



THE UNIVERSITY OF  
NEW SOUTH WALES



FACULTY OF LAW

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The Hon Ray Finkelstein QC  
Chair  
Media Inquiry  
PO Box 2154  
CANBERRA ACT 2601

Dear Mr Finkelstein

### **Independent Media Inquiry**

Thank you for the opportunity to make a submission to the Independent Media Inquiry. We are making this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

In this submission we focus on constitutional issues that arise with respect to strengthening regulation of the news media in Australia. In particular, we address how the scope and limitations of federal power are likely to impact upon any new regulation of the print and online media, including by bolstering the status or powers of the Australian Press Council (APC). We suggest that, while the scope of Commonwealth power in this area is substantial, it is not comprehensive and its extent with respect to the online environment remains uncertain. As a result, any proposal to implement a comprehensive model of regulation that encompasses all media will likely require cooperation between the Commonwealth and the States.

Our submission begins with an overview of the different modes of media regulation, before proceeding to give an overview of how the constitutional framework shapes such regulation in Australia. It then discusses how the scope and limitations of federal power relate to specific proposals to strengthen regulation of print and online media. Our focus is solely on legal issues, and we do not offer any opinion on the substantive merits of these reform proposals.

### **Modes of media regulation**

Traditionally media has been regulated in a variety of ways, but driven at least overtly by content regulation and licensing. Forms of content-based regulation include

censorship and prior restraint, the third party effect of damages for defamation, privacy and intellectual property. Other forms of regulation, such as licensing, control the conditions of entry into the media market, or control via competition the nature of entities involved in such markets. State and political interest in areas such as national security and terrorism have also impinged upon media regulation, and public order rationales lie behind regulations regarding hate speech, incitement, sedition and electoral and political communications. Collective interests and minorities protection have also driven certain forms of regulation regarding religion or religious freedoms and encouraging pluralism and language rights. Individual protection has been offered in terms of defamation and privacy protections.

More hidden forms of regulation appear as neutral, but their burdens may nevertheless target the media. Such methods of regulation include taxation, customs laws, labour laws and competition laws. Selective enforcement of laws by governments can also be used to help shape particular regulatory outcomes, and another means is the control of media access to public officials and other means of impacting upon newsgathering and freedom of information. Much of the anxiety about media regulation revolves around the necessary and yet fraught relationship between the media and the state. The media is regulated by the state, often for important societal reasons and to good effect, and yet the media can be co-opted by the state, regulated to bolster state power and mask corruption. The internet and the new media have also posed interesting questions regarding the means by which the media is to be regulated, the role of the nation state in such regulation (and indeed the role of the international community).

Media in fact can be regulated at a number of different levels. In the field of telecommunications, regulation has traditionally been directed not so much at content as at infrastructure, yet convergence blurs these distinctions and throws up challenges for regulators. The regulatory response in comparative contexts such as the UK has been to move towards ‘converged’ regulators such as OfCom, and to attempt to streamline and universalise models of regulation. One trend has also been to be technology or format neutral as regards media regulation. Further with the internet there is the question of where and who to regulate as traditional hierarchies are challenged by the new political space mapped out in cyberspace. Questions arise as to whether service providers, users or content providers should be liable for infringing content restrictions, and whether the rights of users should be configured in citizenship or consumer terms.

### **The Constitution and media regulation**

The Australian Constitution does not confer upon the Commonwealth any general power to regulate the all types of news media. Instead, the degree to which the Commonwealth can regulate in this area varies across mediums.

### ***Radio and television broadcasting***

Section 51(v) of the Constitution gives the Commonwealth legislative power with respect to ‘postal, telegraphic, telephonic and other like services’. The High Court has held that this extends to the regulation of radio and television broadcasting.<sup>1</sup> More specifically, section 51(v) encompasses the regulation of transmission systems – that is, the regulation of the means by which people can communicate at a distance.<sup>2</sup> This includes, for example, the construction, maintenance and use of communications systems. The power also extends to placing restrictions on the ownership of radio and television broadcasting licenses.<sup>3</sup> Further, it has been held the Commonwealth may regulate the preparation of programs for broadcasting, including through the establishment of a body (such as the ABC) to provide broadcasting content, as this is incidental to the exercise of power under section 51(v).<sup>4</sup>

### ***Print media***

The Commonwealth has no direct head of legislative power with respect to the print media. However, the Commonwealth may nonetheless regulate the print media by virtue of indirect heads of power such as those relating to trade and commerce, taxation, corporations, external affairs and the Territories.<sup>5</sup> The most significant of these is the corporations power – its potential application to news media regulation is expanded on below. In addition, the Commonwealth may regulate print media where doing so is incidental to the exercise of a direct head of power – for example, it can limit ownership and control of print media as a condition of radio and television broadcasting licenses issued by virtue of section 51(v).

### ***The internet and online journalism***

The extent of Commonwealth power over matters concerning the internet, including journalism that is published online, is yet to be considered by the High Court. However, it is likely that the internet falls within the scope of section 51(v) either as a ‘telephonic’ or ‘other like service’, and that federal regulation could validly extend to the means of online communication, such as infrastructure (eg, the installation of fibre optic cables) and the conduct of internet service providers (ISPs). Other heads of power, such as those mentioned above, may also support Commonwealth regulation of online content. The potential for this is explored further below.

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<sup>1</sup> Section 51(v); *R v Brislan; Ex parte Williams* (1935) 54 CLR 262; *Jones v Commonwealth [No 2]* (1965) 112 CLR 206.

<sup>2</sup> *R v Brislan; Ex parte Williams* (1935) 54 CLR 262.

<sup>3</sup> *Herald & Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418.

<sup>4</sup> *Jones v Commonwealth [No 2]* (1965) 112 CLR 206.

<sup>5</sup> *Australian Constitution*, ss 51(i), (ii), (xx), (xxix) and s 122.

## **The Constitution and emerging challenges in media regulation**

The extent of federal power with respect to various media will shape any attempt to alter the way in which the print and online media are regulated in Australia.

### ***Strengthening regulation of the print media***

Several reform proposals have been put forward with the objective of strengthening regulation of the print media. Given the constitutional framework outlined above, any reform proposal that requires federal legislative action must be carefully framed or it will risk invalidity. This applies, for example, to any suggestion that the APC be given statutory powers or be replaced by a statutory body; that the APC be funded by the federal government, rather than by media companies; that self-regulation be replaced with an alternative model that regulates the conduct of publishers (eg, requiring disclosure of payment for stories); and that the APC and ACMA be replaced by a universal regulator that oversees all media.<sup>6</sup>

In the absence of a direct head of legislative power with respect to the print media, the Commonwealth's capacity to implement reforms such as these will rest primarily on its ability to make laws under section 51(xx) of the Constitution with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.<sup>7</sup> The three types of corporation listed in this section ('foreign', 'trading' and 'financial') are known collectively as 'constitutional corporations'.

A key question in determining the scope of this power is which aspects or activities of a constitutional corporation may be regulated by the Commonwealth. The answer was settled in *New South Wales v Commonwealth (Work Choices Case)*,<sup>8</sup> in which the High Court, by a 5-2 majority, upheld the Federal Parliament's use of the power to enact the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The majority held that s 51(xx) extends to:

the regulation of the activities, functions, relationships and business of a corporation described in that subsection, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.<sup>9</sup>

It is clear from this passage that, following the *Work Choices Case*, the Commonwealth's regulatory power over constitutional corporations is extremely wide. The description of s 51(xx) in the paragraph above provides an ample basis

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<sup>6</sup> See, eg, Inquiry Terms of Reference, 4-5; Eric Beecher, Submission to this Inquiry.

<sup>7</sup> *Australian Constitution*, s 51(xx).

<sup>8</sup> (2006) 229 CLR 1.

<sup>9</sup> *Ibid*, 114 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

upon which to regulate the affairs of constitutional corporations engaged in the print media.

The power cannot apply to an entity engaged in the print media unless that entity also qualifies as one of the constitutional corporations listed in section 51(xx). On the same basis, the power cannot be used to directly regulate the work of an individual journalist, only to regulate him or her via his employment or other relationship with a constitutional corporation.

If a print media organisation is a constitutional corporation under s 51(xx), it will likely be because it is a 'trading' corporation rather than a 'financial' or 'foreign' corporation. A threshold question is whether the organisation qualifies as a corporation at all. This is a matter of whether the body is constituted as a corporation in the first place. Hence, a sole trader or partnership engaged in the print media cannot be the subject of direct regulation under this power. A body that was a corporation can also escape the ambit of power by changing its status.

At present, the major participants in the Australian print media are constituted as corporations. The test for determining whether they are also a 'trading corporation', and so fall within the scope of power, is whether they have 'substantial' trading activities.<sup>10</sup> So long as an entity involved in the print media is operating on a for-profit basis, they will be classified as trading corporations. It would only be when the print media organisation constituted as a corporation is operating on a not-for-profit basis or for educational or other purposes that questions would arise as to whether it could be so classified.

The corporations power offers a viable basis upon which to regulate the Australian print media. However, the scope of regulation is vulnerable to participants in the print media changing their status to being other than a corporate entity. The power would also not extend to print media entities that operate using another business form.

### ***Strengthening regulation of online journalism***

To the extent that online journalism is carried out by constitutional corporations, it will be open to federal regulation via the corporations power in the same way the print journalism is. However, the extent of federal power is less certain where the online content is published by an entity that is *not* a constitutional corporation. A large number of individuals and bodies fall into this category, including any news outlets that operate as sole traders or partnerships, individual bloggers, and individuals posting on social media sites such as Facebook and Twitter.

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<sup>10</sup> *R v Federal Court of Australia; ex parte WA National Football League ('Adamson's Case')* (1979) 143 CLR 190; *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282.

The extent of Commonwealth power to regulate online journalism of this nature is unclear. As noted above, it seems likely that section 51(v) authorises regulation of ISPs as bodies responsible for the transmission of online content. However, on current authority, it is doubtful that it extends to the regulation of the creators of content such as individual bloggers. Where news or other content appears online through a service such as Facebook which is controlled by a foreign or for-profit corporation, this could be regulated under the corporations power.

***Towards universal regulation of the news media***

The Commonwealth has extensive, unrealised potential to further regulate the Australian media, including the print media. The corporations power in particular provides a basis upon which to establish new regulation in this field. However, such regulation is subject to the limits of existing powers. In particular, the corporations power only extends to entities that are incorporated and operate as a financial, trading or foreign corporation. In the circumstances, it must be recognised that, although it has extensive power, the Commonwealth does not possess the legislative power to comprehensively regulate the media in Australia. The only means of achieving this would be via cooperation with the States.

Yours sincerely,



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