



FUTURE OF PUBLIC INTEREST JOURNALISM
SUBMISSION TO THE SENATE SELECT COMMITTEE
CENTRE FOR MEDIA TRANSITION, UTS

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Introduction

Thank you for the opportunity to contribute to this inquiry. Some of the comments in this submission are included in remarks made by Professor Fray at public hearings on 17 May 2017 and in subsequent responses to Questions on Notice from Senator Xenophon.

The Centre for Media Transition is currently being established at UTS. A joint initiative of the Faculty of Arts and Social Sciences and the Faculty of Law, it will work across disciplines to explore and develop responses to the dramatic and ongoing movements wrought by digital disruption to the media industry, the role of journalism in Australian democracy, the implications and potential of evolving technology, and the business models that support a diverse and prosperous industry.

As Co-Directors of the new centre, our remarks below cover both industry practice and regulatory arrangements. Comments on the impact of new participants on journalism in Australia are followed by observations on some of the specific areas of intervention embraced by the terms of reference.

Impact of search engines, social media and disinformation on journalism in Australia

The terms and conduct of this inquiry give rise to the question, what is journalism for? There are many definitions. Journalism textbooks are full of them. But perhaps one of the most pertinent comes from the US media scholar, Jay Rosen¹, who cites the ‘special power that journalism has to enlarge our sense of the present so that it includes the public world’.

He goes on:

Journalism becomes a powerful force in the culture when it gains a kind of authority over the present, persuading us that what is happening “out there,” over the horizon of our personal experience, is happening to us and must be followed. When it works, journalism refutes an existence that has grown too private.

We mention this because underlying your inquiry is the concern that journalism’s capacity to enlarge the private world – and in so doing, serve the public — is under threat.

These threats range from the amorphous, fashionable and nefarious phrase of ‘fake news’ – a beast that may, hopefully, be just a passing fancy of presidents and politicians — to the serious and ongoing structural issues that fly with great force from digital disruption, in particular the undermining of journalism’s business model.

Of course, the two are related: the engines of disruption have allowed faked news to spread across the internet, delivering to its authors either the perverse satisfaction of having interrupted democratic discourse with lies or monetary compensation via social platforms in part blinded from the value of facts and authenticity. In some cases, they have gained both.

Perversely, perhaps, there have been immediate benefits for journalism: those same platforms have rapidly embraced facts and verification and moved against purveyors of fake news; journalism brands known and respected for their reporting, values and ethics have, in the face of a president calling fake news on regular basis, gained new readers and followers.

This is particularly so in the United States. It remains to be seen whether the so-called Trump Bump crosses the Pacific. But it is possible that 2017 may mark a positive turning point for journalism and its relationship with the digital universe: it may assist more people to actually know – or remember – what journalism is for.

But this is not to ignore the realities before us. The transition from analogue to digital is brutal and ongoing, as several of your witnesses have noted. Is there a bottom? Just how many journalists –

¹ Jay Rosen (2013), ‘The “Awayness” Problem’, *Columbia Journalism Review* (online), September/October 2013. http://archives.cjr.org/cover_story/the_awayness_problem.php.

how much native journalism — does this country need or could do without? What will be the impact of, say, automation and smart machines? What is worth holding on to and spending public money to keep? What not? And who, if not the public, should pay? These are massive questions and if it were possible to freeze time, it might be possible to seek lasting answers and solutions. But digital time moves fast.

Five years ago, for instance, it was widely thought (certainly hoped) that mass redundancies at Fairfax Media would be sufficient to put *The Sydney Morning Herald* and *The Age* on a road to recovery. Now, as we write, another 125 journalists are leaving the company; since 2012, there have been redundancies approximately every 18 months or so at Fairfax. Other publishers have been doing much the same though not as publicly. Who would now be brave enough now to call time on Fairfax — or industry — downsizing?

It may be convenient and tempting to blame Facebook and Google for the industry's predicament — and suggest they fix it in some way. As we say later, it would be incorrect to ignore the impact social platforms are having on the gathering, distribution and finances of news media. But it would be pure folly to use them as scapegoats or fail to recognise that millions of eyeballs find journalism everyday via those platforms.

The internet changed the business model of journalism because it shifted control away from publishers to audiences and the platforms that serve them. The money has gone with it. News publishers could (perhaps, even still could) have created such platforms and certainly formed closer, service-oriented relationships between themselves and their audiences, recognising as a primary tenet that it is now the audience in the box seat.

Failure to listen to what audiences were saying and wanted has been one of the great sins of journalism in the digital age. There are many reasons for this, not least because of the way journalism behaves itself as an elite. It is no wonder that trust in media is now at low ebb. Like politicians, journalists are seen by many of their 'former audiences' (to quote Rosen again²) as part of the problem, not the solution.

There are signs of redress. But they have been slow coming. It is unreasonable and illogical to blame social platforms for that. Publishers and broadcasters, their boards and their employees, were well suited for the good times, when they had control of their audiences and the barriers of entry to their worlds were high. They have largely been less than nimble when they did not have control and everyone had the tools of publishing and broadcasting via Facebook, YouTube, Twitter and the like.

These are difficult times. But from deep within them, and with some assistance from government, there could yet spring a new media ecosystem, a system that is not dominated by, say, the ABC to the Left and News Corp to the Right. That is not to criticize either organisation rather than to restate what should be obvious: this country needs a massive dose of native media diversity. It is a welcome development to see the Guardian, Huffington Post, the New York Times and others set up shop here and employ local journalists.

But it would be even more heartening to see distinctly local outfits spring up to meet the information needs of Australians. What are those needs? Six years ago, the Federal Communications Commission in the United States issued a landmark report by Steve Waldman on the information needs of US communities.³ It may be beyond the scope of this inquiry, but we strongly urge consideration be given to understanding the information needs of Australians, across the country. It may be time for governments as well as journalists to listen more, talk less.

² Jay Rosen (2006), 'The People Formerly Known as the Audience', *PressThink* blog, 27 June 2006.
http://archive.pressthink.org/2006/06/27/ppl_fmr.html

³ Steve Waldman and the Working Group on Information Needs of Communities, Federal Communications Commission (2011). *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*.
https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

Measures to address these conditions

The proliferation of disinformation and the failure of the traditional news business model may be two aspects of the same phenomenon, there is no single solution. In fact, using the same tool to address both aspects could cause more harm. For example, the harm caused by foreign governments or others seeking to influence political views or even election outcomes might be addressed by developing more effective means for news outlets to establish their trustworthiness through membership of a credible standards and complaints scheme, whereas restricting the opportunities for scammers to profit from invented, eye-catching content may hinge on the actions of search engines and possibly consumer law.

It is useful, therefore, to separate the various options or avenues contemplated in the inquiry's terms of reference and in initial remarks from Committee members. We think they can be represented in Figure 1.

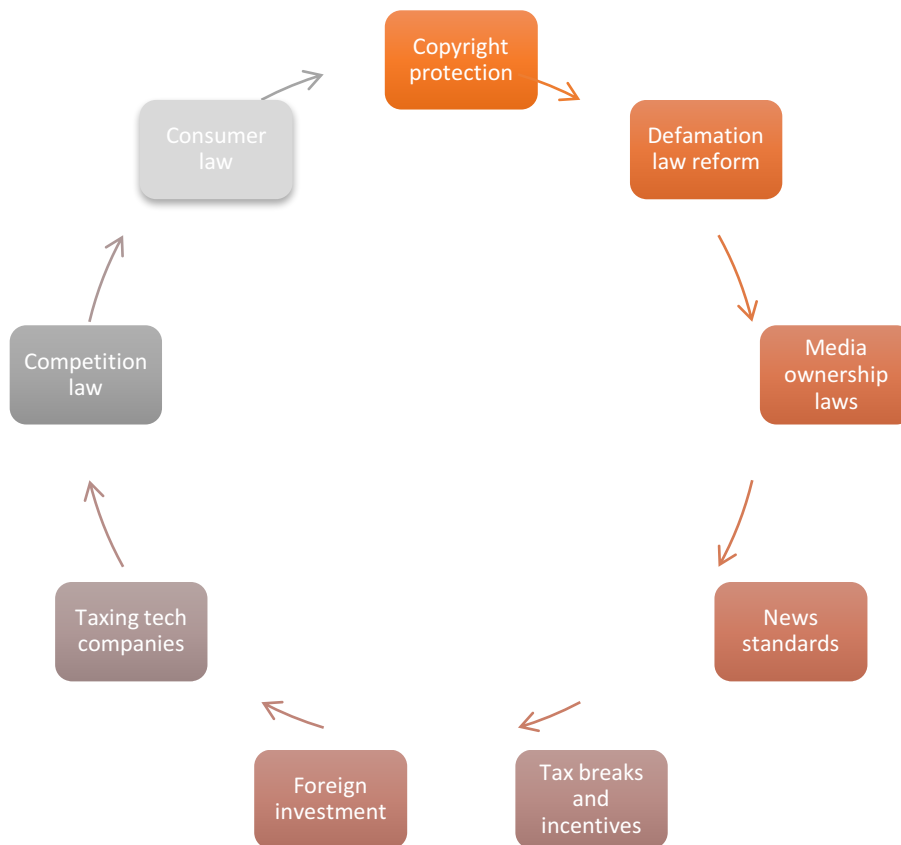


Figure 1: Potential areas of regulation

This wheel of options shows the expansive scope of this inquiry. No one is a specialist in all these areas. We make some observations below about several of these, but our principle recommendation is under 'strengthening journalism'. It concerns the means of marking out journalistic practice as an activity distinct from disinformation distributed for political ends but also from casual commentary as well as marketing and other forms of commercial speech.

We think this is more pragmatic than again attempting to directly tax the new technology platforms – whether or not they present as publishers – or to reconcile entrenched opposing positions in the copyright debate.

In any event, represented this way, the possibilities for regulation can be seen as operating in two dimensions. The first dimension is the *target* of regulation: some interventions would target multi-national tech companies; others would target local publishers, broadcasters and other content producers. The second dimension is the *approach* to regulation: some measures would strengthen

obligations through additional regulation; others would involve some level of relaxation of existing obligations or the offering of new benefits or incentives.

This relationship can be represented as follows:

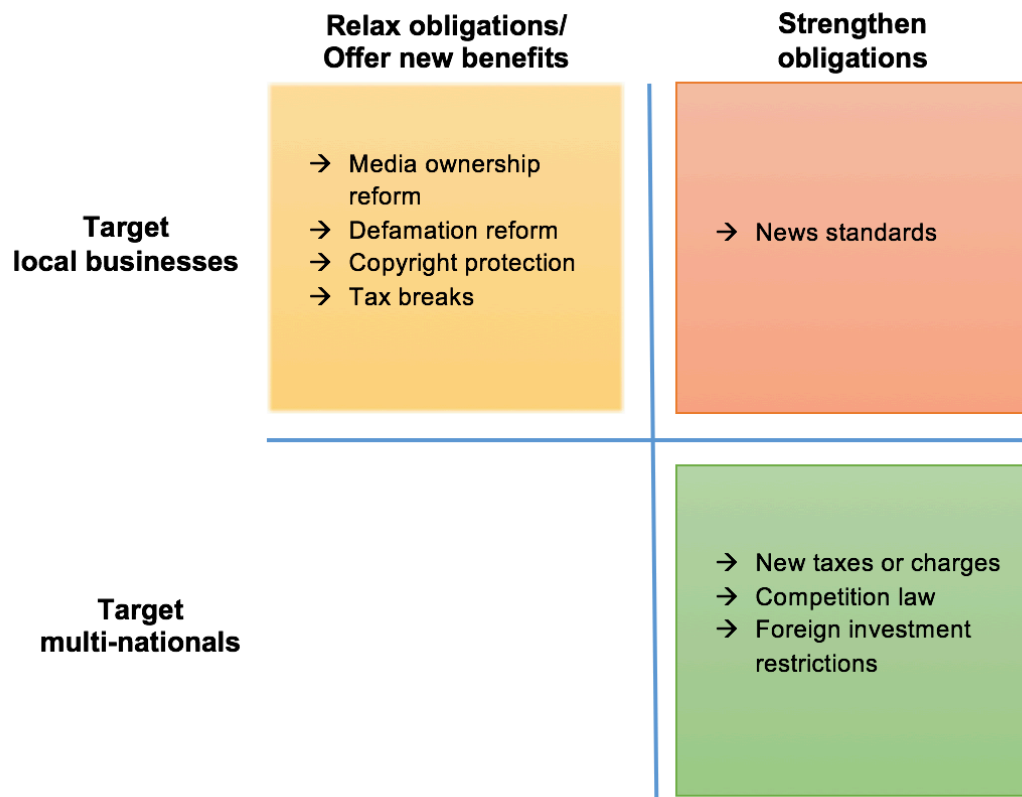


Figure 2: Dimensions of regulation

Our comments on these various measures are set out below. In summary we've formed the view that most are worthwhile interventions. However, we have reservations over the desirability as well as the effectiveness of new taxes on multinational tech companies and restrictions on foreign investment.

Imposing a new tax or levy on multinational tech companies

At the outset can we first correct the misconception that the profits made by Facebook and Google are made from or because of the distribution of news content. They are not. Google makes its money from search. Facebook, from within its 'walled garden', from friends and family connecting and sharing content, some of which is news, most of which isn't. The money that both social platforms gain directly from news (or placing advertising around it) is a relatively small percentage of their multi-million profits. We suggest you ask both companies to explain how much. Google, for instance, will tell you it makes nothing from Google News. This not to say that news is irrelevant for either company.

But if Facebook withheld the news, it would still be an exceptionally strong ecosystem of friends and family sharing. If Google withdrew Google News, consumers would still use the platform to search. Publishers would lose audience and revenue. As we noted in our answer to questions on notice, the 'Google tax' imposed in Spain on news aggregators for showing snippets and linking to

stories has, according to a study commissioned by the Spanish publishers association, done considerable damage to the industry.⁴

We are not pretending that Google and Facebook do not exercise considerable market power or that they should avoid paying their fair share of tax. The forthcoming imposition of the Diverted Profits Tax has already seen the platforms paying more tax. The so-called Netflix Tax will see the GST charged on electronic services irrespective of the legal entity providing that service. Australian consumers will ultimately pay for that, of course. In the same vein, is the committee prepared to advocate that the public, indirectly, should pay for public interest journalism?

Given the argument that taxation should be imposed in the place of value creation, and in the absence of any coherent view of what now constitutes the media industry in Australia, efforts to tax or levy social platforms would to us appear arbitrary at best. Do Google and Facebook come in the same category as the high street banks and as such, warrant their own levy? Politically, we do not see the two ideas as compatible: people don't dislike Google and Facebook. The opposite is true. Further, and on a more commercial note, these social platforms do not make super profits solely out of journalistic content. Google will tell you it makes nothing from Google News.

Perhaps that is missing the point. If there is a perceived market failure – i.e. insufficient funds to support public good journalism – we need to ask whether these platforms are to blame because of some harm they cause, or whether they are simply not contributing sufficiently to some aspect of social good.

If there is some active harm, then perhaps we need to impose a penalty to correct the situation in much the same way authorities impose fines and levies on companies that spew carbon into the atmosphere. But that requires being able to calculate the social harm to journalism of a Google search or a Facebook ad. That harm is debatable, but in any case it is beyond our capacities to calculate – and again appears to be an area fraught with misuse, unintended consequences, booby traps and endless bureaucracy.

On this approach, we therefore see no logical way or reason to impose a specific tax on Google or Facebook to fund public interest journalism.

Alternatively, if we think these companies are not causing a harm as such, but are failing to contribute in the way that others do, there may be a case for some form of levy. This is broadly the view that would inform a policy decision to require Netflix to contribute to the production (or at least the funding) of Australian 'television' drama. It requires a prior decision that the new entrant is essentially in the same game as the legacy operator – or at least that they are all now in the same game together.

The Convergence Review suggested something along these lines,⁵ and to some extent it's seen in the obligations placed on pay TV channel providers to fund Australian production through the new eligible drama expenditure scheme. This aspect of public policy will be explored as part of the current review of Australian content and children's television. There may be a more convincing case for intervention to assist local television production than for assistance of public interest journalism. Or it may be that the principles are quite similar. More work is required on this point.

Tax incentives for local companies

On the broader area of taxation incentives, there may be more of a case to assist and incentivise public interest journalism and/or innovation in the sector. We note, and draw the committee's attention to, the UK's generous (or more generous than ours) system for promoting investment in

⁴ The study, published in Spanish, is available from the *Asociación Española de Editoriales de Publicaciones Periódicas*: <http://www.aepp.com/noticia/2272/actividades/informe-economico-del-impacto-del-nuevo-articulo-32.2-de-la-lpi-nera-para-la-aepp.html>. See also the *znet* report, 'The Google News effect: Spain reveals the winners and losers from a "link tax"' at <http://www.znet.com/article/the-google-news-effect-spain-reveals-the-winners-and-losers-from-a-link-tax/>.

⁵ Convergence Review (2012). *Convergence Review: Final Report*. See Chapter 5 'Australian Content: Screen'. http://pandora.nla.gov.au/pan/126527/20120709-1616/www.dbcde.gov.au/digital_economy/convergence_review/index.html.

small to medium sized enterprises and even later stage companies. In essence, the UK deploys a wider definition of what constitutes a SME (in terms of turnover) and provides a bigger tax write-off for research and development (up to 230 per cent). For later stage companies a separate scheme delivers a 30 per cent rebate on R & D investments. For further reading, we recommend a recent article by Roman Lanis and Prabhu Sivabalan.⁶

In principle, if there is agreement on a scheme for local content in the film and television industry, there is no reason why we shouldn't do it for journalism. This is to be preferred to a tax on Google, Facebook and other aggregators which, as noted above, has major issues associated with the target companies, location, enforcement etc.

But even with tax offsets, there is a whole set of definitional issues – not just what is 'journalism' (if a site publishes cat videos and investigative journalism, is it still journalism? What is the preferred ratio of cat to investigative work?) but also practical questions about how such offsets are calculated and how they are applied.

This then raises the question of whether there needs to be an intervening agency that certifies what is and isn't journalism in the public interest. There are industry agreed standards to draw on but it may be beyond the realm of the ATO to apply them and check how they are shifting, as virtually everything else in the industry is. We would be reluctant starters to see the creation of a new body to administer and adjudicate on what is in the public interest. But there may be a case for entrusting an existing body to adjudicate and administer.

Another area for consideration, raised by several witnesses to the inquiry and no doubt in subsequent submissions, is the matter of charitable status for not-for profit journalism, in particular the potential for deductible gift recipient (DGR) status as a way of building and sustaining diversity of media voice. It is worth noting that debate about charitable and DGR is fairly characterised as having a see-saw quality in recent years.

The history of this debate is efficiently summarised by Franco Papandrea, from the University of Canberra, and needs little repeating by us here.⁷ The existence of your inquiry would indicate that the time is ripe to revisit this debate and in the name of public interest, explore ways to make DGR status easier to obtain for not-for-profit journalism. We cite, for instance, the ongoing success of *The Conversation* website, one of the few journalism enterprises to have gained DGR status in recent years. But we would add a note of care and caution.

To cite a question posed by Papandrea: is the lack of such status significantly hampering the development of a sufficiently diverse and vibrant news sector? The follow up question is, of course, what has since changed?

Along with the mastheads previously mentioned, other journalistic enterprises, some more local in origin, have joined the market, namely *The New Daily* and *The Saturday Paper*, both Australian, plus *The Mail Online* and *BuzzFeed*. These enterprises, though modest employers by comparison with a News Corp or Fairfax, are bringing with them a new level of breadth to the local market. Against this backdrop, the case could certainly be made to leave alone and let the market decide. Governments have much to do; is helping journalism one of them?

We believe more can and should be done to encourage for-profit start-up enterprises, in part via tax offsets or other forms of market incentive, as mentioned previously. But when it comes to not-for-profits and questions of charity and tax deductibility, we would support adding an overlay of overt innovation and 'public service' if not 'public interaction' as a pre-requisite.

We would, for instance, make the case for entities such as the community broadcast sector as being a 'special' place where journalism services public needs as the first and foremost agenda item. In fact, in this sector it is often the public as broadcaster. The similar level of audience-first

⁶ Roman Lanis and Prabhu Sivabalan, 'Rethinking "Small" Business Could Drive a Real Ideas Boom'. *The Conversation* 1 March 2016. <https://theconversation.com/rethinking-small-business-could-drive-a-real-ideas-boom-54550>.

⁷ Robert G Picard, Valerie Belair-Gagnon and Sofia Ranchordás (2016). *The Impact on charity and tax law/regulation on not-for-profit news organisations*. Reuters Institute for the Study of Journalism, University of Oxford/Information Society Project, Yale Law School, Yale University. See Section II National Studies: Australia. <http://reutersinstitute.politics.ox.ac.uk/publication/impact-charity-and-tax-lawregulation-not-profit-news-organisations>

journalism is emerging in other areas of the media. In the Netherlands, for instance, *Die Correspondent* uses a system of crowd funding, crowd sourcing and pro-am journalism to realise an agenda set by the public. Its founder, Rob Wijnberg, will be hosted by UTS and Sydney University later this year. In readiness of his visit, he recently sent though the following promotional blurb that, to us, rings true:

'Every day, somewhere around the world there is a conference held about the 'crisis in journalism'. Panels will talk about 'new business models' and 'digital innovation' as the path forward...What is needed is a fundamental change in the kind of information journalists provide, and fundamental new ways of producing this information. Only then are new business models and digital innovation able to take root. Because without a new journalism philosophy, innovation will be nothing more than finding new ways to keep doing the same things.'

Picking winners is a fraught business. The above quote resonates and challenges but, put into practice, how do we understand and allocate resources to 'fundamental change'? If, as we have suggested, we are at an inflection point in public journalism, then such radical thinking will need in part to be codified and embraced if the public purse is to play a part.

We suggest that having a form of direct public involvement – a level of 'message ownership' and interactivity — may be the place to start this conversation as it recognises the flat nature of the relationship between journalism and its audiences and crying need for the former to listen hard to the latter. The digital revolution has restructured of the point of engagement and its incumbent power dynamic.

Alternative selection criteria could revolve questions of media literacy and diversity of voice and access. If we start from a position that society benefits from greater media literacy, then a journalistic enterprise such as kids' newspaper, *Crinkling News*, would be a worthy object of favourable tax treatment. If a publication gave mainstream voice – and useful information – to and about marginalised groups then a similar case could be made. As we say, picking winners is tricky. But if we are seriously concerned about enhancing public good through public interest journalism in the not-for-profit space then we need to consider how current laws governing charitable and DRG status, namely the *Charities Act 2013* and the *Income Tax Assessment Act 1997* could be reformed with such goals in mind.

The link between media ownership and news standards

Traditionally, regulation has attempted to promote diversity through the prohibition or limitation of cross-media ownership. It's likely this approach is no longer sustainable if we also want sufficient capacity in local newsgathering. But it's also true that ownership was only ever a proxy for diversity.

Below we explain why changes to the media ownership laws should be supported as part of a move towards recognising the actual sources of news and current affairs in Australia and the promotion of trust in journalism through a better approach to standards of practice.

Media Reform Bill

We support passage of a media reform Bill which takes substantially the same form as the Broadcasting Legislation Amendment (Media Reform) Bill 2016 for reasons outlined in some detail in a submission made by Derek Wilding in March 2016⁸ and summarised as follows:

- Most of the concern over cross-media ownership is about the combination of commercial television and major newspapers. This arises largely from the importance of these sources as producers of journalism, their influence in the news cycle and the transition (or potential

⁸ Submission to the inquiry of the Senate Environment and Communications Legislation Committee on the Broadcasting Legislation Amendment (Media Reform) Bill 2016, and evidence to the committee at hearings held at Parliament House on 30 March 2016.

transition) of their content to online and other digital media. Yet the combination of these two platforms has been possible since the Howard government reforms of 2006-07.

- The repeal of the 'two-out-of-three-rule'⁹ rule would have a noticeable effect in the metropolitan licence areas and in some regional areas, but 'diversity' (more on this below) would also be addressed by the operation of other rules that will remain in place. The analysis conducted for the March 2016 submission showed consolidation around three major commercial media groups in most areas, along with some independent commercial media, the national broadcasters, community and non-profit media and various international sources (some of which engage local journalists).
- In the decade since the last substantial changes to the media laws, the environment has changed substantially. The downside is that advertising revenue and journalist jobs have been lost; the upside is that smaller local operations and international news sources now genuinely contribute to media diversity.

While the case for repeal of the two-out-of-three rule is now reasonably persuasive, this doesn't mean all ownership rules should be repealed or that we should stop thinking about diversity. The one-to-a-market rule for commercial television licences (s 53(2)) and the two-to-a-market rule for commercial radio licences (s 54) are the critical protections that encourage three large-scale, newsgathering commercial media groups in most markets.

The complicated 'points system' in ss 61AG and 61AH of the BSA is less successful. Under that scheme, a radio station offering syndicated programs has the same value as a commercial television station or a daily newspaper investing in local or regional newsrooms. In our view, the community would be better served by replacing this scheme with one that identifies real sources of news and information and restricts further concentration after the changes facilitated by the current reforms.

In addition to these ownership rules, there would continue to be requirements on regional commercial television and radio licensees to provide local (regional) content. We note, however, that there is no such requirement on metropolitan licensees. This was previously thought to be unnecessary. Speculation about the future of the Ten Network news service could prompt reconsideration of this aspect of broadcasting regulation. Any sharing of news services between commercial television stations or between commercial television and pay TV services will not serve the interests of public debate on issues of importance to the community. There will likely be a marked reduction in diversity. Addressing this might require amendment of the standard licence conditions which require only that a broadcaster 'contributes to the provision of an adequate and comprehensive range of broadcasting services' in the applicable licence area – not that they actually provide their own news service.¹⁰

News standards

The public interest in having strong local newsgathering organisations underpins changes to the media ownership laws, but the public interest does not end there. Instead of just deregulation, we could see this as a transition to new regulatory arrangements which emphasise the importance of trust in news and current affairs. **Removing cross-media ownership prohibitions creates an opportunity to develop a new cross-media standards system that promotes accuracy and fairness in news and current affairs across all media, including online-only media.**

Current regulatory arrangements split print and online into a different system from broadcast media, and impose different sets of standards on the same subject (for example, fairness) depending on the category of broadcasting service. Multiple sets of standards on aspects such as accuracy and fairness are unsustainable, especially if there is substantial cross-media ownership. These different sets of standards are formulated by different bodies and administered through two different complaints schemes, the Australian Press Council and the Australian Communications and Media Authority.

⁹ See ss 61AMA and 61AMB which prohibit an 'unacceptable three-way control situation'.

¹⁰ See clause 7(2)(c) of Schedule 2 to the BSA.

Readers, viewers, listeners – all consumers of media content – would benefit from one set of standards and one complaints body. Our community would benefit from widespread membership of this single standards body, including publishers who are not currently part of either system. This would make ‘fake news’ sources more easily identifiable – or at least expose them as largely unverifiable sources.

There are some serious questions of policy to be considered in developing this new system, among them:

1. To what extent is there still a statutory element? As it would be important not to impose a statutory scheme on print and online publishers, and as the industry-based scheme administered by the Australian Press Council generally works well, the cross-platform scheme should be largely industry-based. The Convergence Review committee explored this idea and included such an arrangement as part of the recommendations of its final report in 2012.¹¹
2. Can a single standards system embrace variations? This is not to suggest there should be a different principle about accuracy for a 6pm TV news bulletin and the same report appearing on its website – rather, that there could be more rigorous standards that apply to different tiers of regulation. This was the approach proposed in a report from the Reuters Institute for the Study of Journalism.¹² Under that approach, publicly-funded national broadcasters would be required to observe more rigorous, ‘tier 3’ news standards. Commercial media that wish to mark themselves out on the basis of their standards may opt in to this tier but would otherwise observe a baseline set of standards. The lowest tier represents commitment only to various laws that affect newsgathering, such as defamation, contempt, trespass etc.
3. What is the class of ‘publishers’ to which the scheme should apply? Various concepts of ‘news’, ‘media’ and ‘journalism’ are found in the *Broadcasting Services Act 1992*, *Copyright Act 1968*, *Competition and Consumer Act 2010*, *Privacy Act 1988*, *Evidence Act 1995*, *Telecommunications (Interception and Access) Act 1979* and others as well as at common law (for example in defamation law). Achieving some level of consistency across at least some of these acts, and using a more identifiable definition of journalism as the basis for a public interest defence to statutory incursions on speech, would be a worthwhile activity in itself. When combined with a single news standards scheme, it would help to mark out the practice of journalism – as distinct from other forms of distributing information or data – as deserving protection and definition, and help to build trust in the sources of most value to public discourse within democratic society. We think this question is best approached by targeting the practice of journalism, rather than the producer, distributor, platform or device. Broadly, we mean something more than the news as delivered in traditional media forms, but something less than every person with a blog. We acknowledge this is an aspect that requires further thought and consultation, as there are reasonable differences in opinion on where the line should be drawn.
4. Is there any incentive for publishers of all kinds to join the scheme, beyond simply the marketing potential as a trusted source? At least two options could be considered. First, at least for commercial television, it could be a continuing public interest obligation imposed on broadcasters in recognition of three significant concessions they receive: discounted fees for access to radiofrequency spectrum; the benefits offered by the anti-siphoning regime; and the continuing moratorium on the allocation of new licences. Alternatively, access to certain statutory rights, exemptions and concessions could be made dependent upon membership of a cross-media standards scheme. The New Zealand Law Commission conducted a thorough review of the provisions then applying to news media in New

¹¹ Convergence Review (2012). *Convergence Review: Final Report*. See Appendix I. http://pandora.nla.gov.au/pan/126527/20120709-1616/www.dbcde.gov.au/digital_economy/convergence_review/index.html.

¹² Lara Fielden (2011). *Regulating for Trust in Journalism: Standards Regulation in the Age of Blended Media*. Reuters Institute for the Study of Journalism. https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Regulating%20for%20Trust%20in%20Journalism%20Standards%20regulation%20in%20the%20age%20of%20blended%20media_0.pdf

Zealand in 2012.¹³ In Australia, there are such rights, protections and exemptions found in laws relating to defamation, privacy, copyright, consumer protection, telecommunications interception and data retention, national security, and elsewhere, including the journalist shield laws found in the various Evidence Acts. These schemes are of varying value and effect and they differ in their application, but they are integral to the practice of responsible journalism. We note that if access to such rights and exemptions is made conditional on participation within a news standards scheme, and the class of ‘publishers’, while expansive, is limited in some way to acts of journalism, some who currently claim these rights and exemptions will lose them. We think this is fair enough: exemptions to general rules about misleading and deceptive conduct or the handling of private information are of course justified for journalism, provided those who claim such an exemption are prepared to commit to at least a base level of standards of practice. And for privacy, this should mean something more than the current requirement to make a public statement committing to the standards developed by others, without submitting to that scheme’s jurisdiction. Those who refuse to join a standards scheme and will not subject themselves to adjudication of complaints about their content, should not have access to the rights and exemptions afforded to publishers of journalism.

5. If a tiered system as mentioned above can be developed, should it extend to other aspects of content regulation? The Convergence Review looked at this kind of approach, and it is likely to be part of the review of Australian content and children’s content. Though beyond the terms of reference of this inquiry, this is an issue that will need to be tackled at some stage, and we note that the Department has recently indicated that a review of the regulatory framework is required.¹⁴ It involves some difficult decisions, among them whether the multinational tech companies are ‘platforms’ or ‘publishers’ and the extent to which they should contribute to local cultural objectives and comply with local ‘program’ standards. At this stage, we would just say that Facebook can be criticised for being slow to the party on addressing ‘fake news’ and failing to see or acknowledge the way its platform can be used to spread lies and propaganda either for political or financial gain. And it has been said there is a connection here between the proliferation of fake news and Facebook’s attempts to keep users within the walled garden: although this content is most in need of exposure to external scrutiny, it is in fact less likely to be shared and circulated without further verification. In this environment, strategies that actively discourage users from exposing these claims to other sources inevitably make the problem worse.¹⁵ However, the company is actively seeking to redress this situation in partnership with media organisations and made inroads in reducing the amount of deemed fake news providers on its platform. In short, both Facebook and Google are seeking to strengthen the news media ecosystem through voluntary initiatives. Could they do more? Yes. Whether they should be ‘content service enterprises’ (to use the terminology of the Convergence Review) remains to be seen.

Other areas of law and regulation

Competition law

In the media sector, Google’s first click free rule — an imposition on publishers who wish to be indexed by Google — clearly works against the spirit and intent of a media company’s pay wall. It

¹³ New Zealand Law Commission (2012). *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC R128).

<http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP27.pdf>.

¹⁴ Department of Communications and the Arts. *Final Report of the Review of the Australian Communications and Media Authority*, May 2017. <https://www.communications.gov.au/what-we-do/television/media/acma-review/acma-review-final-report>.

¹⁵ Sally Hubbard, ‘Why Fake News is an Antitrust Problem’, *Forbes* 10 January 2017.

<https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem/#ee19c0430f1e>.

has been reported¹⁶ that if a publisher does not comply with the requirement to provide access to the first three articles in a 24-hour period, they will be placed lower in search results. Loss of traffic means reduced subscription payments and reduced exposure to advertising on their sites, but it also means a loss of data about these users. Facebook's capacity to tweak its algorithm, seemingly on a whim, can have considerable unintended and intended consequences on publishers. The lack of transparency only adds to the industry's sense of powerlessness.

Much has been written on the proposals to overhaul the regulation of market power under s 46 of the *Competition and Consumer Act 2010*. We are hesitant to say much on this aspect since we are not competition law specialists, but it seems reasonable to at least ask questions about market power in an environment where it is claimed that 85% of advertising revenue has been diverted to two multi-national companies¹⁷ and where local companies feel compelled to comply with the conditions they impose.

We note the ACCC warned in 2012 in a submission on the media industry to the Convergence Review that it may not have adequate powers to address such conditions.¹⁸ In a submission to Treasury last year it made a similar point and noted that US action against Microsoft and European Commission action against Google (for favouring its own comparison shopping product in search results) would not be possible in Australia.¹⁹

Defamation reform

We are not in a position to advise on the specific ways in which the law relating to defamation could be amended, but we can briefly outline what we understand to be key problems with defamation law in Australia. These in turn could be the source of specific recommendations on legislative changes. In addition to these, Australia's media organisations would almost certainly nominate as a high priority reform to circumstances in which suppression orders are issued.

- There is little scope for assessing the reasonableness of a publisher's conduct when using the statutory or common law defence of qualified privilege, which should allow, in appropriate cases, for the public interest in publication to outweigh the interests of the person who is said to have been defamed. For example, there could be greater recognition of the way in which information is presented within an article, including rebuttals, or the opportunities given for comment. This also applies to the narrow scope of the implied right of freedom of political communication. As a result, there is no workable defence of qualified privilege. This undermines the idea of media as a source of public accountability, for which we are prepared to accord a workable level of free speech (albeit it 'qualified'). In contrast, we give our political representatives access to defamation law while also giving the right to fully 'privileged' speech – in parliament.
- Other difficulties include the requirement for the publisher to prove the truth of a statement (in a defence of truth) in response to an assertion that the statement was false; the difficulties in establishing fair comment/honest opinion defences, especially in the light of the interactive nature of social media; the procedural burden of establishing triviality late in the proceedings (in contrast to a requirement for the plaintiff to establish serious harm); the risk that courts could decide there is 're-publication' each time an online article is accessed; the high quantum of damages in Australia.

¹⁶ Darren Davidson, 'How Free-Rider Google Takes a Rising Share of News Profits', *The Australian* (online) 21 May 2017. <http://www.theaustralian.com.au/business/media/how-free-rider-google-takes-a-rising-share-of-news-profits/news-story/a110d2c6e199214b57c6c95e06054de3>.

¹⁷ Michael Miller, 'Google is Not Journalism's Friend and Now it's Trying to Undermine Paywalls', *The Australian Financial Review* (online) 31 May 2017. <http://www.afr.com/opinion/google-is-not-journalisms-friend-and-now-its-trying-to-undermine-paywalls-20170530-gwghgp>.

¹⁸ Australian Competition and Consumer Commission. *ACCC submission to the Convergence Review Framing Paper*, June 2011. <https://www.accc.gov.au/system/files/ACCC%20submission%20to%20Convergence%20Review%20Framing%20Paper.pdf>.

¹⁹ Australian Competition and Consumer Commission. *Options to Strengthen the Misuse of Market Power Law. Australian Competition and Consumer Commission Submission to the Treasury*. February 2016. <https://www.accc.gov.au/system/files/ACCC%20submission%20to%20the%20Treasury%20-%20Options%20to%20strengthen%20the%20misuse%20of%20market%20power%20provision.pdf>.

Copyright

Copyright law has been raised as an alternative to tax or competition law that could, for example, regulate the reproduction of local publishers' content in forums such as Google News. Some but not all publishers have objected to the unpaid use of headlines and snippets from an article.

This is the subject of proposals before the European Parliament for a 'publisher's right', although the form of the proposed change to copyright appears uncertain. There are arguments on both sides of this debate, but there is often insufficient evidence of current practice, and it is important to keep clear the differences between platforms (and even the differences between, say, Google search and Google News).

It would be possible, presumably, to develop a licensing scheme in Australia – building on a model like Screen Rights – that requires a fee to be paid for this kind of aggregation. However, any proposal in Australia would need to grapple with the existing debate over the merits of the current fair dealing regime or the introduction of a fair use scheme proposed by the Australian Law Reform Commission in 2014. Some current practices may well not amount to fair use, but this appears not to be an option local publishers wish to explore.

Conclusion

These areas of inquiry — media rules, standards, regulation and competition — are important to the nature of public debate and democracy in our country.

Australia's media sector is at an inflection point, a time of undoubted uncertainty and great opportunity. We argue the overarching aim of any inquiry into journalism is not to so much to protect what is currently in the market per se, rather than to see what can be done to expand the landscape and choice, to grow Australian voices on a sustainable basis — and in the broad interest of the public.

We commend this inquiry's efforts to recognise and support the special power that journalism has to expand our horizons.