THE CONSTITUTION AND COMMONWEALTH PROPOSALS FOR NEW MEDIA REGULATION

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(2013) 18 *Media and Arts Law Review* 2

[2016] *UNSWLRS* 66

UNSW Law
UNSW Sydney NSW 2052 Australia

Articles

The *Constitution* and Commonwealth proposals for new media regulation

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This article examines the capacity of the federal Parliament under the Australian Constitution to introduce new forms of media regulation in Australia, especially for print and online media. This question is examined in light of recent proposals for reform put forward by the Finkelstein Inquiry and Convergence Review.

Introduction

Australia's federal government is considering options for major regulatory reform of the media. It is doing so in response to the recommendations of its Finkelstein Inquiry and Convergence Review, which were initiated in part due to the United Kingdom's *News of the World* scandal and the pressures brought about by rapid technological change. Their recommendations propose broad ranging changes to national media regulation in Australia. The greatest impact would be felt by sections of the media not yet subject to federal regulation, in particular print and online media.

The idea of new government regulation for print media has generated heated public debate. This has largely concerned questions of freedom of speech and freedom of the press, with little attention paid to underlying questions of constitutional law. Despite the suggestion of News Ltd CEO Kim Williams that any new print media regulation would be challenged in the High Court,[1] there has yet to be academic analysis of the constitutional capacity of the Commonwealth to regulate this form of media.

Even the federal government's Finkelstein Inquiry and Convergence Review failed to engage with this key underlying issue.[2] As a result, the debate has yet to recognise that the current federal regulation of television and radio, but not print media, reflects the historic limits of Commonwealth legislative

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1 Jessica Leo, 'News Ltd CEO Kim Williams Vows to Fight Media Censorship in the High Court if Necessary', *The Advertiser* (online), 13 July 2012 <www.news.com.au/national/news-ltd-ceo-kim-williams-vows-to-fight-media-censorship-in-the-high-court-if-necessary/story-fndo4eg9-1226425499369>. The full speech can be found at <http://media.news.com.au/fe/2012/07/sapressclub/doc/SAPressClubJuly12.pdf>.

2 There are only a few, ad hoc references to constitutional issues in the report of the Finkelstein inquiry: see Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 136–8, 254.

power in this field. The unanswered question is whether more recent High Court decisions have altered understandings of the *Australian Constitution* so as to grant the Commonwealth greater scope for media regulation.

This article addresses the capacity of the Commonwealth to bring about a new legislative regime for media regulation in Australia, especially as it might apply to print and online media. Our purpose is to ascertain how far the federal Parliament can go in introducing new media regulation without exceeding the boundaries of Commonwealth legislative power.

Specific proposals for reform may raise further constitutional questions. In addition to the scope of federal legislative power, new laws might infringe the separation of judicial power,[3] freedom of interstate trade and commerce[4] or implied freedom of political communication[5] brought about by the *Australian Constitution*. These and other constitutional limitations are not dealt with in this article. In the absence of a detailed legislative proposal, it is not possible to assess what, if any, constitutional limitations might be engaged. In any event, these are issues that, in the main, can be worked around through the careful drafting of any new legislation.

Media regulation in Australia

Australia has a number of media regulation models operating concurrently. The applicability of any particular model depends on the medium of content delivery. While broadcasting services (such as television and radio) are regulated by statute, online content operates under a co-regulatory model (that is, a model involving a partnership between industry and government) and traditional print media is self-regulated.

The *Broadcasting Services Act 1992* (Cth) ('BSA') is the primary statutory instrument for the regulation of broadcasting services. The BSA defines a 'broadcasting service' as a service that delivers television or radio programs.[6] Under the BSA, the Australian Communications and Media Authority ('ACMA'), a statutory body, has broad regulatory powers including a number of licensing functions.

To a limited extent, the BSA also provides for the regulation of online content. Here ACMA performs only a co-regulatory function. Its primary responsibilities include investigating complaints, encouraging online service providers to develop and register codes of practice and monitoring and enforcing compliance with those codes. It also plays a role in disseminating information to the community in relation to internet safety issues, researching trends in internet and mobile usage, advising the Minister for Broadband, Communications and the Digital Economy on emerging trends and liaising with overseas regulatory bodies.[7]

The focus of regulation of online content is on the prohibition of illegal or 'highly offensive' material or material that is considered harmful to children.[8]

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3 *Australian Constitution* ch III.
4 *Australian Constitution* s 92.
5 See, eg, *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.
6 *BSA* s 6.
7 *BSA* schs 5, 7.
8 Explanatory Memorandum, Broadcasting Services Amendment (Online Services) Bill 1999.

For example, sch 5 of the BSA requires that industry codes of practice address matters such as the access to content by children.[9]

Although industry codes are voluntary, ACMA maintains the power to make industry standards if no industry codes are made or if the industry codes are considered deficient.[10] Once an industry code of practice is registered with ACMA or if ACMA makes its own industry standards, it has a range of enforcement measures available to it to ensure compliance. ACMA must investigate a complaint regarding a breach or potential breach of an industry code or standard.[11] It can issue remedial directions[12] and formal warnings.[13] Failure to comply with these may amount to a criminal offence.[14]

Under sch 7 of the BSA, ACMA is also required to investigate complaints about 'prohibited' or 'potentially prohibited' content that is publicly accessible online or through a mobile phone.[15] This includes content available on mediums such as live streams and chatrooms, but excludes email, SMS and MMS. Content may be prohibited if it is has been refused classification by the Classification Board or if it falls in to the X18+ or, in some circumstances, R18+ classification categories.[16] If ACMA deems content to be prohibited, it issues a take-down notice to the internet service provider.[17]

The self-regulation of the Australian print media, and to a limited extent online media, is overseen by the Australian Press Council ('APC'). The APC is an industry body and its membership includes representatives from publishers and other media outlets, independent members with no media affiliation and independent journalists. The APC develops industry standards, investigates and responds to complaints from the public regarding media content and disseminates policy positions on matters affecting its stakeholders, such as freedom of expression, freedom of information and privacy. The APC has developed broad industry standards to address general principles of fairness, accuracy and transparency as well as specific standards in relation to privacy.

Participation in the APC is voluntary and the Council is funded by its members. Under new arrangements announced in April 2012, members are required to give a years' notice of withdrawal from the Council.[18] Members agree to be bound by the APC, which determines the outcome of complaints and can require the publication of corrections and apologies. Complaints may also be made to the APC regarding print content published by non-members. The APC can investigate these complaints, but non-members are not bound by any such determination.

Membership of the APC had until recently been the sole preserve of print media publishers and, as such, the APC was primarily concerned with the print

9 *BSA* sch 5 cl 60.
10 *BSA* sch 5 cls 68-70.
11 *BSA* sch 5 cl 26.
12 *BSA* sch 5 cls 72, 83.
13 *BSA* sch 5 cls 67, 73, 84.
14 *BSA* sch 5 cls 86-87.
15 *BSA* sch 7 cl 43.
16 *BSA* sch 7 cl 20.
17 *BSA* sch 7 cl 47.
18 Australian Press Council, 'Publishers Agree on Major Strengthening of the Australian Press Council' (Media Release, 5 April 2012).

publications and related online content of these publishers. However, the APC has now expanded its membership to include a number of online-only content providers.[19]

Recent inquiries

Independent Media Inquiry

The Independent Media Inquiry was established by the federal government in September 2011 and chaired by former Federal Court Justice, Ray Finkelstein QC. It was set up following calls by Senator Bob Brown and others for an investigation into the media industry, prompted in part by revelations that journalists at London newspaper *News of the World* had engaged in phone hacking of politicians, murder victims and celebrities. Several Labor politicians had also raised concerns that *The Australian* and *Daily Telegraph* frequently reported on issues in a way that they said was biased against the federal government.[20]

Against this background, the purpose of the Inquiry was to inquire into a range of matters affecting the contemporary media landscape, including the effectiveness of codes of practice, the impact of technological change on journalism's business model, ways of strengthening the independence and effectiveness of the Australian Press Council and '[a]ny related issues pertaining to the ability of the media to operate according to regulations and codes of practice, and in the public interest'.[21] The Finkelstein Inquiry was conducted simultaneously with the federal government's Convergence Review, discussed below, which examined the policy and regulatory frameworks that apply to the converged media and communications landscape in Australia.[22]

The Inquiry ran a public consultation program in late 2011 and reported to the federal government in February 2012.[23] It recommended replacing the existing system of self-regulation for print media with what it called 'enforced self-regulation'.[24] Central to this new regime would be the establishment of an independent, statutory body called the News Media Council to handle complaints and promote journalistic standards across print, broadcast and

19 Australian Press Council, 'Online-only Members Join the Press Council' (Media Release, 24 May 2012); Australian Press Council, 'Ninemsn Joins the Press Council' (Media Release, 16 August 2012).

20 See Finkelstein, above n 2, 15–16; Richard Willingham, 'Push on for Media Inquiry', *The Age* (online), 15 July 2011 <www.theage.com.au/national/push-on-for-media-inquiry-20110714-1hg7n.html>.

21 Department of Broadband, Communications and the Digital Economy, *Independent Media Inquiry* <www.dbcde.gov.au/digital_economy/independent_media_inquiry>.

22 See <www.dbcde.gov.au/digital_economy/convergence_review>.

23 The Inquiry received 132 submissions from a variety of individuals and organisations, including the Australian Press Council ('APC'), major broadcasters and publishers (including the Australian Broadcasting Corporation, Ninemsn, Seven West Media, Fairfax Media and News Ltd), Senator Brown, research centres, academics, journalists and media analysts. In addition, it received 10 600 short submissions of fewer than 500 words, generally making use of the same prepared text and facilitated by the advocacy organisations Avaaz and NewsStand. The Inquiry conducted six days of hearings in Melbourne, Sydney and Perth.

24 Finkelstein, above n 2, 287.

online media.[25] In having the ability to regulate all media platforms, the Council would act as a single regulator, as many of the submissions to the Inquiry had recommended. In fulfilling this role the Council would take over the existing functions of the APC, as well as the news and current affairs standards functions of ACMA. The standards of conduct to be promoted by the Council would be developed by the Council in consultation with industry.

Importantly, the Council's regulatory regime would not be voluntary. Any news publisher distributing more than 3000 print copies per issue, or news website attracting more than 15 000 hits per year, would be subject to Council regulation. This threshold could capture popular bloggers and social media commentators, and some student publications.[26] In another departure from the current APC model, the Council would be funded by government, thus avoiding the APC's current reliance on industry contributions.[27]

The Inquiry recommended that the Council have the power to: require publication of a correction; require withdrawal of a particular article from continued publication; require that a media outlet publish a reply by a complainant or other relevant person; require publication of the Council's decision or determination; and direct when and where publications would appear. The Inquiry recommended against giving the Council the power to impose fines or award compensation, warning of 'constitutional difficulties'[28] (presumably due to a concern that this might infringe the separation of judicial power)[29] and the risk that the complaints-handling process would become more complex and time-consuming. Were a media outlet to refuse to comply with a Council determination, the complainant would have the right to apply for a court order compelling compliance. The Inquiry suggested that Council determinations should not be subject to internal appeal or merits review, nor to external merits review by the Administrative Appeals Tribunal.

The Inquiry's report attracted a great deal of media commentary, much of it critical in nature.[30] Among the criticisms levelled at the reform proposals were that government funding of a media regulator would endanger freedom of speech, and that the proposed threshold for regulation of online material was unreasonably low. Other commentators conceded that the Inquiry's proposed new regulatory regime had flaws, but argued that it generally

25 The role and functions of the proposed News Media Council are set out in ibid 290–300.

26 Nic Christensen, 'Students, Blogs Will Be Caught in the Net', *The Australian* (Sydney), 3 March 2012, 8.

27 Finkelstein, above n 2, 9.

28 Ibid 298.

29 See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

30 See, eg, Editorial, 'Bringing the Media to Heel', *The Australian* (Sydney), 3 March 2012, 23; Stephen Brook, 'New System Dear and, in a Word, Unworkable', *The Australian* (Sydney), 3 March 2012, 8; Julian Lee and Bianca Hall, 'Media, Government Clash Looms on Calls for Regulation', *The Age* (Melbourne), 3 March 2012, 3; Katherine Murphy, 'Feeding Frenzy of News', *The Age* (Melbourne), 5 March 2012, 13; Mark Day, 'Free Press Not Open to Political Meddling', *The Australian* (Sydney), 5 March 2012, 24; David Kemp, 'Finkelstein Media Recommendations Would Poison Our Democracy', *The Australian* (Sydney), 6 March 2012, 14.

amounted to moderate reform and did not warrant the amount of criticism it had received.[31]

Perhaps the most high-profile criticism of the Inquiry came from Kim Williams, the News Ltd CEO, who labelled its recommendations 'preposterous and foolish'.[32] Williams also said that he would launch a High Court constitutional challenge to any new regulation of the print media, although he did not specify the grounds of such a challenge.[33] Nonetheless, Williams' comments raised an issue that was overlooked by the Inquiry's report and most of the commentary that followed its release: namely, whether the proposed new regulatory regime could actually be implemented by the Commonwealth given the federal division of legislative powers enshrined in the *Commonwealth Constitution*.[34] This issue is taken up in Part IV below.

Convergence Review

The Convergence Review was established in December 2010 to examine a broad range of issues relating to the Australian media landscape, including media ownership and control, media standards and the promotion of local and Australian content. The Review was prompted by recognition that the relative inertia in Australian media regulation was at odds with the emergence of an ever-expanding range of new media platforms. Regulatory boundaries that had been established to deal with traditional media were being blurred by these platforms, a phenomenon referred to by the Review as 'convergence'. The Review's purpose was to advise the federal government about the adequacy of the current regulatory framework and suggest new regulatory measures to deal with convergence. The Review was also asked to take into consideration the recommendations of the Finkelstein Inquiry.[35]

After analysing 340 submissions and over 28 000 comments, the Review released its final report in March 2012. The report recommended a regulatory overhaul that would substantially extend regulatory oversight in some areas and reduce it in others. The expanded regulatory functions would be overseen by two separate bodies. The first would take over from ACMA and would be a statutory body operating at arm's length from government. It would be responsible for regulating media ownership and classification standards across all media platforms, as well as ensuring a minimum level of Australian content.[36]

The second body would absorb functions currently performed by the APC and, to some extent, ACMA in relation to news and commentary. It would be responsible for overseeing industry codes addressing journalistic standards

31 See, eg, Graeme Orr, *Finkelstein's One-Stop Shop* (6 March 2012) Inside Story <http://inside.org.au/finkelstein-one-stop-shop>.

32 Leo, above n 1.

33 Ibid; Kim Williams, 'Address to the South Australian Press Club' (13 July 2012) <http://media.news.com.au/fe/2012/07/sapressclub/doc/SAPressClubJuly12.pdf>.

34 But see Paul Kildea, 'Constitution Could Bite News Watchdog', *Daily Telegraph* (Sydney), 15 March 2012, 33; George Williams, 'Challenge to Print media Regulation Would Almost Certainly Fail', *Sydney Morning Herald* (Sydney), 17 July 2012.

35 See Convergence Review Committee, Australian Government, *Convergence Review Final Report* (2012), vii.

36 Ibid viii–ix.

across all media platforms. However, in contrast to the Finkelstein Inquiry, the Review recommended that this second body be industry-led and have a statutory basis. The body would have a funding model based on a membership scheme similar to that of the current APC, but would also receive public funds.[37]

Alongside these recommendations, the Review Committee reached the view that some sections of the industry, such as broadcasting, were overregulated, causing unnecessary complication and expense. It recommended that the licensing of broadcasting services be terminated.[38] At the same time, the Review recommended that substantial content providers, or 'content service enterprises', should be regulated irrespective of their medium of content delivery. Organisations would be considered 'content service enterprises' if they have control over the professional (as opposed to user-generated) content they deliver, have a large number of Australian users and have a high level of revenue derived from content delivered to Australians.[39]

Federal legislative power and new media regulation

Section 51 of the *Australian Constitution* does not confer a general power on the Commonwealth to regulate all types of media. Instead, the degree to which the Commonwealth can regulate in this area varies across mediums.

The federal Parliament is capable of making laws with respect to radio and television broadcasting, and telecommunications, by virtue of its power under s 51(v) to legislate with respect to 'postal, telegraphic, telephonic and other like services'.[40] This power may well also extend to regulation of online media, but this has yet to be determined by the High Court.

By contrast, the Commonwealth has no clear head of legislative power with respect to the print media. Federal regulation of print media is therefore reliant on heads of power such as those relating to trade and commerce, taxation, corporations, external affairs and the Territories.[41] The Commonwealth may also regulate print media to the extent that this would be incidental to the exercise of these or other heads of power,[42] or where the requisite power has been referred to it by the States.[43]

The most significant heads of power for the current debate over new media regulation are s 51(v) and that over corporations in s 51(xx). The capacity of the Commonwealth to introduce new media regulation in reliance on these powers is discussed below.

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37 Ibid xiii.
38 Ibid viii.
39 Ibid viii–ix.
40 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262; *Jones v Commonwealth (No 2)* (1965) 112 CLR 206; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595.
41 *Australian Constitution* ss 51(i), 51(ii), 51(xx), 51(xxix), 122.
42 *Australian Constitution* s 51(xxxix), or via the implied incidental power as recognised in cases such as *D'Emden v Pedder* (1904) 1 CLR 91, 109.
43 *Australian Constitution* s 51(xxxvii).

Section 51(v): postal, telegraphic, telephonic and other like services

Section 51(v) of the *Constitution* gives the Commonwealth power to make laws with respect to 'postal, telegraphic, telephonic and other like services'. Two key questions arise as to the scope of this power: first, what types of 'service' it encompasses; and second, what types of activities it allows the Commonwealth to regulate.

The Convention Debates at which the Constitution was drafted in the 1890s offer little insight into either of these questions, as the section was subject to scant debate. One of the enduring mysteries of s 51(v) is why the framers included the words 'other like services', a phrase of extension which does not appear in any other head of power. The words were inserted on a motion by Bernhard Wise at the 1897 Convention and accepted with very little discussion.[44] La Nauze, after a detailed survey of the drafting history surrounding s 51(v), makes a plausible case that the phrase was inserted to allow for the future development of wireless telegraphy.[45] It seems likely that several of the framers were aware that such technology was being developed at the time of the drafting debates; indeed, Wise himself was the brother-in-law of a physicist who had authored a widely distributed paper on the topic.[46]

Services subject to regulation under s 51(v)

Whatever the framers' rationale in including the phrase 'other like services', the words of s 51(v) have since been interpreted to encompass forms of technology that did not exist in 1900. The High Court has confirmed that it extends to regulation of radio and television broadcasting, and telecommunications, but is yet to decide whether the power extends to communication via the internet. The foundation for this broad reading of s 51(v) was set in *R v Brislan; Ex parte Williams*,[47] which established that radio broadcasting fell within the scope of the power.

The case involved a challenge to the *Wireless Telegraphy Act 1905* (Cth) which, among other things, gave the Postmaster-General the exclusive right to establish, erect, maintain and use stations for transmitting and receiving messages by wireless telegraphy. A majority of the court found the Act to be a valid exercise of s 51(v). Four members of the majority did not resort to the words 'other like services' and instead found that radio broadcasting was a 'telegraphic or telephonic service'.[48] Rich and Evatt JJ for example said that the words 'telegraphic or telephonic' should be understood as referring to 'electrical means of transmission of signals and speech'.[49] Radio broadcasting was said to fall within this description, 'both in its means and in the fact that

44 *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 773.

45 J A La Nauze, '"Other like services": Physics and the Australian Constitution' (1968) 1(3) *Records of the Australian Academy of Sciences* 36, 44.

46 Ibid 41–2.

47 (1935) 54 CLR 262.

48 Ibid 283 (Rich and Evatt JJ), 286–7 (Starke J), 294 (McTiernan J).

49 Ibid.

its main purpose is the transmission of sound instantaneously over long distances'.[50] Justices Rich and Evatt also remarked that s 51(v) was a 'constitutional power intended to provide for the future' and cater for 'unknown and unforeseen developments', and as such should be given a 'wide operation'.[51] Latham CJ differed from his colleagues in the majority by describing radio broadcasting as a 'like service'. In his view, the characteristic that made radio broadcasting similar to postal, telegraphic and telephonic services was the fact that it was a form of communication.[52] He also looked to the future development of the power when he remarked that, '[i]f a new form of communication should be discovered, it too might be made the subject of legislation as a "like service"'.[53]

Dixon J, in dissent, was the only member of the Court to systematically address the meaning of the different components of the phrase 'postal, telegraphic, telephonic and other like services'.[54] He concluded that these words should be understood as allowing Commonwealth regulation over means of *interpersonal* communication, but not communications addressed to the public at large.[55] On this basis, he ruled that regulation of radio broadcasting was beyond federal power under s 51(v).

Justice Dixon's dissenting opinion in *Brislan* is of enduring interest because it represents a plausible alternative construction of s 51(v) that, had it been adopted, would have severely hamstrung the future development of the power. In the later case of *Jones v Commonwealth (No 2)* in 1965,[56] Windeyer J expressed sympathy with Dixon J's interpretation, saying that if it were not for the decision in *Brislan* he 'would have thought that the feature which would make a "like service" was an organized system enabling individuals to communicate at a distance one with another and having that as its primary purpose'.[57] Nonetheless, Windeyer J accepted the decision in *Brislan* as binding, remarking that he '[did] so the more readily because the very nature of the subject-matter makes it appropriate for Commonwealth control regardless of State boundaries'.[58]

It was in *Jones* that the Court confirmed that television broadcasting also falls within the scope of s 51(v). Four judges viewed this conclusion as following logically from the decision in *Brislan*.[59] For Barwick CJ, television broadcasting was properly classified as a telephonic service given that the 'basic concept of telephony is communication at a distance by sound, the means of bridging the distance not being of the essence of the concept'.[60] More broadly, Barwick CJ affirmed the notion that s 51(v) should not be

50 Ibid.
51 Ibid.
52 Ibid 280.
53 Ibid.
54 Ibid 292–3.
55 Ibid 293.
56 (1965) 112 CLR 206.
57 Ibid 237. Similarly, Sawer described Dixon J's approach as 'an overwhelmingly more probable construction of what the Founders intended': Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne, 1968) 87.
58 (1965) 112 CLR 206, 237.
59 Ibid 219 (Barwick CJ), 222 (McTiernan J), 226 (Kitto J), 237 (Windeyer J).
60 Ibid, 219.

confined to services conducted at the time of Federation. Instead, he saw the essence of the power as 'the organised communication of messages from a distance, as well as the communication of messages by an organised means from a distance'.[61] Four decades later in *Bayside City Council v Telstra Corporation Ltd* in 2004, the Court confirmed that s 51(v) includes a power to make laws with respect to 'telecommunications services', although it did not clarify what particular services fall into this category.[62]

In summary, the High Court has given s 51(v) a broad construction with respect to the types of services that fall within its scope. The power covers services that disseminate messages to a mass audience by electrical means, and is not limited to those services which existed at Federation. Radio and television broadcasting, and telecommunications, have been held to qualify as such 'services' under s 51(v). There is a strong argument that the internet also falls into this category of 'service', and that online media is therefore also subject to Commonwealth regulation via this power. Not only does the internet facilitate the sending of messages via electrical means to a wide audience, but a reading of s 51(v) that incorporated the internet would be consistent with the view of several judges that the section is to be read in a flexible way that provides for technological developments. However, there will continue to be some uncertainty around federal legislative power over online media until the High Court determines the matter.

Activities subject to regulation under s 51(v)

The High Court has also taken a broad approach to the question of which activities are open to Commonwealth regulation under s 51(v). Provided that a law is directed at the regulation of one of the specified services, the Court has so far been reluctant to limit the means of that regulation. Latham CJ laid the basis for such an expansive approach in *Brislan*. As noted above, the result in that case confirmed the validity of a law granting the Postmaster-General the exclusive right to construct, maintain and use a communications station for transmitting and receiving messages by wireless telegraphy. In finding that this law was valid, Latham CJ also speculated as to the potential scope of the power:

> It appears to me to be impossible to attach any definite meaning to sec 51(v) short of that which gives full and complete power to Parliament to provide or to abstain from providing the services mentioned, to provide them upon such conditions of licences and payment as it thinks proper, or to permit other people to provide them, subject or not subject to conditions, or to prohibit the provision of such facilities altogether.[63]

This observation proved apposite when, three decades later in 1966, the Court in *Herald & Weekly Times Ltd v Commonwealth* found that s 51(v) authorised provisions in the *Broadcasting and Television Act 1942* (Cth) that placed restrictions on the ownership and control of commercial television stations.[64]

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61 Ibid 219. See also 226 (Kitto J).

62 *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, 624 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

63 (1935) 54 CLR 262, 277.

64 *Herald & Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418.

In *Jones*, the Court took this a step further in holding that s 51(v) supported a law regulating the preparation of programs for broadcasting. At issue was the ability of the Commonwealth under s 51(v) to establish the Australian Broadcasting Commission (now the Australian Broadcasting Corporation). Kitto J (with whom Barwick CJ and Taylor J agreed) found that the establishment of a body such as the ABC to provide content was incidental to s 51(v).[65] He said that '[t]he activities involved in preparing and otherwise acquiring programme material are necessarily incidental to the presentation of the programmes before the transmitting apparatus'.[66] McTiernan J took a similar view:

> The very description 'broadcasting and television service' implies something more than the mere provision of a method of communication. Proper incidents of such services are the preparation of programmes for broadcasting to inform and entertain the public. It is incidental, therefore, to the conduct of the service not only to provide and compile adequate and comprehensive programmes for transmission but also to take appropriate measures to maintain a supply of programmes for transmission, and to inform and interest the public in such activities.[67]

Menzies J dissented on the basis that the ABC was neither a telephonic service, nor a service 'like' a telephonic service, and that as such the preparation and provision of programs by the ABC could not be subject to Commonwealth regulation under s 51(v).[68]

In *Bayside City Council v Telstra Corporation Ltd*, the most recent High Court case to consider s 51(v), the Court considered the validity of a provision in the *Telecommunications Act 1997* (Cth) which rendered State and Territory laws of no effect to the extent that they discriminated against telecommunications providers. In this particular case Telstra and Optus claimed immunity from annual charges imposed on them by local councils for the installation of broadband coaxial cables, arguing that the charges were higher than those imposed on other public utilities and therefore discriminatory. As noted above, the Court in *Bayside* held that s 51(v) extends to the regulation of telecommunications services. The Court went on to affirm that the section encompasses the power to impose a range of conditions on the provision of such services. In holding that the impugned provision was validly enacted under s 51(v), the Court held that the power:

> extends to making laws regulating the terms and conditions upon which such services may be provided, the licensing of carriers, their conduct as licensees, and the conferring upon them of powers and immunities in connection with the activities undertaken by them pursuant to the chosen regulatory framework. The federal object of promoting the development of the telecommunications industry, and ensuring that telecommunications services would be provided to meet the needs of the Australian community, falls within a head of the legislative power of the Parliament of the Commonwealth.[69]

65 (1965) 112 CLR 206, 227–8.
66 Ibid 228.
67 Ibid 223. See also 237 (Windeyer J) and 245 (Owen J).
68 Ibid 233.
69 (2004) 216 CLR 595, 624 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

This statement suggests that, should the Court determine that internet regulation is within the scope of s 51(v), the range of activities potentially subject to federal laws will be very broad. As noted earlier, federal regulation of online content is already provided for in the *Broadcasting Services Act 1992* (Cth), but the constitutional validity of this scheme has not been tested before the courts.

Section 51(xx): Corporations power

Section 51(xx) of the *Constitution* provides that the federal Parliament has the power to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. The section thus enables regulation of the three listed types of corporations ('foreign', 'trading' and 'financial'), known collectively as 'constitutional corporations'.

Which activities can be regulated?

A key question in determining the scope of the power is which aspects or activities of a constitutional corporation may be regulated by the Commonwealth. In *Strickland v Rocla Concrete Pipes Ltd*[70] in 1971 and subsequent cases this was left unresolved by the High Court in a way that left little room to argue that the power could provide a secure base for regulating constitutional corporations engaged in the media.

The issue was finally settled in the *Work Choices Case*[71] in 2006. There, the High Court, by a 5–2 majority, upheld the Federal Parliament's use of s 51(xx) to reshape the regulation of industrial relations brought about by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The majority endorsed the reasoning of Gaudron J in *Re Dingjan; Ex parte Wagner*[72] and *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union*,[73] and confirmed that Commonwealth power under s 51(xx) extends to:

> the regulation of the activities, functions, relationships and business of a corporation described in that subsection, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.[74]

It is clear from this passage that, following the *Work Choices Case*, the Commonwealth's regulatory power over constitutional corporations is extremely wide. The power would enable the federal Parliament to enact a general scheme of media regulation (as it was able to do validly with respect to industrial relations) in so far as this applied to constitutional corporations.

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70 *Strickland v Rocla Concrete Pipes Ltd (Concrete Pipes Case)* (1971) 124 CLR 468.

71 *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1.

72 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

73 *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346.

74 Ibid 375 (Gaudron J), affirmed in *Work Choices Case* (2006) 229 CLR 1, 114 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

However, laws passed under this power cannot actually apply to a media entity unless the entity qualifies as a constitutional corporation, or is already sufficiently connected to one (such as through some form of direct contractual arrangement).[75] The question of whether a particular media organisation is a constitutional corporation is, therefore, a crucial one.

Constitutional corporations

A media entity cannot be a constitutional corporation unless it is formed as a corporation in the first place. This is significant because the type of business entity used by a media organisation is itself subject to choice and alteration. If a media body is constituted as, for example, a partnership or sole trader, rather than as a corporation, it does not qualify as a constitutional corporation under s 51(xx). This leaves open the possibility that a media organisation will escape federal regulation under this power by initially forming itself as a different type of business entity, or by restructuring its business to divest itself of its corporate status.

If a media entity is a corporation, it may qualify as a 'trading' or 'foreign' corporation under s 51(xx). It will fall under the latter category simply if it was 'formed outside the limits of the Commonwealth'.[76] Hence, any corporation formed outside of Australia that seeks to engage in media activities in Australia, whether via the internet or other means, can be regulated on the basis of being a constitutional corporation.

The current test for determining whether a corporation is a 'trading corporation' stems from *R v Federal Court of Australia; ex parte WA National Football League* ('*Adamson's Case*').[77] This High Court decision stands for the proposition that determining whether a corporation is a 'trading corporation' involves characterising the corporation by reference to its *activities*, rather than by the *purpose* for which it was incorporated.[78] A majority of the Court[79] held that corporations engaged in a football league qualified as 'trading corporations' due to the significant level of their trading activities.

The level of trading activity required for a corporation to qualify as a trading corporation was not resolved in *Adamson's Case*. Specifically, the question of whether the corporation's trading activities need to be its *predominant* activities, or whether it suffices that they are a *substantial part* of its business was left open. This was addressed in *State Superannuation Board of Victoria v Trade Practices Commission*,[80] where a majority of the High Court rejected the idea that a trading corporation's trading activities needed to be predominant:

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75 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

76 *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482, 498.

77 *R v Federal Court of Australia; Ex parte WA National Football League (Adamson's Case)* (1979) 143 CLR 190.

78 Compare the prior decision of *R v Trade Practices Tribunal; Ex parte St George City Council* (1974) 130 CLR 533.

79 Barwick CJ, Mason, Murphy and Jacobs JJ.

80 *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282 ('*State Superannuation Board*').

> [T]here is nothing in *Adamson* which lends support for the view that the fact that a corporation carries on independent trading activities on a significant scale will not result in its properly being categorised as a trading corporation if other more extensive non-trading activities properly warrant its being also categorised as a corporation of some other type.[81]

There have been very few High Court decisions in the quarter century since this decision on the test to be applied in determining whether a body is a trading corporation. It thus remains the case that a corporation will be classified as a trading corporation where it has 'substantial trading activities'.

The 'substantial activities' test is notoriously difficult to apply as it depends on an intuitive judgement as to whether the trading activities of a body are sufficiently substantial for it to be classed as a trading corporation. The High Court has not provided guidance as to what percentage of a corporation's total activities amounts to a substantial proportion, nor a clear definition of what amounts to a trading activity in the first place. The test also leaves open the prospect that a corporation may be a constitutional corporation at one point in time, but not at another as the proportion of its trading activities shifts from being substantial to insubstantial. The activities test must thus be applied on an ongoing basis in order to determine whether a body remains a constitutional corporation. That said, the difficulty of determining whether a body is a trading corporation will only apply at the margins. Any media organisation constituted as a corporation that runs a significant business will be classified as a trading corporation.

How far can the Commonwealth go?

It is clear that major media organisations like News Ltd and Fairfax Media Ltd are constitutional corporations, and thus subject to the possibility of broad federal regulation under s 51(xx). Other corporations that engage in the media on a for-profit basis will also be caught in this way, as will non-profit corporations that generate significant revenue through trading and other like activities. On the other hand, media organisations that are not constituted as corporations, or that engage in the media without generating significant revenues, will fall outside the scope of this power.

Once a media organisation is classified as a constitutional corporation, it can be the subject of almost any form of federal media regulation that is desired (subject only to other constitutional limitations such as the separation of judicial power). Federal legislation could provide that a constitutional corporation may not publish a newspaper or operate or host a website unless it passes a public interest test. The publication of a newspaper might also be subject to federal direction as to the content of the paper, and a requirement for a correction or apology in the event of misreporting. In essence, the corporations power can be used to create an equivalent regime for print and other forms of media operated by constitutional corporations as currently exists for television and radio.

A new regulatory regime based upon the corporations power could implement in full the recommendations of the Finkelstein Inquiry and

81 Ibid 304.

Convergence Review, subject to one important caveat. Entities involved in the media that do not operate as corporations would not be brought within the regime. This could have major implications for the coverage of the new laws given that a number of smaller media entities might not be covered on the basis of being unincorporated. The Uniting Church's monthly newspaper *Crosslight*, which is not incorporated, is an example of a publication that would fall outside the scope of federal regulation relying upon the corporations power. Such entities may be small in number. Many religious and community publications with small distributions, such as the *Catholic Leader*, *Fiji Times* and *Greek Herald* are incorporated and so would be subject to federal regulation provided they could be classified as 'trading corporations'. Nonetheless, it would remain open to an incorporated media entity to escape the federal regime by divesting themselves of their corporate status. Of course, such a step would also come with a range of other costs by virtue of the fact that the corporate form can offer significant benefits to such businesses.

The Commonwealth's other major power in this area, that in s 51(v) over 'postal, telegraphic, telephonic and other like services', does not suffer from the same problem. It provides a broad scope to regulate the services encompassed by the power, without the opportunity for organisations operating services to move in or out of the regime based upon their legal status. Section 51(v) has already been applied with great effect to regulate broadcasting and television. As suggested above, there are sound reasons to believe that it might in the same way be applied to produce a broad scheme of regulation for online news media. If this were the case, s 51(v) could capture online media outlets beyond the reach of the corporations power. Section 51(v) would enable regulation of unincorporated online news entities, such as Vexnews and the Failed Estate, as well as bloggers more generally. It would also provide an additional basis for the regulation of incorporated online news outlets such as Crikey, New Matilda and Mumbrella where there may be doubt as to whether they generate sufficient revenue to be classified as 'trading corporations', and so subject to regulation under s 51(xx).

Conclusion

Examination of the federal Parliament's legislative powers demonstrates great capacity for the Commonwealth to increase the reach of its media regulation, including with regard to print and online media. However, the scope for such regulation is not without its limits. The primary powers that might be relied upon by the Commonwealth are not sufficient to produce new media regulation that ensures complete coverage of those areas.

In particular, regulation of print media under the corporations power leaves open the possibility that some participants will escape the federal net by operating in the industry without assuming a corporate status. This is an inescapable aspect of the scope of this federal power. It is a problem often faced by the Commonwealth in other areas. The only certain way to avoid it is to instead base new federal regulation of the media on a referral of power by the States, something that is highly unlikely to be forthcoming.