

6. The moment of Leveson: Beyond ‘First Amendment fundamentalism’ in news regulatory policies

ABSTRACT

Australian discussion of the Leveson Inquiry has started and finished at asking whether ‘we’ suffer from precisely the same ethical malaise that led to phone-hacking in the United Kingdom. Yet as Leveson has unfolded it has become clear that its report will have international significance as a watershed moment in content regulation in a multi-platform future. A 30-year-old neoliberal orthodoxy has promulgated the view that digital convergence would mean the expansion of newspaper models of self-regulation to all future platforms. Broadcast models of structural and content regulation would disappear along with spectrum scarcity and other ‘old media’ trappings. All that is now at serious risk. Instead, for the UK at least, the public service obligations placed on commercial broadcasters now appear a more evident success story in maintaining journalistic integrity. Convergence might mean instead that public service obligations should be applied to newspaper publishers. However, making sense of all this from Australia is rendered difficult by the failure of our regulatory regimes to set such standards for commercial broadcast journalism at even levels achieved in the US at its broadcast regulatory high watermark. This article thus weighs up recommendations of the Finklestein and Boreham reviews in this context.

Keywords: broadcasting, digital convergence, freedom of expression, Leveson, media freedom, media law, media regulation, newspapers, press councils, pseudo-journalism

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DIGITAL convergence of the formerly discrete platforms of broadcasting and newspaper publishing has consequences for any talk of regulation, supportive or oppositional. It requires that anyone addressing the possible regulation of all ‘converged’ journalism be familiar with the regulation of broadcast journalism. Yet it is fair to say that the statutory regulation of commercial broadcast journalism is not well understood in Australia where self/co-regulation by industry codes has been the dominant norm. There has never been an Australian regulatory regime that meets international standards. So envisaging a successful regime takes either some imagination or the labour of comparative analysis. Critical debate has tended to focus instead on proprietorial partisanship and its consequences, a legacy of the former historical dominance of broadcast ownership by newspaper publishers. Such a perspective has strongly informed the recent polarised debate about the establishment of the Finkelstein Inquiry and the reception of its report.

From that critical perspective, ABC journalism has thus functioned as a kind of default embodiment of independent good practice, a view reaching its highpoint in the Whitlam government plan to model a newspaper on the ABC (Whitlam, 1985, p. 580). The best measure of commercial broadcast journalism’s incapacity to compete with the ABC in quality is the blindness of the ABC’s conservative critics to the existence of market alternatives. Never is commercial broadcast journalism held up as an alternative to the ABC’s amid the ritualised charges of bias.

None of this is especially healthy for Australian democracy. There is at least suggestive evidence that Australia has polarised television audience-publics—with dramatically different levels of political knowledge and so informed citizenship. This at a time when television is only gradually yielding its place as most-nominated source of news (Jones & Pusey, 2010).

But this is to compare journalism with journalism. Australia’s *laissez-faire* broadcast regulation has permitted the rise of forms of pseudo-journalism in commercial television current affairs and the importation of US aggressive talk radio formats. These are the standard targets of the ABC’s *MediaWatch*. Few journalists would openly defend such practices, but suggestions of regulation are usually met with anxiety about freedom of expression.¹

So, whatever the cause, the unusual temporal alignment of the UK Leveson Inquiry with two Australian media inquiries is highly fortuitous. For, as

argued below, UK policymakers can look to their broadcast regulation for inspiration in addressing the widely acknowledged failure of the press council model. Freedom of expression is at the fore of these discussions because of the existence of the UK *Human Rights Act* which ‘harmonises’ with European legal frameworks.

To this extent that forgotten Whitlam strategy of basing newspaper policy in broadcast precedent was prescient, even if Whitlam’s regrettable practical legacy was the abolition of the ABC’s licence fee, so removing a major source of relatively independent revenue still enjoyed by the BBC. (Whitlam’s retrospective view from 1985 remained that the ABC license fee was a ‘regressive system ... amounting to a virtual poll tax on every family in Australia’ [Whitlam, 1985, p. 577] but no comparably independent alternative revenue source was provided, so leaving the ABC vulnerable to direct funding pressures from governments of the day.)

What follows thus briefly tracks the respective broadcast regulatory legacies of the US, UK and Australia and their relevance for the current press-regulatory debate around the inquiries. I have concentrated on content regulation as this is the key indicator from a free speech perspective.

The US legacy: Reliance on ‘technologies of freedom’

For a generation, US media and communications policy has been driven by the mantra that digital convergence would be an inherently deregulatory, market-friendly revolution. Digital abundance would mean that news and other media corporations would in future address information-rich consumers, not citizens expecting public services like quality journalism. In effect, digital abundance of data, but not necessarily journalism, would deliver a return to the 18th century ideals of press freedom by rendering every citizen a potential publisher.

The target of this mantra was the system of broadcast regulation based in ‘spectrum scarcity’ that had grown up from the 1920s. Licensing of the scarce resource of electronic spectrum enabled regulators to place conditions on those licences such as ownership rules and codes of practice relating to broadcast content. In many jurisdictions codes of conduct for broadcast journalism were developed which broadly echoed those in journalists’ codes of ethics.

Perhaps the most influential academic text in this regard is Ithiel de Sola Pool’s *Technologies of Freedom* (1983), which is often credited with laying

the ground for the very concept of convergence (eg. Jenkins, 2006, p. 10). Pool certainly anticipates much recent neoliberal deregulatory practice such as the selling, rather than licensing, of spectrum. For Pool the starting point for considerations of communications policy in democracies is necessarily constitutional. The regulation of broadcasting was ‘an uncomfortable partial exception’ (1983, p. 133) to US *First Amendment* principles.

Analysts of freedom of speech and media regulation routinely distinguish between structural and content regulation (Lichtenberg, 1990; cf Petley 2012). The terms are reasonably self-descriptive with the weight on content, as the freedom is understood chiefly to protect content. The logic here is also driven by a First Amendment conception of exceptionalism. In particular, the more regulatory practices place a ‘burden on speech’, usually understood to include all broadcast content in this context, the more they are at risk of being struck down if appealed to the US Supreme Court. In effect, structural regulation is a ‘safer’ option for regulators than content regulation.

However, in the broadcast era structural circumstances were also acknowledged to facilitate content regulation. In the most famous Supreme Court decision in this context, the 1959 *Red Lion* case (Barendt, 1993 p. 158ff), the fact that access to broadcasting was restricted by spectrum scarcity and ownership patterns was a key factor in the Court’s support of content regulation. Content regulation had become necessary because structural circumstances—notably technical capacity and related ownership configurations—had narrowed the avenues of transmission of content. The content regulation at issue was the Fairness Doctrine, which required a *de facto* right of reply if programming involving political speech was not sufficiently balanced.

By 1987 digital convergence was highly anticipated by policymakers and the US regulator, the Federal Communications Commission (FCC), began rescinding the Fairness Doctrine. In this sense Pool’s futurological scenario succeeded in ending a chief component of the ‘uncomfortable partial exception’ to First Amendment principles.

There is a broad intellectual consensus that the rescinding of the Fairness Doctrine substantially contributed to the shape of the US non-print news market today. Opinions diverge, of course over the evaluation of these changes. The rise of Fox News, most obviously, occurs in this period. It might be more accurate, however, to follow Cass Sunstein (1995) and refer to a ‘speech market’ rather than ‘news market’ here. For the Fairness Doctrine sought to

regulate not only news but all broadcast political speech. The *Red Lion* case itself did not concern news directly but rather the ‘speech’ of a fundamentalist preacher—broadcasting on the Red Lion radio station—in which a journalist was personally attacked. The journalist then demanded a right of reply. It was the journalist’s right of reply that was at issue (Pool, 1983 p. 130; Barendt 1993, pp. 158-159).

Red Lion’s socio-legal complexities speak directly to the present. In many ways the current situation is one where fundamentalist speech, most notably in the form of aggressive talk radio (to use the US term), is at odds with the norms of professional journalism. Such aggressive styles dominated the 250 percent expansion of this format in the US between 1990 and 2006 (Project for Excellence in Journalism, 2007). As in Australia, local radio news was what the new subgenre often replaced.

The emergence of aggressive talk radio of the Rush Limbaugh mode in the 1990s, while sometimes closely linked with Fox (Jamieson & Cappella, 2008), carried other connotations in the US. For many in the blogosphere it was reminiscent of an earlier wave of radio populists in the 1920s and 1930s. The most notable was Father Charles Coughlin who entered a brief political alliance with Governor Huey Long of Louisiana, himself an accomplished radio populist. Coughlin and Long were negotiating a challenge to Roosevelt (FDR) in the 1936 election when Long was assassinated in 1935 (Brinkley, 1982). In one set of popular memories at least, the means of historicising these two waves of radio populism was clear. What sat between them was the Fairness Doctrine. The early radio populists made no pretence to journalism. While talk radio has its journalist-pretenders, the parallels are otherwise striking. A lobby developed several years ago for the reintroduction of a Fairness Doctrine by the next Democrat administration (Puzzanghera, 2007). It failed. The Obama administration declined to introduce such content regulation (Novak, 2009).

The UK legacy of broadcast regulatory sophistication

The UK broadcast regulatory system became colloquially known as ‘the least worst broadcasting system in the world’ because from the outset it sought to address both structural and content issues. A key difference between the US and UK systems can be found in the role of editorialisation. Where the Fairness Doctrine was premised on the assumption that licence-holders were entitled to editorialise, the UK system was premised on the prohibition of all

such practice for all licensees (Hitchens, 2006 p.168). To this extent, the UK system was even more resistant than the US one to any suggestion that broadcast licensees were in the same position as newspaper publishers.

More generally, while the institutional example of the BBC is well-known and was widely emulated, the complementary regulation of commercial broadcasting, especially television, was poorly understood outside the UK. Some elements are familiar—such as content regulation for fairness and impartiality based in journalists' codes of ethics. This element was administered externally by the broadcast regulator, however, to the same degree that the BBC administered its charters internally. That is, unlike Australia, content regulation of commercial and BBC journalism was broadly comparable.

Indeed, for the initial commercial television system as a whole, remarkable innovations were developed to avoid one of the key structural features of the US system—'head to head' competition that facilitated convergent emulation of content. The regulatory system was designed to prevent such downsides of 'market forces' that economists recognise as 'Hotelling's Effect' (Jones & Holmes, 2011, pp. 209-213). It is in this context that a major determinant of the 'pseudo-journalism' referred to above arises—where all journalism's professional ethics and 'hard' news values are subordinated to the role of the news or current affairs programme as a 'downmarket' ratings vehicle. Unusually, the British found structural solutions to Hotelling's effect that lasted many years. The chief instruments were the granting of regional monopolies to the ITV television licence holders of 'Channel 3' and the outsourcing of television news production to an external provider, ITN, again underpinning the separation of licence-holders from editorial practices. The latter move especially, prior to its subsequent dilution, also established a firm buffer between editorial and other television production in the commercial sector. Overall, however, the key to this combination of structural and content regulation was its regulatory 'nudging' of commercial television journalism to compete *qualitatively* with the BBC (instead of quantitatively for greater audience share).

By the time of the 1977 Annan Report, ITN News was widely considered to have the edge over BBC News. Annan's chief legacy, the better known Channel 4 model, built on these initiatives by employing a combination of cross-subsidy revenue provision from the Channel 3 companies with, again, the outsourcing of news provision. From this developed the highly regarded *Channel 4 News*.

United Kingdom deregulation towards a ‘light touch’ regime in the wake of satellite and later digital terrestrial multi-channelling during the last 20 years was slower and more complex than the earlier US developments. The ‘technologies of freedom’ position was certainly advocated by Rupert Murdoch and others. The title and content of Murdoch’s landmark 1989 MacTaggart Lecture, for example, ‘Freedom in Broadcasting’ echoed Pool very strongly (Murdoch, 1989; Keane, 2005). However, unlike the US, this neoliberal discourse faced a much more entrenched public service ethos across the whole regulatory system, not just the BBC.

At the level of content regulation, multi-channelling meant a shift to an increasing reliance on complaints procedures as the prospect of content monitoring by a regulator became impractical. Overall, Channel 4 is perhaps the best bellwether of these developments. It was permitted to head ‘down-market’ in its general programming, which had originally been avant-garde and multicultural: Channel 4 instead became the UK home of *Big Brother* and similar ‘reality’ and ‘lifestyle’ programming. However, the structural and content regulation of its news were largely preserved. *Channel 4 News*, accordingly, has held its reputation, including a reputation for investigative journalism, even if its ‘seriousness’ seems at odds with much of Channel 4’s other programming.

Interregnum: From broadcasting to press regulatory practices

One of the key themes emerging in the wake of the Leveson Inquiry is the contrast between the success of UK broadcasting regulation and the series of failures in press regulation in Britain, despite three Royal Commissions into the Press and a Privacy Committee since 1949. The accusation of failure may have been a controversial point at one time but is currently almost universally accepted by participants in the Leveson Inquiry, not only because of the hacking scandal but because of the continued failure to establish self-regulatory procedures that ensured trust. James Curran’s considerable body of work is perhaps the most consistent means of tracking this issue in the UK, both for its historical depth (Curran & Seaton, 2010) and for his prescient recognition of the appropriateness of the comparison between UK broadcasting and press regulation (Curran 1995). It is from his work that I borrow the term ‘First Amendment fundamentalism’.

The US case in broadcasting (de)regulation demonstrates the unintended

consequences of a curious alliance between technological determinism and neoliberal deregulatory logics, underwritten by ‘first amendment fundamentalism’. It also provides an important indication that what might first appear to be regulation that restricts journalistic freedom can also be regulation to protect journalism from fundamentalist political speech and so enhance the deliberative qualities of a public sphere.

In many ways these differing legacies set the scene for today’s differing lines of demarcation of professional—or, in populist language, ‘elite’—journalism from other modes. In the UK the line runs between broadcast journalism and the quality newspapers, on the one hand, and redtop tabloids on the other. In the US, that line runs through broadcast journalism itself as well as through newspapers. Murdoch’s television interests in each country to some extent mark that differing point of demarcation: Sky (UK) practices a form of quality emulation of the BBC resembling ITN’s while Fox News (US) does the opposite.

However, even this does not quite capture the distinction at stake here. The risk in framing the issue as the previous paragraph did is that it conflates professionalism and traditional forms of high/low cultural distinctions established within the UK tradition (as does my use of ‘pseudo-journalism’ above).

If we instead were to map the demarcation from the opposite pole we could speak instead of how fundamentalist and partisan political discourses are managed in each regulatory regime. In the US’s free speech tradition such discourses flourished more readily without prior constraint or professional mediation, even under the Fairness Doctrine. The UK’s anti-editorialisation principle in broadcasting regulation displaced these practices into print journalism. Hence the important hybridity of much ‘professional tabloid’ news—that it is constituted by a struggle between such populist discourses and journalistic ethical conventions such as multiple sourcing, verification and the separation of fact from opinion.

Of course, all the above assumes what Chalaby (1996) has christened the ‘Anglo-American invention’ of objective journalism. As Hallin and Mancini (2004) have elaborated, in many European journalistic traditions partisanship has been the norm, albeit now generally yielding to the Anglo-American model.

Crucially then, the crisis of the press council model of self-regulation has provoked an opportunity for policymakers to seriously develop a radically different framework from Pool’s for thinking about the relationship between

digital convergence and regulation. There can no longer be an inevitable assumption that the digital future will be regulation-free and entirely ‘market driven’. The harbinger of this challenge was most likely the successful move into online content provision by public service broadcasters. This development was the target of James Murdoch’s 2009 MacTaggart Lecture which somewhat hubristically drew on Darwin rather than Pool to rearticulate the determinist dimensions of the challenged neoliberal deregulatory vision. Its title was ‘The Absence of Trust’ (Murdoch, 2009). The titular trust refers here not to trust in journalism or publishers but a populist directive to ‘trust the people’s will’—as evidenced by market preferences—and so remove all need for ‘paternalist’ regulation (Jones, 2011; but cf Hitchens, 2006, for more detail).

Australia: No worries?

What of Australia’s regulatory legacy in this context? It was conventional in the broadcast era for domestic assessments to regard Australia’s ‘dual system’ as ‘the best of both worlds’ in its combination of an ABC with a regulated commercial system. As I have argued elsewhere, this view is fallacious, primarily because Australia deployed neither the British innovations in commercial broadcast regulation nor a US-style Fairness Doctrine (Jones, 2001; but cf Hitchens, 2006, for more detail). The track record of under-regulation of broadcast journalism and political speech is remarkably similar to that for press regulation. The linkage may well be ownership concentration, notably the comparatively unusual permission granted to newspaper proprietors to take up licences at the foundation of television broadcasting.

Hoffmann-Riems’ 1996 comparative assessment of the normative deficit in Australian commercial broadcast regulation—specifically here of content—stands today still:

Above all, Australian broadcasting law did not stipulate that commercial broadcasters ensure substantive plurality or balanced consideration of all relevant interests. ...The bonds between broadcasting regulation and the functioning of a democratic society have thus far not been made the subject of any special normative provisions under Australian broadcasting law. One also finds no specific precautions against the risk of one-sided influence— a thoroughly remarkable situation in view of the degree of media concentration. (Hoffmann-Riems, 1996, p. 246)

So it seems likely Australian practice partly informed James Murdoch's Darwinian neoliberal populist utopia (Jones 2011). The recurrent crises of ethical legitimacy in commercial television current affairs journalism and talk(back) radio—the spaces of pseudo-journalism—are the most indicative fruits of this under-regulation. They inspired the content regulation recommendations for fairness and accuracy standards—as opposed to self-regulatory codes—by the Productivity Commission Inquiry into Broadcasting (2000). That report also recommended a clause on freedom of expression in the major regulatory legislation.

Thus, despite its incomplete borrowings from the US and UK, the Australian system has been anything but a perfect embodiment of Hallin and Mancini's Anglo-American Liberal model (Jones & Pusey, 2010).

Australia enjoys neither of the key regulatory foundations to which policymakers in the US and UK would currently turn in reimagining the role, if any, of press regulation. In the continuing absence of a constitutional protection of freedom of speech or press, Australian policymakers cannot turn to a constitutional rationale for our under-regulation, the implied freedom of political communication notwithstanding (Jones, 2003). Nor can they turn to a successful tradition of sophisticated commercial broadcasting regulation like the UK's.

Three inquiries

This is the appropriate comparative context in which to place the two recently completed inquiries that form the basis of current policy reviews in Australia: The Convergence Review chaired by Glen Boreham (Boreham, 2011; 2012) and the Independent Media Inquiry into the Media and Media Regulation chaired by Justice Finkelstein (Finkelstein, 2012). The former was conducted over 12 months from March 2011 and the latter was initiated more quickly following much political debate. Finkelstein was appointed on 14 September 2011 and required to submit his report by 28 February 2012. This means that The Convergence Review already had six months' momentum and a later submission date than Finkelstein's. Moreover, Finkelstein's Report needed to be referred to the Convergence Review. Accordingly the Final Report of the Convergence Review includes a commentary on key recommendations of the Finkelstein Review and even a comparison of their differing recommendations for a cross-platform news regulator.

Both reports address the issue of freedom of speech and communication in their respective approaches to (de)regulation.

The Boreham Inquiry, it must be said, sits in a long tradition of Australian inquiries informed by technologically determinist Poolian deregulatory rhetoric. Accordingly, it moves from the same premises as Pool's regarding what is now called a rapidly changing 'media landscape'—i.e. digital convergence—for which the broadcast era licensing model is deemed no longer valid. Thus the outright abolition of licences is proposed in the Convergence Report. However, as noted above, a Poolian constitutional default position is not available in Australia. So a remarkably amorphous conception of freedom of communication is invoked with no constitutional or legal basis provided (2012, p. 25). Despite Hitchens' warnings in one of her submissions (2011), the report tends to practice the Poolian neoliberal conflation of public-citizen-consumer.

The closest the Final Convergence Review Report comes to an elaboration of its position on freedom of communication is in its discussion of the Finkelstein Report (2012, p. 69), to which it simply defers. It arises directly from the thorny question of how to maintain news standards in the deregulated scenario envisaged by the report (as even self/co-regulatory codes of practice are currently tied to licensing). It also acknowledges Hitchens' warning (2011) that its earlier position that 'community standards' were a sufficient basis for content regulation was flawed, and that ethical standards are a quite discrete matter. Reliance on 'community standards' alone would have been remarkably close to James Murdoch's populist notion of 'trust'.

The Finkelstein Inquiry gave great prominence to freedom of speech and the press in its Issues Paper (pp. 345-347) and its report's second chapter on 'The Democratic Indispensability of a Free Press' (2012, pp. 23-54).

However, the trajectory of its discussion is quite unusual, which can only be assumed to be a product of the unreasonable haste with which the report needed to be prepared. Freedom of speech and freedom of the press tend to be conflated. Such conflation is a recognised problem in much of the media regulatory literature as the role of journalists, editors and publishers—and, of course, speakers outside journalism—are likewise conflated as a result: That is, the very different roles and power relations of each of these claimants to the freedom are thus obscured, most obviously the power of proprietors and editors over jobbing journalists (Barendt, 1991). This conflation may partly explain

why the fourth estate metaphor is presented together with the philosophical rationales for freedom of speech. Fourth estate is, rather, a quite distinct and far more pragmatically compromised notion that has been long criticised for its legitimisation of publisher property rights and market advantage dating from the dissolution of the 19th century British radical presses (Curran, 1979; Boyce 1978; Jones, 2000).

Finkelstein's report also lacks a central discussion of the constitutional place of freedom of speech/press in Australia. Instead it tends to be assumed that freedom of the speech/press should be central to these discussions for Australian policymaking as Australia is a Western liberal democracy (e.g. Finkelstein, 2012, p.36). So the absence of a federal bill or charter of rights and the discovery of an implied freedom by the High Court in the 1990s are likewise marginalised (Finkelstein, 2012 p. 32).

Perhaps predictably then, US literature features prominently, notably that on the Social Responsibility tradition in discussions of US journalism. The chapter's final synthesis is heavily dependent on the work of Michael Schudson which, while usually valuable, is also usually blind to the regulation of broadcast journalism. Indeed the relation between broadcast content regulation and freedom of speech is only discussed in a completely discrete section on the Fairness Doctrine that primarily concerns fears of a 'chilling effect' by any statutory regulation. The impression is left that such content regulation of broadcast journalism was an historical oddity. There is no fundamental consideration of the positive free speech rationales for media regulation usually presented in comparative media law monographs as a European counter-tradition (to the US negative freedom tradition) (eg. Barendt 1993). Somehow Pool's 'anomaly' has crept into this report too.

Somewhat ironically then, the dominant 'logic' of the Finkelstein Report tends to operate within the terms of the very binary that has haunted it since its publication—statutory regulation vs freedom of speech. It does, of course, recommend the former but provides no discussion of the major—and still active—precedent for statutory regulation relating to journalism compatible with freedom of speech: the UK's experience in regulation of broadcast journalism.

Perhaps it is unsurprising then that the same binary is used by the Final Convergence Report to cast the Finkelstein recommendations as the alternative to its own self-regulatory preference.

Given that there is no longer any rationale to treat print and broadcast media differently, the Convergence Review believes there should be a single cross-platform body responsible for news and commentary standards. There are two options. One option is to move print and online media into statutory regulation consistent with the recommendations of the Independent Media Inquiry. The other option is to move broadcast news and commentary into a self-regulatory structure together with print and online media.

The Convergence Review has adopted a deregulatory approach and therefore proposes the self-regulatory structure for all news and commentary in the first instance. This will allow the industry to demonstrate the effectiveness of platform-neutral, self-regulatory arrangements. Once this scheme has operated for a period of time, the government can determine whether self-regulation is working or whether further measures should be considered. (Boreham, 2012, p. 50)

So here we have the Poolian neoliberal vision hard up against its undesirable Other. To be fair, both reports are more nuanced than this in their scenarios for establishing their cross-platform regulators with even the Convergence Review envisaging the use of legal privilege to induce publisher participation in its self-regulatory entity.

Yet by failing to provide any account of the firm linkage between free speech principles and successful models of statutory regulation of broadcast journalism, the two reports have left the door wide open for the attacks they have suffered—and to a likely High Court challenge, based in the implied freedom of political communication, to any enabling legislation.

Luckily there is Leveson, still proceeding as this article was drafted. Its less publicised Module 4 explored regulatory options for the future. The newspaper publishers followed Leveson's earlier advice and returned to the inquiry with a revised self-regulatory model (Press Standards Board of Finance Ltd, 2012). It is based in a complex contractual system of publisher participation designed to address the previous failure of press councils to ensure universal publisher participation. It was found under examination to be unable to guarantee publisher participation, and its complaints handling process was found to be heavily weighted towards representation by current editors of newspapers. Again and again Counsel Jay put to Lord Black the proposition that a statutory system was more likely to deliver both universal participation and visibly impartial complaints handling. Again and again the

reply came—‘freedom of the press’... (Leveson, 2012a). This is precisely what Curran called in his briefing to the inquiry ‘first amendment fundamentalism’ (Curran, 2011).

Perhaps the watershed moment came on July 12 when the head of OFCOM, the UK broadcast regulator, declared the latest newspaper industry proposals for press council reform unworkable and lacking in transparency compared to equivalent broadcast regulatory procedures (Leveson Inquiry, 2012c).

One of the most impressive submissions so far has been that from the Media Standards Trust (2012). It is crafted as an historical critique of previous UK press inquiries and their consequences. Its key point is that the kind of panglossian self-regulatory scenario painted in the Convergence Report citation above has been tried and failed many times. The window of opportunity for real effect by any such inquiry is small. Thus any recommendations need to be immediately operational and not dependent on publishers’ consciences or their performances of goodwill—or *mea culpas*—before inquiries. Its key innovation is to maintain industry-based self-regulation but to oversee that with a ‘backstop independent auditor’ (BIA). Here statutory legislation would play its role, as the trust’s director explained to Leveson:

... the statute really performs three functions. The first is to oblige large news organisations to have basic internal complaints and compliance mechanisms. The second is to oblige those same large publishing organisations to participate in a self-regulatory organisation—and we anticipate that actually there will probably be one to begin with. The third is to set up a BIA and to ... nominate its principles under which it is set up and nominate and restrain its powers. (Leveson Inquiry, 2012b, pp. 53-54)

This is only one of several models in play but the fundamental point is crucial—that ‘buffers’ are possible which ensure the freedom is preserved while ethical standards are transparently regulated. There is a clear continuity, if not causality, here from the UK’s innovative broadcast regulatory practices in providing for similar buffers between licence-holders, news providers and regulatory agencies, not to mention ‘market forces’.

In short, my brief comparative account has sought to demonstrate that regulatory innovation can enhance freedom of content but recent Australian inquiries have sadly overlooked this fact. Likewise ‘first amendment fundamentalism’ is perhaps best redefined in the moment of Leveson as a dogmatic

adherence to the neoliberal argument—a la Pool—that digitisation is inherently deregulatory and so necessarily enhances freedoms of speech and press. No regulatory sophistication is thought to be needed. All forms of statutory regulation are thus insisted to be anomalously incompatible with the freedoms in the face of mounting evidence to the contrary.

In the absence of either a constitutional freedom or an innovative legacy in regulatory sophistication in Australia, the Australian Parliament would do well to await the Leveson Report and the possibility that its recommendations will generate a practicable model for news regulation worthy of consideration, if not emulation.

Note

1. ‘Pseudo-journalism’ may seem overly polemical but I am here attempting to capture the scale of subordination of journalistic norms to commercial or other imperatives.

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