content standards, the ongoing production and distribution of Australian and local content, and the allocation of radio communications spectrum.[4]

In September 2011, while the Convergence Review Committee was still deliberating, Senator Conroy announced an independent inquiry into the media (the Independent Media Inquiry) in the wake of the *News of the World* scandal in the UK. The Honourable Ray Finkelstein headed this inquiry. The terms of reference were to assess: the effectiveness of the current media codes of conduct in Australia, in light of technological change; the impact of this change on business models and quality journalism; methods of strengthening the independence of the Australian Press Council (APC); and any related issues in the public interest.

The Independent Media Inquiry Report was released in February 2012, followed by the Convergence Review Committee Report in April. The Independent Media Inquiry Report's key recommendation was that the current, largely self-regulatory regime should be replaced by a more stringent statutory regime for regulating media content, based on the notion of 'enforced self-regulation'. The Convergence Review Committee, on the other hand, recommended a two-tier model based on self-regulation with an overseeing statutory body.

PROBLEMS IDENTIFIED BY THE INDEPENDENT MEDIA INQUIRY AND THE CONVERGENCE REVIEW COMMITTEE

The print media are currently self-regulated by the APC in Australia, whereas broadcast news and commentary are co-regulated through codes of conduct registered by the Australian Communications and Media Authority (ACMA). Online news media are largely unregulated. The APC has existed for four decades as a private organisation that 'self-regulates' the media. Structurally, it is closely associated with the industry, membership is entirely voluntary and it is funded by members. The APC complaints process is not supported by legislative powers of sanction.[5] Thus, historically it has been seen as a weak organisation, with little power to enforce news standards for fear of members becoming disenfranchised.[6] In addition to the APC requirements, journalists who are members of the Media Entertainment and Arts Alliance (MEAA) must abide by standards set down in its codes of practice.

The ACMA monitors the broadcasting industry and has a range of functions under the *Broadcasting Services Act* 1992 (Cth) (BSA). The BSA sets the structural foundations for the co-regulatory regime, with a mixture of industry codes of practice, standards determined by the ACMA and licence conditions setting the standards of news and commentary. The primary responsibility for upholding news standards and handling complaints rests with the broadcasters themselves.[7]

The clear conclusion reached by the Independent Media Inquiry was that self-regulation by the press has not been successful in dealing with irresponsible reporting or ensuring media accountability.[8] While it was acknowledged in the final Report that self-regulation is cheap, quick and efficient, the lack of APC enforcement powers led the Inquiry to conclude that it should be replaced by a statutory regime with punitive powers.[9] In addition, the Inquiry drew attention to APC's limited mandate, which extends only to print publications and their associated online outlets, but not independent online outlets.[10] The Inquiry questioned the appropriateness of applying two different standards to online and offline publishing of the same news stories.[11]

Both the Independent Media Inquiry and, to a greater extent, the Convergence Review Committee examined the role of the ACMA in regulating broadcast media content.[12] The current arrangements under s123 of the BSA mandate that radio and TV broadcasters develop and maintain codes of practice that reflect community standards. These codes are required to cover fairness and accuracy of news and current affairs and to include complaints procedures.[13] The ACMA is required to investigate all valid complaints unless >>

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it is satisfied that the complaint is frivolous, vexatious or not made in good faith, or has reason to believe that the complaint was made for the purpose of frustrating or undermining the effective administration of the scheme for regulating the broadcast media.[14]

The Convergence Review Committee proposed ten principles to guide media regulation, the first of which is most relevant to the present discussion: 'Citizens and organisations should be able to communicate freely and, where regulation is required, it should be the minimum necessary to achieve a clear public purpose.' The Committee was also critical of the complex arrangements for regulating broadcasting services, seen as unnecessary with the increased availability of broadband services, and recommended simplification. It also supported the recommendation for harmonising standards between offline and online news and commentary.[15]

REGULATORY THEORY

While the two reports both addressed the need for a platform-neutral regulatory structure, the reforms suggested were different. The proposed regulatory frameworks are analysed here within the context of regulatory theory, with specific focus on the model of responsive regulation created by John Braithwaite and Ian Ayres. While the Independent Media Inquiry dedicated a whole chapter[16] to the discussion of self-regulation and theory, the Convergence Review Committee was largely silent on this topic.

Regulatory theory indicates that regulation can range from government control or command through to self-regulation, but there is not always a simple dichotomy between these extremes.[17] Government must make an informed choice to engage with the media in a controlling manner, or allow self-regulation in a structured sense, with 'hybrid' or 'enforced self-regulation'.[18] The APC sits at the self-regulatory end of the spectrum. Co-regulation exists in various forms, and demonstrates the current position of the ACMA.

Braithwaite's 'responsive regulation' theory is described in the form of two pyramids. The pyramids represent levels of intervention and enforcement, the base of the pyramid reflecting the minimal intervention and enforcement like self-regulation, ascending to more interventionist regulation and strict enforcement, from co-regulation to command and control. Where the lower level responses have not had the desired outcomes, regulatory responsiveness mandates that the next step is to ascend the pyramid, employing a greater degree of government intervention.[19]

Braithwaite's regulatory pyramid has self-regulation at the base, ascending to enforced self-regulation; command regulation with discretionary punishment; and command regulation with non-discretionary punishment.[20] The second pyramid focuses on enforcement, with escalating sanctions for non-obedience. Braithwaite contends that not only must these enforcement steps exist, the threat of ascending sanctions must be perceived as real by industry for the enforcement and regulatory pyramids to function correctly.

The Australian print media currently self-regulates, reflecting the base of Braithwaite's regulatory pyramid. It was noted by the Independent Media Inquiry that self-regulation is advantageous as it is the least burdensome on the industry and the government, and thus taxpayers.[21] The paradox of the pyramid is that the capacity to ascend to greater intervention means most regulation can be driven down to the deliberative base,[22] as the strengths of actors involved is built upon.[23] Self-regulation as the lowest tier draws upon the expertise of the industry and is flexible and adaptable,[24] and industry compliance is more likely when regulation is seen as fair.[25] Unfortunately for the Australian media, true self-regulation with little government intervention has proved ineffective.[26]

Braithwaite has noted that regulatory frameworks must be responsive.[27] But it may be a mere presumption that a low intervention level is the best starting point.[28] Self-regulation can work well during the period of upswing into virtue (that is, news standards are at a high level), but fails during the descent to vice (that is, declining news standards). In phases of vice, there is a requirement for tougher government-led enforcement.[29] The role of the regulator, then, is to elicit and strengthen 'change talk' in the industry.[30]

The enforcement pyramid relates to the sanctions that the regulator can apply for breaches, each tier acting as a persuasion for compliance with regulation.[31] The pyramid operates on assumptions about regulated actors: virtuous actors respond to restorative justice; rational actors respond to deterrence; incompetent or irrational actors respond to incapacitation. Braithwaite has noted empirical evidence that 'sometimes punishment works and sometimes it backfires, and likewise with persuasion'.[32] Braithwaite argues that compliance is most likely when an enforcement pyramid is explicit,[33] with a number of sanction levels[34] that are responsive to the degree to which co-operation with the regulation is lacking. Responses should align with the nature of the actor, or with failure at a lower tier. Rational actors are channelled down the pyramid[35] when self-punishment has been successful.[36] The APC (and, to a lesser extent, the ACMA) lacks this characteristic, being largely a 'toothless tiger'. The APC's ineffective enforcement powers may not even satisfy the lowest persuasion level of Braithwaite's enforcement pyramid. The unique position of the media as watchdogs and gatekeepers dictates that media players must participate in informing public opinion, in order for the active deterrence aspect of a sanction pyramid,[37] and thus the threat of adverse public opinion, to be effective.

REFORM RECOMMENDATIONS

If self-regulation is not operating effectively in the Australian media, then, observing Braithwaite's model, it is necessary to ascend the regulatory and enforcement pyramids. The major reform suggested by the Independent Media Inquiry was the abolition of the APC and its replacement with a News Media Council (NMC), a statutory body, which would use enforced self-regulation to cover a broader field of media providers.

Alternatively, the Convergence Review Committee suggested simplification of existing legislation and the creation of an industry-led 'News Standards Body' (NSB), together with an over-arching statutory communications regulator. The table below shows the differences and similarities between the two models, taking a pro-regulatory and de-regulatory approach respectively.

	Independent Media Inquiry: 'News Media Council'	Convergence Review Committee: News Standards Body and Communications Regulator
Regulatory form	Enforced self-regulation with NMC as a statutory authority.	Industry-led self-regulatory NSB with supervision by new communications regulator.
Purpose	Set and enforce standards for news media across all platforms; educate media and public on standards; investigate and resolve complaints.[38]	Similar to NMC, subject to orders to investigate by the communications regulator.
Jurisdiction over content-providers	Low threshold – online publishers with 15,000 hits per annum.[39] Jurisdiction over ABC and SBS for news and commentary (currently overseen by the ACMA).[40]	High threshold – the 15 top content service-providers (currently the major TV broadcasters and newspaper publishers) No jurisdiction over the ABC and SBS.
Membership	Mandated, with non-news entities able to 'opt in' to the system.	Mandated for top 15; opt-in for others.
Funding	Fully government funded, free from government influence.[41]	By members – majority view. Government funding – minority view.[42]
Remedial functions	Legislative complaints procedures and enforcement mechanisms.[43] Complainant must waive legal rights to have complaint investigated.[44] Where media outlets do not abide by NMC rulings, the complainant or NMC may seek an order for compliance from a court with jurisdiction.[45]	Power to order members to promptly publish findings,[46] a range of contractual remedies and sanctions.[47] Complainant's legal rights and remedies retained.[48]
Implementation	Implementation of enforced self-regulation immediately.	Direct statutory mechanisms to be considered only after industry is given the opportunity to develop and enforce a cross-platform self-regulatory regime.
Reliance on other bodies	NMC would be responsible for all news and commentary media issues. No deference to other bodies. NMC would have a statutory basis, but no government intervention.	NSB can refer to the new communications regulator (a body of unclear scope) where there are persistent and serious breaches; and regulator can order the NSB to undertake investigations. The regulator has discretion to approve industry codes, and has direct enforcement powers.

The Independent Media Inquiry described the NMC as a form of 'enforced' self-regulation, retaining the benefits of self-regulation. However, some of the finer details of the Inquiry's recommendations put the NMC at a somewhat higher level on the regulatory pyramid. For example, although the intention expressed by the Inquiry was that governing members would be chosen by an independent body, government influence may still be implicitly exercised over selection of the members.[49] In addition, the NMC would be responsible for setting standards of conduct for news media,[50] rather than leaving this task to industry or individual codes of conduct, suggesting a significant move away from 'self'-regulation. The Inquiry also recommended stronger legislative complaints procedures and enforcement mechanisms.[51]

The Convergence Review Committee recommended a somewhat smaller step up the regulatory and enforcement pyramids. A dual-tiered self-regulation and enforcement model was suggested, rather than a statutory body,[52] which the Committee considered a position of 'last resort'.[53] The new communications regulator would cover all compliance >>

matters, except for news and commentary which would be covered by the industry-led NSB and industry codes. The regulator would operate at arm's length from government direction, with excepted matters.[54] The independent self-regulatory NSB established by industry would operate across all media and absorb the functions of the APC and ACMA, enforcing a media code aimed at promoting fairness, accuracy and transparency in news reporting.[55] Self-regulation was chosen because it could be implemented more effectively, produce more immediate results, and have potential for better long-term outcomes.[56] But it was conceded that the NSB model was a transitory pilot program, and further legislative intervention may be required.[57]

RESPONSES TO THE REFORM RECOMMENDATIONS

The somewhat conflicting recommendations of the two reviews, together with the growing chorus of concerns by media agencies about incursion on the freedom of the press following the release of the reports, no doubt placed the government in a difficult political and policy position. A response was obligatory, given the significant investment in the reviews. However, a lack of exposure to the gravity of breaches of ethical standards (and possibly legal obligations) as was being seen in some sectors of the UK press, meant that there was less public pressure to increase regulatory intervention in Australia, making cross-party support unlikely.

Senator Conroy introduced a package of six bills amending media laws into the Australian parliament on 14 March 2013.[58] Of the six, four directly related to the regulation of content. The key feature of this aspect would have been the creation of a Public Interest Media Advocate (PIMA), with the primary task of declaring a body corporate to be a news media self-regulatory body. Although certain eligibility requirements would have been attached, the impact of the proposed changes to the existing self-regulatory framework for print media content would have been far more modest than recommended by either review. Even so, following vehement opposition by leading figures in various print media organisations and lack of support by independent and Greens members of parliament (whose vote was crucial given the minority status of the government in both Houses of Parliament), the government decided not to proceed with the four content bills.

This occurred against the backdrop of rapid developments in the online media environment and growing concerns internationally, particularly in the UK, about declining media standards. The UK inquiry into the media by the Right Honourable Lord Justice Leveson recommended an even more stringent regulatory regime than either of the Australian reports.[59] Yet, within a matter of days following the introduction of the package of media reform legislation in Australia, the UK Conservative, Liberal Democrat and Labour parties all agreed to the Leveson recommendation of a Royal Charter on Self-Regulation of the Press.[60]

Lord Justice Leveson recommended the establishment of an independent regulatory body headed by an independent board. He envisaged that the board would be responsible for setting standards, hearing individual complaints, taking an active role in promoting high standards and providing for quick and inexpensive arbitration.[61] In particular, the board would be responsible for developing a standards code and internal governance processes.[62] The regulatory framework would be implemented by legislation but would impose an explicit duty on the government to protect and uphold press freedom.[63] The Report also included a recommendation that the regulatory body should be overseen by a 'recognition body', which would certify that the regulatory body satisfies the requirements of law.[64] Lord Justice Leveson further recommended that the regulatory body should have remedial functions including sanctions for poor press behaviour, such as ordering printed apologies, but no power to prevent publication of materials, excepting financial sanctions for systemic breaches.[65] Membership would not be mandatory, but merely incentivised by a 'kite mark'[66] to indicate trusted journalism, and arbitration by the board would be a 'fair, fast and inexpensive' alternative to court-based dispute resolution for non-members.[67]

In light of these recommendations, it seems clear that Lord Justice Leveson deliberately intended to take a significant step up the regulatory pyramid, which suited the gravity of transgressions in the UK media landscape, and explains why the recommendations were ultimately accepted by the three major political parties. For the most part, the perceived Australian media 'problem' stems from power imbalance and political reporting, rather than press criminality or corruption.[68] Perhaps, then, the lessons to be learned from the UK situation are limited. In this country, even the smallest steps up Braithwaite's pyramids appear to be steps too far for the press and for many politicians.

CONCLUSION

The Independent Media Inquiry and Convergence Review Committee suggested different ways of developing regulatory reform of the media in Australia. Both concluded that the existing system, at least for print media, is not effective, as there is no real risk of sanction of powerful media entities. Thus, it should have been simply a matter of degree about what action to take: a stronger approach recommended by the Independent Media Inquiry Committee, or a more layered approach as endorsed by the Convergence Review Committee. Neither set of recommendations found favour with the government. Rather, a smaller step up Braithwaite's regulatory and enforcement pyramids was attempted, but even this was not accepted by the media or parliamentarians.

The challenge in the evolving new media environment is to create a dynamic regulatory scheme that will be adaptable to change. Media standards should reflect community standards and the expectations of the Australian public.[69] Regulation as it stands may be deficient, and news standards appear to be in decline, but Australians may not be ready to exhaust self-regulation as the key regulatory measure, and do not wish to risk getting stuck with statutory measures that cannot be reversed. A knee-jerk response based on the hype of urgency is not the solution. The problems are visible and serious enough to warrant well-considered higher steps up the regulatory and enforcement pyramids sometime soon. But

perhaps all we can hope for in the foreseeable future in Australia is that media organisations, of their own initiative, raise their standards of ethical operation. ■

This article has been peer-reviewed in line with standard academic practice

Notes: **1** See, for example, the Honourable Ray Finkelstein QC, assisted by Matthew Ricketson, *Report of the Independent Inquiry into the Media and Media Regulation* (2012) (Independent Media Inquiry Report), [2.2]. **2** *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 382 per Toohey and Gaudron JJ. **3** See, for example, Lara Fielden, *Regulating for Trust in Journalism: Standards Regulation in the Age of Blended Media* (Reuters Institute for the Study of Journalism, 2011). **4** See Australian Government, *Convergence Review Final Report* (2012) (Convergence Review Report), Executive Summary, vii. **5** David Rolph, Matt Vitins, Judith Bannister, *Media Law: Cases, Materials and Commentary* (Oxford, 2010), [3.4.1.1]. **6** Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Australian Press Council; 1996) http://www.presscouncil.org.au/uploads/52321/ufiles/press-files/whither-the-australian-press-coucil.pdf. **7** *Ibid*, [3.2.3]. **8** Independent Media Inquiry Report [11.12]. **9** *Ibid*, [11.77]. **10** *Ibid*, [8.94]. **11** *Ibid*, [11.13]. **12** *Ibid*, Annexure G. **13** *Broadcasting Services Act 1992* (Cth), ss123(2)(a); (c); (h). **14** Convergence Review Report, 144. **15** Independent Media Inquiry Report [11.13]. **16** *Ibid*, [10.1]. **17** *Ibid*, [10.14]. **18** John Braithwaite and Ian Ayres, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford 1992) 106-7. **19** Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What it Cannot* (Edward Elgar, 2011), 10. **20** John Braithwaite and Ian Ayres, see note 18 above, 39. **21** *Ibid*, 38. **22** John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *UBC Law Review* 476, 505. **23** *Ibid*, 480. **24** Independent Media Inquiry Report [10.24]. **25** John Braithwaite, see note 22 above, 486. **26** Failures of the self-regulatory model are canvassed in detail in the Independent Media Inquiry Report [11.3]-[11.16]. **27** John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008), 87. **28** John Braithwaite, see note 18 above, 493. **29** *Ibid*, 481. **30** *Ibid*, 497. **31** *Ibid*, 481. **32** John Braithwaite, see note 27 above, 90. **33** John Braithwaite and Ian Ayres, see note 18 above, 35. **34** *Ibid*, 36. **35** John Braithwaite, see note 22 above, 481. **36** *Ibid*, 487. **37** *Ibid*, 488. **38** Independent Media Inquiry Report [11.52], [11.56]. **39** *Ibid*, [11.67]. **40** *Ibid*, [11.70]. **41** *Ibid*, [11.54]. **42** Convergence Review Report, 155. **43** Independent Media Inquiry Report [11.70]. **44** *Ibid*, [11.70]. **45** *Ibid*, [11.77]. **46** Convergence Review Report, xvii. **47** *Ibid*, 156. **48** *Ibid*, 156. **49** Independent Media Inquiry Report [11.48]. **50** *Ibid*, [11.52]. **51** *Ibid*, [11.70]. **52** Convergence Review Report, Executive Summary, x. **53** *Ibid*, xiv. **54** *Ibid*, xiii. **55** *Ibid*, xvii. **56** *Ibid*, 155. **57** *Ibid*, 68. **58** Public Interest Media Advocate Bill 2013 (creating an independent statutory office of the Public Interest Media Advocate (PIMA)) (not proceeded with); News Media (Self-regulation) Bill 2013 (principally providing for PIMA to declare a specified body corporate as a news media self-regulation body (not proceeded with); Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 (principally introducing public interest provisions into broadcasting legislation) (not proceeded with); News Media (Self-regulation) (Consequential Amendments) Bill 2013 (providing that the media exemption from the *Privacy Act* 1988 (Cth) only applies to a news media organisation that is a member of a news media self-regulation body) (not proceeding); Television Licence Fees Amendment Bill 2013 (passed by both houses on 20 March 2013); Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013 (relating to broadcasting licences, Australian content and other matters (passed by both houses on 20 March 2013). **59** The Right Honourable Lord Justice Leveson, *An Inquiry into the Culture, Practice and Ethics of the Press: Report* (2012) (the Leveson Report). **60** Draft Royal Charter on Self-regulation of the Press (2013), available at: https://www.gov.uk/government/publications/leveson-report-draft-royal-charter-for-proposed-body-to-recognise-press-industry-self-regulator. **61** Leveson Report, 1759. **62** *Ibid* 1762-63. **63** *Ibid*, 1780-81. **64** *Ibid*, 1775-76. **65** *Ibid*, 1766-68. **66** *Ibid*, 1796. **67** *Ibid*, 1806. **68** Brian McNair, 'UK and Australian Media Reforms Are Very Different Beasts', 19 March 2013, http://theconversation.com/uk-and-australian-media-reforms-are-very-different-beasts-12900?utm_medium=email&utm_campaign=Latest+from+The+Conversation+for+20+March+2013&utm_content=Latest+from+The+Conversation+for+20+March+2013+CID_e0241434e9e6ae6a07709a4c5bf653b3&utm_source=campaign_monitor&utm_term=UK%20and%20Australian%20media%20reforms%20are%20very%20different%20beasts. **69** Convergence Review Report, Executive Summary, viii.

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