

# Submission to the Review of the News Media and Digital Platforms Mandatory Bargaining Code

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I apologise for this very late submission but I only became aware of the Review on reading Rod Sims article last week in *The Conversation*. I hope my suggestions can be considered despite missing the deadline for submissions.

The focus of this submission is the professional standards test set out in s52P of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*, and Questions 11 and 14 in the Review's Consultation Paper of April 2022. The suggestions made are intended to address the second of the Review's terms of reference, namely to 'identify potential improvements to the Code'.

The Code has successfully led to increased revenues for public interest journalism. The professional standards test has ensured that those benefiting from the Code are subject to some form of test of their standards aimed to ensure they are indeed contributing to the public interest. A similar test applies to Government support for certain regional media outlets. Together, these requirements to meet professional standards have led to an expansion of the membership of the Australian Press Council and have arguably increased the capacity of existing members to contribute fees to the Council.

My understanding, however, is that the resources of the Press Council have not increased in recent years in real terms, and that the Council continues to be heavily reliant on funding from two major news organisations raising perceptions in some quarters of insufficient independence. The Treasury Review might like to seek details from the Council about its membership and revenues over the last five years.

More important, perhaps, is that the professional standards test itself facilitates increased fragmentation of media standards regulation when media convergence requires a more coherent and integrated approach; the fragmentation also undermines the capability of those undertaking the regulation.

A decade ago, the Finkelstein and Convergence Reviews concluded that the then fragmented arrangements were not fit for purpose, and recommended coordinated regulation of media standards, albeit suggesting different models to do so. While neither approach was implemented, the threat of increased government involvement allowed the then Chair of the Press Council, Julian Disney, to negotiate major reforms which increased the Council's independence and its resources. Over more recent times, those achievements have been somewhat diluted, and there has been no progress towards consistent, robust regulation of standards.

The professional standards test in s52P requires only that the registered organisation belong to the APC or the IMC, or is subject to internal editorial standards that are analogous to the rules of the APC or IMC (or those of broadcasters). The truth is that the IMC has nowhere near the capacity of the Press Council, its key members having withdrawn from the APC refusing to accept the reforms

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<sup>1</sup> Andrew Podger was a Public Member of the Australian Press Council from 2012 to 2021. This submission does not purport to represent the views of the Council but only the views of the author.

negotiated by Disney. Now the professional standards test allows a news organisation to find the lowest common denominator, the cheapest version of a regulator, it can.

A 'platform-neutral regulatory framework' was envisaged as the preferred end-state in the previous Government's response to the original ACCC report and in ACMA's 2020 Green Paper. That may be beyond the remit of the Mandatory Bargaining Code and the current Review but the Code's professional standards test could help to point in the right direction by being strengthened and identifying more clearly what it means by professional standards and what functions and capabilities are required of an acceptable standards organisation.

For example, the standards should relate to accuracy, fairness and balance, and to the ethical collection and dissemination of information. The standards organisation must be independent of its news organisation members, have the capacity to consider complaints in a timely and professional manner, have the capability to regularly review its standards taking into account contemporary developments (such as social and technological developments), and should contribute to the enhancement of professional standards through support for the education and training of journalists and public reporting.

Such clarification might constrain organisations from trying to rely on internal editorial standards as allowed by s52P(1)(a)(iv), and might lead members of the IMC to reconsider separation from the Press Council (or at the very least strengthening its capacity and role). In time, it might also point to wider reforms of media regulation.

For further information, I have attached the unedited version of two articles I wrote that were published in *The Conversation* on 9 November 2021 and 7 January 2022.

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## **PUBLIC INTEREST JOURNALISM NEEDS FIRMER PROFESSIONAL STANDARDS NOT JUST BETTER PROTECTION**

**Andrew Podger<sup>2</sup>**

While Australia has been pioneering measures to protect public interest journalism from the threats arising from media restructuring, it has yet to properly address the corresponding need for firm professional standards.

It is nearly a decade since the Finkelstein Review recommended a new government funded statutory body to take over the role and functions of the Australian Press Council and the current affairs functions of the Australian Communications and Media Authority, and the subsequent Convergence Review recommended an industry-led news standards body to oversee journalistic standards for news and comment whichever media platform is used. Neither model eventuated though the threat of government regulation did lead to significant reforms to the Press Council under Julian Disney's leadership.

Continuing media restructuring, however, has left us with a highly fragmented, underfunded and incomplete system of regulating professional standards.

### **Media Regulation Reform So Far**

According to the Media Reform Green Paper last year, the Government is committed to 'a staged process to reform media regulation towards an end state of a platform-neutral regulatory framework covering both online and offline delivery of media content to Australian consumers'.

The first step was the Mandatory Bargaining Code legislated earlier this year following the ACCC's Digital Platforms Inquiry which found that the digital platforms had excessive market power and should pay for the use of core news content. Registered news businesses which satisfy a professional standards test have the right to bargain with the digital platforms with ACMA responsible for mediation or arbitration if agreement is not reached.

The major news outlets have voluntarily reached agreements with the main digital platforms indirectly taking advantage of the Code without directly using its provisions. Many smaller news businesses are yet to negotiate but the ACCC has declared its intention to ensure broad coverage of the Code. In the meantime, the Government has provided some funding for regional news organisations, also subject to a professional standards test.

Another step has led to an Australian Code of Practice on Disinformation and Misinformation issued by the Digital Industry Group Inc. (DIGI) in February. This industry code was in response to an ACMA discussion paper released in June 2020. Despite its title, the DIGI code focuses only on disinformation not 'misinformation and news quality' or 'empowering users to identify the quality of news and information' as ACMA proposed.

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<sup>2</sup> This is the unedited version of an article, 'More than protection, Australian journalism needs better standards', that was published in *The Conversation* on 9 November 2021

Last year's Media Reform Green Paper focused mainly on modernising television regulation (final decisions are yet to be made by the Government) but, interestingly, it also suggested the establishment of a Public Interest News Gathering (PING) Trust with substantial capital from the sale of spectrum. The Trust might help to safeguard the ongoing provision and dissemination of journalism, particularly at the local and regional level, but operate at arms-length from government.

The Parliament is also conducting an inquiry into media diversity but has yet to report.

### **Action lacking on professional standards**

While the Bargaining Code and the government funding require the relevant news organisations to have professional standards, the provisions are weak and may worsen the problems of underfunding and fragmentation.

To meet the professional standards test, relevant businesses need to be members of the Press Council or the Independent Media Council or be 'subject to internal standards that are analogous to ... (such rules) ... to the extent that they relate to the provision of quality journalism'. What a standards organisation must do or how it must operate is not specified and some publishers may simply look to the lowest cost and least intrusive arrangement approved.

Technological change and the excessive market power of the digital platforms on the revenues of news businesses have already flowed on to the Press Council. Fees to the Council are currently frozen, revenue projections look even bleaker<sup>3</sup> and the Council is dependent financially on two publishers: News Ltd and Nine.

These developments are jeopardising the reforms the Press Council made following the Finkelstein and Convergence Reviews. These strengthened its independence and its capability not only to consider complaints but also to review its General Principles, develop new standards and guidelines for reporting and establish education and promotion activities. Publisher members agreed to double their fees and to enter into contracts requiring them to give four years' notice should they leave. A more rigorous approach was introduced for handling complaints with adjudications being made by panels of Public Members and Independent Journalist members only.

The fact is that not even the IMC has all these attributes: its publisher members (mostly in WA) did not agree to the changes Disney orchestrated and went their own (cheaper) way. The IMC has a code of conduct but no additional standards or guidelines such as those the Press Council has developed; it handles around 30 complaints a year whereas the Press Council handles well over 1,000.

The Press Council has its critics of course, whether related to slowness in handling complaints (a legitimate concern) or being a paper tiger or seeming insufficiently independent or insufficiently (or overly) critical of the articles or cartoons it examines.

### **A broad conceptual framework**

Moving towards a 'platform-neutral regulatory framework' requires a general concept of the media landscape. This might involve separating the media into the following categories and the respective standards the public should expect from each:

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<sup>3</sup> For example, while ACM (publisher of the Canberra Times) is still a member because the commitment by Fairfax is yet to expire, it has not committed to continue membership.

- The vast majority of individuals and organisations who communicate publicly, exercising their freedom of speech limited only by the laws of defamation and anti-discrimination etc.;
- Non-government organisations providing public interest journalism, expected to meet professional standards including ‘accuracy, fairness and balance’; and
- Government-funded media organisations such as the ABC and SBS, expected not only to be ‘accurate, fair and balanced’ but also politically neutral overall in their current affairs.

Broadcasters licensed by government to use spectrum might be included in the second category, though some might argue they should have the higher standards of the third category.

Missing from this categorisation are the digital platforms which disseminate information from all three groups. The question is what obligations they should have for the content they distribute and the way in which they do so.

### **A possible reform agenda**

To achieve a firmer and properly resourced ‘regulator’ of professional standards for the second category above, the obvious starting point is to replace or restructure the Press Council.

There was good reason for rejecting the Finkelstein recommendation of a statutory regulator of press standards: a self-regulating model would be more consistent with press freedom. But concerns about capacity to do what should be required of a professional standards body remain, as do concerns about media convergence. Strengthening the Press Council and extending its ambit to include, for example, the news and current affairs responsibilities of ACMA, would help, as would other measures to address fragmentation.

The professional standards test might then set out the attributes and capacities of an acceptable standards organisation or, preferably, specify the need to belong to the new national organisation.

Third, the new organisation would need better resourcing. While the success of the Public Interest Journalism Initiative and the Judith Nielson Institute may suggest some room for philanthropic support, that is unlikely to be a significant and reliable source of additional funds. As the Convergence Review suggested a decade ago, some government funding is required, not only for the functions transferred from ACMA, but recognising the public good in such ‘regulation’. The ACMA Green Paper’s suggestion of a PING Trust may offer a way of providing such funds without allowing any government interference.

Fourth, a partnership with the digital platforms might effectively strengthen the new DIGI Code. Users might better assess the quality of news and information from the platforms if the fact that information was from a member of the professional standards organisation was highlighted, advice provided about how users could complain to the organisation, and any remedy or adjudication arising from such a complaint promulgated.

A broader international agenda needs to be developed about regulation of the digital platforms ensuring sufficiently independent oversight of their algorithms to limit the risk of social harm.

## A DISAPPOINTING EFFORT TO ADVANCE MEDIA REFORM

Andrew Podger<sup>4</sup>

The deeply partisan report of the Senate Inquiry into Media Diversity in Australia, tabled on 9 December, is a disappointment.

The main report by the Greens and Labor (Senator Hansen-Young in the chair) endorsed the campaign by former prime ministers Rudd and Turnbull for a royal commission, echoing their attacks on the dominance, style and influence of News Limited and its owner, Rupert Murdoch. The dissenting reports by Coalition members (Senator Bragg and Senator McMahon) oppose any inquiry, recommend the Press Council reform itself and that the ABC be subject to stronger regulation.

Amongst these predictable and largely unhelpful proposals, the report does identify some of the underlying problems facing the media and media regulation in Australia and the main report's second recommendation points towards the measures that need to be taken to complete the reforms the ACCC, under Rod Sims, has pioneered. Sadly, however, these are drowned out by the partisan shouting.

The ACCC's focus, understandably given its statutory role, has been on the excessive market power of the digital platforms and the impact this is having on the production of news and related content, which is a public good crucial to democracy.

A second underlying issue, related to the first, concerns the fragmented and inadequate regulation of professional standards for the collection and dissemination of public interest journalism with the convergence of media forms and the growing role of digital platforms.

A third issue, which is the original focus of this Senate inquiry, concerns the diversity of the media: whether Australia's news media market excludes some voices while giving others excessive power. It is not possible to explore this issue adequately without also carefully addressing the first two.

Rather than a royal commission, led by lawyers and established by politicians wanting to pursue Murdoch and News Ltd., or no inquiry at all, we need an expert inquiry to build on the ACCC's work and related developments. It might be led by the Productivity Commission or set up as a separate independent inquiry reporting to the Treasurer and Minister for Communications.

### *Sufficient production of public interest journalism*

The ACCC's bargaining code which the Government has enacted goes some way to address the excessive power of the digital platforms, ensuring they make a financial contribution towards the production of public interest journalism. The Government has also taken some initial steps to support local and regional news gathering and the AAP wire service. As the ACCC has argued, and News and Nine have shown, there is market failure that limits the production of news about local courts, local government and other local and regional activities. Some ongoing government support would lower the cost for new entrants into the news business, allowing them to compete with the

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<sup>4</sup> This is the unedited version of an article, 'Forget calls for a royal commission into Australia's big media players: this is the inquiry we really need', *The Conversation*, 7 January 2022.

larger organisations. The ACMA Green Paper's suggestion to use the sale of spectrum to finance an independent trust might help, but first we need an assessment of how much is needed.

There is also a case for concessional rates of tax for new ventures investing in public interest journalism, and for extending deductible gift recipient status for appropriate philanthropic ventures, as suggested by the Public Interest Journalism Initiative and recommended by the committee.

Notwithstanding the Coalition senators' attacks on the ABC and SBS, these play a significant role in the collection and dissemination of news, including in local and regional areas.

### *Regulation of professional standards*

In my previous article ([link](#)). I argued that more needs to be done to ensure adequate and consistent regulation of the media. As the Finkelstein and Convergence reviews a decade ago revealed, the current fragmented arrangements are no longer fit for purpose. The provisions in the bargaining code, however, allow for even further fragmentation, not the 'platform-neutral regulatory framework' set as the preferred end state in the Government's response to the original ACCC report and in ACMA's Green Paper last year.

While the Finkelstein review's proposed statutory authority goes too far, relying solely on industry self-funding is a recipe for continued weak regulation and insufficient capacity to keep standards up-to-date and to promote standards including through education campaigns. The suggested independent trust might be a suitable vehicle for such funding, avoiding any risk of government interference.

In focusing on a couple of Press Council cases, the report fails to acknowledge the challenges involved and the need to invest resources into reviewing and updating standards. The Council revised its General Principles some years ago in part in recognition of the increased blurring of news and comment. It strengthened its Principle 1 concerning accuracy to ensure it applied to 'factual material' wherever it occurs, including in commentaries. There remains a requirement that factual material be distinguishable from opinion, but that is increasingly problematic: many online publications are based solely on commentaries.

Other challenges for the Council (and any new standards organisation) include regulating 'fairness and balance' and whether it should consider patterns of articles and not just each article complained of in turn. Societal developments also need to be considered by setting new standards and guidelines, such as the Council's new guidelines for reporting on persons with diverse sexual identification.

The ABC and SBS face an additional challenge because of the need to be 'impartial'; it does not always get this right but holding government to account almost inevitably leads governments to see partisan bias against them. It will be interesting to see how John McMillan's review of the ABC's complaints system addresses this issue.

Perhaps the thorniest issue here is the appropriate regulation of the digital platforms. As ACMA indicated last year, we need more than a disinformation code. Some form of partnership with a new public interest media regulator might also assist users to identify whether the news they see online is from a reputable source.

### *Media diversity*

Action on the above two issues should enhance the production and quality of public interest journalism and the range of voices involved. Ownership controls are no longer central, though

perhaps ownership might remain a factor in some new public interest test about cross-media mergers to contain excessive power by particular media businesses as Allan Fels suggested to the inquiry, drawing on a past Productivity Commission report.

For the foreseeable future, the ABC and SBS also remain essential to a well-informed public, reducing the risk of reliance on sources that may promote particular views.

### *Conclusion*

That News Ltd has campaigned vigorously for political purposes is very clear; in doing so its publications have at times breached Press Council standards, and sometimes loudly disagreed with Council adjudications. But the best way to address such concerns is not to focus an inquiry onto News Ltd., but to constructively address the three issues above to shift the environment in which News Ltd (and other news organisations) operates. That might promote freedom of speech, not constrain it, while also promoting media responsibility and wider participation.