

Privacy and the Media – A Platform for Change?

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A free press is both a critical feature of an open, democratic society and a threat to privacy. For decades, the media in Australia have successfully avoided meaningful regulatory mechanisms, through a combination of corporate muscle and the chimera of self-regulation. But events in recent years raise the possibility that change may be on its way. From 2006 to 2011, the News of the World revelations weakened the Murdoch empire. This emboldened politicians in Australia as much as in the UK. In parallel, public dissatisfaction has been evident with media behaviour and unjustified disclosures of personal data in media publications. Calls for institutional and process reformation to achieve more appropriate balances have risen to a crescendo.

This paper chronicles the key events in Australia between 2007 and 2011 and in the process unfolding the key issues. In 2009, the Australian Privacy Foundation published specific proposals aimed at an enhanced self-regulatory regime. Discussions with News Limited, Media Alliance, the ABC, the Australian Press Council (APC) and university research centres were all fruitless. A mailing to the complete list of Professors of Journalism resulted in nothing more than a couple of acknowledgements of receipt.

Yet, only two years later, during the course of 2011, four separate processes with potentially significant outcomes occurred. Firstly, the Government canvassed a civil right of action that would apply to the media as it would to everyone else. In addition, both the APC and the Australian Communications and Media Authority (ACMA) undertook reviews of their codes and processes. The fourth initiative was an independent inquiry into media regulation, which recommended in early 2012 that a News Media Council be established, to replace both the APC and ACMA.

These activities represent a platform for change. Whether there will be outcomes, and whether they will be positive for privacy, depends on the degree of commitment of the proponents for change.

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INTRODUCTION

Various channels exist whereby-to-date information and entertainment are conveyed to humans over time and distance. The generic term ‘the media’ is commonly applied to these channels. The media plays a vital role in informing the public, and its exposure of inappropriate behaviour by governments is a crucial element of an effective democracy.

There are many circumstances in which personal data about individuals and their behaviour is communicated as part of news and entertainment. In many cases, the public interest exceeds the private interest in suppressing that information. Privacy abuses have, however, been a feature of media practices for over a century (e.g. Warren & Brandeis 1890). The incidence of abuses has seldom slackened. It appears to have increased during the last half-century, particularly in UK tabloids, magazines and ‘tabloid TV’, and that increase has been reflected in Australian equivalents.

The tendency has been reinforced by the cult of self-exposure. Although this can be traced back into the nineteenth century (de Leon 2002), it was intensified by Andy Warhol’s exhortation to “15 minutes of fame” in 1969, fanned by Oprah Winfrey from 1986 (“It’s the most pressing human need besides sex and food: the desire to be known” – Beck 2003), and by the ‘Big Brother’ genre commencing at the end of the 1990s. It moved beyond film and TV into networked media in 2004, with ‘social networking services’, and subsequently the broader category of ‘social media’, enveigling people into exposing themselves and one another for the titillation of all, the ‘attraction of eyeballs’ and ‘monetisation’ through advertising.

Privacy abuses by media organisations are not confined to the unjustified publication of personal data, but rather commence during the information-gathering phase. It is a widely-held belief that Australian media organisations, unlike their UK counterparts, have not gained unauthorised access to voice-mail. On the other hand, in response to speculation in mid-2011, journalists working for *The Australian* wrote that “private investigators and hidden cameras have been deployed by Australian media organisations to pursue stories”. The same article declared that competitor Fairfax broadsheets had “used an ALP password to hack into the database to verify its contents ahead of exposing the database [and] relied on hacked and stolen diplomatic cables, as part of their WikiLeaks coverage” (Overington & Canning 2011).

It appears likely that many other privacy-abusive collection practices are used from time to time, include ‘pretexting’ (lying or otherwise misrepresenting the purpose of a conversation, in order to get access to information that would normally be protected), masquerade or ‘blagging’ (pretending to be someone else, in order to get access to information that would normally be protected),

unauthorised access to files and stored communications, visual and audio observation, recording of audio, image and video, enhanced visual and audio surveillance (e.g. using telescopic lenses and directional microphones), pursuit, and the location and tracking of vehicles and individuals by planting devices to facilitate their detection.

The 'quality press' or 'broadsheets' have been for the most part professional, although occasional bad judgement is inevitable under the time-pressures inherent in news-reporting. Murdoch's 'The Australian' has from time to time been accused of waging political campaigns in breach of reasonable expectations of media behaviour (Manne 2011).

Much worse misbehaviour has been apparent in the lower-grade press, which have been for many years subject to the pejorative label of 'tabloid' (although the term originally referred to the size of the sheets they are commonly printed on). Meanwhile, the broadcast media, particularly television 'news', has become cavalier in its pursuit of video that will stimulate viewer interest. To justify their behaviour, media outlets continue to use the term 'journalism' not only in its real sense, but also to refer to the pursuit of 'sensational trivia', frequently about people, which is more reasonably described as 'voyeurism'.

It is a normal function of parliaments to impose regulatory regimes in order to combat excesses such as these. However, for many decades, media organisations have used their power over politicians to avoid regulation. The purpose of this paper is to trace recent developments in the political landscape, and consider whether the power of media organisations may have eased sufficiently for change to occur, and appropriate forms of regulation to be imposed.

The paper commences by reviewing the changing nature of the media, media content and media organisations. Building on that base, the media's privacy impacts are considered, both in abstract terms and by means of examples of privacy abuses. This leads to a statement of privacy needs, and an assessment of the (very limited) protections afforded by current Australian laws, the nominally 'co-regulatory' arrangements in the broadcast arena, and the self-regulatory scheme that operates in relation to the print media. During the last five years, a number of threads can be traced that may be laying the foundations for a more privacy-protective framework. These threads are reviewed, and the prospects for change evaluated.

THE MEDIA IN THE EARLY 21ST CENTURY

This section reviews the nature and current dynamics of firstly the media, then media content, and finally media organisations.

THE MEDIA

A series of broad waves of ‘media’ can be usefully distinguished. Although individual formats may become obsolete, none of the waves have subsided, and all remain in flow. The following are the five waves:

- *Display Media.* The historical evidence for this wave begins with the first cave-paintings, 30,000 years ago, and encompasses symbols on clay-tablets, sheets of parchment and papyrus, and on scrolls; hand-written codices (i.e. in book-form); painting on man-made walls, flags, blimps, packaging and billboards; neon signs; placards stuck in the ground or carried by demonstrators; signs towed by aircraft, and skywriting. Cinemas can also be classified as (a sophisticated form of) display media.
- *Print Media.* This dates to at least Gutenberg in the late 15th century, and includes single-sheet leaflets and pamphlets, printed codices (i.e. in book-form), newspapers and magazines (together ‘the press’), and printed photographs, which are all directly accessible by the human eye.
- *Sound and Video Recording Media.* This wave dates back to the late 19th century and includes cellulose film, wax cylinders, vinyl discs, magnetic disks, cassettes, CDs, VCRs, DVDs and detachable solid-state storage (‘thumb-drives’), each of which requires an intermediating device to render the content.
- *Broadcast Media.* This wave emerged in the early and mid-20th century, and comprises radio and television, originally analogue, more recently digital. These require a transmission medium (broadcast electromagnetic signals), and a device to convert the broadcast signals into sound for the human ear and/or light for the human eye.
- *Networked Media.* This has exploded since the mid-to-late 20th century, and distributes digital content. It requires storage, a network and a device to render the content for eye and/or ear. The storage has migrated from large hosts to smaller ones, and from corporation-controlled devices to consumer-owned devices, and currently appears to be migrating back again. Networks were originally cabled or ‘wired’; but today a great deal of it is now wireless or ‘unwired’, supporting mobile users. Networked media may be narrowcast, i.e. targeted at a few recipients; or broadcast, to many recipients – in which case it intersects with the previous category. The devices that are capable of performing the rendering function have migrated from terminals, via workstations, PCs and portables, to handhelds and mobile phones.

Later forms of media have influenced earlier kinds in various ways, including both displacement and reinforcement. For example, VCRs – which film makers

initially claimed would be very harmful to the industry's viability – provided a huge additional source of income for them; encyclopaedias and dictionaries have migrated from print to CD and on to web-sites for distribution over networks; and many radio stations not only broadcast but also stream over the Internet.

MEDIA CONTENT

A great many forms of content are carried by the media, including text, still-image, sound (particularly the spoken voice) and music, moving-image or video, animation, and combinations, principally text with still-image, and video with sound. This paper is less concerned with the form than with the content.

A great deal of the content made available by the media is not information about the real world. This includes novels (which were originally depicted as 'a sustained lie'), most feature films and games. Art includes exaggerations and inventions, but in a context that makes clear that the presentation is not of information, that is to be understood in a literal sense. This paper considers the impact of media behaviour on individuals' privacy, and hence does not focus on these kinds of content.

The primary concern here is with three kinds of content, which do, or may be seen to, convey information about the real world, and in particular about people in it. These kinds of content may be projected using any of the media and media forms mentioned earlier. Such words as 'news' and 'journalism' are commonly used for informational content, but care is needed in order to distinguish several categories:

- *'journalism'* is used in this paper to refer to the preparation of news, current affairs and documentaries, by means of the discipline of collecting, analysing, cross-checking and presenting information regarding events and issues that are 'in the public interest'. Journalism includes 'opinion', but opinion needs to be clearly distinguished as such. The term and the definition are conventional.
- *'advertorialism'* is used in this paper to refer to a form of corrupted or debased journalism, in which the analysis and cross-checking of information is compromised. It involves essentially re-publishing government propaganda and business propaganda as provided by those organisations' public relations and marketing apparatus. This term may not yet be mainstream, but is consistent with contemporary thinking.
- *'voyeurnalism'* is used in this paper to refer to a different form of corrupted or debased journalism, in which information regarding events and issues is presented that is not 'in the public interest', but rather is 'what the public is interested in', or 'what the public may be made to be interested in'. Some voyeurnalism departs further from journalism by presenting information

in a constructively misleading manner or inventing pseudo-information along the lines of ‘fantasy news’. This category of media was referred to as ‘yellow press’ and ‘yellow journalism’ in the USA a century ago, and the term ‘sensationalist media’ is used in the UK. The word ‘voyeurnalism’ is a concoction by this author, to deal with the absence of an established term.

This paper does not further address advertorialism. It is concerned primarily with journalism, but also to some extent with voyeurnalism because of the prevalence with which it deals in content relating to identifiable individuals.

MEDIA ORGANISATIONS

Newspapers originated in the seventeenth century and matured through the eighteenth and nineteenth centuries. Journalism professionalised with it. The term ‘the press’ originally referred to journalism in print media, and the term ‘the fourth estate’ was initially used as a positive reference to its role in political processes.

There has been a bifurcation in ‘the press’. What were for a time reliably described as ‘broadsheets’ but are now better-described as ‘the quality press’. There is a focus on journalism, with some leakage into advertorialism (particularly in ‘supplements’ and ‘liftouts’ in such areas as tourism, real estate and education) and some leakage into voyeurnalism as well. What were for a time reliably described as ‘tabloids’, on the other hand, has a primary focus on voyeurnalism, sometimes with a veneer of journalism. Some specialist magazines focus on journalism, others on advertorialism or voyeurnalism, with others extending across multiple categories.

Media organisations whose origins were in ‘the press’ have migrated to new media as opportunities arose. In Australia, the large newspaper groups own or have significant interests in radio stations and television channels. During the late 1990s, as the Internet became widely available, they also quickly moved into networked media, particularly in the form of web-sites that operate as adjuncts to their print operations.

The rise of radio broadcasting saw media organisations emerge that also conducted journalism (as that term is used in this paper). This has applied particularly to the ABC, but most radio stations run at least some ‘news’. Television broadcasting followed a similar trail during much of the second half of the 20th century, although the compromises to journalism on commercial channels have become more marked. Cable TV and satellite TV primarily reticulate entertainment, but make some contributions to news. These media organisations have also moved quickly into networked media. Radio news is now streamed on the Internet, and television reports are available for streaming and download. By 2010, every media organisation that existed in the mid-1990s had a content-rich web-site that supplemented, and that to some extent at least cannibalised, its other channels to

market.

The term 'news media' is now reasonably applied to journalism using any of the wide range of available media, including some newspapers, some magazines, some broadcast radio and TV, some narrowcast radio and TV, and some networked media. The term 'convergence' has been much-used to refer to the inevitable reconfiguration of industry structures.

Meanwhile, competitors emerged whose websites were not an echo of print, but an alternative to print. The first appears to have been The American Reporter, in 1995. Other well-known examples include The Huffington Post and, in Australia, Crikey. Many of these produce little or no journalism themselves, e.g. The Drudge Report is almost entirely a 'news aggregation' site, and The Huffington Post is primarily opinion rather than news reporting.

In addition, for-profit media organisations have been increasingly joined by 'unofficial media', in such forms as personal web-sites containing commentary, image and video, 'web-site diaries' referred to as a (we)blogs, video-postings (on such sites as YouTube), 'social media' (such as Facebook and Twitter) and collaborative reference-sites (such as Wikipedia). A more formalised instance of collaborative news reporting is the Independent Media Center (Indymedia), formed in 1999. The 'Arab Spring' of 2011 featured a considerable amount of reporting by participants directly via networked media. The standards vary widely, from journalism, via various forms of compromise to quality, to veyournalism.

Competition for content and for customer attention has greatly intensified, as media organisations moved onto one another's turf, and as formal and informal newcomers emerged. The competition for revenue has been even more vicious. The Internet arrived without turnstiles. The 'free as in beer' ethos took hold, and it has proven very challenging for media organisations to sustain their subscriptions revenue. In 2011, News Corp began erecting a 'paywall', hoping to join the few strongly-reputed organisations that have been successful in charging for access (notably The Wall Street Journal, The Financial Times, The Economist and Nature).

Yet worse than the leakage of subscription revenue has been the haemorrhage of advertising revenue. Networked media gave rise to serious challenges to the dominance of print media over classified advertising. Meanwhile, in the display advertising area, not only is the available revenue now spread more thinly over more channels, resulting in less to each media organisation, but the business of advertising in networked media is now dominated by a single organisation, which extracts far higher margins than did the value-chains that have long existed in print and broadcast advertising.

In the new era of much-reduced revenues, serious doubts have been expressed about the capacity of the media organisations that have conducted journalism

to sustain the discipline of collecting, analysing, cross-checking and presenting information.

THE MEDIA'S PRIVACY IMPACTS

The media has gone through frequent reformations, and is currently going through another – one which journalists and shareholders alike are finding painful. This section, however, is concerned with the pain caused by the media to individuals, particularly pain that is not justified by the lofty ideals of journalism and the news media nor by the practical issues of contributing to an effective society and economy by informing the public about matters genuinely ‘in the public interest’.

The first sub-section identifies aspects of the behaviour of the media that are of concern. The second provides an empirical base of examples. The ground is then laid for an assessment of current and emergent regulatory measures, by presenting a summary of the privacy needs. The final sub-section provides an assessment of media regulation as it existed in 2007, and, with limited qualifications, continues in 2012.

MEDIA BEHAVIOUR

Media organisations and the journalists on whom they depend perform a vast amount of valuable public-interest reporting. This is done primarily in quality outlets, especially in ‘the press’, but also in broadcast and to some extent in networked media. There is, however, an even larger amount of what-the-public-might-be-able-to-be-made-interested-in material, infotainment, and outright invention. When dealing with ‘public figures’, especially ‘celebrities’, a great deal of the content is playing to voyeurism.

The media performs two functions that can impinge on privacy: information-gathering and publication:

- the gathering of material about individuals; and
- the publication of identities and of personal data.

The information-gathering function involves interviews with people who know something of relevance, or can offer a view of relevance and interest. In addition to gathering personal data, this function may involve incidental disclosure of individuals’ identities and personal data. Information-gathering also involves observation of events, locations and individuals, and may involve recording of people’s behaviour.

Information-gathering activities may be performed in a professional manner, with the degree of intrusiveness proportionate to the public interest that the story affects. In a moderate number of cases, on the other hand, the degree of intrusiveness is unjustified, disproportionate, tasteless, or seriously excessive and

bordering on criminal activity. The term ‘paparazzi’ refers to a photographer or reporter who seeks sensational but essentially trivial material with great persistence and frequently with audacity. Their activities are often indistinguishable from harassment and stalking. As one commentator puts it, “[p]rivacy laws could deal more effectively with the stalking, the trespass, the unreasonable intrusions - denying the daily oxygen to the trashy “scoops” of tabloids and current affairs television” (Cheryl Kernot, in SMH 2011). The results of a study of the media’s use of surveillance techniques and technologies is in Clarke (2012d).

Typically, information-gathering data by one or a few journalists results in a first round of publications. When a story is judged to be capable of running longer, additional media organisations then seek small amounts of further information, in order to justify re-publication of the same information, nominally updated. Media organisations feed off one another in order to fill space (the press and web-pages) or time (broadcast and streamed media), resulting in a snowball of scores and often hundreds of repeats. When a single report unjustifiably publishes privacy-infringing personal data, that report is used as justification by scores of other outlets for large numbers of follow-on breaches.

In the analysis that follows, it is necessary to recognise that a variety of circumstances involve different balances among interests. Important among the categories are the following:

- (1) genuine instances of public interest. These may involve people who, by virtue of the position(s) they hold or the functions they perform, are ‘public figures’ in some sense at least. The nature of the public interest is examined at various points in this paper.
- (2) attention-seekers, including celebrities and notorieties, some of whom came to public notice because of some act that was noteworthy and others of whom are ‘famous for being famous’.
- (3) people who have celebrity-status – or notoriety-status – thrust upon them by the media, usually for a short time, e.g. because they won a lottery, or because they are caught up in significant events.
- (4) vulnerable people, including the young, the mentally-impaired, accident victims, and the bereaved.

INSTANCES OF PRIVACY ABUSE - 2007-2011

In order to underpin the policy discussion, an empirical base is needed. One potential source is the 1,500 case notes on Australian Press Council adjudications provided at APC (2012) and more comprehensively at AustLII (2012). However, only 138 of the 1,500 reports contain the word privacy – or 4 p.a. over the APC’s 35-year history – including only 17 in the most recent 4-year period, 2008-11. A detailed reading of all reports would presumably identify some additional

privacy-related cases. However, it was not until June 2010 that “the procedures for drafting adjudications were changed to achieve greater clarity, consistency and rigour, especially concerning the reasons for decisions” (APC 2011c, para. D24, p. 15).

Another potential source is ACMA’s 2,500 Investigation Reports. These are stated to be accessible (ACMA 2012), but the sub-site is organised in a manner unhelpful to analysis, and appears to be unsearchable. It is accordingly unclear how many and which investigation reports relate to privacy. From the 2010-11 Annual Report, it appears that, of the 197 investigations completed that year, only 6 included privacy matters, and all of them resulted in a no-breach finding. In ACMA (2011b), eight investigations, scattered across the period 2003-11, were selected for inclusion as appendices – although only 4 instances resulted in a breach finding, and only 2 of those were within the most recent 5-year period.

These catalogues are of some value. However, they are subject to the limitations mentioned above, and to the lack of public visibility and the lack of public credibility that both APC and ACMA suffer – a topic examined in a later subsection. These catalogues therefore represent a highly biased sample of both instances and outcomes.

The approach adopted in this section is to identify 15 well-publicised and diverse instances of privacy-abusive behaviour and publication that occurred during the 5-year period 2007-11. The selection is limited to instances that have come to the author’s notice, that had a nation-wide reach, and that can be readily documented. The selection under-represents abuses by television channels, because the author only occasionally sees commercial TV news, and transcripts are less easily located than press reports. The selection specifically focuses on privacy abuses, and does not include instances in which apparently intrusive behaviour or disclosure was or reasonably may have been justified in the circumstances. It focuses on ‘official media’, because until a satisfactory framework is in place for that segment, it will remain pointless trying to impose discipline on the individuals who make up the increasingly active and productive ‘unofficial media’.

In April 2007, well-performed sports stars Candice Falzon and Sonny Bill Williams’ ‘toilet tryst’ was exposed, with multiple follow-on stories living off the salaciousness (DT 2007a, 2007b). The story was about sex between consenting adults, behind a cubicle door, using a photo captured surreptitiously and without consent. There was no suggestion that consent to publish was provided, not even implied consent based on their self-promotional public behaviour. No attempt was apparent to predicate publication on the basis of the individuals’ role-model responsibilities – which has been the (in many cases entirely reasonable) justification for large numbers of stories about allegations of assault and sexual coercion, and repeated instances of drunkenness, particularly among practitioners

of the more robust forms of sport. Keating (2010) wrote that “the then editor of the Daily Telegraph defended the publication [solely] by “it is currently the second highest read story of the year so far. The readers clearly loved it””.

In July 2007, media reports about the female partner of celebrity Deborah Hutton, aired at the time of her brother’s death, gave rise to requests for her private life to be left alone. Reports on those requests brazenly repeated the privacy-infringing comments that had been made about her bi-sexuality (AAP 2007, Connolly 2007), and Murdoch tabloids have re-cycled the breach from time to time thereafter (e.g. DT 2009b).

In February 2008, a policeman, Ashley Don, “lodged a complaint with the Australian Press Council about media coverage of the attack [on him], which he said had threatened his privacy and safety by revealing his rank, his address, his age and the school attended by his sons” (Baker & Welch 2008). No evidence of a determination was found on the APC site.

In May 2008, Antony Elliott’s boat-engine exploded on the Yarra River, killing his parents (Hastie 2008). Channel 10 broadcast footage of him, injured, distraught and very angry with the media crew, and clearly denying consent to capture and publish the footage. Three years later, an editorial piece in The Sydney Morning Herald expanded on the desiderata involved in the publication of distressing images (Prisk 2011).

A complaint to ACMA about the Elliott case gave rise to humiliation for the agency. When it reported, 13 months later, it found against the act of publication. However, it could not find against the media behaviour at the time of the recording of the video (even though it acknowledged that grief is a private matter, whether or not in a public place) because the guidelines provided “inadequate guidance” and it decided that the benefit of the doubt should go to the media organisation not the person whose privacy has been seriously invaded (ACMA 2009b, p.4).

In January 2009, new VC-winner, Mark Donaldson, was subjected to exposure of family tragedies that had occurred some years previously, in considerable detail (Buchanan 2009). The newspaper attempted to justify publication on the highly dubious grounds that the tragedies explained why he had enlisted. This case earned serious criticism from letter-writers (SMHLetters, 2009), but no action from the media organiser nor any regulator.

In February 2009, a newspaper exposed Alexandra as an ex-girlfriend of Brendan Sokaluk, who had allegedly set bushfires that resulted in over 20 deaths (DT 2009a). The article was published (including a photo), despite acknowledgement that the relationship went back more than a year, was irrelevant to the case, a quotation from her mother saying that she was “a guileless and not-worldly person”, and clear communication that she did not want to be associated with the suspect. Multiple articles appeared, mentioning her name, in at least three

Murdoch papers, including the 'quality broadsheet', The Australian. The details published included her age, her commonly-used abbreviation, and her dog's name, and the small town in which she lived was apparent from the reports.

The Alexandra case was in apparent breach not just of reasonable public expectations, but even of News Ltd's own Professional Conduct Policy: "Unless it is in the public interest to do so, do not identify the family or friends of people accused of or convicted of a crime" (News Ltd 2006, para. 4.2). That Policy may be unenforceable by the company, however. Despite the then CEO's assurance that

"Our code of editorial conduct is available to all journalists; indeed all staff can access it. It is on our intranets and available in hard copy. The code is given to journalists who are required to read it and abide by it as a condition of their employment (Hartigan 2011)

there is considerable evidence that it was not effectively communicated to News Ltd's journalists (Simons 2011a, 2011c).

In March 2009, the Murdoch press scored double-points by publishing 'nude photos of Pauline Hanson', only to find out soon afterwards that her face had been photoshopped onto someone else's body (Dart 2009). Keating (2010) wrote, "When questioned about the precise public interest involved [the Daily Telegraph editor] said "That's for our readers to tell. That will be determined by the number of people that buy the paper"". Media Watch attacked the Murdoch press's abandonment of journalistic standards: "if there were a statutory right to privacy [Hanson would] have a lay down misère. This sleazy exercise, Mr Hartigan, makes it all the more likely that very soon, there will be" (MW 2009b). In this case, it was reported that Hanson was able to use causes of action other than privacy to achieve retraction and compensation; but this appears to have been the only one of the 15 cases for which any meaningful redress has been achieved.

In June 2009, the mother of Anthony Splatt, Victoria's first swine flu victim was subjected to unwelcome media attention and disclosure of distressing details, because a Department of Health announcement contained enough information to enable the deceased man's identity to be inferred by searching the small number of death notices in the 10,000-strong town of Colac (Medew & Smith 2009). No public interest was served by disclosing the person's identity, as distinct from the fact and nature of his death, and the location.

In July 2009, radio hosts Jackie O and Kyle Sandilands prepared to subject a 14-year-old girl to live-to-air questioning about her drugs and sex experience, apparently at the girl's mother's instigation. At the beginning of the conversation, the girl disclosed that she had been raped when she was 12. After a follow-on question that was widely regarded as highly inappropriate, the segment was

quickly brought to an end (Robinson 2009). Privacy breach was only one of the many reasons that Sandilands lost a number of employment contracts (although in some cases only briefly).

In September 2009, The Daily Telegraph, a Murdoch tabloid, while contesting a defamation action by NSW Minister John Della Bosca, published details of an affair he had had, which were provided by his (ex-)partner (Watson 2009). The media company had a self-interest in discrediting its opponent before the courtroom door, but the attempt to construct a public interest justification based on Della Bosca's party-leadership ambitions lacked any substance (Ackland 2009).

In March 2010, model Lara Bingle, at that stage partnered with the heir-apparent to the Australian cricket captaincy, was the subject of disclosure by magazine 'Woman's Day' of a nude photo captured 3 years earlier while she was still a teenager (WD 2010). The story was picked up and rolled onwards by large numbers of outlets. It was clear that no consent had been given, it was untenable to infer consent to publish merely on the basis that she was an inveterate attention-seeker, and no relevance to any public interest consideration was ever apparent or even suggested. It appeared that prior publication on 'social media' web-sites was the sole excuse offered.

In May 2010, various media outlets published nude photos of several St Kilda footballers, including Nick Riewoldt, that had been supplied by a 17-year-old (i.e. of-age) 'St Kilda Schoolgirl', Kim Duthie. As subsequent events made clear, even very limited checking would have thrown serious doubt on Duthie's credibility. In any case, no public interest was apparent that might have been sufficient to justify publication. There were many scores of media reports on this and on subsequent related events – for many of which public interest justifications were apparent. The volume of media reports and informal postings have made it difficult to identify the earliest publications by media organisations.

Also in May 2010, Channel 7 News disclosed NSW Minister Campbell's visit to a gay club. The publication was immediately and severely criticised, including by many media commentators, as being not justified by any public interest factor (e.g. Salusinszky 2010, Marr 2010, MW 2010). Marr's comments provided evidence of the existence of (unwritten) rules at a level of articulation considerably greater than that in the various codes of conduct, and that clearly needed to be formalised and promulgated: "blowing [Minister Campbell's] cover could only be justified if, once again, his hypocrisy affected his public life. That's the rule" (Marr 2010).

When ACMA's decision, finalised in December, was published in February 2011, it was immediately apparent that ACMA had failed again. It had bent over backwards to protect the media organisation rather than privacy, by inventing an illogical excuse on Channel 7's behalf that the stalking and publication were in the public interest "because it provided a deeper explanation of the circumstances behind the resignation" (ACMA 2010). ACMA was roundly chastised, by the

media itself, for being too soft on the media (e.g. Ackland 2011a).

In August 2011, following her ordeal with a fake collar-bomb put on her by an intruder, Madaleine Pulver was inevitably the centre of attention for a short time (AAP 2011a). The ‘event of significance’ justification for incursions into privacy subsided quickly, but despite early requests to be left alone (BigPond 2011), which were repeated on successive occasions (e.g. AAP 2011b, Ralston & Hutchens 2011), she and her family were relentlessly set upon for many weeks, in particular by the broadcast media. The press, including the ‘quality press’, participated, offering the thin veneer of justification that the privacy-invasive behaviour of the media had become the story. Throughout, the Murdoch media’s presence was in very apparent breach of News Ltd’s Professional Conduct Policy: “Do not harass or try to intimidate people when seeking information or photographs” (News Ltd 2006, 7.1).

In October 2011, a 14-year-old Australian boy was arrested in Bali and charged with a drug offence. The boy was subjected to extraordinary pressure by Australian television camera operators and reporters despite clear denials of consent, and the widely-acknowledged sensitivity of Indonesian judicial processes to outside influences (e.g. Alford 2011). In addition to the tabloid press and commercial television, the ‘quality press’ also participated in the frenzy. The interference with the boy’s progress to and from the court-room appeared to involve serial breaches of News Ltd’s Professional Conduct Policy: “Do not persist in ... pursuing, questioning, door-stopping or obstructing access after you have been asked by an authorised person to stop” (News Ltd 2006, 7.4).

Of these cases, nine (Falzon and Williams, Deborah Hutton, Mark Donaldson, Pauline Hanson, John Della Bosca, Lara Bingle, Nick Riewoldt, Minister Campbell, and Madaleine Pulver on a couple of fleeting occasions) involved ‘public figures’, whereas seven (Don, Elliott, Alexandra, the mother of Anthony Splatt, the 14-year-old girl, Madaleine Pulver most of the time, and the 14-year-old boy) did not.

The likelihood of a public interest factor justifying media attention, or the publication of personal behaviour or personal data, varies depending on such factors as the nature of the behaviour or the event, the significance and longevity of the person’s ‘public figure’ status, and the degree to which the individual exhibits attention-seeking behaviour. At no stage, however, does the individual surrender their claims to a private space and to be ‘let alone’ in public spaces, and at no stage do the media escape the moral responsibility to justify its data collection and publication actions.

THE PRIVACY NEEDS

Law and practice in Australia are so deficient that the 15 instances of privacy abuse by media organisations listed in the previous sub-section were almost

entirely without remedy. The following sub-section provides an outline of the inadequate arrangements that are currently in place. This sub-section briefly summarises the privacy need, in order to provide a reference-point against which those arrangements can be compared.

In Clarke (2012a) a set of requirements is presented for the effective protection of privacy, balanced against the public interest. This draws heavily on work by the Australian Privacy Foundation (APF, 2009, 2011c).. The requirements comprise the following elements:

- 1 *Principles and Standards Articulated into Codes.* Statements of principles are appropriate and important, but they need to be re-expressed in Standards that are more detailed, and that focus on particular contexts. Beyond that, each media professional needs a Code that is structured and expressed in ways useful to them, enabling them to quickly locate and drill down to what they need, and including relevant examples.
- 2 *Privacy Protections.* The principles that are embodied in Codes need to be privacy-protective, and need to extend to information-gathering, publication, and review processes and remedies.
- 3 *Processes for Assimilation and Application.* Media professionals must be imbued with the Codes' content, through education and training. A positive obligation must be placed on journalists to apply the relevant Code, and controls must be implemented to ensure that the obligation extends to information-gathering and publishing activities.
- 4 *Processes for Review and Redress.* There must be a positive obligation on media organisations to handle complaints, effective complaints-handling processes, sanctions, and appeals mechanisms.
- 5 *A Single Regulatory Body.* A public regulatory body with the necessary powers and resources is essential, together with a governance structure and processes that is dominated by the public not the media. Given the rapid convergence of media forms, the commonality of issues, and the need for clear and credible processes, the body needs to have comprehensive scope, encompassing all media organisations.
- 6 *Legal Authority.* The regulatory framework must be underpinned by legislation that imposes obligations on media organisations, and both empowers the regulatory body and requires it to operate in a responsible manner.
- 7 *A Statutory Cause of Action.* A complementary process is needed, in the civil jurisdiction, to enable the most serious and repeated instances of abuse to be subjected to court action. This is, however, a general cause of action, not one targeted at the media and adjudications must weight 'the public interest' heavily.

Liberal definitions of ‘the public interest’ that have been invented by media organisations must be narrowed down, to exclude ‘what the public is merely interested in’ – “There’s a difference between ‘the public interest’ and whatever junk sells newspapers” (MW 2009b). Six public interest elements need to be defined and explained, comprising relevance to the performance of a public office, to the performance of a corporate or civil society function of significance, to the credibility of public statements, to arguably illegal, immoral or seriously anti-social behaviour, to public health or safety, and to an event of significance.

A Code Template is provided in Clarke (2012b) which presents Foundation Principles and Definitions, articulates the specific information-gathering and publication behaviour that requires justification, and identifies the requirements in relation to review processes and remedies.

MEDIA REGULATION

Earlier sub-sections showed protections against privacy invasions by media organisations are inadequate. This sub-section outlines the regulatory arrangements in place during the period 2007-11, and assesses them against the requirements defined in the previous section and the supporting documents. Broadly, there are three potential sources of protections: tort law, privacy laws and media codes.

TORT LAW

A range of torts exist that might at least nominally constrain the media’s information-gathering activities. These include:

- trespass to land (unauthorised entry to a person’s real estate)
- nuisance (interference with a real estate occupant’s quiet enjoyment of their property)
- trespass to the person (direct and substantial interference with a person’s autonomy)
- stalking (persistent unwanted communications, approaches, pursuit and/or monitoring that creates apprehension or fear)
- misrepresentation, involving deceit or injurious falsehood
- negligence (to the extent that a duty of care may exist, e.g. to a child who is being interviewed or whose behaviour is being recorded)

These torts appear to be largely unused against the media. In some cases, media organisations and/or media professionals may be effectively exempted, and in others the applicability of the law is highly unclear.

A further tort, defamation, is a historical relic intended to protect the rich, and is expensive and uncertain. Even in its recently-modified form, it is not an effective

means of protection or remedy for most individuals whose privacy is intruded into by the media.

Statutory protections akin to torts have been created in some States. In NSW in 2005, Apprehended Violence Orders (AVOs) were granted to Nicole Kidman against two paparazzi. The NSW Government then moved the protection from Part 15A of the Crimes Act to the *Crimes (Domestic and Personal Violence) Act 2007*, which appears to have had the effect of denying access to them in actions against the media. In Victoria, Personal Safety Intervention Orders (PSIOs) have been available since 2010 for “victims of ... harassment [and] stalking ...”, where “harassment means a course of conduct by a person towards another person that is demeaning, derogatory or intimidating ...”, and “[stalking means] a course of conduct with the intention of causing physical or mental harm to the second person, including self-harm, or of arousing apprehension or fear in the second person for his or her own safety or that of any other person; and that includes any of ... following ..., contacting ..., tracing ..., entering or loitering ..., [and] keeping ... under surveillance ...”. Stalking would be difficult to invoke against the media, but harassment may be more tenable. It remains to be seen whether the Victorian courts will consider awarding PSIOs against the media.

The potential for such causes of action to protect privacy is nullified by the costs, the delays, the enormous uncertainties of court processes, the arcane language and procedures, and the vast range of opportunities the law affords to the well-resourced to delay the process, to increase costs, and to avoid or circumvent justice. Media organisations can easily fend off most actions.

PRIVACY LAW

In 2000, the *Privacy Act 1988* (Cth) (the Privacy Act) was extended to the private sector. The protections are very limited, in that the amendments authorised far more privacy-invasive behaviour than it protected against (Clarke (2000)). The media was singled out for special protection. The new law merely required media organisations to be “publicly committed to observe [published] standards that deal with privacy in the context of the activities of a media organisation” (Privacy Act, s.7B(4)).

The audacity of the exemption was, and remains, extraordinary. It grants media organisations not only freedom from regulation, but also the freedom to set any ‘standards’ that they like, provided that they purport to “deal with privacy”, without any external standards or tests of credibility, or even consultation. Naturally, all media organisations were happy to comply with this embarrassingly pro-business, anti-consumer provision.

MEDIA CODES

There is a wide array of Codes, reflecting the hitherto fragmented nature of the media, and of media pseudo-regulation. A useful summary of complaints channels and their inadequacies as at the end of 2011 is provided in Dick (2011b).

The Australian Press Council (APC) was formed in 1976, as a means of holding the line against regulatory action by providing the appearance of self-regulation. From the earliest archived copy of the website on 18 October 1999 until at least 24 May 2011, APC's web-site included the forthright statement that "The Council is funded by the newspaper and magazine industries, and its authority rests on the willingness of publishers and editors to respect the Council's views, to adhere voluntarily to ethical standards and to admit mistakes publicly" (Australian Media Directory, 2012). No such statement is apparent on its recently revamped web-site, which refers to the source of its funding but not to its lack of enforcement powers.

Following its successful lobbying of the Attorney-General for a media exemption to be included in the Privacy Act amendments, APC created a code in December 2001 (APC 2001a). The most recent revision is that of August 2011 (APC 2011a, 2011b). The great majority of Australian print media acquit their minuscule responsibilities under the Privacy Act by means of the APC Code.

In the case of broadcast media, the Privacy Act requirement intersects with a scheme under the *Broadcast Services Act 1992* (Cth), which is administered by the Australian Communications and Media Authority (ACMA). The scheme is nominally 'co-regulatory' Clarke (1999). Compared against the reasonable expectations of a co-regulatory scheme ACMA is toothless and regulatee-captive. In 2005, as ACMA's site explains, it registered a set of guidelines that "were developed ... in consultation with the broadcasting industry" without mention of, or apparent interest in, the views of the affected public or its representatives and advocates. For various categories of commercial broadcasting, there are seven separate codes, and ABC and SBS each has its own. A revised set of guidelines, published on the last working-day before Christmas 2011, makes it even more difficult than before for a complaint of a breach of privacy to be successful (ACMA 2011a).

In addition to the above codes, which relate to media organisations, members of the Australian Journalists Association (perhaps 50-80% of working journalists) are subject to the MEAA Code of Ethics (MEAA 1996). No information appears to be published about the handling of complaints. In early 2012, an attempt by the author to have a complaint considered, far from giving rise to a substantive response, failed to even gain an acknowledgement. There appears to be no basis for confidence in the MEAA as a self-regulatory mechanism.

The Code Template outlined in Clarke (2012b) was applied in order to assess the APC and MEAA codes and the ACMA guidelines, together with the codes of three leading 'quality newspapers', of two segments of the commercial broadcast media, and of the two national broadcasters, ABC and SBS.

Every one of the extant Codes falls far short of the requirements in the Code Template. Some, such as The Sydney Morning Herald and SBS, are so inadequate

that they may as well not exist. Commercial radio and TV have taken advantage of a business-friendly statute and captive regulator to impose virtually no obligations on themselves. The Codes of MEAA, the ABC and The Age evidence so many gaps that they are also of very limited value. The APC's Principles, while less empty than the Commercial Radio and TV Codes, are highly favourable to the press, the body lacks any significant powers, and it has very little public credibility. The least-worst of the Codes, that of News Ltd, still has vast gaps in the protections that it affords, and appears until at least the end of 2011 to have been mere window-dressing and essentially unused.

Former Prime Minister Paul Keating has not been noted as a privacy advocate, but he recently wrote that "the current framework within which the media deals with privacy issues and concerns is ... ineffective and works, in the main, to the benefit of media organisations" (Keating 2010, reported in Holmes 2010).

With minor qualifications mentioned in the following section, the situation described above continues to hold at the beginning of 2012.

REGULATORY THREADS

The previous section provided examples of inappropriate behaviour by media organisations, defined the privacy protection need, and demonstrated the serious inadequacy of the existing controls over those excesses. The remainder of this paper investigates a number of developments during the period 2007-11 that may be laying the foundations for a regulatory regime.

'AUSTRALIA'S RIGHT TO KNOW' COALITION

From 2007-2010, calls for freedom of information (FOI) reform were published under the banner of the News Ltd-led 'Australia's Right To Know' coalition (ARTK). Although its primary target was FOI laws, it was concerned about constraints on press freedoms generally, including suppression orders on court processes and detention without charge, risks facing journalists and whistleblowers, the extended sedition laws passed during the national security extremism phase following the 2001 attacks, defamation and contempt. The primary substantive document was a review of press freedoms (ARTK 2007) and a well-publicised event in March 2009. A very limited privacy thread was included within the ARTK movement, but privacy was primarily seen as one of the constraints on media.

By April 2010, ARTK was claiming modest success (ARTK 2010), particularly in relation to FOI reforms at federal level (discussed in the following sub-section), but also in relation to FOI reforms in some of the States, government proposals for whistleblower protections, and reviews of the laws relating to sedition, secrecy and court suppression.

GOVERNMENT POLICY ON PRIVACY – 2008-11

The incoming Labor Government at the end of 2007 transferred FOI and privacy responsibility from the Attorney-General to a new Minister within the Prime Minister & Cabinet (PM&C) portfolio, Senator John Faulkner. Driven by his own concerns, but probably also ARTK, Faulkner brought reformist zeal to the FOI area, and, for a time it seemed, to privacy as well.

In June 2009, Faulkner was transferred out to rescue the Government in the Defence portfolio. The preceding 18 months had in any case severely dented his confidence in achieving substantial reforms. The FOI legislation eventually passed, almost a year after Faulkner left the portfolio. There have been apparent gains in relation to FOI, but privacy has proven to be a substantial loser in the process. As part of the changes, Faulkner switched Australia from the longstanding Privacy Commissioner model to an Information Commissioner model. Privacy has been subjugated to the point that a Privacy Commissioner now exists in name only.

The Australian Law Reform Commission (ALRC) submitted a very substantial Report on Privacy in August 2008. This is discussed in some detail below. The Government split its response to this report into two tranches, but even then took 14 months to release the first volume (DPMC 2009). However, that document did not address any of the aspects relevant to privacy and the media. The remainder of the period under Minister Joe Ludwig, to June 2010, saw the release of a draft set of ‘Australian Privacy Principles’. These merged the two lengthy existing sets for the public and private sectors which produced a document containing large numbers of exemptions and loopholes to be negotiated with the States. This had the propensity to result in even more ratcheting-down of privacy protections to the lowest common denominator.

The next Minister, Brendan O’Connor, had responsibility for information law and privacy for 18 months from June 2010 to December 2011. His portfolio was dominated, however, by Federal Police and Customs matters. Two privacy-related events of significance occurred. One was that draft amendments to the credit reporting provisions were released, which would grant a substantial shift in favour of the credit reporting industry and against privacy interests.

The second tranche of the Government’s response to the ALRC Report had still not appeared in early 2012, 3.5 years after the Report was published. It remains unknown whether the Government even has a view on privacy and the media, let alone what that view might be. However, opportunistically, the ALRC’s recommendation of a privacy cause of action was plucked out of the queue for early consideration. That is discussed in the following section.

Late in 2011, the Privacy Branch was emasculated, and was transferred back from the never-sympathetic PM&C to the always-hostile Attorney-General’s Department. In December 2001, as part of a ministerial re-shuffle, privacy was

transferred away from the junior Minister to the new Attorney-General. As the first female to hold the role (and one of the most senior Cabinet-members to hold the role in recent decades), and after keeping privacy advocates at distance during her 4 years in the Health portfolio, Nicola Rixon appears very likely to have her priorities elsewhere.

A PRIVACY CAUSE OF ACTION

During 2006, the ALRC was given a wide-ranging reference on privacy by the then Attorney-General, the Coalition Government's Philip Ruddock. It published an Issues Paper in October 2006. Among many other questions, this asked "Should a cause of action for breach of privacy be recognised by the courts or the legislature in Australia?" (ALRC 2006, para. 1.86). The NSW Law Reform Commission (NSWLRC) also received a reference, to perform a less comprehensive review of NSW privacy law. Its Discussion Paper in mid-2007 (NSWLRC 2007) also contemplated a statutory tort of privacy.

In September 2007, the ALRC issued a Discussion Paper, which included the view that "The ALRC agrees with the preliminary view of the NSWLRC that individuals should be protected from unwanted intrusions into their private lives or affairs in a broad range of contexts, and proposes that a statutory cause of action is the best way to ensure such protection (ALRC 2007, para. 5.69). In August 2008, the ALRC presented its Report to the, by then, Labor Government. It recommended a statutory cause of action and that "acts and practices in the course of journalism should remain subject to the recommended statutory cause of action" (ALRC 2008a, para. 42.25, ALRC 2008b, Recommendation 74).

The NSWLRC also recommended a carefully designed cause of action (NSWLRC 2009). The Victorian Law Reform Commission (VLRC) had a more specific reference, but also recommended in August 2010 that two statutory causes of action be created, for "serious invasion of privacy [firstly] by misuse of private information [and secondly] by intrusion upon seclusion" (VLRC 2010).

Since at least 2007, the Law Reform Commissions have been subjected to assault by a few in the media, a Murdoch journalist particularly prominent among them (Merritt 2007, Merritt 2008). Others joined in, both within the News Ltd stable, (e.g. Quill 2008), and elsewhere (e.g. Ackland 2008). These critics either failed to study the proposals or deliberately misrepresented the Recommendations, because their accusations were seriously misleading.

A further media manoeuvre, used on several occasions, is to conflate the cause of action proposed in Australia with the common law privacy right that has emerged in the UK in the context of voyeurism and celebrities (e.g. Fortado & Lumley 2011). These attacks were responded to in Keating (2010).

The federal Government, emboldened by the problems that the Murdoch empire was facing, issued a Media Release in July 2011 declaring that a Discussion Paper would be published canvassing a privacy cause of action (Kelly 2011, O'Connor 2011). The announcement was quickly welcomed by NGOs (Stilgherrian 2011, APF 2011), and the Government was urged to table a Bill to implement a (modestly adapted) version of the ALRC's Recommendations. A Discussion Paper was released in September 2011. It was spoken about positively by the junior Minister, but very cautiously by the then Attorney-General (Murphy 2011b).

The federal Government's proposal was subjected to further poorly-aimed assaults by elements in the media, particular the Murdoch press, including in articles that purported to be news reports but were actually opinion, e.g. Merritt (2011b, 2011c, 2011d) and Penberthy (2011). Shrill and misleading commentary was not confined to the Murdoch stable, however. See, for example, Ackland (2011b).

The primary distortions projected in irresponsible articles and opinion pieces on behalf of the media were identified in Clarke (2011) as being:

- that the tort is targeted at the media (Aust 2011), when it is quite expressly comprehensive in scope, and the media is not a specific target.
- that there is no evidence of a problem (Rout & Parnell 2011, Aust 2011), when ample instances had been cited of people having their privacy abused, particularly public figures (e.g. MW 2008, MW 2011, APF 2011b). See also the earlier section of this paper.
- that the tort is threatening to press freedoms, variously because it is "unreasonable" (Day 2011), and "extremist", "vague and nebulous" (Stutchbury 2011), in the process "distorting a judge's comments made 28 years earlier" (Clarke 2011), particularly since the three Law Reform Commissions took great care to identify the competing interests in placing great weight on freedom of the press, shifting the onus of proof very firmly to the claimant, and structuring multiple and high hurdles.
- that there is no public interest defence (Merritt 2011a), when the absence or inadequacy of a public interest is one of the elements that has to be established by the plaintiff at the outset, and hence there is no need for a public interest defence.

It proved challenging for supporters of the cause of action to get space for their opinion pieces in Murdoch outlets. Hyland (2011) appears to have seen the light of day only in Western Australia, and a short piece did make it into *The Australian* (Waters 2011). Other channels, however, enabled support to be voiced for the cause of action, including the SMH (Pearce 2011), Crikey (Smith 2011), an ABC Online site (Barns 2011), again in Crikey Clarke (2011) and again in the SMH (Dick 2011a, Williams 2011).

By the end of 2011, the Government's discussion paper had attracted many submissions. But the Branch had been emasculated and moved back to an even less sympathetic Department, and the Minister had changed. It was therefore unclear whether anything further would ever happen in relation to the Government's initiative.

THE JOURNALISM EXCEPTION

The ALRC Report (ALRC 2008a) acknowledged that "such sanctions for breach as exist provide few, if any, real remedies for individuals whose privacy rights have been seriously affected" (42.24). Yet it meekly supported continuation of the journalism exemption: "In deference to the critical importance of freedom of expression – particularly freedom of political communication – in our democratic system of government, the ALRC supports retaining an exemption in the *Privacy Act* for journalistic acts and practices" (para. 42.21).

Two minor refinements were proposed:

- insertion into the Act of a definition of 'journalism'; and
- in order to qualify, the standards to which organisations commit should "deal *adequately* with privacy in the context of the activities of a media organisation" (42.115). Guidance as to how 'adequacy' was to be assessed and "a template privacy standard" should be developed by "[what is now the OAIC], in consultation with ACMA and other peak media representative bodies" (42.117). This process "usefully could be informed by ACMA's *Privacy Standards for the Broadcast Media*" (42.118), and "codes registered by ACMA automatically [should] meet the 'adequacy' requirement under the Privacy Act" (42.120).

As shown elsewhere in this article:

- ACMA is not a regulator, but merely a registrar of industry codes;
- the codes it registers are seriously inadequate;
- ACMA's original guidelines were seriously inadequate, and it has subsequently issued a revised set that is even more seriously harmful to the privacy interest; and
- ACMA is not the appropriate organisation to self-approve guidelines.

Moreover, the ALRC recommended that the deal be done between the media industry and two oversight agencies (APC and ACMA) that, from the public perspective, are untrusted and demonstrably untrustworthy, to the complete exclusion not merely of the Parliament, but of the whole of civil society. This accordingly represents perhaps the most privacy-hostile of all of the many conclusions in the ALRC's entire Report. It is clear why Governments are terrified

of the power of the media, but it is far less clear why the Law Reform Commission went to such lengths to appease the media.

Even 3.5 years later, no indication has yet been provided of the Government's thinking on this aspect of the ALRC's Report. Generally, however, Governments value their relationships with media organisations more highly than people's privacy. It therefore appeared unlikely that a government policy would emerge that was any more privacy-friendly than the ALRC's recommendations.

THE CONVERGENCE REVIEW

In late 2010, a 'Media Convergence Review' was commenced, within the Department of Broadband, Communications and the Digital Economy (DBCDE). The focus was on digital channels and content, and the scope encompassed 'telecommunications, radio, television and the Internet', but not the print media. Advice was sought on a "policy framework" for "reform", including "regulatory objectives" and "the regulatory approach embedded in the current policy framework".

In December 2011, an Interim Report was released (DBCDE 2011b). It recommended 'regulatory convergence' – "a platform-neutral regulatory framework focused on the new concept of Content Services Enterprise", and "a new independent regulator". The Report did not contain the word 'privacy', and the notion of 'consumer protection' was mentioned only once, as an entry in a list of the regulator's functions (p. 2). The Report attracted little interest, but it will inevitably collide with other threads of activity reported on in this section.

A draft conclusion that the Convergence Review could usefully reach is as follows: "the media would benefit from unified arrangements, consistent principles, and uniform enforcement mechanisms applying to all sides: newspaper companies, journalists, broadcasting companies and internet services providers" (Keating 2010).

AN AWAKENING AT THE AUSTRALIAN PRESS COUNCIL?

In the words of its Chairman 2000-09, the Australian Press Council (APC)

...was essentially set up in 1976 as a defensive initiative by newspaper proprietors in response to concerns, similar to today, about possible government intervention. Despite lofty broad objectives, it was no doubt intended and remained until recent years essentially a complaint-handling organisation. In any case, the funding provided by proprietors has never been sufficient for the Council to do much more. It is an under-funded, frugal organization. (McKinnon 2011, p.2).

For many years, it described itself in the following manner: “The Australian Press Council is the self-regulatory body of the print media. It was established in 1976 with two main aims: to help preserve the traditional freedom of the press within Australia and ensure that the free press acts responsibly and ethically” (APC 2001b).

In 1999-2000, “the Council was successful in its argument for the inclusion of [the media] exemption” in the Privacy Act (APC 2006). In December 2001, APC created a code in compliance with the friendly terms of the exemption (APC 2001a). The code has been amended on several occasions. The current versions are APC (2011a, 2011b). As shown in a previous section and Clarke (2012c), the code suffers a large number of serious weaknesses. The APC “has no sanction power other than publication of the adjudication in the paper complained about” (McKinnon 2011, p. 3).

Given this background, it is unsurprising that the APC has suffered throughout its life from a severe lack of public credibility. This was acknowledged by the Chair in October 2009. Ken McKinnon had been Chair from 2000, through an era of national security extremism. He was satisfied that he had materially assisted in holding the line on press freedoms (APC 2009a). He was candid, however, that, in all that time, despite his considerable efforts, he had achieved little in relation to the public credibility of its primary ‘self-regulatory’ function. In his last Annual Report, he said that “the problem boils down to the fact that, when every penny for every activity depends on specific industry approval, funding authorities can easily use the veto to avoid potential embarrassment, ensuring no facts that might be inconvenient are collected. More dangerously from the point of view of the perceived independence of the Council, funding authorities are seen to be calling every shot ... constitutional change to protect the Council’s independence is essential to its credibility” (APC 2009b).

McKinnon’s departing comments raised additional concerns. He said that the Pauline Hanson case, and the publication of details of NSW Minister John Della Bosca’s infidelity raised privacy issues, “in particular whether there is a genuine public interest in the publication of the matter, as distinct from the public being entertained at the cost of the privacy of the individuals” (APC 2009b). This was the 9-year Chair of the (self-)regulator speaking. It is untenable that the nominal regulator did not and could not know whether or not the full swathe of media organisations that carried the story had been in breach.

In October 2009, in the context of the economic downturn, the Australian Press Council’s operations were under threat (APC 2009a), because “the Council faced emasculation via a savage budget cut by the newspaper proprietors who fund the Council. Fighting a rearguard action McKinnon, and the Council’s public members, forestalled the worst of the proposed cutbacks” (APC 2009c, p. 3). The changes nonetheless saw a much-reduced budget, a highly novel

arrangement whereby Council-members are only permitted to participate in a subset of Council-meetings, and retention of the dominance of industry over public members.

A new and reformist Chair, Julian Disney was appointed in December 2009. Strengthened by the circumstances, he was successful in instigating “a sustained program of reform in early 2010” (APC 2011c, p. 3), although the actual terms of the Designated Resolutions appear not to have been published.

The APC stated in its submission to the Finkelstein Inquiry that it had taken a small number of steps to address deficiencies in its processes, including:

- establishing Standards, which articulate the Principles in specific contexts, and that are “binding” on constituent bodies – to the limited extent that the APC can enforce its decisions (pp. 7-8)
- improving adjudications by “applying the actual words of its Standards of Practice” (p. 8). The increased focus on rigour in adjudications may be the principal reason for the percentage of upheld complaints having increased from 43% in 2009-10 (and a 10-year average of 46%) to 71% in 2010-11. This partly reflects greater willingness to make separate findings on different elements of the complainants’ concerns, rather than a generalised decision across disparate elements” (p. 15). This represents a candid admission that the quality of past adjudications was very low

The APC proposed to both the Convergence Review and the Independent Media Inquiry that its current scope of “print publications and related digital outlets, such as websites, of its constituent bodies” (p. 6) be extended to Internet-only media, and then to all media including broadcast media (p. 7). To this end, it has held meetings with ACMA, MEAA and the ABC (p. 8). However, this would only be beneficial to privacy if the standards were substantially improved first, because, as demonstrated earlier in this paper, none of those documents are anywhere near adequate.

The claim that “the Council’s principal responsibility is to improve the quality of coverage of news and comment in the print media and online” (p. 7) is somewhat different from its constitutional Objects, which are “to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards”. In addition, most of the key improvements were only aspirations and were not actual decisions or commitments. These included such vital aspects as outlawing dishonest collection methods and harassment (pp. 8-9), reviewing the complaints-handling process (by inviting the (non-binding) inference that this was being done with a view to further improving it (pp. 15-16)), making good on the failure to achieve “due prominence” of adjudications (pp. 16-17), considering the addition of such sanctions as censure, reprimand, explicit call for “apologies, retractions, corrections or other specified remedial action”,

“[suggestion] or call for specific measures to prevent recurrence of the [particular] type of breach” (pp. 2, 17-18), and establishing “a separate panel to which it can refer matters which it considers may merit imposition of a fine” (p. 18).

A few improvements have occurred, some positive steps are being taken, and some of the organisation’s many serious inadequacies may be gradually addressed – but only if the energy and the pressure are sustained. And many enormous weaknesses will remain, because they are engrained.

NO AWAKENING AT ACMA

In mid-2011, the CEO said that “We, at the ACMA, have identified more than 50 ‘broken concepts’ where the regulatory framework is under stress” (Chris Chapman, in SMH 2011). Unfortunately, his agency is one of those broken concepts. As one of his fellow writers on that occasion said, “A succession of blatant invasions of privacy (the fake ‘Pauline Hanson’ photographs, the outing of NSW Transport Minister David Campbell) showed the mainstream media don’t understand ‘the public interest’ – and in the latter case, nor does the regulator, ACMA” (Jonathan Holmes, in SMH 2011).

During the 3rd quarter of 2011, ACMA conducted a review of its 2005 guidelines (ACMA 2011a). ACMA said that this was prompted by a case that had demonstrated a very substantial inadequacy in the guidelines (the Antony Elliott case in May 2008, discussed earlier). ACMA had done nothing about the deficiency for over 3 years. The fact that ACMA received only 47 privacy complaints in the 6 years 2005-11 (and upheld only 3 of them, none in 2009-11) was ample evidence that ACMA’s soft-touch regime has very little credibility with the public. It is open to speculation that ACMA proposed a change to the guidelines only because privacy and the media had become front-page news and the agency was at risk of being embarrassed about its lack of action (Dick 2011).

On the last working day before Christmas 2011, ACMA published a revised set of Privacy Guidelines for Broadcasters (ACMA 2011b). There was a small amount of progress in comparison with the 2005 document. For example, the concept of ‘seclusion’ was added, reflecting impacts on the privacy of personal behaviour in addition to the privacy of personal data. But the modest improvements were swamped by four devices whereby almost all privacy complaints are all-but-guaranteed to fail:

- use of an ultra-high threshold of ‘highly offensive’.
- use as a reference-point not the individual whose privacy has been invaded but ‘a person of ordinary sensibilities’.
- inclusion of the longstanding media-protective APC interpretation of ‘the public interest’ which is written so broadly as to encompass ‘what the public can be tempted to be interested in’.

- failure to outlaw privacy-abusive behaviour by media organisations when they gather information, because a breach of privacy is declared to arise only when something is published (“The guidelines ... do not deal generally with unlawful, unethical or distasteful journalistic practices” – p. 1 and “the codes protect against the broadcast of material” – p. 2)

The media’s intrusions and publication activities may be completely unnecessary. And they may be rude, offensive or even very offensive. The person affected may be vulnerable, and annoyed, upset, or even distraught. However, privacy-abusive information-collection behaviour is protected unless the resulting material is published. Unless the media’s actions can be shown by the complainant to be completely beyond the pale, ACMA won’t even issue a warning, let alone take any actual protective action. The sum total of the guidance ACMA provides in relation to vulnerable people is that “[s]pecial care must be taken” (p. 4). ACMA’s new guidelines give *carte blanche* to broadcasters to be as objectionable as they like in the pursuit of news, and to publish personal data that is unnecessary to the story, and that may cause the individuals concerned substantial offence or distress.

Reflecting the low standards to which ‘The Australian’ has fallen on media freedoms issues, a News Ltd sub-editor contrived to make ACMA’s highly media-friendly guidelines appear like an attack on media freedoms (Christensen 2011).

THE INDEPENDENT MEDIA REVIEW

From 2006 onwards, there was increasing suspicion that UK journalists employed by tabloid newspapers had accessed the voice-mail of various of their ‘celebrity’ targets (actions that were misleadingly referred to in many reports as ‘phone hacking’). The problems came to a head in mid-2011, engulfing the Murdoch tabloid ‘News of the World’ (NOTW), and severely embarrassing News Corp. executives and Board-members, including the Murdochs themselves. Although NOTW was abruptly closed in July 2011, the public opprobrium remained, and was reinforced by further revelations arising from a House of Commons Inquiry during the second half of 2011 and into early 2012.

The concerns about media practices, particularly among Murdoch companies, spread to Australia, to the extent that the then CEO of the Australian arm, Neil Hartigan, felt constrained to issue a succession of announcements distancing Murdoch’s Australian newspapers from the practice of ‘phone hacking’, e.g. Hartigan (2011). The claims about professionalism would have been stronger if anyone had been able to locate News Ltd’s Code of Conduct. Adding to the controversies, in early September 2011, a 40,000-word analysis was published by a political scientist, which was highly critical of News Ltd’s behaviour and its effect on Australian democracy (Manne 2011).

During 2009-11, News Ltd outlets had been publishing ongoing, intemperate attacks on various aspects of the federal Government's policies. One explanation was that "[The then Editor-in-Chief of 'The Australian', Chris Mitchell] has inculcated a view [at the newspaper] that they are there not only to critique and oversee the government, [but also that] it is their role to dictate policy shifts, that they are the true Opposition" (Neighbour 2011, quoting "a News Limited insider").

The Government was tempted, and was urged on by the Greens, to take advantage of News Ltd's (possibly short-term) emasculation to establish a review into various aspects of the media. The focus was to be on how to achieve quality journalism, and regulatory arrangements to ensure appropriate handling of complaints about biased and inaccurate reporting (e.g. Murphy 2011, Taylor 2011). The Commonwealth Parliament may be constitutionally empowered to regulate newspapers by virtue of the High Court's 2006 decision in the Work Choices case, which greatly broadened the interpretation of the Commonwealth's powers in relation to corporations (Hull 2011).

On 14 September 2011, the Independent Media Review was launched within the Broadband, Communications and the Digital Economy (BCDE) portfolio. It was to complement the Convergence Review's "broad and considered approach to a range of regulatory issues across the broadcasting, telecommunications and radio-communications sectors" by focusing on "print media regulation, including online publications, and the operation of the Press Council", including "the effectiveness of the current media codes of practice" and "ways of substantially strengthening the independence and effectiveness of the Australian Press Council, including in relation to on-line publications, and with particular reference to the handling of complaints". Among the many issues the Inquiry identified were (DBCDE, 2011a):

- 11 Would it be appropriate for such a model to include rules that would:
 - (c) prevent the unreasonable intrusion into an individual's private life
 - (d) prohibit the gathering of information by unfair means (for example, by subterfuge or harassment)
- 12 If an alternative model was to be a statutory complaints tribunal, is it appropriate for that tribunal to have power to:
 - (a) obtain information necessary to resolve a complaint;
 - (b) require a publisher to do an act (for example, publish a correction of unfair or misleading reporting);
 - (c) impose sanctions for a failure to do that act?
- 13 Is there any reason why the regulation of the print media should be different from the regulation of broadcast or online media?

A considerable number of submissions were made, supplemented by verbal evidence and cross-examination of key organisations. The Murdoch and Fairfax

media groups submitted variously that the media were too important to be subjected to regulation, and/or that it was unnecessary because everything was alright, and/or that it was necessary but was being achieved through improvements in the APC self-regulatory arrangements (e.g. Hywood 2011, Merritt 2011e).

The Australian Privacy Foundation submitted that the key requirements of the new regulatory scheme were in the areas of governance, scope, the avoidance of harm to the media's effectiveness, a progressive compliance framework, adequate powers, enforcement, and resources. It argued strongly against self-regulation, and against not only ACMA's involvement but also against that of any government regulatory body. It proposed instead that a public regulatory body be established, or alternatively that the APC be transformed and its scope extended to encompass all media (APF 2011c, 2012).

The Inquiry was undertaken by barrister Ron Finkelstein QC, and the resulting document is commonly referred to as the Finkelstein Report (DBCDE 2012).

The Inquiry considered a broad range of problems with media behaviour. In relation to data collection practices, these included not only privacy-invasiveness, but also concerns about deceit, and about insensitivity in dealing with vulnerable people. In relation to reporting, issues included inaccuracy, unfairness, bias, failure to declare potential conflict of interest, insensitivity and unreasonable discrimination, as well as unjustified disclosure of personal data.

Finkelstein concluded that “[the existing] mechanisms are not sufficient to achieve the degree of accountability desirable in a democracy” (Executive Summary, para. 6). “The problems ... are inherent, and cannot be easily remedied by piecemeal measures” (7). Finkelstein recommended a News Media Council to exercise regulatory functions in relation to “news and current affairs coverage on all platforms”, replacing APC with a statutory entity and picking up relevant functions that are currently with ACMA (8-9). Other than ensuring funding, “government should have no role” (10).

THE PROSPECTS FOR CHANGE

From early 2009 onwards, the Australian Privacy Foundation campaigned for the articulation of meaningful guidance for media professionals, but its efforts met with no positive responses, from the industry, the profession, university research centres, nor even from journalism professors.

Meanwhile, privacy law reform has withered since Faulkner ran out of enthusiasm, comprehensively beaten by a rampant bureaucracy and uninterested colleagues. Responsibility for privacy has passed through four Ministers in four years. The role of Privacy Commissioner has been reduced to a ‘first-level report’ to the Information Commissioner. The Privacy Branch has been reduced to a rump, subjugated to information law, and returned to an Attorney-General's Department

that has been dominated for a decade by national security extremism. ACMA has comprehensively demonstrated that it is part of the problem, not part of the solution. These aspects of the state of play at the end of 2011 bode ill for improvements in the parlous state of 'privacy and the media' in Australia.

Yet this paper has also identified strong signs of change afoot. In April 2011, Editor Paul Whittaker moved from the broadsheet 'The Australian' to the tabloid 'Daily Telegraph' (DT 2011). At least The Australian, but perhaps News Ltd as a whole, may have since moderated their behaviour, both in their coverage of such partisan issues as climate change and the mining tax, and of 'privacy and the media issues'. For example, late in 2011, an article in 'The Australian' about a NSW Government MP demonstrated care in the search for balance between the public interest and private exposure (Leys 2011).

DBCDE and Minister Conroy continue to have much of their attention consumed by National Broadband Network (NBN) matters. However, they have Finkelstein's Report, and the Convergence Inquiry is running towards completion with the expectation that it will dovetail with Finkelstein's recommendations. Finkelstein expressly recommended regulatory renewal in the media standards/privacy/complaints space, and was explicit about what the new structure should look like.

A News Media Council might in due course be enacted, constituted and resourced. Even if such comprehensive reform does not eventuate, while the possibility remains real, scope exists for at least some improvements in the present, parlous state. Specifically, the threat of regulation may sufficiently strengthen the hand of the APC Chair that momentum might be sustained and some of the mooted changes in the field of print media might come to fruition. Unfortunately, the deep antipathy of ACMA to privacy values appears unlikely to change, unless the Convergence Review leads to substantial changes in the regulation of the behaviour of broadcast media.

CONCLUSIONS

The privacy of both public figures and private people who come to the attention of the media has long been hostage to the power of media organisations and the disinclination of politicians to impose genuine regulation, least of all regulation that the media can portray as threatening to press freedoms.

Yet multiple threads of activity between 2007 and 2011 have created scope for public policy to balance media freedoms against privacy. The tensions between privacy and the public interest are well-understood, and capable of being sufficiently codified that journalism will be, as it must be, well-protected. The requirements described in this paper and its companion documents dictate balance-points that are strongly in favour of the public interest – where it can be shown to exist, where information-gathering and publication activities can be demonstrated to be proportionate to the importance of the interest, and finally

where the personal data can be shown to be relevant to that interest.

On the other hand, media organisations earn a great deal of their shrinking revenue from outlets that indulge in far more voyeurism than journalism. There is far greater tension between privacy and the entertainment industry's freedom to collect personal data by any means, and to publish personal data that the public is merely interested in. Media organisations can be expected to continue the pretence that paparazzi methods, and the publication of irrelevant information that satisfies the public appetite for titillation, somehow fall within the media's noble calling of informing the public, uncovering political corruption and hypocrisy, and assuring the survival of democracy.

Time will tell whether the platform for change identified in this paper is sufficient to generate the necessary momentum for change.

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