



COMMONWEALTH OF AUSTRALIA

# Proof Committee Hansard

## SENATE

ENVIRONMENT AND COMMUNICATIONS LEGISLATION  
COMMITTEE

**Broadcasting Legislation Amendment (Convergence Review and Other  
Measures) Bill 2013, News Media (Self-regulation) (Consequential Amendments)  
Bill 2013, News Media (Self-regulation) Bill 2013, Public Interest Media  
Advocate Bill 2013, Television Licence Fees Amendment Bill 2013, Broadcasting  
Legislation Amendment (News Media Diversity) Bill 2013**

(Public)

TUESDAY, 19 MARCH 2013

CANBERRA

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**SENATE**

**ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE**

**Tuesday, 19 March 2013**

**Members in attendance:** Senators Bilyk, Birmingham, Cameron, Ludlam, McKenzie, Ruston, Singh.

**Terms of Reference for the Inquiry:**

To inquire into and report on:

Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, News Media (Self-regulation) (Consequential Amendments) Bill 2013, News Media (Self-regulation) Bill 2013, Public Interest Media Advocate Bill 2013, Television Licence Fees Amendment Bill 2013 and Broadcasting Legislation Amendment (News Media Diversity) Bill 2013.

## WITNESSES

<b>BERG, Mr Chris, Director, Policy, Institute of Public Affairs</b> .....	17
<b>BREHENY, Mr Simon, Director, Legal Rights Project, Institute of Public Affairs</b> .....	17
<b>CASSIDY, Mr Brian, Chief Executive Officer, Australian Competition and Consumer Commission</b> .....	53
<b>DAVIDSON, Mr Bruce, Chief Executive Officer, Australian Associated Press</b> .....	34
<b>DISNEY, Prof. Julian, Chair, Australian Press Council</b> .....	26
<b>FINKELSTEIN, Hon. Roman (Ray), QC, private capacity</b> .....	1
<b>FRASER, Professor Michael, Director, Communications Law Centre, University of Technology, Sydney</b>	38
<b>GILLIES, Mr Tony, Editor in Chief, Australian Associated Press</b> .....	34
<b>GLENN, Mr Richard, Assistant Secretary, Business and Information Law Branch, Attorney-General's Department</b> .....	53
<b>MacRAE, Mr Drew, Federal Policy Officer, Media, Entertainment and Arts Alliance</b> .....	47
<b>McCREADIE, Ms Sue, National Director, Media, Entertainment and Arts Alliance</b> .....	47
<b>McGINTY, Hon. James Andrew, Member, Independent Media Council</b> .....	10
<b>McNEILL, Ms Jennifer, General Manager, Content, Consumer and Citizen Division, Australian Communications and Media Authority</b> .....	53
<b>O'LOUGHLIN, Ms Nerida, Deputy Secretary Broadcasting and Digital Switchover, Department of Broadband, Communications and the Digital Economy</b> .....	53
<b>PELLING, Dr Simon, First Assistant Secretary, Department of Broadband, Communications and the Digital Economy</b> .....	53
<b>RICKETSON, Professor Matthew David, Professor of Journalism, University of Canberra</b> .....	1
<b>SIMONS, Dr Margaret, Private capacity</b> .....	38
<b>WEBB, Ms Rose, Executive General Manager, Mergers &amp; Adjudication Group, Australian Competition and Consumer Commission</b> .....	53
<b>WILDING, Dr Derek, Executive Director, Australian Press Council</b> .....	26

**FINKELSTEIN, Hon. Roman (Ray), QC, private capacity**

**RICKETSON, Professor Matthew David, Professor of Journalism, University of Canberra**

**Committee met at 12:41**

**CHAIR (Senator Cameron):** I declare opening this public hearing of the inquiry of the Senate Standing Committee on Environment and Communications into the Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013, 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 Television Licence Fees Amendment Bill 2013. The committee's proceedings today will follow the program as circulated. These are public proceedings. The committee may also agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. If a witness objects to answering a question, the witness should state the grounds upon which the objection is to be taken and the committee will determine whether it will insist on an answer, having regard to the grounds which are claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request, of course, may also be made at any other time.

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I welcome the Hon. Ray Finkelstein and Professor Matthew Ricketson. Thank you for talking to us today. Do either of you, or both of you, wish to make an opening statement?

**Mr Finkelstein:** Thank you and good afternoon. I suppose I have been invited to appear before this committee so I could be of some assistance in relation to the deliberations on the media bills. Perhaps it might be helpful if I make some introductory observations, but confining myself to only some of the bills. I will begin by making a statement or two about free speech. While there are several rationales for free speech and a free press—different concepts—no-one seriously doubts the critical importance of both freedoms to a properly functioning democratic society. On the other hand, very few people regard either freedom as absolute. Simply by way of example, there have always been laws against obscenity: it is a contempt of both the parliament and the courts. There are laws against defamation. Each of those areas of the law inhibit what would otherwise be absolute free speech.

One important issue for the committee is whether there should be additional regulation of the news media. The background against which this issue might be considered is as follows. Without any doubt, the news media, whether it is via print, broadcasting or online, is a powerful institution. It shapes the nation's policy and can change the course of history. At the same time the news media can cause great harm to individuals, organisations and other groups in society. The media can cause harm when it does not adhere to the basic standards of fair and accurate reporting; hence the need for there to be some oversight of the news media. There is some existing oversight. At present the print media regulates itself through the mechanism of internal codes of conduct plus supervision by the Australian Press Council. Putting that into context, this amounts to an acceptance by the print media that its important role requires, first, the adoption and observance of codes of conduct and, secondly, oversight of their process. As a result of legislation, the broadcast media is regulated through internal codes of conduct approved by ACMA and externally through ACMA itself. On the other hand, the online news media is substantially unregulated.

As regards the Australian Press Council and ACMA, neither form of regulation has worked well. Three of the last four chairpersons of the Australian Press Council have spoken of its failings. The most significant failings I can list: a lack of public awareness of the Press Council, a lack of powers of investigation, a lack of resources, a lack of powers of enforcement, a lack of independence from publishers and slow procedures. Regarding ACMA, it is hamstrung by limited statutory powers of enforcement and slow statutory procedures. So, if oversight is

required—and both the print media and parliament regarding the broadcast media think that it is—then the committee might easily accept that the existing models are inadequate.

In considering whether the current proposal for a media advocate is an appropriate model, one important question is whether that model will restrict press freedom. The media advocate's role is to make sure that there are in place proper codes of conduct based on existing codes in Australia and elsewhere. A proper code will at least require fair and accurate reporting; it may also require the correction of serious error. Hence enforcement of the code of conduct might require an editor or a publisher to publish an apology, a retraction or a correction. In reality, that is the extent of the potential encroachment on a free press.

One other issue that I wanted to make a few observations about is the diversity issue. I do not have very much to say about it other than to remind the committee—if it needs any reminding at all—that economists explain that there is market failure from the concentration of news services. Concentration often results in a lack of diversity in views that are given voice, the possibility that only a handful of people, media owners and journalists, will unduly influence public opinion and the potential for a decline in standards because of the absence of effective competition. Many commentators think that democracy loses out with undue concentration. They are the only opening comments that I wished to make.

**CHAIR:** Thank you, Mr Finkelstein. Professor Ricketson?

**Prof. Ricketson:** Thank you for this invitation to appear before the committee today. The situation, as it is in Australia at present, is that the print news media is among the most concentrated in the developed world, with two media companies accounting for 86 per cent of daily print circulation in Australia. The rise of new communication technologies, such as the internet, mean that today there is a much wider diversity of information and opinion available to citizens. But, if you look at the most widely used news and current affairs websites in Australia, they remain the mainstream news media brands. Further, newspapers remain the engine room for bringing newsworthy information to the general public. Radio and television outlets continue to draw heavily on the original reporting, especially investigative journalism, that is generated by newspapers.

There is a good deal of interesting, important and relevant newsworthy material available outside the mainstream news media, but the difficulty is that it rarely reaches a mass audience. That is one of the many lessons for us of the rise of WikiLeaks, which began in 2006 but which did not actually reach global prominence—and, for some, global infamy—until it began collaborating with major media companies such as the *Guardian* in England, the *New York Times* in the United States and *Der Spiegel* in Germany. It would be a welcome development if the federal government were to spend more time and energy positively promoting diversity of news and current affairs by introducing schemes to assist or support new online start-ups.

Finally, the overwhelming evidence presented to the independent media inquiry was that the system of voluntarily self-regulation for the print media has not worked and will not work unless important changes are put in place. Improvements in the certainty of funding arrangements for the Australian Press Council have been put in place after the delivery of the media inquiry report, but a key weakness of voluntary self-regulation has been exposed again with the withdrawal of the Seven West Media Group from the Press Council and the prospect that some have raised of the further splintering of the members of the council. This would be a retrograde step that would take us back to the beginnings of the Press Council in 1976, when the then John Fairfax newspaper company refused for several years to join the council. Thank you.

**CHAIR:** Thank you, Professor Ricketson. Mr Finkelstein, I am sure that you were an interested observer in some of the evidence yesterday or, if not, you have read some of the press reports over the last few days. Would that be correct?

**Mr Finkelstein:** That is correct, yes.

**CHAIR:** I suppose one of the threshold issues in the arguments we have heard is that the legislation before this inquiry is antidemocratic, will destroy the freedom the press and will lead us to being some sort of authoritarian society where the minister can direct editorial content and the content of the media. Is there anything in that legislation you see that could achieve that purpose?

**Mr Finkelstein:** Whether those allegations are right or wrong depends wholly and exclusively on the legislation and the power that it gives, in particular, to the media advocate. Those powers are—at least just reading the text—quite limited. The media advocate can declare that a body is a self-regulation body only if certain criteria are satisfied. Most of the criteria, I imagine, would be unobjectionable—that it is an effective regulator of its members and that it has a code of conduct that deals with issues which the legislation sets out: privacy, fairness, accuracy and so on. Most of the topics that are dealt with in legislation are covered by existing codes of conduct. So the legislation *prima facie* does nothing new in that regard.

One area which is different, which has the potential for requiring a media owner or an editor to do something which the media owner or editor does not want to do is that a body will only be declared to be an appropriate body—I am picking up the language of clause 7(3)(e) of the bill for news media self-regulation—if it provides for remedial action. One asks: what is remedial action? I suppose there are obvious things that remedial action will include, probably limited to apologies, retractions and corrections. A fourth possibility—but one never knows until one sees the code of conduct which is to be approved by the media advocate—is that there might be a right of reply. They are areas where, in a properly working, functioning code, mistakes made by the media—by and large, serious mistakes: serious factually incorrect reporting and that kind of thing—require rectification and the body which is to be declared as an appropriate body must have appropriate mechanisms. So if you are looking at any encroachment on press freedom as opposed to free speech—because there is a difference between the two—this is the one area where an editor may be told what he or she should publish; that is, the editor should publish an apology, the editor should publish a retraction or the editor should publish a correction.

As I read this legislation, that is the beginning and end of any imposition on a free press. It does not affect free speech, funnily enough, because the editor and the journalist can say what they like. There is no restriction on what they say, how they say it and when they say it. But if they say it wrongly or if they say it badly, the Press Council, or an appropriate body that has Press Council type functions, can say, 'What you said was false and you should correct it,' and there is a mechanism here that would require that to be done.

In a very technical sense, that is a restriction on free press because it restricts the editor's freedom not to publish whatever the editor wants, because many people accept that part of press freedom as opposed to free speech is the editor's freedom to do nothing—that is, to ignore what might be the truth or to ignore facts and that kind of thing. There is that imposition. But I would be very surprised if any serious commentator would regard that as bringing democracy to an end. That is a long answer to a short question.

**CHAIR:** Thank you. I welcome that response. Mr Finkelstein, you do not feel as though you are a pawn to assist in the abolition of democracy and the end of free speech?

**Mr Finkelstein:** This bill does nothing towards ending democracy and it is a relatively minor imposition on press freedom and probably no restriction on free speech. That is just looking at the text.

**CHAIR:** Professor Ricketson, some of the other argument says that there is no need for this to be done and that the Press Council has reformed itself and is working effectively and that this is simply an attack on News Ltd predominantly. Could you outline some of the examples where ordinary Australians have suffered under the existing process with no right of reply, no fairness and no justice at the hands of the media?

**Prof. Ricketson:** Certainly. The first thing I would like to say about that is that the idea that there is no problem with our news media in this country strikes me as an odd one in the sense that comparisons are made with the situation in England where there has been entrenched phone hacking and so on; ergo, if we do not have entrenched phone hacking here in Australia, we therefore have no problem with our news media. We did not find evidence in the inquiry of phone hacking occurring, but we did find problems with the news media in a variety of ways and from a variety of sources—and you referred to a couple of those. Also I would like to say that it strikes me as an odd argument to say that because we in Australia have not suffered the worst scandal of media ethics in living memory, therefore everything is okay with the media in this country. It seems to me that is suggesting that you are prepared to accept journalism that ranges from average to poor to very poor to falling just short of phone hacking, which clearly in my view is not a satisfactory situation.

At annexure (i) of the media inquiry report, one of the things we did—drawing on some academic research that was in process at that time—was detail anonymous comments by people. For example, they had been the victim of rape or somebody in their family had been murdered or something of that nature and then that had been reported on in the news media. We have anonymous comments from them because they were given anonymously in the academic study. I will quote one to begin with. It is someone who was a survivor of rape and was being hounded constantly for an interview. The quote from the person was:

I did have someone from the media call me, but she was just a hungry animal. I found her quite a lovely person but eager to get a story. I was in tears but she didn't care. She was happy to throw my case all over the TV and magazines, and I kept saying, 'No, no, no, you don't understand; you know nothing about me; don't do this.'

In fact, in any case, the story was run. That is one of numerous examples in annexure (i) about that particular issue. We did highlight some others—some of which involved ordinary people and some of which involved more high-profile members of the community—in chapter 11 of the report, and I will just list them briefly. A minister of the Crown: his homosexuality was exposed and he was forced to resign. A second one involved a chief commissioner of police who was the victim of false accusations about his job performance being fed to the news media by a ministerial adviser and, following publication of the articles, he was forced to resign. A third one was

that a woman was wrongly implicated in the deaths of her two children in a house fire. Her grief over her children's deaths was compounded by the intrusive news media coverage. A fourth one was that nude photographs said to be of a female politician contesting a seat in a state election were published with no checking of their veracity. The photographs turned out to be fakes. Finally, a teenage girl was victimised because of her having had sexual relations with a well-known sportsperson. So those are some.

We also, as you may know, looked at not simply one or two opinion polls about the news media but at many opinion polls over many years looking at the way the news media operates from a variety of perspectives. Overwhelmingly, it was found that there was a low level of trust by ordinary Australians in the functioning of the news media in this country.

**CHAIR:** Just before we go to Senator Birmingham, Mr Finkelstein, I have to ask you this question. Your report deals with an incident with Professor McKinnon where he was approached by a media editor and was told that, if they dropped any cases against them, they would double their subscription to the Press Council. I have asked Fairfax, I have asked News Ltd and I have asked Seven West whether any of their editors or employees made that offer to Professor McKinnon. They all deny it and they all say, 'It may have been before our time,' or, 'It's lost in history; this was a long time ago.' It is obviously a very serious charge. Can you elaborate a bit on Professor McKinnon's statement to your inquiry?

**Mr Finkelstein:** I can elaborate, but I cannot add to what he told the inquiry. I did not see it as part of our function, given the time constraints we had, to check out the veracity, to see whether there was an opposing view and that kind of thing. I took it from the way that the professor gave the evidence—and bearing in mind that he was a former chair of the Australian Press Council himself—that he was relaying to the inquiry what had happened. I had no reason to doubt his word. But because it was likely to have occurred such a time ago, it would have been very difficult to track down the personnel. In the end, although it might assume importance today, it was not really of overwhelming importance to me during the course of the inquiry, which is one of the main reasons we did not take the trouble to take that matter any further.

I do want to add one thing to what the professor has said about regulation needed by reason of misconduct in the press. One could get terribly distracted if the object of the exercise were to look for particular press failings. There might be, from the senators' perspective and from the community perspective, a different approach, which is the one that I took in the report. Essentially it is this: there was common ground during the course of the inquiry between me and the newspaper proprietors that they wield enormous power. It struck me as being very odd that any group in society that wields enormous power should be wholly or substantially unregulated. There are no groups in society, or no powerful groups in society, that can come along to governments or anybody—the community—and say, 'We can do what we like when we like, and there is nothing you should do about it.'

That strikes me as being a very surprising approach and one which, in my report, I rejected. I suggested that, even if there were no evidence of press misconduct, misbehaviour or however you might want to characterise it, there was good reason for any powerful institution to be regulated. Part of that process was that the press regard that to be true because they regulate themselves. They developed codes of conduct to regulate how journalists should behave. At the forefront of all of their codes—and there are dozens of them around the country, and they seem to adopt common language throughout the world—is 'fair and accurate reporting'. The journalists regard that as important and the press owners regard that as important, and they set up the Press Council to oversee themselves.

Not only do I take the perspective that powerful groups in society cannot be unregulated; this particular powerful group also regards regulation as important. But the difference or the issue is whether that regulation should be wholly self-regulation or whether there should be some additional regulation—in this case to make the self-regulation work. That is really, as I see it, the key question. I would raise that as a central issue, whether or not there was a catalogue of misbehaviour, misconduct or breaches. Codes and effective codes and disciplines by press councils that are effective act on journalists and act on media owners in a way that society expects—that is, they will do their job as best they can in accordance with quite noble sentiments in the various codes of conduct, and I do not know why the public should expect any less.

**CHAIR:** Mr Finkelstein and Professor Ricketson, I noticed that you read from a prepared opening statement. Is that in a form that could be tabled?

**Mr Finkelstein:** With one correction; I have 'four out of five' instead of 'three out of four'. But subject to that, yes.

**Prof. Ricketson:** Similarly.

**CHAIR:** It would be handy if you could table those documents; thank you.



**Senator BIRMINGHAM:** Thank you both for your time today. Mr Finkelstein, perhaps I can pick up where you finished. Are you telling the committee that your opinion is that, even if there were no demonstrable issues in the media sector or, indeed, in any other sector, of any influence or power, there should still be regulation to govern it in some way, shape or form?

**Mr Finkelstein:** If there were absolutely none, I probably would not say that, because then the answer would be that there is no need and you would have to investigate why there was no need. So if there was an absolutely clean slate and there was never any misreporting, false reporting or anything of that order, I suppose that you could say that there does not need to be any regulation. If, however, that were the position—just assume it to be the case; it is not true but assume it were true—one answer might be because the journalists association, the union and the newspaper proprietors had put in codes of conduct because they understand that there ought to be some rules against which standards of journalists should be judged. I do not know that we have had in our world—or at least in any democratic world with which I am familiar—journalists operating under no rules whatsoever anywhere.

**Senator BIRMINGHAM:** I suspect there has been an evolution of industry rules and self-government rules and, absolutely, journalists' codes of ethics and so on that obviously have been adhered to but, importantly, set by the profession themselves, rather than by governments of the day

**Mr Finkelstein:** Correct.

**Senator BIRMINGHAM:** So having gone through 113 years of federation, why does Australia now suddenly need to start regulating print media when we seem to have survived quite happily for the previous 113 years with a robust system where the press criticise each other, where politicians criticise the press, where everybody is free to have their view on these matters and where, indeed, the industry has responded in that time with advances in terms of their own self-regulatory conduct?

**Mr Finkelstein:** That is a fair question. One of the reasons that I reached the conclusion in my report that there ought be additional regulation was that those who were asked to regulate the press, the people who ran the Press Council, including the current chair of the Press Council, all bar one, said that the regulation was defective. I took them at their word. They explained why it was defective and I believed them. Each of them said there was a need for improvement. I accepted their evidence.

I thought that it would be almost flying in the face of common sense if I said to the three of the four former chairpersons of the Press Council, 'I know you think the system doesn't work but I don't care.' They suggested improvements. I bought some and suggested others which they might not have agreed with. I could not see what merit there was in a system of regulation which the participants said did not work.

**Senator BIRMINGHAM:** Do you believe the changes that have been made to the operation of the Press Council in recent times are an improvement?

**Mr Finkelstein:** I cannot answer that question because I do not know in detail what the changes are. Professor Disney—

**Senator BIRMINGHAM:** Surely, Mr Finkelstein, you have a fairly strong interest in this area, now having authored this report. You must have had a chance to have had a look at some of them.

**Mr Finkelstein:** You should not assume that, Senator. I have a very strong interest but I do not spend my time keeping up to date with reforms in the media. What I do know is that Professor Disney outlined in some detail the kinds of changes he intended to make and, if I may say so, with respect to Professor Disney, those changes were all, I think, overdue and likely to improve the position.

**Senator BIRMINGHAM:** So if those changes have been made, it is likely we have a better Press Council today than we had a few years ago?

**Mr Finkelstein:** I think that is true.

**Senator BIRMINGHAM:** Why do we then not enter a period where we should give that model a go? Why do we need to step beyond the self-regulatory approach into a world of government intervention?

**Mr Finkelstein:** There are two reasons for that. First of all, the way that I approached the problem was that I did not confine myself just to the Press Council and its jurisdiction, because, as everybody explained to me in a way that I think I came to understand, the world is a different place now from the time when the Press Council first began its oversight of the print media. Now we have journalists who work for a newspaper online. We have people who are news commentators on television who are online. There are three basic platforms for news broadcasting. One is substantially unregulated. That is the online media. It is a growing segment of the provision of news services.

So I thought that there would be real sense in three basic propositions. The first is that there should be single oversight of the news. It didn't make any difference to me whether it was platform A or platform B or platform C. I still think that, no matter what the commentators might say or what the commentary might be, because one thing that is always bad for any system is inconsistent decision making. If you have one set of oversight for the same conduct, you don't have inconsistent decision making, you don't have inconsistent rules, except to the extent that different rules are necessary to accommodate a different platform. For example, you might have a take-down requirement for the Internet but you cannot have a take-down requirement for a newspaper. That was one factor.

That was really two propositions. That is to say, there should be one set of rules for everybody and it should be administered by one group so that there would be complete consistency in the application of the standards.

**Senator BIRMINGHAM:** I want to come back to some of the reasons why we need these reforms. Given the answer you have just given—one rule for everybody—if these laws are passed, we will have different rules, won't we, for radio and television media outlets, a different rule for print and online and different rules for online outlets, depending on their size? They can be very significant. They can be pretty large and not be captured by these. They, of course, are often the growing segments while the traditional newspapers are seeing declining market shares. How do these reforms actually meet with your objective of one rule for everybody?

**Mr Finkelstein:** I looked, during the inquiry, at dozens and dozens of codes of conduct—most of the codes that had been adopted by Australian media—compared them with codes of conduct adopted by English media, compared them with codes of conduct adopted by European and eastern European media, and spent some time reading some books on codes of conduct. I found common themes throughout the world or at least that part of the world in which I looked, which was eastern and western Europe and basic common-law democratic countries.

I do not accept that in a proper set of rules, whether developed for print or for online—when I say 'rules', I mean codes of conduct, which is what this legislation is about—there are likely to be great variances between the codes. There has not been. When they have been developed in South Africa, New Zealand, Australia, England, there are minimal variances. So the premise on which you operate, Senator, I do not think is likely to come about—

**Senator BIRMINGHAM:** But the regulators are completely different constructs that are proposed here—ACMA versus the PIMA, a well-established, a well-resourced regulator where a group decision will be made, in a sense, versus a solitary individual as regulator.

**Mr Finkelstein:** I do not accept that that is how the legislation works. I am sorry, Senator, that is not how I understand the legislation works.

**Senator BIRMINGHAM:** We will come to that.

**Mr Finkelstein:** Sorry.

**Senator BIRMINGHAM:** Time is tight. 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; in the case of others, no. One of the issues with the Press Council—there is another annexure dealing with complaints to the Press Council—is that they are not always dealt with to the satisfaction of the complainant.

**Senator BIRMINGHAM:** Generally speaking, complainants will not be satisfied unless their complaint is upheld. Did you do any analysis of the merits of those complaints?

**Prof. Ricketson:** The ones we were looking at?

**Senator BIRMINGHAM:** Yes.

**Prof. Ricketson:** Yes. We looked at those and we thought they were all prima facie complaints. As Mr Finkelstein has said, we didn't follow these sorts of matters through to the nth degree because that was not the purpose of the inquiry, but we were satisfied prima facie that there appeared to have been a problem in the way these matters were reported in the news media. And that was enough for us at that stage.

**Senator BIRMINGHAM:** So there was no particular checking with the media outlets in question?

**Prof. Ricketson:** No.

**Senator BIRMINGHAM:** I am being called to ask my last question here. Professor Finkelstein, can I go to your report, particularly paragraphs 2.92 and 2.93—

**Mr Finkelstein:** Can I do this from memory or am I allowed to look at it?

**Senator BIRMINGHAM:** You can have a look and I will read at the same time.

**CHAIR:** It is not a test.

**Senator BIRMINGHAM:** That is right.

It could not be denied that whatever mechanism is chosen to ensure accountability speech will be restricted. In a sense, that is the purpose of the mechanism.

The mechanism proposed by the government today is a mechanism to try to, allegedly, ensure some level of accountability. Do you stand by that statement, that that means that speech will, to some extent, be restricted?

**Mr Finkelstein:** I have explained earlier that the editor's freedom not to publish is affected if you have a code of conduct which has remedial provisions in it. That's a necessary consequence. Does it restrict free speech in the broad sense? No, because the editor can still say what he wants. She can say what she wants. They can say whatever they want.

**Senator BIRMINGHAM:** What about at the other end of the equation where a journalist's exemption under the Privacy Act is removed? Does that restrict their capacity to do their job, compared with a fellow journalist?

**Mr Finkelstein:** Yes. I think that's the object of removing the restriction, the method by which what is at the moment voluntary—that is, 'I'll be a member of a press council and pay my subscription fees if I feel like it and not otherwise'—has added what I think the English would call some 'carrot and stick'. I would say that too. It is intended to impose a reason why an organisation will be part of a press council group. As I read the draft bill, that is its purpose.

**CHAIR:** Thank you.

**Senator BIRMINGHAM:** If time permits, I have others.

**CHAIR:** Can I just indicate that I notice that Mr McGinty has arrived. His time was set down for 1.20. We will need another 10 minutes, I think, with Mr Finkelstein and Professor Ricketson. Senator Ludlam, if that gives you time, go for it.

**Senator LUDLAM:** Thank you. Thanks, gentlemen, for coming in. Apart from Professor Fraser yesterday, you are the only people we have heard from so far who are not representing some kind of commercial interest. With your background in the report, it is important that you are here.

You indicated before that you have had time to review those bills that relate to the work that you did on the press sector last year. Setting aside the broadcasting aspects of the package, how closely does this package of bills that the government has brought forward follow the findings of your report last year?

**Mr Finkelstein:** In my report, I gave two possible approaches to remedy what I thought was a failure in the existing system of press oversight. I had, as one, a statutory body which would, in its structure, mirror the Press Council but would have statutory powers and its membership would not be voluntary.

I had as a fallback, which I said was a second-best option, repairing the Press Council by putting in place mechanisms like taking away statutory protections that exist in favour of the press unless the organisation remained a member or was a member of the Press Council. That was my fallback. I explained why I thought that was not as effective.

The proposed legislation is different again. No doubt there are another two or three or four different ways in which what I think needs to be achieved—that is, some reform of the process—can be achieved.

I just read only a sentence or two of what the legislation was that was enacted in the UK overnight. It is another royal charter company which I had not thought of. I do not think we have had a royal charter company in Australia for a very long time. The possibility escaped me. It is just another way of achieving the same result.

**CHAIR:** That is probably a good thing.

**Mr Finkelstein:** I think so.

**Senator LUDLAM:** The government does appear to have delivered a model—it is before this parliament now—that sits closer to your fallback option in that you have a statutorily recognised regulator. It is recognised by law. Its only sanction, as far as I can tell, is withdrawal of exemptions from existing privacy laws.

**Mr Finkelstein:** None of my models had any sanctions such as fines or damages or anything like that, which the English have picked up. I stayed away from that.

**Senator LUDLAM:** I am more interested in how close the Australian government has come in what it has drafted to your proposals. It sounds like they are within the ballpark of your fallback option.

**Mr Finkelstein:** Yes, closer to my fallback option than my primary option.

**Senator LUDLAM:** Maybe it is a bit unfair to put you on the spot. Is the model which you described as second best, or whatever your language was, better than nothing—what the government is putting forward to give some teeth to the Press Council?

**Mr Finkelstein:** I said in my report that, at least in my view, the 'do nothing' option was not an option. Then I said there are two and that I preferred one of the two. But if there are third models or the UK model, I would still stick to the position I took in my report that 'do nothing' is not an option.

**Senator LUDLAM:** You acknowledged in your answers to the chair earlier that you do not think anything in this package, on your reading of it, poses a fundamental threat to freedom of speech. Where has that come from? One of the most interesting responses, I guess, to the tabling of your report was that it provided a brilliant illumination of how we will not ever get any straight reporting of media reform proposals, which is ironic. It seems to be the environment that we are in.

**Mr Finkelstein:** I had assumed that the reporting of my report was a warning to the parliament of what would come next. That is a layperson's view.

**Senator LUDLAM:** That is exactly what has occurred. Do you have a view on whether the legislation appears to entrench what has already occurred? We are hearing from Mr McGinty shortly. Seven West has effectively established its own body to perform the functions of the Press Council. Do you have a view as to the risk of multiple press councils? Was that something you canvassed in your report?

**Mr Finkelstein:** No, I did not. I canvassed the possibility of people leaving the Australian Press Council. But nobody had suggested the possibility that they would set up their own—although in my report I did discuss notions that exist in some places and from time to time existed in Australia, like a media ombudsman, where a newspaper would have its own person to whom complaints can be brought, who would be delegated the task with some authority to deal with complaints.

**Senator LUDLAM:** That is the situation we have. Do you believe that kind of model could survive in the West, for example—because that is an example that we have to deal with here—without undermining the basic premise of a single national press standards body?

**Mr Finkelstein:** In theory, there is no reason why parallel bodies cannot survive. The question really is whether it is desirable. This legislation assumes that as a possibility and as a matter of logic it can work. You will have the problems of different approaches, maybe different standards—although, as I said earlier, the standards that the newspapers adopt and that the media generally adopt are pretty uniform. You will have differences in implementation. One might take three months, the other one will take three weeks—that kind of thing. But then I have always been a great proponent of competition, and some competition might not be a bad thing.

**Senator LUDLAM:** Competition and self-regulation. It strikes me as—

**Mr Finkelstein:** It is an odd concept.

**Senator LUDLAM:** It is not ideal.

**Mr Finkelstein:** No.

**Senator LUDLAM:** Sorry, that is my view, not yours—I have put words in your mouth. Finally, because we are short of time, I think all three of the key proprietors who spoke yesterday at this hearing implored us, the parliament, to identify the problem we were trying to fix as though the government's proposal is a solution in search of a problem. They begged us to identify it: 'What is the problem here? We cannot see it.' Could either of you spell out what, in your view, the problem is?

**Mr Finkelstein:** To be fair to the media proprietors, I think they put the same propositions to me, saying something like, 'If there is no deficiency which you can identify, why intervene?' I said earlier that I do not accept the general proposition that one of the most powerful institutions in the community should be unregulated. I simply do not accept that. But then that is a political question and my politics on that issue might be different to many other people. The second proposition is that when the press accept some regulation—that is, they set up the Australian Press Council as an oversight body for the print media—it strikes me as being somewhat odd, when it is clear to everybody, or at least objectively clear, that the system did not work, that anybody would say, 'We are very happy with a system of oversight that does not work very well.'

**Senator LUDLAM:** We did hear a bit of that yesterday. I will leave it there.

**CHAIR:** Senator McKenzie, I have tried to give everyone in the coalition a fair go as well. I just cannot take any more. If you have some questions we can put them on notice.

**Senator McKENZIE:** I will—around definitions.

**CHAIR:** Professor Ricketson, Mr Finkelstein—thanks very much for coming here. Did we table those documents?

**Mr Finkelstein:** Yes.

**Prof. Ricketson:** Can I make one correction?

**CHAIR:** Yes, that is fine; thank you. Thank you very much for being here. It has been very helpful.

**McGINTY, Hon. James Andrew, Member, Independent Media Council**

[13:31]

**CHAIR:** I welcome representatives from the Independent Media Council. Thank you for talking to us today. I appreciate your patience. As you could hear, the issues we were discussing with Mr Finkelstein and Professor Ricketson were important issues. Do you wish to make an opening statement?

**Mr McGinty:** If I might, Senator.

**CHAIR:** Certainly.

**Mr McGinty:** There are just four points I would like to address in opening. The first is the formation of the Independent Media Council. It was formed nearly a year ago, in May 2012. It was formed, although I had no role in this, out of concern about the Australian Press Council's relationship with government, especially the likelihood of increased government funding for the Press Council. That was seen as something the organisation was not happy with.

**CHAIR:** What organisation was that?

**Mr McGinty:** Seven West Media. After the three members of the Independent Media Council—that is, Christopher Steytler, Cheryl Edwardes and me—were appointed, we negotiated with Seven West Media a code of conduct, by which publications would be judged, and guidelines for our operation, that I will refer to briefly. They all appear on the website of the organisation, if you want reference to them. In drawing up those particular documents we had input from those people who might be, from time to time, complainants. I refer here to mental health groups, disability groups, Muslim organisations, a range of journalists and media academics.

The second point that I wanted to touch on was the question of independence of the organisation. The initial appointments were all made by Seven West Media. Subsequent appointments will come from a panel of names provided by the Independent Media Council to Seven West Media. The independence lies in the people who are appointed. The chairman is the former president of the Court of Appeal in the Supreme Court of Western Australia and the other two members were both Attorneys-General in Liberal and Labor governments. We made a point in our initial appointment of ensuring that the honorarium which we are paid, which is \$20,000 a year, was modest so that there could be no reliance or dependency related to the financial arrangements between the members. That was quite consciously done. I do make the point that 25 per cent of the complaints that we have dealt with in our nearly a year of operation we have ruled against Seven West Media or the *West Australian* newspaper.

The third point I wanted to touch on was the operation of the Independent Media Council in the time that it has been operating. I want to refer to five points. One of the great advantages of the organisation is its timeliness in determining matters. They are resolved within days, not months. It is my view that an inaccurate or unfair report left to hang around for several months compounds the distress and damage that has been caused by the publication initially. The most recent determination that we made, for instance, concerned an article that appeared in the *West Australian* newspaper on 11 February. We published our determination in response to that complaint on 23 February. That is the sort of timeframe in which we aim to deal with matters. That has not been my experience—and I do not want to be particularly critical of the Press Council—albeit dating back some years, of the expedition with which the Press Council deals with these matters. The Independent Media Council is locally based in Western Australia, which has two advantages. It gives its members an understanding of the local context of the issue that it is dealing with and it also enables the expeditious determination of matters.

Fourthly, I raise procedural fairness. We have a number of procedures, all of which are designed to minimise legal form and to maximise the fairness to somebody who comes before the organisation and complains. We have a readers' editor, who attempts to resolve the matter internally. We then obtain from the newspaper their justification for publishing, which we provide to the complainant and ask them for their comment on that. In appropriate cases if we have a tentative view we advise the complainant of that tentative view and ask them to address that. Finally, any hearing is always done very informally, sitting around a table with much discussion, rather than formal submissions as such. Our determinations are transparent. They are all published in the newspaper on the 'Letters to the Editor' page, although we do have the right to direct that a particular determination be published more prominently, depending upon the subject matter. That has not arisen so far in our consideration. They are also published on our website. We think our publications contain clear guidance for journalists and others.

Finally, on the question of the legislation itself, if I can make some quick points in relation to the mandatory and discretionary requirements of the advocate. This relates to the self-regulatory body. It requires that it be incorporated; we are not incorporated. For my part I cannot see the benefits of incorporation for a body. We seem

to have operated quite well without that incorporation. Secondly, we do not have the power to suspend or expel a member. Thirdly, we do not have the power to order retractions, corrections or apologies. We do, however, have the power to direct the placement of our ruling in relation to any particular complaint. There is also the issue of a complaint direct to the self-regulatory body. Our general modus operandi is to require that if we receive a complaint we will refer it to the readers' editor to attempt to resolve it in appropriate cases—not always. There seems to be a presumption that a complaint ought to be able to be made directly to the self-regulatory body which, while it is allowed, is not necessarily what we would encourage. We do not publish statistics, which is another discretionary requirement. My final point is that there is also the overriding requirement to minimise the number of self-regulatory bodies. They are the issues that arise in respect of the way we have been set up and operate under this new legislation, as I understand it. Thank you.

**CHAIR:** Thanks, Mr McGinty. I got the impression from the evidence from Mr Stokes yesterday that the fundamental issue was cost. He went to some extent yesterday to say that the cost of flying to the east was not something he wanted to impose upon his business in Western Australia. This is a new issue you have raised in relation to a matter of—shall we call it—principle. Are you saying that, if the government were funding the Press Council, Mr Stokes wanted nothing to do with that?

**Mr McGinty:** We were appointed to do a job. The motivation of Seven West Media, as I understood it, and as it was explained to me at the time, had a lot more to do with the relationship between the Press Council and the government, particularly as it related to funding. As I understand it, we are a very economical model. I do not know for sure, but I think our total operating costs would be \$100,000 a year or less. Substantially, three honoraria and a secretarial support service are the costs that are involved, which would be significantly less than what is paid to the Press Council, as I understand it, although I cannot quantify that amount.

**CHAIR:** Would it be possible for you to take this on notice and provide us with some kind of running sheet with what you do compared to the Australian Press Council, so we can judge the differences?

**Mr McGinty:** I think that would be, Senator.

**CHAIR:** If you could take that on notice that would be helpful, thanks.

**Mr McGinty:** Yes. My experience with the Press Council is somewhat dated now. It related to my time when I was involved in politics. I always took the view that in public life you should not take defamation action; that you need to cop it on the chin and you should not really complain. I broke that once and lodged a complaint with the Press Council. So my practical experience with the Press Council which I have referred to obliquely in what I have already said related to my one complaint which I lodged with the Press Council, where I was successful, some six years ago.

**CHAIR:** As a former politician you are used to reading legislation; correct?

**Mr McGinty:** Yes.

**CHAIR:** Can you point out to me where this legislation destroys the democratic fabric of Australia?

**Mr McGinty:** No, I cannot.

**CHAIR:** I did not think you could. It was not a trick question, but basically that is what has been put. So you do not agree with what has been put, do you?

**Mr McGinty:** No. My role here, as I said, is to explain the way in which the Independent Media Council in Western Australia operates and some of the elements of the legislation as it impacts on that. The broader considerations, the broader political considerations that underpin this, are matters for others to look at and consider.

**CHAIR:** This is not a broader political consideration. This is legislation that could eventually encapsulate your organisation.

**Mr McGinty:** Yes.

**CHAIR:** I am simply asking a straightforward question which I think you have answered. You said that the legislation does not destroy the democratic fabric of Australia.

**Mr McGinty:** It would mean that our organisation, as currently structured, the Independent Media Council, could no longer exist. It certainly does that. Naturally, the limit of my input—

**CHAIR:** Where does it do that? Can you point me to that?

**Mr McGinty:** We are not incorporated and, as I understand it, that is a mandatory requirement under the legislation.

**CHAIR:** There would not be a problem with incorporating, would there?

**Mr McGinty:** That is the starting point. It is a question of timing associated with the appointment. There is a very short time frame, if this legislation is passed, which then requires the body to seek, as I broadly understand it, approval from the advocate to continue in operation. There are timing issues which I doubt whether we could comply with.

**CHAIR:** Do you agree with the proposition that has been put that this legislation interferes with freedom of speech and interferes with the right for editorial comment? Can you point me to any areas in the legislation where those two aspects are dealt with?

**Mr McGinty:** I cannot point to that in the legislation. I did not come prepared to address that because I saw those as being—

**CHAIR:** Would you like to take that on notice?

**Mr McGinty:** I am happy to do that, yes.

**Senator LUDLAM:** I am very interested in your contention. I understand, because these standards have just been proposed to be legislated, why you would not necessarily comply, but there is a period in which the IMC would be given leave to seek registration. Do you think it is impossible that that organisation would be able to do so in time?

**Mr McGinty:** My understanding is that it is a question of weeks or at best months. You might be able to correct me on that if my understanding of that is incorrect. Because of the procedures involved in discussing all of that, it would most probably mean, if my understanding of weeks and months is correct, it would be very difficult to comply.

**Senator LUDLAM:** It is brief. That is interesting. Is that simply because you do not think you could incorporate in time or are there other criteria that you would not be able to meet?

**Mr McGinty:** It is more a matter, if the legislation was passed, of then discussing, in the same way that we did initially when we were first formed, the guidelines and the code of conduct, which involved considerable discussion with relevant interest groups. We saw it as part of the validity of our existence that we would need to do that. But if it was a legislative imperative that we do it, I guess we would need to short-circuit some of those desirable processes.

**Senator LUDLAM:** It is useful for us to know that it may be that you would seek accreditation but that the time frames that are in the bill are unreasonable. That is something that we could actually do something about.

**Mr McGinty:** I guess that is the extent of the point that I am making there, yes.

**Senator LUDLAM:** I am presuming that you do not see anything—we have had a bit to say about this. I am actually quite concerned about, for example, what happens if Fairfax does what Seven West has done and what if News does that? You could actually break the Press Council up. You could end up with no national print media standards body, in effect. Do you acknowledge that that is something of a risk if we do not make some kind of legislative changes here?

**Mr McGinty:** I approach this somewhat differently to the way in which you have formulated it to me, Senator. I have taken the view that it is really a question of whether you have an acceptable level of standards which are being enforced by a self-regulatory body. It is a policy consideration for you as to whether a number of self-regulatory bodies would achieve that same objective or not. I do not see the number as being particularly important if you are obtaining a better outcome.

I mentioned before my one experience with the Press Council. The hearing was three months after the offending article was published. It was in Sydney. A joint complainant, who was a hospital patient, withdrew because of the legalistic nature of the proceedings, the requirement and the inconvenience of travelling to Sydney and the prospect of being cross examined by the media outlet. This is somewhat dated knowledge. I do not know whether this is the current method of operation of the Press Council but it certainly was then, and my experience then was quite unsatisfactory, I must say.

**Senator LUDLAM:** I can imagine. I tend to concur. We can hope that those sort of things have been improved. I understand that contention. Nonetheless, I do have a real concern about what would happen if another media organisation did what Seven West did and jumped out of the APC. I understand it has been made a bit more difficult to do. You have a longer lead time but it would still be possible.

**Mr McGinty:** Can I very quickly comment on that?

**Senator LUDLAM:** Yes, of course.



**Mr McGinty:** The point of what I was just saying was that I think the way in which complaints are now dealt with in Western Australia against the *West Australian* or the Seven West Media is better than what it was. If your end result is better in terms of timeliness, quality and things of that nature then I do not see a problem with proliferation if the end result is better. I would rather have proliferation than poor quality outcomes.

**Senator LUDLAM:** I would rather have a high quality outcome with a single regulator, I suppose.

**Mr McGinty:** Sure.

**Senator LUDLAM:** That is the objective.

**CHAIR:** Can I just say, on the issue of 'better', it is not a word that really gives you a lot of enthusiasm, if it is better than rubbish.

**Senator LUDLAM:** I have one case study.

**Mr McGinty:** That might well be right, Senator. Can I make this point. I think timeliness is a key element. That was absent from my experience in dealing with the Press Council six years ago. There was a whole series of other things that I have referred to which I think means—and I will try and use a more objective phrase than 'better'—

**CHAIR:** I think it was—

**Senator LUDLAM:** No, I did not start that one.

**CHAIR:** I will go back to Senator Ludlam. I have got myself into trouble here.

**Senator LUDLAM:** I have a case study that illustrates both the point that you are making and the point that I am seeking to make. It was a complaint made by Environs Kimberley and the Wilderness Society on the reporting by the *West* of the gas hub. You are probably familiar with this one.

**Mr McGinty:** Yes.

**Senator LUDLAM:** To back up your contention, it was handled, as far as I can tell, fairly rapidly—less than three weeks, according to the time line that I have here. With your final adjudication, can I just check: do the three of you form a consensus view or does one of you take carriage of a particular matter?

**Mr McGinty:** We form a consensus view.

**Senator LUDLAM:** The consensus view of the IMC was:

We do not consider that there was any obligation on the part of the newspaper to investigate the accuracy of what was said by the Premier before publishing what had been said by him without comment of its own.

In other words, you said there that you were fine with the *West* printing a demonstrable falsehood without an alternative point of view, without bothering to fact check. I believe that story ran on the front page. That does not give me a great deal of comfort that actually the obligations of editorial fairness are being met.

**Mr McGinty:** We took the view—and I remember that case well; it was fairly recently—that what is said by a Premier, a Prime Minister or, for that matter, a Leader of the Opposition, is in itself newsworthy and of public interest. In this particular case what the Premier of Western Australia said was said without any editorial comment whatsoever, apart from the provision of basic background information to the debate about the James Price Point gas hub.

**Senator LUDLAM:** It did not bother you that it was demonstrably false—that you were later provided with evidence that what the Premier said actually was not true?

**Mr McGinty:** We were not. There was a point of view put to us that what the Premier said was wrong. But with the report itself, no one ever questioned the accuracy that this is exactly what the Premier said.

**Senator LUDLAM:** He was correctly quoted in uttering a complete falsehood.

**Mr McGinty:** If he does, this particular issue is the subject of a continuum of media reports, as you know. It is a matter of great controversy in the west and, for that matter, nationally as well. The complainant had in fact been offered and took up the opportunity of presenting their point of view, with which the Premier would no doubt disagree, in the newspaper a month or two previously. As I recollect it, it was a half-page report putting forward the point of view of the Conservation Council of Western Australia. So it was a continuum of reporting. To us the important issue was that what was done was, without any editorialising, reported as 'the Premier said this.'

That is a matter which I think helps to contribute to the public debate. If the Premier is wrong then others can take him to task over that. When you are talking about someone of that level, reporting accurately what the Premier said was the prime requirement on the media organisation.

**CHAIR:** Senator, if you have another question can you put it on notice? I have to go to Senator Birmingham.

**Senator LUDLAM:** I will put this on notice to you. Could you confirm with a yes or no that you do not have the power to compel the paper to print a retraction or an apology?

**Mr McGinty:** No, we do not.

**Senator LUDLAM:** You can issue a determination and the paper can tell you to get stuffed?

**Mr McGinty:** No. The paper has to publish that determination and we can direct the paper as to where that determination is published. In an appropriately egregious case we might direct that it be published on the front page and the paper would have to comply. But not—

**Senator LUDLAM:** Not the actual apology?

**Mr McGinty:** Not an apology, retraction or correction. We do not have the power to do that.

**Senator BIRMINGHAM:** Just picking up on that, however, Mr McGinty, in your findings you could be making demonstrably clear that your findings are that the paper was wrong and that an apology is warranted?

**Mr McGinty:** Yes.

**Senator BIRMINGHAM:** The paper might reject that, but you can have those statements splashed across the front page if the case warrants it?

**Mr McGinty:** That is exactly correct.

**Senator BIRMINGHAM:** Mr McGinty, again to be clear, if these laws are passed in their current form, your organisation will need to make numerous changes, not just to its construct as a corporation or an unincorporated body at present; it will need to make other changes as well, it would appear, to fit the test of being accredited by the PIMA. Is that correct?

**Mr McGinty:** That is correct.

**Senator BIRMINGHAM:** You outlined in your opening statement that it is not just about getting incorporated; it is also about having to change some of the structures or requirements that exist in the government's legislation.

**Mr McGinty:** And they fit into two categories, Senator. Firstly, the mandatory requirements of this legislation, such as incorporation, we would need to comply with or else we simply would not be eligible to be approved as a self-regulatory body. There are other discretionary matters which the advocate would take into account in determining whether we would be a self-regulatory body. My view is that we should comply with those to the maximum extent. So we would need to review the basis upon which we were set up and some of the very important underlying principles there, yes.

**Senator BIRMINGHAM:** Were you not to be accredited then the journalists of the *West Australian* newspaper would, until such time as you are accredited, lose their exemptions under the Privacy Act?

**Mr McGinty:** Yes.

**Senator BIRMINGHAM:** In terms of how you assess matters, how does the council assess fairness and accuracy?

**Mr McGinty:** We measure it against our published guidelines to the extent that they are an indication. Perhaps I can give you one very quick example of that. One of the cases in which we found against the *West Australian* newspaper is that they published, very prominently, details of a suicide that took place. It was a euthanasia case. The guidelines are quite clear. You do not publish the detailed method of suicide. That was a case where we had a very clear guideline contained in the privacy policy of Seven West Media and Seven West Media broke its own guideline. That is a clear cut case.

With the others we attempt to provide what we can understand to be broadly acceptable community-based or our own subjective opinions on what is fair, what is honest, what is reasonable—those sorts of things—where the guidelines are not explicit, as they were in the case of euthanasia.

**Senator BIRMINGHAM:** Is it possible in your view to actually codify fairness, accuracy or indeed community standards, which is another requirement in the PIMA act, or does it really come down to the subjective judgement of the individuals making those decisions?

**Mr McGinty:** In my view you cannot codify those issues beyond the broad statements of principle. Others might be more expert in this field and maybe they can try. In my view, it is those broad statements of principle that we should use as our yardstick. I would find it very difficult myself to codify them.

**CHAIR:** Senator Birmingham, I am sorry to do this to you. I have this decision here and you did not uphold the complaint.

**Mr McGinty:** This is in the—

**CHAIR:** The euthanasia one, 'end of my pain euthanasia campaign'.

**Senator BIRMINGHAM:** There may have been different complaints—

**CHAIR:** Can you clarify that on notice?

**Mr McGinty:** I can do it very quickly now, Senator. I remember it very well. The complainant raised three issues. One was about the complicity of the journalist being involved with this person who was about to commit suicide and whether there was any obligation on the journalist in respect of her conduct. We did not uphold that part of the complaint. There was another element of the complaint which we did not uphold, but the essential point was of the *West* publishing the details of the suicide. We upheld the complaint in respect of that particular matter.

**Senator BIRMINGHAM:** If a new government regulator is to accredit the operation of the council and determine whether it actually meets requirements of fairness, accuracy and reflection of community standards, is it really the case that that government regulator is going to have to decide whether the members appointed to sit in judgement are appropriate to make those judgements rather than being able to take into consideration any codified outline of exactly what fairness, accuracy or reflection of community standards actually means?

**Mr McGinty:** I think that is a very significant part of it. In the case of the Independent Media Council that I am representing here today, you can also look back over the eight determinations that we have made in our almost year of operation, and perhaps also look at the extent to which the internal processes through the readers' editor have been successful in resolving a significant number of others, and the basis upon which that is done. In a sense there is a bit of case law built up, if I can put it that way, which will give an indication of the approach that we have adopted and whether that is reasonable or not. Otherwise it comes back to the ability of the individuals who are appointed to be able to bring those judgements to bear.

**Senator BIRMINGHAM:** Mr McGinty, at its heart do you believe this type of reform is necessary? From your liaison with complainants and members of the public since the council was established, do you think there is effective consideration of the public interest in the handling of complaints against the media in the west or do you think there is a need for some level of additional intervention?

**Mr McGinty:** If I can go back one step, during my time in political life I was on the receiving end of what I regarded as some very sharp, unethical reporting. The one complaint that I did lodge that I mentioned to Senator Cameron in opening was the one time I let my guard down and actually complained about it. Having been on the receiving end of that it gives you a very good insight into what ethical reporting is and, particularly in a political context, its importance to democracy, as the media being the conduit by which political parties' actions and opinions are disseminated to the broader public and therefore voting intentions are formulated.

Having said that, I think I have a good sense of it. I am very pleased with the way in which the Independent Media Council is operating. I think it is working very well in the way in which it treats complainants and the ultimate results that come through from it. I do not think this legislation will improve the service that is delivered to the public and to journalists in Western Australia. That is my view of the way in which things are operating.

I must say that the *West Australian* newspaper—and its 15 or 20 other subordinate newspaper outlets that are part of this; they are basically the regional newspapers in Western Australia, all part of the Seven West Media stable—is today, in my view, quite a different organisation from what it was when I was in politics and on the receiving end of what I described as some sharp reporting. So it is easier to do it these days because of the nature of the organisation; that is my point.

**Senator BIRMINGHAM:** Mr McGinty, you are in the unique situation where your council is handling complaints specific to one media company. Have you ever felt any influence from that media company in terms of the operation of the council, the structure of the council or the determinations of the council?

**Mr McGinty:** None whatsoever. Apart from my initial appointment, I have not communicated or spoken with the owner, Kerry Stokes, at all in the last 12 months. I have had no communication, other than to ask me to write an opinion piece for the *West Australian*, which was published in last Saturday's paper, which—

**CHAIR:** There is a coincidence, isn't there?

**Mr McGinty:** Can I perhaps give you a copy of that article because it summarises a lot of what I have had to say here today.

**CHAIR:** I am happy for you to table that. This is the Kerry Stokes inspired opinion piece, is it?

**Mr McGinty:** It was in fact Bob Cronin, who is the managing editor of the *West*, who rang me and asked me if I would write a piece.

**CHAIR:** Oh, the Bob Cronin inspired opinion piece. That is good.

**Mr McGinty:** It very substantially describes how the Independent Media Council has worked over its first 12 months of operation.

**CHAIR:** We look forward to reading it with great interest.

**Senator BIRMINGHAM:** Surely such pieces, given criticisms that these bodies do not have a high enough public profile, are important to raise the public profile of these organisations.

**CHAIR:** Thanks, Senator Birmingham. Can I ask one last question? Are there any obligations on Seven West to continue the operation of your Media Council?

**Mr McGinty:** No, there is not.

**CHAIR:** There is not. So they can pull the pin at any time.

**Mr McGinty:** Yes.

**CHAIR:** Thanks very much, Mr McGinty.

**Proceedings suspended from 14:01 to 15:31**

**BERG, Mr Chris, Director, Policy, Institute of Public Affairs**

**BREHENY, Mr Simon, Director, Legal Rights Project, Institute of Public Affairs**

[15.31]

**CHAIR:** I welcome representatives from the Institute of Public Affairs. Thank you for talking to us today. Do you wish to make a brief opening statement before we go to questions?

**Mr Breheny:** Yes, please. The news media reform package 2013 is nothing less than an attack on freedom of speech and freedom of the press in Australia. It is absurd to claim that the government could institute a regulator to regulate media self-regulators like the Australian Press Council and pretend that doing so would not constitute substantial new government oversight of the free press. This is a fundamental conceptual error with very disturbing consequences and, in our view, government oversight of the press is unacceptable in a liberal democracy. The government has no business deciding what constitutes fairness or balance in a media whose job it is to hold them to account. That ought to be a bedrock principle accepted by all sides of political debate.

We have a number of specific points we would like to raise about the proposed public interest media advocate. The government-appointed PIMA would be responsible for deciding which news media self-regulation bodies' members would receive an exemption from the Privacy Act and which would not. This regime means that news outlets will never be able to write about things that are claimed to be personal or sensitive. The news-gathering functions of a news media organisation would be shackled for fear of breaching the Privacy Act. To us, the coupling of Privacy Act exemptions with regulated membership clearly makes this a de facto licensing system, further emphasising the significance of the attack on free expression that the proposal represents.

The minister can directly and unilaterally appoint any person to the public interest media advocate role. Government members of this committee might reflect about whom a future government could appoint and whether instilling such significant powers over the press on a political appointee is democratically desirable. This is doubly so because of the entirely undefined concept of public interest that this entire project seems to be founded on. I am sure that our idea of what is in the public interest is different to the ideas of some members of the committee.

The proposed regime also undermines fundamental legal rights. The bills provide no avenue for appeal of a decision of the PIMA, they reverse the burden of proof in cases of proposed media mergers and they use ambiguous terms that give the PIMA enormous discretionary power.

The most disappointing part of this process is how the government has completely shirked the necessary reform to regulatory frameworks governing media and communications. There is almost nothing in these bills that deals with the serious and important problems in media regulation brought about by technological convergence. Instead, the process seems to have been entirely diverted by a partisan battle between one side of politics and one media company.

We have one final, broader concern. Chris Berg and I appeared before another Senate inquiry into another bill less than two months ago, on 23 January 2013, to defend freedom of speech against another real threat posed by legislation that this government proposed. That bill was the draft Human Rights and Anti-discrimination Bill 2012. Both pieces of legislation seek to shrink civil society by restricting free speech, one under the guise of human rights and the other under the guise of fairness and accuracy in the media. For these reasons, it is our view that the bills should be rejected.

**CHAIR:** Mr Berg, do you wish to add anything?

**Mr Berg:** No. I agree with Simon.

**CHAIR:** Senator Birmingham.

**Senator BIRMINGHAM:** Gentlemen, thank you for your time today. You describe this as a de facto licensing system. The government claims that it is only setting up a mechanism to hold media companies to commitments that they already make under existing Press Council and self-regulatory arrangements. Why shouldn't the government reinforce those existing self-regulatory arrangements in this way?

**Mr Berg:** I think there are some serious problems with the existing self-regulatory arrangements but probably not what some of our opponents suggest they are. I am not confident in giving the Press Council the statutory backing that this legislation would give. In my view, the idea that you would take a voluntary regulatory scheme and turn it into a mandatory regulatory scheme or a full, black-letter-law regulatory scheme throws away any concepts of self-regulation and it would give, as I say, some sort of statutory backing to what was previously an amorphous, voluntary system. I think that is deeply concerning.

**Senator BIRMINGHAM:** The government's proposal here has been scrutinised by the Parliamentary Joint Committee on Human Rights, which handed down its report today. It cites, for example, the UN Human Rights Committee as indicating:

Restrictions must not be overbroad ... they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function ... they must be proportionate to the interests to be protected...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.

Do you believe that the government has in any way managed to demonstrate, in a specific and individualised fashion, the precise nature of the threat that warrants this action being taken?

**Mr Berg:** No, absolutely not, and I think it is important to track back to where the original media debate came from. It did not start with the Finkelstein inquiry; it did not even start with the Leveson inquiry. It started with the Convergence Review, which, in my view, was an extremely important process and an extremely important desire to deal with technological change and how it affects existing and legacy communications and media outlets. I think that is the biggest issue that the parliament could face in the communication space and the media space at the moment. But we have seen this process being diverted into a political issue with justifications being invented after the fact. I have not had a chance to scrutinise the Human Rights Committee's findings, but to me that part that you read out makes complete sense. The government, to my satisfaction, has not demonstrated any sort of need for change in this area.

**Senator BIRMINGHAM:** In terms of the overall issues—and in the opening statement you identified concerns that there was a pattern here that followed the anti-discrimination legislation in terms of attacks on free speech—do you believe that there is sufficient commitment given in human rights agenda to the issues of free speech and to the types of principles that were outlined by the UN Human Rights Committee that I quoted from just before?

**Mr Berg:** No. Through a wide range of policy areas, we have consistently seen freedom of speech, as a principle, downplayed. This has been a long-term trajectory, in my view; it has been going on for the last 30 to 40 years. But I think it has really taken a sharp uprise in the last couple of years. Obviously we all followed the Bolt case very closely, where Andrew Bolt was found to have unlawfully breached the Racial Discrimination Act. Then there was the Finkelstein review which, in my view, seemed to be inspired by political rather than policy desires. Then we have had the human rights and anti-discriminations acts. What we have found in these debates is that freedom of speech is almost always relegated to a second-tier concern above other concerns. I am a strong believer in freedom of speech. I have extremely strong, firm beliefs that it is the central value of our liberal democracy. It is absolutely essential to individual liberty and it is utterly essential to the maintenance of a democratic sphere. It is very disturbing to see it being continually downplayed across a wide range of policy areas.

**Senator BIRMINGHAM:** You highlighted that all of this began with the Convergence Review. Senator Conroy has claimed, in proposing these reforms, that there are now fewer and fewer voices in the media landscape. Is that a proposition that the IPA agrees with?

**Mr Berg:** No, absolutely not; and I am not sure that Senator Conroy believes that is the case either. I think it is very obvious that the amount of material we are able to access has never been more than it is today. The amount of information available to an individual reader or consumer of media content has been growing continuously for the last three centuries; there has been an extraordinary explosion of media content in that time. But over the last two decades, we have seen so much content that it completely breaks the regulatory frameworks that govern our existing systems. We have so much diversity available to us on the internet at any time and in any circumstances that we have to seriously rethink why and how we are regulating existing legacy contents. This set of legislation does not go anywhere towards that, and any future government is going to have to deal with that problem.

**Senator BIRMINGHAM:** But how do you respond to those who say that there is disproportionate power and influence between a blogger versus News Ltd?

**Mr Berg:** There is certainly disproportionate readership; nobody is questioning that. More people read the Herald Sun than read myblog, for example; and more people read the Herald Sun than read the IPA website, for that matter.

**Senator BIRMINGHAM:** I am sure that that will change after today's hearing.

**Mr Berg:** I have great plans for this Senate committee hearing. But having said that, you have to ask: what is the objection there? More people want to read the Herald Sun than want to read myblog. Are we complaining about the power of the media or are we complaining about what citizens choose to read voluntarily? I worry that, when we discuss these issues, we are patronising or dismissing the importance of consumer choice. There is more diversity than ever before, in all of Australian and global history, available to citizens if they want to choose. Are we really here to second-guess those choices of our citizens?

**Senator BIRMINGHAM:** The Treasury made some submissions to the Convergence Review and they said:

Where convergence provides consumers with more choice and a greater variety of media content, it should be encouraged, provided it meets community standards ... Regulation that interferes with competition is likely to have the opposite effect—

in terms of encouraging a competitive media and communications market—

and instead stifle innovation and make it less responsive to consumer needs.

Do you believe that these proposals in terms of new regulation have the potential to, as the Treasury indicated, stifle innovation? In particular, can I direct that question to the proposals to apply a public interest test on media acquisitions and mergers?

**Mr Berg:** I think this is the last time in the world that you would want to be imposing a new constraint on what media businesses can do on a commercial basis. It is instructive to see the difference between when the Finkelstein report was released in March 2012 and today. The Finkelstein report suggested that the media companies had told him that everything was actually going pretty well; they saw that there was substantial growth in the future and they saw that there was not going to be a huge problem any time soon. So Finkelstein basically called for the government to hold a watching brief. That was just three months before the extraordinary job cuts in Fairfax and before the extraordinary job cuts in News Ltd. Basically, the heart of the newspaper sector in Australia had a great big contraction.

That, in my mind, makes many of the policies recommended by previous reviews—reviews prior to those huge contractions—really quite redundant or certainly needing to be revised in light of these changes. I worry that we are trying to regulate the last war; we are trying to regulate based on concepts that we developed a decade ago and to impose them on an extraordinarily fast-paced media sector. I have heard the public interest test mentioned for at least a decade. I know that it came out in a Productivity Commission report in 1999-2000. The idea that we are still talking about the exact same policy proposal going through a decade later, when there have been so many changes to technology, to media and to communications, I just find completely absurd.

**Senator BIRMINGHAM:** The specific legislation before us requires a news media self-regulation scheme to ensure that it has standards addressing matters of privacy, fairness, accuracy and other matters relating to the professional conduct of journalism. It then goes on to require that it also meet a level of community standards—no particular definition of what those community standards may be. Do you believe that they are appropriate subjects for a regulatory scheme to consider; and, if so, how should a regulatory scheme go about considering those particular issues?

**Mr Berg:** I believe that they are appropriate subjects for a self-regulatory scheme. If I were running a newspaper, I would very much want to impose those sorts of things. I think it is important that newspapers open up their pages to contrary letters and contrary opinion pieces and so on and so forth. But I do not think it is appropriate for any government regulator or any government to try to impose on the free press its own conception of what constitutes fairness or balance. The free press has a vital and essential democratic role to basically expose the misdemeanours of government. The idea that the government would then turn around and regulate the press for fairness or balance seems to me to be deeply worrying and seriously concerning. It is extraordinary that we are talking about this in 2013.

**Senator BIRMINGHAM:** Why is it that, even at a self-regulatory level, the media industry should be concerned with matters of fairness?

**Mr Berg:** It depends on how you are running your newspaper. The newspapers I like to read tend to be fair, try to be balanced and all those sorts of things. I personally think that is a virtue worth pursuing, but I do not think it is a virtue worth regulating across the board.

**Senator BIRMINGHAM:** Why that distinction?

**Mr Berg:** Because the free press and freedom of speech are too important for government to be deciding what constitutes fairness. Government is not a neutral player in this game; it has great interests in what is printed in the newspaper, and government control or oversight would be very, very dangerous, in my view.

**Senator BIRMINGHAM:** Historically, have we seen a greater tendency or a lesser tendency than would be the case today to have publications that take very biased approaches?

**Mr Berg:** Historically speaking, the news press started as an extremely partisan business. The newspapers in the 18th and 19th centuries were funded by political parties specifically and they hurled all sorts of abuse at each other and at politicians. There was a period in the early to mid 20th century where the idea of objective journalism really took hold. Now I think the concept of objective journalism is coexisting with a broader, more aggressive, more opinionated news media. I do not have a problem with that. I think it is a very interesting thing to look at, but I certainly do not think it is the job of the government to be second-guessing those sorts of philosophical changes in journalism.

**Senator BIRMINGHAM:** So an evolution has occurred over a period of time from a period where the emergence of news media as such was driven by parties with a self-interest, be they political parties, business groups, unions or otherwise, who funded magazines—what leaps to mind is one I quoted in my maiden speech, called *The Worker*, which I suspect would be dear to Senator Cameron's heart if he were to go back and look at those old copies—through to an era today of objective journalism. Also there has been a transition perhaps, as you say, to people now partaking more in opinion based journalism. That appears to reflect also the greater choices and spread of options that people have. As there are more choices, they will presumably seek out media opportunities that better reflect their outlook on life, whether that is good, bad or otherwise.

**Mr Berg:** I suspect that we are going back to an earlier stage of journalism where you have commercial neutral or objective journalism outlets but you also have private donor-supported outlets with very, very strong opinions. We can see this in the United States; we have seen a huge development of what you might unfairly describe as 'partisan' media outlets that are privately funded or donated to by small members and philanthropists. I suspect that we are going to see that in Australia as well.

**Senator BIRMINGHAM:** And the opportunity to produce content cheaply online or for 24-hour news channels or those sorts of things—

**Mr Berg:** Exactly. It is a business model that we should all get into, basically.

**CHAIR:** Given that you have mentioned your maiden speech, I will go back and have a look at that again because all I can remember from your maiden speech is that you are a very strong supporter of dealing with climate change and using a market-based approach.

**Senator BIRMINGHAM:** You were not in the Senate at the time of my maiden speech, Senator Cameron.

**CHAIR:** But I have read it.

**Senator BIRMINGHAM:** I am pleased to hear that.

**CHAIR:** Mr Berg and Mr Breheny, why should we give more weight to your evidence than to Mr Finkelstein's and Professor Ricketson's?

**Mr Berg:** The IPA has strong views; I think it is backed by research evidence. I do not think that the Finkelstein review was as intellectually coherent as some have claimed it was, and I do not think it is the be-all and end-all of media discussion in this country. I do not know why we would raise that up to being the definitive statement on the free press.

**CHAIR:** But strong views are not the basis on which to make deliberations; strong views are strong views.

**Mr Berg:** Absolutely; and I would be happy to send you a copy of my book, which details at great length the evidence that we bring to bear on this discussion, which is a historical and philosophical grounding on the importance of the free press and the historical and current threats to it.

**CHAIR:** Do you have a PhD in the media or something like that?

**Mr Berg:** No, I do not.

**CHAIR:** What are your qualifications?

**Mr Berg:** I have a Bachelor of Arts and I am doing a PhD at the moment at RMIT university.

**CHAIR:** In what?

**Mr Berg:** In economics.

**CHAIR:** So you have no qualifications in the media?

**Mr Berg:** In the media in general?

**CHAIR:** Yes.

**Mr Berg:** I am a published commentator on all sorts of things.



**CHAIR:** A commentator—

**Mr Berg:** No, I understand—

**CHAIR:** I am asking about your professional base. I am not asking whether you are a commentator; we know you are a commentator. Mr Breheny, what about you? What are your qualifications?

**Mr Breheny:** I am currently a university student; I am studying arts and law at the University of Melbourne.

**CHAIR:** Arts and law—good on you; that is great. Let us go to the issues you have raised about fairness and balance. Do you believe the press should have the right to say whatever they like? Should there be any restrictions on the press?

**Mr Berg:** There are already many, many restrictions on the press at the moment, from defamation to intellectual property. There are courses that you can do in media law. Journalists have to do dedicated subjects about these sorts of things. It is a straw man to suggest that we are discussing a laissez-faire press versus a regulated press. We have a highly regulated press at the moment and the government is proposing to increase those regulations.

**CHAIR:** You have read the Finkelstein report?

**Mr Berg:** Yes.

**CHAIR:** What do you say to the instances where individuals have suffered because the press has taken a wrong position and caused those individuals huge problems—for instance, a minister of the Crown having his homosexuality exposed and being forced to resign; a chief commissioner of police being the victim of false accusations about his job performance fed to the news media by a ministerial adviser and, following publication of the articles, being forced to resign; a woman wrongly implicated in the deaths of her two young children in a house fire, with her grief over her children's deaths compounded by the news media coverage; nude photographs said to be of a female politician contesting a seat in a state election published with no checking of veracity and the photographs being found to be fake; and a teenage girl victimised because of her having had sexual relations with a well-known sportsman? How do these people get some redress?

**Mr Berg:** There is a wide range of ways they can get redress at the moment. There are a couple of things we have to break down in that list. Obviously many of the claims made were defamatory. If the government is interested in changing defamation laws so that they are more accessible to some people, that is a different discussion we can have.

**CHAIR:** A different discussion in your eyes. So you are saying—

**Mr Berg:** No, I am not suggesting—

**CHAIR:** You are not suggesting that—

**Mr Berg:** I am not suggesting anything. What I am suggesting is that again we are discussing, not the legislation that is before parliament, but some general feeling about what the media can and cannot do.

**CHAIR:** Just a minute, Mr Berg. It is not a general feeling—it is what the Finkelstein report indicated were serious problems with the operation of the Press Council and individuals' rights. So do not dismiss it like that. If you want to be accurate, be accurate. If you want to tell us how smart you are that is okay, but at least deal with the issues I am raising.

**Mr Berg:** I am happy to. My argument is that many of the cases in the Finkelstein review—which I have read as well as you have—are clear options for defamation action. Many of the cases were given apologies by the newspaper, which is all that the existing legislation would allow—

**CHAIR:** So the woman whose two children were killed in a tragic accident—what did she get?

**Mr Berg:** I am not sure exactly—

**Senator BIRMINGHAM:** Mr Ricketson was not able to tell us that, Senator Cameron.

**CHAIR:** I just thought Mr Berg could. He is telling us all the details.

**Senator BIRMINGHAM:** There was a lot of—

**CHAIR:** Senator Birmingham, I did not interrupt you. Do not interrupt me—thanks.

**Senator BIRMINGHAM:** Well you keep interrupting—

**Mr Berg:** I am also concerned with some of those other cases we are talking about—ministers of the Crown, public figures. There cannot be any restrictions on what newspapers and journalists can investigate about public figures. I do not think it is the job of the government to defend its own ministers using the statutory arm of the law.

**CHAIR:** Tell me where in the legislation the government can defend its ministers using the statutory arm of the law?

**Mr Berg:** I am not suggesting that that is in the legislation. I am suggesting that any solution you might propose that would directly attack or directly deal with those specific examples—coming back to Senator Birmingham's point about specific examples—would necessarily allow a government to defend its minister. I am happy and eager to talk about the specifics of the legislation, but you have brought up the Finkelstein review. The legislation that is offered is not exactly what the Finkelstein review suggests.

**CHAIR:** But we are dealing with some principles that underpin the legislation. I am entitled to ask whatever I like. You do not have to answer. If you do not want to answer, you can always go. I am simply saying to you that these are significant issues that the Finkelstein review raised. There is another one. Are you familiar with a person called James Delingpole?

**Mr Berg:** Yes, very much. The IPA had him out a couple of months ago.

**CHAIR:** So you sponsored him?

**Mr Berg:** I am not sure what the arrangements were, but the IPA brought him out.

**CHAIR:** So you brought him out. Are you aware of an article that he wrote which appeared in the Australian on 3 May, 2012?

**Mr Berg:** I think I am familiar with the one you are referring to.

**CHAIR:** The 'Wind farm scam' article.

**Mr Berg:** Yes. If that is the one I am thinking of, I am familiar with it, yes.

**CHAIR:** Were you perfectly happy that that was a legitimate expression of free speech?

**Mr Berg:** Yes.

**CHAIR:** It was?

**Mr Berg:** Yes.

**CHAIR:** Are you aware that the Press Council had a different view on that?

**Mr Berg:** Yes.

**CHAIR:** So you think it is okay to make an assertion that union superannuation funds 'are using the wind farm scam as a kind of government endorsed Ponzi scheme to fill their coffers at public expense'. Is that a fair and reasonable proposition?

**Mr Berg:** I would not say that it is a fair proposition to the unions, but I think it is a very clear illustration of the boundaries between satire and public commentary. I think if you tried to regulate that distinction we would be in a lot of trouble.

**CHAIR:** So Mr Delingpole was using satire, was he?

**Mr Berg:** I think in many parts of that article he has a very satirical pen.

**CHAIR:** 'A very satirical pen'? Even to the extent where he quotes an anonymous New South Wales sheep farmer opposed to wind farm development?— 'The wind farm business is bloody well near a paedophile ring; they are f...ing our families and knowingly doing so.' Is it perfectly okay to do that?

**Mr Berg:** He is quoting a farmer. I do not understand what the objection specifically would be to. You might think that is an exaggeration of the true position. You might think that is unfair. But this is the nature of a free and open discussion. People who exaggerate, who use satirical strategies and all this sort of stuff—you have to allow that in a free and open country, in my view.

**CHAIR:** You have to allow misrepresentations?

**Mr Berg:** Are you suggesting that that was a misrepresentation or are you suggesting that all misrepresentations would be allowed? As I have said, if the union super fund suggested that was defamatory then perhaps they could take it up.

**CHAIR:** Everyone has to go to the law courts?

**Mr Berg:** I have serious problems with defamation law. I do not want to excessively defend that.

**CHAIR:** You have said 'defamation' a number of times.

**Mr Berg:** Yes.

**CHAIR:** But you have got serious problems with that.

**Mr Berg:** Yes.

**CHAIR:** I do not know what to make of that. This article also indicated:

The owners on whose land the turbines are built are subject to rigorous gagging orders (from law firms such as Julia Gillard's ex-company, Slater & Gordon); tame experts are paid huge sums to testify that there are no health implications ...

It is not true, is it?

**Mr Berg:** I am not sure. Is it not true?

**CHAIR:** It is not true. So if it is not true should people just be allowed in the Australian to say what they like, even if it is not true?

**Mr Berg:** Issues that are not true and issues that you think are wrong or objectionable should be loudly fought in the public sphere. If you find that article objectionable you should write to the *Australian* or if the *Australian* will not publish your response you should write to another newspaper, you should put it on your website, you should put out a press release or you should talk about it in parliament. But I do not feel that it is the job of the government or a government backed regulator to make the decisions about what is legitimate speech and what is not.

**CHAIR:** Your definition of 'legitimate' is that people can basically print untruths, and that is part of the debate?

**Mr Berg:** I would not necessarily say that.

**CHAIR:** What are you saying?

**Mr Berg:** I would suggest legitimate speech is any speech directed towards a public purpose in this, and this is clearly a public purpose. If you object to that then you should debate the issue in public, as we all have to.

**CHAIR:** Does the IPA believe that the press should regulate itself in any way?

**Mr Berg:** We all regulate ourselves in many ways. I am sure that if you talk to journalists and editors they make decisions about what they are going to put in their paper on all sorts of grounds. The press does regulate itself. Should the press have a self-regulatory body? I do not have a big problem with that, and that is really up to the press, in my view.

**CHAIR:** Would you argue that there is no need for self-regulation?

**Mr Berg:** I am not sure. It is really up to the press. The whole point about self-regulation is that the individual industry gets to decide whether it wants to or not. That is the definition of a self-regulatory framework.

**CHAIR:** That is a principle that you would support, that the press can make a determination whether it self-regulates or not?

**Mr Berg:** Yes.

**CHAIR:** So it can just say, 'We will do what we like and face any consequences'?

**Mr Berg:** Yes. Of course that would be within the existing legal framework, which is substantial and extensive.

**CHAIR:** The IPA issued a press release after the Press Council concluded on three points that this article should not have been printed in the way it was; is that right?

**Mr Berg:** Yes. Was it under my name?

**CHAIR:** It was under your name, was it?

**Mr Berg:** I am not sure.

**CHAIR:** You are not sure. So you cannot remember?

**Mr Berg:** I am not sure exactly what the claims were in that specific press release.

**CHAIR:** I think it was a Mr Roskam, actually. You guys are interchangeable, are you—flexibility?

**Mr Berg:** We have so many—

**CHAIR:** Mr Roskam said:

The Press Council thinks they should decide what is allowed to be written about climate change or any controversial topic. But in a free society journalists and newspapers should be able to publish whatever they want on any topic of public debate ...

Even to the extent of quoting someone to say that an organisation is the equivalent of a paedophile ring?

**Mr Berg:** Yes, I concur with the press release, if that is an accurate—

**CHAIR:** You concur with that?

**Mr Berg:** Yes.

**CHAIR:** So people can be equated to paedophiles as far as the IPA is concerned?

**Mr Berg:** I am not suggesting that it is a very good thing to equate people with paedophilia. I am not defending that claim. I am defending the claim that in a society that respects freedom of speech as a fundamental value we have to accept sometimes that offensive speech will be made. If you are only going to defend speech you agree with then you are not defending freedom of speech at all.

**CHAIR:** Very interesting, Mr Berg. After the publication of that article, we had the Press Council determination, we had the IPA press release basically saying you should be allowed to do whatever you like, and the *Australian* published Mr Delingpole's response, which again repeated some of the issues that the Press Council said should not have been there. Is that fair and reasonable?

**Mr Berg:** That is a position for the *Australian* to take, surely.

**CHAIR:** The *Australian* can basically ignore the Press Council and just print—

**Mr Berg:** Yes, that is the definition of a voluntary self-regulatory scheme.

**CHAIR:** So it is all voluntary; it is really meaningless—the Press Council?

**Mr Berg:** No, I would not suggest it is meaningless. I think they would have very seriously considered whether to do that.

**CHAIR:** If the *Australian* decides it is just going to repeat the same allegations in a different form, it is just ignoring the Press Council, isn't it?

**Mr Berg:** I think it is defying the Press Council in that case but I also think—

**CHAIR:** Defying?

**Mr Berg:** Yes, sure. But I think in many—

**CHAIR:** That is okay?

**Mr Berg:** Yes. It is a voluntary self-regulatory system. I think in many cases the *Australian* will have published retractions and so forth according to Press Council edicts. I am certain that other newspapers do and I have no reason to suggest that the *Australian* does not either.

**CHAIR:** Following that article, Christopher Pearson again went on to repeat the paedophile statement. So we had Delingpole run it up first. We had the Press Council, on the basis of complaints, say that should not have been done; it was wrong. We had Delingpole come back again in the *Australian* and run the same allegations and then we had Christopher Pearson run the allegations. And in between this we had the IPA saying basically 'do what you like'. Wouldn't you understand from that that individuals who do not have the power of the Murdoch press, do not have the power of Fairfax, do not have the power of Seven West, would say, 'How can we get a fair go'?

**Mr Berg:** Those individuals have never been more empowered at any time in history. It is very important to remember that. We are talking about increasing regulation on the press when the people who feel that they have been aggrieved have never been more powerful and never more capable of getting their own message out. The press is not a uniform bloc. It does not just exist as a solid entity shouting down small individuals. As you well know, there are many press outlets that go loggerheads against each other, that expose scandals about each other, all these sorts of things, and we have never been more empowered to get our message out and start those backlashes to what we might consider unfair or unbalanced.

**CHAIR:** Secretary, I might table the *Australian* article by James Delingpole of 21 December. I also table the *Australian* editorial of 21 December, the Christopher Pearson article of 22 December, the James Delingpole article of 3 May, the adjudication of the Press Council of 20 December and the IPA media release under the name of John Roskam of 20 December. It takes you through the problems that individuals would have in dealing with the arguments the IPA are putting up. Senator McKenzie?

**Senator McKENZIE:** Thank you very much for appearing today. I simply have one question. What would the IPA's response be to the issues around regional, local news, local weather and local sport?

**Mr Berg:** I have not gone into great detail about this particular piece of legislation and how it affects that. I want to preface it with that. In my view, however, the same arguments that I have made today hold for that as well. There has never been more opportunity for local and regional news, sport and weather to get out there. Unfortunately, the winds of business models are changing really rapidly and substantially. I do not think any legislation is going to make a regional newspaper any more commercially viable than it is at the moment, and certainly no more commercially viable than it would have been 10, 20 or 30 years ago. We need to recognise that the community is adapting and learning to adapt to these huge and significant business changes.

**Senator McKENZIE:** I was interested in your commentary around the convergence review and the opportunities that it presents. In terms of those sections within our community who lack the infrastructure to take up the opportunity of the changed environment in which we can consume media, do you have any commentary to make around that?

**Mr Berg:** I am not sure what the figure is to hand. It might be 17 per cent of Australians do not have an internet connection. By this stage it is not that they do not have an internet connection because they cannot have an internet connection; it is because they have deliberately chosen not to have one. That is an unfortunate thing. They are really missing out. A lot of those people are eventually going to have to get internet access. We just have to wait for the population to catch up with a lot of these things, I am afraid.

**CHAIR:** Last question, Senator.

**Senator McKENZIE:** Do you have a specific view on the 75 per cent reach rule?

**Mr Berg:** Not a specific view.

**CHAIR:** That is not for this inquiry. Thanks, Mr Berg and Mr Breheny. Good luck with your university studies, Mr Breheny.

**Mr Breheny:** Thank you, Senator.

**DISNEY, Prof. Julian, Chair, Australian Press Council**

**WILDING, Dr Derek, Executive Director, Australian Press Council**

[16:13]

**CHAIR:** I welcome representatives of the Australian Press Council. Thanks for talking to us today. Professor Disney and Dr Wilding, do you wish to make a brief opening statement before we go to questions?

**Prof. Disney:** Yes. Thanks very much, Senator Cameron, for the opportunity to be here. I will make a statement. It may focus a little more on the prosaic realities than some of the contributions have.

I want to deal firstly with problems relating to media standards. There are substantial problems with media standards in Australia. A number of them we have in common with other countries. What I am going to say now is based on the experience of the complaints that we receive. We get about 600 now. The numbers increased by about 50 per cent over the last year or so, probably because our profile is so much higher than it was before, with our existence and our role being advertised in virtually all issues of every member publication.

They are also based on the community roundtables that we have started. We have held now probably 10 of them. They have been somewhat delayed by or suspended by the work involved in responding to the Finkelstein inquiry and other things, but we have held roundtables in four states. That will continue with both media and community organisations to identify what they see as problems with media standards and what could be done about it. There are some problems that come up in that.

We also gather from journalists as well. Journalists tend to speak more freely, of course, one to one than they do in broader discussions about what they see as problems within the media. The problems include distortion and suppression of key facts and opinions; confusion of fact and opinion; errors of fact, especially online due to excessive haste in posting material and inadequate corrections of those errors; invasion of privacy, particularly through the use of photographs taken from a distance. Some problems, of course, in any profession or industry, are inevitable. I do not think it should be a surprise that there are some. The level is higher than it should be and I think it is a significant problem that needs to be addressed.

On the other hand, we need to bear in mind that it is true that the media, and journalists in particular, many of them, if they are to be effective and if they are to serve the broader public interest in access to information and free expression of opinion, do need to be from time to time somewhat aggressive, somewhat unruly. One should not seek perfection in this area. Indeed, if one did seek perfection, it would be at a very high price.

Having said that, there is a substantial problem that needs to be addressed. I might say that it has an adverse impact, amongst other things, on freedom of expression. If people are to have freedom of expression, they need access to reliable information. If they are fed false information, then the views that they form and they might want to express will not be the views that they would form and express if they were well informed. Access to unreliable, distorted information is an attack on freedom of expression.

Similarly, if they are unable to get their voice heard reasonably, because particular outlets have perhaps a general tendency to be more willing to publish views from one part of a perspective on a particular issue rather than another, that infringes on the freedom of expression of those people who do not come from the part that is going to be more generously covered. If they are given an occasional example to express their views but that is overwhelmed by a very extensive coverage of the other view, then again their freedom of expression suffers. Freedom of expression needs to be for all people, not just for those who are wealthy or for those who have special access to the most widely read media. Of course, it is a huge infringement on freedom of expression if people are intimidated by vitriol or by other forms of excessive abuse. That, again, even if it comes from active proponents of freedom of speech, it is in fact an attack on freedom of expression.

So media standards, good media standards, are an essential element, for a number of reasons. One of them is, in fact, genuine, wide-ranging freedom of expression. The Press Council has a very important role in this, a very demanding role. We can never do it to my satisfaction, and there are many issues which one should not look to the Press Council to solve anyway. There are other aspects of society in a democracy which must address them. We must always have realistic expectations of a press council.

But we need to do a lot better. That was one reason why I agreed when I was approached to chair the council. If I thought the council had been going fine, I would not have gone there. I thought it did need to be improved. With support from a range of different interests, we have started to improve it. We improved it to some extent before the phone hacking and the Finkelstein inquiry, and we have improved it further since then, though many of the improvements are really just ready to go. For example, the funding boost that we got is leading to two new

staff. They started yesterday. They are getting neglected, I am afraid, in their induction at the moment. There has been a long lead time in getting these things sorted out.

I want to just mention quickly some of the progress because I feel that there perhaps is not from various quarters in the room, really much, if any, up-to-date understanding of what the council is doing. Firstly, we have expanded substantially to online-only publishers. That is very important. Almost all of our complaints involve online because, even if they were read in print version, we deal with online as well and with corrections online. Our adjudication processes are now much more independent than in the past. We now have a situation where there are virtually no people employed by publishers on our adjudications, and the majority, as has always been the case, are public members.

We are having meetings with adjudications more frequently. We do not, contrary to some of what was said earlier, require people to travel. Indeed we encourage them not to travel really. We can do these things by teleconference in most cases. We are certainly not legalistic. The suggestion earlier of cross-examination is extraordinary. If it happened in the past, it certainly does not happen now. The discussions are around the table and they are all on first name terms.

We are developing a new suite of specific standards. For example, the first is to do with suicide. The next is to do with access to patients. We will have ones on photographs taken from public property onto private land. We will have some on a very important issue, which is ensuring that people who are going to be the subject of a story are given a fair opportunity to comment before the matter is published at all, including online. The advent of online publishing has led to a tendency for people to say, 'I'll get up one side first and I'll tidy it up later.' But in fact the need for accuracy and fairness first up is enhanced, is increased, by online publishing, not reduced.

We have already got agreement that the publishers will all provide us with internal statistics. I noticed earlier the IMC apparently will not be providing internal statistics. All our publishers will be providing their own statistics, their own internal complaints handling, in the same form as we do, just as we are.

Quite a lot of progress has been made but we are still moving too slowly in our handling of complaints. We are suffering from sustained misrepresentation of our adjudications and other comments from some quarters, sometimes from proponents of freedom of speech, who are alleging quite forcefully that some of our adjudications have inhibited freedom of speech. By falsely presenting what we have said and implying that we have put inhibitions on freedom of speech, they themselves are inhibiting freedom of speech. We are still suffering from not a high enough level of cooperation from publishers in some areas and we need to keep working on that. We are making progress.

I want to finish with two important strengthenings that we need to achieve and then comment very briefly on the bill. The first strengthening is—as Mr Finkelstein asked of me at the inquiry, but at the time I said perhaps we should do it another way—we now definitely need to be able to institute our own investigations without waiting for a complaint. There are far too many instances. We have one in chapter and verse where a very strong-minded, almost pugnacious public figure has declined to bring his complaint to us because he believes that it will only make the situation worse, that he will be discriminated against more fiercely by the newspaper in question. This is a view expressed to us frequently.

**CHAIR:** It was not Ian?

**Prof. Disney:** No. We really need to be able to take these things on board without waiting. I have seen some very bad abuses in the last few weeks where we have had no complaint and yet I know, in fact, the people were concerned about it but thought it would just make it worse if they complained.

We need to have the ability to initiate our own investigations, to ensure that the strengthening that we have undertaken is, firstly, taken through to its fruition, because it is mid-path; secondly, entrenched, not subject to subsequent withdrawal or erosion; and thirdly, if need be, we strengthen ourselves further without having to wait for a Finkelstein inquiry.

I believe we should have an independent review of our activities every three years by an independent panel. They should firstly report just specifically on our compliance with particular benchmarks. We put benchmarks to the convergence review, which are designed at ensuring adequate independence, for example, and adequate complaint-handling procedures, like the right to bring complaints directly to the council rather than via the publisher. It is a crucial right, an absolutely crucial right, that you are entitled to come to us directly rather than through the publisher. Those things need to be reported on every three years, that we are complying with them. These are specific, objective benchmarks.

We need a report then on more subjective evaluations as to how well we are doing in certain areas, not something that can direct us what to do but that brings to the court of public opinion an independent analysis of

how well we are going. So I think it is very important to build on what we have done and ensure that we keep getting better. I will perhaps stop there and I will weave in any comments I have about the bill going beyond that.

**CHAIR:** Thank you very much for that very detailed overview. Normally we do not like long introductions but you have taken us to a lot of important issues. I thank you for that.

Can I just deal with a procedural matter before we go any further. The *Australian* has sought copies of Mr Finkelstein's opening address and Professor Ricketson's. I do not have any problem with that. We always try to help the *Australian* wherever we can. So we need them tabled.

**Senator BIRMINGHAM:** I move that they be tabled.

**CHAIR:** There being no objection, I declare it carried. These can be made available to any journalist who wants a copy. I might go to Senator Ludlam first and then come to you, Senator Birmingham.

**Senator LUDLAM:** Thanks, Professor, for your evidence. Maybe you can take us through the background of how it has come to be that Seven West Media have established an independent media council. We heard directly from Mr McGinty this morning on this. Can you talk us back through how that occurred and maybe just give us your view on whether you believe the Australian Press Council should be the only entity of its type or whether you are comfortable with more than one?

**Prof. Disney:** Firstly as to how it occurred, really, Seven West Media are the authorities on that. I was negotiating at the time to get strengthening of the council, particularly as a result of the Finkelstein findings. I was negotiating with a group of four publishers. They were then conferring amongst themselves as to their attitude. The lead people with whom I was negotiating were from News and Fairfax. It was believed that agreement had been reached. We had a teleconference to confirm that agreement. Seven West Media, about five minutes before, indicated they would not be taking part. It was a surprise to the publishers and to me.

The only reason that has been given, so far as I am aware, was the belief that we were not sufficiently committed to refusing any form of government funding. The situation was, before any of this happened, before the Finkelstein inquiry, we had already agreed that very limited project funding from government sources could be obtained if the council felt it was appropriate.

It would usually have been obtained in a mixture of sources for a particular project. We did obtain money, for example, from the Myer Foundation to assist with our work on standards. But there was never any commitment from anyone that we would get government funding, let alone government core funding, let alone funding that would exceed 50 per cent. In fact it was the reverse.

So far as one knows, that is the reason that has been given. It is possible, of course, that the reason was that the council was strengthening itself and it was believed that they did not want to be part of a stronger council. I do not know.

As to the question of whether there should be more than one regulator, I just say I do not know of any part of the world where it has been canvassed that there should be more than one, with the exception of the United Kingdom, although Lord Justice Leveson said it would be a major failure of the industry if they did not all come together in one. But there was a suggestion that there might be one for regional newspapers and one for national newspapers which, of course, is more manageable in the UK.

I do not think there can really be any question, both from any understanding of regulatory practice in other areas or in this area, that in general this leads to confusion, inconsistency and over time an erosion of standards, a competitive race to the bottom as publishers seek to be with the less rigorous regulator. It is a major issue. It is particularly a major issue if you have regulators that are in fact one-publisher regulators. How any requirement of independence—and independence of course must be judged over the longer term, not over initial appointments. They must be judged over the longer term, bearing in mind what pressures will come to bear if one is subject to just one publisher. The pressures are substantial when you are subject to lots of publishers but at least they are not usually pushing all in the same direction and they also do not have the ability to cut off your funding and pull out at no notice. We, of course, got an agreement as part of the negotiation, and this may have been a big factor in the decision to move away from us by Seven West Media, that you could not get out in less than four years.

So unless they got out on the date they got out, they would not have been able to get out without four years notice in future. We now have that. That is unique around the world. And we have three years advance funding, specific dollars from each publisher.

**Senator LUDLAM:** Technically one of the other big publishers could still leave the Press Council but there are now those very long lead times involved in that occurring.



Without making any judgement on the character or the qualifications of those who sit on the IMC, do you have a view on how well it is working in Western Australia?

**Prof. Disney:** I would be very reluctant to delve into that, but I just say, particularly because Senator Cameron did ask for a check list of comparisons, I might send some. But, in general, they are to do with principle. This is not a matter to do with WA, in my view, or a matter to do with the particular people that are there. It is a matter to do with the general concept of whether it is appropriate to have, firstly, multiple regulators but, secondly, to have a regulator that is solely responsible to one of the corporations. Obviously there are problems in that respect. I have mentioned some of our differences. I may be perhaps more willing to acknowledge weaknesses in my own organisation that some others might be—I do not regret that. I might add that the success rate—I do not think we should judge our adjudications too much by our success rate—of our adjudications last year was 70 per cent.

**Senator LUDLAM:** What do you call a success?

**Prof. Disney:** It is a partial upheld or full upheld. That went up from 40 per cent the year before. That was before any Finkelstein impact or anything else. I emphasise though that, having said that, I do not believe we should judge our success or our performance by success rates. That would be wrong. But if people are asserting that there is a particularly strong degree of independence shown by a certain success rate then one has to bear in mind other factors.

**Senator LUDLAM:** I do not know how we are going to go with definitions here, but I am interested to know this: in terms of the general work of the Press Council and the complaints that you receive from people who feel aggrieved by reporting, is it possible to break out the proportion of them that would be public figures—politicians or people who are in the public eye and who are routinely in the press—as opposed to what are characterised as private individuals—people who, through no fault or will of their own, have suddenly been drawn into a story and find that they regret it. Is there a way of breaking out the amount of work you do?

**Prof. Disney:** We could do that. We do not particularly have it in those terms, although we have some data. I am afraid that, as I said to Mr Finkelstein, some of our data in the past just was not reliable. It is a lot better now, but it means we do not have huge historical stuff. We do have some complaints from public figures, but they are often very reluctant to complain to us—some of them because they have their own avenues which are more effective than coming to us.

Obviously there are I think problems in that respect. I have mentioned some of our differences. I may be perhaps more willing to acknowledge weaknesses in my own organisation than some others might be, but I do not regret that. I do not think we should judge our adjudications too much by our success rate, but I might add that the success rate of our adjudications last year was 70 per cent.

**Senator LUDLAM:** Defamation law?

**Prof. Disney:** No. We had a complaint recently which involved a childcare centre and one of the parents was an extremely powerful person in the publishing world. I knew they were not going to need my phone call to the newspaper to sort that out. It was going to be sorted out by that person's phone call. So some people do not need to come to us. Others feel that it would only make matters worse. A lot of them though are ordinary, mainstream Australians. I might say that particularly because there is a real representation on this score—so-called third-party complaints, which are complaints about material that does not relate to the person being complained about but is about some general coverage of an issue. Those are mainly made by individuals, not by groups in any way. We had a very striking one just very recently involving a very senior journalist. I think he would be the first to admit, although he started with a very different view, that the complainant came to the matter with absolutely the best motivations and expressed her goodwill towards the journalist in general but just said that this article was not right. Then at the end of the day, incidentally—and this is quite common with us now—they said how much they had valued at least the opportunity to have their chance to speak with the newspaper and express their concerns. So, far from being intimidated or cross-examined, they had found it a useful experience. Incidentally, they were all communicating with us by phone, not in person.

**Senator LUDLAM:** But principally the work of the Press Council—and push back if I am mischaracterising your work—whether it is a statutorily recognised Press Council or not, is about giving ordinary citizens the right of redress over what is a very powerful sector in our society.

**Prof. Disney:** Most of our work, yes. I mean, of course, some of the people are powerful, but the overwhelming majority of our work is not. I should emphasise, though, that I believe our work in setting standards is actually at least as significant as our response to complaints.

**Senator LUDLAM:** I wanted to bring you to those. You mentioned one about reporting of suicides. What is the status of the standards determinations that you are making? If they go on and are breached by some of your member organisations, what is the sanction or consequence?

**Prof. Disney:** Firstly, our standards are now legally binding. I should say that the obligation on our members is to demonstrate a commitment to our standards. That does not mean perhaps that every breach of a standard means that they have acted unlawfully, but it would mean that a continued breach of that nature would call into question whether they in fact have a commitment to our standards. Our only power is in fact to say that our standards have been breached and to insist on the publication of the adjudication. I might add, because it is a very important change that we have achieved, that one of the things that the public and in fact many in the media complained about most in terms of our adjudications was that they were not being published or they were not being published prominently. It was never true to say that they were not being published, but they were not being published prominently enough. We now say exactly where they have to be published, both in print and online, and that is getting full compliance. We write the headings and we say what part of which page range they have to go on.

**Senator LUDLAM:** All right. Thank you very much for that. I will come back if there is time.

**Senator BIRMINGHAM:** Professor Disney and Dr Wilding, thank you very much for your time today. Can I come to the specific proposals that are before the parliament. Do you believe that the proposal for the public interest media advocate and the associated news media self-regulation legislation are well-thought-out proposals?

**Prof. Disney:** We have a lot of concerns about them. There are four elements. I will try to be quick. The first is what we call the benchmarks, which is the list of things that the PIMA is to take into account. In our view those benchmarks in their current form—and we have not seen the specifics of any different form—are far too broad and discretionary. They could end up with too intrusive a role for PIMA. They could indeed be at least as likely to end up with too weak a role—for example, too inclined to allow a council that is not adequately independent. That is probably at least as big a problem in my mind as anything else—that this would be too weak and that these would not be properly independent councils with decent complaint structures. That is the first thing. Those standards are too broad and discretionary.

We agree with benchmarks, but we think they should be specific and objective—for example, are most of the members of the council not appointed by publishers; do you have a direct right of action to come to the council. They are just things that there is no debate about. You look at the constitution and you count up the numbers. That is what we felt and what we put to the Convergence Review—that there should be benchmarks of that kind.

Secondly, on the PIMA, we feel that if there is to be any role of this kind it should be played by, say, a three-person panel, at least two of whom should be independently chosen—a verifying panel or a designation panel—and it should only express its views every three years or two years or whatever, or just check after three years whether they are still complying with the essential benchmarks. But there could be also be a case for commissioning a reasonably concise report on how we are going generally in achieving certain specified goals. But that would just be advice. The other element would be verifying compliance.

The third aspect is: should there be more than one body that can be designated? I have spoken about that. We have a very firm view that there should be only one. The final point is: if you are a publisher, what should be the sanction if the council that you are a member of is not a designated body? So that raises the Privacy Act issue. There are a few different ways that one could address that. There would be value, I think, in just designating a body—us as national press standards council—not with capital letters, but the national press standards council subject to our continuing compliance with benchmarks. That then could be available for governments, legislatures and others. If they want to provide privileges on certain grounds then that can be a criterion they use. They can say that, in order to have this privilege, you have to be employed by a publisher who is subject to the national press standards council. So you could just make it available in this legislation. You do not say that it applies to any particular privilege; you are just making it available as a criterion for the future. I personally believe for reasons that I am happy to expand on that that is very important for a whole number of reasons going way beyond media regulation.

You then can go further, of course, and say that, for example, particular exemptions and privileges will only be available and that is the Privacy Act issue. The question of whether you go down the Privacy Act route depends very heavily on the rest of the bill, the rest of the package and detailed discussions and negotiations. I think you began by asking me did I think this had been well put together. One of the problems we have about this is that, if there is to be any specific privilege dealt with in this legislation and said to be dependent on being subject to a designated body, that has to be very carefully thought through and discussed. That is why an alternative approach is just to get the body out there available for later discussion if people think that it is appropriate in different

contexts. It may be, for example, that this applies to courts—when judges say who is a recognised journalist and who can stay behind in a closed court or tweet from a closed court. There is a whole stack—at least 50 or 60 that we know of—of statutory or non-statutory privileges for journalists or media organisations. Having some criterion there would help—and this is the last of a long answer—and to me one of the main answers to media diversity is to strengthen quality online journalism, to recognise the validity of that journalism and to encourage people to be able to identify it so that we have a broader range of sources. Some of the talk about diversity generated by online I think overstates the case. I think we need to bulk up the audiences for some of these people. They need then to be clear that they have the same standards and the same privileges as mainstream journalists. That was the view taken by what I think is easily the best report in this whole area, which was by the New Zealand Law Commission: starting exactly from that point and saying that we need to encourage online journalism and recognise them, but if they want to have the same privileges as traditional journalists then they must comply with the same standards.

**Senator BIRMINGHAM:** Thank you for that comprehensive answer. In terms of going through your four reforms, firstly the benchmarks—and you touched somewhat there on the need for them to be less broad and less discretionary and more able to be clearly assessed and judged as to whether an organisation is actually meeting them—do you have a series of recommendations that could be made as to what you think are appropriate benchmarks in that regard?

**Prof. Disney:** Yes, and we can table that. They are very similar to what we put to the Convergence Review 15-odd months ago. The Convergence Review did broadly adopt that approach, but instead of our very specific stuff they put it in broader terms. But we have a list of about 15 that we are happy to put in front of you.

**Senator BIRMINGHAM:** I will let you table that. The second area in relation to the construct of PIMA—and you have advocated for a three-person panel, at least two of whom are independently chosen—what is your definition there of 'independently chosen'? Who is making the independent selection?

**Prof. Disney:** I can just give you an example. Perhaps you give the power of nomination to the president of the Law Council or the chair of Universities Australia or someone like that. You try to pick the positions that you think are by and large people who will be independent or at least of an unpredictable perspective. That would be our suggestion. We do not have a totally closed mind about how you would do it if we were setting this kind of panel up, and we might if it is not done in any other way; I have already flagged it with the council and I think we should set it up if someone else does not.

**Senator BIRMINGHAM:** I am getting a wind-up already—

**CHAIR:** Already!

**Senator BIRMINGHAM:** So can I come back to the overriding principle perhaps. Professor Disney gave a very comprehensive answer that was very useful to an earlier question. But, on the overall principal, would you rather see a situation where you as the Press Council put in place a three-yearly review by a panel of eminent persons such as you just described or would you prefer to see a legislated statutory approach that binds the operation of the Press Council in some way, shape or form?

**Prof. Disney:** Firstly, there will be differences of opinion on the council about that, so I will not be expressing a council view as to whether it should be statutory or not. I do not think I can express a firm view myself because the detail really matters. I do think that, given the nature of the pressures that are involved in this situation, there is merit in having some sort of statutory involvement, but it needs to be of the kind that I have mentioned, which is just specifying benchmarks which are not changeable and are only checked every three years and that kind of thing.

**Senator BIRMINGHAM:** Given that Senator Conroy has told the parliament that we have a take-it-or-leave-it option with these proposals, would you take it or leave it?

**Prof. Disney:** I do not want to delve into the language and the realities of the political process, but—

**Senator BIRMINGHAM:** No, but honestly these are the proposals on the table. Should we vote for them or not?

**Prof. Disney:** We have made it very clear that we think this package has to be dramatically changed for it to be acceptable.

**Senator BIRMINGHAM:** In its current form you would rather not see it implemented?

**Prof. Disney:** Yes. We have indicated in considerable detail to the minister and others changes the thrust of which we would regard as essential. The detail, of course, one can talk about, but the thrust we regard as essential for this to be changed. I have outlined them to you: specific benchmarks, a three-person panel, one regulator. The

main query then would be what you do about the Privacy Act. We believe that, even if you leave out the Privacy Act, it is worth doing it to establish a criterion for use by statutory and non-statutory people at later times. There is a worry, I think—the link between commercial organisations and media organisations is increasing for different reasons. Media organisations are getting more involved in commercial activities and commercial organisations like the AFL are getting more involved in running their own media operation. That is going to create big problems for who is a journalist and who is entitled to privileges and ensuring adequate standards. So we need to look at that issue down the track.

**Senator BIRMINGHAM:** Indeed. Is there a risk that what we are doing is embarking on a process of regulating a diminishing media landscape while there will continue to be increasing voices of increasing influence, be it perhaps from a small base, who will not be regulated at all through these types of reforms or, indeed, existing self-regulatory measures?

**Prof. Disney:** Yes. Incidentally, I actually prefer the term 'moderating' rather than 'regulating'. We are not really a regulator in the normal sense of the term. Nevertheless, that is one reason that really one of our very highest priorities has been to become more active in the online area. I think there will always need to be an unregulated sector online, but that does not mean that we cannot try to encourage a sector that says, 'We are going to stick to higher standards and we want your benchmark or your kitemark to show people that we are adhering to higher standards'. That is our approach with online. But it is also why we believe that there should be a move towards a unified system with broadcasting as well. It is one reason that it is really odd to be talking about moving to two regulators in one platform, namely print, when the general thrust has been that we should be moving to reduce the number of regulators across all platforms.

**CHAIR:** I just want to raise one practical example of the work of the Press Council and get your comments about the weaknesses that may still be there. You would be aware of the article by James Delingpole, 'Wind farm scam a huge cover-up'. This was in the Australian on 3 May. Basically organisations were compared to paedophiles. Are you aware of that article?

**Prof. Disney:** Yes.

**CHAIR:** The Press Council then made a determination on certain aspects of that article. That is adjudication 1555. You did that in December 2012. Then, following your adjudication, in which you upheld some of the complaints, the IPA issued a press release saying that your ruling shows a threat to free speech. I would ask you to comment on that, but let me get the whole context in. On 21 December James Delingpole again published in the Australian basically restating the positions that the Press Council had said were unacceptable and the Australian printed it anyway. Then the Australian in an editorial defended Delingpole's article on 21 December lamenting the loss of free speech. Then on 22 December some of the paedophile issues were again raised in an article by Christopher Pearson. How can anyone have confidence in the rulings of the Press Council if the Australian treats them with such a cavalier approach in this regard?

**Prof. Disney:** That is a matter of concern to us and it is a matter that I have raised with the council. There are other examples that you could have given as well.

**CHAIR:** I thought that one was enough.

**Prof. Disney:** I have raised that with the council. All I would say about that is that the first step for strengthening the council is to be rigorous in our adjudications—that is the first thing—and to have said that was wrong. The second step is to try to get adequate coverage for that, which we now do. We get our adjudications very prominently published. That has been a big step.

The third—and that is what I alluded to when I began this afternoon—is to avoid misrepresentation, even within our members' journals, about what we have said, and that is a worry that I have raised and will continue to pursue. The fourth is to avoid repetition of the problem. That, again, is something that we are just going to have to try to continue to push for. So I am not satisfied with where we have got to, and the example that you gave is one reason that I am not satisfied.

**CHAIR:** Is this still a live matter with the council?

**Prof. Disney:** There is a complaint about one aspect of it which we are still considering. But I should say that, even if there had not been, this is an example of where we could investigate of our own volition. That highlights, really, some of the concerns that I mentioned and it is why I believe there needs to be a continuing examination of how well the council is doing and expressions of opinion from an independent panel raising those kinds of issues.

One of the reasons that we are conducting the community roundtables, which we will do on a regular basis, is that concerns of that kind can be raised at roundtables and can then be brought to bear directly to the publishers. I

guess I was also referring to this when I said that there is a limit to what any press council can do in relation to some of these problems. There are other factors and other avenues that will need to be pursued.

**CHAIR:** Professor Disney, we have been told by the media executives who have come here that the Press Council is important and the Press Council has been beefed up, but this is really a News Ltd—in the colloquial term—'Up yours!' to the Press Council. So how can we have confidence that the Press Council will be treated with any respect from the moderate press and the *Australian*? Wouldn't it then be a justification for having the public interest media authority there?

**Prof. Disney:** I have spoken more about the detail of the role of the advocate and how they are appointed and the benchmarks that are applied. I am not happy and many on the council are not happy or not satisfied with where we have got to so far. So you will not find me—and you did not find me earlier today—saying that we were satisfactory. The concerns you have raised, I think, are concerns. I suppose that is one reason that I think that, to erode our ability to address these matters by having multiple regulators or other pressures which intrude on us in the wrong way, because these pressures—in the way that the bill is designed at the moment—could be just as likely to erode our ability to be an effective regulator as to strengthen it.

The main response is firstly we have some measures and some increasing rigour underway which I think are starting to address that problem. I think if we have proper oversight to keep the pressure on us, that will start to address that problem. But I also have to say that there are the realities of power in the community and the press council is only one part of any response to concerns on that front.

**CHAIR:** I am not sure if you paid any attention to the Institute of Public Affairs media release on the day of your ruling. They describe themselves as 'Australia's leading free-market think tank'. We just had them here; if they are the leading free-market think tank, we have some problems here. They said that the Delingpole Press Council ruling shows a 'threat to free speech'. Do you have any views on that?

**Prof. Disney:** I suppose—not that I particularly want to base it on the Delingpole one, because I do not see that case as actually the strongest example of what worries me. What he said in that case—I see things worse than that most weeks, frankly.

**CHAIR:** Really?

**Prof. Disney:** So I don't want to base it on that one. But that was really at the heart of what I was alluding to when I said that freedom of speech and freedom of expression is eroded when people's speech is misrepresented. That means in effect they have no voice, so if people are misrepresenting—adjudications in our case—if they are misrepresenting what other people have said, then that is denying them effective freedom of speech.

But, also, if they are engaging in—and I am not particularly putting this at the door of the IPA, and not particularly directed at the Press Council; there are others—vitriol, intimidation, character assassination, that is an abuse which has a number of weaknesses but one of them is that it actually inhibits genuine freedom of expression.

By 'freedom of expression' we mean freedom of expression for the whole community as much as we can achieve, not freedom of expression for a certainly privileged group who have access to mainstream media and whose views accord with the views of mainstream media. It means freedom of expression for all of us as best we can, and that in turn means that, as with any freedom, we have to accept some limitations on it in order to provide a reasonable degree of freedom for others. This notion of absolute freedom is highly out of date and highly inaccurate as a real definition of freedom. Absolute freedoms destroy freedom. That is well known across a wide range of areas. To distort, to provide people with unreliable information, to excessively abuse and intimidate, is amongst other things an attack on freedom of expression.

**CHAIR:** Thank you very much, Professor Disney and Doctor Wilding. You have been very helpful. We will now suspend.

**Proceedings suspended from 16:56 to 18:10**

**DAVIDSON, Mr Bruce, Chief Executive Officer, Australian Associated Press**

**GILLIES, Mr Tony, Editor in Chief, Australian Associated Press**

*Evidence was taken via teleconference—*

**CHAIR:** I welcome representatives from Australian Associated Press. Do you have an opening statement?

**Mr Davidson:** We really appreciate the opportunity to speak to you today. Given the nature of the lateness of our appearing before the committee, we have a very brief opening statement. It is important to outline for the committee and for those who may not know the role of AAP within the media in Australia. As the national news agency of Australia, AAP has a vital and significant role in our media. It is a role we are very proud of and one we take extremely seriously. It is important to understand that by its nature AAP must be an unbiased, independent news provider. We are like the Switzerland of the news game. Our clients are often fierce competitors and we must deliver content that can stand close scrutiny and be trusted to provide the facts and only the facts.

We are a commercial organisation with no government funding or assistance, unlike many other news agencies around the world. We are owned by Australia's major newspaper groups and our articles of association guarantee complete independence from control by any one owner or interest group. AAP is a major resource for all the Australian media, from broadcasters to publishers to digital players. We provide some 600 stories per day for all the media. We believe we occupy a vital role as an impartial and credible news source for all media platforms in Australia. Our service is available to all sections of the media, regardless of ownership and on an equitable commercial basis.

AAP believes that Australia's media are well served by the current checks and balances that provide responsible governance of media activities. This has evolved through an effective three-tiered system: self-regulation by the media themselves, including many internal codes of conduct, ethics and standards, as well as the ultimate judge, that of the public. We have low-cost public access to an industry complaints forum, the Press Council, which has been recently strengthened to make sure that its activities are more transparent and more open to examination by members of the public and complainants. There is also the range of legislative and legal avenues to address any criminal or civil breaches, such as defamation and contempt of court. There are also clear requirements to adhere to laws regarding telecommunications and privacy.

For AAP's part we are proud of our record of accuracy and balance. We believe this is almost entirely achieved from strict compliance to our code of practice and journalistic standards but also from the commercial need to have the complete trust of our customers. Without our customers we have nothing. We simply do not believe that there is a problem with the conduct of the media in Australia, and certainly not that of AAP, that warrants further oversight, especially by a minister appointed body.

**CHAIR:** Thank you. Why is there a problem with a minister appointing an independent oversight person, the same as ministers appoint other independent oversight executives?

**Mr Davidson:** The publishing industry and the press itself are in a unique position. We are there to hold public officials and corporate bodies to account. Simply any level of potential interference, potential oversight, even any perception of government interference is simply a dangerous precedent that may lead to control, may lead to interference. The aims may be noble, but the potential for misuse and changes of that legislation as presented to us is a dangerous thing to contemplate.

**CHAIR:** What comments do you have then about—I am not sure if it is the oldest parliament in the world but—one of the oldest parliaments in the world, in Westminster, about to do something nearly exactly the same as what we are doing?

**Mr Davidson:** I have obviously read the reports today and have not seen the detail. I also note that the press in the UK is certainly going to examine that legislation and that proposal which is before the parliament. I also note that there is, I think, what I can see, a greater level of potential of further scrutiny for any changes to that legislation by a large majority of the parliament. I do not see that in this legislation.

**CHAIR:** Are AAP a member of the Australian Press Council?

**Mr Davidson:** Yes, we are.

**CHAIR:** Do you agree that the Press Council has not been operating effectively for nearly 37 years?

**Mr Davidson:** I believe that the Press Council has acted effectively. We certainly were involved in discussions around the changes. We have increased our financial commitment to the Press Council and we fully

endorse the changes that have been brought about by Julian Disney, probably a very active chairman in recent times, who has the public interest at heart in renovating the Press Council.

I am aware of criticisms of the Press Council in the past, particularly where publishers perhaps have not fully embraced the principles behind publication of corrections and complaints. I believe that those days are behind us and I believe that the Press Council's changes are a very good thing and we fully endorse them.

**CHAIR:** Did you hear the evidence from Mr Finkelstein and Professor Matthew Ricketson?

**Mr Davidson:** I heard some of that today, not all of it I am afraid.

**CHAIR:** What do you say to their argument that there is no absolute freedom of the press?

**Mr Davidson:** I think in our western democracies most individuals or members of our community would believe that there should be absolute freedom of the press. I heard Mr Finkelstein discuss that issue and I do not agree with his contention that there must be a level of regulation, which I think were his terms. I am quite happy with a level of regulation in terms of the industry ensuring that its codes of conduct and its practices are adhered to and I am quite happy to be held to account for any breaches of those, but I think we need to avoid the potential for interference by government to potentially misuse or distort that regulation.

**CHAIR:** We have had evidence from Mr Finkelstein, who is a QC, who has looked at the legislation. He says that the legislation does not determine what the press can say what the press cannot say. Do you agree with that?

**Mr Davidson:** Yes, I do not see that the legislation can determine what the press can say and what they cannot say. But the Press Council standards, ethics and code of conduct, regarding ensuring that those behaviours are adhered to, is something that the advocate can influence, and the very loose phrase, 'we may change standards according to changes in community standards', to us is extremely open to interpretation, extremely loose and really does open up a can of worms.

**CHAIR:** Have you read the Finkelstein report?

**Mr Davidson:** Yes, I have.

**CHAIR:** The Finkelstein review outlines a number of what they call 'striking instances': a minister of the Crown has his homosexuality exposed and he is forced to resign; a chief commissioner faces false accusations and he is forced to resign—this is after publication of articles; a woman is wrongly implicated in the deaths of her two young children in a house fire and her grief over the children's death is compounded by the news media coverage; nude photographs of a female politician contesting a seat in a state election are published with no checking of the veracity—the photographs are fake; and a teenage girl is victimised because of her having had sexual relations with a well-known sportsman. You just said there should be no restrictions on the freedom of the press. Is it fair and reasonable for those individuals who are demonstrated in the Finkelstein review to have suffered under the press exposes to have that done to them on the basis of freedom of the press?

**Mr Davidson:** First of all, I would like to say that AAP is in a different position from much of the media in that we do not have—

**CHAIR:** Mr Davidson, I am not asking you about AAP. I am asking you about the principal position that you have put forward that there should be no restrictions on the freedom of the press. I have drawn your attention to the examples in the Finkelstein review, and I am asking you: does the freedom of the press outweigh the rights, the privacy and the needs of those individuals that are outlined in the review?

**Mr Davidson:** Those examples I would categorise as certainly unfortunate examples of particular conducts of parts of the press. We have to be aware that there are many, many other laws that potentially could cover and overlap those activities. There are criminal sanctions and there are defamation laws, as I mentioned before. Without understanding the background of those examples that you have mentioned, that notwithstanding, the principle of the freedom of the press to uncover many, many other instances of legitimate coverage of wrongdoing that needs to be outed, if you like—needs to be exposed. Is part of the mix of what the media needs to do and needs to have—

**CHAIR:** But, Mr Davidson, you have not answered my question: is it fair and reasonable that these individuals are treated the way they were treated by the press under the principle that the press should have no restrictions on their rights to print what they like?

**Mr Davidson:** Obviously if I were an editor in those particular examples, I may take a different approach and other editors would take other approaches. My approach may be that some of those cases—and again, without the detail, the background and the context it is hard for me to comment entirely about those actual examples—on the face of it some of those examples are potentially bad examples of the treatment of some individuals that happens

by the press. Obviously the ultimate arbiter of continued treatment of people like that would be consumer distaste and the fact that those particular publishers would not have a market because—

**CHAIR:** Somebody's life, somebody's career is destroyed; a distraught mother is basically accused of killing her children and that is okay?

**Mr Davidson:** No, I did not say it was okay. The context of those examples is hard for me to comment on. There is no doubt that press does not always get it right. We—talking for the industry—can get it wrong. It is very unfortunate that individuals can be hurt in that process. There are many avenues of redress for correcting and understanding some of those examples. But I think that is something that the press and the media live with on a day-to-day basis, about making those judgement calls. I think, generally, throughout our history, we make those calls in a good manner, and in a way that is ethical and upholds the standards. There will be occasional lapses and breaches. I am not excusing those and I understand that obviously individuals are often hurt in the process. That said, the overarching ability of the press to be unfettered in uncovering extreme examples of corruption, of misuse of political power et cetera, needs to be protected.

**Senator BIRMINGHAM:** Gentlemen, thanks for your time today. If somebody has their reputation destroyed by a media outlet, what is the best recourse they can possibly pursue from there?

**Mr Davidson:** The highest level of recourse is taking action for defamation. That obviously would be for very serious breaches that have affected someone's reputation, someone's livelihood, and they have judicial avenues to explore in that area. If they do not believe that is going to be the best avenue, they can take the issue to the Press Council, who then has the power, now, to enforce redress by the publication in an appropriate manner.

**Senator BIRMINGHAM:** As editors and heads of media organisations, are you conscious of the reputational risks to your companies as well as the financial risks to your companies that these avenues present?

**Mr Davidson:** Absolutely. As I mentioned earlier, if AAP, not being a media retailer as such, get it wrong, if we do things that are distasteful, if we trash somebody's reputation, and that is published by our customers, our customers are going to be very unhappy with us. So our reputation would certainly be damaged, as would be our commercial endeavours. That really is the case with the mainstream media. Ultimately the consumer backlash for continued lapses or breaches of standards is going to have a massive impact on their readership and on their business.

**Senator BIRMINGHAM:** The proposals before us propose that a Public Interest Media Advocate be appointed. Do you have confidence that the person appointed under the model proposed would be independent?

**Mr Davidson:** No, I do not. As I said earlier, it may seem that way, it maybe painted that way. As I think has been said in previous discussions, this is an independent appointment like other statutory bodies. The potential for changing that or misusing that is there, and quite frankly I would not like to be a government in a situation where I have the community being suspicious about my motives in terms of someone having oversight over a regulator.

**Senator BIRMINGHAM:** Is there a risk in this space that, once government starts to legislate and regulate, when the outcomes of that legislation do not meet the demands of some there will be further legislation or regulation that provides more direct intervention?

**Mr Davidson:** I would think that is a risk. I think there would be even further opposition and further campaigning against any further regulation, and so there should be. But, yes, once you start on a particular path there is the potential for that path to grow.

**Senator BIRMINGHAM:** How easy is it as an organisation—you are in a unique position as a provider of content to various media outlets—to assess what is fair?

**Mr Davidson:** I will hand over to our Editor in Chief, Tony Gillies, who is more across the tenets of our ethics and standards.

**Mr Gillies:** We have a number of standards that we apply to every story. Every story must be balanced, accurate and fair. That is, of course, the overarching tenet. And that comes from a practice that for every claim there has to be a counterclaim over the course of a short period of time. We operate in a real time environment which creates some challenges for us in that stories need to be rolled out as issues develop. However, we are constantly in contact with both sides or all sides of a story. So the role in which we play sort of determines that we do provide our customers with the complete picture, both sides of the story, so that they can make that best assessment from that.

Getting back to Mr Davidson's earlier point, our reputation is absolutely everything at AAP. We must be steering a story straight down the middle. If we do not do that, if we skew it one way or another, if we get it wrong, that is pretty much the beginning of the end for us.



**Senator BIRMINGHAM:** In terms of making those decisions, do you think that notions of fairness can be effectively codified or indeed notions of community standards be effectively codified, which it would seem this legislation will require a news media self-regulation scheme to do?

**Mr Davidson:** I would not suggest codified, but what I can say is that in a review of our content after the event, we do go back and seriously check what we have done. This comes from an enormous amount of experience from our news team and so on. Certainly our experience is that standards within the community are a constantly changing scene. Therefore, we cannot codify it. What is right today might not be right tomorrow.

**Senator BIRMINGHAM:** Thank you, gentlemen.

**CHAIR:** Mr Davidson and Mr Gillies, that has been helpful.

**FRASER, Professor Michael, Director, Communications Law Centre, University of Technology, Sydney**

**SIMONS, Dr Margaret, Private capacity**

[18:32]

**CHAIR:** I now call Dr Margaret Simons and Professor Michael Fraser. Dr Simons is from the Centre for Advanced Journalism and Professor Fraser is from the Communications Law Centre, UTS, Sydney. Dr Simons and Professor Fraser, would you like to make an opening statement?

**Prof. Fraser:** Yes.

**Dr Simons:** Yes.

**CHAIR:** Dr Simons, we will go to you first.

**Dr Simons:** I have put in a written submission so I do not intend to be at all extended in these opening comments. My basic position is that I am not opposed to and indeed support the thrust of the bills to make meaningful and effective self-regulation of the media and to make the rights and freedoms under law contingent on a willingness to sign up to self-regulation. However, I think the drafting of the bills has been very flawed, and I am unhappy with them in their present form. I have detailed my unhappiness in my written submission and also made some suggestions for improvement.

There are some other things that I would like to emphasise. We have heard a lot over this last week about freedom of speech and the right to freedom of speech. I think it pays us to remember that the right to freedom of speech is not held by organisations, including media organisations. It is a right that is held by individuals. The rights, freedoms and privileges that media organisations have in most liberal democracies are consequential. They rely on the extent to which the media outlet or the journalist serves the free flow of information in society, and the right to freedom of speech of both the individuals who make up the media organisation but also the individuals in the audience and the broad general public. While for the most part large media organisations play a vital, effective and good role in disseminating information and extending the right to freedom of speech, it is possible—and the risk is highest when media concentration is highest—for the media to actually interfere with freedom of speech. This happens, for example, if somebody requests a correction to incorrect information and they have trouble in obtaining that correction, or if they ask for a right of reply to something that has been published and they are not able to obtain that right of reply. I think there is quite a lot of evidence, which I am prepared to detail, that we do have that situation in Australia with at least some media outlets at the moment.

Given that the right to freedom of speech of large media organisations is a consequential right and it relies upon the extent to which they serve the rights of freedom of speech of citizens, it is reasonable for them to sign up to standards about accuracy, fairness, publication of corrections and rights of reply and other matters. Indeed, all of our main media organisations have signed up to such codes and standards. If there is concern that they are not taking those obligations and standards seriously, then it does not seem to me unreasonable to suggest that their special privileges under law, which are there to enable them to disseminate information, should be contingent on taking self-regulation seriously.

I think legal penalties for conscientious free speech are obnoxious. I do not like the idea of editors and journalists being able to be sent to jail or heavily fined for conscientious free speech, but that is not what is proposed here. What is proposed here is that the privileges which result from media's role in advocating freedom of speech and advancing freedom of speech should be contingent on self-regulation, which makes sure that they stand up to their own standards.

That is it from me; the rest is in my written submission.

**CHAIR:** Thank you, Dr Simons. Professor Fraser.

**Prof. Fraser:** I also am very happy to be here and contribute to this process. However, I note that the haste of this process, of the introduction of these bills, is not conducive to good lawmaking. But I am happy to contribute, it being the case that the parliament's time is so short.

The role of the media is not enshrined in our Constitution, but it is the fourth estate with the parliament, the executive and the judiciary. One cannot run a liberal pluralistic democracy without a free press—it is an essential component. The press today, the media today, with the resources is available to them, are extremely powerful and at times it appears that they are more powerful than our elected representatives in setting the agenda and the national discourse. It follows along the lines of the focus of the media. The media holds everyone to account. The press holds every actor in the community to account. I also concur that it is reasonable that the media themselves should also be held to account. Powerful as they are, they are not above accountability. In this case, what is being

proposed in these bills is that the media should demonstrably and transparently live up to their own standards—no more than that.

It has been claimed by media representatives that their freedom of expression should be unfettered and unlimited, but no right is unlimited. They themselves recognise this by having industry self-regulatory standards and professional and ethical standards which they impose on themselves. Moreover, the right to freedom of expression by journalists or by an organisation that pretends to enjoy that right, which is an individual right, is limited to the extent that it conflicts with other fundamental human rights, such as the right to privacy, the right to reputation and honour of the person. These rights are equally important in a liberal democracy. So it cannot be the case that it is only the media that should not be accountable to anyone. And it cannot be the case that the essential rights of the media in serving the public's right to know cannot be limited. Indeed, as has been noted just now, these rights are limited by many other laws, such as defamation laws, privacy laws, contempt of court laws, suppression orders and other laws that apply.

I think it is agreed by everybody that the best mechanism for accountability by the press is self-regulation. I think many disinterested persons, including previous Chairs of the Press Council, have acknowledged that self-regulation by the Press Council has to date not been sufficiently independent and effective and that their decisions have sometimes been ignored by their members. Or, when their members have not liked the activities of the Press Council, their own body, in limiting their unfettered role, that they have walked away and withdrawn their funding and their membership. This bill attempts to maintain industry self-regulation but holds the industry to account to ensure that that self-regulation is genuine and lives up to its own standards. The other aspect of the public interest media advocate is ensuring diversity. Unfortunately, I have not had the opportunity to hear the earlier parts of the hearing, but I am sure that it is well established here that we have one of the most concentrated media in the world. There are many commercial reasons for that, but it is certainly in the public interest that news and current affairs should not be monopolised by only one or two voices. That is in the public interest.

Finally, I would make one further point. The public interest media advocate is proposed to be established by statute. There seems to be some argument that by establishing an office by statute that means that that office is not independent. But that is a false argument. There are many public officers that are established by statute to be independent, and this is intended to be one such office.

**Senator BIRMINGHAM:** Thank you both and particularly Dr Simons for providing a comprehensive submission at short notice, which everyone has had to prepare such things. Senator Conroy has put to the parliament and to the people that we should adopt these reforms on a take it or leave it basis. If they are unamended, should we take them or should we leave them?

**Dr Simons:** Regretfully, if they were completely unamended I would say leave them. But I think that some very simple amendments, particularly to the first two points that I mentioned in my submission—that is, the criteria that the PIMA must apply in deciding whether or not to give the heart foundation tick of approval to the industry self-regulation body and also the independence of PIMA's appointment. If those two points were addressed, and I think that that could be done quite easily, then I would say take them.

**Senator BIRMINGHAM:** Professor Fraser?

**Prof. Fraser:** I think with one or two simple amendments to ensure that the independence of the PIMA not only exists but is seen to exist, and that the factors within which the PIMA would operate are clear so that critics of the PIMA could not attack it for lack of independence because it seemed to be operating on a whim, if there were a framework there, then I think that it ought to be passed.

**Senator BIRMINGHAM:** The Australian Federation has operated happily for 113 years without these types of reforms in place. Why do we suddenly need them now?

**Dr Simons:** I would not say this is sudden. I would actually say that we could have had this argument at any time over the last 10 years. And, indeed, it has been had, although it may not have come to this forum. As was previously observed, we have one of the highest concentrations of media ownership in the world. It has steadily got worse since the mid-1980s. We are now talking about withdrawing the 75 per cent reach rule, which would see instant further concentration, particularly in rural and regional areas. That is one reason why we need it now. Secondly, there is no controversy about the standards. As the Finkelstein report observed, they are very similar the world around. There is no controversy about what the standards should be. I think that there is also quite a lot of evidence that while all the main media organisations sign up to commonly accepted standards, they are not taken seriously in newsrooms. I can draw your attention to some evidence of that if you wish.

**Senator BIRMINGHAM:** That would be useful because, frankly, one of the challenges coming into this is that the government has not exactly made the case for why these reforms are necessary.

**Dr Simons:** Certainly.

**Senator BIRMINGHAM:** If you think there are specific examples of how reforms like this could actually fix particular problems and particular examples, that would be helpful.

**Dr Simons:** Well, several recent adjudications of the Press Council go to this issue of the ability to get corrections published when false information has been published. Obviously— and I heard Professor Disney make this point earlier this afternoon—if false information is published to that extent, the media's role in promoting freedom of speech is comprised. So too, I would say, are its rights on special privileges also compromised. Adjudication 1558 concerns selective information on climate change being published. There was a difficulty in getting a correction published. Adjudication 1553 concerned Andrew Wilkie and the *Launceston Examiner*. An editorial that misrepresented the impact of his agreement with the Feds on the Hobart Hospital. He had trouble getting a correction published. Now, if an MP has trouble getting a correction published, imagine an ordinary citizen. Adjudication number 1550 concerns the Gold Coast City Council and the *Gold Coast Bulletin*. A front-page article about loan costs and so on, again the council had to go to the Press Council to get action taken because they could not get a correction published. I will not go through the others in detail, but adjudication 1549, adjudication 1547 and adjudication 1554 are also relevant. The Press Council has published its own statistical overview of the nature of complaints and those that are upheld. All this information is on their website. It is not like this evidence is hard to find. Furthermore, one of the—

**Senator BIRMINGHAM:** Are you saying that in all of those cases the Press Council rulings were rejected?

**Dr Simons:** No. The Press Council ruling was that corrections should have been published. The information was false and corrections should have been published. But in all of those cases the complainant had tried to get a correction published before they took Press Council action.

**Senator BIRMINGHAM:** So the Press Council action then took effect.

**Dr Simons:** But all of these media organisations have already signed up to standards saying that they accept the responsibility to publish corrections. But in practice they are not playing it out. Can I give you another example, which has not been to the Press Council. This is an article from the *Daily Telegraph* of 4 March. It contains photos taken surreptitiously of the Bulldogs rugby league star Ben Barba in a rehab facility. The photos on the website also showed his children, who were with him. Those pictures were pixelated. News Limited's own internal code of conduct would rule this out. Certainly Press Council principles do. And yet, it is published. How can this happen in an organisation which is committed to its own self-regulation? Now, there has been no complaint in this case. I do not think that is because the individuals concerned are happy with this happening. I think it is because there is a price to complaining. I have worked as an educator both in the industry and in universities with journalists for many years and as a media commentator. I know that until very recent times, the industry's own internal codes of conduct did not form part of the training in newsrooms. This has changed over the last few years, but under intense political pressure which is also one of the reasons why we are here today. So what we are talking about—

**Senator BIRMINGHAM:** You are saying that they were a breach due to a breach of privacy issues?

**Dr Simons:** In this case it is a breach of privacy. I do not actually think that privacy is the hot button issue here, as it is in the UK. I think it is fairness and accuracy which is the hot button here. I do not have the empirical evidence for that. That is an observation on the basis of my experience in the industry, and as a media commentator. There are other examples as well. There have been articles published on the conversation by the Winthrop professor in Western Australia about accuracy of reporting on climate change across the media. And I can give other examples.

**Senator BIRMINGHAM:** Some would say that that is a contestable issue.

**Dr Simons:** Well, it is a contestable issue. In many cases the Press Council has made findings on these things and yet the errors are repeated time and again. And ordinary citizens, including highly credentialed academics and MPs, cannot get corrections published. And yet the organisations in their internal codes and in their membership of the Press Council say that they will correct inaccurate information. Yet they fail to do it.

**Senator BIRMINGHAM:** So how do you foresee these particular reforms as actually changing these issues that you claim to be instances of media abuse?

**Dr Simons:** The Press Council has been under a considerable reform process over the last few years, and we heard Professor Disney detail those, including long-term funding agreements and contractual law. I would make the point that if those contracts were ever broken, that too would be a legal process, presumably, through the courts. It is not that it is a law free approach at the moment. But all of that has been done under pressure. I have

no faith that the publishers would not sabotage that reform process once the pressure is off or taken away. I think history suggests that that might well happen. But in any case—

**Senator BIRMINGHAM:** Publishers have had to provide funding upfront for three years. That is a fairly significant long-term commitment.

**Dr Simons:** That is true, but certainly among some of the people I talk to in the industry, it is not out of the question that they would give their four years of notice. It is not out of the question, I think, that contracts might be broken.

**Senator BIRMINGHAM:** Is there any reason, given the significance of these reforms, and they have been significant changes, that that process shouldn't be allowed to be tested?

**Dr Simons:** I think it is reasonable in this context to say that, given the whole right of a large media organisation to freedom of speech is contingent on the degree to which it serves the interests of citizens to accurate information and the free flow of ideas, to the extent that you are not prepared to sign up and take seriously standards which hold you to that mark, to that extent your special rights and privileges are also contingent.

**Senator BIRMINGHAM:** So, Dr Simons, to go to the specifics of the legislation, you have described the News Media (Self-regulation) Bill as giving dangerously wide discretion. You go on to indicate that the application of community standards in this context is wrong in principle in relation to the types of terms that are being used.

**Dr Simons:** Yes.

**Senator BIRMINGHAM:** So, for the particular section that goes to how a news media self-regulation scheme would be accredited, that section needs a complete re-draft, does it, to meet any kind of standard?

**Dr Simons:** Yes.

**Senator BIRMINGHAM:** As a pointed question, just having described the news media self-regulation scheme as it is described, do you believe it is possible for newspapers or online news sites to effectively do their jobs without the Privacy Act exemptions?

**Dr Simons:** I have given a lot of thought to this, and I am not a privacy lawyer, so this is not a lawyers answer. There are some sorts of journalism which I think would be possible, but it would be under an immense bureaucratic burden of having to contact everybody mentioned, get permissions and so on. Some kinds of journalism I think would not be possible, and that is particularly the investigative journalism, the journalism that annoys people and so on. That would not be possible in anything but the most sporadic fashion.

**Senator BIRMINGHAM:** Okay. In that case, in terms of this being a self-regulatory scheme, really that self-regulatory nature will be taken away by these reforms, won't it, because it will be impossible to do your job if you are not signed up to a scheme? And there is a government arbiter looking over the scheme to say whether or not it meets a range of government conditions, which at present are terribly vaguely defined.

**Dr Simons:** Well, it is a self-regulation with a statutory underpinning. Self-regulation because the body is financed by the publishers. The standards are very similar to the system that currently applies to broadcast media. The codes of conduct under the broadcasting act are agreed by the broadcasters and then given approval by ACMA. That is the system that has existed without much controversy or claim that it is a limit of freedom of speech for broadcast media for many decades. So the codes of conduct are developed by the industry, they are approved by ACMA, or in this case the PIMA. With broadcast media at the moment, a licence can actually be withdrawn or a condition imposed if they are found to be in breach of standards. Now, this is much more liberal than that. You are just saying you will lose your special rights and privileges under law. They are not talking about withdrawing a licence.

**Senator BIRMINGHAM:** Do you believe that it is appropriate for newspapers to run campaigns?

**Dr Simons:** In some cases, yes. It is certainly within their rights.

**Senator BIRMINGHAM:** Even though those campaigns may choose to take a side on an issue?

**Dr Simons:** Yes. Indeed, some of the finest journalism has resulted from campaigning journalism, yes.

**Senator BIRMINGHAM:** How does the notion of fairness fit into such an approach?

**Dr Simons:** The facts have to be accurate and the distinctions between fact and opinion should be clear. Exactly what the Press Council principles say.

**Senator BIRMINGHAM:** And when those facts are contestable?

**Dr Simons:** Well, all facts are contestable at a fundamental philosophical level. But there is the simple case of whether something did happen or didn't happen, something was said or was not said and whether the evidence says this that. These facts one can assess.

**Senator BIRMINGHAM:** The first two points of those three examples—something did happen or did not happen, something was said or was not said—are usually relatively black and white. Whether the evidence is of course were often times you will enter a grey zone.

**Dr Simons:** Yes, that is right.

**Senator BIRMINGHAM:** Should newspapers running campaigns be held to account in having to justify that their evidence is bullet-proof in that sense?

**Dr Simons:** I think that where there is controversy and a diversity of views or contestable evidence, that needs to be fairly represented. For example, climate change is the example everybody uses now, but 30 or 40 years ago it might have been the health impact of tobacco. Where there is a weight of scientific evidence in one direction and also some disputes and controversy, that needs to be fairly represented. Campaigning journalism is often not a matter of campaigning for one lot of evidence. It is a matter of bringing a particular issue to light. For example, in the early years of my journalistic career at the *Age*, there was a campaign to clean up the Yarra. That was not an issue that was on anybody's agenda before that. So a campaign is not necessarily pushing for one particular world view; it can simply be saying that here is an issue that should be brought to public attention. The *Australian* has done some terrific work on indigenous affairs in this case, saying that these issues have been neglected and they should be brought to attention. That, too, is campaigning journalism.

**CHAIR:** Senator McKenzie

**Senator McKENZIE:** Dr Simons, section 8 of the Public Interest Media Advocate Bill says that PIMA will be appointed by the minister. You raise this as an issue in your submission. I would appreciate it, as I am sure that others would, if you could expand on why that is an issue.

**Dr Simons:** Well, the bill also says that the PIMA cannot be directed by the minister and yet the minister appoints the person and also has the power to dismiss them, presumably. This is a very important position. Freedom of speech is a very important issue. The government should not be involved in licensing journalists. So, I think an arm's-length process similar to that which has been employed for the ABC and SBS boards for similar reasons would be more appropriate—or appointment by parliament. I heard Professor Disney this afternoon propose a three-person panel. That is another option which had not occurred to me.

**CHAIR:** Thank you for your submissions, and thank you, Dr Simons, for actually putting yours in writing. It is helpful. You raise the issue of Section 7(3) about what you describe as 'dangerously wide discretion'. You say PIMA must have regard to "amorphous criteria such as 'community standards'". That is not how it is in the legislation, is it? It is not like that. What the legislation says—

**Dr Simons:** "The PIMA must 'have regard to' the 'extent to which' the body—"

**CHAIR:** The standards reflect. So that is not quite what the legislation says, is it?

**Dr Simons:** Sorry, what is not quite what the legislation says?

**CHAIR:** You are saying that these amorphous criteria such as community standards. So it gives the impression that the PIMA has to have this reliance on community standards. But what the legislation says is that the self-regulation body must have regard to community standards.

**Dr Simons:** My reading of the bill is that the PIMA must have regard to the extent to which the regulation body reflects community standards in order to decide whether or not to give it the tick of approval.

**CHAIR:** That is 7(3)(c).

**Dr Simons:** I do not have it in front of me, I am sorry. You have the advantage of me there.

**CHAIR:** Would it make any difference if the determination by PIMA was in relation to the community standards that applies to the self-regulation rules?

**Dr Simons:** I am sorry; I do not follow the question.

**CHAIR:** You have raised the issue.

**Dr Simons:** Yes, but I do not understand the question.

**CHAIR:** The legislation says at 7(3)(b):

the extent to which standards formulated under the body corporate's news media self-regulation scheme deal with the following:

- (i) privacy;
- (ii) fairness;
- (iii) accuracy;
- (iv) other matters relating to the professional conduct of journalism;

No drama. No problem. Then it says at 7(3)(c):

the extent to which those standards reflect community standards;

Well, there are community standards, surely, in terms of privacy—

**Dr Simons:** Well, yes.

**CHAIR:** fairness, accuracy and professional conduct.

**Dr Simons:** How is the PIMA to determine what the community standard is on whether a journalist should protect the confidentiality of a source? Or whether a journalist should conduct an aggressive interview? Community standards in the sense that you and I might meet over a coffee would suggest that there is a certain standard of polite behaviour. If I were interviewing you as a journalist I may well not be very polite. The term is so vague.

**CHAIR:** You have actually been in Aussies then, have you?

**Dr Simons:** Frequently! The term is so vague that it could mean anything and we have a single statutory officer who has to in some way divine what the community standard is on these contentious issues.

**CHAIR:** But isn't there statutory officers making these determinations on national interest, on public interest matters, all the time—all over the world?

**Dr Simons:** If you look at people like Auditors-General, for example, it is usually in a fairly well defined field where they are bringing professional expertise to bear, for example on an annual report or a statement of accounts. To bring this single statutory officer's understanding, I assume, of what community standards are to bear on a news media self-regulation body is the wrong standard. There are professional standards recognised internationally—well written up in professional literature and reflected in things such as the Media Alliance code of ethics and the Press Council statement of principles.

**CHAIR:** Do those reflect community standards within the industry?

**Dr Simons:** They reflect professional standards—the norms of journalism.

**CHAIR:** So if (c) was changed to 'the extent to which those standards reflect professional standards', would that satisfy you?

**Dr Simons:** I am not a legal drafter and I am not going to say yes, they are the words.

**CHAIR:** No, I'm not asking you for a legal opinion. You have had an opinion on it, so I am simply asking you for an opinion. You have said that it should be about professional standards. So if 'community' was changed to 'professional', would that be more comforting for you, let me put it that way?

**Dr Simons:** Something in that direction or along those lines. I am not going to commit to those precise words.

**CHAIR:** Because you said that minor changes were required. This is the type of drafting changes that we have to look at.

**Dr Simons:** I think you need to have a simple list of as objective as possible standards, and I referred to a page in the convergence review which I think is a good starting point for that. I do not think that that is very difficult to do. I would probably take out any reference to community or professional standards. But, as I say, I am not trying to draft the bill.

**CHAIR:** Okay, Thanks. Professor Fraser, have you followed the history of the Press Council?

**Prof. Fraser:** Yes.

**CHAIR:** How would you describe their approach over a number of years?

**Prof. Fraser:** Before saying that, I too would like to acknowledge Julian Disney's role since he has taken over as chair. He has been trying to bolster the Press Council. But there is no regulatory body that is effective without enforcement powers. Unless those regulated fear the regulator, that the regulator has an armoury of weapons with which to enforce their decisions, that they are binding and that they can't be walked away from, then any form of regulation is not worth the paper it is written on. The Press Council has had a role as a self-regulatory body, but it has been weak.

**CHAIR:** People spoke earlier about carrots and sticks. We have a hugely influential and powerful press in this country. Is that your estimation as well?

**Prof. Fraser:** It is, and if I could just say a few words as to why they should be regulated now. I think that they are far more powerful than before. As a community we had norms that were well established and recognised by all kinds of corporations, including media corporations. But now we see extreme invasions of privacy using long lenses and surveillance techniques and we see prurient interest in people's personal and private lives far beyond what would have been unimaginable only a short while ago—within our own lifetimes. The media now have such powerful techniques and technologies and propaganda skills that they are feared by everybody if they focus these techniques. As we have seen in the UK, even the most senior politicians have feared the power of the media. The lack of ability of an ordinary citizen to get a right of reply or correction or to be able to even be consulted sometimes before a story touching on them is run, I think that is why these issues have come up. Although we have avoided the most egregious examples such as in the UK, I think there is a general feeling in the community now that this great power of the media is unsettling our civic life and the ability of others to go about their duties.

I would like to see some more clarity around the factors that the public interest media advocate would need to advert to. However, I do not think that you have to drill down far, because some of the most effective changes in our society have been with the introduction of very broadly based new laws, like the competition and consumer laws. They introduced broad concepts of fairness in contracts and abuse of market power. Nobody knew what they meant at first and lots of corporations objected to them. What do these very broad terms mean? But if you have a conscientious office—in that case the ACCC—who publish the reasons for their actions, you come up with a body of understanding as to what these terms mean and how they can be applied consistently. To drill down into too much detail in setting the parameters would limit the ability of the PIMA to respond to unimagined changes in the way that the media operate.

**CHAIR:** Yesterday, News Limited threatened High Court action if these laws went through the parliament. There is an issue of case law as well. Some of the issues that Dr Simons is raising and how you would interpret some of the issues that the PIMA has to have regard to may also be subject to case law. I don't know that you can ever say that when you draft legislation and have it passed in parliament that everyone is clearly of the understanding of what it means. There is always litigation to get case law to determine exactly the meaning. So aren't we sort of throwing the baby out with the bathwater? Because of the pressure from the media groups, we get ourselves spooked to say, 'Well, we have to get this exactly right'. And yet in other areas of legislation, the legislation goes in and then there are challenges, there is case law and there are practical developments. Is that to be discarded when you are talking about the press? That is the point I am making.

**Prof. Fraser:** That is right. It is new. But this problem can also be ameliorated actively if the regulator, the PIMA, which is really a recognition body, is proactive and publishes best practice guidelines and it publishes its opinions. It can build up a body of advisory material that will serve as a guide so that perhaps you can avoid doubt and you can avoid litigation.

**CHAIR:** Wouldn't you think that most of, not the case law, but the practical application of the laws would be determined by the Press Council itself actually applying their own standards. And if they apply their own standards then PIMA has got no job to do, have they? Other than in terms of mergers and concentration of the media. But in terms of overseeing the work of the Press Council, the best practice would be that PIMA does nothing.

**Prof. Fraser:** It has an initial role, does it not, in declaring the self regulatory body that its code does deal with this issue of fairness and accuracy. It looks at privacy, it looks at professional journalistic standards and it looks at these community standards as well. If the code adverts to those and deals with them, and if there is a complaints mechanism that people can directly access, including access to the PIMA, then it can declare that organisation. So it does have a role as providing a checklist that the industry self-regulatory body must meet. But it can meet and address those standards in its own way.

**Dr Simons:** If I can just add to that, the PIMA does all of that and can also withdraw the authorisation. That is a concern. Everything you said, Senator Cameron, about the legal process and case law and so on is of course true, and is true whether the law is well drafted or not. I mean, it is not a reason to be relaxed about the drafting.

**CHAIR:** No, I am not saying that we should be relaxed.

**Dr Simons:** All of that will happen regardless, and I am sure that Senator Conroy would have had some legal advice on the potential for a High Court challenge by now as well. But it is not a reason not to draft as tightly as possible. Also, of course, when one is anticipating laws that are for the long term, one should think about what would happen if you had the wrong person in that job—somebody who says that community standards are that journalists should not be rude in interviews and the Press Council has not been holding that up adequately and



that is a problem. Of course, it seems unlikely but we have had some very unlikely people dealing with these sorts of things in the past.

**CHAIR:** But, Dr Simons, that is not what the legislation says. The legislation says that the Press Council set the standards.

**Dr Simons:** It says that in deciding whether or not to give and maintain an authorisation, the PIMA will have regard to the extent to which the media self-regulation body applies community standards.

**CHAIR:** Sure. Before I hand over to Senator Ludlam, you mentioned some of the adjudications by the Press Council. I was waiting to hear 1555. I am not sure if you are aware of 1555, which is the Blair Donaldson and the *Australian*.

**Dr Simons:** I am broadly aware of it.

**CHAIR:** I have raised this. I wish I had had this yesterday when News Limited were in the room, but I received some stuff on it today. This goes to basically a number of issues. Basically quoting a sheep farmer who said that the 'wind-farm business is bloody well near a paedophile ring. They're f.cking our families and knowingly doing so.' And there were a couple of other areas in that. The Press Council concluded that that was a breach and that certain things should be done in relation to that. The IPA, which you would not be bothered about I am sure, came out and criticised it, so I will not go there.

But after the Press Council made this determination—and they made a determination 20 December 2012—on 21 December the person who wrote the original article, a James Delingpole, wrote another article and basically repeated the same position. So it was in direct defiance, basically, of the council. Then on 21 December the *Australian* ran an editorial basically saying, 'Press Council: up yours'. Then on 22 December we had Christopher Pearson defending the position of saying to the Press Council, 'We don't really care'. How could any anyone have confidence, even in the Press Council now with the good people that are there, if the *Australian* and the Murdoch press treat them with absolute contempt?

**Dr Simons:** Indeed. And this is not new. Senator Birmingham earlier asked 'Why now?' Well, I remember when I was writing a book on the Australian media which was published in 2007—so this must have been around 2005 or 2006—when there was a very similar controversy in which there was a Press Council adjudication against, I think, the *Herald Sun*. Do not hold me to these details. They published the adjudication, but alongside it an article which defied it, basically. There have been other examples as well. Again, I would say that this is an example that demonstrates that all the rhetoric about currently adhering to standards and media organisations being the judge and jury in their own case about whether standards are being observed, can be a bit hollow. Not in every case. Excellent work is done. But the example you have raised, I think, like this one in an organisation in which its own internal standards on privacy were inculcated and were spread through the organisation and understood by photographers and journalists and editors, how would this happen? It is very telling about the newsroom culture.

**CHAIR:** Thank you. Senator Ludlam.

**Senator LUDLAM:** Dr Simons and Professor Fraser, I'm sorry that I missed the first part of your evidence. I am interested in some of your comments later in the document—and thanks for putting this submission together on such remarkably short notice—on using the privacy clauses as something of a hook or something of an incentive, I guess, for media companies to stay within the Press Council. I believe overseas it is defamation law that has been used in similar schemes. Here it is privacy.

**Dr Simons:** That was Leveson's recommendation, yes.

**Senator LUDLAM:** You have made what could be described as a cautious approval that that might be the appropriate way to keep companies in the tent.

**Dr Simons:** It is a very difficult balancing act between freedom of the press and holding journalists to account for their own standards. It is seriously a difficult balancing act and you can see that from the way that jurisdictions all around the world wrestle with it. Obviously most prominently the UK at the moment. Different balances have been struck. So I do not think you are going to get the perfect solution. The Privacy Act exemption is a privilege that is given so that the media can better serve the interests of freedom of speech. It is reasonable to make it contingent on the extent to which they observe standards in freedom of speech. But I do think there are big problems with the way that bill is drafted, as I have detailed.

**Senator LUDLAM:** In the first part you have some quiet strongly worded concerns that the chair was teasing out just before on community standards and so on.

**Prof. Fraser:** Forgive me please. May I just interrupt on that particular point and make a contribution to that question about the sanction of not having the privilege of the exemption from the Privacy Act? Obviously, there has to be a sanction for breaches, otherwise, as we have said, they are meaningless. But in my view this sanction would effectively stop a media organisation from functioning in large part, from doing any investigative journalism. So it is a very powerful sanction. In that case I think that the PIMA will rightly hesitate to use it, and it may not be used, just as one sees in broadcast the revocation of the licence not used. So I think for effective regulation it is important to have a range of graduated sanctions.

**Proceedings suspended from 19:25 to 19:50**

**McCREADIE, Ms Sue, National Director, Media, Entertainment and Arts Alliance****MacRAE, Mr Drew, Federal Policy Officer, Media, Entertainment and Arts Alliance**

**CHAIR:** We have present Media, Entertainment and Arts Alliance representatives. Thank you for coming along to talk to us tonight, Ms McCreadie and Mr MacRae. Does anyone wish to make an opening statement?

**Ms McCreadie:** Yes. I will make a brief one. Thank you very much, Senator Cameron and other members of the committee, for the opportunity to appear. I appear on behalf of Actors Equity, which, as you probably know, is a division of the Media, Entertainment and Arts Alliance, which also includes journalists and media workers. Of course, there is a lot of interest in their issues. I appear tonight to, I guess, represent the issues of our actor members—professional actors throughout Australia—many of whom earn their primary living from television drama, along with directors, screenwriters, producers, cinematographers, editors and production designers. They collaborate to produce the dramas that you see every night on your screens.

I think the whole of the production industry is united in being very troubled by the Australian content provisions of the Broadcasting Legislation Amendment (Convergence Review and other Measures) Bill. Actors Equity, along with all the other organisations, engaged very closely with the convergence review on the issue of Australian content. Of course, that is a major issue for us and has been a major issue for many decades. It is an issue we have campaigned very strongly on. We feel that that panel consulted our industry widely and over a lengthy period. In our view, in the final report of the convergence review on Australian content, the recommendations were well-reasoned and well-considered. Those recommendations included both transitional and longer term measures to support new Australian content in the digital environment. Those transitional measures included allowing the commercial networks some flexibility insofar as recommending that they be allowed to fulfil their subquota obligations for drama, documentary and children's drama to spread those obligations, which are currently on the main channels, across on to the digital channels but—and it is a very big but—with the proviso that the quotas be increased by 50 per cent.

So what we have in this bill instead is that they are allowed to spread those subquotas, but there is absolutely no increase, as you know, in the obligation. Of course, we acknowledge that in the bill that we are discussing there is a requirement for minimum Australian content on the multichannels. But the hours requirement is set at a level which is well below what the networks are already showing on the multichannels. Most importantly, that quota can be met through repeats and through genres which, historically, it has been acknowledged do not really require any particular support. They are genres such as news, sport, quiz shows and reality TV.

The new standard does nothing to encourage the most vulnerable genres, in particular drama, which has been historically recognised as needing its own subquota—that is, its own specific quota. The final report of the convergence review explicitly recognised that drama, documentary and children's drama need ongoing support. I would just like to quote what the report said about drama, which is:

Drama contains the most artistically rich content and has the greatest capacity to tell complex stories and convey social and cultural messages.

Well, unfortunately, the bill as it stands—and it looks tragically like it will go through as it stands—will result in a dilution of Australian drama on the main channels. Insofar as it is fulfilled on the digital channels, it is likely to result in lower average licence fees. Clearly, the licence fees which the networks will pay for content on the digital channels are significantly lower due to the lower audience numbers and the lower advertising revenue. So it is quite problematic in terms of a sustainable screen production industry. I have not seen the transcript, but I believe yesterday Channel Ten acknowledged that they would pay less for content on the multichannels. Certainly in our experience dealing with contracts every day and agreements, we know that the licence fees on the digital channels are substantially lower.

So this is a huge concern for the screen production industry. Ultimately, it is a concern for Australian audiences. It is a great shame that with all the noise around the media reforms, this issue in this bill, which is part of one of six bills, has had really, I think, very little debate and very little public exposure and there is very little public understanding of what is going on, especially since Australian audiences have really demonstrated an increased appetite for Australian drama in recent years. They have got very used to high quality dramas, such as *Rake*, *Howzat!*, *Puberty Blues* and the *Slap*, just to name a few. Really it is quite ironic that at a time when Australian drama is enjoying a considerable resurgence it has never been more under threat in the digital environment. We do not have a sensible transition plan and we do not have a plan for going forward into the bigger converged environment. Had the convergence review recommendation been implemented, it would have equated to no more than 30 to 60 minutes a week of adult drama per network and no more than 20 additional

minutes a week of children's drama per network, which I think is a very modest ask and pales into insignificance when compared to the licence fee rebates that are being provided to the networks.

I was going to say that I think the bill should not pass, and I still believe that, but it looks unfortunately like it could go through. It is a real shame because it is a waste of three years of engagement around the convergence review. What I would say, though, is that at the moment there is no provision for a review. There really does need to be some provision for a review of what the impact is of this one-sided flexibility, which allows the commercial networks to spread this obligation for drama, documentary and children's drama on to the multichannels to look at the impact on audiences, to look at the impact on licence fees and to look at the impact overall on our culture and our production industry. What we need above everything, of course, is a plan for going forward, which we do not have, because we have had no sensible response, I think, on the Australian content side to the convergence review. So what is the process for dealing in the coming years with supporting Australian content? What sort of mechanisms are we going to have? It can be regulation or it can be subsidy and it can be, as it has been for several decades, a mix of regulation and subsidy. I think this is a failure of regulation, so really we will have to pick up the ball on the subsidy side, if that is the way we are going forward. But we need a mechanism, essentially. We need the independent regulator, I think—ACMA—to be pulled in more to this process. We need some kind of process for involving the industry as well as the broadcasters and perhaps organisations like Telstra and Google going forward. Thank you.

**CHAIR:** Thanks, Ms McCreadie. Are you making any submissions on any of the other bills?

**Ms McCreadie:** No. Our media division will make a submission on the other bills. But we will not be tabling that tonight.

**Senator BIRMINGHAM:** I have a few questions. I have to duck out in a minute and so I apologise for that. Obviously, you are very critical of the process that has been applied here. That is in relation to issues that have engendered less criticism elsewhere. The media companies, when asked about the content quotas, indicated that they had reached a point of agreement with the government in November last year. What engagement or consultation did you have with the government over these matters?

**Ms McCreadie:** Well, to be frank, since the convergence review final report came out, there was initial engagement and we made clear our support for those recommendations. But I think once that deal was done, it was quite hard to get a conversation going.

**Senator BIRMINGHAM:** Once the November deal was done?

**Ms McCreadie:** That is right, yes. In fact, in the lead-up to it, it seemed that was the case, yes.

**Senator BIRMINGHAM:** You make the contention that drama produced on the multichannels is of less value than drama produced on the primary channel or is likely to be produced at a lower cost basis. Why, when the networks have a desire to increase their viewing audience, wherever it may be, would that hold to be the case over the longer term?

**Ms McCreadie:** Well, I think the viewing audience is only one of their considerations. The whole rationale for specific subquotas for genres such as drama in particular, including children's drama—children's drama is not so much a ratings issue—is that adult drama does rate very well. But imported drama can be purchased for a fraction of the cost. So the networks are looking at costs and they are looking at ratings and they are balancing the two. The ratings relate to their advertising revenue.

**Senator BIRMINGHAM:** Do you dispute the figures given by the networks, which I think are that 47 of the top 50 rating programs last year were Australian produced content?

**Ms McCreadie:** Well, I am not disputing that. But very few of them were drama. I think *Howzat!* was in that, but I do not think any others were in that list.

**Mr MacRae:** They would be reality television type programs, news and sport.

**Senator McKENZIE:** So what are the numbers for drama?

**Senator BIRMINGHAM:** I will leave it to Senator McKenzie, actually.

**CHAIR:** Thanks, Senator Birmingham.

**Senator McKENZIE:** Thanks, Senator Birmingham. So what are the numbers?

**Ms McCreadie:** In terms of what?

**Senator McKENZIE:** In terms of the top rating programs that were dramas?

**Ms McCreadie:** Well, I think *Howzat!* was well rated at over 2½ half million. *Underbelly*, I think, held the record earlier, which was over two million, which had been the highest rating drama program. So the ratings have

been going up for these high production value programs. But the issue is that for the networks, ratings is only one thing that they take into account. Clearly, cost is an issue. There is fabulous imported drama as well, and that rates well. But our concern is that Australian audiences see Australian stories and Australian performers on screen. The rationales, really, for the content quotas have historically been cultural rationales.

**Senator McKENZIE:** Thank you. In the conversation around content by 2015, you released a statement on 12 March that said Minister Conroy, and I quote:

...was pulling a swiftie on the Australian community in regards to mandating additional hours of Australian content on Australian TV screens.

Why did you think this was the case?

**Ms McCreadie:** Well, because he claimed that it was going to create additional Australian content, and clearly it is not, because the requirement is for 730 hours on the multichannels and they are currently doing, I believe, something like 1,400 hours a year. So it is not much more than half of what they are currently doing. The ultimate goal is also only about what they are doing now. So it is not an incentive to increase what they are doing. I think it is a way of saying, 'Well, okay, we'll set a minimum, but we're not addressing a problem.' I've called it smoke and mirrors in the past, and I think that is the same thing as a swiftie.

**Senator McKENZIE:** I think you are not alone there.

**Ms McCreadie:** I think it has created an illusion, unfortunately, for the Australian community that something is being done and it is not actually going to make any difference. If there is any change, it is going to be a negative one because of this new flexibility arrangement.

**Senator McKENZIE:** In terms of the public interest test, are you happy to comment?

**Ms McCreadie:** It is not so much our area.

**Senator McKENZIE:** But in terms of the comments around doing anything to protect or promote diversity of voices in the media, what do you think is the greatest threat to diversity of voices in the media?

**Ms McCreadie:** Well, I think what our media division has said is that they think it is a shame that none of these bills or none of this discussion is really addressing the major crisis in the media sector. Twelve thousand journalists—twelve hundred, sorry; I just added a zero—have lost their—

**CHAIR:** You did a Barnaby.

**Ms McCreadie:** Twelve hundred journalists lost their jobs this year. Clearly, that has an impact on diversity. So I think what the union would like to have seen is a plan for increasing investment and increasing the sustainability of good journalism going into the future. They do not feel that this package addresses that at all.

**Senator McKENZIE:** So in terms of the convergence review and the huge amount of scrutiny and purported consultation right across industry and stakeholders in the media conversation over the past few years, is this the iconic response we were expecting to take us forward into the 21st century?

**Ms McCreadie:** What, these six bills?

**Senator McKENZIE:** That is right. I am assuming this is the minister's response to all those consultations, conversations and reviews.

**Ms McCreadie:** Well, I guess we would be hoping that it was not the response. As I said, I think that going forward into the future, we have always had a mix of regulation and subsidy for this sector. I think it is acknowledged in the convergence review that certain genres need support going forward into the future. There is nothing here that does that. So I would hope this is not the iconic response and that there was some mechanism for further discussions, yes.

**Senator McKENZIE:** Have you had any conversation with the government that would suggest there is more to come?

**Ms McCreadie:** Not particularly. But I guess we are hoping that there is, yes.

**Senator McKENZIE:** Thank you, Chair.

**CHAIR:** Ms McCreadie, the submissions we have had in the last couple of days have concentrated on the changes to the Press Council and the establishment of the PIMA. You are raising an issue that has not had much debate over the last couple of days except to say that the media companies are saying continually that local shows are the top rating shows and that more and more money is going into them. But you say that is in a narrow area of sports and what else?

**Ms McCreadie:** I think the increase has been in others. We were looking at some figures earlier. These are slightly out of date. Certainly the increase has been in areas such as news and current affairs and light

entertainment. In fact, children's drama has been going down. There has been quite a lot of pressure on children's drama. There has been a shift from live action drama to animated drama, essentially to, I suppose, save money and fulfil the quota in a cheaper way. That is a concern for us, I think. If you look at it long term—if you looked over, say, about seven years, it goes up and down—you see that there has not been a substantial increase. But there has been a substantial increase in some other areas. Indeed, in sport there does seem to be a significant increase there. Looking at 2000, it was \$261 million going up to \$330 million in 2008-09. Some of the figures are out of date, but that is not entirely our problem, of course. There are ACMA figures.

**Mr MacRae:** We just have some figures from ACMA detailing figures that have not been released about 2009-10 and 2010-11. It is quite clear that all the increased expenditure is going towards sport, news and current affairs, light entertainment and variety programming—so your reality shows—and a very minimal increase to adult drama of roughly about \$5 million. Documentaries are down quite significantly, as is children's drama.

**CHAIR:** Is the ABC included in those figures?

**Mr MacRae:** No. These are just the commercial networks.

**CHAIR:** Have you got any views on the ABC?

**Mr MacRae:** The ABC received an injection a few years back in 2008-09, I believe. That was a significant boost to Australian drama. They have carried that through. As you can see, the output has increased vastly.

**CHAIR:** In other hearings, not this hearing, it has been put to me that the costs of Australian drama are quite prohibitive for some of the commercial stations, given their financial position. How do we deal with that issue?

**Ms McCreadie:** Well, there is significant subsidy on offer. There is the producer offset of 20 per cent for television. We and other industry organisations have supported an increase in that perhaps for a premium fund or an overall increase. Obviously, there are some fiscal limitations on that, but we have supported that. But that is there and the Screen Australia subsidy is there. So I think they need to take into account that it is heavily subsidised as well as regulated. So it is perhaps not as prohibitive as they see it.

**CHAIR:** What about the reduction in the licence fee issue? Would that provide an incentive for more local products?

**Ms McCreadie:** Well, not unless there is some serious obligation. I think that is the problem. At the moment, the reduction in the licence fee is going to happen. To date it has not resulted in an increase in Australian content. Now we have got locking in the reduction. I do not see that, without an effective change to the Australian content standard, that will happen. There needs to be an obligation to go with that reduction.

**CHAIR:** Briefly, walk us through the areas of concern you have with this block of legislation.

**Ms McCreadie:** Well, the first concern is that it is being presented as an increase in Australian content. The transmission quota requirement, which is effectively a transmission quota for the digital channels, the multichannels, is less than what they are currently doing. Secondly, in the genres which are most vulnerable and historically acknowledged as being most vulnerable, such as drama, documentary and children's drama, there is no subquota for the multichannels. Worse still, there is a flexibility proposal to allow the subquota on the main channel to be fulfilled by being spread across on to the multichannels, which will result in a dilution in those genres on the main channels and potentially drive down the licence fee. Certainly there will be lower licence fees insofar as the networks choose to shift their obligation on to the digital channels. I think that would be the main short-term problems. The longer term problem is there not a long-term process or plan.

**CHAIR:** It seems to me that the multichannels are being used as a filler.

**Ms McCreadie:** Yes.

**CHAIR:** I do not know whether that makes any sense. I do not know what the technical term is. They just fill the space with repeats.

**Ms McCreadie:** Yes. A lot of repeats.

**CHAIR:** And some of them are okay. I think some of the channels have got reasonable audience reach. So would it really matter if these multichannels actually do put in some new drama?

**Ms McCreadie:** Well, it would be great, but the trouble is that at the moment it is a zero sum game. It will take away from the main channels. The networks rarely exceed their obligations, so that is the trouble.

**CHAIR:** It is not so much membership, but how many artists or actors are actually working on a regular basis in the Australian industry? Is there such a figure? There is a bit of casual in and out. Give us an idea how it works.

**Ms McCreadie:** What are you saying? Nine thousand?

**Mr MacRae:** No. One thousand.

**Ms McCreadie:** One thousand working really regularly. There would be 9,000 people probably who make a significant living from acting or see themselves as actors. So our estimate is 1,000 for those who work in and out.

**Mr MacRae:** That would cover television, theatre and film. But it is a very intermittent job. It is very insecure. It is one of the most insecure jobs you could get. There is usually at any one time about 90 per cent unemployment. So you can have a one-day job and then the next day you do not have the job.

**CHAIR:** So you are unhappy with the bill. What are your options or your recommendations to us?

**Ms McCreadie:** Well, our recommendation, in the best of all worlds, would be to implement recommendation 18 of the convergence review, which is the list of transitional recommendations to deal with the transitional environment. Since that is not in there, we certainly think there should be a review process or mechanism to look at the impact and to see whether the licence fee rebates have indeed led to increased Australian content. We would be particularly interested in drama and documentary and children's programming being highlighted in there to see what the impact is.

**CHAIR:** Are you saying that if this legislation goes through, there should be a review?

**Ms McCreadie:** Yes, definitely.

**CHAIR:** So what timeframe are you looking for?

**Ms McCreadie:** Twelve months would be good.

**Senator McKENZIE:** We have heard of a review before. They were suggesting three years. I wonder why you would pick 12 months? Is that long enough given the production timelines and contractual negotiations that I assume you go through?

**Ms McCreadie:** Well, I suppose it is open to discussion how long the review should take. I suppose we are in a fairly rapidly changing environment, though. It is debatable, but some would say that the current landscape in three years or five years is going to be very different. So given that we are looking at the transitional arrangements, I would think maybe shorter than three years could be justified. Essentially we just think there should be an independent review, perhaps by ACMA.

**CHAIR:** Do you have any draft terms of reference that a review should look at?

**Ms McCreadie:** We could do some. We would say: have the licence fee rebates resulted in increased Australian content, with special reference to the genres currently covered by subquotas? What has been the impact of the flexibility arrangements which allow the subquota obligations to be spread across the digital channels?

**CHAIR:** Senator Ruston, do you have any questions?

**Senator RUSTON:** Sure. If there is time.

**CHAIR:** Yes, sure.

**Senator RUSTON:** You commented before that the major crisis in the media sector was the loss of 1,200 jobs for journalists. Could you expand a little on that, particularly in the context of how or whether these bills address this issue or not address this issue? How would you like to see them address this issue? Having had a look at the bills to some degree, I am not quite sure how that comment actually can be addressed by the context of what we are dealing with today.

**Ms McCreadie:** You do not see how the bills could have addressed that one way or the other?

**Senator RUSTON:** I do not see how they do.

**Ms McCreadie:** Right. I defer to our media section, because I am here representing the performers section. Their view would be that there is nothing that addresses the crisis in the business model, which has resulted in the loss of 1,200 jobs. There is a shift towards outsourcing and offshoring of some jobs. So clearly there is—

**Senator RUSTON:** Journalist jobs?

**Ms McCreadie:** Subeditors jobs, yes. The journalist jobs have been lost, but subediting is being outsourced, basically. There has been a shift away from subeditors being, I guess, local. They are being outsourced so that they are distant. Some have been moved to New Zealand, I understand, yes.

**Senator RUSTON:** So how would you like to see that addressed?

**Ms McCreadie:** Well, I think that is the subject of a bigger discussion about how you promote investment in new media.

**Senator RUSTON:** I suppose I ask the question only because there is an obvious change out there in the media space of recent times, which has seen many things change. I suppose if you were a blacksmith 20 years ago, you could not reasonably expect to continue to be a blacksmith. So is the change in the media space just—

**CHAIR:** There are still some blacksmiths.

**Senator RUSTON:** There is one, apparently, in our chamber. I use it only as an example. Is the change in the media space driving change? I only draw it to your attention because you said the major crisis in the media sector is the loss of 1,200 journalist jobs. I wonder whether that is just not a result of a change in a space as opposed to being a crisis that should be averted.

**Ms McCreadie:** Well, I do not know if it is so much averted, but how do you deal with that adjustment and how do you maintain diversity in that sort of environment? Clearly, when you lose a lot of journalists from a particular newspaper, for instance, there is less diversity and there is a lot more pressure on people. I think there is probably less scope for in-depth investigation and journalism. It feels that way.

**Senator RUSTON:** You made a comment about the ratings in relation to drama were high but you said spending generally tends to focus on sport and reality TV, obviously, because they must be live. Has anybody actually had a look at the costing mechanism that would suggest that? Ratings run how television put their programs on, I would suggest. How high do ratings need to be to absorb the cost of production of local drama in comparison to the other things? I understand your point, but I wonder how much the market is allowed or could drive the outcome of that?

**Ms McCreadie:** I do not know that I would have the figures. I guess what I was saying is that there is a trade-off between cost and revenue. The ratings lead to the revenue. They are related to the advertising revenue. So the network has to balance the two factors. Yes, I am sure there is probably a demand and supply curve we could draw, but we would have to look at how that would work. It would be very high, I would suggest.

**Senator RUSTON:** I suppose it is just a question whether there has been any cost-benefit analysis. We would all like everything to be perfect, but you just cannot afford it sometimes. If the cost is so prohibitive, the people of Australia probably need to make the decision as to whether they want the drama or whether they are happy to have the sport and reality TV.

**Ms McCreadie:** Well, I do not think it is prohibitive. I think that probably the subsidies that have gone into the industry have been fairly modest. The networks, of course, have got free access to scarce spectrum. Part of the deal has been, 'Well, you've got that for nothing. In exchange, there's regulation that obliges you to do certain things for cultural reasons.' I would not suggest it is prohibitively high. I think probably the amount that each taxpayer pays in order to get access to Australian content on television is fairly low. I do not know if you have ever seen a figure on that, Drew?

**Mr MacRae:** No. It is certainly the case that there is market failure here. We do not have the audience size and the population base in Australia to support the production of program at such a high level in terms of the amount of money that goes into these programs. We cannot recoup that. When that is played up against a US drama that can be bought on the cheap, both of them may rate 1.8 million viewers one night. The broadcaster needs to make a decision which one. But that is why Australian governments for the past 60 years have all agreed that there should be Australian drama quotas.

**Senator RUSTON:** If we are getting American dramas dumped on Australian TV, there is no reason why we cannot be dumping Australian dramas on the stations of other countries. Why is it that we have not been as successful as the American producers of drama? We all live in the same English speaking drama market, do we not?

**Ms McCreadie:** Well, I think they recover their costs in the American market, which is much larger. Clearly, we want our programs to be culturally relevant. It is possible that they do not travel as easily as an American program. Basically, there is a global cultural hegemony from the United States. The economics are that they do not need regulation and subsidy. What they are doing is selling into the Australian market at a marginal cost, so it is a huge disparity in terms of costs. We could just produce, I suppose, American programs here. I do not think they would travel as well.

**Senator RUSTON:** No. I do not mean that at all.

**Ms McCreadie:** But it is about cultural resonance. The American programs rate culturally in America. They recover their costs in their home market. Then they are selling them to the rest of the world at a marginal cost.

**CHAIR:** Thanks, Senator Ruston. Any further questions? If not, thanks, Ms McCreadie and Mr MacRae.



**CASSIDY, Mr Brian, Chief Executive Officer, Australian Competition and Consumer Commission**

**GLENN, Mr Richard, Assistant Secretary, Business and Information Law Branch, Attorney-General's Department**

**McNEILL, Ms Jennifer, General Manager, Content, Consumer and Citizen Division, Australian Communications and Media Authority**

**O'LOUGHLIN, Ms Nerida, Deputy Secretary Broadcasting and Digital Switchover, Department of Broadband, Communications and the Digital Economy**

**PELLING, Dr Simon, First Assistant Secretary, Department of Broadband, Communications and the Digital Economy**

**WEBB, Ms Rose, Executive General Manager, Mergers & Adjudication Group, Australian Competition and Consumer Commission**

[20:30]

**CHAIR:** I welcome representatives from the Department of Broadband, Communications and the Digital Economy, Australian Communications and Media Authority, Australian Competition and Consumer Commission and the Attorney-General's Department. I thank you for talking to us today. As government officers, you will not be asked to give opinions on matters of policy, though this does not preclude questions asking for explanations of policy or factual questions about when and how policies were adopted. Does anyone wish to make a brief opening statement before we go to questions?

**Ms O'Loughlin:** Not from the department.

**Ms McNeill:** Nor from the Communications and Media Authority.

**Mr Cassidy:** Nor from the ACCC.

**Senator BIRMINGHAM:** Thank you all for coming along.

**CHAIR:** I did not miss the Attorney-General's Department, did I?

**Mr Glenn:** No.

**CHAIR:** This looks like estimates and you are not normally here.

**Senator BIRMINGHAM:** That is true. We might be tempted to ask Ms O'Loughlin or Dr Pelling about other issues. Thanks to you all for coming along. I will start with the drafting of these bills and, in particular, with the decision to pursue the public interest media advocate and the News Media (Self-regulation) Bill. When were those two bills first drafted?

**Ms O'Loughlin:** Senator, I do not think it is probably appropriate for us to discuss the toings and froings of the bill. The bills were considered last week by the government and introduced last Thursday.

**Senator BIRMINGHAM:** Ms O'Loughlin, I think the Chair just read the usual statement, which does reflect that it is reasonable to pursue issues of timing and so on in relation to decisions that were made. Were these bills drafted ahead of last week's cabinet meeting? Did they exist then?

**Ms O'Loughlin:** Yes, Senator, they did. There were some minor amendments before they were finally introduced.

**Senator BIRMINGHAM:** And how long prior to that had these bills existed?

**Ms O'Loughlin:** They had existed in one form or the other over the last couple of months, but they were not finalised until after the cabinet meeting last Monday.

**Senator BIRMINGHAM:** Has the constitutionality of these bills been considered?

**Ms O'Loughlin:** Yes, Senator, it has.

**Senator BIRMINGHAM:** And I assume the government believes they would withstand High Court challenge?

**Ms O'Loughlin:** Yes, Senator, they do.

**Senator BIRMINGHAM:** Have any particular issues been raised, does the government have any concerns or have you taken any particular actions to try to prevent the risk of successful challenge to any of these bills?

**Ms O'Loughlin:** Senator, we have taken advice on the matter during the drafting of the bills.

**Senator BIRMINGHAM:** Have any particular precautions or steps been taken to ensure that these bills would withstand challenge?

**Ms O'Loughlin:** My advice is that, firstly, we have taken advice on the matters but also both bills contain provisions to the effect that respective acts do not apply to the extent, if any, that they would infringe any constitutional doctrine of implied freedom of political communication.

**Senator BIRMINGHAM:** I want to work through some of the terms in the bills. I will ask about the News Media (Self-regulation) Bill, which is the one I have in my hand. Section 5 part 2—

**CHAIR:** What bills are we on?

**Senator BIRMINGHAM:** The News Media (Self-regulation) Bill. Section 5 part 2 provides a range of exemptions in terms of how they apply. One of those exemptions is for material that is targeted to a special interest group. How is that defined?

**Ms O'Loughlin:** Senator, it is not defined in law, but I think there are various tests available to understand what is a special interest group. What the legislation is trying to achieve there is to make sure that things that are produced for local community groups, the trade press or for small areas of special interest are not captured by the provisions in the act.

**Senator BIRMINGHAM:** Is there a threshold that applies to what constitutes a special interest group?

**Ms O'Loughlin:** No, Senator, there is not. But if there were any doubt, that would be a matter that the PIMA could look at.

**CHAIR:** I missed that, Ms O'Loughlin. It is a matter for?

**Ms O'Loughlin:** The public interest media advocate could look at that issue.

**Senator BIRMINGHAM:** In terms of threshold content, can you talk us through exactly the government's understanding of what is captured in terms of news media that will have to be subjected to this self-regulation, as it is described?

**Ms O'Loughlin:** The government's proposals are aimed at significant providers of print and online news and current affairs. A news media organisation will not be eligible, as defined, for the exemption under the Privacy Act. The news media organisation rules are defined in section 4. Then there are a number of exemptions. The purpose of the proposals is to capture into the scheme the significant providers of print and online news but to not capture those organisations producing information and news for smaller communities. So it really is around the significant providers of news and online services. It does not apply to broadcasters. It really is defined around print. It does not apply to small business operators within the meaning of the Privacy Act.

**Senator BIRMINGHAM:** So how big does a newspaper have to be to be captured?

**Ms O'Loughlin:** It just needs to be a corporation. There are no defined thresholds, unlike under the public interest test, where there are thresholds.

**Senator BIRMINGHAM:** So any publication produced by a corporation that contains news and does not manage to fit within a description of something for a special interest group or the like would be captured?

**Ms O'Loughlin:** Senator, if they are not captured by the various exemptions which are included in the bill, they would be captured.

**Senator BIRMINGHAM:** How many newspapers or publications are believed to be captured by the bill?

**Ms O'Loughlin:** Senator, we have spent quite a bit of time trying to draft the bill in a way that really sticks to the purpose of the exercise. It really is focussed, as I said, at the significant news and current affairs providers. That would, I think, from our analysis, pretty much take in most of the people you would expect that would be covered by it, such as the major national newspapers and the major regional newspapers, but not get down to things like the local society gazette in a community or a particular print publication which was designed to go only to a small number of interested parties.

**Dr Pelling:** Senator, I also draw attention to the definition of a news media organisation, which is a constitutional corporation whose activities are wholly or principally media related activities and consist of or include news and current affairs activities. It does not include a small business operator within the meaning of the Privacy Act, which I believe is any corporation with a turnover of less than \$3 million.

**Senator BIRMINGHAM:** Would, for example—this is a publication I am not terribly familiar with—the *Women's Weekly* be captured?

**Ms O'Loughlin:** I would expect that it would not meet the definition of a news media organisation as its activities do not consist of or include news or current affairs activities and are wholly and principally media related activities.

**Senator BIRMINGHAM:** So although they might cover public interest stories, including profile pieces on public figures, and may even cover news stories of interest to people that touch on news content on a regular basis, probably in every edition, that would not be captured?

**Ms O'Loughlin:** Senator, the definitions of news or current affairs activities are the collection, preparation for dissemination or the dissemination of any of the following material for the purpose of making it available to the public—material having the character of news or current affairs, material consisting of commentary or opinion on or analysis of news or current affairs.

**Senator BIRMINGHAM:** They are relatively broad, in a sense, though, Ms O'Loughlin—commentary on news or current affairs. Let me turn to the online sphere. Another outlet that perhaps is not on my regular visit list is the Mamamia blog. Would it potentially be captured?

**Ms O'Loughlin:** Again, Senator, I do not think it falls under the definition of news or current affairs or opinion. Most of the *Women's Weekly* and the Mamamia sites are more straight information sites or entertainment sites.

**Senator BIRMINGHAM:** A lot of opinion goes on in the Mamamia site. The Prime Minister has even seen fit to have to court the editors and writers on the site to help disseminate and influence public opinion.

**Ms O'Loughlin:** Senator, the rules under the law are material consisting of commentary or opinion and material having the character of news or current affairs. I do not think that those types of services, which are a mixture of many things, would fall under even the plain English version of what people would think were news or current affairs or opinion and activities which are specifically directed and principally about news, current affairs or opinion.

**Senator BIRMINGHAM:** Will PIMA identify those outlets that it expects must be a member of a regulated organisation?

**Ms O'Loughlin:** The way the legislation works is that it is up to a news media self-regulation body to establish itself. It is open to providers of services to join that body if they so choose if there is any concern that they might be caught by the legislation. Or they can sit outside that if they consider that they fit within the exemptions. I think you will find that a lot of small business operators which fit outside the exemptions will be quite happy to sit outside a news media self-regulation body. But there may be bloggers who feel that there is benefit in them being part of that news media self-regulation body. That would be a matter for them.

**Senator BIRMINGHAM:** Would a journalist who is writing for the *Women's Weekly* or Mamamia, for example, enjoy the exemptions under the Privacy Act that are targeted in these reforms?

**Ms O'Loughlin:** I might pass over to my AGD colleague.

**Mr Glenn:** The question was around?

**Senator BIRMINGHAM:** Would a journalist who is writing for something like the *Women's Weekly* or the Mamamia blog enjoy the exemptions under the Privacy Act that these bills potentially would draw, should they not be a member of a relevant organisation?

**Mr Glenn:** Senator, to the extent that the subject matter that is being written about by the particular journalist who is working for that media organisation can fall within the definition of a media organisation in the Privacy Act, then, yes, they could be covered by the exemption in the Privacy Act. In an organisation that is not covered by the provisions to be inserted into the Privacy Act that deal with news media organisations under this scheme, they could still nonetheless be able to access the media exemption under the Privacy Act if they are able to now.

**Senator BIRMINGHAM:** So there could well be people operating as journalists who are working for major outlets or publications rather than simply a community service newspaper or particular special interest outfit. There could be journalists who would be able to enjoy the exemptions under the Privacy Act but not be subjected to the proposed regulatory structure?

**Mr Glenn:** Potentially, yes, Senator. If the journalist or the media organisation does not fall within the definition of news media organisation proposed by the amendments put forward in these bills but nonetheless is able to enjoy the media exemption in the Privacy Act now, they will continue to be able to enjoy that exemption.

**Senator BIRMINGHAM:** Is this felt to be a loophole or inconsistency that the government looked at, or was there consideration given to how you might attempt to align these definitions?

**Mr Glenn:** Senator, I think that is actually about the scope of the regulation that is being introduced by these bills, and the entities they are being directed at is a narrower set of entities than those that the broader journalism exemption in the Privacy Act applies to.

**Senator BIRMINGHAM:** I come to the online space in particular. What online sites and services will be captured?

**Ms O'Loughlin:** Again, Senator, this is about organisations and not necessarily about particular publications of organisations. The news media organisations are caught by it. Again, if there are organisations that are engaged in wholly or principally media related activities and these consist of or include news or current affairs activities, they will be caught by the regulation. There are, again, exemptions around some of the online material in that it does not apply if it is associated with a broadcasting service. It does not apply if it is associated with a data casting service and anything done by the provider of news or current affairs aggregation service. So what we are not trying to do is put people in the loop who really do nothing more than pull together sources of news and current affairs and opinion from all over the place and just put it out. We are looking for people who are directed towards an Australian audience and who also have editorial control.

**Senator BIRMINGHAM:** So if you are specifically an online business and you provide your content for free, are you captured?

**Ms O'Loughlin:** It would depend on whether or not you were an online service which undertook news and current affairs activities, whether or not you were a small business provider, whether or not you were associated with any of the exemptions in the act and whether you had editorial control over the content. So it really depends on what type of organisation you are and what type of service you are providing.

**Dr Pelling:** The section 5 provisions at various points, for example, say that subsection 1 does not apply to material disseminated by various things, an online service that is not targeted to the public in Australia or material that is including an online service that is targeted to special interest groups. So the same sorts of divisions, I think, would apply in relation to online services as to other forms of services in terms of who the target audience is.

**Senator BIRMINGHAM:** So would Crikey be covered?

**Ms O'Loughlin:** We would expect that Crikey would be covered because it is primarily a news and current affairs site and opinion site.

**Dr Pelling:** Provided it is not a small business operator. I do not know the size of Crikey in terms of the business.

**Senator BIRMINGHAM:** And in that sense there is essentially an honesty system at play, is there? They would have to self-regulate themselves by joining the Press Council, or will PIMA be able to look into whether somebody has tripped the small business threshold?

**Ms O'Loughlin:** That would be a matter when applying the privacy exemption that would have to be looked at. The proposals are that the industry itself would develop a self-regulation scheme, including coverage of members who are covered by the provisions in the act. The privacy provisions would be available to those members of those organisations. It would be a matter to consider when the privacy exemption needed to be applied as to whether or not the provisions in this act applied in those circumstances. Sorry, I said that really badly.

**CHAIR:** You can try again, Ms O'Loughlin.

**Ms O'Loughlin:** I will try again. I am sorry, Senator. If a journalist were not part of the news media self-regulatory scheme and there was an issue in terms of the Privacy Act, the protections under this scheme would not be available to them.

**Senator BIRMINGHAM:** So we understand very clearly at the Privacy Act level, can we talk through what exemptions currently apply? What exemptions would apply in the future to journalists who are not captured by an organisation that has to join a news media self-regulation body? What provisions would apply to journalists who in the future are working for a captured news media self-regulation body?

**Mr Glenn:** We will start with the existing rules in the Privacy Act. There is an exemption in section 7C of the Privacy Act for an act done or a practice engaged in by a media organisation. It will be exempt if it is done in the course of journalism at a time when the organisation is publicly committed to observe standards that deal with privacy and have been published by the organisation. So typically media organisations that are operating under this Privacy Act exemption now have either a self-published set of standards that they say they adhere to in relation to privacy or are a member of another body that does that. In that sense, this exemption engages. If there

is a complaint made against that particular media organisation in relation to an interference with privacy, they can claim the exemption in relation to that complaint.

**Senator BIRMINGHAM:** It is an automatic exemption if they meet the relevant tests in there? There is no need to apply for it?

**Mr Glenn:** That is right.

**CHAIR:** On that point: we had a submission today from Dr Margaret Simons from the Centre for Advanced Journalism in Melbourne. She brought a *Daily Telegraph* front page that showed a footballer who was in rehabilitation. Inside it showed the footballer's children with their faces pixelated. Is that a breach of privacy?

**Mr Glenn:** Senator, I could not comment on whether a particular incident is a breach of privacy. I can say in that situation, though, that that media organisation has the advantage of the exemption in the Privacy Act if at the relevant time it had privacy standards that it said it was meeting, so the exemption operates.

**CHAIR:** So a company says, 'Our privacy standards are that we can from a public place with a long lens zoom take a photograph of a footballer in rehabilitation. That is our standard.' Is that acceptable?

**Mr Glenn:** Whether that meets the standard that the organisation has said that it would meet in terms of the exemption I do not know. That is a matter for that particular standard. In terms of whether, though, the Privacy Act exemption has been engaged by the organisation saying that they have privacy standards and publishing them, that in itself, on the current law, is sufficient to engage the exemption for journalism.

**CHAIR:** So even if the standard does not meet what most people would think would be a fair and reasonable position? So you can set your standard extremely low under the current legislation. You can set your standard so low that it gives you the exemption. Is that correct?

**Mr Glenn:** The act does not talk about the nature of the standards that are to be applied. It simply talks about the organisation being publicly committed to observe standards that deal with privacy in the context of the activities of a media organisation and that have been published.

**CHAIR:** Roughly, how long has that statute been in place?

**Mr Glenn:** This exemption was introduced into the law in late 2001.

**CHAIR:** It is pretty vague, but it has been there for 12 years and we have managed to work with it.

**Mr Glenn:** Yes, Senator.

**CHAIR:** Ms O'Loughlin, you wanted to say something.

**Ms O'Loughlin:** Thank you, Senator. The proposed amendment, of course, builds on that exemption. Our amendments to the Privacy Act just strengthen the condition by, in effect, requiring the news media organisation to commit to standards set by an independently approved news media self-regulation body, as evidenced by the news media organisation becoming a member of that body.

**CHAIR:** That is this legislation?

**Ms O'Loughlin:** That is correct.

**CHAIR:** I am talking about the current legislation.

**Senator BIRMINGHAM:** Which brings it back, in a sense, to the question that I originally asked. Ms O'Loughlin or Mr Glenn, provide some clarity. Ms O'Loughlin was just outlining that this legislation proposes to be the threshold test in the future for journalists working for organisations that are captured by the legislation. That would change the test. It would be the same exemption except for the fact that the test to qualify for the exemption is that you would have to be meeting a privacy standard of the Press Council or whomever rather than your own privacy standard?

**Ms O'Loughlin:** That is right. You would have to be a member of a body which is a registered body that the public interest media advocate has designated to be an appropriate body.

**Senator BIRMINGHAM:** And if you are not in a news media organisation as defined and captured by this legislation but are a working journalist, you can still enjoy the existing exemption in the future with the existing terms of needing to have your own privacy code?

**Mr Glenn:** Yes.

**Ms O'Loughlin:** And the small business exemptions may apply.

**Senator BIRMINGHAM:** Small business exemptions may apply with the Privacy Act?

**Mr Glenn:** Yes. There are a range of exemptions in the Privacy Act, including one for small business operators.

**Senator BIRMINGHAM:** I turn to the example Senator Cameron gave before. How is the Privacy Act policed or enforced?

**Mr Glenn:** The Australian Information Commissioner, along with the Australian Privacy Commissioner, have regulatory responsibility for the Privacy Act. The Privacy Commissioner has the ability to receive complaints in relation to people who allege that there has been an interference with their privacy. It has the ability to investigate those complaints. It also has the ability to initiate own motion investigations if the commissioner becomes aware of circumstances where privacy may have been breached.

**Senator BIRMINGHAM:** So in this instance of the footballer who had been photographed in what is claimed to be a breach of the organisation's own privacy principles, if that were the case and it was a breach of the privacy guidelines of the news media organisation and they went ahead and published a photograph in breach of their own guidelines, that would be a breach of the Privacy Act? The exemption would not apply and they would have breached the act. Is that correct?

**Mr Glenn:** No, Senator. As I understand it, the exemption would still apply but that media organisation would have breached its own privacy standards. Whatever consequence there was for the media organisation for having done that in relation to its own privacy standards would flow.

**Senator BIRMINGHAM:** Is there any capacity for such an organisation who has its own standards to breach the Privacy Act, or is it a blanket exemption in that section?

**Mr Glenn:** In relation to its activities as far as journalism is concerned, the exemption would stand.

**Senator BIRMINGHAM:** Once they qualify, it is blanket?

**Mr Glenn:** The rest of the organisation defines that.

**Senator BIRMINGHAM:** Excellent. I want to move further into the news media self-regulation body. I go to some of the matters to which PIMA must have regard in making a declaration, which is 7 part 3, the very long part. How does the department expect matters of privacy, fairness, accuracy and other matters relating to the professional conduct of journalism to be defined?

**Ms O'Loughlin:** Senator, what the provisions in this part of the act do is to say that the PIMA must have regard to a range of matters when assessing whether or not it can declare a news media self-regulation body. The way the provisions work is to really put the emphasis back on the news media self-regulation body to come forward with proposals in each of the areas that these matters cover for consideration by the PIMA. So it would be up to the news media self-regulation body to present to the PIMA standards that deal with privacy, fairness, accuracy and other matters relating to the professional conduct of journalism rather than for the PIMA to define that.

**Senator BIRMINGHAM:** But the PIMA is going to have to define it because the PIMA is going to have to approve whether those standards are met or not.

**Ms O'Loughlin:** The PIMA must have regard to the following matters. Those matters talk about the extent to which the standards formulated deal with the following and the extent to which those standards reflect community standards and a number of other provisions aimed at accountability and transparency and complaints handling.

**Senator BIRMINGHAM:** So if the Press Council code simply says that news media organisations must have regard to matters of privacy, fairness, accuracy and other matters relating to the profession or conduct of journalism in their conduct as a news media organisation, is that sufficient to meet the standards of the public interest media advocate?

**Ms O'Loughlin:** I think it would be unlikely that any news media regulation body that took the provision seriously would present something that just repeated back the legislation. Journalists and the council have spent a lot of time and energy in developing different standards around privacy, fairness and accuracy. They are things that the sector takes quite seriously, so I expect that they will bring forward standards which are quite precise. Some of the evidence earlier today from both the council and from the Independent Media Council talked about how they have presented quite extensive work in the area of privacy, fairness and accuracy. That is what we would expect would be brought forward. If the PIMA felt there were any difficulties around that and the other provisions, it could request that the news media self-regulation body amend its standards or expand its standards. If it felt that privacy was not covered in the standards, it could ask for it to come back and provide something on privacy. But it is really up to the self-regulation body itself to come forward with what it thinks should be covered. Because it is not just that PIMA is going to tick this off. This is about a news media self-regulation body taking self-regulation seriously.

**Dr Pelling:** I think also it would be difficult, if you think of the practicalities of how this would be implemented, for an organisation like the current Press Council to come to the PIMA with a significantly watered down set of things and say, 'Having lived with an existing code or just recently upgraded the code, we now choose to bring it down to what might be the possible lowest common denominator'. For the PIMA to say that is acceptable.

**Senator BIRMINGHAM:** It would seem that simply regurgitating the requirements of the act is not acceptable. Is the current code of the Press Council acceptable?

**Ms O'Loughlin:** Senator, I am not going to speculate on that. It would be a matter for the PIMA to do so.

**Senator BIRMINGHAM:** The minister has indicated that it is.

**Ms O'Loughlin:** I am not going to speculate on that. They are the minister's comments.

**CHAIR:** The officer has indicated that she does not believe it is appropriate for her to comment.

**Senator BIRMINGHAM:** So are there any guarantees in this legislation that the current code would meet the requirements of the PIMA?

**Ms O'Loughlin:** Senator, again, I am not going to speculate. What we have provided in the provisions of this act is what the PIMA would consider. It is up to the new self-regulatory body to bring forward a code that it considers covers off all the clauses that are required.

**Senator BIRMINGHAM:** So if the existing Press Council model were put forward, the PIMA could say yes or it could say no or it could request changes?

**Ms O'Loughlin:** It could say yes or it could say no, yes.

**Senator BIRMINGHAM:** Or it could request changes?

**Ms O'Loughlin:** It could advise the self-regulatory body that it was not prepared to say yes or no at that time. But it cannot put forward suggestions and drafting changes to codes or standards. So it is not like it will come back with, 'Add this in here. Add that in there.' That is not the intention of the PIMA. It can say that it accepts the self regulatory body's proposals or it does not. Or it may work with the applicant to refine matters in some areas. But it is not designed to write the standards itself.

**Dr Pelling:** I draw your attention, Senator Birmingham, to section 8, which states that before making a declaration under 7(1), the PIMA must consult with the Privacy Commissioner and cause to be published a notice setting out the draft declaration, inviting persons to make submissions to the PIMA about the draft declaration and consider any submissions. So there is a process, too, for deciding to approve or not approve.

**Senator BIRMINGHAM:** Is the PIMA prohibited from making suggestions?

**Ms O'Loughlin:** Under the proposals, it has the power to approve or revoke, but it does not have any power to make suggestions.

**Senator BIRMINGHAM:** But is it prohibited from making suggestions?

**Ms O'Loughlin:** It is not part of its powers.

**Senator BIRMINGHAM:** Section 8, which Dr Pelling drew our attention to before, requires the PIMA to set out a draft declaration. Would a draft declaration include reasons?

**Ms O'Loughlin:** Yes, it would. But it would not provide direction back to the self-regulatory body. As I said, the PIMA is not engaged in trying to define for the body itself what its standards would be. Its role is to consider a range of matters that are brought forward from the industry to assess whether or not it thinks it will be a robust self-regulatory scheme. While some of these matters go to standards, a lot of the other matters go to some of the areas that have been of most concern in the current arrangements, which are about accountability, transparency, independence and dealing with complaints.

**Senator BIRMINGHAM:** If an individual who has been appointed to the position of PIMA—I will try to come back to that—publishes a declaration or makes a declaration or a decision in relation to either bringing into play a news media self-regulatory body or the revocation of their status and in that declaration says, 'We are revoking or refusing status because it fails to do these things. But if it did these things, we would approve it', would that be in any way prevented by the legislation before us?

**Ms O'Loughlin:** That would not be an acceptable way of the PIMA. Going back to industry, after its consultation, it would provide back to industry that consultation information. It would either revoke or accept.

**Senator BIRMINGHAM:** You are telling me it is not acceptable, Ms O'Loughlin. Where is the legislative clause that says they cannot do that? Yes, they can approve. Yes, they can revoke or refuse. Yes, they can publish a draft that sets out reasons. Why in those reasons can they not make suggestions? Where is the prohibition?

**Ms O'Loughlin:** Senator, the PIMA has been provided with functions and it cannot operate outside its functions. Its functions are to accept or to revoke.

**CHAIR:** On this issue: if a news body says to PIMA, 'We have this problem. You're looking at it. Because of your knowledge and understanding of these issues, can you give us some suggestions without exercising power?', would that be acceptable?

**Ms O'Loughlin:** Senator, that is not the way that the PIMA is expected to operate. This is expected to be a self-regulatory scheme. The PIMA may say to the people working on the proposals to come forward. Their role is to accept or revoke. It would not be appropriate for them to guide the development of the standards or guide the development of the scheme.

**CHAIR:** Is this to ensure that self-regulation is self-regulation without any interference or advice from PIMA?

**Ms O'Loughlin:** The proposals are directed towards improving the current self-regulatory scheme and having an independent oversight of the development of that scheme. That is so it can be assured that, for example, it improves on the issues that have been dealt with in the privacy debates around dissatisfaction with issues of privacy in newspapers, where consumers have not had satisfaction through the process.

**Senator BIRMINGHAM:** If the PIMA behaved in a manner that I outlined before and provided suggestions in a ruling, what recourse is there for anybody, including the minister?

**Ms O'Loughlin:** There are powers in relation to the PIMA. I will just need to find it.

**Senator BIRMINGHAM:** If you are looking for the termination of appointment of the PIMA, that is section 16 of the bill.

**Ms O'Loughlin:** The minister may terminate the appointment of the PIMA for misbehaviour, if the PIMA is unable to perform the duties or becomes bankrupt, and there are a number of additional provisions.

**Senator BIRMINGHAM:** So if the minister of the day thought that it was inappropriate for the PIMA to provide explicit suggestions about what should be in a code, the minister of the day might define it to be misbehaviour and terminate the PIMA? Is that the process we are looking at here with all of those things in mind?

**Ms O'Loughlin:** I think it would depend on what the intent of the PIMA was in providing that advice. The PIMA, once appointed, is very clear in its role. It would be very clear in its role in terms of accepting or revoking. Whether or not the provision of advice came down to the need for termination of appointment would be a matter to be considered at the time. I would expect that the first instance would be that the industry self-regulatory body itself would not accept any advice coming from the PIMA which crossed the line in terms of trying to guide the development of their self-regulatory body. That is certainly not the intention of the act and certainly not within the PIMA's powers.

**Senator BIRMINGHAM:** So if it works as you are saying it will work, Ms O'Loughlin, and the PIMA does not provide any direction or advice and the self-regulatory body puts up its model and the PIMA says no, the self-regulatory body then goes back and tries again?

**Ms O'Loughlin:** Yes.

**Senator BIRMINGHAM:** If the PIMA says no, the self-regulatory body goes back and tries again?

**Ms O'Loughlin:** Well, the legislation is very clear about the matters that the PIMA must have regard to. So it would be unusual for a proposal to come forward that did not have regard to those matters in presenting a proposal to the PIMA.

**Senator BIRMINGHAM:** Yes. But if those matters are to be precise or prescriptive and the PIMA is to sit in judgement on whether they are appropriately precise or prescriptive, then the organisation is going to have to try to keep guessing until they meet the PIMA's satisfaction, if the PIMA is not going to provide any guidance to them.

**Ms O'Loughlin:** The proposals in the legislation are specifically objectives based, not prescriptive, because we consider that that is a better model for the news media self-regulatory scheme. It would be inappropriate for the setting down in the law of highly prescriptive arrangements that a news media self-regulatory body would have to tick off. That is not the way that the scheme is intended to work and really flies in the face of the intent of the scheme, which is for it to be a self-regulatory body. Self-regulatory bodies can put up proposals to the PIMA,



who can accept or revoke. If the news media organisations felt that the advocate had directed them inappropriately, there is nothing to prevent them undertaking court action.

**Senator BIRMINGHAM:** That does flow nicely into one of the other issues raised here. In terms of the determinations of the PIMA, the right of appeal for a news media organisation would be that you would have to go straight to the Federal Court?

**Ms O'Loughlin:** Yes.

**Senator BIRMINGHAM:** Was any consideration given to putting any internal appeals process into this legislation?

**Ms O'Loughlin:** Senator, what we have included in the PIMA's role is a high level of transparency in its activities so that it does need to consult both with the Privacy Commissioner in terms of the news media self-regulation bill, with the ACMA and the ACCC in relation to the media diversity bills and to open up its decisions for public consultation in advance of the final proposals. It has a high level of transparency built into its processes so that its decision making is transparent to the community as well as the people who are involved in its decisions. The types of decisions it makes, we consider, are best then assessed by the court.

**Senator BIRMINGHAM:** In expecting transparency and expecting to provide a high level of transparency, you are really expecting it is going to provide detailed reasoning for its determinations, are you not, Ms O'Loughlin?

**Ms O'Loughlin:** Senator, the PIMA will provide such information as it sees fit against the matters that it has to assess the proposals against, which are laid out in the bill.

**Senator BIRMINGHAM:** The last of the long list of factors that the PIMA can consider are such other matters, if any, as the PIMA considers relevant. Basically it gives the PIMA a blank cheque as to how they want to work, does it not?

**Ms O'Loughlin:** No, Senator. I would not characterise it that way at all.

**Senator BIRMINGHAM:** Why not?

**Ms O'Loughlin:** Because the PIMA is very clearly defined in that the intent of its appointment is to approve or revoke a scheme presented by an applicant to become a news media organisation under the law. It is not intended to consider anything outside that remit. As you know, usually with legislative drafting, one does not want to miss things in the drafting. Being highly prescriptive, you can actually miss things along the way. We have chosen an approach to not be prescriptive, but we have provided some sensible flexibility for the PIMA. Of course, those considerations have to be relevant within the context of their overarching role.

**Senator BIRMINGHAM:** Could the PIMA determine that a news media self-regulation body had to have a scientific adviser informing their decisions on complaints made to them about their member organisations?

**Ms O'Loughlin:** Senator, there is nothing in the matters that it has to have reference to which would get down to directing the body as to who should be on it and who should not be on it. Its role is to be provided with by an applicant a scheme that it can approve or revoke. Within that scheme it is up to the new self-regulatory body that is applying to identify how that scheme will work, including its membership, including how its complaints handling processes will work, and including the make-up of those people who will make decisions on the complaints put forward to it. So it is all embedded back in the industry itself to come forward with proposals which spell out a scheme that the advocate will either tick off or not tick off.

**Senator BIRMINGHAM:** It is then completely within the discretion of the PIMA themselves as to whether they are satisfied with all of those terms, including matters such as who will sit on judgement of complaints made to a news media self-regulation body?

**Ms O'Loughlin:** Sorry, Senator, what was the question?

**Senator BIRMINGHAM:** The PIMA then has complete discretion in terms of whether it accepts or rejects an application as to whether it is satisfied with the type of person who is going to sit on a complaints body?

**Ms O'Loughlin:** No, Senator. It does not have a role in choosing between the people who are going to sit.

**Senator BIRMINGHAM:** I did not say the people. I said the type of people.

**Ms O'Loughlin:** Or the type of people. It has a role in reviewing from the public interest perspective the self-regulatory scheme that is provided to it by the industry itself. So its role is to sit in the seat of the public to say, 'Does this scheme stack up, given the community concerns? Does it have the types of matters covered off which are in the law?' That is its job.

**Dr Pelling:** Senator, if you look at 7(3) again and the list of things that can be taken into account in the approval process, you will see that they relate to processes like complaints handling. They relate to standards and various things about how the organisation functions. They relate to independence and other similar sorts of things. But there is nothing in there which goes to individual people who might be involved or appointed by that body to undertake particular functions and so on.

**Senator BIRMINGHAM:** Dr Pelling, it was the type of person rather than individual people. I think a number of those matters could potentially go to the type of person. Surely the PIMA is going to say, 'Well, there must be a level of independence amongst these people. There should be some degree of representation of community standards, which is a factor that has to be considered in here. There should be perhaps somebody with an understanding of privacy considerations. There are a number of things that the PIMA could—'

**Ms O'Loughlin:** That is not the way the legislation works. The legislation spells out to the industry the matters that the PIMA will have consideration of. It is not—

**Senator BIRMINGHAM:** And that it is in the PIMA's discretion and judgement?

**Ms O'Loughlin:** But it is not in the PIMA's discretion and judgement to go back and provide prescriptive direction.

**Senator BIRMINGHAM:** The PIMA can just say no?

**Ms O'Loughlin:** That's right. The PIMA can say no.

**Senator BIRMINGHAM:** And in just saying no, the industry has to guess what they got wrong, if that is the approach that the PIMA takes?

**Ms O'Loughlin:** The PIMA would direct the applicant to relook at the legislation and the issues that they have to have regard to.

**Senator BIRMINGHAM:** The legislation is pretty sweeping in its construct, though. So the applicant just has to keep guessing until they get it right or ratcheting it up until they meet the PIMA's satisfaction, unless the PIMA does actually provide detailed reasons?

**Ms O'Loughlin:** Senator, the emphasis in law is on the industry itself to take seriously a self-regulatory body. It is not just for the purpose of getting a tick from the PIMA. It is about the industry itself taking responsibility for addressing the concerns of the public around news media coverage. That is the intent. The incentives are there to improve the current self-regulatory schemes, not to provide some sort of de facto prescriptive arbitrator under the PIMA. The whole purpose of these provisions is about the independent role and the freedom of the press and all those issues and saying, 'The expectations of the community are that there should be some consideration of whether that body is working effectively and will work effectively.'

**Senator BIRMINGHAM:** Ms O'Loughlin, in the end it comes down to the judgement of whoever is appointed as the PIMA as to how these matters are actually interpreted and applied, does it not?

**Ms O'Loughlin:** It comes down to the guidance that is provided to the PIMA in the law as to what matters it must consider and how it goes about its business.

**Senator BIRMINGHAM:** And the PIMA has a long list of matters it must consider. It must then exercise its judgement as to whether those matters are adequately addressed.

**Ms O'Loughlin:** They have a number of matters that they must consider and then they can come to a conclusion.

**Senator BIRMINGHAM:** And the conclusion is they exercise their judgement as to whether the matters are addressed to their satisfaction or not.

**Ms O'Loughlin:** With objectives based legislation, yes, of course, it will be a judgement.

**Senator BIRMINGHAM:** It comes down to their judgement.

**Dr Pelling:** And there is a consultation process.

**Senator BIRMINGHAM:** And there is a consultation process, where every media critic in the country can make their comment on the satisfaction or otherwise as well as—

**Ms O'Loughlin:** Also, importantly, the Privacy Commissioner.

**Dr Pelling:** Going to a matter that you mentioned earlier, I am just looking at the explanatory memorandum and notice it must also set up the body corporate news media self-regulatory scheme and the initial views of the public interest media advocate concerning the matters to which it must have regard. So there is a capacity for them to provide views and then get comments from anybody who feels like putting in comments.

**Senator BIRMINGHAM:** I did not quite catch all of that, Dr Pelling.

**Dr Pelling:** I am just reading it out. You raised a point about what can be a company. Can the declaration that it puts out to the public have an explanation of the PIMA's views? The answer, according to the explanatory memorandum, is that it is a matter that it can include.

**Senator BIRMINGHAM:** It can include its reasons and those reasons, as reasons often could, could inherently have suggestions within them?

**Dr Pelling:** Well, initial views is what the EM says.

**Senator BIRMINGHAM:** To the appointment of the PIMA and who that person may be. The minister has said that the government will consult with the opposition. The minister has said that he does not foresee that it would be a former member of parliament or the like. Are there any requirements in the legislation that meet the minister's commitments there?

**Ms O'Loughlin:** There are requirements for the types of skills that the PIMA should have. There is not a specific inclusion in the legislation about the consultation with the opposition. But the minister has made that commitment publicly.

**Senator BIRMINGHAM:** And unlike the ABC Act, there is no specific prohibition on who could possibly be appointed to the PIMA? I was about to say a member of the PIMA, but of course there is only one, so it is who is appointed as the PIMA.

**Ms O'Loughlin:** In terms of the consultation process, there is information in the explanatory memorandum that clarifies that there would be consultation with the opposition. But there are not the exclusions in the act that are in the ABC Act about the exclusion of certain types of people. It is more in looking at the types of skills that you would want in an advocate. Those skills are laid out in the legislation itself.

**Senator BIRMINGHAM:** An example I have given is Nicola Roxon, the former Attorney-General, who has substantial experience in the law and substantial experience in public administration. She would meet the sole criteria that exists in the legislation?

**Ms O'Loughlin:** I am not going to speculate on who might meet the criteria, Senator.

**CHAIR:** Thanks, Senator Birmingham. One of the criticisms we had about the bill is division 1 on page 9 and 7C.

**Ms O'Loughlin:** Senator, my apologies. Which bill?

**CHAIR:** The News Media (Self-regulation) Bill at page 9, which sets out what PIMA has regard to. We went there earlier. We had a bit of a discussion about clause C, the extent to which those standards reflect community standards. Have you got that?

**Ms O'Loughlin:** Yes.

**CHAIR:** How do you make a judgement about community standards? The criticism is that this is too wide-ranging.

**Ms O'Loughlin:** The concept of community standards is actually fairly common across the codes of practice which are covered off by the Broadcasting Services Act currently. For example, the ACMA, in registering codes of practice for the commercial broadcasting sector, both radio and television, has to take into account community standards. I am sure Ms McNeill will correct me if I get that wrong. So it is a reasonably standard clause when we are looking at these types of issues of delivering content to the Australian community. I might ask Jennifer to comment on it. Normally that would be either through consultation processes, or research can be undertaken. They are the types of things that would test what community standards were at any given time. I will ask Ms McNeill if she wants to add to that.

**Ms McNeill:** Under the BSA, the ACMA must register codes of practice provided they meet a couple of preconditions. One of them is that they contain appropriate community safeguards. When the ACMA is forming a view on that, obviously they draw on the experience of the various members of the authority. They also draw heavily on community research that is conducted into attitudes to particular protections and to particular matters. We closely consider any apparent deficiencies that might have become manifest over time while a code has been in place—whether complaints are coming to us raising issues which are not covered off by codes and so forth. So it is possible to form a view on community safeguards and, by implication, community standards.

**CHAIR:** So it is not uncommon for an individual to rely on their experience? Is that why Ms O'Loughlin or whoever gets the PIMA role must be experienced?

**Ms O'Loughlin:** That is certainly part of it. As I said, the PIMA already has consultation processes built into that. That would be a way of testing community standards. Or it may wish to undertake research in a particular area to assist it in its decision making. But also its own experience and its own skills, within the skills and experience that we have requested under the law, would certainly add to that.

**Dr Pelling:** Senator, remember that the whole point of this is that the self-regulatory body brings forward its own proposal. So there is plenty of scope for the self-regulatory body, in bringing forward to that proposal, to argue a case and to demonstrate the research that it has based on its own intelligence out in the community about why it thinks a particular standard reflects the community standard.

**Ms O'Loughlin:** And specifically in relation to privacy, of course, the consultation with the Privacy Commissioner would tap into the experience and understandings of the commissioner around community standards as well in the area of privacy.

**CHAIR:** The commissioner is a part-time position, as I understand?

**Ms O'Loughlin:** That is correct, yes.

**CHAIR:** So there is not a huge amount of resources there, is there, because it is just monitoring; it is not actively managing, is it?

**Ms O'Loughlin:** The role of the PIMA is envisaged as a part-time position because the expectation is that in the area of the News Media (Self-regulation) Bill there will be one, two or three proposals perhaps come up at the beginning if the legislation is passed. Then there is a role for the PIMA if there is substantial change to that body. Or if there are substantial changes to the workings of that body, it would come back to the PIMA for assessment as to whether it should be revoked or accepted. So there is a peak of work at the beginning, but then we would expect that it would not be a position where it had a full-time role after that.

**Dr Pelling:** I also draw your attention to clause 18 of the media advocate bill, which says that assistance to the PIMA is given by any or all of the following: the ACMA, the ACCC, the department.

**CHAIR:** So what bill are we on?

**Dr Pelling:** I am looking at the Public Interest Media Advocate Bill, which is the bill that appoints the PIMA. I am looking at page 9, section 18. It sets out that a range of bodies may assist the PIMA in his or her functions. The assistance may include the provision of information, the provision of advice and making available resources and facilities, including secretariat services and clerical assistance.

**CHAIR:** Could that be ACMA?

**Dr Pelling:** ACCC, ACMA, the department or any other Commonwealth agency, department or authority of the Commonwealth may assist the PIMA.

**Ms O'Loughlin:** Because our expectation is also that a lot of the information that would be useful for the PIMA will be collected through processes with the ACMA or the ACMA's research through the ACCC. Of course, the department can also assist the PIMA.

**CHAIR:** So you would not be expecting PIMA to actually conduct any research but to seek the assistance of other bodies?

**Ms O'Loughlin:** The PIMA can call on the assistance of those agencies to fulfil its functions. For example, it may call on the ACMA to provide it with research that has been recently undertaken on community standards in a particular area, which may be relevant to its considerations.

**CHAIR:** There was some speculation today that PIMA may never make any determinations on anything after the initial set-up if the standards bodies—the press councils—actually do the job themselves. Is that correct?

**Ms O'Loughlin:** That is correct, Chair. The only time that the PIMA's responsibilities would be enlivened again is if there were a substantial change to that body. An example is if half its membership left or it pulled back on its standards. But once they are established and once they are declared, that really leaves the industry to perform its functions well.

**Dr Pelling:** There is also a requirement that the PIMA must give as soon as practicable after the end of each financial year a report to the minister for presentation to the parliament on its activities in the year and such other matters concerning the operation of the following provisions during that year. It lays out several provisions.

**Ms O'Loughlin:** That is correct. It could be that once the bodies are established, the PIMA's role is only brought back into effect if something radically changes.

**CHAIR:** We have had submissions from the Independent Media Council. I think the chair of that media council is a former politician, by the way, appointed by Mr Stokes. If the Press Council sets certain standards and

the Independent Media Council sets different standards—it is a Western Australian group—how do we deal with that? Does PIMA say that the community standard that has been set by the bigger organisation is the standard you should set if their standards are set lower?

**Ms O'Loughlin:** The PIMA's test is really around the extent to which the body corporate's news media self-regulation scheme has been or is likely to be effective—that is one of the core provisions—and that they have standards in place. So if two news media organisations came forward with schemes which deal with the matters that the PIMA is required to consider, then the PIMA could decide whether the two schemes met those criteria and were acceptable. Firstly, there are mandatory eligibility requirements, but the matters are really around the type of arrangements that have been put in place for the body around issues like accountability, transparency, that they have standards in place and that they have complaints handling processes in place. So it is feasible that the PIMA could approve both. I would expect that it is probably likely that through the public consultation process the different bodies that may be putting proposals up may look at the other schemes and adjust their schemes accordingly if they think there is benefit in doing so.

**CHAIR:** We are still on the self-regulation bill. I want to go to the revocation issue. Obviously, this is an important issue. This is purely hypothetical, but a revocation could be made against the Press Council if it were not meeting the standards. Is that correct?

**Ms O'Loughlin:** If it was appointed, declared originally by the PIMA and then something substantial changed.

**CHAIR:** So that revocation takes place. It has a number of members. The change that took place could be the behaviour of one individual member of the Press Council. What happens to all the other members of the Press Council who have not behaved in a manner to excite the attention of PIMA? Are you with me?

**Ms O'Loughlin:** Chair, the revocation is about the behaviour of the body, not the behaviour of individual members. The emphasis, again, is on the body and how they might handle the behaviour of their own members.

**Dr Pelling:** There is also a provision that says that PIMA must not revoke unless it has taken reasonable steps to ensure a declaration in relation to—

**CHAIR:** Yes. I was going to come to that replacement declaration. How would that work in practice? This is 10(6), I think. It is the replacement declaration. PIMA must not revoke under subsection 103 unless PIMA has taken reasonable steps to ensure that a declaration under 7(1) relating to another body corporate will be enforced at least six months before the revocation takes effect. Can you just explain to me what that means?

**Ms O'Loughlin:** The intent of that clause is to make sure that if one body fails, there is another body that the members may be able to move to in a reasonably timely manner so that they in good time would be able to access another organisation whereby the privacy exemptions afforded for that body would apply to those journalists.

**Dr Pelling:** So there is always a body, in other words, is the intention.

**CHAIR:** What happens if no-one wants to form a body?

**Ms O'Loughlin:** Then they would not be covered by the privacy exemptions.

**CHAIR:** So that is the incentive and the stick, really?

**Ms O'Loughlin:** That is the incentive, yes.

**CHAIR:** So if the existing body does not take steps to comply with its own self-regulation, that is probably the big trigger, is it not?

**Ms O'Loughlin:** The trigger for revocation, as in division 2, is there are mandatory revocations, which are around things like the body actually does not have a news media regulation scheme any more. Another is if the members decide that they do not want that scheme at all. But then there are some other discretionary revocation factors laid out where there have been significant changes in relevant circumstances and where there has been a change in relevant community standards. The intent there is that the PIMA would only look at discretionary revocation where something significant had changed. As I mentioned earlier, an example is that three-quarters of the members left the organisation and had not established an alternative organisation. Again, before revoking, there are consultation provisions that the PIMA must go through as well. The replacement declaration there is very much recognising the strong incentive in the bills around the access to the privacy provisions and that we do not want disruption in the industry if one scheme and one body fails and there is not a body that journalists could move to.

**CHAIR:** Can you walk me through the mandatory revocation of declaration? It says that if a declaration is in force under section 7(1) in relation to a body corporate, the PIMA must by writing revoke the declaration if—and then we go to (d)—the body corporate has the power to suspend a news media organisation member's rights as a

member of the body corporate or expel a news media organisation member from the body corporate. Then it goes on to say that if there are circumstances that do not involve a failure by the member or a breach of remedial direction. Can you explain that to us?

**Dr Pelling:** If you go back to 7(2), you will find there is an eligibility requirement, which is a compulsory eligibility requirement. There is a restriction. The only two circumstances—

**CHAIR:** I have that, yes.

**Dr Pelling:** that apply relate to a failure to pay a corporate fee or charge payable or a breach of remedial direction. So there is a narrow set of circumstances which applies in relation to the corporation. The mandatory revocation applies if the body corporate has powers which go beyond those limited set of circumstances.

**Ms O'Loughlin:** As my colleague has just put it, it is to make sure that the body corporate does not just expel people willy-nilly.

**CHAIR:** But they would have the power to expel provided it was in 7(2)(iii) or (iv)?

**Ms O'Loughlin:** That is correct.

**Dr Pelling:** Yes. The only circumstances where they have the power to expel will be a failure to pay a fee or a breach of a remedial direction, which they have themselves imposed.

**CHAIR:** If they expel a member for not meeting the standards, PIMA does nothing in relation to that, do they?

**Ms O'Loughlin:** That is correct, yes.

**CHAIR:** So the question of expulsion is not a PIMA matter; it is a self-regulation matter?

**Ms O'Loughlin:** The types of actions that the self-regulatory body might want its members to take if they are in breach of its standards would be a matter for the self-regulatory body.

**CHAIR:** Ms McNeill and Mr Cassidy, does the ACCC have this issue of community standards in your legislation?

**Mr Cassidy:** No. We do not.

**CHAIR:** But do you apply community standards at all?

**Mr Cassidy:** No. Not that I am aware of.

**CHAIR:** Ms McNeill, you have indicated you do.

**Ms McNeill:** We have the concept of appropriate community safeguards. I can see that there are some commonalities with the concept of community standards.

**CHAIR:** Could you take us to the commonalities?

**Ms McNeill:** Well, appropriate community safeguards involves a consideration of what the community as a whole regards as an appropriate protection or an appropriate standard of conduct from, in our case, predominantly broadcasters. But there are some other frameworks in which a similar concept operates. So that involves accepting that there will be a plurality of views, but pitching it appropriately so that it is reflective of those views, accommodates those views but is not protective of the one per cent, perhaps, who have an extreme or particular view. So that is why I say it involves the exercise of judgement on the part of the authority decision making group. But that would be informed by research. In the past, research we have undertaken has included research on community attitudes to broadcasting privacy protections and community attitudes to accuracy obligations in news and current affairs and a range of things. We update the research periodically.

Only recently we announced a project to undertake a holistic assessment of contemporary community safeguards. Again, that will be informed by research. The focus of our research necessarily reflects our remit. We typically in this context research expectations and attitudes around broadcast content as opposed to, for example, written content. If we are doing something similar in the telco space, where we also have a role, we will look at obviously the safeguards offered in the telco context. So our research is specific to the remit that we are pursuing at any point in time.

**CHAIR:** Thank you. Mr Cassidy, does the ACCC have a public interest test approach?

**Mr Cassidy:** We can do what is referred to as our authorisation process. Basically, what that is about is when they approach us, say, in relation to a merger or various other forms of conduct, we say, 'Look, this may well result in a lessening of competition. But we believe there are offsetting benefits as a result of which the commission should authorise us to undertake the conduct.' Those benefits can be fairly widely defined. So, in a sense, if you like, we do get into having to make a judgement about how on the one hand you compare an anti-

competitive cost with offsetting public benefits. If you like, you could characterise that, I suppose, as a public interest type test, but it is one is couched still in an economic framework, if I can put it that way.

**CHAIR:** Ms McNeill, what about ACMA? Do you have any public interest issues that you deal with?

**Ms McNeill:** Probably the closest analogue is this concept of community safeguards. Mr Cassidy has referred to the commission's authorisation role. Obviously, the diversity regime that we administer at the moment is not a discretionary regime. It does not have that kind of discretionary functionality built into it. It is much more based on numeric calculations and so on.

**CHAIR:** Ms O'Loughlin, what about the public interest in relation to mergers? Can you take me very briefly to PIMA's role in terms of making sure there is media diversity?

**Ms O'Loughlin:** The public interest test set for the PIMA is that in changes of control of significant news media voices, there is not a substantial lessening of diversity in the market. If there is to be a substantial lessening, it is in the public interest. So the test that the advocate is to apply is to look at the significant news media voices, where there may be changes of control through mergers or acquisitions. The advocate is charged with looking at how that transaction will actually affect diversity in the market. For example, at the moment, there are already a number of diversity rules in the current legislation. There is the two out of three rule and the four out of five rule. Neither of those rules actually addresses nationally significant voices at the national level. The current legislation is based around the concepts of radio licence areas. So it is all about who is operating within one licence area or another licence area. The proposals that the government has put forward do a number of things. Firstly, they allow for consideration of national voices, which have not been covered previously in the law. They also allow for changes in the influence or importance of those news media voices over time. For example, at the moment, the media diversity rules are only around commercial television and commercial radio.

**CHAIR:** Ms O'Loughlin, I will ask you to take this on notice because I have promised Senator McKenzie I will give her the call. We are about one minute away from adjourning. I know that she has a question she wants to ask. I am not sure if she wants to put that on notice. Could you take that on notice?

**Ms O'Loughlin:** Certainly we can provide you with more information.

**Senator McKENZIE:** Thank you so much. I would like to let you know that there will be questions on notice from me too, because I have more than one minute's worth of questions. Earlier in questioning from Senator Birmingham, you were outlining whether one worked for a major publication. There was criteria laid out about whether one was covered or not by the Privacy Act. I understand that. Are you not a journalist if you do not work for one of those particular organisations?

**Ms O'Loughlin:** You are certainly a journalist.

**Senator McKENZIE:** Are you protected under the Privacy Act if you work for a publication that turns over less than \$3 million a year?

**Ms O'Loughlin:** The small business exemption.

**Mr Glenn:** Potentially, Senator, yes. The exemption works at the level of the media organisation rather than the level of the journalist.

**Senator McKENZIE:** So is the *Benalla Ensign* covered or the *Mirboo North Times*? Would they or the staff that work for them be covered under this legislation? This is a similar line of questioning to Senator Birmingham's *Women's Weekly* questions. If you could take that on notice, that would be great. Earlier, we went into great detail on community standards and what that represents. Clauses 10(3)(b) and (c) are about a significant change in relevant circumstances and a change in relevant community standards. Who decides what is relevant and who decides what is significant?

**Ms O'Loughlin:** Senator, it is a judgement for the PIMA under the current—

**Senator McKENZIE:** Thank you. That is fine. I am just conscious of time. Does the minister hire PIMA?

**CHAIR:** Ms O'Loughlin, have you finished your response? Ms O'Loughlin is entitled to finish the answer.

**Ms O'Loughlin:** It is a matter for the PIMA to be comfortable that they are significant changes, not that they are minor changes.

**Senator McKENZIE:** Absolutely. We heard that the minister appoints the PIMA.

**Ms O'Loughlin:** The minister appoints the PIMA.

**Senator McKENZIE:** Does the minister also have the power to sack the PIMA?

**Ms O'Loughlin:** As I mentioned earlier, there are provisions in the act for the termination of the PIMA under certain circumstances. I am happy to provide them on notice if that would help.

**Senator McKENZIE:** Thank you very much. I know we were talking about national significant voices and the diversity of voices. I am particularly interested in local content and local news et cetera. We have heard a lot of evidence around that over the last two days. Could you please provide your understanding of the implications of these media laws on that issue? I am particularly interested in the ACCC's role in protecting competition and diversity within the media environment and how you see PIMA enhancing or assisting. Is there a duality of crossover in terms of what you are looking at? I think that might be it.

**CHAIR:** Thanks very much. That concludes today's proceedings for the inquiry into the media reform bills. I thank all witnesses for their informative and sometimes feisty presentations. The committee has resolved that answers to questions on notice be returned by 8.00 am on Wednesday, 20 March 2013. In case I have missed anything, it is agreed that all documents tabled be accepted. I declare the hearing closed.

**Committee adjourned at 10.01 pm**