

**WHEN DOES PRESS  
SELF-REGULATION WORK?**

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*All societies must make decisions over what to regulate and how. Short of 'black letter law', there are many codes of conduct and models of self-regulation. The press has always been considered a special case, because of the conflicts and potential abuses involved in government regulating an industry which has a central role in reporting and commenting on government activities. However, any consideration of the role of press councils in Britain and Australia shows how, in practice, self-regulation of the press has failed as an avenue for providing accountability. Those who feel aggrieved by coverage only erratically achieve redress or a clear right of reply. Public opinion polls consistently find a low opinion of press performance and ethics.*

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## I INTRODUCTION — ANTI-REGULATORY RHETORIC

Regulation is not of itself an appealing idea. No political leader would call for a general increase in regulation. Rather, everyone is against ‘red tape’, against ‘excessive’ regulation and against onerous compliance costs. When the Rudd government was elected, one of its four most senior ministers, Lindsay Tanner, had the title Minister for Finance and Deregulation. The Abbott government also had a Minister for Deregulation, Josh Frydenberg.

Deregulatory rhetoric reached a peak in March 2014, when the government had a ‘Repeal Day’. It announced ‘the abolition of more than 1000 acts of Parliament and the repeal of more than 9500 regulations’.<sup>1</sup> Some of these were historical curiosities and anachronisms, such as the *Defence Act 1911* (Cth), which regulated how long a senior cadet could drill for.<sup>2</sup> So some of the effect was ‘the theatre of scrapping dead letters and fiddling with trivia’.<sup>3</sup> One claim was that the savings would add up to \$700 million. But, warned *The Sydney Morning Herald’s* economics editor Ross Gittins, ‘don’t ask how that figure was arrived at’.<sup>4</sup> The dominant theme, according to public policy scholar John Wanna, was that the regulations were all part of a “culture of compliance and enforcement that stifles productivity” and that by eliminating all unnecessary regulation we will be liberated’.<sup>5</sup>

The image here is of regulation as the product of either an aimless, irrational bureaucracy or meddling, expedient politicians. The attack on regulation is also a symptom of the aversion to state intervention that became more insistent and pervasive in the late 20<sup>th</sup> century. According to Chris Berg of the Institute of Public Affairs, ‘[r]egulation suppresses innovation, raises consumer prices, ties the sector down in compliance costs, and opens up opportunities for rent-seeking’.<sup>6</sup>

<sup>1</sup> Ross Gittins, ‘Abbott Bangs the Big Bell on Repeals’, *The Sydney Morning Herald* (Sydney), 24 March 2014, 28.

<sup>2</sup> See Bernard Keane, “Bonfire of the Regulations” Has a Decidedly Musty Smell’, *Crikey* (online), 20 March 2014 <<http://www.crikey.com.au/2014/03/20/bonfire-of-the-regulations-has-a-decidedly-musty-smell>>.

<sup>3</sup> Ibid.

<sup>4</sup> Gittins, above n 1, 28.

<sup>5</sup> John Wanna, ‘Repeal Day an Exercise in Deregulation Smoke and Mirrors’, *The Conversation* (online), 26 March 2014 <<http://theconversation.com/repeal-day-an-exercise-in-deregulation-smoke-and-mirrors-24482>>.

<sup>6</sup> Chris Berg, ‘FoFA Fearmongering a Blow to Deregulation’, *The Drum* (online), 18 March 2014 <<http://www.abc.net.au/news/2014-03-18/berg-fofa-fearmongering-a-blow-to-deregulation/5327570>>.

Such unqualified anti-regulation generalisations are not helpful to an understanding of the role of regulation. They obscure rather than illuminate the choices all societies make about what should be regulated and how. A society devoid of all regulation may seem like a utopia to some ideological warriors but would prove to be an unlivable nightmare for its members.

## II WHY REGULATE?

The general opposition to regulation rests on two basic assumptions. The first is that the market is a self-correcting set of mechanisms, and that interfering with it will produce distortions, inefficiencies and sub-optimal outcomes. The second is that regulation is an intrusion on individual liberty; that individuals know best what is good for them, and that no external state body should impose such choices on them.

Even if one were to accept the broad thrust of these assumptions the need for regulation cannot be dismissed, for two reasons.<sup>7</sup> The first is that the faith that markets can, in all circumstances, be self-correcting is more of a theological than scientific claim, and there is a need for intervention to deal with problems that markets alone cannot remedy. The second is that there are some social ideals so important and costs that are so great that societies are unwilling to risk an unregulated environment. For instance, no-one would contemplate allowing people to practise medicine without regulations on entry and practice, and just say 'let the market decide'. Nor would they allow market forces to be a sufficient determinant of transport safety standards, or occupational health and safety rules. And most would champion the desirability of anti-discrimination laws, where people are excluded from their rights not only as citizens but in their ability to act in the market on the basis of gender, race, religion or sexuality. So when the stakes are sufficiently high, or when key social ideals are at stake, regulation is embraced as the way forward.

Similarly there are many situations in which markets do not act perfectly. For example, a monopolist will inevitably reduce production to raise prices. To correct this requires incentive or regulation to lower costs. Another is that markets respond to the present but not to the costs and risks that current activities will produce in the future. Regulation to guard against environmental degradation and long-term occupational health and safety issues is all but universally accepted, at least in principle if not always over specifics.

<sup>7</sup> Michael Legg, *Regulation, Litigation and Enforcement* (Thomson Reuters, 2011) 1–5; Lisa Schultz Bressman, Edward L Rubin and Kevin M Stack, *The Regulatory State* (Aspen Publishers, 2010) 61–63.

Market theories are premised on perfect information and knowledge. In practice the gaps in knowledge are often crucially important. In many cases, 'buyer beware' does not offer sufficient consumer protection. The hidden dangers in a purchase mean there are regulations about how information is to be made available to potential consumers to protect against the inevitable limits of their knowledge.

There has for decades been regulation of companies to protect investors. Companies must submit to audit. They may not publish false or misleading information about their affairs. They must keep the market informed of price-sensitive information. It is not only powerful corporations which are required to act responsibly and be accountable for their actions. Society insists on this for most professions — lawyers, doctors, accountants and many others.

Governments also are subject to constraint. In democratic societies there are regularly held elections. Freedom of information laws, which act as a restraint on government power, exist federally and in all Australian states. Courts can review decision-making to ensure that the executive acts fairly, proportionately and that its decisions are not irrational.

The dilemma is that, while regulation can be burdensome and wrongheaded, and manifest the criticisms made in the general anti-regulation rhetoric, some regulation is appropriate in many cases where one person's conduct can affect others. The answer to poor regulation is not no regulation, but better regulation. It is therefore necessary to decide what regulation is desirable and what regulatory mechanisms will combine efficiency with optimal outcomes.

### III SELF-REGULATION

In practice, there is a variety of regulatory measures between a free-for-all and absolute regulation by the state. As well as official regulation, there are co-regulatory and self-regulatory regimes. Self-regulation takes many forms. In its pure form, it refers to regulation as specified, administered and enforced by the regulated organisation or industry. It includes regulation that has explicit state support, but where the scheme itself is not run by the state.

There is a long history of self-regulation in Australia. Once it was the principal means of regulating many trades, industries and professions. Now there are varying degrees of self-regulation and co-regulation in a broad range of commercial activities, including advertising, broadcasting and the media, direct marketing, the financial services sector, general industry schemes,

pharmaceuticals and proprietary medicines, professional associations, retail sector schemes and telecommunications.<sup>8</sup>

There are several factors that explain why self-regulatory mechanisms have been adopted. In industry it is usually an alternative to the imposition by statute of obligations of fair dealing, ethical conduct and compliance with appropriate product and service standards. Self-regulatory schemes are also adopted as a selling point to attract new business, to enhance consumer information and to satisfy legislative requirements.

#### IV TYPES OF SELF-REGULATION

The options for self-regulation vary considerably. At one end are information campaigns (for example, the Responsible Service of Alcohol campaign which complements liquor licensing laws), and service charters adopted by banks and insurance companies that set out the rights of the customer.<sup>9</sup>

An often-adopted mechanism is an internal complaints handling procedure. Financial industry participants, for example, are required to be licensed by the Australian Securities and Investments Commission ('ASIC'), the corporate regulator, and as a condition of their licence must be a party to a dispute resolution scheme approved by ASIC.<sup>10</sup> A consumer is able to take their complaint to an independent body as an alternative to litigation. The service must be free of charge to the consumer.<sup>11</sup> ASIC requires the procedure to be accessible, independent, fair, accountable, effective and efficient.<sup>12</sup>

Mandatory accrediting is a 'radically different type of self-regulation from [a] voluntary code'.<sup>13</sup> The idea involves ceding to an organisation, or a third party, the ability to decide that a person has achieved a relevant level of technical expertise needed to enable particular services to be provided.<sup>14</sup>

<sup>8</sup> Taskforce on Industry Self-Regulation, *Industry Self-Regulation in Consumer Markets* (2000) 23–30.

<sup>9</sup> See *ibid* 26–7.

<sup>10</sup> See ASIC, *Licensing: Internal and External Dispute Resolution*, RG 165, June 2013.

<sup>11</sup> ASIC, *Approval and Oversight of External Dispute Resolution Schemes*, RG 139, June 2013, 16.

<sup>12</sup> *Ibid* 14–46.

<sup>13</sup> Susan D Phillips, 'Regulating Self-Regulation in the Charitable Sector: Innovation or Contradiction?' (Paper presented at the Conference of the International Research Society on Public Management, Copenhagen, 6–8 April 2009) 6. See also Susan D Phillips, 'Canadian Leapfrog: From Regulating Charitable Fundraising to Co-Regulating Good Governance' (2012) 23 *Voluntas* 808.

<sup>14</sup> See Phillips, 'Regulating Self-Regulation', above n 13, 6; Taskforce on Industry Self-Regulation, above n 8, 28.

Accreditation is ‘essentially a form of licensing’.<sup>15</sup> It is commonly found in self-governing professions such as law and medicine. It also serves to set a standard within the relevant industry or profession.

Third party certification is a ‘form of accreditation ... on a voluntary basis’.<sup>16</sup> Certification is intended as a ‘hallmark of quality’.<sup>17</sup> It is commonly found in professional associations. The third party organisation sets standards to which its members must adhere. The members use the certification as a ‘hallmark of approval’.<sup>18</sup> The primary objects of certification are to give consumers confidence, to encourage self-improvement, and to raise overall standards.<sup>19</sup>

By far the most common form of self-regulation is the voluntary code of conduct or code of ethics. These codes are ‘designed to influence, shape, control or benchmark behaviour’.<sup>20</sup> They ‘range from an industry or association’s internal code of conduct, which is applied only to its members’, to broader subscription-based codes which apply to a whole market sector.<sup>21</sup> Participation may be voluntary or a condition of membership of an association.<sup>22</sup> A ‘range of monitoring arrangements and compliance inducements’ exist from, at one end, the use of a ‘light touch, where responsibility is left to the members or signatories’, to, at the other, ‘the mandatory reporting of breaches’.<sup>23</sup>

## V WHEN DOES SELF-REGULATION WORK?

Although self-regulation has been described as ‘club government’ or regulation by gentlemen,<sup>24</sup> it does have advantages, especially in terms of expertise and efficiency. So, it is said that regulation set by those with ‘more expertise and technical knowledge’ than government officials leads to ‘greater effective-

<sup>15</sup> Phillips, ‘Regulating Self-Regulation’, above n 13, 6.

<sup>16</sup> *Ibid.* 7.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* 5.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* 6.

<sup>24</sup> Ian Bartle and Peter Vass, ‘Self-Regulation and the Regulatory State — A Survey of Policy and Practice’ (Research Report No 17, Centre for the Study of Regulated Industries, School of Management, University of Bath, 2005) 23.

ness and compliance'.<sup>25</sup> Self-regulation is also likely to be more flexible and adaptable. It certainly will be more efficient than regulation by the state. Disputes can be settled informally without recourse to the courts, or to the often complicated processes adopted by government agencies.<sup>26</sup> From the perspective of government, self-regulation is always preferable from an efficiency viewpoint because it lowers the cost to the state.<sup>27</sup>

So it is not surprising to find a number of examples of successful self-regulation. One case is the Australian Market and Social Research Society. Its members have a common interest in protecting themselves from operators that would threaten their viability and public acceptance. For example, they do not want their capacity to do surveys compromised by salespeople posing as market researchers. Nor do they want unscrupulous activities such as push polling sully their reputation. A measure of its success is that when the government enacted the 'Do Not Call' register, the groups exempted were political parties, charities and market researchers.<sup>28</sup>

While self-regulation has a number of advantages, it is in a state of decline. Partly the decline is the result of its weaknesses. Commentators have identified several problems. One is that industry self-regulation might result in anti-competitive behaviour.<sup>29</sup> There is also the possibility of 'regulatory capture'.<sup>30</sup> Another problem is that most self-regulatory mechanisms are neither transparent nor accountable. And many people regard self-regulation as too 'soft'.<sup>31</sup>

The Australian government has on several occasions studied the value of self-regulation. One such study was carried out in 1999 by the Taskforce on Industry Self-Regulation.<sup>32</sup> Its report published in 2000 identified 'the characteristics of markets where various forms of self-regulation are likely to operate effectively and the circumstances where self-regulation is likely to be

<sup>25</sup> Ibid 7.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> See *Do Not Call Register Act 2006* (Cth) sch 1.

<sup>29</sup> Organisation for Economic Co-operation and Development, *OECD Reviews of Regulatory Reform: United Kingdom — Challenges at the Cutting Edge* (2002) 61.

<sup>30</sup> Bartle and Vass, above n 24, 8.

<sup>31</sup> Ibid.

<sup>32</sup> See Taskforce on Industry Self-Regulation, above n 8.

inappropriate'.<sup>33</sup> The Taskforce adopted the Commonwealth Office of Regulation Review's 'Regulatory Impact Statement checklist', namely:

- when there is 'no strong public interest concern';<sup>34</sup>
- when the problem is low risk, that is, when 'the consequences of self-regulation failing ... are small'; and
- when the problems 'can be fixed by the market itself', that is, when 'there is an incentive for institutions or groups to develop and comply with self-regulating arrangements', for example, to secure or 'gain market share'.<sup>35</sup>

Others might be added, for example where companies or practitioners share a collective self-interest, which leads them to engage in mutual protection against rogue operators.

## VI THE PRESS AND REGULATION

The press has always been — and certainly has always seen itself to be — a special case in terms of regulation. On the one hand, the case for regulation is strong. It is a powerful, non-democratically organised force which influences the political process and shapes cultural attitudes, and which can cause great damage to businesses and to people's lives. In all forms of power, those who exercise it must be subject to some constraint. Otherwise, the temptation for abuse may be compelling. As regards the press, Cohen-Almagor asserts:

As it is unthinkable to allow other agents of power in society to act without proper professional standards, so it is unthinkable to allow journalists to act with complete freedom and oblivious attitude to risks and harmful consequences.<sup>36</sup>

Baker has identified several other values, intrinsic to the press, that might justify regulation: first, the wish of members of the public to have access to diverse options rather than having one or a few media owners having power over content choice; second, the need for effective opportunities for speakers to reach large target audiences; third, the important democratic principle that

<sup>33</sup> See John Wallace, Denise Ironfield and Jennifer Orr, 'Analysis of Market Circumstances Where Industry Self-Regulation Is Likely to Be Most and Least Effective' (Tasman Asia Pacific Economic, Management and Policy Consultants, May 2000) v.

<sup>34</sup> Taskforce on Industry Self-Regulation, above n 8, 21.

<sup>35</sup> Ibid 22.

<sup>36</sup> Raphael Cohen-Almagor, 'After Leveson: Recommendations for Instituting the Public and Press Council' (2014) 19 *International Journal of Press/Politics* 202, 207.

the community is not subject to potential political or cultural manipulation by one or a few media owners; and fourth, the desirability that there be a broad opportunity for discursive participation.<sup>37</sup>

However, the press also is an area where official regulation is perhaps uniquely contested because of the press's struggle to establish its independence from the state, to assert its democratic role in holding governments to account, and to argue plausibly that no official body can be an impartial arbiter, but instead will always be influenced by ulterior motivations and partisan self-interest.

The press's democratic role is at the forefront of those who seriously consider the issues. Professor Julian Disney, chair of the Australian Press Council ('APC'), said '[t]he press is a means to an end ... which is the public's right to information. So that's the underlying driving force, and it is important to always think of that, its ultimate importance from the point of view of democracy'.<sup>38</sup> Sir Brian Leveson began the hearings for his major inquiry in November 2011 by declaring that '[t]he press provides an essential check on all aspects of public life. That is why any failure within the media affects all of us. At the heart of this Inquiry, therefore, may be one simple question: who guards the guardians?'<sup>39</sup> It would be remarkable if the commercial interests of the publishers, especially in a concentrated oligopolistic newspaper market such as Australia's, were always identical with what is best for democracy.

Moreover, running in close parallel with the narrative of the press and democracy is the press and power. Members of the press are often very conscious of their capacity to affect political fortunes. In 2007 Mathias Döpfner, Chief Executive Officer of the Axel Springer SE media group, the owner of *Bild* newspaper, said: 'whoever takes the elevator up with *Bild* will also take the elevator down with it'.<sup>40</sup> *The Guardian* editor Alan Rusbridger explained the long inaction and lack of response to the phone hacking scandals at Rupert Murdoch's *News of the World* as

<sup>37</sup> C Edwin Baker, 'Media Concentration: Giving Up on Democracy' (2002) 54 *Florida Law Review* 839, 890–1.

<sup>38</sup> Lara Fielden, Interview with Julian Disney (February 2012), quoted in Lara Fielden, 'Regulating the Press: A Comparative Study of International Press Councils' (Report, Reuters Institute for the Study of Journalism, University of Oxford, April 2012) 81.

<sup>39</sup> Fielden, 'Regulating the Press', above n 38, 12. See also Transcript of Proceedings, *Leveson Inquiry: Culture, Practice and Ethics of the Press* (14 November 2011, Morning) 1–2.

<sup>40</sup> Fielden, 'Regulating the Press', above n 38, 64.

a combination of fear, dominance and immunity. People were frightened of this very big, very powerful company and the man who ran it. And News International knew it.

They had become the untouchables of British public life. ...

It is a company intensely interested in its political muscle — an influence which politicians now readily admit they routinely courted because they felt they had no alternative. There became an unspoken reciprocity about the business and regulatory needs of Mr Murdoch and the political needs of anyone aspiring to gain, or stay in, office.<sup>41</sup>

So the need for regulation of the press is compelling, but the difficulties of doing it in a way that is fair, and does not compromise the press's democratic role in holding government to account, are formidable. But, as we shall see, self-regulation presents as many problems.

In relation to the activities where self-regulation has been most effective, though, the press does not present a promising scenario. Ownership of the press is concentrated rather than dispersed. There is not a belief that rogue behaviour will be punished by the market, but rather that it will be rewarded. While there are broadly agreed codes of conduct,<sup>42</sup> their application in practice is rarely agreed on by all. The result is that both in Australia and in Britain, the country on which Australian practice has often drawn, self-regulation by the press is widely and justly seen as a failure.

## VII THE BRITISH PRESS AND SELF-REGULATION

The history of press regulation in the United Kingdom shows the industry only moved towards self-regulation when there was a threat of external regulation, and that self-regulation has been spectacularly ineffective in preventing the growth of abuses by newspapers and the public opprobrium towards them.

In 1947 the United Kingdom government established the first Royal Commission on the Press. This was in reaction to the 'decline in the number of national newspapers, the concentration of ownership in the provincial

<sup>41</sup> R Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (2012) 210–11 [8.29], quoting Alan Rusbridger, 'Hacking Away at the Truth' (Orwell Lecture delivered at University College London, 10 November 2011).

<sup>42</sup> Denis Muller, *Journalism Ethics for the Digital Age* (Scribe, 2014) ch 3.

press, the suppression and distortion of news for politically partisan or commercial reasons' and a general decline in standards.<sup>43</sup>

In its report published in 1949 the Commission recommended a voluntary General Council of the Press, with lay members, which would protect privacy, correct mistakes and encourage the publication of diverse views.<sup>44</sup> Nothing happened for four years. Then in 1952 a private members' bill was introduced to set up a statutory council.<sup>45</sup> The press immediately established the General Council.<sup>46</sup>

In 1961 there was a second Royal Commission on the Press. It inquired into the increase in concentration of press ownership and the lack of diversity and accuracy of news presentation. The resultant report criticised the General Council's failure to implement the recommendations of the first Royal Commission, in particular the appointment of lay members. It reiterated the call for lay membership and a lay chairman.<sup>47</sup>

The third Royal Commission on the Press, which reported in 1977, conducted a detailed study of the Press Council.<sup>48</sup> It concluded that the Press Council had failed to persuade the public that it dealt satisfactorily with complaints. It found 'flagrant breaches of acceptable standards' and 'inexcusable intrusions into privacy'.<sup>49</sup> It recommended the publication of a written code of conduct for journalists and that the Press Council monitor the press's compliance with the code.<sup>50</sup> The Press Council did not follow these suggestions.<sup>51</sup>

In 1983 Sir Zelman Cowen became head of the Press Council, the same year that another Australian, Geoffrey Robertson, had written a book denouncing the Press Council as a sham. The period has been labelled the 'Dark Ages of British journalism', as the tabloid press, led especially by Rupert

<sup>43</sup> Geoffrey Robertson, *People against the Press: An Enquiry into the Press Council* (Quartet Books, 1983) 9.

<sup>44</sup> See United Kingdom, Royal Commission on the Press 1947–1949, *Report*, Cmd 7700 (1949) 177–8 [684].

<sup>45</sup> See Press Council Bill 1952 (UK), cited in Robertson, above n 43, 10; see also at 167 n 3.

<sup>46</sup> Robertson, above n 43, 10–11.

<sup>47</sup> *Ibid* 11–12. See United Kingdom, Royal Commission on the Press 1961–1962, *Report*, Cmnd 1812 (1962) 100–2 [320]–[326].

<sup>48</sup> See United Kingdom, Royal Commission on the Press, *Final Report*, Cmnd 6810 (1977) ('1977 Royal Commission Report').

<sup>49</sup> *Ibid* 210 [20.64]. See also Robertson, above n 43, 14.

<sup>50</sup> 1977 *Royal Commission Report*, above n 48, 209 [20.58].

<sup>51</sup> Robertson, above n 43, 13–16.

Murdoch's *The Sun* and *News of the World*, increasingly invaded privacy and heightened their sensationalism.<sup>52</sup> In 1987, *The Sun*, under editor Kelvin MacKenzie, had more complaints, around 40 per cent (15) of the total upheld, than any other newspaper.<sup>53</sup> Its lack of respect for the Council was shown in one case after a complaint had been upheld. The paper published the verdict, but then also repeated the original allegations, and criticised the complainant for 'scuttling to the Press Council'.<sup>54</sup> According to Roy Greenslade, by the end of the 1980s 'no one on either side — press or public — trusted the Press Council'.<sup>55</sup> An increasingly frustrated Cowen publicly voiced his frustrations and stood down in 1989.<sup>56</sup>

A Privacy Commission chaired by Sir David Calcutt QC examined the protection of privacy by the press. In 1990 it recommended the establishment of a new Press Complaints Commission ('PCC').<sup>57</sup> In part the reason was 'a continuing reluctance by the press to reform itself except when under the threat of more drastic measures being imposed'.<sup>58</sup> The new body was established.

In 1993 Sir David Calcutt QC delivered his *Review of Press Self-Regulation* to the British government.<sup>59</sup> Sir David had been asked to consider whether self-regulation since the establishment of the PCC had been effective.<sup>60</sup> His conclusion was that it was not. He explained:

The Commission has not been set up in a way, and is not operating a code of practice, which enables it to command not only press but also public confidence. It does not ... hold the balance fairly between the press and the individual. The Commission is not the truly independent body which it should be. The Commission, as constituted, is, in essence, a body set up by the industry,

<sup>52</sup> Roy Greenslade, *Press Gang: How Newspapers Make Profits from Propaganda* (Pan Books, revised ed, 2004) 537.

<sup>53</sup> *Ibid* 498.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid* 536.

<sup>56</sup> *Ibid* 537–8.

<sup>57</sup> *Ibid* 540. See also Home Office, *Report of the Committee on Privacy and Related Matters* (1990) ch 15.

<sup>58</sup> Home Office, above n 57, 57 [13.18].

<sup>59</sup> Sir David Calcutt, *Review of Press Self-Regulation*, Cm 2135 (1993).

<sup>60</sup> *Ibid* xi.

financed by the industry, dominated by the industry, operating a code of practice devised by the industry and which is over-favourable to the industry.<sup>61</sup>

He recommended that the government establish a statutory regime for the regulation of the press. This statutory tribunal should, he emphasised, be ‘wholly independent of Government’.<sup>62</sup> It should be required to prepare a code of practice, receive complaints about and inquire into breaches of the code. It should have power to require the ‘printing of apologies, corrections and replies’.<sup>63</sup> It should have power to award compensation, impose fines, and award costs.<sup>64</sup>

Nothing that Sir David recommended was acted upon. The press was simply too powerful for the government of the day to antagonise.<sup>65</sup>

The press’s many professions about improved standards and new beginnings quickly proved illusory. Not only was a self-regulatory code powerless to discipline conduct, but increasingly there was a lack of respect for the law itself. See, for example, the attitude of *News of the World* editor Piers Morgan. When the *Mail on Sunday* had an exclusive interview with English rugby player Will Carling, it explicitly warned Morgan not to breach its copyright. But according to Morgan’s account in his memoirs, he laughed at the warnings from the *Mail*, and made the calculation ‘£50,000 maximum damages. Well worth a front page and two spreads inside’.<sup>66</sup>

Given such contempt for the law, the chances of a self-regulatory code to discipline standards was zero.

## VIII THE LEVESON INQUIRY

The contempt for the rule of law became manifest in the scandal surrounding *News of the World* and its activities in phone hacking, and the involvement of that paper and some others in bribery and ‘blagging’ people’s electronic identities. The British government established the Leveson Inquiry into the

<sup>61</sup> Ibid 41 [5.26].

<sup>62</sup> Ibid 44 [5.41].

<sup>63</sup> Ibid 45 [6.5].

<sup>64</sup> Ibid.

<sup>65</sup> See Greenslade, above n 52, 600.

<sup>66</sup> Tom Watson and Martin Hickman, *Dial M for Murdoch: News Corporation and the Corruption of Britain* (Allen Lane, 2012) 16, quoting Piers Morgan, *The Insider: The Private Diaries of a Scandalous Decade* (Elbury Press, 2005) 95. See also Rodney Tiffen, *Rupert Murdoch: A Reassessment* (NewSouth, 2014) 319, quoting Brian Cathcart, *Everybody’s Hacked Off: Why We Don’t Have the Press We Deserve and What to Do about It* (Penguin Specials, 2012).

Culture, Practices and Ethics of the Press ('Leveson Inquiry') in July 2011, in response to the outpouring of anger following *The Guardian's* exposure that month that the *News of the World* had years earlier hacked the mobile phone of 14-year-old Milly Dowler, a victim first of abduction and then murder.<sup>67</sup> This was the climax of a scandal that had been slowly, but very unsteadily, building since January 2007 when a journalist and private detective had been jailed for hacking the phones of Prince William and his entourage.<sup>68</sup> Though the Milly Dowler hacking was the immediate cause, the Leveson Inquiry expanded to cover the culture, practices and ethics of the press in its relations with the public, the police and politicians.

Leveson found that there were many examples where the press disregarded its public responsibilities. The consequence was that the press caused 'real hardship and, on occasion, wreaked havoc with the lives of innocent people whose rights and liberties have been disdained'.<sup>69</sup> There had been a large trade in private and confidential information with 'little regard to the public interest'.<sup>70</sup> There were numerous examples of illegal phone hacking and other unethical activities.<sup>71</sup> There was complete disregard by journalists of their ethical standards:<sup>72</sup> 'Misrepresentation, distortion, and embellishment became part of the press culture'.<sup>73</sup> Concerning the PCC, Leveson agreed with the views of the Prime Minister, the Deputy Prime Minister<sup>74</sup> and the Leader of the Opposition in describing it as 'ineffective and lacking in rigour'<sup>75</sup> and a 'toothless poodle'.<sup>76</sup> Leveson's main concern was that '[a] profound lack of any

<sup>67</sup> Tiffen, *Rupert Murdoch*, above n 66, 260.

<sup>68</sup> *Ibid* 255–6.

<sup>69</sup> Sir Brian Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary and Recommendations* (2012) 4 [7] ('*Leveson Inquiry Executive Summary*').

<sup>70</sup> *Ibid* 7 [20]; see also at 10 [35].

<sup>71</sup> *Ibid* 8 [23]–[26].

<sup>72</sup> *Ibid* 9 [29].

<sup>73</sup> Cohen-Almagor, above n 36, 204.

<sup>74</sup> Sir Brian Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (2012) vol IV, 1516 [1.7] ('*Leveson Inquiry Report*'), citing Nick Clegg, 'Witness Statement of the Rt Hon Nick Clegg MP, Evidence in *Leveson Inquiry into the Culture, Practices and Ethics of the Press*, 30 April 2012, [18], [85] and Transcript of Proceedings, *Leveson Inquiry: Culture, Practice and Ethics of the Press* (13 June 2012, Morning) 10–11 (Nick Clegg).

<sup>75</sup> *Leveson Inquiry Report*, above n 74, 1516 [1.6], quoting Joe Sinclair, 'PM Signals End of Press Complaints Commission', *The Independent* (online), 8 July 2011 <<http://www.independent.co.uk/news/media/press/pm-signals-end-of-press-complaints-commission-2309210.html>>.

<sup>76</sup> *Leveson Inquiry Report*, above n 74, 1516 [1.7], quoting Ed Miliband, 'Speech on *News of the World* Closure' (Speech delivered at Thomson Reuters, London, 8 July 2011).

functional or meaningful independence from the industry that the PCC claimed to regulate lay at the heart of the failure of the system of self-regulation for the press.<sup>77</sup> This lack of independence was both at the level of perception as well as in the PCC's substantive decision-making. Leveson judged that significant contributions to the PCC's lack of independence were: first, that its funding was raised voluntarily from the industry itself; and, second, that the funding that was forthcoming was never sufficient to enable the PCC to conduct complaints handling efficiently.<sup>78</sup>

Central to the PCC's failure was its composition and mix of roles. Its domination by insiders, including, for example, having serving editors on the board, compromised its independence.<sup>79</sup> A 'clear flaw' of the PCC was the fact that the contents of the Editors' Code of Practice ('Code') had little or no public input. This led at least to the perception that the rules were made to serve the press and not the public.<sup>80</sup>

Then there was the problem that the PCC was a strong advocate for self-regulation. This, according to Leveson, 'served to create a real conflict of interest between the core function of the PCC ... and the role it arrogated to itself in advocating the interests of the industry as a whole'.<sup>81</sup> Another failure was that the PCC did not regard its function to be that of a 'regulator'. It was there to raise standards through 'education, exhortation and adjudication'.<sup>82</sup> This failure was in part due to the PCC's lack of funding, lack of structural independence and lack of power to impose sanctions for contraventions of the Code. Leveson characterised the PCC as a 'complaints and mediation service' rather than a regulator.<sup>83</sup> Yet another obvious deficiency was the PCC's limited power to investigate complaints. The PCC could not compel the production of documents or require the attendance of witnesses. It could not take sworn evidence. There were no sanctions that could be imposed for false or misleading testimony.<sup>84</sup> As well, the PCC did not monitor the press for breaches of the Code.<sup>85</sup> Nor did it launch investigations of its own volition.<sup>86</sup>

<sup>77</sup> *Leveson Inquiry Report*, above n 74, 1520 [3.1].

<sup>78</sup> *Ibid* 1520–2 [3.3]–[3.9].

<sup>79</sup> *Ibid* 1527 [3.32].

<sup>80</sup> *Ibid* 1529 [3.39].

<sup>81</sup> *Ibid* 1530 [4.2].

<sup>82</sup> *Ibid*, quoting Lord Wakeham, 'Witness Statement of Lord Wakeham', Evidence in *Leveson Inquiry into the Culture, Practices and Ethics of the Press*, 9 February 2012, [2].

<sup>83</sup> *Leveson Inquiry Report*, above n 74, 1542 [5.6].

<sup>84</sup> *Ibid* 1545 [6.7].

<sup>85</sup> *Ibid* 1548 [6.22].

The lack of compulsory membership was an obvious weakness. If an editor disagreed with a particular decision, he or she could make credible threats to leave, or in fact leave, the self-regulatory system. On occasion this is precisely what occurred. This was called in Britain the ‘Desmond problem’.<sup>87</sup> The publisher of the *Daily Express* and various other publications, Richard Desmond, simply refused to participate in the PCC.<sup>88</sup> His companies did not seem to suffer as a result of this non-participation.

All in all, these failings ‘fatally undermined the PCC and caused policy makers and the public to lose trust in the self-regulatory system’.<sup>89</sup> So Leveson recommended the establishment of a new independent body headed by an independent person.<sup>90</sup> He suggested that the body set standards and hear complaints for breach of those standards. He recommended that the body should have power to require the publication of apologies and retractions and to impose fines for breaches of standards. But central to its effectiveness would be that it operate under a legislative umbrella.<sup>91</sup>

#### IX AUSTRALIAN PRESS COUNCIL

Following the creation of the United Kingdom Press Council there were various suggestions that a press council be established in Australia. In 1969 the Australian Journalists Association (‘AJA’) recommended that a press council be set up. Around that time the AJA made several requests of state and federal governments that they should establish such a council. The then federal Attorney-General supported the idea. Not surprisingly, however, it was vociferously opposed by the press, a leading spokesman being Rupert Murdoch. And, accordingly, nothing was done.

In 1975 Dr Moss Cass, the then Minister for the Media, issued a press release stating that the establishment of a voluntary APC was ‘desirable and

<sup>86</sup> Ibid 1546 [6.12].

<sup>87</sup> See Brian Cathcart, ‘The Press, the Leveson Inquiry and the Hacked Off Campaign’ in Richard Lance Keeble and John Mair (ed), *The Phone Hacking Scandal: Journalism on Trial* (Abramis, 2012) 38, 43.

<sup>88</sup> See *Leveson Inquiry Report*, above n 74, 1516–17 [1.8]–[1.9], 1544–5 [6.1]–[6.6].

<sup>89</sup> Ibid 1579 [8.12].

<sup>90</sup> See *ibid* 1781–2 [7.1]–[7.12].

<sup>91</sup> *Leveson Inquiry Executive Summary*, above n 69, 14–17 [56]–[71].

practicable'.<sup>92</sup> Immediately he was attacked by the press.<sup>93</sup> Two days later the Minister described this attack as 'bizarre distortion and historical overreaction'.<sup>94</sup> *The Sunday Telegraph* reported it under the headline: 'Outrage over Press Council — Freedom of Speech Threatened'.<sup>95</sup> A comparison with Nazi Germany was made in an editorial in *The Australian*: 'Monitoring of the Press. What country are we living in? It sounds more like Dr Goebbels' Nazi-Germany than Dr Cass's Australia'.<sup>96</sup>

Similar themes appeared in 2000, when a Senate Select Committee set up in response to concerns about invasions of privacy in the lives of public figures recommended the creation of a Media Complaints Commission covering print and broadcast media alike.<sup>97</sup> It, too, was widely denounced, with *The Advertiser*, an Adelaide newspaper owned by News Limited, describing it as 'the first step on the descent to the Orwellian hell of Ministry of Truth'.<sup>98</sup>

Within two months of the Cass proposals in 1975, no doubt with the threat of legislation still hanging in the air, the press commenced moves to establish a national press council. The APC was formally created by the press in 1976 as a self-regulating body. Several proprietors had disliked the idea or been harsh critics of its effectiveness. In 1972, for example, Rupert Murdoch was opposed to the idea: 'The Press Council was invented as a fig-leaf by a frightened British Press establishment at a time of genuine concern. Surely we do not need such hypocrisy in Australia?'<sup>99</sup> Sir Warwick Fairfax haughtily dismissed the idea because of the

high standard of responsibility to the public [our papers have shown for] 144 years. We do not think it would have any appreciable effect on newspapers

<sup>92</sup> Deborah A Kirkman, *Whither the Australian Press Council? Its Formation, Function and Future* (Australian Press Council, 1996) 10, quoting M Cass, 'Media Release' (8 August 1975) 5.

<sup>93</sup> See Henry Rosenbloom, *Politics and the Media* (Scribe Publications, revised ed, 1978) 90–102.

<sup>94</sup> Kirkman, above n 92, 10–11, quoting M Cass, 'Media Release' (10 August 1975) 2.

<sup>95</sup> See Rosenbloom, above n 93, 95.

<sup>96</sup> *Ibid* 100.

<sup>97</sup> See Senate Select Committee on Information Technologies, Commonwealth of Australia, *In the Public Interest: Monitoring Australia's Media* (2000) ch 6.

<sup>98</sup> Peter Putnis, 'Newspapers as Political Instruments in Media Policy Debate' (2001) 8 *Agenda* 99, 110, quoting Editorial, 'A Dangerous and Silly Intrusion', *The Advertiser* (Adelaide), 15 April 2000, 20.

<sup>99</sup> Finkelstein, above n 41, 224, quoting 'Papers "Regulate" Themselves: Idea of Press Council Opposed by Murdoch', *The Sydney Morning Herald* (Sydney), 16 November 1972, 16.

which aimed at different standards. It is not our function to sit in judgment on other newspapers and we would strongly resent their sitting in judgment on us.<sup>100</sup>

Kerry Packer, appearing before the House of Representatives Committee into the Print Media in 1991, said the APC was ‘a complete and absolute piece of window-dressing’.<sup>101</sup> However, by the time of the Finkelstein Inquiry all the companies were vocal advocates for the desirability and effectiveness of the APC.

In its 36 years of existence, the APC has not fared well. As an institution for offering redress and a means of accountability of the press, the APC had five major failings, and several of these were intrinsic to its structure and needed institutional change to be rectified.

The first was that publishers could opt out whenever they wished. In the past, they sometimes had — for example, after the APC criticised the coverage by Adelaide’s *The News* of the South Australian election in 1979, News Limited simply withdrew and stayed out until its takeover of *The Herald & Weekly Times* in 1987.<sup>102</sup> As if to underline the validity of the report’s criticism on this point, the West Australian Newspapers Group withdrew from the APC soon after the report was published, and has set up its own in-house procedures for handling complaints.<sup>103</sup>

The second was that there was no consistency in where and how or even whether APC adjudications were published. The APC kept a record of all its decisions, but had no data on how these decisions were published in the relevant newspapers. Impressionistically, there seemed a pattern whereby adjudications favourable to the newspaper were published more prominently than critical ones. There was variation between papers, but in some at least it seemed that adverse findings were published much further back in the paper with nondescript headlines and reported more briefly. There were at least some times when critical adjudications were simply not published. Professor Matthew Ricketson observed that

[t]he requirement that Press Council adjudications be published prominently in newspapers is honoured in the breach. Most adjudications are published but

<sup>100</sup> Henry Mayer, *Mayer on the Media: Issues and Arguments* (Allen & Unwin and AFTRS, 1994) 9.

<sup>101</sup> Kirkman, above n 92, 15.

<sup>102</sup> Finkelstein, above n 41, 226 [8.79]–[8.82].

<sup>103</sup> See Julian Lee, ‘Media Group Pulls Out of Press Council’, *The Sydney Morning Herald* (Sydney), 5 April 2012, 3.

they're buried; a few are not published at all. Rarely are the adjudications written in the clear, far less the vigorous prose, that characterises good journalism and almost all are topped by a vanilla plain headline along the lines of 'Press Council ruling'. It seems safe to observe that no sub-editor has ever entered, let alone won, a Walkley award for the wittiest complaint adjudication headline.<sup>104</sup>

Third, the APC suffered from inadequate and insecure funding. Several former chairs of the APC told the inquiry that their greatest problem was that it did not have the funding base needed to undertake its roles. The former chair, Professor Julian Disney, said the budget needed to be doubled for the APC to meet the goals it had proclaimed for itself. Moreover, publishers could arbitrarily change their funding as they wished. When the APC undertook a research project on the State of the News Print Media in Australia, News Limited disapproved, and cut its funding by \$100 000.<sup>105</sup> Professor Pearce (chair from 1997–2000) said that 'the APC would never be effective unless it had secure and adequate funding'.<sup>106</sup> He made the point that another major problem with the APC was its lack of a 'sanction power'.<sup>107</sup> The omission enables proprietors to ignore APC rulings and this, he concluded, has 'stayed in the subconscious of the Press Council'.<sup>108</sup> Professor McKinnon (chair from 2000–09) said that the funding provided by proprietors had never been sufficient for the APC to carry out its objectives. He described it as 'a frugal, under-funded organisation'.<sup>109</sup> This was not a view shared by Greg Hywood, Fairfax Chief Executive Officer, or senior representatives of *The West Australian*, who thought the APC had sufficient funding.<sup>110</sup>

Fourth, the APC had a low public profile. Many people either knew nothing about it, or they saw it as an ineffectual forum for pursuing complaints. Sam North, a journalist for 35 years, including 4 spent on the APC, said that now he was working with business in public relations, he had been surprised by three things: 'the general acceptance that the media will get it wrong; the

<sup>104</sup> Matthew Ricketson, 'The Finkelstein Inquiry: You Wouldn't Read About It', *The Drum* (online), 21 May 2012 <<http://www.abc.net.au/news/2012-05-21/ricketson-the-finkelstein-inquiry3a-you-wouldn27t-read-about-/4022628>>.

<sup>105</sup> See APC, *State of the News Print Media in Australia: 2008 Report* (2008).

<sup>106</sup> Finkelstein, above n 41, 236 [8.111].

<sup>107</sup> *Ibid.*

<sup>108</sup> Belinda Merhap, 'Press Watchdog Has No Bite, Inquiry Told', *The Sydney Morning Herald* (online), 9 November 2011 <<http://www.smh.com.au/breaking-news-national/press-watchdog-has-no-bite-inquiry-told-20111109-1n6fb.html>>.

<sup>109</sup> Finkelstein, above n 41, 237 [8.113].

<sup>110</sup> *Ibid* 242 [8.120]–[8.121].

fear that the media will exact retribution should anyone complain; and the almost total lack of awareness of the Press Council'.<sup>111</sup>

Finally, especially on difficult and contentious cases, there were sometimes long delays. In some cases at least, justice delayed was justice denied. The Greens complained about a *Herald Sun* story before the 2004 election. The APC eventually found in their favour, but not until a long time after the election.

In the time since the announcement of the Finkelstein Inquiry, the former chair, Professor Disney, identified the APC's weaknesses to include: a lack of public awareness of its existence; its 'inability to properly investigate a complaint for lack of binding powers'; lack of resources; insufficient enforcement powers; and the lack of independence from its publisher members.<sup>112</sup>

In the last year or so the APC has attempted to rectify some of these deficiencies. Without legislation, however, many of the existing deficiencies are irreparable. Thus, when in 2012 a major publisher, the West Australian Newspapers Group, decided that it no longer wished to operate under the auspices of the APC, it simply withdrew.

In other words, the APC has not fared much better than its United Kingdom counterpart, although the press which it has had to regulate has not manifested the corruption the United Kingdom has seen.

## X PROPOSALS FOR REFORM

Many, including many in the press itself, accept that there must be some press regulation and that, because of the key weaknesses outlined above, the APC has only very partially succeeded as an avenue for accountability. However, it is universally agreed that any reforms must be carried out so as to ensure the freedom of the press, so that newspapers can effectively carry out their functions of discovering and testing the truth and of providing a critical report on the political and social life of the community. Appropriate regulation can and will further these ends.

The thrust of the Finkelstein Inquiry proposals was 'about making the news media more accountable to those covered in the news, and to the public generally'.<sup>113</sup> It sought to address the weaknesses of the APC by:

<sup>111</sup> Sam North, 'Finkelstein's "Monster" Not So Big and Scary', *The Sydney Morning Herald* (Sydney), 13 March 2012, 11.

<sup>112</sup> Finkelstein, above n 41, 237–8 [8.115].

<sup>113</sup> *Ibid* 9 [10].

- first, and most contentiously, preventing publishers from opting out by giving the work of the APC statutory underpinning;
- second, having agreed formulas for how and where adjudications would be published; and
- third, guaranteeing secure funding by having government finance the APC, indexed at twice the current level.

It should be stressed that there was no proposed change in standards. Rather these would continue to be the current ones, ones which the industry says that it already embraces. There was to be no change in the composition of the APC — it would remain as half industry and half public representatives. Finally the sole punishment was publication of the adjudication and in some cases offering a right of reply.

The Finkelstein Inquiry's main aim was to offer a forum for redress that: a) was as conciliatory as possible; b) carried no financial or legal risk for either party; c) procedurally was simple, quick and cheap; and d) would enlarge rather than restrict the flow and exchange of information and views.

Although the report recommended secure government funding and a statutory basis to underpin the APC's authority, it would not give the government of the day any extra power to influence news coverage than that which it already possesses. The report explicitly set out procedures to ensure its independence. The proposal was one of compulsory self-regulation, with standards, procedures and outcomes closely following the current practices of the APC.

The inquiry was proposing minimal reforms. They would have little impact on the practice of journalism. They would not affect at all issues of newsworthiness or story selection. The complaints that the Greens and Labor held about the Murdoch press, for example about double standards in news judgement, would not be touched. But it would give better procedures for testing and resolving issues of misrepresentation.

Despite the modesty of the proposals, the reaction was immediate and extreme. Visiting celebrity Naomi Wolf called the report 'step one to fascism'.<sup>114</sup> The former Chairman of News Limited, John Hartigan, saw it as 'part of a jihad against that company'.<sup>115</sup> Bob Cronin, group editor-in-chief of the West Australian Newspapers Group, described it as 'the most outrageous assault on our democracy in the history of the media, and likened its pro-

<sup>114</sup> Rodney Tiffen, 'Finkelstein Gets a Bad Press', *The Age* (Melbourne), 14 March 2012, 13.

<sup>115</sup> *Ibid.*

posals to what was common when Joe Stalin was running the Soviet Union'.<sup>116</sup> The economist Henry Ergas wrote in *The Australian* that 'Finkelstein's proposals would empower state-appointed officials to silence dissent',<sup>117</sup> while columnist Andrew Bolt thought that such 'thought police can only stifle debate'.<sup>118</sup> Paul Kelly thought it was 'another threat to freedom in Australia,' and that it reflected 'naive hubris'.<sup>119</sup> The *Australian Financial Review* 'thought it constituted a Labor plan to control the media',<sup>120</sup> while *The Sydney Morning Herald* editorialised that the report wanted to impose 'reason' on society, but '[t]hat experiment was tried last century and, in 1989 it collapsed amid rejoicing with the Berlin Wall. But the spirit of that disastrous experiment clearly lives on in reports such as this'.<sup>121</sup> The head of the Institute for Public Affairs, John Roskam, thought it was

intellectual arrogance at its most breathtaking ...

the totalitarian fallacy: don't let the people decide (because the people are too stupid), let judges and academics decide for them.

The Finkelstein Report overturns two centuries of Western political philosophy.<sup>122</sup>

Then Opposition Leader Tony Abbott was squarely in the critics' camp. He thought the Finkelstein Inquiry looked like 'an attempt to warn off News Ltd from pursuing anti-government stories'.<sup>123</sup> 'It's easy to imagine the fate of Andrew Bolt or Alan Jones, for instance, at the hands of such thought police,' he argued.<sup>124</sup>

<sup>116</sup> Ibid. See also ABC Radio National, 'Experts Debate Pros and Cons of the Finkelstein Review', *The World Today*, 9 March 2012 (Bob Cronin).

<sup>117</sup> Henry Ergas, 'Watchdog Can Muzzle Government's Critics', *The Australian* (Canberra), 12 March 2012, 12.

<sup>118</sup> Andrew Bolt, 'Thought Police Can Only Stifle Debate', *The Daily Telegraph* (Sydney), 5 March 2012, 13.

<sup>119</sup> Paul Kelly, 'Naive Hubris Pervades Media Inquiry', *The Australian* (Canberra), 7 March 2012, 12.

<sup>120</sup> Tiffen, 'Finkelstein Gets a Bad Press', above n 114, 13.

<sup>121</sup> Editorial, 'Not a Media Blueprint', *The Sydney Morning Herald* (Sydney), 6 March 2012, 10.

<sup>122</sup> John Roskam, 'A Failure to Defend Liberty', *Australian Financial Review* (Sydney), 9 March 2012, 50.

<sup>123</sup> Tony Abbott, 'Freedom Wars' (Speech delivered at the Institute of Public Affairs, Sydney, 6 August 2012).

<sup>124</sup> Ibid.

## XI CONCLUSION

Laura Stein has observed that the press

favors the interests of advertisers, shareholders, and more valued audience segments over those of the broader populace, including the poor, the very young and old, and racial and ethnic minorities. [The press] also systematically disfavor[s] unpopular and minority viewpoints ...<sup>125</sup>

There are several reasons for this. The most important is that newspapers are businesses. They exist to make money. At the same time newspapers also report the news, 'act as watchdogs' and 'unearth scandals'.<sup>126</sup> But newspapers do these things to succeed in business.<sup>127</sup>

Along the way they publish inaccurate, misleading and distorted information which is rarely corrected and, when it is, even more rarely with due prominence. Not only this, the press, while free to be partisan, ought to distinguish clearly between comment, conjecture and fact. This 'obligation' is routinely treated with contempt.

The proposal in the Finkelstein Inquiry report aimed to establish a forum independent of both government and industry that would provide redress to those injured by the press. It did so in ways that enlarged — and did not restrict — the flow of information, and through procedures with no financially punitive sanctions on either side beyond public exposure. The successful hostility of the press to having a statutory basis for such procedures means that for the foreseeable future, beyond the rule of statutes and torts, such as defamation and contempt of court, the main means of accountability will continue to be voluntary self-regulation.

There are some who believe in press self-regulation. The Swedish Press Ombudsman Ola Sigvardsson declared that '[a]mong the Swedish publishers there is a desire to behave decently, to behave in an ethical way. I think many publishers just think it's a good thing to do'.<sup>128</sup> A journalist thought that the German Press Council sits within a vibrant array of wider media accountability instruments, including 'ombudsmen, codes of newsroom ethics, reader advisory councils, correction corners, online portals that specialise in media

<sup>125</sup> Laura Stein, *Speech Rights in America: The First Amendment, Democracy and the Media* (University of Illinois Press, 2006) 47.

<sup>126</sup> Colin Sparks, 'The Press' in Jane Stokes and Anna Reading (eds), *The Media in Britain: Current Debates and Developments* (Macmillan Press, 1999) 41, 45–6.

<sup>127</sup> See *ibid.*

<sup>128</sup> Fielden, 'Regulating the Press,' above n 38, 19, quoting Lara Fielden, Interview with Ola Sigvardsson (January 2012).

criticism and self-criticism, media literacy campaigns to encourage reader interaction, and so on'.<sup>129</sup>

Experience tells us that the thought that such rosy scenarios represent the future of press self-regulation in Australia is foolish. Still, it is not surprising that action by government, even though not directed to fettering or gagging the press, is never likely to occur. It is the press and not the government that runs the show.<sup>130</sup>

<sup>129</sup> Fielden, 'Regulating the Press', above n 38, 78, quoting Mark Thompson, 'Leveson Inquiry — Briefing on International Approaches to Press Regulation' (Speech delivered at the Regulatory Models Briefing, Royal Courts of Justice, London, 5 October 2011) 3.

<sup>130</sup> See Anthony Sampson, *Who Runs This Place? The Anatomy of Britain in the 21<sup>st</sup> Century* (John Murray, 2004).