

## CHAPTER 6

### PROPRIETY

#### Interactions between governments and the media - previous experience

6.1 In this chapter the committee has examined the mainstream of thought in similar countries on the matter of balance in the media in particular, and on the relationship between the media and the government in general. The analysis is based particularly on parliamentary and judicial inquiries and the trends in rulings by courts. *News & Fair Facts*, the 1992 report from the *House of Representatives Select Committee on the Print Media* also devoted some time to summarising other media inquiries. This committee has only examined those aspects of such inquiries as are relevant to the issue of balance.

6.2 Any comparison of the Australian press with other countries is bound to be qualified by the relative circumstances of the different countries. Australia's press still ranks as 'most free' in the Freedom House survey of press liberty. On the basis of an international survey this puts it, with only Belgium, Denmark, New Zealand and Norway, ahead of all other countries including the US, UK and Canada in terms of freedom from restraint by laws and administrative rules, economic influence, political pressure and overt repressive actions against reporters.<sup>1</sup> As the Hon Justice Michael Kirby pointed out in his speech to mark International Press Freedom Day, Australians enjoy a very high standard of media freedom and have a responsibility to protect and extend it, rather than to allow it to be diluted to the standard of our sometimes critical neighbours.<sup>2</sup> Given the above, comparisons have been made with like countries, and in an awareness that questions of degree are relative.

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<sup>1</sup> Leonard Sussman, *Good News and Bad, Press Freedom Worldwide: 1994*, Freedom House, New York, p 10

<sup>2</sup> Transcript of address in Sydney to mark the first International Press Freedom Day, 3 May 1994

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### Summary of overseas practices

6.3 Although the concept of freedom of speech is as old as that of democracy and that of the freedom of the press is probably as old as the history of writing, it is possible to trace the main concepts which influence our understanding of these notions in modern Western democracies. The notion of the freedom of the press as we currently know it has been strong at least since the English Revolution and the rash of tracts and treatises which spread across all of Europe in that age. As related philosophies of government and economics were refined during the eighteenth and nineteenth centuries, there was a tendency for them to share concepts and to provide metaphors for each other. Jeremy Bentham's 'On the Liberty of the Press and Public Discussion' (1820) had argued that a free press helps to control the 'habitual self-preference' of those who govern.<sup>3</sup> John Stuart Mill's 'On Liberty' (1859), was another influential essay which advanced the argument that since we cannot be sure where truth resides we must always tolerate the greatest possible diversity of views in the interests of all:

When there are persons to be found, who form an exception to the apparent unanimity of the world on any subject, even if the world is in the right, it is always probable that dissentients have something to say for themselves, and that truth would lose something by their silence.<sup>4</sup>

6.4 The metaphor which has come to us from this age is that of free speech and the press itself as a kind of 'marketplace of ideas'. The difficulty for democratic Western governments has always been that the reality of press regulation is not as simple as the metaphors for its functioning. The ideal view of a democracy might be that there is an effective marketplace of ideas in which free expression is possible and that the natural functioning of this market is such that it is self-regulating. Thus, if there are a large number of people in the community with ideas of a certain type, then the market forces will be such that a corresponding number of newspapers will reflect those views, thereby creating a balance.

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<sup>3</sup> John Keane, *The Media and Democracy*, Polity Press, Cambridge, 1991, p 16

<sup>4</sup> John Stuart Mill, 'On Liberty', in J M Robson, *Essays on Politics and Society*, Toronto & Buffalo 1977, p 254. Cited in John Keane, *The Media and Democracy*, Polity Press, Cambridge, 1991

6.5 A more pessimistic but still rationalist view is that such a free marketplace cannot function in modern industrialised societies. Bentham and Mill had envisaged a society in which ideas flowed freely and could easily be disseminated. In complex modern societies the needs, interests and aspirations of widely different groups must be represented, but ownership of the means of publication is in the hands of a very few. Under this view, government intervention is necessary to ensure that voices are heard other than from those who control capital.

6.6 This pessimistic view has been widely accepted with regard to broadcast media with very little opposition, largely because when such new technologies as radio and television appeared, it was manifestly obvious that ownership of them would be limited. Hence cross-media ownership rules and government subsidised public broadcasting have been established in many countries. In the United States the 'Fairness Doctrine' was specifically introduced to bring about balanced coverage in the broadcast media. The view has been widely resisted with regard to print media, however, although public newspapers have at times been proposed as a balance upon sectoral interests.

6.7 The second imperfection in the simple models of press freedom is that they ignore layers of involvement by many individuals, including owners, advertisers and journalists. If the press is to be free, who is to be most free? Should society support the right of the owner to say what he or she likes in his or her newspaper, or do they have obligations to respect the freedom of their readers to hear a variety of views, and of their journalists to express an opinion? Should advertisers be free to influence what is printed with the money which they provide, or should they be forced to fund the expression of views contrary to their own interests in the sake of democracy?

6.8 A third problem with the market model is that it ignores values and ethics. Those who introduce values to the argument have at times, for instance, advocated censorship or restrictions on the right to publish in the belief that the values of some take precedence over the values of others. On the other hand, those arguing for an ethical model have proposed the argument that the right to publish is not an individual freedom, but a right granted collectively by society and one which imposes reciprocal ethical obligations on the publisher, editor or journalist to be mindful of the society's plurality.

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6.9 The next issue which arises and it has been a particular issue for this committee, is the question of national interest. In an age of rapid internationalisation of the media, is it appropriate to treat news as just another commodity, capable of being imported from wherever it can be produced most cheaply, or is the surrender of local voices and local control of the media also a surrender of national values, the national interest and culture? This issue has been little examined overseas, and some of the witnesses before the committee have commented adversely on it as in some way xenophobic. The committee rejects this view and signals that it is an issue of increasing significance for this and other nations in the face of convergence in communications technologies.

6.10 Most of the commissions into the press which have been set up in Australia, the United Kingdom and Canada, have been directly as the result of increasing concentration of newspaper ownership, often triggered by a specific takeover or merger. They have arisen out of concern for the lack of diversity in ownership and hence opinion, and concern for the way in which media power will be used.

6.11 There is a general acknowledgment by commissions of inquiry that the trend in newspaper ownership is towards concentration. Despite this, in the print media it has been very rare that any concept of forcing 'balance' of an individual owner or publication has arisen. Invariably the resolution, whether explicit, or implicit by virtue of ignored recommendations, has been that governments should not intervene to obtain balance, other than by supporting press councils and endorsing the notion of charters of editorial independence. The recognised risk is that politicians, who often live or die by their treatment at the hands of the media, are the last persons who should be entrusted with the responsibility for determining balance.

6.12 To allow politicians to make significant media ownership decisions contingent upon their highly subjective judgements of such a notoriously controversial issue as balance would be even less proper.

6.13 The notion of 'balance', where it arises, is as a consequence of freedom of speech for journalists and editors (ie freedom to express the variety of views within the community without constraint by owners) or of diversity of ownership (ie giving rise to diversity of views). Neither has seen determined action by government, except in the areas of broadcast media and, by extension, cross-media ownership.

**Finding 6.1**

The committee finds that Mr Keating's request of a **single** newspaper proprietor to provide 'balanced coverage' is at odds with the whole history of media regulation and with the overwhelming trend of democratic governments throughout the years, which has been to protect the diversity and plurality of the print media as a whole.

6.14 The following sections trace the recent history of print media regulation in countries similar to Australia.

**The United Kingdom****1947**

6.15 In the United Kingdom there have been a number of inquiries into the press. A Royal Commission was established in 1947 with the object of furthering the free expression of opinion through the Press and the greatest practicable accuracy in the presentation of news to inquire into the control, management and ownership of the newspaper and periodical press and the news agencies, including the financial structure and the monopolistic tendencies in control, and to make recommendations thereon. The Commission's conclusions were focussed on whether the particular concentration of ownership that did exist was 'so great as to prejudice the free expression of opinion or the accurate presentation of the news or to be contrary to the best interests of the public'.<sup>5</sup>

**1961**

6.16 These concepts of 'free expression of opinion' and 'accurate presentation of news' recur verbatim in the terms of a similar Royal Commission established in 1961.<sup>6</sup> In its Report the Commission commented on 'variety of opinion in the press' and stated that 'there is still a

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<sup>5</sup> Cmnd 7700 pp 4-5 and p 176

<sup>6</sup> Cmnd 1811

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considerable range of choice ...but...it would be better if there were more<sup>7</sup>, and referred to 'the potential danger that variety of opinion may be stifled'.<sup>8</sup> The Commission recommended that a General Council of the press be established to, among other things, 'act as a tribunal to hear complaints from editors and journalists of undue influence by advertisers or advertising agents and of pressure by their superiors to distort the truth or otherwise engage in unprofessional conduct'.<sup>9</sup> Again, key concepts were the freedom to express opinions, and the need for accuracy. The concept of balance, so far as it arose, was as a product of variety of opinion rather than as the result of moderating any individual opinion or of forcing an equal space to the statement of contrary positions. The recommended role of government was to provide mechanisms which would support the individual freedom of editors and journalists.

## 1977

6.17 A Royal Commission on the Press reported in 1977 after having been established in 1974 'to inquire into the factors affecting the maintenance of the independence, diversity and editorial standards of newspapers and periodicals, and the public's freedom of choice of newspapers and periodicals, nationally, regionally and locally'.<sup>10</sup>

6.18 Amongst features which the report considered desirable were 'editorial variety' and 'editorial independence from proprietors'.<sup>11</sup> It recommended a charter of press freedom which would include amongst others, the following 'essential safeguards':

- (a) Freedom of a journalist to act, write, and speak in accordance with conscience without being inhibited by the threat of expulsion or other disciplinary action by his union or his employer;
- (b) Freedom for an editor of a newspaper, news agency or periodical to accept or reject any contribution whether or not the contributor

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<sup>7</sup> Cmnd 1811 p 116

<sup>8</sup> *ibid*

<sup>9</sup> Cmnd 1811 p 117

<sup>10</sup> Cmnd 6810

<sup>11</sup> Cmnd 6810 p 135

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is a professional journalist or a member of a union, so long as this freedom is not abused;

- (d) Protection of an editor's right to accept or reject any contribution notwithstanding the views of his proprietor, the management of his company, union chapel or any advertiser or potential advertiser;<sup>12</sup>

6.19 In the terms of reference and the recommendations of the Royal Commission, the concept of diversity had been strengthened alongside those of freedom of expression and accuracy. That Commission in fact spent considerable time over the difficult issue of freedom of the press and whether the combination of a free market and lack of restraint on comment would result in true diversity:

We define freedom of the press as that degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing the facts and opinions without which a democratic electorate cannot make responsible judgements. However, some parts of the press are more subject to economic than to other forms of restraint. Anyone is free to start a national daily newspaper, but few can afford even to contemplate the prospect. Among the questions that we have to consider are whether the public can obtain the information and opinions that it needs in this democracy without a range of diverse newspapers ...<sup>13</sup>

6.20 The Commission analysed newspaper coverage of elections and tabulated the circulation of newspapers supporting Labour, Conservative or Liberal views in a given election against the votes for those parties at that election. The study found that a consistently higher number of papers had given editorial support to the Conservative Party than any other and that the circulation of Conservative newspapers tended to be increasingly higher than the Conservative vote.<sup>14</sup> This correlates with the view described in the report, that newspapers requiring capital as they do for their production, are inherently likely to support a capitalist and conservative perspective.

6.21 The Commission also analysed suggestions which had been advanced in the UK for a 'balancing' of the press by the state subsidisation of newer,

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<sup>12</sup> Paragraphs c, e and f not quoted to save space

<sup>13</sup> Cmnd 6810 p 9

<sup>14</sup> Cmnd 6810 p 98

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less conservative newspapers. They concluded that 'we cannot accept either that the creation of more newspapers whether partisan or not, would be likely to lessen the irresponsible conduct which is engaged in by some existing partisan newspapers, or that it would quieten the political dissatisfaction with the contents and behaviour of the press'.<sup>15</sup>

6.22 Finally, the Commission stated that 'Our firm belief is that the press should be left free to be partisan and restrained as at present only by the law and by the voluntary system of a Press Council... There is no escape from the truth that a free society which expects reasonable conduct must be prepared to tolerate some irresponsibility as part of the price of liberty'.<sup>16</sup>

### Canadian reports

6.23 As in the United Kingdom, inquiries into the media in Canada were generated by concern over the concentration of ownership. Their tendency was towards a view of freedom of the press which was based on an ethical rather than a rationalist view. In 1961 the O'Leary Commission on Publications stated that:

There is need to remember that freedom of the press is not an end in itself, but only a function of general intellectual freedom; to remember that no right includes a privilege to injure the society granting it; to understand that a great constitutional doctrine cannot be reduced to a mere business convenience.<sup>17</sup>

6.24 Plainly for the O'Leary Commission, the right to publish was not absolute, but given collectively by the society. The individuals who were entrusted with this right had a reciprocal duty.

6.25 In 1970, a Canadian Senate committee on the mass media, chaired by Senator Keith Davey, recommended strategies to reduce further concentration of media ownership.<sup>18</sup>

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<sup>15</sup> Cmnd 6810 p 107

<sup>16</sup> Cmnd 6810 p 107

<sup>17</sup> Quoted in Kent, Royal Commission on Newspapers Conclusions and Suggestions, 1981, p 235

<sup>18</sup> Davey 1971



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6.26 In 1980 a Royal Commission (the Kent Commission) was established because of further concentration which had occurred. The Kent Report traced a link between the freedom of the press and the right of the public to information. The Report was built on a strongly ethical view of the media. It described a link between the freedom of the media proprietor who owns the medium of communication to express his or her views, and the right of the public to full information:

Freedom of the press is a double-edged sword for the owner or publisher. The one edge serves as a defence against the outside, but the other is turned inward. It is the difference between enterprise and the duty to inform. Business is private, but information is public.<sup>19</sup>

6.27 If one accepts the notion of media ownership as imposing ethical obligations, one can come more readily to a concept of an individual duty of 'fairness' or 'balance'. The Kent report argued for the existence of such an ethical duty. The difficulty which the Commission faced was that such an ethical duty did not exist in law. They pointed out that:

In fact, British jurisprudence does not recognise any special freedom of the press. Anything that is printed goes - as an extension of freedom of opinion - as long as one does not break the law of libel or other laws. In other words, such freedom is absolute as long as it is not used to damage someone's reputation, act immorally, or betray the nation.<sup>20</sup>

6.28 The Report went on to describe a situation in which owners have the discretion as to whether or not to be ethical:

In the minds of newspaper owners and publishers, freedom of the press flows from freedom of opinion. It is a private right, one that is inseparable from the freedom to do business. They are loath to admit duties that prevail over economic responsibilities... . There are still many publishers who are not ashamed to admit their bias or to lead fierce political opposition, but the vast majority strive to present a wide range of opinion; only they want it to be of their own free choice. This is a very sensitive question with newspaper publishers: they consider any social responsibility

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<sup>19</sup> Kent Report p 26

<sup>20</sup> Kent Report p 25

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imposed from outside, and especially by the government, as an intolerable blow to free enterprise in the press.<sup>21</sup>

6.29 The dilemma which the Kent Report could not resolve was that although the Commission perceived an ethical duty, they also recognised that it was not present in the minds of some proprietors and was not embodied in law. They also dismissed the notion that economic forces would in some way deliver a balance:

In history, and still in current mythology, 'freedom of the press' has been supposed to ensure the fulfilment of the newspaper's public responsibility. John Stuart Mill, and others before and since, in effect applied to information and opinion the same concepts that Adam Smith articulated for the production of physical goods: the competition of free markets creates an invisible hand to ensure that what is produced is what people will pay for, priced at the lowest possible cost. Freedom of the press would likewise ensure diverse expression and, by the discipline of competition, completeness and accuracy of public information.

In many sectors, the economic theory has been made unreal by the technologies and institutions that have created rigidities and power positions which Adam Smith could not envisage. It retains, nevertheless, vestigial elements of validity in some economic processes.

As much cannot be said for the concept of press freedom as the guarantee of responsibility. In a one-newspaper town it means nothing except the right of the proprietor to do what he will with his own. In a country that has allowed so many newspapers to be owned by so few conglomerates, freedom of the press means, in itself, only that enormous influence without responsibility is conferred on a handful of people. For the heads of such organisations to justify their position by appealing to the principle of freedom of the press is offensive to intellectual honesty.<sup>22</sup>

6.30 Unable to find a natural champion of fairness in the newspaper owners, the Kent Report then turned to the journalists:

The Commission emphasises what it regards as the essentially professional nature of the journalist's work. The professional - the doctor or the lawyer, for example places his special skills at the service of the patient or client, to deal with problems which the layman does not himself know what to do

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<sup>21</sup> Kent Report p 28

<sup>22</sup> Kent Report p 217

about. The professional is in honour bound to use his judgement to do what is best for the health or welfare of his client. The layman has a closely analogous need for the journalist's services: to select from the mass of available facts the information which is significant to most of the newspaper's readers and to present that information in a way that is accurate, understanding, comprehensible, interesting and balanced.<sup>23</sup>

6.31 Here at last, we find a reference to 'balance'. Unfortunately it is in a context which, for Kent at least, fails to function. The Report goes on to describe an inadequate level of training and professionalism amongst journalists and to comment bitterly that:

The Davey Report said 11 years ago that the newsrooms of most Canadian newspapers were boneyards of broken dreams. Our investigations lead us to think that there are now fewer dreams to break. ... This malaise is, in the Commission's view, part of the price we pay for conglomerate ownership.<sup>24</sup>

6.32 This depressed view of journalism echoes the reports from the United Kingdom. Like the market theories, idealised views of journalism as noble, unbiased, inherently altruistic and discerning of the public good, often run into difficulties when compared with the actual circumstances of a society. Variables such as the limitations of journalists' training, the constraints imposed by owners and editors and the corporate cultures which exist within newspapers can all combine to make the reality differ from the ideal. In Kent's case, the greatest impediment was seen as conglomerate ownership.

6.33 In the end, the Kent Report could only advocate intervention in the market in order to create diversity of ownership. The Commission might have had a moral conviction that balance should be the duty of owners or journalists, but they recognised that there was no objective mechanism to enforce or to measure balance. The only significant remedy which they could recommend was to break up the conglomerates. They did not feel that they could ever keep the owners out of the newsrooms and they therefore urged that there be a broader range of owners.

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<sup>23</sup> Kent Report p 218

<sup>24</sup> Kent Report p 218

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6.34 The recommendations of the Commission were not implemented by the government.<sup>25</sup>

### US approaches

6.35 In the United States, the First Amendment to the Constitution is the cornerstone of media regulation:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.<sup>26</sup>

6.36 By and large, interpretations of this amendment have defined the whole debate in the US over regulation of the media. In the context of the interpretation of this amendment two main traditions have been identified.<sup>27</sup> The first is a literal tradition based on the liberal theories already referred to. That is the tradition of a 'marketplace of ideas' which should be allowed to function unhindered.

A free press, in liberal theory, provides a decisive check on government both through objective reporting and by reconstituting a public through the press' complex mediation of public opinion. Any governmental intervention undermines this editorial independence and tramples on the autonomy of individual speakers. The classical marketplace metaphor is telling for its reliance on economic assumptions about supply and demand, and Enlightenment philosophic assumptions about rationality. The theory, again, is that absent government interference, the autonomous sanctions of diverse individual speech entrepreneurs will lead to a multiplicity of viewpoints whose rationality will be discerned through public discussion to the benefit of the social order as a whole.<sup>28</sup>

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<sup>25</sup> *News & Fair Facts*, p 26

<sup>26</sup> United States Code Service Lawyers Edition - *Constitution*, 1986, p 163

<sup>27</sup> Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, common carriers and free speech in the 1990s', in *Theory and Society*, Kluwer Academic, Netherlands, 1991

<sup>28</sup> Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, common carriers and free speech in the 1990s', in *Theory and Society*, Kluwer Academic, Netherlands, 1991, p 35

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6.37 An example of a court decision upholding this literal tradition was *Miami Herald v Tornillo*, a 1973 case which struck down a Florida statute requiring newspapers to provide reply space to political candidates attacked by the newspaper. Although the court agreed that there was a concentration of ownership in daily newspapers and that there were extreme financial barriers to anyone starting a new paper, the court unanimously refused to allow government intrusion in the print media. They held that there must be no intrusion by government into the editorial function and no reduction in the freedom of the owner.<sup>29</sup> Chief Justice Warren Burger stated that 'A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated'. Similarly, in disallowing a Congressional Act to limit campaign finance, the court held that 'government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others'.<sup>30</sup>

6.38 The second tradition loosely rests on an assumption of market failure. Under this viewpoint, the original metaphor of a marketplace could only function in a traditional society where freedom of assembly and verbal communication meant that the value of one person's speech was equivalent to another's. Once communication is mediated, this view has it that control of the media distorts the market. Generally speaking, worldwide, governments and courts have tended to accept that the broadcast media are an example of an imperfect market, given that they require access to a scarce spectrum and specific capital intensive technologies. Access to broadcast licences has in many countries been held as a privilege not a right, and one which imposes a reciprocal obligation on the licence holder.

6.39 As early as 1947, the view had been advanced in the United States that modern technology was leading to media monopolies which were an obstacle to democracy:

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<sup>29</sup> See Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, common carriers and free speech in the 1990s', in *Theory and Society*, Kluwer Academic, Netherlands, 1991, p 36

<sup>30</sup> *Buckley v Valeo*, 424 US 1 (1976), at 48-49. Cited in Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, common carriers and free speech in the 1990s', in *Theory and Society*, Kluwer Academic, Netherlands, 1991

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If modern society requires great agencies of mass communication, if these concentrations become so powerful that they are a threat to democracy, if democracy cannot solve the problem simply by breaking them up - then those agencies must control themselves or be controlled by government.<sup>31</sup>

6.40 The Hutchins Commission was a philanthropic exercise, financed by Henry R Luce of Time Inc. Its findings were deeply philosophical and moralistic and its authors attempted to balance between advising media proprietors of a moral duty and warning them of government's obligation to intervene if they ignored that duty. It referred to the 'responsibilities of the owners and managers of the press to their consciences and the common good for the formation of public opinion',<sup>32</sup> and said that 'the tremendous influence of the modern press makes it imperative that the great agencies of mass communication show hospitality to ideas which their owners do not share'.<sup>33</sup> The report toyed with the notion of publicly funded media in order to increase diversity and went so far as to say that:

The need of the consumer to have adequate and uncontaminated mental food is such that he is under a duty to get it; and, because of this duty, his interest acquires the stature of a right. It becomes legitimate to speak of the moral right of men to the news they can use.

Since the consumer is no longer free not to consume, and can get what he wants only through existing press organs, protection of the freedom of the issuer is no longer sufficient to protect automatically either the consumer or the community. The general policy of laissez faire in this field must be reconsidered.

The press today, as the Supreme Court has recently recognised in the case of news services, has responsibilities to the general spread of information which present analogies to those of a common carrier or of a trustee...<sup>34</sup>

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<sup>31</sup> *A Free and Responsible Press: A general report on Mass Communication: newspapers, radio, motion pictures, magazines and books*, the Commission on Freedom of the Press, Robert M Hutchins Chair, University of Chicago Press, Chicago, 1947, p 5

<sup>32</sup> Hutchins p vi

<sup>33</sup> Hutchins p viii

<sup>34</sup> Hutchins Commission, op cit, p 125

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6.41 In sympathy with such views there were attempts to gain support for government intervention in broadcast media. The *US Federal Communications Act, 1934* included a 'public interest' standard. This Act established the Federal Communications Commission (FCC) as a force for balance. The Fairness Doctrine, created by the FCC, required that broadcasters 'cover contrasting viewpoints on controversial issues of public importance'. This was based on the premise that the radio frequency spectrum and access to it are limited and that access had to be regulated to ensure fairness.

6.42 In 1978 the Supreme Court upheld the FCC power in the face of a challenge based on the First Amendment by ruling that the Amendment's goal was to achieve the widest possible dissemination of information from diverse and antagonistic sources.<sup>35</sup> It upheld intervention by the government by ruling that rather than being a prior restraint, it was an attempt to facilitate a free marketplace of ideas and a diversity of viewpoints.

6.43 The Fairness Doctrine of the FCC Act was also held to be compatible with the First Amendment when it required that discussion of public issues be presented on radio stations, that each side of an issue be fairly presented, and that individuals personally attacked during broadcasts and opponents of political candidates endorsed in the broadcaster's editorials should be given equal opportunity to respond over the broadcaster's facilities.<sup>36</sup>

6.44 This was in effect, support for the extension of the free speech right on the basis that it implicitly includes the right to hear a wide range of views, as well as the right to express views. In FCC practice, however, and in successive court rulings, the concept of balance became limited to specific right of reply in certain cases, and the broadcast licensee was given 'wide discretion to decide what issues are of public importance, and what kind of programming constitutes balanced programming'.<sup>37</sup>

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<sup>35</sup> FCC v National Citizens Committee for Broadcasting (1978) in *United States Code Service Lawyers Edition - Constitution*, 1986, p 239

<sup>36</sup> Red Lion Broadcasting Co v FCC in *United States Code Service Lawyers Edition - Constitution*, 1986, p 300

<sup>37</sup> Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, common carriers and free speech in the 1990s', in *Theory and Society*, Kluwer Academic, Netherlands, 1991, p 44

6.45 Public interest groups had also attempted to use FCC laws to gain access rights to broadcast media in order to air issues of public concern. The aim here was to protect the collective First Amendment rights of those with dissenting, non-establishment views by guaranteeing them some access to the broadcast medium. The Supreme Court ruled, however, that this treated broadcast licensees as if they were common carriers. Unlike the Hutchins Commission, they did not accept this as a valid role for the media. They ruled that it risked unacceptable governmental intrusion into the journalistic process.<sup>38</sup> In the late eighties the FCC itself abandoned the Fairness Doctrine, apparently on the basis that advances in telecommunications had overcome the scarcity basis for regulation.<sup>39</sup>

6.46 Nor did the US media necessarily perceive the doctrine as leading to balance. It has been alleged in the media that some former US administrations used the doctrine to challenge and harass broadcasters of dissenting views and it has also been commented that:

The doctrine had the exact opposite effect that the FCC sought. After lengthy hearings in 1985, the FCC said the doctrine did not serve the public interest because it did in fact "chill" speech.<sup>40</sup>

6.47 There is currently strong opposition by many journalists to moves by the US government to reintroduce the Fairness Doctrine through legislation before the Congress at present.<sup>41</sup> Their perception is that any requirement for balance is likely to be effectively a restraint on dissent, and they have

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<sup>38</sup> Columbia Broadcasting System v Democratic National Committee in Horwitz, p 42

<sup>39</sup> Emord, Jonathan W 'The First Amendment Invalidity of FCC Content Regulations', in *Notre Dame Journal of Law, Ethics and Public Policy*, Vol 6 1992

<sup>40</sup> Steinfort, Roy Freedom of information: Fairness demands that TV and print work together: Fairness Doctrine threatens First Amendment for all, in *Quill*, November/December 1993. See also Hentoff, Nat, Editorial, *The Washington Post*, 6 November 1993, Final Edition

<sup>41</sup> Bill number HR 1985 by Hefner (D-NC) - Fairness in Broadcasting Act of 1993. 'A bill to clarify the congressional intent concerning, and to codify, certain requirements of the Communications Act of 1934 that ensure that broadcasters afford reasonable opportunity for the discussion of conflicting views on issues of public importance. Senate Bill S.333, of the same title, by Hollings (D-SC), 4 February 1993



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characterised the move as reflecting the current government's discomfort with conservative criticism from within the media. Opponents of the doctrine, including the Governor of New York, have said:

... the drive by Democratic members of Congress to command broadcasters to present opposing views on controversial issues is related to the rising popularity of conservative talk-show hosts on the radio. If the Fairness Doctrine returns, these programs - and the few with hosts on the left - will become safely bland.

New York's governor also noted that broadcasters, by and large, have been rather subdued in protesting the renewed gutting of their First Amendment rights. "I get the sense", he says, "that a lot of people who make profits in this business will sell freedom for fees. They will make deals with Congress, they will accept regulation they shouldn't be accepting ... all in exchange for an opportunity to make more money."<sup>42</sup>

6.48 The US then, like Canada and the UK, has experienced a trend over time where government intervention to promote diversity of ideas, when it does occur, has been generally conservative and limited to broadcast media. The effect of attempts to promote balance via the Fairness Doctrine has been largely regarded as cumbersome and as suppressing free speech rather than promoting it. In effect, the freedom of speech right most strongly upheld in the US has been the power of the owner to publish, rather than the right of the public to have access to a diversity of views.

6.49 It can therefore be seen that even legislative attempts to allow aggrieved citizens a right of reply are fraught with difficulty. None of the countries surveyed has ever legislated to allow an outside body to sit in judgement on the overall balanced coverage of newspapers let alone the tying of foreign investment decisions to subjective decisions by politicians on what constitutes balanced coverage. To effectively intimidate a leading national newspaper or so muzzle its political comments during an election campaign is to use Mr Black's colourful phrase to "put a silver stake through the heart of the democratic process".

### **Australian inquiries**

6.50 In Australia as elsewhere the major inquiries into the media have resulted from concern over concentration of ownership and its effects on

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<sup>42</sup> Hentoff, Nat, Editorial (*The Washington Post*), 6 November 1993, Final Edition

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diversity. The *Norris Report* in Victoria in 1981 found a very high and increasing control of newspapers and warned both of a loss of diversity and of a growing power of a few proprietors to influence the opinions of society.<sup>43</sup>

6.51 The report described:

... the power to influence the very functioning of our whole society by control over the nature and extent of the information presented to it and by the analysis and interpretation of that information. It is this latter aspect of power, affecting social and political affairs, that distinguishes the media industry from other industries.<sup>44</sup>

6.52 It concluded that neither the Australian Press Council nor market forces could prevent further concentration of media ownership, and recommended the establishment of a statutory Press Amalgamations Authority to scrutinise acquisitions by newspaper publishers already owning more than 10 per cent of shareholdings in other newspapers in Victoria. Consent depended on the acquirer proving that the acquisition was not contrary to public interest.<sup>45</sup> Its recommendations were not implemented.

6.53 The Working Party into Print Media Ownership was also set up in Victoria, following concern over the takeover by News Corporation of the *Herald* and *Weekly Times* group. It reported in 1990, and found that since Norris, the concentration of media ownership had further increased. The report distilled from the literature the following list of the potential adverse consequences of concentration:

- (a) concentration of power unacceptable in a democracy, whether or not that power is used;
- (b) insufficient channels for the expression of opinion;
- (c) economic forces creating barriers to entry for others who might dilute that power and open new channels;

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<sup>43</sup> *The Norris Report* 1981, pp 85-86. See also *News & Fair Facts*, p xv

<sup>44</sup> *The Norris Report* 1981, pp 85-86

<sup>45</sup> *The Norris Report* 1981, pp 193 and 219

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- (d) diminished localism of content and accountability caused by a group's size and pursuit of economies of scale;
  - (e) debilitated journalistic culture caused by reduced competition, self-censorship, lack of alternative employment;
  - (f) conflicts of interest for owners with non-media interests. Although not caused by concentration, such conflicts grow in their potential adverse effects in proportion to concentration.<sup>46</sup>

6.54 The Working Party concluded that it would be in the public interest to dilute the existing concentration and to prevent its extension.<sup>47</sup>

6.55 The Report stated that:

We underpin our recommendation with the principles Sir John Norris urged:

- (a) the means to be employed to allow the press to function as it should must not themselves threaten its freedom;
- (b) any legislation to regulate ownership and control must be so drawn as not to interfere with the content of the press, or with the liberty of persons to publish. Any concept of licensing the press or regulating its content must be eschewed;
- (c) if the relevant legislation is to satisfy (such conditions) ... it must not constitute the executive government the repository of the authority to grant or withhold favours.<sup>48</sup>

6.56 The 1991 House of Representatives Print Media Inquiry (or the 'Lee Committee') had the following terms of reference:

To inquire into and report on:

- (a) structural factors in the print media industry inhibiting competition between publications,

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<sup>46</sup> Quoted in CLC Submission No 19

<sup>47</sup> *Report of the Working Party into Print Media Ownership*, 1990, pp 3 & 4

<sup>48</sup> *Report of the Working Party into Print Media Ownership*, 1990, p 3

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- including ownership, production (including paper supply) and distribution arrangements;
- (b) the print media's distribution and information gathering arrangements;
  - (c) the extent to which the ownership or control of various sectors of the print media industry provides a barrier to entry by competitive alternatives;
  - (d) the adequacy of current Commonwealth legislation and practices to foster competition and diversity of ownership in the print media; and
  - (e) the practicability of editorial independence between proprietors and journalists.

6.57 The Lee Committee was making its inquiries in the midst of the Fairfax takeover controversy, and some of the issues involved in our deliberations were also canvassed at that time in its hearings. Many people at the time looked to the Lee Committee for direction in the uncertainty which surrounded media regulation. Although it made some findings, however, its report, *News & Fair Facts* was not taken up enthusiastically. It had been set up amidst the furore surrounding the involvement of Mr Packer with the Tourang syndicate. Concern on ownership concentration was at its highest when he was a member of that group, and to a certain extent public interest and the sense of urgency about concentration declined when he withdrew.

6.58 Amongst the issues which that committee canvassed was the nature of competition in and between the various forms of media. It found, for instance, that there was a trend towards monopoly or small group ownership of newspapers. It also found that there was little competition in terms of advertising between media forms (such as TV and newspapers) in the same area. The significance of this conclusion is that in narrow commercial terms, the 'Queens of Screen and Princes of Print' approach to cross-media regulation introduced by the government in the late eighties is not a significant factor in increasing competition. That is, the cross media rules which prevent ownership of print and broadcast in the one area by the one proprietor may contribute to diversity of opinion but do little to increase commercial competition for advertisers. However, the committee advocated

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their retention because entry to the electronic media is restricted, and the cross-media rules do prevent:

undue influence of public opinion by the few by enhancing public access to a diversity of viewpoints, sources of news, information and commentary.<sup>49</sup>

6.59 The Lee Committee found that the print media market is not highly contestable. That is, it found that there were considerable capital costs and commercial risks for new entrants to the market. It also found that the marginal costs for established papers are small, and that they have a significant edge in attracting advertisers, thus further discouraging new entrants. The ownership of chains of newspapers confers additional economies of scale and opportunities for sharing of resources between mastheads.

6.60 When examining the relationship between the concentration of ownership and the lack of diversity of information and ideas in the Australian Press, the Lee Committee was divided:

Some members of the committee concluded that there was a connection between the unprecedentedly high concentration of media ownership and the lack of diversity of information and ideas in the Australian press, and that the former is likely to be a significant cause of the latter. However, a majority of the committee considered that there was insufficient evidence to conclude that the current high level of concentration in the Australian print media has resulted in biased reporting, news suppression or lack of diversity. All members agreed that concentration of ownership is potentially harmful to plurality of opinion and increases the potential risk that news may be distorted.<sup>50</sup>

6.61 A voluminous submission to the Lee Committee from News Limited included a study prepared by Professor Peter Swan, the Freehill, Hollingdale and Page Professor of Management at the University of NSW, which set out an argument that newspapers in a monopoly position can still offer a diversity of views. This argument essentially maintains the 'marketplace of ideas' metaphor but says that a single monopoly newspaper will still reflect the diversity of its audience because of the commercial motive of wishing to

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<sup>49</sup> *News & Fair Facts*, p 309

<sup>50</sup> *News & Fair Facts*, p xxii

keep that audience as broad as possible. This argument was effectively rejected by the committee when it said:

The relevant issue ... is not whether the range of stories or categories of information presented is affected by concentration, but whether the interpretation of the stories is more likely to vary when newspapers are independently owned.<sup>51</sup>

6.62 Having found high levels of concentration in the Australian print media industry which are potentially harmful to the plurality of views, and having found formidable barriers to entry, the major question the Lee Committee report addressed was how can competition be promoted that will increase the diversity of views which is so important to Australian society?

6.63 The committee considered and rejected calls for some form of divestiture or numerical limits on the number of newspapers and magazines any one proprietor can own. It also concluded that current dominance tests for mergers in the Trade Practices legislation had failed to preserve a desirable level of competition in some sections of the print media.

6.64 The option selected was a move from the dominance test to 'a substantial lessening of competition' test, combined with special requirements for print media. This required an amendment to the Trade Practices Act so that authorisations on print media mergers would look at the impact on:

- free expression of opinions;
- fair and accurate presentation of views; and
- the economic viability of the publication if the merger does not proceed.<sup>52</sup>

Their report stated that:

Diversity of opinion and truth and accuracy in reporting are of fundamental importance to the public interest. While no law will be able to totally guarantee these ideals, steps can be taken to ensure that any potential threat to them which may arise from a merger or acquisition, is

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<sup>51</sup> *News & Fair Facts*, p 195

<sup>52</sup> *News & Fair Facts*, p xxiv

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fully evaluated in a forum which allows all interested parties the opportunity to air their concerns.<sup>53</sup>

6.65 Having expressed reservations about the extent of economic competition across the media in any given area, the committee recommended the retention of cross-media rules, preferably based on a test of controlling interest rather than a fixed percentage, on the basis that:

The intention behind the cross-media ownership limits is to prevent undue influence of public opinion by the few enhancing public access to a diversity of viewpoints, sources of news, information and commentary. It may be that sometime in the future there could be such a proliferation of players and such limited chances of high concentration because of pure or 'atomistic' competition, that the cross-media rules would be irrelevant. Until that time the committee considers that the rules should continue.<sup>54</sup>

6.66 As in other countries, the Report advocated a strengthening of the Press Council. It made only tentative recommendations on ethics, however, by recommending that the Government 'convey to the print media industry the committee's preference' for proprietors, editors and journalists to be 'encouraged to subscribe to the principles' of the Code of Ethics of the AJA. It further said that 'contracts for editors, whilst supported in principle, are a matter for individual proprietors and editors', and that the committee 'rejects calls for legislative requirements for mechanisms to support editorial independence'<sup>55</sup>.

6.67 In summary, the Lee Committee placed the Australian regulatory framework firmly in the tradition of the other countries surveyed here. It subscribed to the 'marketplace of ideas' concept; it mildly advocated an ethical approach by individual players on a voluntary basis, but in the end could only strongly endorse intervention at the point which establishes the number of players. Any attempt to referee the 'balance' of the views reflected by any one player (beyond the well-intentioned but mild umpiring of the Press Council) was not contemplated.

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<sup>53</sup> *News & Fair Facts*, p xxiv

<sup>54</sup> *News and Fair Facts*, p 309

<sup>55</sup> *News & Fair Facts*, p xxxiii

6.68 The most recent government report on the media in this country is the *Review of Government Media and Information Services* by the Queensland Parliamentary Committee for Electoral and Administrative Review. That report takes a strong line on the need for a diversity of press ownership, arguing that 'increased concentration also increases the potential political power of the media companies, making politicians cautious in their dealings with the media' and stating:

This committee acknowledges the concentration of print media ownership in Queensland and recognises that this has the potential to reduce the diversity of news and information available to Queenslanders and lead to possible abuses of influence.<sup>56</sup>

6.69 The Report went on to recommend that the Attorney-General urge the nation's Attorneys-General to consider uniform defamation and shield laws. It then stated that:

At times it is likely that a vigorous and energetic media will be in conflict with the government. It is however in the interests of the electorate to have media which recognises and accepts the responsibilities the Fourth Estate imposes, rather than a docile media which fails to expand the scope of public knowledge, or media which abuses power for its own advantage. To ensure that this is done in a way which recognises the primacy of the public interest the committee encourages media organisations and journalists in Queensland to develop effective and meaningful methods of self-regulation and public accountability, so that the democratic potential of the media may be realised.<sup>57</sup>

6.70 In Australia then, the experience has been broadly the same as in the UK and Canada. While Royal Commissions and Parliamentary Committees have uniformly expressed regret regarding the loss of diversity of views in the media resulting from the trend to concentration of media ownership, governments themselves have tended to confine media regulation to the control of ownership at the point of acquisition, merger or takeover. Although they often advocate a stronger role for Press Councils, they draw back from the manifest risks of allowing executive government to decide on what constitutes 'balance'.

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<sup>56</sup> *Review of Government Media and Information Services*, Parliamentary Committee for Electoral and Administrative Review, Queensland, 1994, p 72

<sup>57</sup> *Review of Government Media and Information Services*, Parliamentary Committee for Electoral and Administrative Review, Queensland, 1994, p 87



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6.71 Sir John Norris' comments in 1981 were taken up again by the Hon Race Mathews in his 1981 report, and quoted again by the Queensland Committee this year. They bear repetition once more in this context:

- (a) the means to be employed to allow the press to function as it should must not themselves threaten its freedom;
- (b) any legislation to regulate ownership and control must be so drawn as not to interfere with the content of the press, or with the liberty of persons to publish. Any concept of licensing the press or regulating its content must be eschewed;
- (c) if the relevant legislation is to satisfy (such conditions) ... it must not constitute the executive government the repository of the authority to grant or withhold favours.<sup>58</sup>

### **Balance and the propriety of Mr Keating's actions**

6.72 As already noted, in this country the notion that diversity should be encouraged at the point of ownership and independence fostered at all levels of the media, has held sway, and the trend is reflected in the Labor Party's own platform which includes the following:

#### Print

- 41 Maintain and enhance freedom of the press, which is a cornerstone of democracy
- 42 Promote the public's right to a full variety of views in printed media by ensuring diversity of ownership through:
  - a) strong cross-media ownership limitations;
  - b) limitations on the capacity of dominance in particular markets by utilising all arms of federal government authority including the Foreign Takeovers Act, the Corporations Act and the Trade Practices Act to ensure proper restrictions on further print media concentrations;

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<sup>58</sup> Quoted in *Review of Government Media and Information Services*, Parliamentary committee for Electoral and Administrative Review, Legislative Assembly of Queensland, 1994, pp 71-72

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- c) encouraging the establishment of independent newspapers serving particular constituencies, including the broad labour movement;
  - d) encouraging and supporting staff ownership of newspapers; and
  - e) supporting the development of enforceable codes of editorial independence by ensuring that the articles of association of newspaper companies guarantee editors a proper degree of independence from the proprietor.
- 43 Establish, in consultation with the media industry, a press council with a majority of public members appointed by an independent panel, responsible for advising and making recommendations to government and the media industry on ways of improving the quality and diversity of print media in Australia.<sup>59</sup>

6.73 The present government has clearly endorsed the need for diversity of opinion and its willingness to legislate for it through the changes to the Broadcasting Services Act and other regulatory mechanisms which it has made over the years. The Prime Minister, as the then Treasurer, played a key part in the 1988 changes to broadcasting rules and spent considerable effort in justifying them under the banner of diversity:

So lets be clear about media bias. There was a lot of media bias by journalists at John Fairfax and Sons in not publicising the diversity of the media change under this Labor government.<sup>60</sup>

Is this not clear social improvement? Is this not more diversity?<sup>61</sup>

6.74 Similarly, in the Second Reading Speech for the Broadcasting Services Bill 1992, Senator Collins made the following remarks under the heading of 'Regulatory Philosophy':

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<sup>59</sup> Source: *Australian Labor Party Platform, Resolutions and Rules* as approved by the 39th National Conference, Hobart, 1991

<sup>60</sup> Archive tape, August 1988, in *Four Corners*, Monday 5 November 1990, MICAHI transcript

<sup>61</sup> Paul Keating, letter to *Media Information Australia*, No 48, May 1988, p 41

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The Bill ... continues to recognise that broadcasting is integral to developing an Australian identity and cultural diversity. It is vital to the operation of a democratic society ... .

Underpinning the whole framework is the intention that different levels of regulatory control apply across the range of broadcasting services according to the degree of influence that such services are able to exert.<sup>62</sup>

6.75 The entire net of media regulation in this country clearly embodies this implicit acceptance of the marketplace of ideas, of the value of diversity, and of the existence of an imperfect market in need of government regulation. The one 'straw man' in all of this has been the reluctance of governments here and overseas to accept that newspapers are an imperfect market in the same way that radio and TV were long ago accepted to be.

6.76 *News & Fair Facts* clearly indicated that the newspaper market is far from perfect. Moreover, any rational analysis of the cross-media rules in this country and the way in which they have worked since the 1980s, can only lead to the observation that the government has been having a major impact in the newspaper market at least since that time, and that if the newspaper market was not imperfect then cross-media rules certainly made it that way.

6.77 The 1991 and 1993 decisions in relation to foreign ownership and Fairfax were also hugely significant in affecting that market. Governments must now squarely face the reality that all sectors of the media are interdependent in their economics and regulation, and that as technology convergence continues so they will become more and more related and less distinguishable as markets. They must also accept that for better or worse, governments are an integral part of media regulation.

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<sup>62</sup> Senate Hansard, 4 June 1992, p 3599

**Recommendation 6.1**

The committee recommends that the Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure, as part of its reference on telecommunications developments (24 March 1994) should consider the regulatory issues of convergence of media technologies, especially as they relate to the preservation of diversity.

6.78 If we accept then that government has an actual and a legitimate role in regulating for diversity of opinion in the print media, what are the other elements of this diversity apart from variety of ownership? We have seen that the next common element in this and other countries has been the protection of editorial and journalistic freedom. We have also seen that in other countries the tendency has been to leave this largely to the discretion of owners.

6.79 The implicit assumption has been that the rights conferred by ownership of a newspaper are absolute except where constrained by laws such as those for defamation, and that there is no enforceable reciprocal obligation on the owner. This assumption is worth re-examining. Simply put, the regulatory framework which government has already put around media ownership implicitly assumes that ownership is not an absolute right but one granted by society. The committee believes that there may be a role for enforceable codes of editorial and journalistic freedom, binding upon the owners.

**Recommendation 6.2**

The committee recommends that the Senate Standing Committee on Legal and Constitutional Affairs, which is examining codes of conduct for journalists, examine the issue of the enforceability of guarantees of independence as part of government regulation of the media.

6.80 However, it is essential to stress that such codes are not currently part of the regulatory framework and were at no time formally put to Mr Black by the government as a requirement of ownership or increased ownership.

The committee therefore finds that Mr Keating's claim to have informally championed editorial independence in his November 1992 meeting with Mr Black to be incongruous:

But, obviously, I don't think anyone in Australia should welcome heavy handed proprietorship. I remember the whole of the Fairfax employees talking about the rights to write and have printed that which they believe and not have proprietorial intervention. And it was that same point that I was making.<sup>63</sup>

#### Finding 6.2

For Mr Keating to have set himself up personally as the judge of bias and the arbiter of the kind and extent of freedom which Mr Black should give to his employees is plainly not at all the same as a government enforcing an open and well understood charter of independence. The committee finds that it was improper for Mr Keating to set himself up in this role, holding power as he did over Mr Black's increased ownership.

6.81 Mr Keating's mistaken perception of his role is exemplified in the following transcript:

**David Margan:** I'm still interested though, in the Prime Minister's notion of balance. Should you be the one who decides that, though?

**Paul Keating:** Well, when prime ministers have got to decide, I mean I notice a bit of comment about this saying: Well, isn't it unusual, the Prime Minister's had to make a decision about the acceptability or otherwise of a particular set of proprietors. That's one of the things, I'm afraid, prime ministers have to do, I mean, because we're the ones that have got to take the decisions about who gets what in terms of equity. So it may be an uncomfortable lot and a burden, but that's part of the job.

<sup>63</sup> Transcript of interview, the Hon P J Keating, Seattle, Friday 19 November 1993

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**David Margan:** Do you think the next media baron, though, should come to you about questions of balance and objectivity for your decision?

**Paul Keating:** If they are foreigners, if they want to buy a large chunk of Australia, yes.<sup>64</sup>

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**J:** But Mr Keating, should a commercial dealing of that sort rest on your judgement about whether a media organisation is fair to Labor?

**PM:** No, not whether it's fair to Labor, but whether reporting is fair.

**J:** But you're the judge, are you?

**PM:** Well, I'm the Prime Minister. That's how I become the judge.<sup>65</sup>

6.82 Certainly Mr Black's long-standing objection to journalistic codes of conduct and his strident assertion of a media proprietor's prerogative to influence the political tone of his newspapers are well known and were referred to by Mr Keating above.

6.83 Mr Black's autobiography proudly boasted of his use of *The Daily Telegraph* in a last ditch attempt to save the Prime Ministership of Margaret Thatcher. It is therefore inconceivable that Mr Black would seriously agree to surrender such powers. Indeed he has always been at pains to defend them as being an integral part of the democratic tradition. It is therefore very difficult to accept that he would meekly bow to the imposition of a 'balance' requirement on one part of his newspaper empire when he would find it abhorrent anywhere else, unless there were some other advantages to be gained.

6.84 The remaining element of government regulation which is relevant to Mr Keating's conversations with Mr Black and with the whole issue of the Fairfax decisions, is the element of cultural diversity. We have already seen

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<sup>64</sup> 7.30 Report, Monday 22 November 1993, MICAH transcript

<sup>65</sup> Transcript of Seattle interview, 18 November 1993, pp 5 and 6

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that democratic governments world-over prize the diversity of sources as an element of democracy itself. However, in an age of increasing globalisation, there is also concern over national identity and the representation of national interests. As mentioned at the end of chapter 5 of this report, Mr Keating has also attempted to portray his discussions as having been an attempt to safeguard cultural sovereignty. This issue is more complex in terms of precedents.

6.85 The FIRB booklet plainly states that:

Foreign investment in mass circulation newspapers is restricted. All proposals by foreign interests to establish a newspaper or acquire an interest in an existing newspaper business in Australia are subject to a case-by-case examination irrespective of the size of the proposed investment.<sup>66</sup>

6.86 Similarly, foreign ownership limits apply for radio and television:

Foreign investment in television licences is governed by the *Broadcasting Services Act 1992*, which provides (i) that a 'foreign person' may not be in a position to exercise control of a television licence, or have company interests in such a licence exceeding 15 per cent; and (ii) that two or more foreign persons must not have company interests in such a licence exceeding 20 per cent in aggregate. proposals for foreign investment in radio which fall within the scope of the *Foreign Acquisitions and takeovers Act* are considered on a case by case basis.<sup>67</sup>

6.87 Mr Black has attempted to portray such concerns and the questions of the committee, as implying: 'that any Australian is preferable to any foreigner and that foreigners tend to be ravening predators from another hemisphere coming here to deprive the women and children of Australia of their birthright.'<sup>68</sup>

6.88 This is plainly ridiculous, but it highlights the risk which governments fear, of being portrayed as xenophobic. The committee has not had the

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<sup>66</sup> *Australia's Foreign Investment Policy: A Guide for Investors*, September 1992, p 7

<sup>67</sup> *Australia's Foreign Investment Policy: A Guide for Investors*, September 1992, p 7

<sup>68</sup> Evidence p 659

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resources to make a thorough study of foreign ownership controls on the media in other countries, but believes that such a study is likely to reveal a healthy and well-founded concern for the preservation of national identity and an awareness that national interests must be preserved via a local voice in the media. Chapter 7 includes information on controls over overseas investment.

6.89 Without canvassing the complex issues involved in foreign ownership and cultural sovereignty, the committee notes the clear incongruity of the government stance on the matter. The FIRB booklet plainly shows the government's public stance to protect cultural identity and a voice for Australians in their own media. Despite this, and in the case of a stated policy which, for television at least, expressly aims to prevent control by a foreign owner, Mr Keating entered into an arrangement with a foreign owner which was designed precisely to deliver control:

Mr Black said to me, 'I have now, for better or worse, charge of this company, an important industrial company in Australia, the primary print media company, and I cannot manage it on 14.9 per cent of the stock'.

...

So the fact was that, at 25 per cent, such an interest meant that there was at least a degree of managerial control in the hands of the Black interests.<sup>69</sup>

6.90 Mr Keating gave this control with no assurances having been sought or received in public or in writing, much less in any binding arrangement, that the owner would respect Australian cultural sovereignty. His remarks to the Parliament on 24 November 1993 give us no confidence that he has ensured that the Fairfax newspapers will 'reflect unambiguously those things which are in Australia's best interests'.

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<sup>69</sup> House of Representatives Hansard, 24 November 1993, p 3540