Victorian inquiry into print media ownership

Race Mathews, Creighton Burns, Sally Walker and Paul Chadwick respond to Grant Hattam's critique of their report

This article attempts to answer criticisms of the report of the Victorian Attorney-General's working party into print media ownership which appeared in the last edition of the *Communications Law Bulletin*.

We four comprised the working party.

We feel that some of the confusion may have resulted from the space in the article given over to criticisms of the working party's recommendations rather than discussing the body of the report.

We also wish to continue debate on this important public issue beyond the basics which have been so methodically laid out by Mr Hattam, a former legal advisor to News Limited in Melbourne.

On 11 July 1990, the Victorian Attorney-General, Jim Kennan, asked us to examine:

- the extent of concentration of ownership and control of newspapers in Victoria;
- the effects or possible effects of this concentration on all aspects of the life of Victoria and on the practice of journalism;
- whether it would be in the public interest to regulate ownership and control of corporations publishing newspapers having a substantial circulation in Victoria or any part of Victoria; and, if so,
- what form of legislation, regulations, restrictions or other action was warranted and desirable and what required implementation by the Victorian Government and/or the Commonwealth Government;

We were also required to examine "the barriers which may impede or obstruct entry to the newspaper industry, including the availability of wire services, plant, newsprint and distribution systems; and ways in which such barriers can be reduced or eliminated".

Our recommendations were to be "directed in all respects to the protection and enhancement of freedom of expression".

Background

Our starting point was the 1981 Inquiry into the Ownership and Control of Newspapers in Victoria by the retired Supreme Court judge, the late Sir John Norris. It remains the only government-sponsored inquiry - it lacked any legal basis or powers - of its type in Australia.

Norris had found "a very high degree of concentration of ownership and control", which seemed then to be increasing "largely in consequence of the operation of economic factors". Norris thought the press a major instrument in the working of our social and political life, notwithstanding the growth of the electronic media.

The two major dangers associated with concentration were, in his view, "loss of diversity in the expression of opinion and, second, the power of a very few men to influence the outlook and opinions of large numbers of people, and consequently the decisions made in society".

Potential for harm

While he found no evidence of a deleterious effect of concentrated ownership, Norris believed the potential for harm was real. Writing when Rupert Murdoch's unsuccessful 1979 bid for the Herald and Weekly Times Ltd (HWT) was a recent memory, Norris concluded that the "probability of harm from a change in the existing state of affairs is by no means so negligible as not to require legislative remedy in the public interest".

Neither the then Liberal Government, nor the Labor Government in office since April 1982, enacted the legislative remedy Norris proposed.

In 1987, Murdoch acquired HWT.

The industry has changed considerably since Norris, and the concentration which concerned him is worse:

- Concentration of ownership and control increased in the categories of metropolitan daily newspapers, Sundays, regional non-dailies and suburbans.
- Overall, in 1981 the major six owners controlled 91.4 percent of total weekly circulation of all types of paper in Victoria. In December 1990, there were four major owners controlling 85 percent of total circulation.
- Victoria's total number of newspapers fell 11.8 percent from 169 in 1981 to 149 in December 1990.
- In 1981, three of the five metropolitan daily newspapers and the two Melbourne Sunday papers were under Victorian control. As at 24 December 1990, none of the metropolitan dailies or Sundays was owned by Victorians

We made it plain to the Attorney that a group like ours, volunteers working with minimal resources, could only hope to sketch the problems and potential remedies, for they are national in scope and, in a sense, need to be understood in an international context.

We recommended a major public inquiry be undertaken as a matter of urgency, preferably by the national government but, if necessary, by Victoria and other States or by Victoria alone. Terms of reference should be similar to ours. The inquiry should examine particularly the issues of divestment, appropriate limits on ownership and control and appropriate measures to encourage diversity. Resources and powers should be adequate to the task, for unlike some of our critics, we were at pains not to oversimplify the complexities and delicacy of the issue. A request to the Prime Minister from the Premier for a national inquiry has since come to nothing and the Victorian Cabinet has decided to establish its own inquiry. At present the Attorney-General is deciding on the appropriate powers and personnel.

Our terms of reference demanded more of us than a brief diagnosis and recommendation for further inquiry. On 10 December 1990, just before we reported, the John Fairfax Group was placed in receivership. It seemed then, and remains a distinct possibility at time of writing, that the sale of the Fairfax papers could result in a worsening of concentration.

The price of not having responded to Norris might be paid again.

Recommended legislation

The working party's recommended legislation is not exactly as Mr Hattam reported. We did not recommend that "there should be legislation immediately or over a period of time to dilute existing concentration which would bring it down to set limits". Our draft legislation does not address divestment of existing ownership.

The report says an inquiry should consider the issue and "divestment down to set limits may be required". It would be in the public interest to dilute existing concentration.

The draft legislation aims to ensure that transactions involving 10 percent or more of a body corporate which publishes a newspaper circulating in Victoria would be subject to the scrutiny of an independent three-member Press Diversity Tribunal.

Under sections 4 and 5, a person or company acquiring one tenth or more of the voting shares of such a publishing company would be required to obtain an authorization from the Tribunal. Under section 7, read together with section 2, the Tribunal could prohibit a person or company from acquiring shares where the result is that person or company, alone or together with associates, obtains a controlling interest (10 percent or more of voting shares) in a body corporate which publishes a newspaper circulating in Victoria.

Mr Hattam implies that the legislation could be circumvented if "11 or so individuals join together to own 9 percent or less each". This is quite wrong. Section 7 would enable the Tribunal to scrutinise such a transaction.

The detailed provisions which aim to ensure that the Tribunal could examine all relevant transactions (section 2 and section 4(2)) are too detailed to reproduce, but two examples will illustrate the method. First, the legislation would catch an attempt to gain control of 10 percent or more of the shares through "means of arrangements or practices, whether or not having legal or equitable force". Second, it would catch acquisition by a person or company together with 'associates', a term widely defined in the draft bill.

Lawyers who read section 2 and section 4(2) will find that the terminology is familiar; the sections are based on provisions already in several pieces of federal legislation.

If the legislation were enacted, we must regrettably expect attempts to avoid such provisions, but they would not be avoided in the manner Mr Hattam suggests.

Mr Hattam accurately reports our distillation of the possible adverse effects of concentration and he does not dispute them.

The public policy issue, then, is what shall we do to avert or ameliorate them?

Trade Practices

We do not share Mr Hattam's faith in market forces and in the *Trade Practices Act* 1974 (Cth). These factors, combined, have brought us to the present position, and to the risk of worse. Mr Hattam has nothing to say about how they might now improve matters.

Section 50 did not avert the concentration. If we accept the 'economic reality' that the dominant operators will not knowingly shrink, nor welcome robust competitors, what evidence is there that the present regulatory scheme works in the newspaper industry?

If we are to put our trust in the *Trade Practices Act* we must consider the lessons of having tried to apply a general anti-monopoly statute to a unique industry such as the press. Britain has provisions in its *Fair Trading Act* which expressly deal with newspaper transactions. US anti-trust cases involving the press are always decided under the special umbrella of the First Amendment. Australia has so far failed to apply special considerations to the special case that the press constitutes. The results are both plain and adverse.

How, precisely, might the *Trade Practices Act* lower the barriers to entry? The reply that the Act can deal adequately with abuse of market power is dubious but debatable. What is less uncertain is the likelihood that no fledgling competitor, subjected to such abuse, would be able to withstand it long enough to have the matter settled in court.

Authorization process

Under the authorization procedure of the *Trade Practices Act*, the Trade Practices Commission (TPC) can consider whether a merger benefits the public only if the person acquiring the shares or assets applies for authorization. This is a major limitation on the capacity of the TPC to protect public interest, and our recommended legislation seeks to avoid this flaw by requiring the person acquiring shares to apply for authorization.

The TPC cannot presently grant authorization unless it is satisfied that the acquisition "should result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place". We adopted the same test in our draft legislation. Mr Hattam thinks "a better test might have been that the Tribunal had power to block a transaction 'if it was not in the public interest' for such a transaction to take place".

He is worried about the 'benefit' test, and about the powers of the proposed Tribunal. But that Tribunal would have to act in accordance with section 3 (5), which requires that it "shall be guided by the principle that further concentration of ownership or control of newspapers is contrary to the public interest". This provision is designed precisely to prevent a focus on individuals and whether or not they are suitable to be owners of newspapers.

We have tried to ensure that Parliament prescribes the key question: would the proposed transaction further concentrate ownership or control? If yes, the transaction would not be allowed unless there were a countervailing public interest such as the likelihood of closure (section 5 (3)). If the answer were no, the transaction should be authorised. The 'neutral' transactions, for which Mr Hattam expresses concern, would go ahead.

It is no answer to criticisms of current concentration to list the number of radio and television stations as if their mere existence ensured the diversity of information and opinion on which - and this appears to be common ground - a free society depends. This incorrectly equates the number of outlets with diversity.

The press, especially the quality papers, remain the 'agenda-setting' medium, with radio and TV taking their lead from them for the day's cacophony. While the number of separate commercial radio stations is large (145 nationwide), the range of sources of news and information is very small (six services, three of which have combined to provide a single service out of Canberra). For the rest, the radio services and much TV news rely on the wire service of Australian Associated Press, which also supplements metropolitan dailies and the regional and country press.

The power which Mr Hattam ascribes to the discerning consumer to exercise judgements to discipline a proprietor who abuses his or her power, seems almost utopian.

Not to worry, he hypothesises, if *The Age* suppresses something, its rival the *Herald-Sun* will point out its bias and so the credibility and readership of *The Age* will be dented. This argument neglects the tendency to avoid stone-throwing in a glass house. But let us pursue it: how is the *Herald-Sun* to know what *The Age* has suppressed? If the *Herald-Sun* does find out and tells its own readers, how will that help readers of *The Age*?

This method of accountability is possible, but surely the chances of it working to benefit the reading public grow in proportion to the number of rivals checking and counter-checking each other.

The greater the stable controlled by one owner, the greater the likely damage when his or her biases are expressed, either by distorted coverage or suppression.

It has long been recognised, even by media owners, that this unique category of privately owned property has a public interest dimension. Media are fundamental to the operation of the freedoms of members of a society, chief among which is the freedom to speak and to be informed, especially on political matters.

Whose rights should prevail?

Mr Hattam's conception of the property rights of media owners seems very old-fashioned. It dates from the days of greater diversity when proprietors usually also edited their paper and naturally made it say what they wished it to say.

It may be convenient to today's large media corporations - some multinational and with diverse non-media interests - to style themselves as individuals with a right to

express their opinion in a democracy in any way they can.

But does this libertarian conception of all media owners as individuals with rights neither greater nor smaller than everyone else make sense today? Those who control major media have such very large megaphones.

It is nonsense to suggest that there is no alternative to the free exercise by owners of their property rights in media, however vast, other than 'for the government to own and control all print media'.

Mr Hattam is partly right: such a result would be disastrous and impractical.

The issue is at what point, and in what way, a society, through parliament, can act not to silence such owners, but to reduce their volume, or at least stop it getting louder. We thought, as Norris did, that in Victoria that point had been reached.

Some with an eye to the history of the fight for freedom of the press in Britain - and in other countries still - will prefer concentration by private interests to any form of legislation by parliament. It is a potent argument and it need not be put in such a way as to imply that those who think differently today are somehow lining up on the side of tyrants who would repress freedom of expression.

The working party agreed that special legislation should be eschewed in relation to newspaper content, but not in relation to ownership and control.

The challenge to those who would defend freedom of the press is to acknowledge the modern and not just the traditional threats to it. One threat is concentration of media power in too few hands. As the US Supreme Court Justice Hugo Black observed "freedom of the press from governmental interference...does not sanction repression of that freedom by private interests".

Minimising risk

hat said, the working party was acutely aware of the risks of recommending that politicians legislate in this sensitive area. It attached to its recommendations the same principles that Norris pinned to his:

- *"the means to be employed to allow the press to function as it should must not themselves threaten its freedom;*
- *any legislation to regulate ownership and control must be so drawn as to not interfere with the content of the press, or with the liberty of persons to publish. Any concept of licensing the press or regulating its content must be eschewed; and*
- *if the relevant legislation is to satisfy (such conditions)...it must not constitute the executive government the repository of the authority to grant or withhold favours."*

We attempted to draw the recommended legislation in this way and welcome informed debate about whether we succeeded.

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Suppression orders

Ross Duncan discusses the novel approach of the South Australian State Bank Royal Commission to extraterritorial suppression orders

The South Australian judiciary's predilection for making suppression orders is notorious. But while Sections 69 and 69a of the *Evidence Act* 1929 (SA) have become the bane of every local court reporter's existence, it has long been thought that these suppression provisions did not limit media coverage outside the State.

Now, however, a ruling by the South Australian State Bank Royal Commission, recently upheld in the Supreme Court, restricts publication of the Commission proceedings throughout Australia, and suggests that Sections 69 and 69a might also have extraterritorial effect.

In May this year, Royal Commissioner Jacobs made a preliminary ruling under section 16a of the *Royal Commissions Act*, 1917 (SA) suppressing publication of any evidence tending to reveal the identity and financial affairs of clients and other persons past or present who had dealings with the State Bank. While acknowledging that the proceedings should as far as possible be conducted in public and without restriction on publication, the Commissioner said he made the order to satisfy Clause 9 of the Terms of Reference - to avoid prejudicing the Bank's ongoing operations and to protect the confidential Bank/Customer relationship.

Extraterritorial effect

Without more, this order would have gagged the local media but would not have applied outside the state where the details could have been freely reported. At least, that was the traditional view. However, the Commissioner, having stated that the Bank had clients beyond the State, went on to declare that:

"...for the purpose of giving full effect to the order ... the prohibition extends to any verbal, written, telephonic, electronic or telegraphic transmission of evidence ..."

As a result, publication outside South Australia is effectively prevented since reporters covering the proceedings cannot communicate by a phone call, fax or otherwise the suppressed information to their colleagues inter-state. The ruling is carefully worded in that it does not attempt to affect directly the conduct of persons outside the jurisdiction but achieves that objective by prohibiting any means of communicating the information by persons within the jurisdiction.

For the national media it also sets an unfortunate precedent which the Australian Broadcasting Corporation sought to have overturned by the South Australian Supreme Court. From the outset, however, the ABC faced one major obstacle. Section 9 of the *Royal Commissions Act* 1917 (SA) provides that:

"9. No decision, determination, certificate, or other act or proceedings of the commission, or anything done or the omission of anything, or anything proposed to be done or omitted to be done, by the commission, shall, in any manner whatsoever, be questioned or reviewed, or be restrained or removed by prohibition, injunction, certiorari, or otherwise howsoever".

Justice Matheson rejected the ABC's argument that, because of the rule of statutory interpretation that where particular words in a statute are followed by general words, the general words are limited to ambit to the particular words, the section ruled out the declaration which the ABC had sought. He said the terms of section 9 which were "very wide indeed, and certainly as far as any particular Royal Commission is concerned, they are extremely wide" ousted the Court's jurisdiction.

He held, in effect, that while the term 'publication' did not encompass one to one communications, it did catch any communication with a "public aspect" to it. "In the case of a reporter ringing his editor and saying 'here is what happened this

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