SELECT COMMITTEE ON THE FUTURE OF PUBLIC INTEREST JOURNALISM

Impact of search engines, social media and disinformation on journalism in Australia

Responses to Questions on Notice from Senator Xenophon

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Questions on Notice (paraphrased)

1. **How do we balance the interests of Google and Facebook (who earn revenue from a new business model that works with the public) and the interests of content creators (who achieve new levels of distribution but suffer substantial revenue loss)?**
2. **Should tax breaks be introduced for local media?**
3. **Should any conditions be attached to reform of media ownership laws?**
4. **What reforms could be made to defamation law so that there is still adequate protection of reputation, but without the current blocks on valid journalistic inquiry.**
5. **Could certain aspects of defamation law and privacy law apply differently to media companies who voluntarily become members of the Press Council, thereby encouraging new players to sign up to a set of standards?**

Balancing interests/Taxation

Can we first correct the misconception that the profits made by Facebook and Google are made from or because of the distribution of news content. They are not. Google makes its money from search. Facebook, from within its 'walled garden', from friends and family connecting and sharing content, some of which is news, most of which isn't. The money that both social platforms gain directly from news (or placing advertising around it) is a relatively small percentage of their multi-million profits. We suggest you ask both companies to explain how much. Google, for instance, will tell you it makes nothing from Google News. This not to say that news is irrelevant from either company.

Can we also state that much of the news industry's current revenue challenge stems from first the severe disruption of its business models caused by the internet and the industry's initial (and in some cases, ongoing) inclination to give away news content for free in order to attract eyeballs. Digital 'classified' vehicles in areas such as car sales, homes and jobs have been the engines of disruption. As stated in evidence, media companies have made a Faustian pact with social platforms: content for eyeballs.

The current situation is certainly fluid and undoubtedly troubling. Job losses in legacy media and debate about such issues as fake news give flight to words like 'crisis.' But it is more

accurate to see the current situation as an inflection point — extended as it may be — from a time of analog to digital, from media company–centred 'journalism' to audience-centred 'content' (that includes journalism), and yes, from a landscape characterised by certainty and control to one that is all about disruption, uncertainty and, perhaps, at times better described as chaotic.

But, as the committee has heard, the audience for journalism is growing, audience choice has greatly expanded and there are new actors in the local field, such as *HuffPo*, *BuzzFeed*, the *Guardian Australia* and the *New York Times (Australia)* to name a few. And yes, as the committee has also heard, the new news distributors are giant technology platforms not newsagents. As the US journalism scholar Barbie Zelizer says in her new book, *What Journalism Could Be*:

> *The news media has not lost their audience, as frequently declared, but new technological opportunities have shifted the nexus of engagement.*[1]

Another way to look at the current dynamic is that everyone is now a publisher. But not everyone is a journalist.

If Facebook withheld the news, it would still be a strong ecosystem of friends and family sharing. If Google withdrew Google News, consumers would still use the platform to search. But publishers would lose their audience and revenue. The 'Google tax' imposed in Spain on news aggregators for showing snippets and linking to stories has, according to a study commissioned by the Spanish publishers association, done considerable damage to the industry.[2]

Are the media's *own* eyeballs now being gouged out in this massive shift? And if so, is this sufficient reason for market interference or redress in the name of the public? And if so, should the government penalise these social platforms and to encourage journalism, find avenues to distribute the penalties?

Imposing a new tax or levy

We are not pretending that Google and Facebook do not exercise considerable market power or that they should avoid paying their fair share of tax. The forthcoming imposition of the Diverted Profits Tax has already seen the platforms paying more tax. The so-called Netflix Tax will see the GST charged on electronic services irrespective of the legal entity providing that service. Australian consumers will ultimately pay for that, of course. In the same vein, is the committee prepared to advocate that the public, indirectly, should pay for public interest journalism?

Given the argument that taxation should be imposed in the place of value creation, and in the absence of any coherent view of what now constitutes the media industry in Australia, efforts to tax or levy social platforms would to us appear arbitrary at best. Do Google and Facebook come in the same in the same category as the high street banks and as such, warrant their own levy? Politically, we would not see the two ideas as compatible: people

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[1] Published by Polity Press, Cambridge, 2017. Barbie Zelizer is the Raymond Williams Professor of Communication, and the Director of the Scholars Program in Culture and Communication, at the Annenberg School for Communication at the University of Pennsylvania.

[2] The study, published in Spanish, is available from the *Asociación Española de Editoriales de Publicaciones Periódicas:* http://www.aeepp.com/noticia/2272/actividades/informe-economico-del-impacto-del-nuevo-articulo-32.2-de-la-lpi-nera-para-la-aeepp.html. See also the zdnet report, 'The Google News effect: Spain reveals the winners and losers from a "link tax"' at http://www.zdnet.com/article/the-google-news-effect-spain-reveals-the-winners-and-losers-from-a-link-tax/.

don't dislike Google and Facebook. Further, and on a more commercial note, these social platforms do not make super profits out of journalistic content.

But perhaps that is missing the point. If there is a perceived market failure – i.e. insufficient funds to support public good journalism – we need to ask whether these platforms are to blame because of some harm they cause, or whether they are simply not contributing sufficiently to some aspect of social good.

If there is some active harm, then perhaps we need to impose a penalty to correct the situation in much the same way authorities impose fines and levies on companies that spew carbon into the atmosphere. But that requires being able to calculate the social harm to journalism of a Google search or a Facebook ad. That harm is debatable, but in any case it is beyond our capacities to calculate – and again appears to be an area fraught with misuse, unintended consequences, booby traps and endless bureaucracy.

On this approach, we therefore see no logical way or reason to impose a specific tax on Google or Facebook to fund public interest journalism.

Alternatively, if we think these companies are not causing a harm as such, but are failing to contribute in the way that others do, there may be a case for some form of levy. This is broadly the view that would inform a policy decision to require Netflix to contribute to the production (or at least the funding) of Australian 'television' drama. It requires a prior decision that the new entrant is essentially in the same game as the legacy operator – or at least that they are all now in the same game together. The Convergence Review suggested something along these lines, and to some extent it's seen in the obligations placed on pay TV channel providers to fund Australian production through the new eligible drama expenditure scheme. This aspect of public policy will be explored as part of the current review of Australian content and children's television. There may be a more convincing case for intervention to assist local television production than for assistance of public interest journalism. Or it may be that the principles are quite similar. More work is required on this point.

Other approaches

In the media sector, Google's first click free rule — an imposition on publishers who wish to be indexed by Google — clearly works against the spirit and intent of a media company's pay wall. It has been reported[3] that if a publisher does not comply with the requirement to provide access to the first three articles in a 24-hour period, they will be placed lower in search results. In addition, publishers benefit not just from subscription payments and users' exposure to advertising on their sites, but also from the data they acquire about these users.

This is not really an area for consideration under tax law but under ***competition law*** and the exercise of market power. Much has been written on the proposals to overhaul the regulation of market power under s 46 of the *Competition and Consumer Act 2010*. We are hesitant to say much on this aspect since we are not competition law specialists, but it seems reasonable to at least ask questions about market power in an environment where 75-85% of advertising revenue has been diverted to two multi-national companies and where local companies feel compelled to comply with the conditions they impose.

[3] Darren Davidson, 'How Free-Rider Google Takes a Rising Share of News Profits', *The Australian* 21.05.17. http://www.theaustralian.com.au/business/media/how-free-rider-google-takes-a-rising-share-of-news-profits/news-story/a110d2c6e199214b57c6c95e06054de3.

We note the ACCC warned in 2012 in a submission on the media industry to the Convergence Review that it may not have adequate powers to address such conditions.[4] In a submission to Treasury last year it made a similar point and noted that US action against Microsoft and European Commission action against Google (for favouring its own comparison shopping product in search results) would not be possible in Australia.[5]

Facebook's capacity to tweak its algorithm, seemingly on a whim, can have considerable unintended and intended consequences on publishers. The lack of transparency only adds to the industry's sense of powerlessness.

In terms of 'fake news', Facebook can be criticised for being slow to the party and failing to see or acknowledge the way its platform can be used to spread lies and propaganda either for political or financial gain. Sally Hubbard has said there is a connection here between the proliferation of fake news has been compounded by Facebook's attempts to keep users within the walled garden.[6] Although this content is most in need of exposure to external scrutiny, it is in fact less likely to be shared and circulated without further verification. In this environment, strategies that actively discourage users from exposing these claims to other sources inevitably make the problem worse.

The company is actively seeking to redress this situation in partnership with media organisations and made inroads in reducing the amount of deemed fake news providers on its platform. In short, both companies are seeking to strengthen the news media ecosystem through ***voluntary initiatives***. Could they do more? Yes. Should they do nothing? Absolutely not.

A final thought in this area: it seems to us that these platforms are being targeted for their own success – not necessarily as aggregators of content but for performing efficient services aligned with what their audiences want and use.

Perhaps the lesson for existing publishers might be to build their own platforms for e-commerce around news and provide the services their own audiences want and use. The main publishers once coordinated their efforts — and set aside rivalries — to establish Australia's newswire, AAP. Why not its e-commerce platform?

The removal of the audience reach rule and the last of the cross-media rules proposed as part of the Media Reform Bill (see our comments below) should help to position these existing, local companies to fashion the kind of platforms and services that will see them well into the 21st century.

On the broader area of ***taxation incentives***, there may be more of a case to assist and incentivise public interest journalism and/or innovation in the sector. We note, and draw the committee's attention to, the UK's generous (or more generous than ours) system for promoting investment in small to medium sized enterprises and even later stage companies. In essence, the UK deploys a wider definition of what constitutes a SME (in terms of turnover) and provides a bigger tax write-off for research and development (up to 230 per

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[4] *ACCC submission to the Convergence Review Framing Paper*, June 2011. https://www.accc.gov.au/system/files/ACCC%20submission%20to%20Convergence%20Review%20Framing%20Paper.pdf.

[5] *Options to Strengthen the Misuse of Market Power Law. Australian Competition and Consumer Commission Submission to the Treasury*. February 2016. https://www.accc.gov.au/system/files/ACCC%20submission%20to%20the%20Treasury%20-%20Options%20to%20strengthen%20the%20misuse%20of%20market%20power%20provision.pdf.

[6] 'Why Fake News is an Antitrust Problem', *Forbes* 10.01.17. https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem/#ee19c0430f1e.

cent). For later stage companies a separate scheme delivers a 30 per cent rebate on R & D investments. For further reading, we recommend a recent article by Roman Lanis and Prabhu Sivabalan.[7]

In principle, if there is agreement on a scheme for local content in the film and television industry, there is no reason why we shouldn't do it for journalism. This is to be preferred to a tax on Google, Facebook and other aggregators which, as noted above, has major issues associated with the target companies, location, enforcement etc.

But even with tax offsets, there is a whole set of definitional issues – not just what is 'journalism' (if a site publishes cat videos and investigative journalism, is it still journalism? What is the preferred ratio of cat to investigative work?) but also practical questions about how such offsets are calculated and how they are applied.

This then raises the question of whether there needs to be an intervening agency that certifies what is and isn't journalism in the public interest. There are industry agreed standards to draw on but it may be beyond the realm of the ATO to apply them and check how they are shifting, as virtually everything else in the industry is. We would be reluctant starters to see the creation of a new body to administer and adjudicate on what is in the public interest. This issue will be further canvassed in our formal submission to the inquiry.

Copyright law has been raised as an alternative to tax or competition law that could, for example, regulate the reproduction of local publishers' content in forums such as Google News. Some but not all publishers have objected to the unpaid use of headlines and snippets from an article.

This is the subject of proposals before the European Parliament for a 'publisher's right', although the form of the proposed change to copyright appears uncertain. There are arguments on both sides of this debate, but there is often insufficient evidence of current practice, and it is important to keep clear the differences between platforms (and even the differences between, say, Google search and Google News).

It would be possible, presumably, to develop a licensing scheme in Australia – building on a model like Screen Rights – that requires a fee to be paid for this kind of aggregation. However, any proposal in Australia would need to grapple with the existing debate over the merits of the current fair dealing regime or the introduction of a fair use scheme proposed by the Australian Law Reform Commission in 2014. Some current practices may well not amount to fair use, but this appears not to be an option local publishers wish to explore.

Media Reform Bill

Apart from a modification to the proposed amendments to local content rules, the Bill currently before the Senate is unchanged. As the proposed changes to the 75 per cent reach rule and the local content rules appear uncontroversial, we will direct our answer to the proposed repeal of the 2-out-of-3 rule.[8]

We agree that, if passed, the Bill would unquestionably lead to further consolidation in the Australian market. Whereas in the past we might have opposed this outcome, in the current

[7] 'Rethinking "Small" Business Could Drive a Real Ideas Boom'. *The Conversation* 01.03.16. https://theconversation.com/rethinking-small-business-could-drive-a-real-ideas-boom-54550.

[8] Here we draw on the evidence in a written submission by Derek Wilding to the inquiry of the Senate Environment and Communications Legislation Committee on the Broadcasting Legislation Amendment (Media Reform) Bill 2016 and evidence he gave to the committee at hearings held at Parliament House on 30 March last year.

circumstances we support the removal of the 2-out-of-3 rule. Briefly summarised, these circumstances are as follows:

- Most of the concern over cross-media ownership is about the combination of commercial television and major newspapers. This arises largely from the importance of these sources as producers of journalism, their influence in the news cycle and the transition (or potential transition) of their content to online and other digital media. Yet the combination of these two platforms has been possible since the Howard government reforms of 2006-07. In effect, the current reform proposals add radio to that mix.
- The repeal of this rule would have a noticeable effect in the metropolitan licence areas and in some regional areas, but 'diversity' (more on this below) would also be addressed by the operation of other rules that will remain in place. The analysis conducted for the March 2016 submission showed consolidation around three major commercial media groups in most areas, along with some independent commercial media, the national broadcasters, community and non-profit media and various international sources (some of which engage local journalists).
- In the decade since the last substantial changes to the media laws, the environment has changed substantially. The downside is that advertising revenue and journalist jobs have been lost; the upside is that smaller local operations and international news sources now genuinely contribute to media diversity.

In weighing the effect of consolidation against the potential strengthening of the local commercial industry that could flow from further cross-media ownership, and taking into account the operation of the other participants noted above, the case for repeal of the two-out-of-three rule is now reasonably persuasive provided we consider more far-reaching changes to this area of regulation so that rules addressing media pluralism are targeted at what counts: sources of journalism. This can be done as follows:

- the ACMA (following any consolidations that occur in this round) could audit and monitor existing sources of journalism;
- the 'points' system which, in Sydney for example, allocates the same value to *The Daily Telegraph* and Smooth FM or 2KY, could be abandoned, with online media, pay TV and other platforms brought into a more nuanced scheme that protects diversity at the benchmark level set following the current amendments;
- in recognition of the additional cross-media consolidation flowing from the repeal of the 2-out-of-3 rule, the system of program standards and complaint handling under the codes of practice could be overhauled so that there is one set of cross-media standards governing accuracy, fairness, privacy etc.

Although we express these as provisos to the in-principle agreement of the repeal of the 2-out-of-3 rule, we hesitate to say they should be conditions. Changing one part of the scheme before the regulatory framework is reviewed (as flagged in the recent review of the ACMA[9]) could create further problems.

[9] Department of Communications and the Arts. *Final Report of the Review of the Australian Communications and Media Authority*, May 2017. https://www.communications.gov.au/what-we-do/television/media/acma-review/acma-review-final-report.

Defamation

We are not in a position to advise on the specific ways in which the law relating to defamation could be amended, but we can briefly outline what we understand to be key problems with defamation law in Australia. These in turn could be the source of specific recommendations on legislative changes. In addition to these, Australia's media organisations would almost certainly nominate as a high priority reform to circumstances in which suppression orders are issued. (If possible, further information will be provided in a written submission.)

- The burden of proof when using the defence of truth: the requirement for the publisher to prove the truth of a statement follows from an assertion that the statement was false. This approach does not reasonably balance the interests of the community in freedom of speech with the interests of plaintiffs in the protection of their reputation.
- The unworkable nature of the statutory or common law defence of qualified privilege: there is little scope for assessing the reasonableness of a publisher's conduct when using this defence, which should allow, in appropriate cases, for the public interest in publication to outweigh the interests of the person who is said to have been defamed. For example, there could be greater recognition of the way in which information is presented within an article, including rebuttals, or the opportunities given for comment. This also applies to the narrow scope of the implied right of freedom of political communication. As a result, there is no workable defence of qualified privilege. This undermines the idea of media as a source of public accountability, for which we are prepared to accord a workable level of free speech (albeit it 'qualified'). In contrast, we give our political representatives access to defamation law while also giving the right to fully 'privileged' speech – in parliament.
- The recent extension of defamation to new platforms: rolling over the current stifling defamation regime to platforms such as Twitter acts as a further restraint on speech. However, it may be that reform to aspects of the law such as those described above cures most of the problems, leaving in place a possible cause of action for truly egregious cases, regardless of the platform.
- Remedies: the quantum of damages in Australia is too high. Further information on this aspect will be provided in a written submission if possible.

Press Council

Making 'concessions' under defamation and privacy law conditional on membership of the Australian Press Council is complicated because of the possible further restrictions on speech for those who do not become members. In principle it is certainly worthwhile trying to encourage publishers (broadly defined) into a system of standards and complaints handling.

The Convergence Review committee explored this idea and included such an arrangement as part of the recommendations of its final report in 2012.[10] In the five years since, developments in news media including the recent proliferation of misinformation have made these proposals more persuasive.

[10] Final Report, April 2012. http://pandora.nla.gov.au/pan/126527/20120709-1616/www.dbcde.gov.au/digital_economy/convergence_review/index.html.

So while there is merit in the proposal, it requires further work. The issue will be taken up in the written submission. Some points to take into consideration:

- Defamation law and privacy law are not the only areas of law and regulation that might be used to encourage publishers to subscribe to a standards system. For example, recognition of the importance of news or journalism is made in an exemption from some aspects of the *Competition and Consumer Act 2010* (the 'publisher's defence'); in the journalist shield laws (in the various Evidence Acts); and in national security legislation such as the *Telecommunications (Interception and Access) Act 1979* (which includes the system for journalist information warrants). These schemes are of varying value and effect and they differ in their application. The New Zealand Law Commission conducted a very good review of the provisions then applying to news media in NZ in 2012.[11]
- Within these areas of law, different definitions of 'news', 'media and 'journalism' apply. This needs to be addressed but the principle – that the same entities that agree to a system of news standards are those who, as news providers, gain exemptions from incompatible statutory obligations – is sound.
- This still leaves the cross-media issue: multiple sets of standards on aspects such as accuracy and fairness are unsustainable, especially if there is substantial cross-media ownership. As it would be important not to impose a statutory scheme on print and online publishers, and as the industry-based scheme administered by the Australian Press Council works well, the cross-platform scheme should be largely industry-based. It could harmonise standards in line with the Press Council benchmarks, while allowing for more rigorous rules to apply to certain categories such as national broadcasters. In this way, making access to concessions under the Privacy Act etc dependent on membership of the industry scheme could also provide the opportunity to establish a national cross-platform system of standards and complaints-handling.

Conclusion

We thank the committee for the opportunity to add more flesh to the bones of an original aural submission. These areas of inquiry — media rules, standards, regulation and competition — are vitally important to the nature of public debate and democracy in our country. They always have been, they always will. Australia's media sector is at an inflection point, a time of undoubted uncertainty and great opportunity. We argue the overarching aim of any inquiry into public interest journalism is not to so much to protect what is currently in the market per se, rather than to see what can be done to expand the landscape, to expand consumer choice, to grow Australian voice, on a sustainable basis. There are many innovative media-focused ideas in this country, many of which will, given the right conditions, grow to assist the cause of public interest journalism. We hope they will have reason to celebrate your deliberations.

[11] *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC R128, 2013). http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP27.pdf.