

Challenges in Media Regulation

On 9 November, Richard Bean, Acting Chairman of ACMA spoke to CAMLA members and guests in Sydney about some of the challenges in media regulation.

Introduction

A free and open public discourse is vital to a well-functioning democracy, but in no democracy is that freedom unlimited. All societies draw lines between what is and what is not permissible.

And in a well-functioning democracy, the government of the day helps to identify and enforce these lines with the broad consent of society as a whole.

Historically the independent electronic media in Australia have both benefited from and been constrained by a high level of government regulation.

First then, a brief reminder of some of the ACMA's roles in regulation of content and regulation of its delivery mechanism or platform.

As to the content that is being delivered to citizens – the ACMA regulates the broadcasting sector in Australia, including commercial and community radio, and free-to-air and subscription television.

We register codes of conduct developed by commercial broadcasters and typically investigate code complaints first made to broadcasters, when the complainant remains dissatisfied with the broadcaster's response.

The codes cover concepts like impartiality, accuracy and, in one form or another, decency.

So, it is a co-regulatory regime, given the ongoing and collaborative work with the industry.

And of course while regulation of news and comment for radio and TV is overseen by the ACMA, the Australian Press Council, an industry self-regulatory body without

any statutory element, manages this function for print media and associated Internet publications.

It's also worth remembering the MEAA's Journalist Code of Ethics, in particular regarding conduct in newsgathering, an area the codes are sometimes criticised for inadequately covering.

The ACMA of course also administers a regulatory framework for the mechanism by which content is delivered, that is, the analogue and digital platforms which Australians get their content on.

Most relevantly for tonight's discussion, we do this through our licensing activity.

This evening I want to reflect on various shifts occurring in the media content environment that are changing the way that news and opinion are created, distributed, curated and consumed in Australia, and thank CAMLA for the opportunity to do that.

I want to consider what these developments mean for media regulation, in particular how we assess media influence and diversity of voices, and diversity of content.

I'll invite you to reflect on whether some of our underlying assumptions and regulatory foundations can or should endure in light of what we think is going on.

And I'm going to do it pretty discursively, so I hope you will tolerate that reasonably well.

Key concepts in media regulation

I am going to focus on some inter-related regulatory concepts that help explain why we have the form of regulation that exists

today, and look at some elements of the regulatory framework that are affected by change, and some elements that continue to give expression to important social and cultural values.

My main focus this evening is on media influence, its role in our current system, and whether and how we can or should continue to rely on it as a foundational concept.

'Influence' was enshrined as a key framing concept in Australian content regulation in the *Broadcasting Services Act* in 1992.

In marked contrast to the current vogue for platform neutrality, in drafting and passing the 1992 Act the Parliament explicitly intended that regulation apply differentially to different service types according to the degree of influence they exercise.

This reflects the view held at the time that some categories of service exercise a particularly important role in shaping public opinion and Australian cultural identity.

The Explanatory Memorandum notes that commercial broadcasting services are considered to exert a strong influence in shaping community views, given that they provide programs of broad appeal to the general public.¹

Typically, policy makers and regulators have focused on the role news and current affairs programs play in supporting the participation of an informed citizenry in our democracy.

'Pluralism' is a related concept, often cited as being fundamental to western liberal democracy — the idea that more than one perspective has validity, and there is social and

¹ *Broadcasting Services Act 1992* (Cth) s 14.

political value in people expressing, and engaging with, these differing perspectives.

The rationale for regulating for pluralism is that in the absence of intervention, media and communications markets (or other interests) may consolidate perspectives or favour certain opinions at the expense of others.

Put another way, diversity operates as a check on the exercise of media influence.

'Diversity of voices' is reflected in legislative controls on what forms of media may be owned and in what combination, and the geographical area in which they may operate. A 'voice' within the meaning ascribed by media legislation, is a proxy for a locus of 'influence'.

'Diversity of content' is given effect in regulation in a few ways, including the competitive provision of content over different distribution networks by different licensees, and through the promotion of particular forms of content, such as through the Australian Content Standard and Children's Television Standard.

A third concept that is less common in other jurisdictions, but one that continues to be an important feature in Australian media regulation, is **localism**.

'Localism' embodies the idea that citizens should have access to media and communications services that enable them to participate meaningfully in their local community.

Among other things, localism obligations also serve as a mechanism to manage the influence of, say, nationally networked voices.

The Act gives explicit expression to matters relevant to influence, diversity and localism, in a couple of important ways.

- First, the categories of services which exert the greatest influence on community views are subject to the highest level of regulatory control. This is done

by describing different licence types for different services with different rights, obligations and enforcement regimes.

- Secondly, the legislative scheme aims to ensure that services provided to the community reflect accepted community standards through co-regulatory codes of practice. Of particular relevance to today's topic are the safeguards placed around the presentation of news and current affairs, including obligations relating to accuracy, impartiality and the representation of viewpoints

There is a small, quite clear set of principal regulatory mechanisms at play here.

- First we see rules designed to preserve diversity of ownership and control of certain commercial media outlets. The key elements relate broadly to:
 - The geographic reach of television networks – the reach rule;
 - Ownership and control of television and radio broadcasting licences in prescribed areas – the one- or two-to-a-market rules;
 - Cross-media holdings of television, radio and newspapers services in the same licence areas; and
 - The diversity – or rather number - of voices in metropolitan and regional markets.
- Second we see government funding to maintain the national broadcasters;
- Third, the regime enables the competitive provision of content over alternative networks like satellite and subscription television and the promotion of particular forms of content like children's television programming.

All focussing regulatory attention on particular media types that are considered **influential** — free-to-air

television and radio broadcasting, and newspapers.

Now let me make a few observations about the current arrangements.

In their favour, the rules are relatively simple to apply and are well understood, at least by the regulated industries. And they probably **do** capture the most 'influential' media voices even today.

But these rules and measures were devised when the internet barely existed.

In particular, they apply by reference to geography – the radio licence areas – when the internet has made geography all but irrelevant to citizens' access to content.

The 1992 Act also in effect created a walled garden that both protected and promoted particular forms of content for distribution over particular platforms and into specific areas of Australia.

A 2000 ministerial determination sought to maintain the walls when it determined that services making television or radio programming available using the internet, were not captured within the definition of a broadcasting service.

This model worked very effectively for a time, but those hard boundaries continue to erode as Australians source news and content in different ways.

Geography does obviously have some concrete appeal. We might conceive of news and political debate occurring at international, national, state or territory, and local levels – but can question whether radio licence areas the best way to focus on media ownership, diversity and influence.

Pressures challenging media regulatory frameworks

Now as we monitor the media environment, we observe a range of sometimes competing forces that are testing the relative simplicity of the available quantitative measures that are used to assess and manage influential media.

Let's look at some of these pressures and take some time to consider whether they can usefully inform our thinking about adapting regulation to the current media environment.

New influences vs established voices

The most obvious example of competing forces is new versus established voices.

We now have an environment in which citizens are engaging with audio-visual content in a much greater variety of ways in widely varying degrees of what you might call intensity – from listening carefully to Background Briefing on ABC radio to glancing at a tweet from an international gossip columnist – and furthermore also acting as content creators engaged in the production of news and opinion.

But I don't want to overstate the effects of digital disruption – after all, broadcast free to air television continues to be the main form of home entertainment in Australian households.

Watching free-to-air television still represents the largest share (some 61 per cent) of the weekly average time spent watching video content (excluding DVDs) among Australian adults.

Although overall time spent watching free-to-air television as it is broadcast has been declining slowly over recent years, broadcast television still remains the main source of news, with 36 per cent of adult Australians frequently accessing news on TV.²

Television also has the highest weekly news **reach** with 65 per cent, ahead of radio with 40 per cent and print with 38 per cent.³

But let's look at what else is going on.

Print newspaper subscriptions are declining as new audiences appear to be moving to online sources.

Some 13 million adult Australians now access online news sites.⁴

We are seeing international news brands such as the *Huffington Post*, *BuzzFeed*, *The Guardian* and *Daily Mail* launch Australian versions of their websites, with *the New York Times* apparently coming soon.⁵

Online platforms like Facebook and Twitter are increasingly acting as a source of news in analogues to both print and broadcasting.

Industry research indicates that 29 per cent of Australians aged 14 to 32 use social media as their primary source of news, compared to 18 per cent watching television news.⁶

18 per cent of Australians list social media as their **primary source** of news, putting Australia ahead of the US at 17 per cent.⁷

So we see persistent strength in some media distribution platforms, although demographic differences in the way that news is accessed - and we are seeing new news brands in the Australian market.

In recognition of the move online, Fairfax has announced a likely move away from a six day a week printing schedule for its main mastheads.⁸

And this is an interesting example of what a move online might do to current rules.

The change of the *SMH* or *The Age* to a weekend newspaper – remembering Monday to Friday would still exist, just online - would mean that they are no longer 'newspapers' for the purposes of the BSA, which requires publication on at least four days a week.

There would be no change to media diversity points – the count of voices – in either Melbourne or Sydney because in each city the masthead is already in a group with radio services counting as one voice, so that even if the masthead no longer meets the definition of 'newspaper' in the Act then there would still be one group.

Under the current 2 out of 3 rule – it would free up Fairfax to control a commercial television service in each city - though if it acquired an ungrouped commercial TV licence, then there would be a reduction in voices.

Consider also two recent changes in the Sydney radio market – the sale of 2CH currently under way and the change of format of 2UE from news/talk – you might say an influential format – to advertorial. The sale of 2CH may or may not create a new voice, depending on the purchaser, but the change in format of 2UE will not alter the voice count – both because it is already grouped, and because format is irrelevant.

Fragmentation vs stability

Another observable contrast is between media **fragmentation** occurring at the same time as apparent **stability** in the sources of news Australians habitually turn to.

Fragmentation itself has a number of different dimensions - the growth of new delivery platforms, and the growth of choices within particular media technologies such as multiple television channels or websites.

For example, on television we have the regular news programming of commercial broadcasters, the dedicated news channel of ABC24, as well as subscription television's Sky news and international news channels.

2 Deloitte, Media Consumer Survey 2016—Australian media and digital preferences, 5th edition.

3 Reuters Institute, 'Reuters Institute Digital News Report 2016'

4 ACMA-commissioned surveys, May 2015 and May 2016

5 Deloitte, Media Consumer Survey 2015—Australian media and digital preferences, 4th edition

6 Deloitte, Media Consumer Survey 2016—Australian media and digital preferences, 5th edition.

7 Deloitte, Media Consumer Survey 2016—Australian media and digital preferences, 5th edition

8 White, D and Mason, M. 'Greg Hywood flags future print changes as Fairfax embraces 24/7 digital,' *The Sydney Morning Herald*, 6 May 2016.

But the growth of new platforms is much more widely observed.

The internet has supported the entry of reputable global news brands into Australia as well as online-only ventures. Social media are redefining what many consider to be news content, as well as providing curated services.

At the same time, and despite all that, we continue to see evidence of relative stability in consumption of news from Australia's traditional media players.

The top 3 most popular news sites as at June this year were *news.com.au*, followed by *ABC News* websites and *smh.com.au* in third place - all long established news brands in the Australian market.

More recently, international news brands have been edging up the list, with *Daily Mail Australia*, *The Guardian* and the *BBC* in fourth, sixth and seventh place respectively.⁹

Even as revenues collapse and the whole question of the survival of the great mastheads as businesses becomes very real, their influence remains immensely strong, both as primary sources and as agenda-setters - although some observe social media usurping that role in the daily news cycle, now moving from newspapers-to-radio-to-TV to twitter-to-radio-to-TV.

Diversity of opinion vs personalising news

Another set of countervailing pressures pits the growing diversity of sources of news against technology which both permits users and aggregators to curate or personalise news feeds, commentary and other content and enables users to browse across multiple sources to select and compare.

Of course access to more sources of news and information may not be equivalent to access to a diversity of views and opinion.

Paul Resnick and colleagues at the University of Michigan's School of Information recently noted that social filters, ranging from online news gathering algorithms to the filters of what our friends, family and peers discuss will isolate us in information bubbles, sometimes only partly of our own choosing.

According to Amy Mitchell, the director of journalism research at the Pew Research Center in the United States, "nearly half (47 percent) of those with consistently conservative political views and about a third (32 percent) of consistent liberals say that the posts they see are nearly always or mostly in line with their own views."

As with the familiar phenomenon known as "confirmation bias", both human and technological choices have the ability to reduce our access to a diverse set of opinions.

But is that any different from choosing to read *The Guardian*, or *The Australian*, or watch *MSNBC* or *Fox News*? It may be in one important respect - the transparency of the process.

Which brings me to the question of trust and familiarity vs the rise of algorithms.

Some might say that an individual has always had the ability to select what he or she reads or hears, but technology now assists the selection of "trusted" sources of news and opinion in new ways that it's important we understand.

And trust in reliable 'sources of truth' has always been an important consideration in understanding how influence may be exercised.

Is the influence of well recognised and trusted brands - mastheads or individual respected journalists or commentators - reinforced or diminished as alternative sources of news and commentary become more readily available? I think that is an open question.

In the online environment, with a ready availability of news sources, reliable sources of news may become increasingly differentiated and highly valued.

In its 2011 Digital Australians research, the ACMA found that the perceived trustworthiness or credibility, and fairness, of online news sites depended on whether or not the source was an established brand.

Where traditional brands also had an online presence, the same level of credibility was attached to their online content.¹⁰

But the rise of algorithms adds complexity to the news supply process and our assessment of the influence of the trusted brands.

Algorithms, whether based on user preference or behaviour, or upon a programmed understanding of what news is important, have an impact on the form and type of news that a citizen sees.

In the face of allegations of liberal bias, Facebook recently moved to accelerate the automation of its Trending news section, removing its editorial team. Unfortunately, a few days later Facebook promoted a patently false news item from, as *Slate* described it, "a dubious right-wing propaganda site", that *Fox News* had sacked Megan Kelly for being a "traitor".

The sacked team members were mostly New York journalists, and they were in fact replaced with other human overseers who were to check that the items that the algorithms chose were linked to the real world - but not make editorial decisions - and who failed to realise the Kelly story was bogus.

This example raises an interesting question about if and how social media platforms will change the extent to which we are exposed to diverse opinions, and more importantly, how transparent the impact of these 'filters' might be.

⁹ Nielsen, 'Social Media Brands Grow and Shifts in News Rankings', Media release, 27 July 2016.

¹⁰ ACMA, Digital Australians, 2011, p. 44.

I would also observe that while in the past we may have been concerned about media proprietors deliberately using their platforms to influence audiences, these algorithm-based services are not so clearly characterised in those terms. They could arguably be presented as simply being a service designed to deliver to an audience exactly what the audience wants.

If I can summarise these broad themes – they all provide evidence of pressures, pulling in different directions and with different implications for how we identify which are the influential media and how influence in news and opinion is being exercised – with consequent implications for the use of influence as a guide in applying differential regulation.

Earlier this year, the ACMA commissioned for its own use an analysis of media influence in a contemporary communications environment – and I want to thank Peter Leonard and Rob Nicholls for their contribution.

The focus of this work was to look at the market trends that are affecting where and how influence is exerted, and to consider some factors that might be brought to bear when attempting to measure it.

What emerges is the need for an approach to assessing influence that looks at how news and current affairs programs in particular exert influence over public opinion in three important ways.

- One is **the agenda setting process**: identifying what news is selected as newsworthy to be reported and where, when and how often that news is carried
- Another is **the process of framing of news**: taking account of how the news story itself is framed for consumption (for example, as factual, commentary or analysis), and finally
- What you might call **the user zone processes**: whether and if so, how, an individual citizen

curates what news they choose to receive, or a provider, using data analytics or editorial choice, curates the news that a user sees.

We've just been talking about algorithms. More broadly, the use of data analytics to target audiences is obviously a significant new phenomenon, and one which may play out in a number of ways – enabling, for example, hyper-specialisation or hyper-localism.

We see pressure for localism on a number of fronts, and should consider its impact in an era of populist politics.

Now what's being done in other jurisdictions?

It is one of the features of a converged, globalised media environment, that many of the challenges experienced in Australia are being felt in other jurisdictions. It's another feature that no-one has found the magic model.

The United States has a regular process of media ownership reviews occurring every four years.

The most recent review conducted in 2014 reaffirmed the importance of local news and public interest programming and elected to retain cross media ownership rules.

Despite legal challenges to various rulings, the structured and regular review for media ownership and influence assessments seems generally well-accepted.

In the United Kingdom, Ofcom has a mandate to undertake regular three-yearly reviews of the UK's media ownership rules.

In its most recent review last year, Ofcom reaffirmed rules to protect media diversity, and recognised that with a rapidly changing news market, that there would need to be **regular reassessments** of media plurality.

Ofcom proposed new measures to assess media plurality, ones that explicitly recognise the role of online news platforms and include qualitative measures such

as impartiality, trust and reliability of news sources to assess media influence.

Notice that the set of influence and diversity measures we have in Australia is directed towards assessments very much focused on quantitative measures of the supply-side of the media industry. But what do we know about how the products of the media players are consumed? Do citizens give them the weight accorded to them under the Act? And what about new sources not contemplated in 1992?

There is much we don't know about the impact of media services – for example what is the impact of simultaneous multiple platform viewing?

In this context it is interesting that Ofcom is developing a new measure – a “share of references” - which is designed to compare consumption of news across different platforms using a variety of consumption measures.

This updates previous ways of assessing influence and can now take account of the role of search engines and algorithms acting as intermediaries in the supply of news content.

I think we have something to learn from our colleagues in the UK.

So what might these developments mean for regulation in Australia?

Specific priority areas for media reform are obviously a matter for Government, and it has chosen the 75 per cent reach rule and the 2 out of 3 rule as the first cabs off the rank, and the ACMA supports, as it has long done, a program of regulatory reform.

Failing to engage with the forces I have been discussing might mean that we constrain competition and innovation without securing the ‘public good’ we are after – that is, ensuring meaningful diversity – especially in news and current affairs.

To be clear, the ACMA considers that the underlying policy objective of a diverse media is important and of enduring public interest – that is also what the community tells us periodically through our research.

But to be equally clear, while a policy objective may be of continuing relevance, we need to distinguish between that goal and the tools we have used to date to achieve it. Markets change, and, as a result the way we intervene, and the need to intervene at all, also change.

Good regulatory design principles evolve: a regulatory construct which assumed that legislation and the regulator determined who was in the market, what they could do and then how they should be obliged to contribute to public goods seems a quaint notion today.

Now in our response to the Department of Communications and the Arts ACMA Review draft report, the ACMA supported draft reform proposals that were directed towards a more platform-neutral approach.

That support continues.

But in applying a more platform-neutral approach, one relevant question we can ask is whether regulating media according to the influence held to adhere to different licence types continues to be an effective means of supporting a public policy objective of ensuring a diversity of news and opinion.

In fact, we might reasonably ask why we should have these different licence types at all in the future?

As we have seen, the UK is moving to a more rigorous way of reflecting the changed role of content users in media diversity assessments. In practical terms, this means we should look at what users think is important and what can be achieved, preferably in a platform-neutral way.

This would lead to a rebalancing across platforms.

This is platform-neutrality as a design principle rather than a policy goal.

How should we move forward?

It is hard for any regulatory regime not to assume a degree of stability and predictability in industry structures, technologies and distribution platforms. But what if that assumption is no longer valid?

At this point, it is unclear when or even if more stable market structures and well-established behaviours of news and opinion content creators and users will emerge.

What does such a disruptive environment mean for concepts like influence? Are the market and market dynamics doing the work that regulation previously had to?

You can make a case that the existing interventions to deliver the public policy objective of promoting diversity of content and opinion based on the influence of legacy platforms are either already or close to no longer being fit for *purpose*. What we don't know is whether we are in a period of permanent disruption, or simply in the midst of a shift to a new, stable environment.

One of the attractions that we see in adopting the regular, structured review process in use in other jurisdictions is that it provides the opportunity to periodically test whether particular public policy objectives remain relevant and whether the market or particular regulatory interventions continue to deliver those public policy objectives.

Since we are in a world where review of current media ownership rules is appropriate, but where the need for or type of replacement arrangements is not clear, a robust, independent and regular assessment of diversity and influence would both give the Australian community confidence that their interests are being looked after and help provide an evidentiary base to assist in the design of new measures.

One thing is clear: if you are not sure if or when a new market equilibrium will emerge, reflecting industry

dynamism in regulatory frameworks is a real and important regulatory design challenge.

This is an argument against attempting to pick a new set of rules in the hope you've got it right for the next twenty years or so.

It is also an argument for principles and outcomes focussed regulation and a flexible, independent, well-resourced and evidence-informed regulator.

Conclusion

So at this moment, some very important things are apparent:

the regulator should be empowered to and resourced to gather a sound evidence base on which to assess risks and detriment and respond proportionately when required;

any responses must have built in flexibility and adaptability, rather than attempting to pre-emptively establish a revised media regulatory framework that appears to be, or even is appropriate for today's circumstances, but which cannot be expected to remain appropriate for 20 years;

just as other jurisdictions are recognising, we need a more nuanced way of assessing media influence and diversity of views and content, that takes account of the dynamic digital media environment and the real consumption patterns of and impacts on citizens; and

the challenges of delivering the objectives of promoting diversity and managing influence provide an opportunity for a fundamental rethink of our whole media regulatory construct.

Thank you for that rather large amount of your time.