

## ❖ Australian Media Monitor, March 2012

**Tim Dwyer**

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The phone-hacking scandal continues to unravel in the United Kingdom with new revelations emerging almost daily to tarnish the News Corporation brand. Ofcom, the UK regulator, is now once again looking closely – very closely – at News' control of BSkyB, the highly profitable satellite broadcaster, and whether or not "fit and proper" provisions will need to be applied. And as I prepare this edition of Australian Media Monitor (AMM), the Press Complaints Commission has announced it is to be closed and replaced by another transitional regulatory body until the new post-Leveson arrangements can be put in place.

This may not occur until 2013, or possibly even 2014, if it's determined that a statutory basis is required for the new regulator ("Press Complaints Commission to Close in the Wake of Phone-Hacking Scandal", Lisa O'Carroll, *The Guardian*, March 8, 2012). O'Carroll reports that the transitional body will consist of

three people, Michael McManus, a former Conservative special adviser, who is director of transition, with Jonathan Collett, the director of communications, who has previously acted as press adviser to former Conservative leader Michael Howard, and Charlotte Dewar, the head of complaints who previously worked at *The Guardian*.

In the meantime Lord Justice Leveson has now moved onto his second investigation 'module' which runs into the second half of 2012, allowing him until October to get to the bottom of the extent of relations between the press and the police.

There is a great deal of commentary in the UK media, especially in the non-News International controlled broadsheets. Writing in *The Guardian* about the Murdoch's new *Sunday Sun* ("If the *Sun on Sunday* soars, Murdoch will also rise again", February 24, 2012), Polly Toynbee sees a point of difference between her values and those of her fellow journalists working at the red tops:

I have never felt much professional comradeship with people hired to promote the self-serving views of a few eccentric far-right billionaires controlling large parts of the British press ... The seventh *Sun* will offer jobs to those willing to put their pens to abusing migrants, travelers, trade unionists, single mothers, women, the unemployed, public sector staff, young people, Europe, foreigners or anyone to the left of John Redwood. Even the disabled are now being harassed as scroungers to win public support for benefit cuts reducing the already poor to penury.

I am not sure that Murdoch's Australian tabloid news print media have plumbed quite those depths, yet (although *The Telegraph* has been running front page stories abusing refugees). But some may disagree, and certainly many felt sufficiently aggrieved to have an independent inquiry launched on these shores, following the *News of the World* revelations and the Leveson Inquiry.

In fact, it is those aggrieved souls (and some other surprising ones), who have been closing ranks on the Finkelstein inquiry report. Paul Kelly in *The Australian* on March 7, in "Naïve Hubris Pervades Media Inquiry" rails against the report, writing

The anger of the Gillard government towards media criticism has resulted in a blueprint for enforced regulation never before seen in Australia ... the report is compiled in haste, shoddy in argument and evidence and, above all, a deeply ideological document revelatory of our times.

This sets the general tone of his commentary.

Perhaps these comments are fairly predictable given his location in Australia's media landscape. His former boss and executive chairman of News Ltd, John Hartigan, remarked "The government used it as a sort of jihad against News" ("Politicians 'running

a jihad' against News") (Andrew White and James Chessell, *Australian Financial Review*, March 5, 2012) What is perhaps a little more surprising are the strident criticisms bubbling out of the Fairfax Media empire. An editorial in the *Australian Financial Review* on March 5, 2012, suggests the "Media Inquiry a case of bad regulation." Like many other sections of the media, the paper argues that the report "breaches basic proper processes for deciding on the regulation of competitive markets." It notes "Finkelstein's overview of the theory of regulation is cartoonish." Ouch! Unfortunately their arguments defending the "no case" are the usual grab bag of clichés about "competitive markets", anti-regulation and "free speech". At least this particular piece doesn't trot out what has become the standard critique that government-funded (and however arranged) means the strings will be pulled by political apparatchiks.

#### \* Media inquiries in Australia

##### *Interim Convergence Review Report*

The Interim Convergence Review report was released in December 2011. The final report is due out at the end of March, but many expect that it will be to a large extent, putting the flesh on the bones of the recommendations mooted in the Interim Review Report handed down in December 2011.

The key features of that report were that the government replaces the existing regulator, Australian Communications and Media Authority (ACMA), with a new, and as yet unnamed regulator, that would complement the functioning of the competition regulator, the Australian Competition and Consumer Commission (ACCC). The reviewers recommended the decoupling of owning spectrum and holding a licence: meaning that holding a licence will no longer be a precondition for providing a content service. The reviewers see that regulatory obligations in relation to a content service ought to be imposed consistently, and irrespective of the delivery platform. However, the claim is that this is, overall, a deregulatory set of measures.

Most innovatively, the reviewers recommend the creation of a new legislative structure for an industry provider known as a "content service enterprises" (or CSEs), which would be a "platform-neutral regulatory framework". The idea is that these CSEs would be defined according to the scale, nature of operations and the entity involved in providing the content services. CSEs would then be regulated for content standards, media diversity and Australian content. Obligations would be differentiated depending on the actual size of the entity supplying their service: for example, major 'branded' CSEs would have different obligations than smaller, less well known CSEs. In broad terms this might be seen as equating to the treatment of term 'influence' in existing laws.

The review committee has recommended abolishing the distinction between spectrum allocated for broadcasting, and for spectrum used for other purposes. Their argument is that market-based pricing mechanisms should replace existing broadcasting licence fees. It is proposed that transitional licensing arrangements will be explained in greater detail in their final report, to be released at the end of March. A moratorium has been extended (yet again) on the fourth commercial TV channel, until a review is undertaken in 2013.

In my view the recommendations of most consequence for media pluralism are those dealing with diversity of voice and opinion: the full removal of remaining (post 2007), media ownership, including cross media limits:

- 75% audience reach rule
- 2 out of 3 rule
- 2 to a market rule; and
- 1 to a market rule.

Replacing these, the committee suggests, would be new rules including:

- a revised number of voices rule for local markets; and
- the introduction of a public interest test (to be implemented by the Committee's proposed new regulator) for significant merger or acquisition transactions (the Committee refers to the UK position as support for this proposal).

I personally have doubts about the ability of these proposed measures to provide the kind of certainty required, let alone the diversity of voices, in an already highly concentrated media ecosystem. There's a lot to be said for clear, numerical limits and transparent, easy-to-understand policy which prohibits further concentration, and at the same time develops measures to take into account the increasingly popular online news media. I think while this report recommends innovative ways of shoring up Australian content, these benefits are far outweighed by the costs of recommendations that may well result in unrestrained media concentration.

I've written elsewhere that there's not much point in being able to see Australian faces and hear their voices, (although I agree that's a plus for the local audiovisual production sector), if mainstream news media are spinning some anti-mining tax or anti-carbon tax line. Further concentration of media ownership allows powerful vested interests to dominate public debate across media platforms whenever it is in their interests to do so.

While it is envisaged that the new regulatory body replacing the ACMA would have additional competition powers, in consultation with the ACCC, to issue directions and make rules regarding for example, questions of content and market power, the details of this process are a matter for the final report. Perhaps they will be analogous to the role that the ACCC has taken in the context of the \$1.9 million Foxtel and Austar merger, where detailed undertakings require some programming (in all genres) to be made available on a non-exclusive basis to emerging IPTV providers using the NBN (John Durie and Damon

Kitney, "Foxtel's merger with Austar to get green light," *The Australian*, Business March 7, 2012).

Undoubtedly the most innovative aspect of the Committee's interim report recommendations concern the continuing investment in Australian content on our screens. The report recommends that CSEs commit to either:

- a percentage of total program expenditure to specified Australian content; or
- if this is not possible, contributing to a converged content production fund.

The interim report recommends transitional arrangements include the maintenance of the 55% transmission quota, although it wants to tinker with the specific subquota requirements (Drama, Children's drama other Children's programming, and documentaries). The public sector would see the Australian Broadcasting Corporation (ABC) mirror the transmission quota, but the Special Broadcasting Services (SBS) would have reduced Australian content obligations.

The Australian production sector will also be pleased about the recommended measures for direct and indirect subsidy, including the extension of the 40% producer offset scheme to premium television content.

The committee recommends that there be continuing rules to support events of local significance, although it wishes to make these 'more flexible' in terms of compliance and reporting arrangements.

#### *Independent Media Inquiry Report*

The recommendations of the Finkelstein inquiry telegraph a brave new world in the regulation of Australian journalism. While Lord Justice Leveson in the UK has the luxury of over a year to undertake his investigation, Finkelstein and his team effectively had only five months to review and report on the state of press regulation in this country. It now will be factored into the broader inquiry into the convergence of media industries, along with recommendations of the review into the National Classification scheme.

On balance the Finkelstein report is a very comprehensive response to the original terms of reference. It is a promising response for enabling independent, accountable and transparent media regulation, which is usefully grounded in comparative international material. In my opinion, the emphasis on immediate change and correction, rather than long-winded or punitive processes, is a very welcome one.

Its key recommendation for the formation of a News Media Council (NMC) is forward thinking and consistent with the reality of media convergence including online news delivery. More critically, the report is not very explicit about the question of the problem of news media diversity in the Australian context, which it really only addresses in a very abstract way. It would have been useful to fully explore subsidy models that are emerging for assisting fledgling online media organisations, as a way to maintain and encourage news diversity.

Other very important recommendations:

- Recommendation for on going monitoring of the health of "quality journalism" by NMC
- Recommendation for Productivity Commission inquiry within 2 years
- Recommendation that the Government investigate the adequacy of news services in regional areas as "a matter of some urgency".

But ultimately it is open to the government, following recommendations by the Convergence Review handed down later this month, to accept this inquiry's recommendations in part or in full.

However, there is certainly a great deal of disagreement about the report's merits. In a very revealing and controversial piece in *The Australian's* Inquirer section ("Media's great divide", March 10-11, 2012), Cameron Stewart describes what he sees as the way in which the Finkelstein Report "has exposed a rift between journalists and academics". While in the UK the Leveson inquiry is widely regarded as bringing sunlight to sections of the media that have generally slid into a state of ethical decline, and this is running in parallel to general financial decline of traditional print media news industries.

Stewart's general thesis is that Finkelstein's report was shaped by the partisan views of academics, such as myself (and about 50 others!). On the other hand, some of the key people involved in writing the report see further shortcomings in the media's reporting of the focus of the report. Stewart notes that Rod Tiffen from the University of Sydney, argues that "the findings of the report have been gravely misrepresented by the mainstream media, which has an obvious self-interest in the outcome." There has, in fact, been a great deal of misrepresentation of key components of the report. For example, because it is proposed that the News Media Council be funded by government, (and this would be structured in such a way as to have multiparty parliamentary supervision), this gets converted into an hysterical claim about "government control of press freedom". It will be interesting to see how the Gillard government handles this very important hot potato.

#### *National Classification Scheme Inquiry*

The Australian Law Reform Commission (ALRC) has handed down its report on the first full review of national classification laws in 20 years. The main recommendation is for a new scheme which applies consistent rules to all media, irrespective of the platform they are delivered over. Basically, this is referring to cinemas, on television, on DVDs and on the internet. The national classification scheme applies to all genres of content, except for news and current affairs.

In his capacity as an ALRC Commissioner, media academic Professor Terry Flew presided over the conduct of the inquiry, with

the report being tabled on 1 March. Professor Flew was quoted in *The Sydney Morning Herald* as saying, "the scheme also needs to be flexible, so it can adapt to new technologies and the challenges of media convergence" (Bianca Hall, "Landmark Report Calls for One-Stop Classification", March 1, 2012).

Other recommendations include:

- One set of laws establishing obligations to classify or restrict access to content across media platforms.
- Clear scope of what must be classified: feature films and television programs, as well as computer games likely to be MA 15+ or higher, that are both made and distributed on a commercial basis, and likely to have a significant Australian audience.
- A shift in regulatory focus to restricting access to adult content, by imposing new obligations on content providers to take reasonable steps to restrict access to adult content and to promote cyber-safety.
- Co-regulation and industry classification, with more industry classification of content and industry development of classification codes, but subject to regulatory oversight.
- Classification Board benchmarking and community standards, with a clear role for the Classification Board in making independent classification decisions that reflect community standards.
- An Australian government scheme that replaces the current co-operative scheme with enforcement under Commonwealth law.
- A single regulator with primary responsibility for regulating the new scheme.

The Australian Government must now decide whether to implement the recommendations, in whole or in part, and there is no set time frame in which the Government is required to respond.

The final report of the Convergence Review due at the end of March will also take into account the ALRC's recommendations.

#### *Fairfax Media*

Gina Rinehart's acquisition of around 13% of Fairfax Media has triggered renewed public interest debate about which individuals and corporations are suitable to control critically significant democratic institutions. The key item for debate in Rinehart's case is not surprisingly about influence and her position as Australia's wealthiest person with extensive interests in the mining sector. She has funded extensive campaigns against the mining and carbon taxes, and is no friend of emerging renewable energy industries.

It begs the question about whether individuals should be deemed "fit and proper" to control media corporations, in this case, the second largest print media organization in Australia (which together with News Corporation owns and controls about 90% of the news print media). As many commentators pointed out, there is little to stop Rinehart buying Fairfax Media outright, since the value of that media organization represents a mere percentage point or two of her overall wealth.

As noted earlier, Fairfax Media is stridently opposed to the key recommendation of the Finkelstein inquiry to set up a News Media Council.

#### *National Broadband Network (NBN)*

On March 7, 2012, the Ministers for Finance and Deregulation Penny Wong, and Communications Senator Conroy announced in a joint press release that the culmination of some two decades of deregulation of the Australian telecommunications industries had been reached, with the agreement of Telstra to "full structural separation" (Joint Press Release, March 7, 2012, "Definitive Agreements between NBN Co and Telstra come into force". [http://www.minister.dbcde.gov.au/media/media\\_releases/2012/026](http://www.minister.dbcde.gov.au/media/media_releases/2012/026)). The means that as part of its "Definitive Agreements" with the Government and NBN Co regarding the roll out of the National Broadband Network (NBN), Telstra will be split into wholesale and retail divisions, creating, at least in theory, the possibility of full and open competition in telecommunications generally, and the NBN in particular.

The government, of course, trumpeted that construction and rollout of the NBN could now proceed full steam ahead, with "Telstra and other retail service providers will have access to a single wholesale-only network offering access on open and equivalent terms" (Media\_Releases/2012/026). This is a major win for the Gillard government, and as it will be arguing all the way to the election, a major win for Australian consumers and citizens. As well as handing over \$11 billion to Telstra, under the terms of the agreements and migrations plans, Telstra will give access to its infrastructure and customer base, and eventually shutting down its copper network. Importantly for Telstra, it now also means that the government must fulfill its side of the bargain and arrange that "Telstra will not be prevented from competing for spectrum released as part of the digital dividend".

It's reported that if the Opposition is elected, an Abbott government "would expect Telstra to hand over ownership of its old copper network at no extra cost under an alternative to Labor's \$35.9 billion NBN plan" (David Crowe and Annabel Hepworth, "Abbott NBN would strip copper lines from Telstra", *The Australian*, February 29, 2012). However, it appears that the Opposition would not undo the structural separation undertaking with the ACCC, and its alternative plan would be for NBN to take control and use Telstra's copper network, as it made decisions about the deployment of a cheaper Fibre-to-the-node (rather than to individual homes) network.

The same piece quotes Senator Conroy as saying he is confident that the NBN will be completed or have construction underway for 758,000 homes by December 2012.

On 21 March the Senator Conroy announced a in media release that major 'Telco universal service reforms passed' (Conroy, [http://www.minister.dbcde.gov.au/media/media\\_releases/2012/0320](http://www.minister.dbcde.gov.au/media/media_releases/2012/0320)). These laws are described in the MR as the last 'major piece of legislation underpinning the National Broadband Network (NBN) and the historic structural reforms to the telecommunications sector', and will mean that a new set of Universal Service Obligations will be transitioned to the NBN network environment. From 1 July 2012, the new package of laws creates the USO agency - the Telecommunications Universal Service Management Agency (TUSMA). TUSMA will be responsible for managing contracts and grants to ensure:

- all Australians have reasonable access to a standard telephone service (the USO for voice telephony services);
- payphones are reasonably accessible to all Australians (the USO for payphones);
- the ongoing delivery of the Emergency Call Service by Telstra (calls to Triple Zero '000' and '112');
- the ongoing delivery of the National Relay Service; and
- appropriate safety net arrangements are in place to support the continuity of supply of carriage services during the transition to the NBN

The new laws means that the Government will be responsible, for contributing base funding for the operation of TUSMA and its management of the USO. This base funding will be '\$50 million per annum during 2012-13 and 2013-14, and \$100 million per annum thereafter'. These funds will be supplemented with additional funds to assist levy contributors other than Telstra in the transition phase of the NBN.

A new policy research paper titled 'Willunga Connects: A baseline study of pre-NBN Willunga' has been published by South Australian government's Digital Economy and Technology Directorate, Department of Further Education, Employment, Science and Technology. Authored by Dr. Melissa Gregg and Dr. Jason Wilson, the report offers important baseline data of the Willunga. The research uses a mix of ethnographic and other empirical approaches 'to create a rich narrative to inform government policy of the perceived and (when the follow up study is done) actual impact of high speed broadband on a community. It is one of several interesting examples of socio-cultural research that is being undertaken to track and explain these broadband impacts. The report is available from the SA government <http://dfeest.blogspot.com.au/2012/01/impact-of-nbn-in-willunga.html>

#### *Mandatory Filtering Update*

The latest in the mandatory filtering saga is that the government continues to challenge claims by some industry experts and ISPs that the plan to censor the net will drastically slow its operation. Senator Conroy's argument is that Telstra and Optus are using online content filters as part of their voluntary scheme, and there was 'negligible' impact on the networks speed. He is quoted as saying: "They are testing it against the Interpol list and overwhelmingly Australians haven't noticed any difference whatsoever" (Andrew Colley, 'Conroy scoffs at claims censor scheme will stall web', *The Australian*, February 29, 2012.)

The proposal has been on ice while the ALRC has undertaken its broader review of the national classification scheme (See item under inquiries).

#### *ACMA*

After a review beginning last year, which continues, the ACMA has announced a new premium mobile code takes effect from June 1 this year (MR9/2012 "Tougher rules for mobile premium services"). These rules focus on accessing various kinds of "premium mobile services" are important because people are increasingly engaging with more transaction-based entertainments, and products and services more generally via their mobile devices. They include SMS, MMS, and a burgeoning array of content genres including news, sport and weather updates; public transport timetables; competitions; voting; ringtones; chat services; games; music and videos. Younger people tend to be the heaviest users, and therefore are more vulnerable to older, more financially established users.

A new Mobile Premium Services Industry Code, registered by the ACMA on March 1, provides tougher rules for the advertising and provision of premium rate SMS and MMS services for mobile phone users. The new code replaces an existing code that took effect on July 1, 2009. That code was developed and put in place as a response to an unacceptably high level of complaints about premium mobile services.

The new code will make the prices, terms and conditions of premium mobile services clearer, and will introduce a new requirement for carriers to "monitor and report" content providers' compliance with the code. Other features of the code include:

- subscription service providers will be required to use the terms 'subscription' or 'subscribe' in sign-up messages, to inform customers of the ongoing nature of these services and related charges
- providers of reverse charge services will be required to inform customers of call costs, terms and conditions before charging
- the requirement that information about the cost of a service be printed close to the number used to request a service in an advertisement (ACMA, MR9/2012).

The ACMA has powers to direct service providers to comply with code obligations. They are able to bring proceedings in the Federal Court for the recovery of a pecuniary penalty of up to \$250,000.

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