

THE FINKELSTEIN INQUIRY: MISCARRIED MEDIA REGULATION MOVES MISS GOLDEN REFORM OPPORTUNITY

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*Laws are generally found to be nets of such a texture,
as the little creep through,
the great break through, and the middle-sized are alone entangled in.¹*

Abstract

The Australian media's nervous wait for the outcome of media regulation reform initiatives came to an abrupt and ignominious end in March 2013 as the moves collapsed. The Federal Government withdrew a package of Bills at the eleventh hour, when it became apparent that the Bills would not garner the required support in parliament. These Bills were preceded by two major media inquiries – the Convergence Review and the Independent Media Inquiry – culminating in reports released in 2012. The latter initiative contained sweeping reform recommendations, including one for the formation of a government-funded 'super regulator' called the News Media Council, which the media generally feared would spell doom especially for those engaged in the 'news' business. This article examines the origins of the Independent Media Inquiry; the manner of the inquiry's conduct; what problem the inquiry was seeking to address; the consequent recommendations; and ultimately, the manoeuvres for legislative action and the reform initiative's demise. This article concludes that the Independent Media Inquiry was flawed from the outset and

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¹ William Shenstone and Robert Dodsley, *The Works in Verse and Prose of William Shenstone, Essays on Men, Manners and Things*, (1764) vol 2, 151.

that it missed a golden opportunity for effecting reform, the need for which even the media acknowledged.

I INTRODUCTION

It is not unusual nor is it entirely objectionable for governments to regulate the media. For all the protestations proponents make about the sanctity of the freedom of speech ideal, it is often not acknowledged that freedom of speech is not absolute and that just as much as there is a public interest in safeguarding freedom of speech, on occasion, countervailing public interests demand that freedom of speech should yield to such interests. These countervailing public interests are sometimes protected through regulatory intervention. Australian media regulation has traditionally comprised a trinity of regulation, co-regulation and self-regulation. The previous occasion on which the Australian media experienced sustained regulatory encroachment came about in the period post-September 11, which triggered a variety of measures aimed at safeguarding national security. In that case, the impact on the media was incidental in the sense that legislative measures that were introduced were not primarily media-specific but rather a part of a general exercise to address national security concerns. The media in their roles as gatekeepers of news and information, as self-proclaimed vanguards of freedom of speech and as self-appointed watchdogs on government, is especially well equipped to articulate its resistance to encroachments or threats of encroachments on freedom of speech generally. As it became apparent that the 2012 reviews would serve as a springboard for new legislative measures that could impact heavily on the media's activities, the Australian media went into overdrive to register its stout opposition. Regulation and freedom of speech are uneasy bedfellows. Media regulation impacts directly on freedom of speech, a

core value in any democratic society. Regulation is also the media's nemesis because the media's *raison d'être* and fortunes rest heavily on being unfettered. In 2011 a precipitation of several factors put media regulation high on the Australian government's agenda and ignited a push for stricter media regulation. One ignition factor was the 'phone hacking scandal', which led to media inquiries in the United Kingdom, including the Leveson Inquiry. Those inquiries exposed a litany of ethical and legal breaches by the British media.² The other ignition factor was a perception, mostly at Australian Federal Government level and in the Australian Greens party, that the Australian media too was culpable of transgressions and needed to be restrained. The Federal Government established the Independent Media Inquiry (referred to in the article as the Finkelstein Inquiry, named after the head of the inquiry, former Federal Court judge, Ray Finkelstein QC), to supplement the work of another review – the Convergence Review. At its base these inquiries were aimed at ensuring that media regulation keeps apace with contemporary needs. Advances in communications technology were rightly recognised as having rendered some aspects of the prevailing regulatory framework obsolete, not least of all because of the inconsistent approaches taken across the different media platforms. This created a variety of conundrums for the government, the regulators, media outlets and news media consumers. Longstanding tolerance of self-regulation by the media came under fresh scrutiny. The thrust for regulatory reform emanating through the Convergence and Finkelstein reviews were juxtaposed with another relevant, but unrelated development a few years

² See Culture, Media and Sport Committee, UK House of Commons, *News International and Phone-hacking: Eleventh Report of Session 2010–12*, (2012), vol 1, [2], which refers to 'three separate inquiries into press standards'. See also Lord Justice Brian Leveson, Report to UK Parliament, *An Inquiry into the Culture, Practices and Ethics of the Press*, 29 November 2012.

earlier – the concerted media crusade mounted by Australia’s Right to Know Coalition to remove burgeoning officially imposed impediments to the media’s ability to perform its proper role.

II ORIGINS, OBJECTS, AND METHODS OF THE FINKELSTEIN INQUIRY

The Minister for Broadband, Communications and the Digital Economy, Stephen Conroy on 14 September 2011 announced the establishment of the Independent Media Inquiry. The terms of reference were:

- (a) the effectiveness of the current media codes of practice in Australia, particularly in light of technological change that is leading to the migration of print media to digital and online platforms;
- (b) the impact of this technological change on the business model that has supported the investment by traditional media organisations in quality journalism and the production of news, and how such activities can be supported, and diversity enhanced, in the changed media environment;
- (c) ways of substantially strengthening the independence and effectiveness of the Australian Press Council, including in relation to online publications, and with particular reference to the handling of complaints; and
- (d) any related issues pertaining to the ability of the media to operate according to regulations and codes of practice, and in the public interest.³

³ Department of Broadband, Communications and the Digital Economy, ‘Independent Inquiry into Media and Media Regulation’ (Issues Paper, 28 September 2011) <http://www.dbcde.gov.au/__data/assets/pdf_file/0004/139837/Independent_Media_Inquiry_Issues_Paper.pdf> 7.

Two themes emerged from the Minister's announcement and related comments. One favoured media independence and freedom. The other leaned towards increased control over the media. In respect of the former – the favouring of media independence and freedom – the Minister, in his official statement when announcing the inquiry, stated: 'A healthy and robust media is essential to the democratic process.'⁴ The Minister added:

The Australian Government believes it is incumbent upon Government to ensure regulatory processes and industry structures are sufficiently strong to support the continuation of a healthy and independent media that is able to fulfil its essential democratic purpose, and to operate in the public interest.⁵

Despite this profession of a commitment to fostering a healthy and robust media, however, no reference or commitment was made to these ideals in the Finkelstein Inquiry's terms of reference. Given the potential enormity of the impact of regulatory moves on freedom of speech, whether directly or incidentally, it ought to have been reflected more acutely in the terms of reference and the concomitant measures that were proposed. In respect of the second theme, it is arguable that the third and fourth items in the terms of reference manifested a control imperative.⁶ Substantially strengthening the independence and effectiveness of the self-regulatory entity, the Australian Press Council, in relation to the handling of complaints would necessarily translate into substantially increased control even if ostensibly that control were to be exercised for the greater good of society. Furthermore, it is not unknown for publishers to be

⁴ Senator Stephen Conroy, 'Government announces independent media inquiry' (Media Release, 14 September 2011).

⁵ Ibid.

⁶ See Department of Broadband, Communications and the Digital Economy, above n 3, 7 (emphasis added).

critical of the Australian Press Council for allegedly exceeding its brief. In one recent manifestation of this malaise, a major publishing group abandoned its membership of the Council to establish its own regulatory entity.⁷ The group's head, WA Newspapers group editor-in-chief said the Press Council had 'drifted further and further from its original goal of promoting freedom of the press and the essential element of adjudicating complaints' and of moving towards 'a culture of control, coercion and punishment'.⁸ Another major publisher, News Limited, has expressed similar views.⁹ Notions of 'independence' and 'effectiveness', however, are value laden and, as will shortly be seen, raised questions in the particular context of the Minister's remarks accompanying the inquiry's launch. Other indicators of the 'control' theme lay elsewhere in the terms of reference. For example, the inquiry was to look into – the 'effectiveness of the current media codes of practice in Australia',¹⁰ and the media's ability 'to operate according to regulations and codes of practice'.¹¹ In his media remarks accompanying the announcement of the Finkelstein Inquiry, the Minister referred to 'accountability' in the media, to the need for accountability to be pursued through the Press Council, to ways of increasing the Press Council's powers, and to the view held by some that the 'Press Council is not doing its job' to the extent that 'there'd be a lot of laughing' in response to the question 'what do you

⁷ Angela Pownall, 'Seven West Media Quits Press Council', *The West Australian* (Perth), 5 April 2012, 4.

⁸ Bob Cronin, 'Independent Press Paramount', *The West Australian* (Perth), 13 April 2012, 21. See also Bob Cronin, 'Rule Out Disney Empire', *The Australian* (online), 16 April 2012 <<http://www.theaustralian.com.au/media/rule-out-disney-empire/story-e6frg996-1226327204539>>.

⁹ 'Press Council Ventures Too Far From Its Brief' (Editorial), *The Weekend Australian* (Sydney), 1–2 June 2013, 21.

¹⁰ Department of Broadband, Communications and the Digital Economy, above n 3, 7.

¹¹ Ibid.

think of the Press Council'.¹² The Minister 'congratulated' the Press Council for recently having 'higher findings in favour of complainants'.¹³ The Minister also said: 'The Press Council, for many, many years, has usually been seen as a fairly toothless tiger'.¹⁴ While the Minister refused to be drawn into explicitly supporting one side of the argument or the other, read in context, the Minister appeared to lean towards greater control over the media. The Minister's lauding of the 'higher findings in favour of complainants' assumes that the Press Council's efficacy rested on the number of complaints it *upheld*. In other words, the more complaints it upheld the more it would indicate the Press Council's efficacy. Such a position is flawed for the rule surely must be that the adjudicator must base its findings entirely on the merit of the complaint and not aim for any preconceived outcomes either favouring or rejecting complaints. As such, it would be entirely conceivable that higher findings *not* favouring complainants should not deny the Press Council the right to be deemed as performing independently and effectively in relation to the handling of complaints. Likewise, the Minister's singling out of a particular offender (*The Daily Telegraph*) indicated a degree of bias on the Minister's part and one that he conceded to be 'a personal opinion'.¹⁵

If the professed media freedom and independence imperative seen above was taken into account the terms of reference would have had to include a

¹² Minister for Broadband, Communications and the Digital Economy, *Minister Stephen Conroy announces the Independent Media Inquiry* (14 September 2011) Media Centre – Minister Speeches <http://www.minister.dbcde.gov.au/conroy/media/speeches/2011_-_minister_speeches/Minister_Stephen_Conroy_announces_the_Independent_Media_Inquiry>

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

consideration of the state of media freedom in this country generally and whether any measures were warranted, for example, to address the concerns articulated by the media. Such concerns are well catalogued, for instance, in the following works: (a) a report commissioned by the Australia's Right to Know Coalition comprising major Australian media organisations;¹⁶ (b) and the annual Press Freedom Reports published by the Media, Entertainment and Arts Alliance.¹⁷ To illustrate the media's concerns, the chair of the Independent Audit into the State of Media Freedom in Australia, Irene Moss, wrote as follows in a letter accompanying the report:

The audit's examination and resulting observations should ring alarm bells for those who value free speech in a democracy. While Australia is generally accepted as a land of freedom and compares well internationally on many fronts on civil rights, this should not be taken for granted. What the audit can observe is that many of the mechanisms that are so vital to a well-functioning democracy are beginning to wear thin. Their functioning in many areas is flawed and not well maintained.¹⁸

¹⁶ Independent Audit into the State of Free Speech in Australia, (Report, Australia's Right to Know Coalition, 31 October 2007).

¹⁷ See, eg, Mike Dobbie (ed) 'Power, Protection & Principles: The State of Press Freedom in Australia 2013' (Report, Media, Entertainment & Arts Alliance, 2013); Jonathan Este (ed) 'Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia 2012' (Report, Media, Entertainment & Arts Alliance, 2012); Jonathan Este, Flynn Murphy and Lizzie Franks, 'Public Good, Private Matters: The State of Press Freedom in Australia 2011' (Report, Media, Entertainment & Arts Alliance, 2011); Jonathan Este (ed), 'Progress Under Liberty: The State of Press Freedom in Australia 2010' (Report, Media, Entertainment & Arts Alliance, 2010).

¹⁸ Letter regarding the Independent Audit of the State of Free Speech in Australia from Irene Moss to Australia's Right to Know Coalition c/o John Hartigan, 31 October 2011.

The Media, Entertainment and Arts Alliance in its Press Freedom Report in the year in which the Minister announced the Independent Media Inquiry noted as follows:

More than a year after the Australian Law Reform Commission reported on more than 500 separate pieces of legislation containing secrecy clauses, its recommendations have yet to be followed. This must be addressed, as a matter of urgency.¹⁹

Other factors similarly contributed to the eventual collapse of the regulation reform enterprise primarily because of doubts as to the inquiry's very legitimacy. Two such factors may be briefly disposed of here. One was the apparent nexus between what has been widely described as the 'phone hacking scandal' in the United Kingdom. Another was the influence on the debate from the Australian Greens. The inquiry's proximity to inquiries in the United Kingdom arising from the 'phone hacking scandal' prompted a perception that those events were the catalyst for this inquiry even though nothing in the conduct of Australian journalists suggested that such an inquiry was warranted in Australia. The Federal Secretary of the Media, Entertainment and Arts Alliance Chris Warren noted:

The *News of the World* phone-hacking scandal was the catalyst for this inquiry – perhaps a little unfairly as there is no evidence that Australian journalists are slipshod or devious when it comes to journalistic ethics. Apart from a handful of cases, Australian

¹⁹ Jonathan Este, Flynn Murphy and Lizzie Franks, 'Public Good, Private Matters: The State of Press Freedom in Australia 2011' (Report, Media, Entertainment & Arts Alliance, 2011) 3.

journalists tend to be pretty scrupulous about how they go about their business.²⁰

The Prime Minister Julia Gillard initially expressed the view that News Limited, the Australian publishing arm of media proprietor Rupert Murdoch's Australian newspapers, had 'some hard questions' to answer over its Australian operations.²¹ The Prime Minister later retreated from that position.²² Indeed, the Independent Media Inquiry report would subsequently note that it was 'not suggested that News Limited, the Australian subsidiary of News Corporation, had engaged in similar practices' as its UK counterpart *News of the World*. Such has been the magnitude of the UK events that several arrests have been made and senior media executives have been charged in court.²³ The then Australian Greens leader and senator, Bob Brown, also featured prominently in the debate, if not altogether becoming a key influence. Mr Brown, writing in 2012, claimed credit for prompting the Australian inquiry: 'After a campaign from the Australian Greens, on 14 September 2011 the Australian Government established an independent inquiry into

²⁰ See Chris Warren, 'How Do You Solve a Problem Like the Media' (2012) 69 *Walkley Magazine* 14.

²¹ Ben Packham, 'Julia Gillard Says News Ltd Has Questions to Answer in Wake of UK Scandal', *The Australian* (online), 20 July 2011 <<http://www.theaustralian.com.au/business/in-depth/julia-gillard-says-news-ltd-has-questions-to-answer-in-wake-of-uk-scandal/story-e6frgago-1226098227102>>.

²² Matthew Franklin, 'Julia Gillard Backs News Ltd Action on Phone-Hacking Scandal', *The Australian* (online), 16 August 2011 <<http://www.theaustralian.com.au/national-affairs/julia-gillard-backs-news-ltd-action-on-phone-hacking-scandal/story-fn59niix-1226115585071>>.

²³ Lisa O'Carroll, 'Andy Coulson Pleads Not Guilty To Phone-Hacking Charges', *The Guardian* (online), 6 June 2013 <<http://www.guardian.co.uk/uk/2013/jun/06/andy-coulson-pleads-not-guilty-phone-hacking>>. Former News International chief executive Rebekah Brooks has also been charged with offences relating to her time in the publisher's service. As to arrests see: Adam Sherwin, 'Six Former News of the World Journalists Arrested in Hacking Inquiry', *The Independent* (online), 13 February 2013 <<http://www.independent.co.uk/news/uk/crime/six-former-news-of-the-world-journalists-arrested-in-hacking-inquiry-8492757.html>>.

the Australian media.’²⁴ He recommended that a new body, a News Media Council, be established ‘to set journalistic standards for the news media in consultation with the industry, and handle complaints made by the public when those standards are breached.’²⁵ Mr Brown’s interest in the matter was influenced by his own experiences in relation to some sections of the Australian media. He singled out the Murdoch media, whom he accused of not being balanced and of ‘doing a great disservice to this nation in perhaps the most important debate of the century so far, which is how we tackle climate change’.²⁶ In the course of those remarks he described the Murdoch press as the ‘hate media’.²⁷ Those remarks have been described as an ‘ad hominem attack on the Murdoch press’.²⁸ The Greens deputy leader Christine Milne expressed similarly critical views about the Murdoch press, accusing it of ‘extreme’ bias in relation to the climate change debate in *The Australian* newspaper, in particular, and spoke of the relevance of the nexus between the UK phone hacking scandal and a ‘truly overdue’ inquiry into the media in Australia.²⁹ The origins of the Independent Media Inquiry therefore lay on loose foundations and it was on course to encounter strong resistance. As bluntly stated by the head of the news establishment that bore the brunt of

²⁴ Bob Brown, *The Facts About the Media Inquiry* (7 March 2012) Greens MPs <<http://bob-brown.greensmps.org.au/content/news-stories/facts-about-media-inquiry>>.

²⁵ Ibid.

²⁶ Tom Cowie, ‘News’ Revenge: Editorial Pages Rain Down on Brown’s Crusade’, *Crikey* (online), 19 May 2011 <<http://www.crikey.com.au/2011/05/19/brown-brands-news-the-hate-media-in-presser-salvo/>>.

²⁷ Michelle Grattan, ‘Pushed To The Limit, Bob Goes In Guns Blazing’, *The Sydney Morning Herald* (online), 22 May 2011 <<http://www.smh.com.au/opinion/politics/pushed-to-the-limit-bob-goes-in-guns-blazing-20110521-1exil.html>>.

²⁸ Denis Muller, ‘Bob Brown’s Misjudged Attack on the Murdoch “hate media”’, *The Conversation* (online), 24 May 2011 <<http://theconversation.edu.au/bob-browns-misjudged-attack-on-the-murdoch-hate-media-1442>>.

²⁹ ABC Television, ‘Q&A Goes to Hobart’, *Q&A*, 25 July 2011 (Christine Milne) <<http://www.abc.net.au/tv/qanda/txt/s3272239.htm>>.

the Greens criticism: ‘The inquiry started life as a witch-hunt by the Greens and has morphed into a fairly narrow look at a mixed bag of issues ostensibly focused on print journalism.’³⁰ Mr Ray Finkelstein, in his report, set out the origins of inquiry by referring to: (a) the UK phone-hacking scandal that prompted the Leveson Inquiry; (b) the calls in Australia for a similar inquiry, including calls by the leader of the Australian Greens for an inquiry (to canvass, among other things: whether publishers should be licensed; and whether a ‘fit and proper person’ test should be applied for media ownership); and concerns expressed by ‘several politicians and others’ that certain sections of News Limited’s newspapers were biased in their reporting on issues such as climate change and the National Broadband Network.³¹ While the heading under which Mr Finkelstein set out these factors was ‘Origins of the inquiry’, the manner in which he set out these factors did not expressly state that these factors in fact constituted the inquiry’s origins. On a strict interpretation, these ‘origins’ were not really origins, per se, but random factors that preceded the establishment of the inquiry. It is safe to conclude, however, that despite the absence of express attribution of the inquiry’s establishment to these factors, these factors were in fact key causal elements. The apparent nexus between the UK phone-hacking scandal and the Australian inquiry is an extremely tenuous one given the gaping chasm between the circumstances in the two jurisdictions. The conditions in Australia were far removed from those that gave rise to the UK inquiries. Keeble and Mair sum up the UK circumstance aptly:

³⁰ James Chessell, ‘Press Council Happy, but Wants More Funds’, *The Australian* (Sydney), 15 September 2011, 8 quoting then News Limited chairman and chief executive John Hartigan.

³¹ R Finkelstein, Report to Minister for Broadband, Communications and the Digital Economy, *Independent Inquiry into the Media and Media Regulation*, 28 February 2012, [1.4]–[1.6] (*Finkelstein Inquiry Report*).

The scale of outrages practised on significant numbers of citizens include, above all else, wanton invasions of privacy through phone hacking, deceit, disguise and sometimes robbery; the giving over of most space in the most popular newspapers to the trivial, ignoring that which is significant in the world; the construction of wholly or partly fictional narratives; the at least implicit blackmailing of politicians with threats of exposure if they prove ‘unhelpful’. All of this has been contained within an attitude which assumed immunity from legal or other challenge, because of the immense power which mass readerships was assumed to bring.³²

On the above premise – that the UK events could not have served to justify an Australian inquiry – the ensuing steps towards an inquiry in Australia, while exuding an attempt to conduct an inquiry grounded in well-conceived objectives and forensic methods of inquiry were tainted even before it began. This can be illustrated by a close look at one aspect of the inquiry – its mode of conduct in so far as submissions is concerned – and that is considered next.

III CONDUCT OF THE INQUIRY

In examining an aspect of the mode of the inquiry’s conduct, one preliminary matter bears addressing. Mr Finkelstein in his report set out the mode of the inquiry’s conduct after observing that the terms of reference were ‘not as broad as had been called for’.³³ He identified two examples of matters he would have liked covered but could not address. ‘For example’, it was not within his remit to investigate whether there should be restrictions on foreign ownership of the press, nor was he required to investigate whether there should be changes to the law

³² Richard Lance Keeble and John Mair (eds), *The Phone Hacking Scandal: Journalism on Trial* (Arima, 2012) 2.

³³ *Finkelstein Inquiry Report*, above n 31, [1.7].

relating to press ownership.³⁴ This raises the question – if these were just two examples of terms of reference that were not as broad as had been called for, what else might he have considered appropriate to investigate but was unable to? In setting out to tap input into the inquiry Mr Finkelstein contacted many publishers, editors, academics and others inviting them to make submissions and in some instances sought information on specific topics and he also conducted public hearings.³⁵ One aspect of the feedback gathering, however, merits scrutiny because it gave the exercise an aura of extensive public consultation. The report, as will be seen below, referred to a substantial body of previous polling showing adverse public perceptions of media standards and performance, covering about 45 years. The inquiry's own feedback gathering, however, raises questions. The report states that submissions were received from some 11,000 persons and organisations. Of this, 10,600 were short submissions (500 words or less) and of the total number of submissions, about 9600 were facilitated through an advocacy group, Avaaz.³⁶ These submissions used a text prepared by Avaaz, which describes itself as 'the campaigning community bringing people-powered politics to decision-making worldwide'.³⁷ The text's phrasing included the following words:

In your findings, *I urge you to demand* a limit on media concentration and an adequately funded public interest media in Australia, call for a 'fit and proper person test' for the use of public airwaves...³⁸

³⁴

Ibid.

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Ibid [1.10] and [1.12].

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Ibid [1.11] and Annexure D.

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Avaaz, *Home Page* (2013) <<http://www.avaaz.org/en/>>.

³⁸

Finkelstein Inquiry Report, above n 31, Annexure D (emphasis added).

The demands for a limit on media concentration and for the introduction of a ‘fit and proper person test’, however, fell outside the inquiry’s terms of reference and to that extent the value of that feedback was undermined. As the Finkelstein Report itself noted ‘[r]elatively few submissions explicitly addressed a number of issues specifically identified in the inquiry’s terms of reference’.³⁹ Only 25 of the submissions dealt with the industry’s codes of conduct; the effectiveness and independence of the Australian Press Council (34 submissions); and the impact on the industry of the emergence of online media (five submissions). Of the 447 submissions that explicitly called for action to strengthen the regulatory regime or enforcement arrangements, only 65 submissions provided detailed options for improvement of self-regulatory arrangements, of which only 34 explicitly identified the Australian Press Council (the country’s main grouping representing newspaper publishers). By engaging in an exercise that harnessed advocacy – at best advocacy of a robust kind and at worst of a crude kind – the Finkelstein Inquiry in effect engaged in the very practices some of the agitators for the inquiry had indicted the media of, including that of imbalance and of biased self-advocacy.⁴⁰ To be sure, the Finkelstein Inquiry itself affirmed that ‘there is nothing wrong with newspapers having an opinion and advocating a position, even mounting a campaign. Those are the natural and generally expected functions of newspapers.’⁴¹

IV WAS THERE A PROBLEM AND WHAT WAS IT?

A rudimentary component of any reform initiative lies in identifying the problem needing to be addressed. Given the apparent influence of the

³⁹ Ibid (emphasis added).

⁴⁰ See Bob Brown, Submission, *Independent Inquiry into Media and Media Regulation*, 2.

⁴¹ *Finkelstein Inquiry Report*, above n 31, [4.37].

Australian Greens, as seen above, on the establishment of the inquiry, it is worth keeping in view the Greens' definition of the problem. This may be seen in then Senator Bob Brown's submission to the inquiry. That submission does not conveniently or clearly set out its definition of the issues or problems underpinning the inquiry. The following list of issues, however, may be teased out from the submission: (a) the journalism profession's ethics are, in important aspects, undermined; (b) the public esteem for the news media is depressed; (c) the concentration of ownership is corrosive of the fabric of Australian democracy; (d) current cross-media rules have limited scope and do not apply to a range of platforms; and (e) the media is owned by the wealthy and media proprietors are often involved in other business activities which may expose them to conflicts of interest with their media outlets.⁴² Of these, only the first two items can be viewed as addressing the inquiry's terms of reference. Importantly, save random references to alleged media lapses, the submission does not provide clear evidence supported by cogent argument for the claim that the profession's ethics are in important aspects undermined.

In examining the inquiry proper, the starting point would be to locate its definition of the issues or problems deserving attention. This is the function usually served by an Issues Paper. Mr Finkelstein released the Issues Paper on 28 September 2011 identifying the 'principal issues that would be considered'.⁴³ The scope of the Issues Paper was, in turn, purportedly determined by distilling from the terms of reference released earlier (21 September 2011). In other words, the scope of the Issues

⁴² Brown, above n 40.

⁴³ *Finkelstein Inquiry Report*, above n 31, [1.9].

Paper was confined to the terms of reference announced by the Minister. On this point, Mr Finkelstein states in his report:

After considering the terms of reference I thought it appropriate to *distil from them and explain* what would be some of the principal issues that would be considered. To that end I prepared and on 28 September 2011 published an Issues Paper in which *those issues were set out*. The Issues Paper was not intended to be a comprehensive list of the topics to be dealt with, but it contained some of the most important.⁴⁴

Two important points can be made about the references above to the ‘issues’. First, strictly speaking, the terms of reference announced by the Minister did not expressly identify any issues or problems. Rather, they identified the matters that the inquiry should address. It is worth restating the terms limb by limb: (a) the effectiveness of the current media codes of practice in Australia; (b) the effectiveness of the codes particularly in light of technological change leading to the migration of print media to digital and online platforms; (c) the impact of technological change on the media’s business model; (d) the independence and effectiveness of the Australian Press Council in relation to online publications and in relation to the handling of complaints; and (e) any related issues pertaining to the media’s ability to operate according to regulations and codes of practice, and in the public interest. None of these terms explicitly identified a problem or issue. They merely identified matters that would be examined through the inquiry. The second important point concerns the very purpose of an Issues Paper. The purpose of an Issues Paper can be viewed as a means of providing ‘a preliminary look at *issues*

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Ibid (emphasis added).

surrounding the inquiry’.⁴⁵ As such, the Finkelstein Issues Paper ought to have identified the issue or the problem it was addressing. It failed to do this. This is what Mr Finkelstein claimed his Issues Paper was designed to do and set out his Issues Paper objective as follows:

In the course of considering the *matters* raised in the terms of reference, it will be necessary for the Media Inquiry to consider, among other *matters*, the *issues* listed below. The list of *issues* is not set out in any order of importance. Nor is the list intended to be comprehensive. The *issues* are, however, among the most important *matters* that the inquiry will consider. The Media Inquiry will be greatly assisted by any comments it will receive. It is not necessary for a respondent to deal with each and every *issue*. The Media Inquiry would in any event be assisted if persons choose to comment only on specific *issues*.⁴⁶

Leaving aside the slippage in the above description between ‘matters’ and ‘issues’ (the former, not necessarily indicative of problems, per se even when read with the terms of reference) this passage clearly evinces an intention to address issues or problems. What followed in the next seven pages of the Issues Paper, however, almost entirely comprised *questions* under various headings: access; standards; regulation; new media and business models; and support. For example, under the ‘access’ heading, after a statement referring to Justice Holmes judgment in *Abrams v United States*, 250 US 616, 624 (1919) concerning the famous ‘marketplace of ideas theory’, the Issues Paper poses five questions, including the following: whether this ‘marketplace of ideas’ theory assumes that the market is open and readily accessible; and whether there

⁴⁵ Australian Law Reform Commission, *Law Reform Process* (3 December 2012) <<http://www.alrc.gov.au/law-reform-process>> (emphasis added).

⁴⁶ Department of Broadband, Communications and the Digital Economy, above n 3.

are alternative or preferable justifications for freedom of the media.⁴⁷ No issues, as such, were expressly identified. Instead, the Issues Paper presented questions and hypotheticals (for example, ‘[i]f self-regulation is not an effective means of regulation, what alternative models of regulation could be adopted that would appropriately maintain freedom of the media?’).⁴⁸ Notably, the Issues Paper contained no reference to ‘bias’, ‘imbalance’, ‘privacy’ or any of the potpourri of complaints preceding the establishment of the inquiry. This is not to say that there were no ‘issues’ whatsoever requiring attention, or that there was a dearth of places in which to look to find those ‘issues’. Aside from the points canvassed above in relation to ‘origins of the inquiry’ some indication of the alleged issue or problem could be found, for instance, from the Minister’s remarks when announcing the inquiry or from those identified by Mr Bob Brown (discussed above). For the sake of completeness and tidiness, however, an exercise as far reaching as this one ought to have clearly enunciated the issues or problems at hand, at the very outset and systematically pursued them through the inquiry and reporting phases. A recent and related approach to an Issues Paper that sets out the problem being addressed is evident in the Australian Communications and Media Authority’s Issues Paper published ahead of a proposed far-reaching inquiry. In that Issues Paper the ACMA identifies the problem at hand as being that many of the traditional legislative mechanisms ‘now struggle to respond to’ technological developments and the merging of previously distinct platforms, and it refers to two further ‘particularly informative’ works that discuss the problem.⁴⁹ In the Finkelstein Issues Paper, far

⁴⁷ Ibid 2.

⁴⁸ Ibid 5.

⁴⁹ Australian Communications and Media Authority, ‘Contemporary Community Safeguards Inquiry’ (Issues Paper, June 2013) 12

from explicitly identifying the problem being addressed, the Issues Paper raised far-reaching and ambiguous questions inevitably resulting in the misdirected responses the inquiry received, consequently afflicting the Inquiry Report itself, as the following discussion illustrates.

In approaching the examination of the report's failure to properly identify the issues or problems warranting reform of media regulation, it is appropriate to focus on the relevant discussion in the Finkelstein Report. The report, covering more than 400 pages, is structured under 12 headings. They are, respectively: introduction; the democratic indispensability of a free press; newspaper industry structure and performance; *media standards*; the legal position of the media – privileges of the media, and restrictions on speech; the regulation of broadcasting; self-regulation – journalistic codes and ombudsmen; self-regulation and the press council; rights of reply, correction, and apology; theories of regulation; *reform*; and changing business models and government support (emphasis added). These headings are instructive in locating the report's identification of the problem the inquiry was ostensibly addressing. Two of the headings are of particular relevance in the present discussion because they contain some indication of 'the problem', or alleged problem. Under the *media standards* heading the report said the purpose of the section was to test the validity of 'the different assertions'.⁵⁰ These assertions, on the one hand, were the media's claim that the present accountability mechanisms were sufficient, that there was no problem with the integrity, accuracy, bias or conduct of the media that warrant further regulation, and that there is no evidence that journalists were routinely inaccurate and biased or lacked integrity or

<http://www.acma.gov.au/~media/Broadcasting%20Investigations/Media%20Release/pdf/CCSI%20issues%20paper_final%20pdf.pdf>.

⁵⁰ *Finkelstein Inquiry Report*, above n 31, [4.5].

that they ignored accepted press principles.⁵¹ The Finkelstein Report, for its part, did observe that there ‘is much to celebrate about the Australian news media’ and the report said it was ‘also clear from the evidence given by the editors and journalists who appeared before the inquiry that major Australian newspapers are staffed by people committed to their craft’ and that ‘[i]n many respects they serve the community well’.⁵² On this count then it may be said that there was no serious problem and therefore no strong justification for regulatory review or intervention. On the other hand, the report stated that there are matters of concern. The report relied on ‘a substantial body of evidence from public opinion polls about the public’s perception of media standards and performance’ covering 45 years from 1966, comprised in 21 surveys leaving to the conclusion that ‘the findings indicate significant concerns in the minds of the public over media performance’.⁵³ The report identified these concerns about the media as: (a) trust; (b) performance; (c) bias; (d) influence/power; and (e) ethics and intrusions on privacy.⁵⁴ While describing the data from the public opinion polls as ‘evidence’ the report itself expressed reservations about ‘the quality – and therefore the usefulness – of public opinion polling’.⁵⁵ It said:

[P]ublic opinion polling is dependent upon a number of factors, including the reliability, validity and fairness of the questions; the size and representativeness of the sample, and the soundness of judgment about whether people know enough about the topic to have a genuine opinion on it.⁵⁶

⁵¹ Ibid [4.1]–[4.3].

⁵² Ibid [4.6]–[4.8].

⁵³ Ibid [4.11].

⁵⁴ Ibid [4.14]–[4.74].

⁵⁵ Ibid [4.13].

⁵⁶ Ibid.

As the report itself said the public opinion polls were based on perceptions. As such, it is questionable whether such public opinion polls can properly be characterised as ‘evidence’. The term ‘evidence’ for legal purposes has been defined as consisting of the ‘testimony, hearsay, documents, things and facts which a court will accept as evidence of the facts in issue in a given case’.⁵⁷ On this definition of ‘evidence’, while hearsay constitutes one of the factors that may be taken into account, the factual imperative cannot be divorced from a consideration of ‘evidence’ – in fact, the factual imperative is prominent. Even conceding that the public opinion polls provided ‘some clear trends of public opinion’, as the report claimed, viewed against the competing evidence that the report attributed above to editors and journalists the answer to the question ‘*is there a problem?*’ must be that the answer to the question is inconclusive and therefore unsafe as a foundation for justifying legislative intervention of the scale proposed in the exercise that was afoot. The Finkelstein Report’s discussion of the five concerns about the media (items (a) to (e) above) is grounded in what the various surveys of public perception showed, and not in evidence of specific instances or data pertaining to media breaches in respect of these five topics. For present purposes it suffices to turn to another relevant discussion of ‘the problem’ in the report. And this is done next.

Under the chapter entitled ‘Reform’ the report provides a discussion under the section entitled ‘Is there a problem?’. While the report appears to identify only *two* problems, going by its references to the ‘first problem’ and ‘second problem’, a longer list of ‘problems’ may be extrapolated from the section: (a) market failure;⁵⁸ (b) the general distrust

⁵⁷ J D Heydon, *Cross on Evidence* (LexisNexis, 5th ed, 1996) 13.

⁵⁸ *Finkelstein Inquiry Report*, above n 31, [11.4]–[11.6].

of the media;⁵⁹ (c) strong evidence of problems with the reporting of political issues;⁶⁰ (d) transgressions of the fundamental principles of fairness, accuracy and balance (examples cited included bias in the reporting of government affairs, obsessive attempts to influence government policy, commercially-driven opposition to government policy, and the unfair pursuit of individuals based on inaccurate information);⁶¹ (e) the wrongful harm that the media ‘can cause’;⁶² (f) the failure of self-regulation ‘in dealing with irresponsible reporting’;⁶³ (g) problems associated with online publications including its ‘unmanaged and uncontrolled’ nature and inconsistency in applicable standards;⁶⁴ and (h) problems associated with the regulation of the broadcast news and current affairs sector.⁶⁵ That said, however, the chapter is afflicted by a lack of clarity in the identification of the alleged problems the inquiry was seeking to address. Curiously, the report accepted the *ninemsn* submission view that ‘there is no significant research that conclusively links drops in readership to specific issues of quality’.⁶⁶ Curiously also, while acknowledging the codes of ethics have improved the position in respect of ‘irresponsible reporting’ (that term warrants deeper discussion but such a task is beyond the scope of this work), the report observes that the difficulties faced by an entity such as the Press Council ‘are problems that such bodies face in many democracies’.⁶⁷ This indicates clearly that problem the inquiry was

⁵⁹ Ibid [11.7].

⁶⁰ Ibid [11.9].

⁶¹ Ibid.

⁶² Ibid [11.10].

⁶³ Ibid [11.12].

⁶⁴ Ibid [11.13].

⁶⁵ Ibid [11.14].

⁶⁶ Ibid [11.8].

⁶⁷ Ibid [11.12].

seeking to resolve was far from unique let alone one that offered easily attainable goals.

The report is also replete with assertions and unwieldy concerns. For example, the report observed that ‘the general reader is seldom in a position to know whether the information provided in a story is accurate, whether the sources quoted are reliable, and whether all the relevant facts have been interpreted objectively’.⁶⁸ Offering a solution to these dilemmas would no doubt bring great relief to society but must remain a pipe dream for reasons that are too obvious to rehearse here. Suffice to say that it would be totally unfair to lay the blame for this malaise squarely at the media’s feet. The report further asserted that while the Senate Select Committee on Information Technologies recognised problems with media regulation as long ago as April 2000, there has been ‘little improvement in the past 12 years’.⁶⁹ If such a claim as to the extent of ‘improvement’ was capable of empirical testing, it was not done in the Finkelstein Report. The report also singled out five ‘striking instances’ of media lapses in support of its claim as to the existence of a problem, that is, the following five examples constituted ‘striking instances’ of how the news media ‘can cause wrongful harm’ through unreliable or inaccurate reporting, breach of privacy, and the failure to properly take into account the defenceless in the community.⁷⁰ A closer look at these five ‘striking instances’ is appropriate as it further illustrates the weak premises upon which the report erected its case for strong regulatory intervention.

⁶⁸ Ibid [11.4].

⁶⁹ Ibid [11.15].

⁷⁰ Ibid [11.10]–[11.11].

The first alleged ‘striking instance’ cited was that of a minister of the Crown being forced to resign after the media exposed his homosexuality.⁷¹ That case, however, was disposed of by the Australian Media and Communications Authority, which found in favour of publication of the material on the grounds of ‘an identifiable public interest’.⁷² Without going into detail about the wisdom of that decision, the point that needs emphasising is that the complaint in question was processed through an existing complaints mechanism and no argument was advanced as to the adequacy or otherwise of that complaints process. The second alleged ‘striking instance’ referred to the forced resignation of a ministerial adviser following false accusations about the job performance of a chief commissioner of police.⁷³ The report fails to explain why this constituted a ‘striking instance’ of media malfeasance or why the victim was unable to obtain redress through conventional redress mechanisms if such redress was merited. The third alleged ‘striking instance’ referred to a person being wrongly implicated in the deaths of her two young children in a house fire and media coverage in her moment of grief.⁷⁴ The report fails to set out whether the victim invoked any existing complaints device and what the outcome, if any, was or even if the fault lay with the media. Such a false allegation would have been an open and shut case in which liability would be found if the transgressors did not make amends. The fourth alleged ‘striking instance’ referred to the publication of nude photographs falsely said to be of a female politician.⁷⁵ While the Finkelstein Report did not identify the politician concerned it presumably referred to the publication of purportedly nude

⁷¹ Ibid [11.11]; see also *ibid* [4.57].

⁷² *Investigation Report No 2431* (Unreported, Australian Communications and Media Authority, Members Chapman and Benn, 23 December 2010).

⁷³ *Finkelstein Inquiry Report*, above n 31, [11.11].

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

pictures of former One Nation leader Pauline Hanson. In that case, however, the offending publisher conceded the error and apologised to Ms Hanson and reportedly arrived at a settlement with her.⁷⁶ As such, the available and established redress mechanisms performed satisfactorily in this instance. The fifth alleged ‘striking instance’ of the media’s lapse was identified as the victimisation of a teenage girl because she had sexual relations with a well-known sportsman. The Finkelstein Report did not provide details but this presumably refers to the saga of the girl otherwise referred to as the ‘St Kilda Girl’. While the facts concerning this matter are not entirely clear and while there are suggestions that the girl herself was complicit in the publication of private material eventually some media outlets took a stand and announced that they would ‘back off’.⁷⁷ The failure here, if any, can also be attributed to the absence of clarity in the country’s privacy law – an issue that Australia’s legislatures have long grappled with and failed to properly address. The most recent initiative in this direction was shelved, according to the Commonwealth Attorney-General Mark Dreyfus, because ‘there was little consensus even amongst privacy advocates on how this legal right should be created’.⁷⁸ That aside, it is far from clear that the Australian media are inveterate privacy violators going, for instance, on complaints made to the Australian Press Council. In the 22 years to 2010, the Council received a

⁷⁶ Neil Breen, ‘Pauline: We’re Sorry, They Weren’t You’ (Editorial), *The Telegraph* (online), 21 March 2009 <<http://www.dailytelegraph.com.au/news/opinion/pauline-were-sorry-they-werent-you/story-e6frezza0-1225690416866>>; Nick O’Malley and Erik Jensen, ‘Valuable Lesson from Pauline’, *WAtoday* (online), 18 May 2009 <<http://www.watoday.com.au/national/valuable-lesson-from-pauline-20090519-bd70.html>>.

⁷⁷ Sally Jackson, ‘Sex, Lies & Ethics: Kim Duthie Story a Media Dilemma’, *The Australian* (online), 20 June 2011 <<http://www.theaustralian.com.au/media/sex-lies-ethics-kim-duthie-story-a-media-dilemma/story-e6frg996-1226078101736>>.

⁷⁸ See, for example, Chris Merritt, ‘Labor Shelves Privacy Tort Plan’, *The Australian* (online), 13 March 2013 <<http://www.theaustralian.com.au/media/labor-shelves-privacy-tort-plan/story-e6frg996-1226595931407>>.

total of 469 complaints for invasion of privacy, out of a total of 8916 complaints during that period, amounting to just over five per cent of the total complaints.⁷⁹ No breakdown is available specifically for the outcome of the privacy intrusion complaints. The general rate of complaints fully or partly upheld on adjudication by the Press Council for that period was just over eight per cent. If this ratio was applied to the statistic above for total complaints received, it would appear that over the 22-year period only 40 complaints to the Press Council for privacy intrusion were fully or partly upheld on adjudication. This is by no means intended to suggest that privacy intrusion by the media is not a matter of concern. Rather, it is meant to suggest that, on paper at least, more was needed to substantiate the Finkelstein Report's claim that breach of privacy was a matter of serious concern warranting the measures that were being recommended.

Each of the above five cited 'striking instances' were either disposed of through existing redress mechanisms or could easily have been addressed through these mechanisms. The Finkelstein Report does not explain why existing redress mechanism failed to assist the victims in these circumstances, for example, through the law of defamation or through complaints for breach of professional codes of practice.

V THE FINKELSTEIN INQUIRY RECOMMENDATIONS

The recommendation of foremost significance to the news media emerging from the Independent Media Inquiry was the establishment of a 'News Media Council' ('NMC'), loosely referred to as a 'super regulator', to oversee the enforcement of standards of the news media and

⁷⁹ Australian Press Council, '2010–2011' (Annual Report No 35, Australian Press Council, June 2012).

that this body would take over the functions of the Australian Press Council and the current affairs standards of the Australian Communications and Media Authority.⁸⁰ The NMC was to be free from the influence of the executive branch of government and a committee independent of government would appoint NMC members.⁸¹ The NMC would develop standards of conduct to govern the news media – non-binding aspirational principles and detailed standards – similar to the standards of the two peak press entities, the Media, Entertainment and Arts Alliance and the Press Council. A detailed critique of the recommendations is not possible in the present work given the breadth of the report and the extent of its reach covering the rationale for the establishment of a new regulatory entity, its composition, the manner of its appointment, the processes for handling complaints, the remedial powers, enforcement, appeals, cost of implementation and its purported benefits.⁸² A few observations might, however, be made. One concerns the ‘independence imperative’ and the related question of the proposed NMC’s composition. The inquiry clearly acknowledged that any reform of media regulation would be unsatisfactory if the regulatory mechanism was not underpinned by independence, especially from the executive branch of government.⁸³ That led the inquiry to recommend an elaborate council composition framework that, notwithstanding the inquiry’s good intentions, was fertile for challenge. Among its features was the proposal to set up a body to appoint the NMC, such a body perhaps comprising three senior academics from tertiary institutions; the NMC itself would consist of a full-time independent chair and 20 part-time members – one half of them selected from the public at large, the other half appointed

⁸⁰ *Finkelstein Inquiry Report*, above n 31, [11.44].

⁸¹ *Ibid* [11.46].

⁸² See generally, *ibid* ch 11.

⁸³ *Ibid* [11.45]–[11.46].

from the media but excluding media managers, directors and shareholders and whose candidates are nominated by the MEAA and the media, and one half comprising men and the other half women.⁸⁴ While these appointment devices bore the hallmarks of an independent appointment process and leading to an ostensibly balanced composition of the bodies entrusted with regulatory power, it would hardly escape questioning, for example, as to why senior academics should be given the role of appointing the NMC members or how these senior academics themselves would be selected given that deep divisions emerged within even the academic fraternity as to what shape regulatory reform should take.⁸⁵ It is also pertinent to query the Finkelstein Inquiry proposal to devote half the make-up of the News Media Council to media representatives given, as noted above, the weight the inquiry gave to the low public perception of the media reflected in public opinion surveys over a 45-year period. Likewise, questions could be asked as to what material improvement could result from the recommended reform if the setting of standards was carried out by an entity whose very constitution was vulnerable to scepticism. Furthermore, why should the same minimum standards of fairness and accuracy not have to apply across delivery platforms, so that some aspects were treated as platform specific, as recommended by the inquiry?

While the setting of standards should be left to the News Media Council, they should incorporate certain minimum standards, such

⁸⁴ Ibid [11.46]–[11.49].

⁸⁵ See, eg, Mark Pearson, ‘News Media Council Proposal: Be Careful What You Wish For #ausmedia #MediaInquiry #Finkelstein’, *Journlaw* (online), 3 March 2012 <<http://journlaw.com/2012/03/03/news-media-council-proposal-be-careful-what-you-wish-for-ausmedia-mediainquiry-finkelstein/>>; John Henningham, ‘State Must Not Be A Watchdog’, *The Weekend Australian* (Sydney), 17–18 March 2012, 16; Wendy Bacon, *Effective Media Accountability Does not Have to Threaten Journalists’ Independence*, (30 August 2012) <<http://www.wendybacon.com/tag/finkelstein-inquiry/>>.

as fairness and accuracy. The same standards need not apply across delivery platforms. Some aspects will need to be platform specific.⁸⁶

One particularly objectionable aspect of the inquiry's recommendations was its proscription of any freedom of speech obligation on the NMC's part, contrary to the dictates of any prudent approach towards media regulation. The inquiry stated:

The News Media Council requires clearly defined functions. It is *not recommended* that one of them be the promotion of free speech. There are ample bodies and persons in the community who do that more than adequately. The principal function of the News Media Council should be to promote the highest ethical and professional standards of journalism.⁸⁷

The recommendation directly contradicted any profession of a commitment to 'a healthy and robust media' and to an 'independent media that is able to fulfil its essential democratic purpose' as seen above in the Minister's position during the launch of the inquiry and it went against established values and principles cherished by any democratic society. In sharp contrast, in the United Kingdom, where the subject of media regulation reform has been aggressively canvassed in the wake of the phone hacking scandal and the ensuing Leveson Inquiry, sight has not been lost of the need to entrench free speech protections into any regulatory scheme. The draft royal charter on regulation, for instance, while allowing for provisions that would check against media excesses, incorporated support for the 'freedom of the press'⁸⁸ and for any code to

⁸⁶ *Finkelstein Inquiry Report*, above n 31, [11.52].

⁸⁷ *Ibid* [11.55] (emphasis added).

⁸⁸ UK Government, *Draft Royal Charter on Self-Regulation of the Press* (18 March 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/142808/18_March_2013_v6_Draft_Royal_Charter.pdf> 1.

‘take into account the importance of freedom of speech’.⁸⁹ Likewise the draft Bill proposed by the advocacy group that campaigned for a public inquiry into the phone hacking scandal, Hacked Off, in its draft Bill prompted by the Leveson Inquiry recommendations, proposed in its very first clause that there be a guarantee of media freedom.⁹⁰ The Bill’s preamble described it as a Bill ‘to protect the freedom and independence of the media and to provide for the process and effect of recognition of voluntary media regulators.’⁹¹ The group noted that the Bill ‘[e]shrines the freedom of the press in statute for the first time, making attempted ministerial or other state inference in the media explicitly illegal’.⁹² The Finkelstein Inquiry recommendations pertaining to the proposed media policing entity, the News Media Council, were devoid of any such commitment to freedom of speech and, as noted above, deemed this ideal a peripheral concern best left to the unidentified ‘ample bodies and persons in the community who do that more than adequately’.⁹³

VI THE COLLAPSE OF THE REFORM INITIATIVE

Almost thirteen months after the Finkelstein Report was released and after a period of relative hibernation on the report’s recommendations, the Commonwealth Government unveiled the legislative reform package. As reported by ABC Television’s *Lateline* program, the government told MPs they had eight days to decide whether to support ‘the new raft of

⁸⁹ Ibid 17.

⁹⁰ Hacked Off, *Draft Media Freedom and Regulatory Standards Bill* (2013) <<http://hackinginquiry.org/wp-content/uploads/2013/01/The-draft-Leveson-Bill-with-notes.pdf>> 1–2.

⁹¹ Ibid 1.

⁹² Hacked Off, *Hacked Off Publishes the Leveson Bill*, (6 January 2013) <<http://hackinginquiry.org/news/hacked-off-publishes-the-leveson-bill/>>. For background information on the grouping see: Brian Cathcart, *Hacked Off: What did we do? And did we win?*, (25 March 2013) Hacked Off

<<http://hackinginquiry.org/debunking/hacked-off-what-did-we-do-and-did-we-win/>>.

⁹³ *Finkelstein Inquiry Report*, above n 31, [11.55].

media reforms, a take-it-or-leave-it-ultimatum'.⁹⁴ There was no mistaking the Minister's position:

[O]ur position is – and I'm going to be very clear about this – this package is not up for bartering and negotiation and things to be added on here or things to be added on there and deals and cross deals. This is – everybody's known for two years this debate's coming, everyone's known what the Convergence Review have pushed, what the Finkelstein Report recommended, all of those things have been taken in as a consideration. We're not going to be dragged around for months on this. This is a package that the Parliament fully understands and the Parliament will be in a position to make a judgment next week.⁹⁵

Upon being pressed by the *Lateline* presenter Emma Alberici as to the reason for the 'deadline of next week? Why rush it through?' the Minister responded (using the terms 'this package' and 'a bill' in the same interview) that the proposed legislation had been many years in the making, that every political party had debated it and that in essence the proposed legislation was no 'surprise to anybody'.⁹⁶ The Minister added, in response to the presenter's question, as to what the outcome would be if no agreement were reached by the deadline:

We won't be proceeding with it. That is absolutely the position. We are not going to proceed with this, we're not going to spend months and months being dragged around, negotiating this little bit

⁹⁴ ABC Television, 'Minister Says We Need New Media Laws', *Lateline*, 12 March 2013 (Emma Alberici) <<http://www.abc.net.au/lateline/content/2013/s3714134.htm>>.

⁹⁵ Ibid.

⁹⁶ Ibid.

over here or that little bit over there. It's a package; take it or leave it.⁹⁷

In the event, the package referred to six Bills comprising measures representing the Government's response to the Convergence Review and the Finkelstein Inquiry.⁹⁸ Of the six Bills, two were passed and the remaining four discharged from the Notice Paper, that is, these four were abandoned.⁹⁹ Of these four the most controversial, and the key plank of the whole exercise, was the Public Interest Media Advocate Bill 2013 ('PIMA Bill'), which was aimed at creating a new independent statutory office to perform functions under the News Media (Self-Regulation) Bill 2013. The PIMA Bill was also aimed at overseeing the 'public interest test' that was to be established in the new part 5A of the *Broadcasting Services Act 1992*.¹⁰⁰ According to the Bill's Explanatory Memorandum the Public Interest Media Advocate would be appointed by the Minister but, to protect the independence and impartiality of the role, would not be subject to the Minister's or the Government's direction in relation to the

⁹⁷ Ibid.

⁹⁸ Explanatory Memorandum, Public Interest Media Advocate Bill 2013.

⁹⁹ Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013 – among other things providing that no additional commercial TV broadcasting licences will be made available to enable a fourth commercial TV network (passed); Television Licence Fees Amendment Bill 2013 – among other things to reduce by 50 per cent the annual licence fee payable by commercial TV broadcasting licensees (passed); Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 – among other things to enable the Australian Communications and Media Authority to provide certain information to the Public Interest Media Advocate and to provide for a public interest test (discharged from Notice Paper); News Media (Self-Regulation) Bill 2013 – among other things to allow the Public Interest Media Advocate to declare a specified body corporate as a news media self-regulation body (discharged); News Media (Self-regulation) (Consequential Amendments) Bill 2013 – to provide that a news media organisation must be a member of the news media self-regulation body to qualify for the journalism exemption relating to the obtaining, keeping and disclosing of personal information (discharged); Public Interest Media Advocate Bill 2013 – providing for the creation of the independent statutory office of the Public Interest Media Advocate, and providing for the functions, appointment and terms and conditions of the PIMA (discharged).

¹⁰⁰ Explanatory Memorandum, Public Interest Media Advocate Bill 2013.

performance of its functions or the exercise of its powers. Furthermore, this measure would assist to safeguard the PIMA's role and enable it to operate at arm's length from the Government. This attempt at legislative measures to regulate the media went directly against the Convergence Review approach which 'provide[d] for direct statutory mechanisms to be considered *only after* the industry has been given the full opportunity to develop and enforce an effective, cross-platform self-regulatory scheme'.¹⁰¹ The Convergence Review report identified this approach as one of the 'key areas' in which it differed from the Finkelstein Inquiry. The Convergence Review report noted further that, as part of its initial deliberations, the review established a set of ten principles to guide its work and the 'first and most fundamental principle' was that '[c]itizens and organisations should be able to communicate freely and, where regulation is required, it should be the minimum necessary to achieve a clear public purpose'.¹⁰² Yet, the Government, without any explanation as to why it ignored this recommendation by another of its own inquiries, proceeded to introduce the above raft of Bills. It did so with undue haste couched in the language of deadlines and ultimatums and amid widespread concern that the Bills, in particular, the PIMA Bill was lacking in fundamental detail. The Opposition Communications spokesperson Malcolm Turnbull said in Parliament the Government was moving on the PIMA Bill in a manner that was 'turning this Parliament into a farce' by 'currently doing a dirty deal with various of the Independents to change the nature of the Public Interest Media

¹⁰¹ Department of Broadband, Communications and the Digital Economy, *Convergence Review: Final Report* (March 2012) <http://www.dbcde.gov.au/__data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf> 156 (emphasis added).

¹⁰² *Ibid* viii.

Advocate’.¹⁰³ As the deadline for a consensus on the Bills’ passage loomed a last-minute rush unfolded when it appeared that crucial support for the Bills was wavering. It transpired that, contrary to earlier expectations the Bills were not going to be considered together. As Mr Turnbull saw it, the Bills were originally going to be debated in ‘a cognate way, because they all link together’ but ‘now we have learned, just in the last few minutes, of a dramatic change’ that would leave the PIMA Bill to be debated at the very end as the last Bill on the program because the Minister was ‘still negotiating its contents’.¹⁰⁴ The attendant parliamentary chaos is reflected in the following remarks:

[W]e do not know what the PIMA is going to be, because the PIMA is defined as the Public Interest Media Advocate as established in the Public Interest Media Advocate Act 2013. Well, the Public Interest Media Advocate Bill 2013, which is the foundation of this whole exercise, is a work in progress... [E]very time you think the government have plumbed the depths of absurdity and dysfunctionality, they find a new depth to which they can sink, and that is what they are doing tonight. Now what are we debating? What is this Public Interest Media Advocate? Who is it? Who is she? Are there three? Are there five? Are they appointed for life? Do they have to be residents of a particular electorate? Are they appointed for three years or four years? What are their qualifications? We have no idea. And we have no idea because the government have no idea.¹⁰⁵

On the morning of 20 March 2013, as the events were unfolding the ABC News 24 channel was announcing ‘Federal Government sources say

¹⁰³ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2013, 2634 (Malcolm Turnbull).

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

remaining media law bills dead'. This was confirmed as true shortly afterwards.

VII CONCLUSION

The reform exercises through the Convergence Review and the Finkelstein Inquiry, as noted above, were not the first such efforts at media regulation reform. The last major exercise culminating in a Senate Committee report 13 years ago, in key respects, reached somewhat similar conclusions. In particular, that Committee found 'substantial evidence to question the efficacy of self-regulation and co-regulation in Australia's information and communications industries'.¹⁰⁶ That Committee therefore recommended that the Government establish a Media Complaints Commission 'to oversee various existing bodies and processes which currently regulate these industries'.¹⁰⁷ A legitimate conversation on media regulation remains justified at the present time. Such a conversation is one that not even the media itself is averse to. As the peak media body representing journalists observed:

[I]t is a welcome opportunity for us to take stock of self-regulation and ask how it might be enhanced. We should consider if there is a need to reform the Australian Press Council or if there is anything the government might do to support the health of the news industry in this country. *We believe the answer to both these questions is yes.*¹⁰⁸

The Alliance described the reform package as 'a missed opportunity' to recognised the real problems confronting the Australian media; to ensure the future health of Australian journalism; and that it failed to address the

¹⁰⁶ Senate Select Committee on Information Technologies, Parliament of Australia, *In the Public Interest: Monitoring Australia's Media* (2000) 127.

¹⁰⁷ Ibid.

¹⁰⁸ See Chris Warren, above n 20, 14 (emphasis added).

urgent need for investment incentives, digital training and support for alternate voices in the media landscape.¹⁰⁹ The above reform initiative, as the above discussion has demonstrated, was ill-conceived, its data-gathering effort was flawed, the recommendations were not fully grounded in reason, and the final attempt at execution through the legislative package was driven by unseemly haste and riven with confusion and ambiguity. The exercise was – put simply – a debacle. An elaborate exercise in media regulation reform came to an abrupt and ignominious end. That it did so was hardly surprising given the events and the manner in which the proponents of media regulation prosecuted their objectives. As this author noted at the outset, the Finkelstein Inquiry was ‘too flawed, and needs too much fixing to trigger real reform’.¹¹⁰ Any initiative impacting on media regulation is by nature fraught, given the high premium democratic societies place on freedom of speech. Concerns about regulatory inroads into freedom of speech are, not surprisingly, higher in the absence of constitutional safeguards for this freedom, as is the case in Australia.¹¹¹ If it is any consolation, in what is currently the world’s most fertile of arena for media reform – in the theatre of the UK’s phone hacking scandal – answers were still being sought at the time of this writing despite a detailed inquiry and

¹⁰⁹ Media, Entertainment and Arts Alliance, *The Media Reform Package: What Does It Mean For Journalists* (20 March 2013) <<http://www.alliance.org.au/the-media-reform-package-what-does-it-mean-for-journalists>>.

¹¹⁰ Joseph M Fernandez, ‘Finkelstein Inquiry Too Flawed To Lead To Real Reform’, *The Conversation* (online), 15 March 2012 <<http://theconversation.com/finkelstein-inquiry-too-flawed-to-lead-to-real-reform-5732>>.

¹¹¹ For example, see Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000).

recommendations for reform accompanied by intense public and parliamentary debates.¹¹²

¹¹² See Roy Greenslade, 'After Leveson – Is Citizen Journalism the Answer', *The Guardian* (online), 4 June 2013 <<http://www.guardian.co.uk/media/greenslade/2013/jun/04/leveson-report-media-events-conferences>>.