



Independent Inquiry into Media and Media Regulation

Written submission cover sheet

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Name for identifying submission on website		Professor Mark Pearson	
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CONTACT DETAILS			
Any personal information you provide to the Media Inquiry through your submission is used only for the purposes of consideration of issues raised in the discussion paper. Contact details requested below will assist the Inquiry if it needs to discuss your submission further, including any requests for confidentiality. If you are making a submission as part of a group, please provide details for one member of your group.			
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November 4, 2011

Submission from Professor Mark Pearson to Independent Inquiry into Media and Media Regulation

Please accept this personal submission to the Independent Media Inquiry. Please note that, while I am an academic employed by Bond University, and am also Australian correspondent for the organisation Reporters Without Borders, this submission does not represent either of those organisations' views. In fact, as a media freedom body, the latter organisation is likely to have quite differing views on some of the issues I raise.

This submission differs substantially from the one I filed on behalf of the team working on ARC Linkage Project LP0989758 "Vulnerability and the news media...". That submission addressed the research from that project and was limited to common views and values of its collaborative research team members.

I have written extensively on matters of media ethics, law and regulation for more than two decades and my research and analysis is well documented. I attach as Appendix 1 a list of outputs in the area that might be of assistance to your inquiry. I draw your attention particularly to 'Chapter 13, The Regulators' in the latest edition of my media law book – Pearson, Mark and Mark Polden (2011). *The Journalist's Guide to Media Law*. 4th ed. Allen & Unwin, Sydney. That chapter surveys the field of regulation, self-regulation and co-regulation in Australia, focussing on the roles of in-house codes of practice, the Australian Press Council, the MEAA ethics panel, the Australian Media and Communications Authority, the Australian Competition and Consumer Commission and the ABC's Media Watch program.

Rather than address all of the questions you have raised, I will contain my comments to the main topics of your issues paper.

Media freedom

There are many 'justifications' for freedom of the media underpinning the relatively higher level of free expression afforded citizens and journalists in Western democratic nations. The 'marketplace of ideas' you quote is one such justification but others include the place of truth and truth-telling in all major religions, the importance of transparency and communication to the judicial and democratic processes, and the legitimate 'public interest' in the conveyance of information to the citizenry. Alarm bells sound when government inquiries begin to ask whether media freedom is justifiable. Media freedom is not absolute in any country – although the governments calling for its justification are usually found towards the end of press freedom indexes like those compiled annually by Reporters Without Borders and Freedom House. Australia's ranking in such indexes has usually reflected its standing as a western democratic nation placing considerable value on free expression, moderated by the fact that it has a large number of laws restricting media freedom.

Access

Questions about citizens' access to the media to express their views are important, though several factors complicate the response. The mainstream media outlets still hold considerable influence over public debate, but access issues are less pronounced in the Web 2.0 environment. It is human

nature to gravitate towards like-minded others, and this tendency can exaggerate misinformation and prejudice, but surely part of freedom is being able to choose to have a narrow or restricted diet of media consumption? My view is that the wealth of material available via social media, the Internet and desktop publishing, and the inexpensive public access to much of this material via portable devices and public libraries, combine to erode the traditional arguments against concentration of media ownership. Minority and marginalised voices across the political and religious spectrums have always faced difficulty in getting their views heard in the mainstream media. Today they have numerous other options. That is not to say that media organisations should not provide opportunities to respond, particularly when they have attacked an individual or group. That should form part of their codes of practice and should continue to underscore their defences to the many media laws already applying to them.

Standards

It is essential that media outlets and journalists conform to ethical codes. It is in their interests that they do so, because it is these very ethical standards that distinguish them from the many new voices seeking audiences in the new media environment. However, the appendix to our submission from ARC Linkage Project LP0989758 demonstrated the confusing array of self-regulatory and co-regulatory documents guiding ethical standards of journalists and their outlets in this country. No single journalist could possibly be expected to understand and operate effectively within deadline, paying heed to all that might apply to him or her, including the MEAA Code of Ethics, an in-house code, an industry code and the related laws and formal regulations that might apply. This moots strongly for a single code of ethics applying to journalists and their employers across all media, similar to the existing MEAA Code of Ethics, addressing fundamental principles of truth, accuracy, verification, attribution, transparency, honesty, respect, equity, fairness, independence, originality and integrity, with exceptions only for matters of substantial legitimate public concern.

Of course, this could be supplemented by industry or workplace ‘information and guidance’ documents to help explain to journalists and editors the fact scenarios and precedents applying to a particular medium or specialty, along the lines of the Australian Press Council’s guidance releases.

In summary, a single ethical principles document should be developed in collaboration with the existing co-regulatory and self-regulatory bodies to provide an agreed professional platform for Australian journalism.

Regulation and new media implications

There is already an oversupply of regulation of the media and free expression generally in this country – across all levels of government and via quasi-governmental and self-regulatory and co-regulatory bodies. Added to this there is considerable censorship of free expression in government and the corporate sector in the form of ‘spin’ or media relations policies that carefully control the flow of information to the public via the media. It would be counter-productive at a number of levels to apply new gags on the traditional media in the Web 2.0 environment. Firstly, it would send the wrong message to the international community about Australia’s level of free expression. Secondly, it would place Australian traditional media at a competitive disadvantage to new media providers who might be based overseas but reporting on Australian news and current affairs.

That said, the regulatory systems should recognise that the Web 2.0 environment has motivated the traditional media to focus more strongly on commercial interests than it has ever had to do

previously. Historic sources of revenue such as classified advertising (the ‘rivers of gold’) have migrated to online providers, new media platforms have earned a share of the display advertising budgets and smart phone, tablet and web-based advertising and marketing have morphed with news content, breaking down the traditional ‘firewall’ between advertising and editorial material. News corporations should now be seen for what they really are – ‘just another business’ – seeking the eyeballs, hits and downloads of consumers in the competitive new media environment. Thus, the regulatory oversight of those selling news content should come under the auspices of the Australian Competition and Consumer Commission, with strong protections in place for those pursuing legitimate responsible journalism on matters of public importance. A division within the ACCC should be established to act as a ‘one-stop shop’ for the referral of citizens’ complaints about media outlets to the self-regulatory and co-regulatory bodies which would continue their complaints procedures and research functions.

The most serious cases of ‘misleading and deceptive conduct’ under Section 18 of the Competition and Consumer Act 2010 – in blatant disregard of the new ethical code and with inadequate public interest grounds – would be pursued by the ACCC like any other consumer complaint, with the force of the regulatory powers it already holds. The key to this would be an amendment of the ‘prescribed information provider’ exception (Section 19) so that news organisations would not have the blanket, almost unchallengeable protection for misleading and deceptive conduct (introduced after their lobbying in the 1980s). Instead, it would be a rebuttable presumption that such corporations publish news and current affairs material of *legitimate public interest* in accordance with a *journalism code of practice*. In other words, they would not have to defend trivial complaints on these grounds – only those where a court has ruled there had been a clear breach of their ethical code in circumstances clearly contrary to the public interest. The reform would expose media organisations from all platforms to ACCC prosecution for heinous ethical breaches along the lines of the *News of the World* scandal in the UK. Anything less than the most extreme and offensive ethical transgressions impacting detrimentally on the rights of other citizens would be handled via the existing laws or self-regulatory processes because they would not meet the relatively high threshold to overcome the s.19 exception. (It is noted that the ACCC already has powers to pursue corporations for ‘unconscionable conduct’ under section 20, to which the media exemption does not apply.) The High Court recently found against a media organisation under the former Trade Practices Act in *ACCC v. Channel Seven Brisbane Pty Ltd* [2009] HCA 19. That decision related to false claims about goods and services. The reform would extend this to other ethical breaches.

The purpose of this submission is not to go into the mechanics of such legislation or its drafting. Your legal team could advise you on this if you wished to recommend this course. There have been legislative precedents on the use of regulatory codes as a backdrop to such a provision. For example, in the UK s12 of the Human Rights Act directs a court to take into account ‘any relevant privacy code’ when considering whether free expression rights should outweigh privacy rights in a given situation. The ‘Journalism’ exemption to the Privacy Act 1988 at s. 7B(4) references privacy standards issued by the Australian Press Council as news organisations’ ticket to a waiver. The proposed reform would require more of them than simply being ‘publicly committed to observe standards’ and to have published them.

In short, this would give teeth to an existing provision by recognising both that the news media in the new era is ‘just another business’ but that there is still strong protection for responsible, ethical journalism inquiring into serious matters of legitimate public concern.

I would be happy to offer elaboration on any of the above if you require it. Please feel free to email me at mpearson@bond.edu.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read "M. Pearson". The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

Professor Mark Pearson

Appendix 1: Mark Pearson, PhD. Selected related outputs.

Books

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Blogs at journalaw.com

- Journalists and vulnerable sources: our submission to the Media Inquiry 1.11.11
- My top five media law topics for country newspaper editors 12.10.11
- Update: FIVE Australian media inquiries at once: your guide to the mayhem 1.10.11
- Judges and social media – lessons from the Canadian CJ's oration: #law 23.9.11
- Why the Australian Government's media inquiry is fraught 15.9.11
- Why the #law stops you venting on #Facebook and #Twitter about the #Morcombe case 16.8.11
- Shorthand vs. new recording methods as evidence in court #journalism #medialaw #law 15.8.11
- How #bloggers can apply the Kipling formula to social media #law 8.8.11
- #Law: How #courts decide whether to out #anonymous #Internet authors 29.7.11
- Australian journalists break surveillance laws every day #notw #law #journalism 25.7.11
- Who was first to tweet from court? 6.7.11
- Police Facebook wall raises fair trial questions 20.6.11
- Trivialising a gag on free expression 12.6.11
- Mental illness, journalism investigation and the law in Australia and NZ 12.6.11

Actions against media send international message 19.5.11
Union's press freedom report covers key issues 11.5.11
South Australia's antiquated sex ID law 4.5.11