Coalition Senators' Dissenting Report

The Coalition's belief in a free media

The Coalition shares the concerns of many witnesses that the Public Interest Media Advocate (PIMA) is an unprecedented attack on free speech and a free media.

The Coalition is proud to have a strong commitment to free speech and a free media in both our philosophical underpinnings and the history of our party. From John Stuart Mill's optimistic belief in 1859 that the time 'is gone by, when any defence would be necessary of the liberty of the press' to Robert Menzies 1942 plea for 'freedom for people who disagree with us as well as our supporters', the liberal support for a free media has been a defining trait.

A free media is an essential feature of a modern democracy. The media should keep citizens informed of the performance and priorities of the polity. In Australia we have such a media. Australians value press freedom and, tellingly, this is the first attempt to restrict freedom of the press in our peacetime history.

At a time like this, where the Government has complete disregard for the conventions of the Parliament and of good governance and where even the most egregious failures of Ministers go unpunished, a critical media eye is essential.

Press freedom is a key tenet of the Australian democracy and was passionately defended by many witnesses, including by Fairfax Media Chief Executive Mr Greg Hywood who stated:

> …regulation of the media should be the last resort of any democratic government and be as light a touch as possible to achieve a clear public good. It is our strong view that the fact that a government feels it is not getting a fair go from one or other media outlet is a very poor reason to regulate; in fact, it is the worst reason. Is the media perfect? No. Does it get everything right? No. But is our media effective in delivering the public good of keeping our community open and transparent? Absolutely.[1]

News Limited Chief Executive Officer Mr Kim Williams who stated:

> These bills breach constitutional rights, equate to direct government intervention and regulation of the media and are a direct attack on free speech, innovation, investment and job creation.[2]

And Seven West Media Chairman Mr Kerry Stokes who stated:

> As a result of that [these changes] you would not get things like Eddie Obeid being discovered; you would not get the investigative journalism

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1 Mr Greg Hywood, Fairfax Media, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 1.

2 Mr Kim Williams, News Limited, *Proof Committee Hansard*, Canberra 18 March 2013, p. 28.

> which is so important to a free democracy to our standing. He [PIMA] has a power to actually change that, and I find that scary.[3]

FOXTEL Chief Executive Officer Mr Richard Freudenstein explored the industry's bewilderment at the spectre of the regulations, stating:

> As others have observed, this is a solution in search of a problem. It is a basic tenet of the regulation of business activity that regulatory intervention should only occur where there is a demonstrated need or case of market failure.[4]

The changing media landscape

The Government has repeatedly asserted that with a changing media environment there exist threats to the diversity of media voices.

Labor Members and Senators have launched shrill attacks on the Murdoch press and spread assertions of unfounded breaches of media standards in Australia.

While there are countless examples over recent years, even as recently as during the extremely limited timeframe of the conduct of this inquiry, Labor's disposition was made very clear by a Labor member of the Joint Select Committee on Broadcasting Legislation, Mr John Murphy MP:

> We are all aware that News Ltd have a stranglehold on the print media in our country. They have a 50 per cent share in monopoly pay television; they have one of the most accessed sites on the internet—news.com—and many of us in this place want to be the guardian of any extension of the reach of News Ltd in our country, particularly as it relates to free-to-air television network and radio stations. Most fair-minded people do not think that is in the public interest or good for our country. I welcome the fair, balanced and objective reporting of your media. I also acknowledge and accept that a large company like News Ltd can report the news the way they want to, and whether it is described as opinions or propaganda, that is their right. But what is at the heart of this for most people who are very concerned about this is that News and the Murdoch family could drown out more voices, including yours, and we do not believe that that is in the public interest or good for the future of our democracy.[5]

The Coalition is wholly unconvinced that convergence is resulting in less media voices. In fact convergence is providing more media voices than ever before. In recent times we have seen the launch of *The Guardian Australia*, *The Conversation* and *Mamamia* to name just a few.

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3 Mr Kerry Stokes, Seven West Media, *Proof Committee Hansard*, Canberra, 18 March 2013, pp 19–20.

4 Mr Richard Freudenstein, FOXTEL, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 50.

5 Joint Select Committee on Broadcasting Legislation, *Proof Committee Hansard*, Canberra, 18 March 2013, pp 50–51.

Nowadays anyone with a webcam can create media content and upload it to social media or content sharing platforms like YouTube. The traditional costs associated with publishing media content—printing presses, television studios or radio equipment—can be a thing of the past. Anyone with a laptop and basic IT skills can start their own news site.

Fairfax Media Chief Executive Greg Hywood reflected on this changing landscape stating:

> When I started in journalism in the late 1970s, there were newspapers, a handful of free-to-air TV stations and a handful of magazines in this country that ran news. We have seen an absolute explosion of sources of news and information in that period. People have the power. Fundamentally, the barriers to entering the media industry have collapsed. Once upon a time, you needed to spend hundreds of millions of dollars on a printing press to get a newspaper out or to get news and information out or you had to have a television licence. This required substantial funds, substantial capital. Now you need a computer and you can run a blog.
>
> You have seen the number of news sites there are. Crikey is a web-only news site. You have seen Business Spectator. You have seen a whole range of other sources of news and information that provide a multitude of voices. So the barrier entries are very low. The irony of this legislation is that it comes when voices have (a) never been louder and (b) never been more extensive for news and information in this country.[6]

FOXTEL Chief Executive Officer Mr Richard Freudenstein, likewise, outlined his views on the new news media landscape:

> In the digital and internet age there is no want of access to news and information.
>
> There has been an explosion in sources of news, information and opinion in Australia and globally. Low barriers to entry, thanks to digital delivery, means that everyone from micro bloggers to major media organisations like The Guardian can establish themselves and develop audiences.
>
> Search engines, content aggregators and social media disseminate videos, articles, opinions and ideas at an amazing pace.[7]

With more news source competitors than ever before, traditional news media organisations have faced sustained pressure on their business models which has resulted in the restructure of many news operations and the loss of jobs in the news media sector.

This reform and its imposition of additional regulatory costs and burdens comes at the worst possible time for new media regulations.

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6 Mr Greg Hywood, Fairfax Media, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 5.

7 Mr Richard Freudenstein, FOXTEL, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 50.

No case for reform

Neither the Prime Minister nor the Communications Minister has been able to coherently outline why the PIMA is necessary. In fact, they have been unable to point to a single instance of where existing self-regulation has failed where the PIMA would have produced a different result.

Seven West Chairman Mr Kerry Stokes was similarly perplexed as to the need for the PIMA:

> I have yet to see anybody explain to me any problem that warrants these laws – not only warrants these laws but warrants them being passed and debated within a week.[8]

The Coalition agrees with The Australian Law Reform Commission who stated in 2007 that:

> In the ALRC's view, freedom of expression is a fundamental tenet of a liberal democracy. Appointing an independent government body to oversee the media is a measure of last resort. Such an approach should be taken only where there is substantial evidence that self-regulation and co-regulation in the media industry have failed.[9]

Further, the United Nations Human Rights Committee has stated that:

> When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[10]

The Government has failed to present any evidence that self-regulation has failed, let alone that such an act of last resort is required.

The only justification offered for the extraordinary intervention in the operation of the media is that there were failures in media regulation overseas. No evidence of similar systemic failures in Australia has been presented at any stage.

Seven West highlighted that:

> In fact there is no evidence that either the Independent Media Council or the Australian Press Council do not rigorously apply their own published standard or that these standards are not satisfactory.

Aside to references of what may or may not have happened overseas, the only case presented was that of Professor Ricketson where he claimed several instances

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8 Mr Kerry Stokes, Seven West Media, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 22.

9 Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion paper no. 72, vol. 1, 2007, para 38.105, p. 1109, available at: http://www.alrc.gov.au/sites/default/files/pdfs/publications/DP72_full.pdf (accessed 20 March 2013).

10 Human Rights Committee, *General Comment No 34 (2011)*, paras 34–35.

represented breaches of media standards. Under questioning it was revealed that none of these cases had been investigated and they had not even all attempted to use existing self-regulatory procedures to pursue their case:

> **Senator BIRMINGHAM:** Professor Ricketson, you gave a list of examples that you said provided some justification for this intervention into the operation of the media. In each of those examples had the anonymous individuals taken a complaint to the Press Council?
>
> **Prof. Ricketson:** In the case of some I think yes and in the case of others no. One of the issues with the Press Council there's another annexure dealing with complaints to the Press Council is they're not always dealt with to the satisfaction of the complainant and so…
>
> **Senator BIRMINGHAM:** And generally speaking complainants won't be satisfied unless their complaint is upheld, so did you do any analysis of the merits of those complaints?
>
> **Prof. Ricketson:** The ones that, the, we are looking at? Yes we looked at those and we thought that they were all prima facie as far as, I mean again as Mr Finkelstein has said we didn't follow these sorts of matters to the enth degree because that was not the purpose of the enquiry but we were satisfied prima facie that there appeared to have been a problem in a way in which these matters were reported in the news media and that was enough for us at that stage.
>
> **Senator BIRMINGHAM:** Prima facie, so there was no particular checking with the media outlets in question?
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> **Prof. Ricketson:** No.

The Government's failure to provide any compelling justification for this reform leaves only the conclusion that this is an exercise in political revenge from a government that feels aggrieved by the eminently warranted criticisms of its gross failures and incompetence.

The ultimate determinant of community standards is the decision for consumers to either purchase the media product (or watch/listen to it) or not. There is a case to regulate in certain circumstances where irregular decisions with high costs, such as the purchase of a home. But in the case of the Australian media market, where consumers make many small decisions with low costs, there is no case to regulate.

Public Interest Media Advocate

The appointment of the Public Interest Media Advocate

The process of appointment of the PIMA alarms the Coalition. While noting our opposition to the PIMA, we are nonetheless concerned that, if this legislation passes, the PIMA will be appointed at the whim of the Minister of the day, and can conversely be sacked on the whim of the Minister.

While Senator Conroy has promised 'consultation' with the Opposition and stated that he does not believe a former Member of Parliament would be a suitable candidate, there are no such requirements in the Bill.

Network Ten correctly notes that:

> Missing from the PIMA Bill is any obligation on the Minister to consult on the appointment of the PIMA or seek independent recommendation. Consultation is optional.[11]

The Coalition expected to see provisions requiring consultation with the Opposition and prohibitions on former MPs or Senators, but notes that the Bill omits any of these conditions and simply says:

> Clause 8 of the Bill outlines:
>
> **Division 2—Appointment**
>
> **8 Appointment of PIMA**
>
> (1) The PIMA is to be appointed by the Minister by written instrument.
>
> Note: The PIMA is eligible for reappointment: see the Acts Interpretation Act 1901.
>
> (2) A person is not eligible for appointment as the PIMA unless the Minister is satisfied that the person has:
>
> (a) substantial experience or knowledge; and
>
> (b) significant standing;
>
> (c) in at least one of the following fields:
>
> (d) the media industry;
>
> (e) law;
>
> (f) business or financial management;
>
> (g) public administration;
>
> (h) economics.
>
> (3) Before appointing a person as the PIMA, the Minister must consult:
>
> (a) the ACMA; and
>
> (b) the ACCC; and
>
> (c) such media industry bodies as the Minister considers appropriate.
>
> (4) Subsection (3) does not, by implication, prevent the Minister from consulting other bodies and persons.
>
> (5) The PIMA holds office on a part time basis.[12]

Coalition Senators explored whether this would allow former Senators or Members to hold the position of PIMA with several witnesses.

Fairfax Media Chief Executive Mr Hywood stated that there is indeed no restriction:

> **Senator BIRMINGHAM:** Are there any restrictions that you are aware of as to who might be able to serve in the position of PIMA?

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11 Network Ten, *Submission 3*, p. 7.

12 Public Media Advocate Bill 2013, Clause 8.

> **Mr Hywood:** Not as far as I know.
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> **Ms Hambly:** There are a few in the bill, but they do not really go to anything in particular. You cannot be a bankrupt and you have to have had some kind experience somewhere. I note that it is also part time and you cannot hold other positions which conflict. That is not unreasonable, but it does beg the question of who may be in a position to take that role.
>
> **Senator BIRMINGHAM:** So hypothetically, for example, the former Health Minister and Attorney-General, Nicola Roxon, when she leaves the parliament, could well be the PIMA if the government so chooses. There is nothing in this act that would say that she could not do it as a former Labor minister, yet she would tick the very basic qualification criteria.
>
> **Ms Hambly:** I am sure that she would.[13]

The Coalition believes that the process of appointing the PIMA is open to gross political manipulation and may result in a highly partisan individual being the sole arbiter on content regulation and media industry structure. Even more alarmingly, there is no recourse to question or review the decisions of the PIMA.

News Limited Chief Executive Officer, Mr Kim Williams effectively summarises this situation, stating:

> … the government is proposing to appoint a single part time member who will be assisted by a department with no expertise in adjudicating and enforcing the law, who will have wide powers and discretion, given key terms in the bills are wholly undefined, who will not have to follow long-established law or principle in relation to the onus of proof, who can seemingly make decisions retrospective and whose decisions cannot be appealed. This is a modern-day star chamber—no more, no less.[14]

FOXTEL Chief Executive Officer Mr Richard Freudentein made clear the Minister's potential for influence over the PIMA stating:

> The PIMA is appointed for a period of up to five years, but appointments could be for a shorter time, maybe even a year, with the threat, actual or implied, of reappointment being contingent on achieving certain outcomes.[15]

Such a process is completely lacking and demonstrates a belief that government should have the right to interfere and determine in an unfettered manner the business decisions on media organisations. The Coalition strongly rejects the creation of such an environment.

The Coalition also notes that the PIMA is apparently to be a part-time appointee, reliant on administrative support from the Department of Broadband, Communications

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13 Mr Greg Hywood and Ms Gail Hambly, Fairfax Media, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 5.

14 Mr Kim Williams, News Limited, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 28.

15 Mr Richard Freudenstein, FOXTEL, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 51.

and the Digital Economy. It is highly irregular for an allegedly independent statutory office holder to rely on a government department in this way and adds to the already high risk that the independence and impartiality of this process is compromised by other government policies or opinions.

The PIMA as a panel

There has been commentary from certain parliamentarians suggesting that it would be preferable for the PIMA to be a panel rather than be constituted as an individual.

This neglects several serious flaws in the approach to the legislation as a whole. Whilst Coalition Senators reject the overall need and premise of this legislation, we nonetheless note that numerous witnesses such as Dr Margaret Simons, who advocates for media legislation, highlighted wider concerns than just the appointment of a one-man band.

Dr Margaret Simons states that:

> In Section 7(3) of the News Media (Self Regulation) Bill, the PIMA is given dangerously wide discretion in deciding whether a news media self regulation body meets standards. The long list of eligibility requirements to which the PIMA must "have regard" include amorphous criteria such as "community standards" and "other matters relating to the professional conduct of journalism". The PIMA must "have regard to" the "extent to which" the body meets these criteria.[16]
>
> The application of “community standards” in this context is wrong in principle. Journalists, in the course of their work, do many things in the public interest that violate community norms of behaviour. The public interest would be severely harmed, and the role of the media dangerously inhibited, if they were to be prevented from acting in ways that might violate community standards.[17]
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> Section 8 of The Public Interest Media Advocate Bill states that the PIMA is to be appointed by the Minister. Given the importance of this appointment to issues of freedom of speech, this is an inadequate process and at odds with the requirement for the PIMA to act independently of executive government.[18]

What is the public interest?

The PIMA will be empowered to assess any proposed change to the structure of media ownership against the public interest.

It is therefore bewildering that the 'public interest' is so ill-defined.

As News Limited Chief Executive Officer, Mr Kim Williams observes:

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16 Dr Margaret Simons, *Submission 4*, p. 2.

17 Dr Margaret Simons, *Submission 4*, p. 3.

18 Dr Margaret Simons, *Submission 4*, p. 4.

> The public interest is as long as a piece of string, Senator. I think the public interest is often used as a term which means many things to many different people; it is in the eye of the beholder.[19]

Mr Williams also notes in regards to the legislation:

> It would be interesting, Senator, to find a definition of the public interest contained within the bills before you. There is no such definition.[20]

The Coalition submits that Paul Howes and Pauline Hanson are likely to have significantly divergent views on what the 'public interest' entails. Under the proposed legislation, either one could be appointed PIMA and would be free, under the provisions of this Bill, to bring with them and apply their own definition of the public interest.

Such vague definitions of key concepts under this legislation give little comfort to stakeholders that the PIMA will be capable of operating in a fair, transparent, impartial and predictable manner.

Disclosure of information to the Minister

Curious provisions in these reforms allow for the PIMA to disclose confidential information obtained in the course of their work about media organisations to the Minister.

News Limited is concerned that:

> If media organisations seek approval of control transactions they will no doubt have to provide detailed information to the PIMA. They must do so in circumstances where the PIMA may share this information with the Minister.[21]

No justification for these provisions has been provided nor is any rationale evident apart from a general consistency with the Minister's approach to accumulating power over the media for his own ends.

News media regulation

Declaration of self-regulation bodies

The News Media (self-regulation) Bill 2013 requires an existing self-regulation body to submit itself for assessment and approval to the PIMA. The PIMA is required to assess the existing body against eligibility criteria including complaints handling processes as well as standards for members relating to privacy, accuracy and fairness.

If the PIMA deems the body compliant it will declare it a 'news media self-regulation body.' News media organisations will only continue to qualify for journalism

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19 Mr Kim Williams, News Limited, *Proof Committee Hansard,* Canberra, 18 March 2013, p. 29.

20 Mr Kim Williams, News Limited, *Proof Committee Hansard,* Canberra, 18 March 2013, p. 28.

21 Mr Kim Williams, News Limited, Letter to Senator Conroy, 18 March 2013, Attachment A, p. 2.

exemptions from the Privacy Act if they are a member of a declared news media self-regulation body.

This is an extraordinary intervention in the existing self-regulation system which directly involves government assessment and potentially intervention of media standards. Given it is virtually impossible for a journalist to operate without the exemptions from the Privacy Act, these reforms end the notion of self-regulation by the media and create a situation of mandatory, government sanctioned regulation.

As News Limited states:

> The introduction of the Public Interest Media Advocate and its ability to declare and revoke declarations of self-regulation bodies is fundamentally inconsistent with the free press.[22]

The PIMA's ability to revoke approvals of self-regulatory bodies poses significant risks for members of self-regulatory bodies.

The conditions under which the PIMA can revoke approval are ill-defined and give the PIMA wide scope to interpret conditions as they see fit. Conditions include 'a significant change in relevant circumstances' and 'a change in relevant community standards'.

News Limited states that under the legislation a revocation of approval may result in no self-regulatory body being accredited at a particular point in time which would:

> …result in all media organisations losing their Privacy Act exemptions through no fault or action of theirs.[23]

The Committee heard from virtually all witnesses that Privacy Act exemptions are essential to the effective operation of journalists. Loss of exemptions across an entire company or companies, while a remote possibility, would cripple the media industry and would make journalism as we know it unviable. As Greg Hywood stated:

> Under the legislation, unless you were accredited, you would not have an exemption under the Privacy Act, which means that you could not gather information about people without their consent. So that is a nuclear option because it would basically shut down a predominantly news-gathering organisation—and that is what we do.[24]

28 June deadline

The Bill requires that existing news media self-regulating bodies secure declaration from the PIMA by June 28. If at this time no such body has been approved, the journalism provisions of the Privacy Act cease to apply, creating an arbitrary and unnecessary deadline to secure approval.

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22 Mr Kim Williams, News Limited, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 27.

23 Mr Kim Williams, News Limited, Letter to Senator Conroy, 18 March 2013, Attachment A, p. 1.

24 Mr Greg Hywood, Fairfax Media, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 4.

Under extensive questioning, the Department argued that the PIMA would not be detailing what a news media self-regulation body would specifically have to contain in their code, but would instead either approve or reject it. The Department conceded that on the judgement of the PIMA it could be rejected multiple times, with no alternative proposed, leaving the body to have to guess how it could become compliant before losing the Privacy Act exemptions of it members.

This deadline, with its unjustifiable threat to journalists, creates undue pressure on media bodies to cede to the PIMA's wishes, or indeed perceived wishes, as they rush to meet this deadline.

In addition, to introduce such a dramatic change the regulation of the media just months before a federal election would appear to be interference in the democratic process with consequent diminishing capacity of the media to provide frank and fearless commentary and critique of not only the political process and policy but politicians themselves.

Control over news media

The extraordinary powers of the PIMA to suspend publications opens the possibility of a potentially outrageous neutering of critical media content.

As Network Ten alarmingly notes:

> There is no obligation on the PIMA to be independent, impartial or transparent in decision making.[25]

The PIMA will not only be empowered to assess and accredit self-regulation bodies, but also asses their compliance with unidentified community standards and the effectiveness of complaints handling arrangements.

Dual regulation role

Several witnesses took issue with the dual regulatory role held by the proposed PIMA.

News Limited stated:

> The PIMA's dual role is inappropriate. The PIMA is both the body that approves or disapproves control transactions in the media and also the body that declares news media self-regulation bodies. The same person who is to be determiner of media diversity and ownership is also the same person who oversees the daily reporting standards for journalists.[26]

News Limited further outlines the danger of such a dual regulatory approach:

> The PIMA should not, even hypothetically, be in a position to use issues arising in one of those areas to influence policies and compliance in another.[27]

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25 Network Ten, *Submission 3*, p. 7.

26 Mr Kim Williams, News Limited, Letter to Senator Conroy, 18 March 2013, Attachment A, p. 1.

27 Mr Kim Williams, News Limited, Letter to Senator Conroy, 18 March 2013, Attachment A, p. 1.

This, however, is a very real concern considering the lack of detail and direction provided for the PIMA on their role by the legislation and the fact that, as this report highlighted above:

> There is no obligation on the PIMA to be independent, impartial or transparent in decision making.[28]

Media diversity

Public interest test of media ownership

Under these reforms, the PIMA is required to assess then approve or reject transactions pertaining to the control of a media organisation.

Media mergers and control transactions are in many cases already reviewed by one or more of the Foreign Investment Review Board, Australian Competition and Consumer Commission and the Australian Communications and Media Authority.

FOXTEL Chief Executive Officer Mr Richard Freudenstein relayed to the Committee that:

> The ACCC has adequate powers to maintain competition and diversity in the media. The ACCC has said in its own Media Merger Guidelines that, and I quote: 'The ACCC will also consider whether a merged media business could exercise market power by reducing the quality of the content it provides consumers which could include reducing the diversity of the content it provides.[29]

The Coalition notes that in recent times, in an act that demonstrates the falsehoods peddled by these who claim current laws lack teeth; the ACCC rejected an application from Seven West Media. FOXTEL Chief Executive Officer Mr Richard Freudenstein told the Committee:

> You may also be aware that Seven West Media recently applied to the ACCC to be able to buy a share of FOXTEL and the ACCC indicated that that would not be possible.[30]

An additional regulatory hurdle to a media transaction appears excessive in light of the failure of the Minister to demonstrate any current lessening of diversity nor any need for further regulation.

News Limited highlights that the tests to be applied by the PIMA appear to replicate, but in vague terms, the existing diversity tests applied by current review processes:

> It is unclear how the diversity test will overlap or be distinct from the substantial lessening of competition test considered by the ACCC…[31]

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28 Network Ten, *Submission 3*, p. 7.

29 Mr Richard Freudenstein, FOXTEL, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 50.

30 Mr Richard Freudenstein, FOXTEL, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 52.

News Limited Chief Executive Officer Mr Kim Williams highlights the fundamental danger of these proposals:

> Senator Conroy's public interest test is really a political interest test. The PIMA will decide whether media mergers and acquisitions of national significance cause no substantial lessening of diversity of registered news voices, but we have no definition of what diversity is. It would be at the whim of this government-appointed PIMA.[32]

There are no guidelines on the process outline mergers and acquisitions to guide the PIMA and provide information for those businesses contemplating a merger or acquisition. This type of information is clear in both the FIRB with criteria on public interest test and the ACCC in their substantial lessening of competition test.

Reversal of the onus of proof

The Convergence Review clearly states the regulator should bear the onus of proof in determining a reduction in media diversity:

> The onus should be on the regulator to demonstrate that the outcomes of the proposed transaction is not in the public interest.[33]

This is of course consistent with normal legal practice and community expectation of regulation by government, yet it is proposed that the PIMA not bear the onus to prove a transaction reduces media diversity, but that the media organisation party to the transaction must prove that it does not reduce diversity.

As News Limited Chief Executive Officer Mr Kim Williams highlighted, there are additional challenges in proving a negative:

> What is of particular concern and contradicts the government's own convergence review is that it is now incumbent upon the applicant to satisfy the PIMA that there is not a lessening of diversity. This deliberate reversal of onus of proof is unworkable and the convergence review explicitly recommended against it. Clearly proving a negative is virtually impossible and logically flawed at law. It is the opposite approach adopted by the ACCC, for example, on mergers and acquisitions.[34]

Similarly, FOXTEL Chief Executive Officer Mr Richard Freudenstein noted:

> The challenge with the onus of proof is that it is very hard to prove a negative, to disprove something. It is a very difficult onus of proof to have

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31 Mr Kim Williams, News Limited, Letter to Senator Conroy, 18 March 2013, Attachment A, p. 8.

32 Mr Kim Williams, News Limited statement on the Government's proposed media law changes, 14 March 2013, p. 2, available at: http://resources.news.com.au/files/2013/03/15/1226597/919255-aus-media-williams-letter-file.pdf (accessed 20 March 2013).

33 *Convergence Review: Final Report*, p. 24, available at: http://www.dbcde.gov.au/__data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf (accessed 20 March 2013).

34 Mr Kim Williams, News Limited, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 27.

> it that way around. So we think there is a great deal of uncertainty in the legislation.[35]

Especially germane to this highly unusual reversal of proof is the fact that, as News Limited Chief Executive Officer Mr Kim Williams states:

> The Bill contains no guidance for the applicant as to what factors the PIMA will take into account when considering the application.[36]

Requiring media organisations to disprove the lessening of diversity without providing a definition of diversity, let alone metrics against which diversity is judged, is an extraordinary request of which one can only conclude a design to ensure all requests fail.

Uncertain time periods for decisions

The PIMA is required to deliver a decision on the review of a control transaction within 90 days. However, if it requests further information, which it can do within 30 days of receiving an application, the clock starts again. This allows the PIMA to take 120 days or more before a decision is due.

There is, however, no actual obligation on the PIMA to render a decision in this time period – simply an obligation to use best endeavours to do so. Such an open-ended timeframe presents clear risks to the negotiation and conduct of potential control transactions.

Lack of merits review

One of the most egregious features of the proposed PIMA is the complete lack of any recourse to internal or administrative review or complaint against decisions.

The aforementioned lack of detail regarding the PIMA's tests creates a murky situation where an applicant has no idea what criteria they are to be assessed against when drafting their application and no ability to seek recourse if the application is rejected. It is also inconsistent with the approach of the ACCC with respect to decisions made on mergers and acquisitions under the Competition and Consumer Act.

This is an untenable situation and, as News Limited states:

> It is concerning that the complexity and uncertainty of the process is being used as a reason why the decisions of the PIMA should not be subject to review, particularly where the factors to be considered and the basis for making of the decision are not specified in the Diversity Bill.[37]

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35 Mr Richard Freudenstein, FOXTEL, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 54.

36 Mr Kim Williams, News Limited, Letter to Senator Conroy, 18 March 2013, Attachment A, p. 3.

37 Mr Kim Williams, News Limited, Letter to Senator Conroy, 18 March 2013, Attachment A, p. 3.

It is hard to fathom that the Government is proposing that an individual it appoints at its own whim should have complete control over the approval of media transactions and will assess such transactions against mystery tests which will be unknown to applicants and will provide no normal recourse to question the decision.

Impacts on restructures and start-ups

The Coalition is very concerned that the PIMA may actually stifle new media voices by creating an additional regulatory burden in setting up a new publication. News Limited states that:

> In what is an active disincentive for innovation, publishers may also need to obtain the PIMA's approval if they want to start a new publication which is likely to be popular. A bill that potentially imposes a criminal offence on a failure by an existing Australian news business to get approval for an increase in the number of voices in the market has to be seriously flawed.[38]

The proposed regulations do not only catch new media voices, but have the potential to interfere in the operation of existing media organisations. News Limited offers itself as an example, stating:

> …the PIMA's powers are so vast that companies will have to seek its approval for internal restructures, even if they do not cause a change in the number of voices. For instance, our recent organisation and merger of divisions and changes at news.com.au would likely have been caught by this provision.[39]

Such overt and undue interference in the operation of news media organisations is an unacceptable infringement on media freedoms and should be condemned.

Applicability to online services

Under the News Media Diversity Bill an associated online service – such as, a website or app - is required to be registered and approved if it is associated with a news media outlet.

News Limited highlights this folly in suggesting that this requirement for registration and approval could have ludicrous consequences, such as if:

> The Australian wants to make available on short notice, a smartphone/tablet app which would update Australian relatives of people caught in an international crisis or natural disaster on critical developments as they unfold.[40]

Under such a circumstance, the PIMA is required to make a determination on approval within 90 days and following a 28-day public consultation period.

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38 Mr Kim Williams, News Limited, *Proof Committee Hansard,* Canberra, 18 March 2013, p. 27.

39 Mr Kim Williams, News Limited, *Proof Committee Hansard,* Canberra, 18 March 2013, p. 27.

40 Mr Kim Williams, News Limited, Letter to Senator Conroy, 18 March 2013, Attachment A, p. 9.

This is obviously a poorly thought out impost on the free operation of media organisations and may have significant impacts on the ability of news media operators to offer the public timely online news platforms for significant news events.

In the changing and challenging modern media landscape regulatory settings should be doing all possible to encourage innovation and, where necessary, appropriate restructuring rather than imposing additional regulations on such activities.

Australia Network

Clause 27 of the Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013 inserts a new Section 31AA that legislates that the Australia Network will remain with the Australian Broadcasting Corporation in perpetuity with no possibility of the service being put to tender again.

While the Coalition understands the deep embarrassment felt by the Government and particularly the Communications Minister, Senator Conroy, over the handling of the corrupted Australia Network tender process[41], the Coalition believes it is poor public policy to lock up this contract with the ABC.

With the ABC mandated as the only broadcaster able to undertake the broadcast of Australia Network services, if questions arise in the future over the level of funding or the performance of the ABC in regards to the Network, ABC Director Legal Mr Robert Simpson, confirms that the ABC can effectively hold the government of the day to ransom:

> **Senator BIRMINGHAM:** Presumably, the only alternative available to government would be simply to not have, and not fund, an international network.
>
> **Mr Simpson:** Under our charter we are required to provide international broadcasting services, so I am not sure how that would work out in practice.
>
> **Senator BIRMINGHAM:** But, in terms of the operation of the Australia Network, if the government of the day were dissatisfied with the ABC's approach to it, they would have no option but to either go with the ABC or simply not have an Australia Network service.
>
> **Mr Simpson:** Yes, I think that is correct.[42]

This provision amounts to the Government giving away significant leverage over the delivery of the Australia Network. With the ABC guaranteed the contract and associated funding in perpetuity, there is no incentive for the ABC to ensure it meets the Government's requirements and expectations for the delivery of the service.

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41 Australian National Audit Office, *Annual Report No. 29 2011–12: Administration of the Australia Network Tender Process*, available at: http://www.anao.gov.au/~/media/Uploads/Audit%20Reports/2011%2012/25790284693869861286302175032753286172387651497395473208567902387.pdf (accessed 20 March 2013).

42 Mr Robert Simpson, Australian Broadcasting Corporation, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 11.

SBS and advertising

The Coalition is supportive of measures allowing SBS to generate revenue in an appropriate manner, including through advertisements and sponsorship announcements on its digital media services, but notes the hypocrisy of the Communications Minister, given his past strident opposition to advertising measures properly implemented by SBS in accordance with the SBS Act.

The SBS Board in 2006 approved a new program break structure, allowing for limited program promotion and advertising within programs within a legislated cap of five minutes of advertising per hour.[43]

Senator Conroy, then Shadow Minister for Communications and Information Technology, used Senate Estimates hearings to argue that advertising during such advertising was not in accordance with the SBS Act and/or the intent of Parliament.

> Do you seriously believe that the SBS's interpretation is consistent with the intent of parliament? … It just seems to me that with the way the act was written – and I have spoken to some of the people who were involved in drafting it – it was not open slather. Clearly, it does not say: 'Just have ads wherever you want;' it says: 'You can have ads in only a couple of places,' and yet, as you have testified, there is now open slather in every single program. That just seems to me to be inconsistent with the intent of the limits that the legislation attempted to set. You have now defined those limits as being unlimited.[44]

Coalition Senators believe that, if Senator Conroy sincerely held these views and had the courage of his convictions, he would have sought to amend the act to prevent the advertising he found so offensive, let alone specifying in this bill, as he has, that he now guarantees similar advertising be allowed on digital media services.

Comments by the Parliamentary Joint Committee on Human Rights

The Labor-dominated Parliamentary Joint Committee on Human Rights, chaired by former Speaker Harry Jenkins, has delivered a damning report into these bills, which is particularly critical or focuses on the need for additional information in the following sections:

> 1.31—the committee seeks further clarification of the standards to be applied in granting or refusing approval for a change of control of certain news media organisations.
>
> 1.49—expresses concerns that the standards which the PIMA is to apply in the determination of an application for approval of a transaction are too broad and general and may in fact lead to being insufficiently precise for the purposes of satisfying article 19(3) of the ICCPR.

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43 Special Broadcasting Service Corporation, Media release, 1 June 2006, available at: http://www.media.sbs.com.au/sbscorporate/documents/48162006__ad_breaks_1_june.doc (accessed 20 March 2013).

44 Senator Stephen Conroy, Supplementary Budget Estimates Hansard, 30 October 2006, p. ECITA 11.

1.50—argues there is insufficient guidance regarding the standards set out in the bill on the basis of which the PIMA will grant or refuse approval in relation to a transaction provide the PIMA or persons affected.

1.51—proposes to write to the Minister for Broadband, Communications and the Digital Economy to seek clarification of the standards applied by the PIMA in determining applications.

1.52–1.56—concerns that the bill does not provide for any right of appeal or for any review on the merits of the decision of the PIMA under proposed new subsection 78BC(2) to refuse to approve a transaction.

1.57–1.58—concerns that the bill creates a number of offences and civil penalty provisions. Explanation is sought from the Minister as to the reasons for the creation of strict liability offences under the proposed new Division 12.

1.59–1.60—concerns for the proposed new section 78FA which provides the PIMA with the power to require a person to produce information and documents where the PIMA believes on reasonable grounds that the person has information or documents that are relevant to the operation of Part 5 A of the bill.

1.61–1.63—concerns that these Bills limit the right to freedom of expression and freedom of association.

1.77—issues that without the benefit of the Privacy Act exemption, it would be difficult if not impossible for many media organisations to carry on their news work.

1.80—removal of the exemption of news media organisations from the Privacy Act 1988 effectively limiting the right to freedom of speech to the journalists.

1.83–1.85—failure to provide the material with the bill it needed to assess whether the limitation on freedom of expression is justified. Neither the explanatory memorandum nor the statement of compatibility demonstrates why these reforms are even necessary.

1.87–1.90—failings in the evidence presented to the Parliament in relation to the bill to provide sufficient information about supposed inadequacies or ineffectiveness of current systems for the regulation of media to allow an informed assessment of the need for and proportionality of the proposed scheme of regulation. Lack of assessment as to whether other less intrusive alternatives to the proposed reforms were considered and if so, why this scheme was chosen over any less intrusive measures.

1.96–1.97—intention to write to the Minister to seek clarification about the combined effect of the proposed new section 78FA of the Broadcasting Services Act 1992 and the proposed power of the PIMA under clause 20 of this bill to disclose information to bodies with prosecution or regulatory enforcement functions.

Coalition Senators agree with the thrust of the committee's findings, as no convincing evidence has been provided as to why this bill and these reforms are even necessary, let alone proportionate to the interventions proposed by the Government. Coalition

Senators hold firm the opinion that these reforms do in fact unnecessarily limit the right to freedom of expression.

The Government's shambolic media reform process

Rushed nature of inquiry

The Coalition condemns the haste with which the legislation was introduced, has been partly inquired into and is set for debate and vote. It may be as little as 7 days between the introduction of these Bills and the conclusion of their deliberation in the Parliament.

As Network Ten highlighted in its submission:

> In 2006 Senator Conroy described the process to implement the last major media reform package as 'debauched' and said 'we should not be surprised when such an approach produces poor policy.'… As is obvious from the above, this current process is far more compressed with far less opportunity for scrutiny and debate than the 2006 process.[45]

Network Ten also provided the Committee with this comparison with the 2006 reform package[46]:

	2006	**2013**
No. of Bills	4	6
No. of days Bills in Parliament	34	7
No. of working days for Committee—inquiry and report	17	2

Seven West Media's submission discusses the impact of the short time frame on the ability to analyse and scrutinise the legislation:

> There has been very little time to either digest or debate the measures proposed in this package. It is disrespectful to both industry stakeholders and the parliament for such a complex and significant package of legislation to have been announced, introduced and considered by Committees and voted on in little more than a one week timeframe…
>
> However, it is our understanding that this Committee is required to deliver an interim report less than a day after conclusion of its public hearings and that the timetable for voting on the legislation in the Senate will not permit any issues identified by this Committee to even be considered.
>
> This process is nothing short of shameful.[47]

45 Network Ten, *Submission 3*, p. 1.

46 Network Ten, *Submission 3*, p. 1.

47 Seven West Media, *Submission 2*, p. 2.

This Committee has been tasked with scrutinising six Bills comprising some 130 pages of new regulation as well as testimony from 22 witnesses in just three working days and with only two days of hearings.

This interim report was required to be submitted just hours after the last witness was called, which limits the ability of Senators to fully analyse evidence given and the impacts of this unprecedented regulatory impost. Hansard transcripts of the committee's deliberations had not even been completed by the time this report had to be tabled.

To say this is an abuse of the Senate is understatement in the extreme.

One can only conclude that the Minister is deliberately seeking to limit scrutiny and debate of these Bills in an effort to subvert due process and the full investigation of the provisions of these Bills.

Lack of details and definitions

These Bills as a package lack clarity in the definitions of what constitutes a media self-regulation body[48], standards required for decision making by the PIMA and the details on what establishes the circumstances of a revocation of declaration.[49] This type of open ended response to vexed policy issues is endemic in the current government.

The majority of submitters were concerned about the lack of detail and uncertainty of definition on notions of fairness and accuracy, community standards and public interest.

Coalition Senators are concerned but not surprised by the lack of detail contained in the Bills, specifically with respect to the definitions of key terms.

Despite our rejection of the need for such regulation, we at least agree with Mr Disney that objective, measurable criteria are more effective when setting standards[50], rather than the 'fairness, accuracy, privacy and community standards' that are referred to in 7(b).[51]

When considering notions of fairness, the PIMA must ensure that the self-regulating body membership standards are 'fair'. Coalition senators believe this is a subjective test and question its appropriateness in this legislation.

Fairfax Media Chief Executive Mr Greg Hywood stated:

> They are not at all defined, and some people's version of fair can be very, very different to what is fair. If we are being fair to somebody who is

48 Broadcasting Legislation Amendment (News Media Diversity) Bill 2013.

49 News Media (Self-regulation) Bill 2013, Division 2.

50 Professor Julian Disney, Australian Press Council, *Proof Committee Hansard*, Canberra, 19 March 2013, p. 30.

51 News Media (Self-regulation) Bill 2013.

> corrupt in their terms, we are not doing our job. We have to be unfair to them in their terms to do our job effectively.

In regards to community standards, again, ambiguity and subjectivity leading to unintended consequences and the potential for government interference abound under such loose and immeasurable indicators.

As there is no agreed measure for 'community standards', ACMA uses surveys and focus groups to ascertain community standards, whilst commercial broadcasters use a combination of ratings, complaints and surveys.

Community standards vary markedly across regions and demographic groupings. The idea that one part time person can develop and determine standards reflective of these various communities to the satisfaction of all is onerous and problematic.

News Limited Chief Executive Officer, Mr Kim Williams noted:

…it is deeply troubling that the legislation lacks any detail on how the PIMA would determine what are relevant circumstances and community standards or what changes would warrant the PIMA's intervention. The only reasonable conclusion is that a single person, the government-appointed PIMA, can remove at their whim the most basic rights on which journalists depend to do their jobs. [52]

While Seven West Media Group Chief of Corporate and Regulatory Affairs Ms Bridget Fair stated:

> I think the point is that the public interest media advocate is able unilaterally to decide what constitutes community standards. They are not outlined anywhere in the legislation.[53]

Dr Margaret Simons states that the community standards are “misguided” as journalists and media sometimes needs to reveal information that harms others which may offend or concern the community, but in no way breech the ethics of professional journalism, rather enhances and supports the very notion of what it means to be a journalist.

The decision to revoke a declaration of an organisation as a self-regulating body, can occur in similarly murky definitions, Clause 10(3) b(i7ii) states:

> **10 Revocation of declaration**
>
> *Discretionary revocation*
>
> (3) If:
>
> (b) the PIMA has reasonable grounds to believe that, since the declaration was made:
>
> (i) there has been a significant change in relevant circumstances; or

52 Mr Kim Williams, News Limited, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 27.

53 Ms Bridget Fair, Fairfax Media, *Proof Committee Hansard*, Canberra, 18 March 2013, p. 20.

(ii) there has been a change in relevant community standards;

the PIMA may, by writing, revoke the declaration.[54]

PIMA can revoke the privilege if there has been a 'significant' change in 'relevant' circumstance. Evidence to the committee was that the PIMA was the sole arbiter of what constituted significant, and relevant events. This leaves too much ambiguity and subjectivity in decision making.

Recommendations

Recommendation 1

Coalition Senators recommend that the Television Licence Fees Amendment Bill 2013 be passed in accordance with arguments made in the majority report.

Recommendation 2

Coalition Senators recommend that the Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013 be passed in accordance with arguments made in the majority report, however call for Clause 27 of the Bill, relating to future funding provisions for international broadcasting service, to be removed.

Recommendation 3

Coalition Senators recommend that the News Media (Self-regulation) Bill 2013, the News Media (Self-regulation) (Consequential Amendments) Bill 2013, the Public Interest Media Advocate Bill 2013 and the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 be opposed on the basis of their encroachment on the freedom of the media, poor design structures, additional regulatory burden and the absence of any compelling case warranting their passage.

Senator Simon Birmingham
Deputy Chair

Senator Bridget McKenzie

Senator Anne Ruston

54 News Media (Self-regulation) Bill 2013, Clause 10.