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## Media reform: in shallows and miseries

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### Executive summary

- The existence of a robust and accountable media is essential to the functioning of democracy. The trend towards a convergence of new and traditional media in an online world has reignited debate about long-standing problems in the Australian media environment, such as lack of diversity, the decline of localism and lack of public trust.
- In an attempt to address these problems the Gillard Labor Government commissioned two media inquiries. In March 2013, the Government response to these inquiries was delivered in a legislative package contained in six Bills. The majority of the Bills in the package were controversial, as was the manner of its introduction and the Government's expectation that the Bills should pass both Houses of Parliament within a fortnight.
- The two non-controversial Bills were rushed through the Parliament. The others were sent to committees, which were given only a few days to make recommendations.
- The controversial Bills were criticised extensively, with media accusations made that if enacted, they would threaten democracy and freedom of speech. The Opposition and key independent members were either unconvinced by the drafting of the Bills that they would achieve their objectives, or believed the media arguments. They refused to support the controversial Bills, which were withdrawn by the Government.
- The short timeframe in which the 2013 media reforms were introduced and withdrawn has meant that there is no record which captures the essence of the proposals and the fundamental elements of the intense debate. This paper provides a background to the Government's media proposals. It details the discussions about, and investigations into, the package of Bills.
- The paper notes, finally, that the issues which prompted the introduction of the 2013 reforms—the accountability of the media and its willingness and ability to serve the interests of democracy—have yet to be resolved.

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## Introduction

As a result of an investigation into the British media following allegations of corruption, the Australian Government announced in September 2011 that it would instigate an independent review into certain aspects of media regulation.<sup>1</sup> In addition to this inquiry, the Finkelstein Review, the Government set up a committee (the Convergence Review Committee) to consider the effect convergence was having on the Australian media landscape.<sup>2</sup>

The findings of the Finkelstein Review and the Convergence Review Committee were presented to the Gillard Government in the first half of 2012.<sup>3</sup> The inquiries essentially recommended that the Government adopt a new approach to media regulation. As the Convergence Review Committee summarised the situation: media content and communications technologies have outstripped existing media policy frameworks, and as a result, ‘many elements of the current regulatory regime are outdated or unnecessary and other rules are becoming ineffective’.<sup>4</sup>

During the time the Government took to contemplate the recommendations of the Finkelstein Review and the Convergence Review Committee, media stakeholders warned against accepting what they saw as radical attempts to overhaul the media environment. While these stakeholders were more accepting of the Convergence Review’s conclusions, in general they argued that if the Government unquestionably agreed to the recommendations of either review, the result would be that the freedom of the press would be restricted. This, in turn, would give governments the power to manipulate and control the flow of information to the public—and consequently, undermine democracy.<sup>5</sup> Other groups, however, were pleased with Finkelstein’s and the Convergence Review Committee’s findings and recommendations. They saw no contradiction between certain types of regulation and freedom of the press. Indeed, they saw a positive and ongoing role for government in

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1. The British Prime Minister announced a two-part inquiry to investigate the role of the press and police in a phone-hacking scandal on 13 July 2011. Lord Justice Leveson was appointed as Chairman of the Inquiry. Part 1 of the Inquiry examined the culture, practices and ethics of the press and, in particular, the relationship of the press with the public, police and politicians. The report on Part 1 of the Inquiry, [An inquiry into the culture, practices and ethics of the press](#), accessed 12 July 2013, was published by the British House of Commons in November 2012.
  2. The Australian Communications and Media Authority (ACMA) defines convergence as ‘the phenomenon where digitisation of content, as well as standards and technologies for the carriage and display of digital content, are blurring the traditional distinctions between broadcasting and other media across all elements of the supply chain, for content generation, aggregation, distribution and audiences’, ACMA, [Digital Australians—expectations about media content in a converging media environment: qualitative and quantitative research report](#), October 2011, accessed 12 July 2013.
  3. R Finkelstein (with M Ricketson), [Report of the independent inquiry into the media and media regulation](#), report to the Minister for Broadband, Communications and the Digital Economy, Australian Government, February 2012, accessed 26 September 2013 (the Finkelstein Review) and Convergence Review Committee, [Convergence Review: final report](#), Department of Broadband, Communications and the Digital Economy, March 2012, accessed 26 September 2013.
  4. Convergence Review, op. cit., p. 1.
  5. Discussion of the comments made in relation to the Finkelstein and Convergence Review Committee reports can be found in R Jolly, [Media reviews: all sound and fury?](#), Background note, Parliamentary Library, Canberra, 5 October 2012, accessed 12 July 2013.

maintaining and supporting ‘a free, diverse and responsible exchange of information, opinion and ideas to ensure the maintenance of a democratic polity’.<sup>6</sup>

Depending on the Government’s response, there was potential therefore for any attempt to reform the media based on recommendations from Finkelstein or the Convergence Review Committee to be controversial and divisive. And so it was. The introduction into the Parliament on 13 March 2013 of a package of Government media reform Bills was both controversial in its manner and its expectations, and divisive in its content. For two weeks it continued to be divisive, as stakeholders debated the failings and merits of the package. For two weeks it continued to be controversial, as claims and counterclaims about how it would undermine freedom of speech or enhance diversity of views and democratic discourse were argued.

This paper recounts the story of the 2013 media reforms—their introduction, the hurried investigations which attempted to explore their intentions and possible outcomes, and their eventual demise—to reveal a policy, which for many, complicated reasons, did not take the tide towards good fortune, but mired in the misery and shallow waters of failed policy.<sup>7</sup>

## Background

### Finkelstein and the Convergence Review

The Finkelstein Review concluded that there are two fundamental problems with the current Australian media environment. These are: the concentration of ownership of mainstream news services, which has led to a lack of diversity of views and the potential for a small group of people to have undue influence on public opinion, and a decline in media standards which has created an increasing distrust of the media.<sup>8</sup>

Finkelstein concluded that the current regulatory environment was ineffective in dealing with these problems; it needed to be strengthened for it to be effective and accountable. He therefore recommended the imposition of ‘enforced self-regulation’ through the establishment of an independent statutory news council to oversee the enforcement of news media standards and accountability—a body that Finkelstein believed could restore public confidence in the media.<sup>9</sup>

The media reacted negatively to Finkelstein’s proposals, unequivocally opposing changes and denying the charge that self-regulation had failed. Other critics denounced Finkelstein’s proposal as reprehensible and intolerable; some called the Finkelstein Review Orwellian or Stalinist and one

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6. See Jolly, ‘Media reviews’, op. cit., for more detail on these views. The specific quote, as cited by Jolly, is from T Dwyer, F Martin and A Dunne, [Submission to the Independent Inquiry into Media and Media Regulation](#), November 2011, accessed 12 July 2013.
  7. This conclusion is indebted to Brutus’ speech from Shakespeare’s *Julius Caesar*, Act 4, Scene 3. Brutus states: ‘There is a tide in the affairs of men, Which, taken at the flood, leads on to fortune; Omitted, all the voyage of their life is bound in shallows and in miseries.’
  8. Finkelstein, op. cit.
  9. Ibid.

warned, if realised, the Review's recommendations would 'relegate Australia to the category of authoritarian regimes'.<sup>10</sup>

Response to the Convergence Review from the media was less derogatory, but for the most part the media concluded that the Convergence Review Committee's intention was the same as Finkelstein's—to introduce unnecessary government intervention.<sup>11</sup> A summary of the Convergence Review Committee's main recommendations can be found in the box below.

### **Box 1: Convergence Review Committee recommendations**

#### **Content service enterprises**

Establish a new regulatory framework for what were to be defined as 'content service enterprises' (CSEs). These were to be defined as organisations that would have control over the content they delivered, have high levels of Australian users of content and their revenue would be derived from supplying content to Australian users. This was to be regardless of the platform from which they delivered services, but was subject to the application of high level thresholds before organisations qualified as CSEs.

CSEs would be subject to new ownership rules.

CSEs would be expected to meet community expectations about standards relating to the content they provided and to contribute to producing Australian content.

#### **Communications regulator**

Establish a new statutory communications regulator to replace the Australian Communications and Media Authority. The communications regulator would be responsible for compliance with media content standards, except for news and commentary, it would define the thresholds for CSEs, administer ownership rules and oversee Australian and local content obligations.

The communications regulator would have direct enforcement powers and a graduated range of remedies to ensure compliance.

#### **News standards body**

Establish an industry body to replace the Australian Press Council.

Print, online, television and radio CSEs would be required to be members of the body and would provide the majority of its funding. The industry body would develop and enforce a media code and adjudicate on complaints and provide remedies. It would have the authority to refer serious or persistent breaches of the media code to the communications regulator.

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10. See Jolly, 'Media reviews', op. cit., for more detail about the reaction. Specifically, the quote in this sentence is from J Morrow, '[Shut up, they explained](#)', *The Spectator*, 10 March 2012, p. viii, accessed 24 September 2013.

11. See Jolly, 'Media reviews', op. cit., for discussion of the responses to the Convergence Review Committee.

### Media ownership

Ownership of local media would be regulated through a 'minimum number of owners' rule; that rule and a 'public interest' test would replace the 75 per cent of audience reach rule and the two out of three, two to a market and one to a market rules (see Table 1 for more detail).

The communications regulator would be able to examine and block proposed changes in the control of CSEs of national significance if it considered those changes were not in the public interest and with regards to diversity.

### Australian content

Under a 'uniform content scheme', CSEs would be required to invest a percentage of their total revenue into Australian dramas, documentaries or children's programs, or into a new content production fund. The content production fund would be funded by direct appropriations from government and spectrum fees paid by radio and television broadcasters.

### Spectrum allocation and management

Broadcasting licence fees would be abolished and replaced by annual spectrum access fees based on the value of the spectrum as planned for broadcasting use.<sup>12</sup>

## Introduction of the media reform package of Bills

In November 2012, in the midst of the tense atmosphere created by the release of the Finkelstein and Convergence Review reports and the hostile responses they generated, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, announced the Government's initial response to the inquiries.<sup>13</sup>

There was nothing particularly controversial about the announcement, which was that the Government intended to retain the quota for Australian programming on television broadcasters' primary channels while introducing multichannel content requirements. It had also decided not to make spectrum or broadcast licences available for a fourth free-to-air television network and to extend a 50 per cent rebate on free-to-air television licenses. It intended to investigate the removal of the 75 per cent reach rule (see Table 1 in the section 'A flurry of inquiries' later in this paper for explanation).

While these proposals prompted little reaction from stakeholders, the same was not the case in March 2013, when Minister Conroy announced the Government's further response to the Finkelstein and Convergence Review inquiries, which was to be realised in a package of six Bills.<sup>14</sup> The cartoon below and comments in Box 2 illustrate the immediate reaction to the package of Bills.

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12. Convergence Review Committee, op. cit.

13. S Conroy (Minister for Broadband, Communications and the Digital Economy), [Government moves to ensure quality Australian content stays on Australian television](#), media release, 30 November 2013, accessed 12 July 2013.

14. S Conroy (Minister for Broadband, Communications and the Digital Economy), [Government response to Convergence Review and Finkelstein Inquiry](#), media release, 12 March 2013, accessed 12 July 2013.



Figure 1: Finkelstein's monster



Source: Nicholson.<sup>15</sup>

## The Bills

The package of Bills was introduced into the Parliament by the Leader of the House and Minister for Infrastructure and Transport, Anthony Albanese, on 14 March 2013 and consisted of:<sup>16</sup>

- Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013 (Convergence Review and Other Measures Bill)<sup>17</sup>
- Television Licence Fees Amendment Bill 2013 (Television Licence Fees Bill)<sup>18</sup>
- News Media (Self-regulation) Bill 2013 (Self-regulation Bill) and News Media (Self-regulation) (Consequential Amendments) Bill 2013 (Self-regulation Consequential Bill)<sup>19</sup>

15. From the [Nicholson Gallery](#) on *The Australian* website, cartoon from 13 March 2013, accessed 24 September 2013.

16. The first reading and second reading speeches for the Bills in the package can be found in House of Representatives, [Debates](#), 14 March 2013, pp. 2096–2102, accessed 12 July 2013.

17. Parliament of Australia, ['Broadcasting Legislation Amendment \(Convergence Review and Other Measures\) Bill 2013 homepage](#), Australian Parliament website, accessed 19 July 2013.

18. Parliament of Australia, [Television Licence Fees Amendment Bill 2013 homepage](#), Australian Parliament website, accessed 19 July 2013.

- Public Interest Media Advocate Bill 2013 (PIMA Bill)<sup>20</sup> and
- Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 (News Media Diversity Bill).<sup>21</sup>

### Convergence Review and Other Measures Bill

The Convergence Review and Other Measures Bill dealt principally with three matters:

- Allocation of the sixth channel of broadcasting spectrum in the broadcasting services bands:<sup>22</sup> the Bill was to repeal sections 35A and 35B of the *Broadcasting Services Act 1992* (the *BSA*) and to insert a new section to limit the number of commercial television broadcasting licences to three.
- New Australian content regulation: the Bill sought to impose new content transmission quotas, which apply to free-to-air broadcasters' primary channels under the Broadcasting Services (Australian Content) Standard 2005.<sup>23</sup> It also sought to impose content quotas on the broadcasters' multichannels incrementally over a three-year period. The Bill was intended to allow for greater flexibility for commercial television broadcasters to meet Australian sub-content quotas on channels other than their primary channel. The quotas were to require the broadcast (between 6 am and midnight each day) of:
  - 730 hours of Australian programs in 2013
  - 1,095 hours of Australian programs in 2014 and
  - 1,460 hours of Australian programs in 2015 and each year thereafter.

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19. Parliament of Australia, [News Media \(Self-regulation\) Bill 2013 homepage](#) and [News Media \(Self-regulation\) \(Consequential Amendments\) Bill 2013 homepage](#), Australian Parliament website, accessed 19 July 2013.
  20. Parliament of Australia, [Public Interest Media Advocate Bill 2013 homepage](#), Australian Parliament website, accessed 19 July 2013.
  21. Parliament of Australia, [Broadcasting Legislation Amendment \(News Media Diversity\) Bill 2013 homepage](#), Australian Parliament website, accessed 19 July 2013.
  22. The spectrum known in Australia as the broadcasting services bands refers to the designated parts of the radiofrequency spectrum which have been referred to the ACMA for planning and licence allocation. Much discussion about whether a fourth network would be viable in the Australian media environment has occurred over time, and restrictions have been in place to prevent establishing a fourth commercial broadcasting licence using the sixth channel. These restrictions were originally justified because of spectrum scarcity and the need to prevent interference between stations. Commercial broadcasters have consistently argued that there not enough viewers, advertising dollars or programs available to support a fourth commercial network. Advances in technology have led to speculation that the channel could be used for purposes other than broadcasting (for example, datacasting—a use of a range of interactive services through digital television, including access to the Internet, video on demand and games—and mobile television).
  23. The content standard required that Australian programs must be at least 55 per cent of all programming broadcast in a year by a licensee between 6 am and midnight, [Broadcasting Services \(Australian Content\) Standard 2005](#), accessed 24 September 2013.

- Amendment to the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) Charters and other matters relating to the public broadcasters. The Bill proposed:
  - to amend the ABC and SBS Charters to recognise their role as providers of digital content
  - to state that the ABC was to be the sole provider of federally funded international broadcasting services (the Australia Network) and
  - at least one of the non-executive directors of SBS was to be an Indigenous person.

### Television Licence Fees Bill

- The Television Licence Fees Bill sought to confirm in legislation a 50 per cent reduction in commercial television license fees, which had been granted by the Government from 2011, and was applicable to the end of 2013.<sup>24</sup> The reduction was at the time specified in regulations.<sup>25</sup> Fees due to the Government under the regulations were up to an amount of nine per cent of gross annual earnings.<sup>26</sup>

### Self-regulation Bill and Self-regulation Consequential Bill

- These Bills were intended to promote ‘compliance by significant providers of print and online news and current affairs with standards of practice’, and to encourage ‘effective complaints handling arrangements to respond to complaints regarding breaches of those standards’.<sup>27</sup>
- The Self-regulation Bill allowed for a Public Interest Media Advocate (PIMA) to declare a specified body corporate to be a news media self-regulation body.
  - To be so declared, a news media self-regulatory body was to be required to meet a number of eligibility criteria, including that it had a binding self-regulation scheme, which applied to its news and current affairs reporting activities.
- The Self-regulation Consequential Bill was to amend the *Privacy Act 1988* so that news media organisations, as defined under the Self-regulation Bill, would only qualify for exemptions from

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24. In 2010, Minister Conroy announced a rebate of 33 per cent for 2010 and 50 per cent for 2011. The move was presented as one which protected local content, because the profitability of the free-to-air television stations was falling, S Conroy (Minister for Broadband, Communications and the Digital Economy), *Government to protect Australian content on commercial television*, media release, 7 February 2010. Note the rebate was later extended for the 2012–13 financial year.

25. The [Television Licence Fees Act 1964](#), accessed 11 July 2013, requires commercial television licensees to pay a licence fee.

26. More detail can be found in the Bills digest for the legislation: A Holmes, [Television Licence Fees Amendment Bill 2013](#), Bills digest, 95, 2012–13, Parliamentary Library, Canberra, 2013, accessed 11 July 2013.

27. [Explanatory Memorandum](#), News Media (Self-regulation) Bill 2013 and the News Media (Self-regulation) (Consequential Amendments) Bill 2013, pp. 1–2, accessed 19 July 2013.

obligations imposed under the *Privacy Act*, and the National Privacy Principles, if the organisation was a member of a news media self-regulation body.<sup>28</sup>

- The Explanatory Memorandum to the Bills argued linking membership of a certain body to journalistic privileges was ‘a simple and transparent mechanism to promote effective and independent self-regulation of print and online news media organisations’.<sup>29</sup>

## PIMA Bill

- The PIMA Bill sought to create the office of the Public Interest Media Advocate (PIMA). This body was intended as an independent statutory office which would have responsibility for administering a public interest test to be established under the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013.
- The Minister was required to consult with the Australian Communications and Media Authority (ACMA), the Australian Competition and Consumer Commission and any other bodies he or she may consider appropriate, before appointing the PIMA by written instrument:
  - The person who would act as the PIMA would be expected to have substantial experience in either the areas of media, law, business financial management, public administration or economics. He or she was to hold office on a part-time basis for a period not exceeding five years (although the PIMA was to be eligible for re-appointment).
  - Functions of the PIMA were to be those conferred on him or her by the *BSA* and the *News Media (Self-regulation) Act 2013* (if enacted).
  - The Minister was to be able to terminate the appointment of the PIMA for misbehaviour, if the Advocate was unable to perform his or her duties, if the Advocate engaged in paid employment that conflicted with the duties of the office or for bankruptcy or matters associated with bankruptcy.

## News Media Diversity Bill

- The News Media Diversity Bill was to insert a new Part 5A in the *BSA*. Under the new part, approval was required from the PIMA for changes to take place in the control of significant media voices.
- The PIMA was to apply a new public interest test in making decisions about control. According to the Explanatory Memorandum to the Bill, the public interest test criteria to be applied when considering changes of control would be:

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28. The Office of the Australian Information Commissioner provides [a short explanation](#) of the *Privacy Act 1988*, accessed 24 September 2013. [Subsection 7B\(4\)](#) of the *Privacy Act* provides an exemption to requirements under the Act for practices engaged by organisations ‘in the course of journalism’.

29. Explanatory Memorandum, News Media (Self-regulation) Bill 2013 and the News Media (Self-regulation) (Consequential Amendments) Bill 2013, op. cit., p. 8.

- that the change of control would not result in a substantial lessening of diversity of control of registered news media voices or
- if the change of control would result in a lessening of diversity, that the situation would deliver a net benefit to the public and that the benefit would outweigh the detriment to the public constituted by the lessening of diversity of control of registered news media voices.<sup>30</sup>

ACMA was to maintain a register of media voices that would be regulated. The register would list news voices whose audience was above a certain threshold.

In his media release on the package of Bills, Minister Conroy noted that the Government intended also to establish a parliamentary committee to inquire into the possibility of introducing three further reforms:

- abolition of the 75 per cent reach rule, particularly in relation to regional and local news
- on-air reporting of ACMA findings regarding broadcasting regulation breaches and
- whether ACMA should consider program supply agreements for news and current affairs, as part of determining whether a person is in control of a commercial television broadcasting service.<sup>31</sup>

## Reaction to the Bills

### Media and commentators

There was immediate outrage in response to the package of Bills; much of it sounded familiar to that which had accompanied the release of the Finkelstein and Convergence Review reports.<sup>32</sup> The media generally asserted that the proposed changes were retrograde and a threat to freedom of speech.

A number of commentators found it hard to contain their indignation at the proposals. Terry McCrann in the *Herald Sun* used words ranging from outrageous and bizarre to misguided, out-dated and Machiavellian to describe what he labelled as a proposal 'almost designed to self-destruct'.<sup>33</sup> Institute of Public Affairs commentator Chris Berg called the package 'son-of-Finkelstein', a de facto licensing scheme and a fundamental threat to freedom of the press. In Berg's view, the public interest test would be a political interest test to allow politicians to use state power to punish their critics.<sup>34</sup> The *Australian's* Mark Day was convinced the plan was 'a dog's breakfast'.<sup>35</sup> See further comments in Box 2 below.

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30. [Explanatory Memorandum](#), Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 accessed 19 July 2013.

31. Conroy, Government response to Convergence Review and Finkelstein Inquiry, op. cit.

32. Jolly, *Media reviews*, op. cit. inconsistent op cit referencing style for this one. See previous op cits for this pub

33. T McCrann, '[Outrage and out of date](#)', *Herald Sun*, 13 March 2013, p. 7, accessed 19 July 2013.

34. C Berg, (Research Fellow, Institute of Public Affairs), [Conroy media regulation is government licensing in all but name](#), media release, 12 March 2013, accessed 19 July 2013.

## Box 2: media comments on the media reform package

The *Herald Sun* labelled the package ‘a muzzle on free speech’. It called the PIMA the ‘Political Interest Commissar’ and saw it as having ‘powers more suited to an old Stalinist state than a modern democracy’. This paper saw the proposals as intended to fit the media with ‘a straitjacket’ and as a desperate attempt ‘to shackle divergent voices’.<sup>36</sup>

Foxtel saw the package as cumbersome and unnecessary media-specific regulation that would hinder investment in the media sector. It argued that media transactions ‘could be subject to review by up to four different regulators. This will add delay and complexity to any transaction and may discourage legitimate transactions from occurring’.<sup>37</sup>

The *Australian Financial Review* claimed the package was ‘a mish-mash of disturbing threats to media freedoms and a needless increase in regulatory commercial uncertainty’.<sup>38</sup>

The *Australian* saw the package as reckless and flawed media reforms—a danger to democracy and free speech.<sup>39</sup>

The *Northern Territory News* called the proposed legislation ‘Soviet media reform’ overseen by a government ‘enforcer’; it concluded Minister Conroy had gone ‘troppo’.<sup>40</sup>

The *Sydney Morning Herald* opined that freedom of speech was too important ‘to be tossed at will into the fickle winds of cynical, face-saving politics’.<sup>41</sup>

Editorials were equally damning. The *Courier Mail* called the proposed reforms draconian, and while the *Australian Financial Review* was more restrained in its criticism, calling it a classic case of bad regulation, the underlying basis of its critique was the same as its more vocal counterparts.<sup>42</sup>

The *Daily Telegraph’s* controversial response to the package, which declared that Minister Conroy had joined a band of authoritarian rulers, perhaps best indicates the depth of protest that lay

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35. M Day, ‘[Such a long wait, and still a dog’s breakfast](#)’, *The Australian*, 13 March 2013, p. 5, accessed 19 July 2013.

36. Editorial, ‘[A muzzle on free speech](#)’, *Herald Sun*, 13 March 2013, p. 22, accessed 19 July 2013.

37. C Kruger, ‘[Media reforms to spur TV deals](#)’, *The Canberra Times*, 13 March 2013, p. 13, accessed 19 July 2013.

38. Editorial, ‘[Classic case of bad regulation](#)’, *The Australian Financial Review*, 13 March 2013, p. 46, accessed 19 July 2013.

39. Editorial, ‘[Senator Conroy’s reckless and flawed media reforms](#)’, *The Australian*, 13 March 2013, p. 13, accessed 19 July 2013.

40. ‘[Conroy goes troppo](#)’, *The Northern Territory News*, 13 March, p. 1, accessed 19 July 2013 and G Jones, ‘[“Soviet” media reform lashed](#)’, *The Northern Territory News*, 13 March 2013, p. 5, accessed 19 July 2013.

41. Editorial, ‘[In whose interest? Conroy’s media clampdown must fail](#)’, *The Sydney Morning Herald*, 14 March 2013, p. 24, accessed 19 July 2013.

42. Editorial, ‘[Draconian law crosses the line](#)’, *The Courier Mail*, 13 March 2013, p. 24, accessed 19 July 2013 and ‘Classic case of bad regulation’, *The Australian Financial Review*, op. cit.



beneath more restrained reports.<sup>43</sup> In its attempt to express its outrage the *Telegraph* depicted the Minister as the dictator Josef Stalin (see picture below).

**Figure 2: the Minister 'joins them'**



Source: *Daily Telegraph*.<sup>44</sup>

And while some questioned if the portrayal had gone too far, a tongue-in-cheek retraction from the paper maintained its stance by issuing an apology—not to the Minister, but to Stalin:

... we would just like to say: We're sorry, Joseph.

Yes, it is true that Stalin was a despicable and evil tyrant who was responsible for the death of many millions.

However, at least he was upfront in his efforts to control the media instead of pretending he supported free speech and then suggesting that cheeky, satirical or provocative newspaper coverage might be against

43. G Jones, '[Conroy joins them](#)', *The Daily Telegraph*, 13 March 2013, p. 1, accessed 19 July 2013.

44. Image in Jones, '[Conroy joins them](#)', op. cit.

the law. We also note that, despite his well-documented crimes against humanity, Stalin at least managed to hold a government together for more than three years.

Nonetheless, we pay tribute to our new Commissar Conroy and stand ready to write and publish whatever he instructs us to.<sup>45</sup>

Professor of Media and Communications at the Queensland University of Technology, Terry Flew, on the other hand, considered the reforms were light weight, cautious and piecemeal.<sup>46</sup> Academic, and media commentator, Margaret Simons, also viewed the proposal as minimal:

All in all, after all the work and controversy, this is about as minimalist a response as it is possible to get, though perhaps more than one would expect in an election year. Most people expected Conroy to do nothing, given the forthcoming election. He has clearly had to work hard to get even this much up, with the big money hard questions — like the 75% reach rule — put off for another day.

The time limit imposed by Conroy for passage of the bills means that whatever happens, it will not preoccupy during the election. The time limit will also concentrate the minds of the Greens and independents by making it clear this is the most they will achieve for the foreseeable future.

The most one can say is that if this is passed — and that is unlikely — it is a small pebble in the foundations for any future action<sup>47</sup>

Matthew Knott in the online journal *Crikey* observed that while the ‘free speech under threat’ campaign which other media were waging was based on the PIMA’s ability to revoke the status of media regulators, it was a power so broad and sweeping that it was difficult to imagine it ever being used.<sup>48</sup>

Despite more measured comments such as these, the overwhelming media response continued to be hostile and uncompromising. If there were voices of unmitigated support for the proposed reforms, they were not featured in the mainstream media. Some blogs commented positively, convinced that the mainstream press in particular criticised reform that may be in the public interest, if that reform clashed with their interests. The reach of these voices was, however, limited.<sup>49</sup>

## Politicians

The Opposition was unsupportive of the media reform package. Opposition communications spokesman Malcolm Turnbull described it as ‘half-baked’, an attempt to regulate because the Government did not like what the media had been saying about it. Turnbull accused the

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45. ‘[Apology](#)’, *The Daily Telegraph*, 14 March 2013, accessed 19 July 2013.

46. T Flew, ‘[Low-key Conroy proposals are media reform lite](#) (sic)’, *The Conversation*, 13 March 2013, accessed 19 July 2013.

47. M Simons, ‘[Minimalist media reform that only starts the job](#)’, *Crikey*, 13 March 2013, accessed 19 July 2013.

48. M Knott, ‘[Freedom of speech at risk? How Conroy’s advocate could hurt](#)’, *Crikey*, 15 March 2013, accessed 3 September 2013.

49. For example, R Lever, ‘[Honest politicians must hold nerve on media reform](#)’, writing on the *Independent Australia* website took this stance, accessed 3 September 2013.



Government of trying to bully the Parliament into passing the legislation.<sup>50</sup> Other Opposition members claimed the reforms were drafted as revenge against the Government's enemies in the media.<sup>51</sup>

The Opposition used a number of tactics to stall the legislation including attempting to move a motion condemning the Prime Minister's 'poor judgment' in relation to the media laws. In calling for the suspension of standing orders, Opposition Leader, Tony Abbott, pronounced:

This is a government and a Prime Minister who do not like scrutiny and are now trying to close it down. That is why standing orders need to be suspended. This is a government that cannot cop criticism, and when it is criticised it reveals its authoritarian streak. That is why standing orders need to be suspended. This is about the Prime Minister's standards and the Prime Minister's judgment. That is why standing orders need to be suspended.<sup>52</sup>

The motion was defeated by 73 to 69 votes.<sup>53</sup>

The Australian Greens, who had urged the Government to act on the Finkelstein and the Convergence Review recommendations, were disturbed, however, by the ultimatum delivered by the Communications Minister. Greens' communications spokesperson, Scott Ludlam, at first declared his party would not comment until it had scrutinised the Bills.<sup>54</sup> Later, while dismissing media hysteria over the proposals, Ludlum identified that the Greens had concerns about certain aspects of the package.<sup>55</sup>

The reform package did not win the approval of the independents. Former Labor member Craig Thomson and Independent Rob Oakeshott declared they would vote against it. Thomson was not sure about how the public interest test would work; if indeed it was necessary. Oakeshott proclaimed himself a supporter of media reform, but he did not believe the Government's package addressed the reforms called for by the Finkelstein and Convergence Review inquiries.<sup>56</sup>

Andrew Wilkie and Bob Katter expressed initial concern over the package, but following a brief Senate inquiry, which immediately followed the introduction of the package, both declared they could not support it. Wilkie saw the controversial Bills as 'rushed and poorly constructed', while Katter called the public interest media advocate proposal 'offensive and revolting'. He called for a

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50. E Griffiths, '[Conroy announces sweeping media reforms](#)', *ABC News*, 12 March 2013, accessed 17 September 2013.
  51. S Birmingham, 'Motion: Free speech', Senate, [Debates](#), 14 March 2013, p. 1765, accessed 24 September 2013.
  52. T Abbott, 'Motions: Prime Minister: censure', House of Representatives, [Debates](#), 18 March 2013, p. 2344, accessed 25 September 2013.
  53. 'Motion: Prime Minister: Censure: Division', House of Representatives, [Debates](#), 18 March 2013, p. 2349, accessed 25 September 2013.
  54. S Ludlam (Greens spokesperson for Broadband, Communications and the Digital Economy), [Media reforms announced at last, but serious questions remain](#), media release, 12 March 2013, accessed 24 September 2013.
  55. S Ludlam (Greens spokesperson for Broadband, Communications and the Digital Economy), [Greens won't be bullied on media reform](#), media release, 17 March 2013, accessed 24 September 2013.
  56. G Jones, '[Craig Thomson will not back media reforms proposed by Stephen Conroy](#)', *news.co.au*, 14 March 2013, accessed 3 September 2013 and R Oakeshott, [Public statement—media reform](#), media release, 20 March 2013, accessed 3 September 2013.

multi-member commission to replace the proposed PIMA. His plan received little overall support, although it was considered in the course of the Prime Minister's intervention to try to save the media package from defeat in the Parliament (see more discussion later in this paper).<sup>57</sup>

At one stage it appeared Tony Windsor may be prepared to support the controversial Bills, but in the end, he too rejected the majority of the package. Former Liberal Party member Peter Slipper appeared to be the lone supporter among the Independents.<sup>58</sup>

## Government response

Labor Senator Catryna Bilyk countered criticism of the Government's intentions with a passionate speech in the Parliament:

How can we be expected to have a reasoned debate with hysterical claims like that? How can we be expected to have a reasoned debate with papers like the *Daily Telegraph* comparing the Minister for Broadband, Communications and the Digital Economy, Senator Conroy, to Chairman Mao, Joseph Stalin and Robert Mugabe? Given the hysteria that this has been met with, anyone would think that the government was planning to censor the media in the manner of Frank Bainimarama or that we were proposing some kind of Syrian style police state.

If we are going to have a reasoned debate, perhaps we should recognise a few facts that even the opposition would not disagree with, such as the fact that there has never been a right to unfettered free speech in Australia and nor should there be. Even those opposite would agree with that. We have defamation laws that stop unwarranted attacks against the reputation or character of other persons. We have laws under the Trade Practices Act which stop corporations making misleading or deceptive claims in their advertising. We have laws which stop people from revealing the names of minors involved in criminal court matters. Even in the United States, where the right to free speech is protected under their constitution, there are rules around what people can and cannot say, just as there are in any liberal Western democracy.<sup>59</sup>

The stage was set therefore for a period of intensive investigation, in which claims and counter claims, recriminations, retorts, reproaches and accusations flowed freely, as the cartoon in Figure 3 below suggests.

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57. B Packham, '[Labor's media reforms dealt a blow](#)', *The Australian*, (online edition), 20 March 2013, accessed 3 September 2013.

58. C Clarke, '[Media reform: how the House crossbenchers will vote](#)', *Crikey*, 14 March 2013, accessed 24 September 2013 and K Sundstrom, '[Media reform? Slipper's for it—but it should be tougher](#)', *Sunshine Coast Daily*, 20 March 2013, accessed 24 September 2013.

59. C Bilyk, 'Motion: Free speech', Senate, *Debates*, 14 March, p. 1769, accessed 24 September 2013.

Figure 3: getting down and getting nasty



Source: Kudelka.<sup>60</sup>

## A flurry of inquiries

### Joint Select Committee on Broadcasting Legislation

The Parliament voted on 14 March 2013 to establish a Joint Select Committee to inquire into, and report on, the areas of potential reform to broadcasting legislation noted by Senator Conroy in his announcement of the media reform package of Bills. The Joint Select Committee on Broadcasting Legislation (the Joint Committee) conducted a public hearing almost immediately (18 March) to address its first term of reference: abolition of the 75 per cent reach rule for broadcasters. Joint Committee Chair, Senator Matt Thistlethwaite, argued the hearing would provide senators and members with an opportunity to understand the issues of concern regarding the rule prior to the legislation being debated in Parliament.<sup>61</sup>

The 75 per cent reach rule provides that a person must not be in a position to exercise control of commercial television broadcasting licences whose combined licence area population exceeds 75 per cent of the population of Australia.<sup>62</sup> The rule, in conjunction with a number of other media ownership rules which apply to commercial broadcast media, as noted in Table 1 below, is intended to foster media diversity.

60. Cartoon from the [Kudelka Gallery](#), *The Australian* website, 19 March 2013, accessed 24 September 2013.

61. Joint Select Committee on Broadcasting Legislation, [Committee appointed to investigate broadcasting legislation](#), media release, 15 March 2013, accessed 24 September 2013.

62. Section 53 of the *Broadcasting Services Act 1992* (the BSA).

Recent investigation of the media landscape by the Convergence Review Committee found that while current media ownership rules are based on distinctions between traditional broadcasting and print media, 'it is no longer practical to distinguish services in this manner', as media enterprises operate across a range of platforms.<sup>63</sup> The Convergence Review considered that the 75 per cent rule was irrelevant and recommended its removal, provided a public interest test and minimum numbers of owners' conditions were enacted to replace the rule.

The Convergence Review Committee argued that a minimum number of owners' conditions, which acknowledged the changed Australian media landscape, would be more likely to ensure that no single operator or small group of operators achieved a dominant position in any local market in terms of news and commentary. The Convergence Review Committee believed:

The new 'minimum number of owners' rule would apply to all content service enterprises that provide news and commentary services in a local market. The application of the rule to all content service enterprises will better reflect where Australians receive their news today and well into the future. With more and more services being delivered through technologies that are not limited to a specific geographic area, it is important to ensure that news at a local level is retained.<sup>64</sup>

Similarly, the Convergence Review Committee was convinced that a suitably designed public interest test applied to media transactions that involved change of control in media outlets of national significance, would help to maintain media diversity.

As the Joint Committee was unable to agree on what it would recommend regarding the 75 per cent rule following the March public hearing, it determined that it would accept further submissions on the matter, as well as on two other issues referred to it, until 5 April 2013. Thirteen submissions and 12 supplementary submissions, primarily from the broadcasting industry, were received. While the Committee was due to report by 17 June 2013, its reporting date was later extended to 24 June 2013.

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63. Convergence Review Committee, Final report, op. cit., p. 26.

64. Ibid., p. 21.

**Table 1: media ownership and control rules**

Media diversity rules	
Medium	Rule
Commercial television, radio, newspapers	Minimum number of voices: the '4/5' rule—there must be no fewer than five independent and separately controlled media operators or groups in a metropolitan commercial radio licence area, and no fewer than four in a regional area. <sup>a</sup>
Commercial television, radio, newspapers	'2 out of 3' rule—a person cannot control more than two out of three specified media platforms—commercial television, radio or an associated newspaper—in a commercial radio licence area. <sup>b</sup>
Commercial television	'One-to-a-market' rule—a person must not be able to exercise control of more than one commercial television broadcasting licence in a licence area, except for commercial licences issued under section 38C of the BSA. <sup>c</sup>
Commercial radio	'Two-to-a-market' rule—a person must not be able to exercise control of more than two commercial radio broadcasting licences in the same licence area, except for commercial licences issued under section 40 of the BSA. <sup>d</sup>
Commercial television	'75 per cent audience reach'—a person must not be able to exercise control of commercial television broadcasting licences if the combined licence area exceeds 75 per cent of the Australian population. <sup>e</sup>

BSA = *Broadcasting Services Act 1992*.

a Sections 61AB and 61A of the BSA.

b Fifty per cent of the geographic area of the radio licence must fall within the television licence area for this prohibition to apply. Also see section 53(2) of the BSA.

c Section 53(2) of the BSA.

d Section 54 of the BSA.

e Section 53 of the BSA.

Source: Convergence Review Committee.<sup>65</sup>

## Public hearings and submissions

### The 75 per cent rule

Broadcasters were divided on the efficacy of removing the 75 per cent rule. WIN Network and Network 10 supported retaining it, while Prime, Southern Cross Austereo and Nine Network believed it was anachronistic.<sup>66</sup> Seven West Media representatives declared that the group neither opposed nor supported the rule, but in their opinion, there 'has not been nearly enough public debate about the implications of removing this rule and what should replace it if we do'.<sup>67</sup>

Network 10 representatives were of a similar view. In their opinion, if the 75 per cent rule was removed without taking other preventative action, the only guaranteed outcome would be less

65. Ibid., p.19.

66. WIN Network and Network 10, [Submissions](#) to Joint Select Committee on Broadcasting Legislation, *Further reform of Australia's broadcasting legislation*, March 2013, accessed 25 September 2013.

67. K Stokes (Chair, Seven West Media), [Evidence](#) to Joint Select Committee on Broadcasting Legislation, *Further reform of Australia's broadcasting legislation*, 18 March 2013, p. 47, accessed 25 September 2013.

media diversity.<sup>68</sup> WIN representatives considered removing the rule would make it difficult for their network to continue its commitment to regional news and to regional communities and advertisers; one even foresaw ‘the end of regional television’ if the rule was rescinded.<sup>69</sup>

In opposition, Prime spokespersons argued that local licence conditions were sufficient to ensure that ‘material of local significance’ would continue on regional broadcasters. They argued further that the rule prevented commercial broadcasters from operating in the most ‘optimally efficient manner’.<sup>70</sup> This declaration prompted Senator Barnaby Joyce to comment:

... there is nothing that you said in that statement that I disagree with. It is perfectly correct. It is about consolidating in the most efficient manner, which means centralising back to cost cells, which means centralising back to silos, because that is how you save money and how you become efficient. But it is not how you deliver a local outcome.<sup>71</sup>

David Gyngell from the Nine Network was adamant that removing the rule was critical for the future of television. He argued that it was unfair for free-to-air broadcasters to be hampered by ‘nonsensical regulation’ about the percentage of the population they are able to reach, when the national businesses which had emerged with the rise of the Internet now delivered an ‘avalanche of content’ into Australian homes, unrestricted by conditions on what they can deliver and where they can deliver it.<sup>72</sup>

Moreover, aware of the arguments about the loss of local content if metropolitan and regional broadcasters merged following the demise of the 75 per cent rule, the Nine Network gave an undertaking that it would continue to provide local content.

In the event of the removal of the reach rule, Nine is willing to commit to broadcast commercial half hour of news in local licence areas across Australia - that is around 23 regional news bulletins in total - subject to the number of licences that we would control. That will guarantee viewers their own local news in any merger Nine undertakes with a regional broadcaster.<sup>73</sup>

## Content supply agreements

The idea that ACMA should consider program supply agreements for news and current affairs in determining whether a person is in control of a commercial television broadcasting service was not

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68. Network 10, Submission to Joint Select Committee on Broadcasting Legislation op. cit.

69. A Lancaster, (Chief Executive Officer, WIN Network), [Evidence](#) to Joint Select Committee on Broadcasting Legislation, *Further reform of Australia’s broadcasting legislation*, 18 March 2013, p. 10, accessed 25 September 2013.

70. I Audsley, (Chief Executive Officer, Prime Media Group), [Evidence](#) to Joint Select Committee on Broadcasting Legislation, *Further reform of Australia’s broadcasting legislation*, 18 March 2013, p. 18, accessed 25 September 2013.

71. B Joyce, [Committee hearing](#), Joint Select Committee on Broadcasting Legislation, *Further reform of Australia’s broadcasting legislation*, 18 March 2013, p. 18, accessed 25 September 2013.

72. D Gyngell, (Chief Executive Officer, Nine Entertainment), [Evidence](#) to Joint Select Committee on Broadcasting Legislation, *Further reform of Australia’s broadcasting legislation*, 18 March 2013, p. 40, accessed 25 September 2013.

73. Nine Entertainment, [Submission](#) to Joint Select Committee on Broadcasting Legislation, *Further reform of Australia’s broadcasting legislation*, March 2013, accessed 25 September 2013.

popular. Seven West Media noted the *BSA* already recognises that a person is in a position to exercise control of a licence if the person is in the position to control the selection or provision of a significant portion of the programs broadcast by a licensee.<sup>74</sup> The Australian Subscription Television and Radio Association (ASTRA) believed in determining what constitutes control, ACMA should continue the existing focus; that it should not concentrate on particular programs produced under a supply agreement.<sup>75</sup>

Seven West Media continued that in a 2007 investigation into the control of commercial radio broadcasting licences, ACMA listed factors it used to determine if a person was in a position to control a significant proportion of programs:<sup>76</sup>

- the decision to purchase programs from a particular program producer, supplier or distributor
- the programs chosen to be purchased from that program producer, supplier or distributor
- the terms of an agreement with any such producer, supplier or distributor
- the decision to broadcast a particular program
- the decision to cease broadcasting a particular program
- scheduling decisions
- the decisions which set budgeting limits on the purchase of programming
- the decision to exceed a budgeting limit relating to programming
- the ability to have complete editorial control over the style and content of the content services provided
- the ability to withhold consent to a variation in 'the services' supplied and
- an inability to obtain news services from another source.<sup>77</sup>

Network 10 considered its decision to outsource production of *Meet the Press* and the *Bolt Report* to News Limited was the impetus behind the content supply proposal. The Network argued that

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74. Clause 2(1)(b) of Schedule 1 of the *BSA*, as noted in Seven West Media, [Submission](#) to Joint Select Committee on Broadcasting Legislation, *Further reform of Australia's broadcasting legislation*, March 2013, accessed 25 September 2013.

75. Australian Subscription Television and Radio Association (ASTRA), [Submission](#) to Joint Select Committee on Broadcasting Legislation, *Further reform of Australia's broadcasting legislation*, March 2013, accessed 25 September 2013.

76. ACMA, [Investigation into the control of commercial radio broadcasting licenses held by Elmie Investments Pty Ltd](#), Canberra, 2007, accessed 25 September 2013.

77. Seven West Media, Submission to Joint Select Committee on Broadcasting Legislation, op. cit.



despite outsourcing, it retained ‘overall editorial control and general oversight’.<sup>78</sup> News Limited in its submission to the Joint Committee cited a number of examples of instances where similar arrangements had been in place. These included reference to the arrangements under which the ABC works with commercial media to conduct investigations and to feature the views of representatives from other media outlets on its programs.<sup>79</sup>

### On-air findings

Media groups were similarly opposed to providing ACMA with the power to require on-air reporting of the findings of investigations. They saw the power as unnecessary and an additional regulatory burden.

ACMA, on the other hand, considered that giving it the power to compel broadcasters to make on-air statements about the findings of investigations would:

- improve its ability to respond proportionately to breaches of broadcasting regulations
- improve compliance incentives for licensees
- facilitate more relevant and responsive regulatory outcomes and
- better align with public expectations of the broadcasting regulatory regime.<sup>80</sup>

In support of its argument, the regulator cited similar recommendations from the Productivity Commission and Professor Ian Ramsay’s report into the effectiveness of the powers of ACMA’s predecessor (the Australian Broadcasting Authority).<sup>81</sup> It noted further that commissioned research in 2009 had found that the public believed overwhelmingly that broadcasters should correct errors as soon as possible after they were discovered and that on-air corrections were an appropriate means of response to errors.<sup>82</sup>

ACMA saw the content requirement as giving it ‘mid-tier’ powers between merely accepting an undertaking not to do something, and cancelling or suspending a broadcaster’s licence. The online journal *Crikey* disagreed that this amounted to a mid-tier power and commented that the issue needed ‘more contextual study’, if the Government was serious about enhancing ACMA’s powers.<sup>83</sup>

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78. Network 10, Submission to Joint Select Committee on Broadcasting Legislation, op. cit.

79. News Limited, [Submission](#) to Joint Select Committee on Broadcasting Legislation, *Further reform of Australia’s broadcasting legislation*, March 2013, accessed 25 September 2013.

80. ACMA, [Submission](#) to Joint Select Committee on Broadcasting Legislation, *Further reform of Australia’s broadcasting legislation*, March 2013, accessed 25 September 2013.

81. Productivity Commission, [Broadcasting Inquiry report](#), no 11, Canberra, 2000 and I Ramsey, [Reform of the broadcasting regulator’s enforcement powers](#), Sydney 2005, accessed 25 September 2013.

82. ACMA, Submission to Joint Select Committee on Broadcasting Legislation, op. cit.

83. G Dyer and B Keane, [Conroy’s “quick and dirty” committee to rule on media marriages](#), *Crikey*, 14 March 2013, accessed 25 September 2013.



## Committee deliberations and report

In its June report, the Joint Committee supported two of the three inquiry proposals.<sup>84</sup> It agreed that convergence of the various media was undermining the intended purpose of the 75 per cent reach rule and that it should be abolished. At the same time, as it was concerned that abolishing the rule could affect local news and current affairs content on regional media, its support was contingent 'on there being legislation or legally enforceable undertakings to support local content in regional Australia'.<sup>85</sup>

The Joint Committee also supported providing ACMA with the power to require on-air reporting of its findings. It believed that ACMA had sufficiently demonstrated that there is a gap in the sanctions the regulator can impose on broadcasters. It did not support the proposal that ACMA consider program supply agreements for news and current affairs when determining whether a person is in control of a commercial television broadcasting service. It noted, however, that it may be appropriate in the future to revisit this issue.<sup>86</sup>

## Senate Environment and Communications Legislation Committee

### Investigation

On 14 March 2013, the Parliament referred the package of six Bills to the Senate Environment and Communications Legislation Committee (the Legislation Committee). Ironically, given the Minister's determination that the Bills were passed by 21 March 2013, the Legislation Committee website publicised that it would seek submissions to 26 April and would report by 17 June 2013.<sup>87</sup>

In their submissions to the Legislation Committee, Seven West Media and Network 10 expressed their disquiet with the inquiry timing and processes. Seven West called the Government's expectations that the Legislation Committee would deliver an interim report less than a day after it had conducted public hearings and the voting timetable for the Bills 'nothing short of shameful'.<sup>88</sup> In referring to the Howard Government's media reform package introduced in 2006, Network 10 observed that Senator Conroy had intensely criticised the lack of time provided for the Parliament to consider the proposals in that legislative package; it provided a comparative table to illustrate its point.<sup>89</sup> See the Table 2 below:

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84. Joint Select Committee on Broadcasting Legislation, *Three broadcasting reform proposals*, June 2013, House of Representatives, Canberra, June 2013, accessed 10 July 2013.

85. Ibid.

86. Ibid.

87. Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, March 2013, [Information about the inquiry page](#), accessed 25 September 2013.

88. Seven West Media, [Submission](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, March 2013, accessed 25 September 2013.

89. S Conroy, 'Second reading speech: Broadcasting Services Amendment (Media Ownership) Bill 2006, Broadcasting Services Legislation Amendment (Digital Television) Bill 2006, Communications Legislation Amendment (Enforcement Powers) Bill 2006 and Television Licence Fees Amendment Bill 2006, Senate, [Debates](#), 11 October 2006, p. 17, cited in

**Table 2: media package comparison**

	2006	2013
No. of Bills	4	6
No. of days Bills in Parliament	34	7
No. of working days for Committee - inquiry & report	17	2

Source: Network 10.<sup>90</sup>

The Legislation Committee conducted two public hearings on 18 and 19 March and received 14 submissions.<sup>91</sup> The gist of the submissions and information provided to the public inquiries was that there was general support for the passage of two of the Bills before the Legislation Committee—the Convergence Review and Other Measures Bill and the Television Licensing Bill.

This was not the case with the remaining Bills in the package. The PIMA Bill, for example, was seen as creating a body that would be a creature of government; appointed on terms and conditions determined by the relevant Minister and dependent on a government department for resources.<sup>92</sup>

It was of concern that an advocate so appointed would then be able to make unilateral decisions about what constitutes community standards, as these were not outlined in the proposed legislation. The PIMA would decide if any self-regulatory body satisfied such standards, and whether the body was entitled to essential exemptions under the *Privacy Act* which allow journalists to do their jobs. According to Bridget Fair from Seven West Media, the PIMA would be the sole arbiter of such decisions—there would be no appeal. The situation would be unprecedented.<sup>93</sup> Greg Hywood, Chief Executive of Fairfax Media, remarked the PIMA would therefore ‘establish the standards by which journalism would be practised’.<sup>94</sup>

Margaret Simons from the Centre for Advancing Journalism at the University of Melbourne expressed this argument well:

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Network 10, [Submission](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, 18 March 2013, accessed 25 September 2013.

90. Network 10, submission to Senate Environment and Communications Legislation Committee, op. cit.

91. Note the Committee website lists 13 submissions and one ‘additional information received’ report from a member of the community television sector.

92. D Muller, [Submission](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, 18 March 2013, accessed 25 September 2013.

93. B Fair (Group Chief, Corporate and Regulatory Affairs, Seven West Media), [Evidence](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, 18 March 2013, p. 20, accessed 25 September 2013.

94. G Hywood (Chief Executive and Managing Director, Fairfax Media), [Evidence](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, 18 March 2013, p. 2, accessed 25 September 2013.

The application of ‘community standards’ in this context is wrong in principle. Journalists, in the course of their work, do many things in the public interest that violate community norms of behaviour. The public interest would be severely harmed, and the role of the media dangerously inhibited, if they were to be prevented from acting in ways that might violate community standards. For example, the media sometimes reveal information that harms people and have obtained it by means that the community might think underhand or dishonest. These are difficult ethical dilemmas that need to be resolved by reference to professional standards, which are designed to take into account the complexities involved. This is a task utterly unsuited to general community standards.<sup>95</sup>

In addition, Simons and Denis Muller, from the University of Melbourne, both agreed that there were better alternatives available for the appointment of a media advocate. These included the appointment process used for ABC and SBS boards or the alternative of appointment by Parliament.<sup>96</sup>

The public interest test to be introduced under the News Media Diversity Bill was also criticised. Kim Williams from News Limited said there was no definition of the term ‘public interest’ in the Bills and implied that there could not be one as the public interest was ‘a term which means many things to many different people; it is in the eye of the beholder’.<sup>97</sup> Seven West Media was opposed to giving the PIMA power to decide whether media mergers and acquisitions may cause a substantial lessening of media diversity—for the principal reason that decisions made by the PIMA would be subjective, as there was no definition of diversity in the legislation.<sup>98</sup> Richard Freudenstein, Chief Executive of Foxtel, expressed similar concerns. He added that there was ‘no guidance regarding the public benefit that might outweigh detriment’ to facilitate making decisions about diversity or the public interest.<sup>99</sup>

On day two of the Legislation Committee hearings, the authors of the Finkelstein Review gave evidence that they saw the proposed legislation differently. Revising his comments in his review report, Ray Finkelstein argued that there were significant failings in the existing system of regulation such as to warrant regulatory changes. There was little public awareness of the role of the Australian Press Council, for example, and the organisation suffered from a lack of investigatory and enforcement powers. It was inadequately resourced, insufficiently independent from publishers and its procedures were laborious. Finkelstein added that ACMA was equally hamstrung by its limited statutory powers of enforcement and slow statutory procedures.<sup>100</sup>

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95. M Simons, [Submission](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, 18 March 2013, accessed 25 September 2013.

96. Ibid. and D Muller, Submission to Senate Environment and Communications Legislation Committee, op. cit.

97. K Williams (Chief Executive Officer, News Limited), [Evidence](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, 18 March 2013, p. 29, accessed 25 September 2013.

98. Seven West Media, [Submission](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, 18 March 2013, accessed 25 September 2013.

99. R Freudenstein, (Chief Executive Officer, Foxtel), [Evidence](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, 18 March 2013, p. 51, accessed 25 September 2013.

100. R Finkelstein, [Evidence](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, 19 March 2013, p. 1, accessed 25 September 2013.

Finkelstein's view was that the proposed PIMA powers were relatively limited. He could see nothing in the PIMA Bill that would threaten democracy or free speech, and any impositions the PIMA Bill enforced on press freedom were relatively minor. He concluded:

Not only do I take the perspective that powerful groups in society cannot be unregulated; this particular powerful group also regards regulation as important. But the difference or the issue is whether that regulation should be wholly self-regulation or whether there should be some additional regulation—in this case to make the self-regulation work.<sup>101</sup>

Finkelstein's co-author, Matthew Ricketson, from the University of Canberra, added that overwhelming evidence presented to the independent media inquiry was that the system of voluntarily self-regulation for the print media 'has not worked, and it will not work, unless important changes are introduced'.<sup>102</sup>

Michael Fraser, Director of the Communications Law Centre, was another who did not agree with much of the media criticism of the legislation:

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

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

Finally, I would make one further point. The public interest media advocate is proposed to be established by statute. There seems to be some argument that by establishing an office by statute that means that that

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101. *Ibid.*, p. 4.

102. M Ricketson, [Evidence](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, 19 March 2013, p. 2, accessed 25 September 2013.

office is not independent. But that is a false argument. There are many public officers that are established by statute to be independent, and this is intended to be one such office.<sup>103</sup>

That did not mean that Fraser did not think that some minor amendments to the legislation were not warranted:

I think with one or two simple amendments to ensure that the independence of the PIMA not only exists but is seen to exist, and that the factors within which the PIMA would operate are clear so that critics of the PIMA could not attack it for lack of independence because it seemed to be operating on a whim, if there were a framework there, then I think that it ought to be passed.<sup>104</sup>

But in the context of the public debate on the media reforms, Fraser, Ricketson and Finkelstein appeared to be in the minority, as was the tongue-in-cheek opinion expressed by the cartoonist, First Dog on the Moon, which is shown in Figure 4 below.

## Report

The Legislation Committee's report summarised what it concluded were the various issues raised in its public consultations:

- insufficient time for consultation—a process that was 'truncated and unduly short'
- concern about oversight and regulation of the media by a regulator that would unnecessarily impinge on freedom of the press and editorial independence
- unfettered power of the media regulator—particularly with reference to retrospective powers and absence of appeals mechanisms and
- lack of explicit definitions.<sup>105</sup>

The overall Legislation Committee report concluded that criticisms of the package of Bills had been so strident that they were 'hysterical'. In its view, the issues being discussed, for example, had been analysed and debated for nearly two years as the result of the investigations by the Convergence Review Committee and the Finkelstein inquiry. Additionally, the model for the proposed regulator was not without precedent. In the Australian context, ACMA had the right to suspend or cancel a

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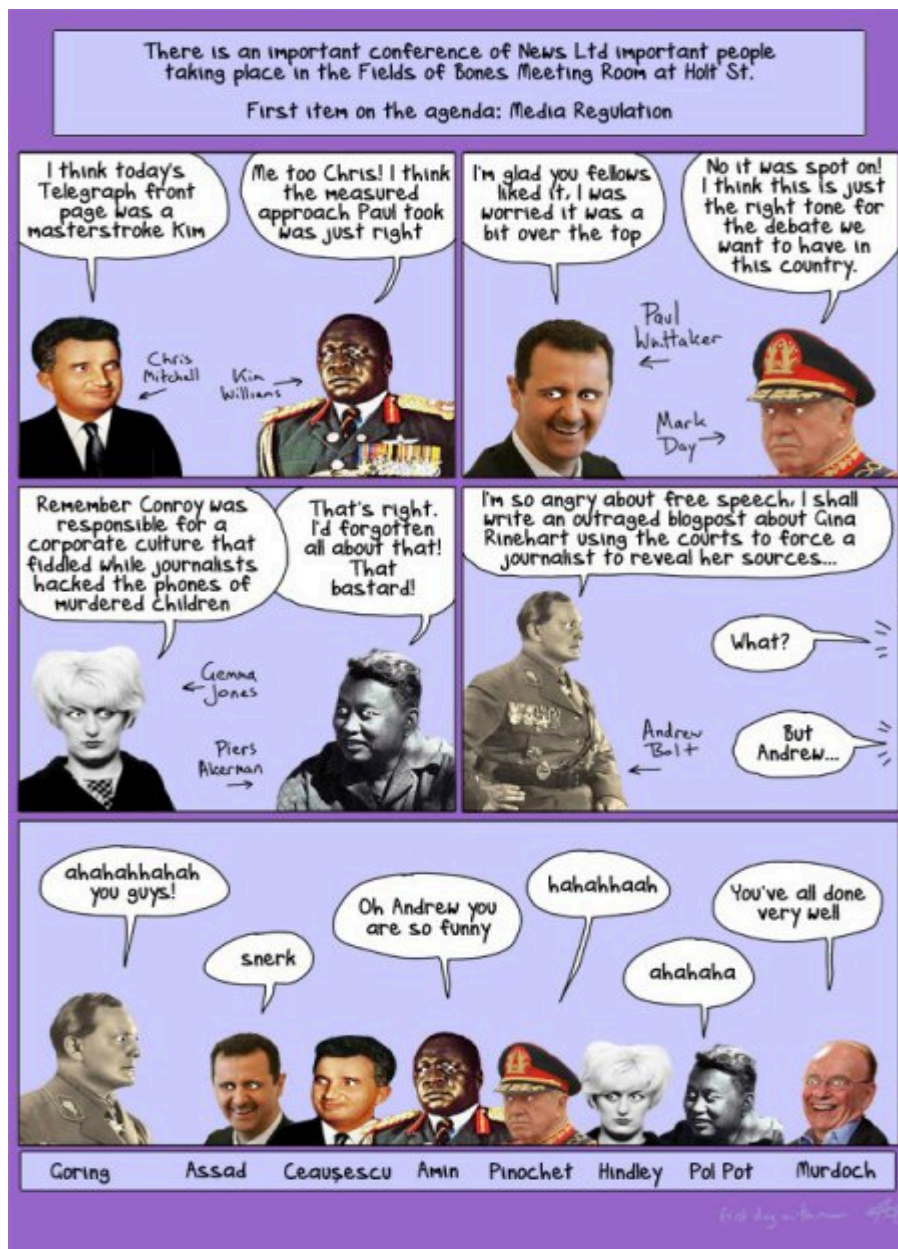
103. M Fraser Director, Communications Law Centre, University of Technology, Sydney, [Evidence](#) to Senate Environment and Communications Legislation Committee, *Inquiry into media reform Bills package*, 19 March 2013, p. 39, accessed 25 September 2013.

104. Ibid.

105. Senate Environment and Communications Legislation Committee, *Inquiry into the Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013 [Provisions]*, , *Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 [Provisions]*, *News Media (Self-regulation) (Consequential Amendments) Bill 2013 [Provisions]*, *News Media (Self-regulation) Bill 2013 [Provisions]*, *Public Interest Media Advocate Bill 2013 [Provisions]*, *Television Licence Fees Amendment Bill 2013 [Provisions]*: [\[Report\]](#), The Senate, Canberra, March 2013, accessed 26 September 2013.

licence should a broadcaster breach regulatory requirements and the Legislation Committee was satisfied that the PIMA would act in a similar fashion.<sup>106</sup>

Figure 4: a rare opposing view



Source: Crikey<sup>107</sup>

The Legislation Committee saw inconsistencies in media submissions, which acknowledged the necessity of certain reporting codes and standards, but at the same time, were critical of proposals

106. Note: that unless otherwise indicated, the information and quotes in this section can be attributed to the Senate Environment and Communications Legislation Committee as contained in the report cited above.

107. First Dog on the Moon, 'The banality of banality', *Crikey*, 13 March 2013, accessed 26 September 2013.



to introduce impartial, independent scrutiny of the industry. It disagreed that the commercial interests of the media and the public interest were 'one and the same', and considered it 'reasonable for an independent, external regulator to judge the extent to which the news media are upholding the public interest'. It agreed, however, that there was a need for certain terms to be defined better, and called for investigation of how more clarity could be given to the use of these.

### Additional comments and dissenting report

Additional comments from Greens' Senator Scott Ludlam supported media reform but agreed that it needed to have been articulated more clearly what exactly was being protected by the public interest test.<sup>108</sup>

Coalition senators on the Committee issued a dissenting report.<sup>109</sup> This argued that there had been no coherent reasons given to the Legislation Committee to prove that the existing regime of self-regulation had failed.

The only justification offered for the extraordinary intervention in the operation of the media is that there were failures in media regulation overseas. No evidence of similar systemic failures in Australia has been presented at any stage.<sup>110</sup>

In echoing much of the media criticism of the Bills, the Coalition senators concentrated in particular on the PIMA proposal. They saw the proposed process of appointing the PIMA as one 'open to gross political manipulation and may result in a highly partisan individual being the sole arbiter on content regulation and media industry structure'. The Coalition senators were alarmed that there was 'no recourse to question or review the decisions of the PIMA' and that the PIMA was reliant on the administrative support of a government department.<sup>111</sup>

So, too, the senators saw the PIMA's ability to be able to revoke approvals of self-regulatory bodies as a significant risk, as the conditions under which it could revoke approval were ill-defined and gave the PIMA wide scope to interpret conditions as it saw fit.<sup>112</sup>

The dissenting report was critical of the fact that the PIMA did not bear the onus to prove a particular media transaction reduced media diversity. Instead, the onus was on the media organisation party to the transaction. It added:

One of the most egregious features of the proposed PIMA is the complete lack of any recourse to internal or administrative review or complaint against decisions. The aforementioned lack of detail regarding the PIMA's tests creates a murky situation where an applicant has no idea what criteria they are to be assessed against when drafting their application and no ability to seek recourse if the application is rejected. It is also

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108. S Ludlam, '[Australian Greens' additional comments](#)', Senate Environment and Communications Legislation Committee [media package] inquiry report, op. cit.

109. Coalition Senators, '[The Coalition's belief in a free media](#)', Dissenting Report, Senate Environment and Communications Legislation Committee [media package] inquiry report, op. cit.

110. Ibid.

111. Ibid.

112. Ibid.

inconsistent with the approach of the ACCC with respect to decisions made on mergers and acquisitions under the Competition and Consumer Act.<sup>113</sup>

The Coalition senators considered it curious that the reforms allowed for the PIMA to disclose confidential information obtained about media organisations to the Minister and personalised its criticism by labelling this provision as ‘a general consistency with [Minister Conroy’s] approach to accumulating power over the media for his own ends’.<sup>114</sup> They concluded that the extraordinary powers of the PIMA to suspend publications opened ‘the possibility of a potentially outrageous neutering of critical media content’ and:

... to introduce such a dramatic change [to] (sic) the regulation of the media just months before a federal election would appear to be interference in the democratic process with consequent diminishing capacity of the media to provide frank and fearless commentary and critique of not only the political process and policy but politicians themselves.<sup>115</sup>

Finally, the dissenting report reflects that the Coalition senators were ‘bewildered’ that the public interest was ill-defined:

The Coalition submits that Paul Howes and Pauline Hanson are likely to have significantly divergent views on what the ‘public interest’ entails. Under the proposed legislation, either one could be appointed PIMA and would be free, under the provisions of this Bill, to bring with them and apply their own definition of the public interest.<sup>116</sup>

## Joint Committee on Human Rights

One of the tasks of the Joint Committee on Human Rights (HR Committee) is to examine Bills to gauge their compatibility with human rights and to report its assessment to both Houses of the Parliament. In this capacity, the HR Committee also examined the package of six bills. It released its advice earlier than usual to provide the other parliamentary committees examining the Bills with ‘the benefit of its comments’.<sup>117</sup>

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113. Ibid.

114. Ibid.

115. Ibid.

116. Ibid. Paul Howes is the National Secretary of The Australian Workers' Union and Pauline Hanson is the former leader of One Nation, a right-wing political party.

117. Parliamentary Joint Committee on Human Rights, [Examination of legislation in accordance with the Human Rights \(Parliamentary Scrutiny\) Act 2011, Bills introduced 12–14 March 2013](#), Fourth report 2013, accessed 26 September 2013.



### Box 3: International Covenant on Civil and Political Rights

The *International Convention on Civil and Political Rights* (ICCPR) was adopted by the United Nations' General Assembly on 16 December 1966. The ICCPR came into force on 23 March 1976.<sup>118</sup>

The ICCPR outlines fundamental civil and political rights. These include: the rights to self-determination, to life, to found a family, to participate in the electoral process and to due process and a fair trial. It also provides for freedoms from torture, slavery, genocide, and freedoms of movement, speech, expression, conscience, and religion. In addition, it provides for equal protection and enjoyment of these rights by women, men, children and minorities.

Most of the rights cited in the ICCPR are not absolute; they are subject to reasonable limitations which are created for legitimate purposes. Some rights, however, such as the right not to be held in slavery and the right to be free from torture, are absolute. Article 4 of the ICCPR identifies absolute (or non-derogable) rights which cannot be infringed in any circumstances.

Australia agreed to be bound by the ICCPR on 13 August 1980, subject to certain reservations.<sup>119</sup>

Article 2(2) of the ICCPR requires Australia to take all necessary legislative and other measures to give effect to the rights in the Convention.

#### ICCPR: Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) for respect of the rights or reputations of others and
  - (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

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118. [International Covenant on Civil and Political Rights](#), opened for signature 16 December 1966, ATS [1980] No. 23 (entered into force 13 November 1980 and 28 January 1993) accessed 26 September 2013.

119. Ibid.

### **Committee assessment: compatible**

The HR Committee was unconcerned by two of the Bills in the package—the Convergence Review and Other Measures Bill and the Television Licence Fees Bill.<sup>120</sup>

In relation to the Convergence Review and Other Measures Bill, the HR Committee acknowledged it could be considered that the decision not to issue additional commercial broadcasting licences may be inconsistent with the right to freedom of expression in article 19 of the International Convention on Civil and Political Rights (ICCPR). It added, however, that as broadcasting spectrum is limited and a large part of it is already used by commercial television services, it was consistent with the United Nations' Human Rights Committee (UNHRC) to make the remaining capacity in the broadcasting services bands available for other purposes. As the UNHRC has stressed, the obligations of states to ensure that there is a diverse range of media, the HR Committee saw the idea of making capacity available to services such as community television and future technologies as consistent with this obligation.

The Convergence Review and Other Measures Bill's proposal that at least one non-executive Director was an Indigenous person was also not seen to be inconsistent with human rights treaties.<sup>121</sup> This proposal was to amend section 17 of the *Special Broadcasting Service Act 1991* to add an additional requirement for the Minister to consider when making appointments to the Board of the multicultural broadcaster.

With regards to Australian content provisions in the Convergence Review and Other Measures Bill, the HR Committee could find insufficient justification for imposing these conditions in the legislation. It concluded therefore that including specific content in programs may limit broadcasters' rights to freedom of expression and possibly the rights of audiences to receive information and ideas. It believed that some clarification of the human rights compatibility of the proposed Australian content standards and licence conditions was needed, to ensure that they were consistent with freedom of expression (under article 19 of the ICCPR) and the right of everyone to participate in cultural life (under article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights).<sup>122</sup>

The HR Committee accepted the argument that the Television Licence Fees Bill would increase regulatory certainty for the industry and enable broadcasters to continue to support the production of Australian content. It concluded the Television Licence Fees Bill may therefore promote the right to participate in cultural life and the right to freedom of expression.

### **Committee assessment: concerns raised**

Again, for the HR Committee, it was the remaining four bills which were of concern.

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120. Note: that unless otherwise indicated, the information and quotes in this section can be attributed to the Parliamentary Joint Committee on Human Rights report cited above.

121. [Special Broadcasting Service Act 1991](#), accessed 24 September 2013.

122. [International Covenant on Economic, Social and Cultural Rights](#), 16 December 2013, accessed 26 September 2013.

## News Media Diversity Bill

The HR Committee had noted with reference to the Convergence Review and Other Measures Bill that it may be necessary in the modern media environment to put in place measures to prevent monopoly control and promote a plurality of media, and that it was the duty of states to prevent excessive concentration of media ownership. The HR Committee acknowledged also that this may be in spite of those restrictions limiting the right of freedom of expression.

With reference to the News Media Diversity Bill, the HR Committee acknowledged unequivocally that its intention was to promote the goal of media diversity. It appeared unconvinced that the proposal to apply a 'substantive' test, administered by the PIMA, to transactions involving acquisition of control of media was the most appropriate means to achieve this end. It cited three particular issues of concern. These were:

### Restriction provided by law

While article 19(3) of the ICCPR permits restrictions on the enjoyment of freedom of expression under certain circumstances, these need to be provided by law—a domestic law or an accepted rule of common law. Further, such law needs to satisfy what is called a 'quality of law' test, so that it gives sufficient guidance for those overseeing the law to ascertain what sorts of expression are properly restricted.

The HR Committee concluded:

The standards which the PIMA is to apply in the determination of an application for approval of a transaction are broad and general, and may give rise to the issue of whether they are sufficiently precise for the purposes of satisfying article 19(3) of the ICCPR.

It is not clear to the committee that the standards set out in the bill on the basis of which the PIMA will grant or refuse approval in relation to a transaction provide the PIMA or persons affected with sufficient guidance or a precise indication of how that power will be exercised.<sup>123</sup>

### Right of access to court—availability of a review of a PIMA decision

As critics had pointed out, the News Media Diversity Bill did not provide for review of PIMA decisions to refuse to approve a transaction. The HR Committee considered that as PIMA decisions would affect the rights of people to enter into contracts and the right to property, then the right to a fair hearing in civil matters would apply in the matter of media control transactions. Accordingly, an applicant would be 'entitled to have access to an independent and impartial court or tribunal with the power to review all questions of fact and law that are critical to the determination of the dispute: the availability of judicial review is not necessarily be [sic] sufficient'.<sup>124</sup>

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123. Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human rights (Parliamentary Scrutiny) Act 2011, Bills introduced 12–14 March 2013*, op. cit., p. 12.

124. Ibid.

The HR Committee cited the Explanatory Memorandum justification for the lack of merits review of PIMA decisions:

Merits review of decisions will not be available due to the nature of the assessment process being undertaken by the PIMA. The process, which will involve elements of both an inquiry with substantial public consultation and potentially a negotiation, has been designed to ensure transacting parties reasonably engage with the PIMA during the assessment process. The Administrative Review Council Guidelines note that processes that would be time-consuming and costly to repeat on review—as would be the case with consideration of the proposed public interest test and any negotiation of associated undertakings—may be exempted from including a merits review process.<sup>125</sup>

It was unconvinced that this explanation identified a legitimate purpose for restriction of persons' rights to access to a court under article 14(1) of the ICCPR.

### Offences

The HR Committee also questioned the offences and civil penalty provisions of the News Media Diversity Bill. Division 12 was to create a number of offences relating to failure to provide notification of various developments to ACMA and under a new section (section 78ML) these offences were to be ones of strict liability.<sup>126</sup> That is, they allowed for the imposition of criminal liability without the need to prove fault. The HR Committee's concern was that this provision would limit the right to be presumed innocent until proven guilty under article 14(2) of the ICCPR.

### Self-regulation Bill and Self-regulation Consequential Bill

The Self-regulation Bill and its companion, the Self-regulation Consequential Bill, were once more questioned on the grounds that they may have unnecessarily impinged on freedom of expression and imposed requirements which would have restricted the operation of a free and independent media.

As has been noted earlier in this paper, these Bills required news media sources to become members of a self-regulation body whose constitution, powers and operations satisfied certain criteria. If the PIMA were to decide that an organisation did not satisfy the criteria, its member media sources may no longer be excluded from certain provisions of the *Privacy Act*. The statement of human rights compatibility for the legislation argued that as it intended to link membership of a recognised body to certain privileges of journalism, this was 'a simple and transparent mechanism to promote effective and independent self-regulation of print and online news media organisations'.<sup>127</sup>

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125. [Explanatory Memorandum](#), Broadcasting Legislation Amendment (News Media Diversity) Bill 2013, p. 13, accessed 26 September 2013.

126. The imposition of strict liability means that a fault element does not need to be satisfied. However, the offence will not criminalise honest errors and a person cannot be held liable if he, or she, had an honest and reasonable belief that they were complying with the relevant obligations.

127. [Explanatory Memorandum](#), News Media (Self-regulation) Bill 2013 and News Media (Self-regulation) (Consequential Amendments) Bill 2013, p. 4, accessed 26 September 2013.

The HR Committee considered, however, that this may impinge on the rights of journalists and the public:

Enabling the PIMA to determine which media organisations can have access to that exemption is a form of regulation on how news media organisations operate, and appears to engage and limit the rights of these organisations to freedom of speech, and the rights of people to receive information from such news organisations. In order to justify an important change of this sort, the Minister must be able to point to a legitimate objective for such regulation, show that the proposed scheme bears a rational connection to this objective, and demonstrate that it is a necessary and proportionate measure for achieving that objective.<sup>128</sup>

The HR Committee did not consider that there was sufficient justification given to indicate that there had been unacceptable intrusions by the news media on personal privacy in Australia, which would justify the provisions in the legislation limiting freedom of expression.<sup>129</sup>

Whether the requirement for media organisations to become members of a self-regulation body impinged the right to freedom of association (article 22 of the ICCPR) was also questioned by the HR Committee. While the statement of compatibility argued that membership of such a body remained voluntary under the scheme, the HR Committee considered:

... as a practical matter most news organisations would feel compelled to join such an organisation. Indeed, the success of the scheme proposed seems premised on the existence of such compulsion in practice if not in law.<sup>130</sup>

## PIMA Bill

With reference to the PIMA Bill, the HR Committee was concerned that certain provisions would allow the PIMA to disclose information of a self-incriminating nature to bodies such as the Australian Securities and Investment Commission, the Australian Prudential Regulation Authority and the Director of Public Prosecutions—bodies that have responsibility for prosecuting criminal offences or instituting civil penalty proceedings.<sup>131</sup>

The HR Committee noted that the statement of compatibility maintained that nothing in the Bill was intended to abrogate a person's common law privilege against self-incrimination. However, the HR Committee was unsure whether the legislation would, in fact, prevent information obtained by the PIMA from being used in this way.<sup>132</sup> It could see no explicit provision in the Bill for persons to refuse to comply with the requirement on the grounds that it may tend to incriminate them or expose them to a penalty.

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128. Parliamentary Joint Committee on Human Rights, [Examination of legislation in accordance with the Human rights \(Parliamentary Scrutiny\) Act 2011, Bills introduced 12–14 March 2013](#), op. cit., p. 21.

129. Ibid., p. 22.

130. Ibid.

131. Clause 20 of the proposed Bill and information that could have been obtained would have been under a new section 78FA of the BSA (to be inserted in that Act by the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013).

132. Parliamentary Joint Committee on Human Rights, [Examination of legislation in accordance with the Human rights \(Parliamentary Scrutiny\) Act 2011, Bills introduced 12–14 March 2013](#), op. cit., p. 25.

The HR Committee was disturbed that proposed section 78FA, to be inserted into the BSA by the News Media Diversity Bill, would provide the PIMA with the power to require a person to produce information and documents if the PIMA believed, on so-called reasonable grounds, that the person had information or documents that were relevant to the operation of the Bill.

## Two down

### Australia Network

As noted earlier in this paper, two Bills in the Government's package were passed by the Parliament in the timeframe set by Senator Conroy.<sup>133</sup> These Bills did not entirely escape criticism, and attempts to change some of their content, however.

With regards to the provisions in the Convergence and Other Measures Bill, which gave the permanent responsibility for providing the Australia Network<sup>134</sup> to the ABC for example, the Opposition Communications spokesperson, Malcolm Turnbull, claimed that processes surrounding recent tendering for the Network had been less than appropriate.<sup>135</sup> Turnbull stressed that while he considered the ABC to be an appropriate body to deliver the Australia Network, he was unconvinced that it was appropriate to remove the possibility of other broadcasters delivering the service in the future. According to Turnbull:

This flies in the face of every conceivable element of good practice because, where you can introduce contestability, you should. If nothing else, it would keep the ABC on its toes and would ensure that it would always have, in the back of its mind, the thought that, if it started to pad out the contract, or sought too much money, or was not efficient in delivering the services, the matter could go out to tender and another entity, a private sector broadcaster, could compete with it.<sup>136</sup>

Therefore, Turnbull moved that proposed section 31AA was deleted from the Bill, to leave future governments with the ability to issue tenders for the provisions of Australia Network services.<sup>137</sup>

The Coalition senators' dissenting comments to the Legislation Committee report had raised a similar concern, labelling the proposal 'poor public policy'.<sup>138</sup> The dissenting comments added that the ABC's own legal director was of the opinion that providing the public broadcaster with the

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133. That is, the Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013 and the Television Licence Fees Amendment Bill 2013.

134. [Australian Network](#) website, accessed 23 September 2013.

135. M Turnbull, Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, Television Licence Fees Amendment Bill 2013, Consideration in Detail, House of Representatives, [Debates](#), 19 March 2013, p. 2630, accessed 24 September 2013. For information on the Australia Network tender issue see, Auditor General, Performance Audit, [Administration of the Australia Network Tender Process](#), Audit Report No. 29 2011–12, accessed 26 September 2013.

136. Ibid.

137. Section 31AA read that the Commonwealth was not to enter into a contract or other arrangement with a person or body other than the Corporation or a prescribed company for the provision of international broadcasting services, see Bills home page, op. cit.

138. Coalition Senators, Dissenting report, Senate Environment and Communications Legislation Committee, op. cit.

control of the Australia Network in perpetuity meant that the ABC could hold future governments ‘to ransom’, by refusing to provide the services if there were disputes over funding.<sup>139</sup>

The Greens did not share the Coalition’s view. In Parliamentary debates Senator Ludlam reminded the Senate that he had previously introduced a Bill with the same intent. He added that the Greens saw no justification for tendering out the international services—‘any more than we tender out any of the other highly valuable functions that the ABC provides to Australian broadcasting’.<sup>140</sup>

## Australian content

The Greens were unhappy with the expressed Australian content arrangements in the Convergence Review and Other Measures Bill. The ‘gift of public spectrum’ provided by the licence fee reductions in the Television Licence Fees Bill came with Australian content obligations, Adam Bandt told the House of Representatives. These obligations were needed to ensure that Australian identity, character and culture was reflected through access to television programs produced under Australian creative control. Bandt sought to have the number of hours of Australian content on commercial broadcasters’ multi-channels increased.<sup>141</sup>

In the Senate, independent senator Nick Xenophon expressed his concern about the effect on Australian drama of the content quotas. Senator Xenophon moved an amendment to require an ACMA review of section 43A of the *BSA*, with particular reference to broadcasting material of local significance to be undertaken within three months from when the Convergence and Other Measures Bill received Royal Assent. He later tabled a letter from Minister Conroy which indicated that the Government had agreed to a review of regional broadcasting and local content, and as consequence of this agreement, he withdrew his amendment and voiced his support for the Bill.<sup>142</sup>

## Television licence fees

One of the few things the Government and the Coalition appeared to agree on in the debate about media reform which the March package of Bills prompted was that there should be a reduction in commercial television licence fees.

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139. Ibid.

140. S Ludlam, Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, Television Licence Fees Amendment Bill 2013, Senate, [Debates](#), 20 March 2013, p. 2261, accessed 24 September, 2013.

141. The amendment was to increase the hours as were stated in Part 9 of the Bill from 1,095 in 2014 to 1,460 and from 1,460 in 2015 and beyond to 2,920. A Bandt, Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, Television Licence Fees Amendment Bill 2013, House of Representatives, [Debates](#), 19 March 2013, p. 2632, accessed 24 September, 2013.

142. N Xenophon, Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, Television Licence Fees Amendment Bill 2013, Senate, [Debates](#), 20 March 2013, p. 2271 and [Debates](#), 20 March 2013, p. 2285, accessed 24 September, 2013.

The Government argued that the reduction would 'enable commercial television broadcasters to continue to innovate and thrive in Australia's rapidly changing media landscape'.<sup>143</sup> The Coalition concurred, arguing that the reduction would help to align Australian broadcasters' fees with those of their international counterparts and that the reduction also reflected the fact that once the switchover to digital television was complete the broadcasters would use less spectrum.<sup>144</sup>

The Greens were less convinced that this legislation served the interests of the public and not just those of the commercial television broadcasters. Greens' Senator Scott Ludlam countered that a less significant licence fee reduction would still have recognised the commercial pressures faced by the television industry. The Senator added that broadcasting spectrum was not a free gift, it was a public good, the use of which carried with it obligations, such as delivering Australian content.<sup>145</sup>

## Final comment

It is interesting to note Independent Rob Oakeshott's comment a week after the media reform circus had died down:

... the two laws that passed are steps backwards. One is a licence fee reduction of \$200 million a year for free-to-air TV broadcasters. No strings attached. The other, the Orwellian named "content" law, has now set the content bar so low that by 2014 it will be lower than the actual Australian content delivered in 2011.<sup>146</sup>

## And none left standing

### The package withdrawn

Following the two days of public hearings and in keeping with the view expressed in their additional report comments to the Legislation Committee, the Greens indicated that, despite their misgivings about the Government's attempt to 'ram' the package through the Parliament, they may come to a compromise. They were adamant that this would be dependent on the Government's ensuring the protection of regional news services.<sup>147</sup>

On the other hand, it appeared that the independents had decided against supporting the media reform package.<sup>148</sup> This was despite the intervention of the Prime Minister in negotiations to reach a

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143. A Albanese, Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, Television Licence Fees Amendment Bill 2013, House of Representatives, [Debates](#), 19 March 2013, p. 2629, accessed 24 September, 2013.

144. S Birmingham, Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, Television Licence Fees Amendment Bill 2013, Senate, [Debates](#), 20 March 2013, p. 2256, accessed 24 September, 2013.

145. S Ludlam, Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, Television Licence Fees Amendment Bill 2013, Senate, [Debates](#), 20 March 2013, p. 2261, accessed 24 September, 2013.

146. R Oakeshott, '[Why I voted down the media laws: Oakeshott](#)', *The Australian Financial Review*, 27 March 2013, p. 39, accessed 24 September 2013.

147. D Crowe, '[Julia Gillard opens door to media deal as executives unite to fight reforms](#)', *The Australian* (online edition), 19 March 2013, accessed 26 September 2013.

148. Only Peter Slipper had indicated conditional support for the package.



compromise. It appeared at one stage that compromise had been achieved, and the controversial PIMA may be replaced with a panel, as suggested by Independent Bob Katter. The panel idea was to have been a complicated solution—a three-person panel, which would have been appointed by a 12-person committee, six of whom would have been appointed by the Council of the Order of Australia, three appointed by the journalists' union and three appointed by the Australian Press Council. In the end, the panel resolution was not enough to save the reforms.<sup>149</sup>

As Wendy Bacon had earlier commented in the online journal *New Matilda*:

... it is a pity that [Senator] Conroy is trying to force the independents' and Greens' hands; they were the only ones to speak up consistently for media diversity and limitations on media power in the first place, without which there would have been no inquiries or reform proposals at all.<sup>150</sup>

In trying to make sense of the tactics used by the Government, David Crowe in the *Australian* had previously astutely remarked:

Media reform is never easy. No communications minister keeps the industry happy and every change sets companies against each other. Yet that is not enough to explain why Conroy, having watched his predecessor, Helen Coonan, struggle for more than a year to make the previous big media changes in 2006, chose to mandate policy by lightning strike. The approach has tactical advantages but impoverishes debate. It curtails the parliament's ability to scrutinise the proposed law and limits the scope for those being regulated to consider the regulations.<sup>151</sup>

A cynical assessment of the media reforms could be that Senator Conroy at least did not expect them to succeed. Various reasons could be advanced to support this conclusion. These could include that the Minister only wanted the measures in the Bills which were eventually passed to succeed; the more radical proposals were a 'smoke screen'. Another assessment could be that the Government was convinced that reform was impossible, yet it needed to be seen to have responded in some way to the recommendations of its own reviews—so it 'went for broke' with radical options. Yet another explanation could be that the reforms proposed were ideologically important to Senator Conroy, who threatened to withdraw his support from Prime Minister Gillard if she did not allow him to attempt to force them through the Parliament.

Another explanation in the smoke screen category was that the media reforms were an attempt to distract media attention from the declining popularity of the Prime Minister. An editorial in the *Australian* elaborated on this theme:

In a better-run government, led by a prime minister who commanded authority and used cabinet to separate good ideas from bad, Stephen Conroy's plans to regulate the media would not have seen the light of day. So denuded is Julia Gillard's standing, and so chaotic is executive process, that the Communications Minister was able to ambush cabinet, catching wiser heads unaware. To his credit, the minister has at least given the Prime Minister a chance to secure her place in history. If the plan is passed, hers will be the first

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149. L Taylor, '[Fight to save "shambolic" law](#)', *The Age*, 21 March 2013, p. 4, accessed 26 September 2013.

150. W Bacon, '[Conroy's all or nothing media reforms](#)', *newmatilda.com*, 13 March 2013, accessed 2 September 2013.

151. D Crowe, '[No credible advocacy suggests media reform bill is designed to fail](#)', *The Weekend Australian*, 16 March 2013, p. 15, accessed 26 September 2013.

peacetime government to restrict press freedom since censorship was abolished in NSW in 1823. Her reputation could be sealed by the impetuous judgment of one of her worst ministers.<sup>152</sup>

However, in contrast to the idea the reforms were radical, Susan Forde from Griffith University implied that Conroy had sought to deliver a package of minor reform by taking a relatively subtle approach:

Conroy probably thought his reforms, in this election year, were the soft option and would attract minimal criticism. Overwhelmingly disappointing and weak compared to what they could have been, they are really the expected response from a government in a tenuous position.

What Conroy probably didn't expect was the level of vitriol coming from the media, and the ability of phrases like threats to freedom of speech, and political censorship and government-controlled media to spread like wildfire through the numerous, homogenous news services we currently rely on.<sup>153</sup>

There is likely to be some truth in all the above reasons.

At the same time, some of the speculation may have been prompted by a Labor leadership spill, which occurred days after the media reform package was withdrawn. Gemma Jones, writing in the *Herald Sun*, blamed Prime Minister Gillard's failure to convince independents Andrew Wilkie, Rob Oakeshott and Craig Thomson to abstain, thereby ensuring the passage of all the Bills.<sup>154</sup>

David Crowe in the *Australian* blamed Senator Conroy. Crowe reported that other ministers had been 'outraged' by Minister Conroy's tactics which 'undercut' more legitimate attempts to focus on jobs and the economy.<sup>155</sup>

## Ideas of reform abandoned

By April 2013 it appeared that media reform had been abandoned. Senator Conroy made it clear that the Parliament had had the opportunity to consider reform, and it would no longer be part of the Government's policy to be taken to the next election.<sup>156</sup>

On 26 June 2013, Senator Conroy directed ACMA to investigate whether people living in regional areas of Australia have adequate access to material of local significance provided via commercial television broadcasting services.<sup>157</sup> In addition, the ACMA investigation was to consider:

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152. Editorial, '[Senator Conroy's reckless and flawed media reforms](#)', *The Australian* (online edition), 13 March 2013, accessed 26 September 2013.

153. S Forde, '[Media reform: hysterical attacks on weak Conroy suggestions tell the real story](#)', *The Conversation*, 13 March 2013, accessed 26 September 2013.

154. G Jones, '[Media reform lit fuse](#)', *Herald Sun*, 22 March, p.7, accessed 25 September 2013.

155. D Crowe, '[How Conroy's calamity almost cost Julia her job](#)', *The Australian*, 22 March 2013, p. 1, accessed 26 September 2013.

156. D Crowe, '[Labor to drop last media reform](#)', *The Australian*, 9 April 2013, p. 4, accessed 26 September 2013.

157. Section 43A of the *BSA* requires that ACMA imposes a licence condition to require commercial television licensees in regional aggregated licence areas to broadcast minimum levels of material of local significance to each local area within their licence area. The regional aggregated licence areas are currently: Regional Queensland, Northern New

- the importance of material of local significance to people living in regional areas of Australia
- impact on people living in regional areas of Australia of recent and significant changes (if any) to the broadcast of material of local significance
- how access to material of local significance can be maintained and enhanced for people living in regional areas of Australia
- whether other sources of local (or regional) information are available to people living in regional areas of Australia
- the economic circumstances facing commercial television broadcasting licensees operating in regional areas of Australia and
- whether section 43A of the *BSA* should be extended to apply to commercial television broadcasting licensees operating in specified additional regional areas.<sup>158</sup>

On the same day as the ACMA direction was issued, Labor's leadership was again contested. Prime Minister Gillard was defeated in the spill by Kevin Rudd. In reporting that the directive was one of the last administrative acts by the Minister before 'Kevin Rudd rolled Julia Gillard as PM and Conroy spat the dummy and resigned', the online journal *Crikey* considered the inquiry related to one aspect of media reform—the advocacy to remove the 75 per cent rule.<sup>159</sup> It also fulfilled Minister Conroy's commitment to Senator Xenophon during the media reform debates.

ACMA has since released a consultation paper on the local content issue and is due to complete its investigation by 29 December 2013.<sup>160</sup>

Anthony Albanese, who became the Minister following Conroy's resignation, announced in August 2013 that he saw no urgency for media reform. He confirmed that if re-elected at the September election, a Labor Government had no plans to make changes in this policy area.<sup>161</sup>

Media reform of any kind appeared not to be on the Coalition's agenda for the election. Given its strident criticism of the majority of the 2013 Labor's responses to the Finkelstein and Convergence

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South Wales, Southern New South Wales, Regional Victoria, Eastern Victoria, Western Victoria and Tasmania. The [Broadcasting Services \(Additional Television Licence Condition\) Notice 8 November 2007](#) (accessed 25 September 2013) defines local areas for each of the regional aggregated licence areas. The licence condition defines material of local significance (local content) to include such things as material that relates to people, organisations, activities and issues in the area and material that deals with the effects on the area of events that occur elsewhere or material that may be of interest to people in the area.

158. [Broadcasting Services \(Material of Local Significance – Regional Aggregated Commercial Television Broadcasting Licences\) Direction 2013](#), 26 June 2013, accessed 25 September 2013.

159. G Dyer, 'Media briefs', *Crikey*, 9 July 2013, accessed 25 September 2013.

160. ACMA, [Local regional TV content under the spotlight](#), media release, ACMA, 8 August 2013, accessed 25 September 2013.

161. L Tingle, [Albanese says no need for media reform](#), *The Australian Financial Review*, 19 August 2013, p. 6, accessed 26 September 2013.

Review Committee's recommendations, and its later dismissal of these reviews as 'functionally of no use', this was not a surprise.<sup>162</sup> It appears unlikely that its stance is likely to change; that it will not consider any media reform based on Finkelstein's or the Convergence Review Committee's assessments following its election victory on 7 September 2013.

## Concluding comments

As this paper has shown, the Labor Government's 2013 package of media reform legislation provoked heated debate in the Parliament and in the media during March 2013. Of the six bills that were introduced into the Parliament, only two passed the House of Representatives on 19 March 2013 and the Senate on 20 March 2013. These were the non-controversial Convergence Review and Other Measures Bill, which dealt with Australian content and spectrum changes, updated the ABC and SBS charters for digital content and ensured that the SBS board has an Indigenous member, and the Television Licence Fees Bill, which permanently reduced annual commercial television broadcast licence fees.

The remaining four bills were discharged from the Parliamentary Notice Paper on 21 March 2013.

As was noted at the beginning of this paper, for two weeks in early 2013 the issue of media reform took centre stage. There was controversy and division about the role of the media and about whether it needed to be reformed. There were arguments and counter arguments about freedom of speech, diversity of views, whether the public interest exists, and if it does, exactly what it is. There was outrage from some that the Government presumed to set up an advocate of the public interest that may have the power to work against that interest, yet relief felt by others that at last there was some attempt to hold the media accountable.

Those who resisted the March 2013 reforms saw the Government's withdrawal of the majority of the reform Bills package as a triumph. But that triumph has left issues raised by the Convergence Review and the Finkelstein Inquiry unresolved. So it is that Australia continues to have one of the most concentrated media environments in the world, and it appears this situation could worsen in the future, and there is considerable public distrust of the media. Concern remains about the inability of existing regulatory instruments to hold the media accountable. And there are still questions about whether there should be a mechanism to decide what is in the public interest with regards to media control, and how that mechanism would be structured and accountable.

As a result, those who supported the idea of reform in March 2013, even if they had reservations about Senator Conroy's particular set of reforms, continue to see the issue of media reform as unfinished business, mired in shallow waters for what it appears may be an indeterminate time.

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162. M Bodey, [Convergence Review is unlikely to revive](#), *The Australian*, 22 April 2013, p. 21, accessed 26 September 2013.

## Appendix A: Membership: committees scrutinising media reform package

### Parliamentary Joint Committee on Human Rights

#### Members

**Chair**, Harry Jenkins, (Scullin, Victoria, ALP)

**Deputy Chair**, Ken Wyatt, (Hasluck, Western Australia, LP)

Graham Perrett (Moreton, Queensland, ALP)

Senator Anne Ruston, (South Australia, LP)

Senator Dean Smith, (Western Australia, LP)

Senator Ursula Stephens, (New South Wales, ALP)

Dan Tehan, (Wannon, Victoria, LP)

Senator Matt Thistlethwaite, (New South Wales, ALP)

Senator Penny Wright, (South Australia, AG)

Tony Zappia, (Makin, South Australia, ALP)

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### Joint Select Committee on Broadcasting Legislation

#### Members

**Chair**, Senator Matt Thistlethwaite, (New South Wales, ALP), to 7 April 2013, (following appointment as a Parliamentary Secretary) and Senator Doug Cameron, (New South Wales, ALP), from 7 April 2013

**Deputy Chair**, Malcolm Turnbull, (Wentworth, New South Wales, LP)

Senator Simon Birmingham, (South Australia, LP)

John Murphy, (Reid, New South Wales, ALP)

Senator Doug Cameron, (New South Wales, ALP), to 7 April 2013

Paul Neville, (Hinkler, Queensland, Nat)

Senator Kim Carr, (Victoria, ALP), from 14 May 2013

Robert Oakeshott, (Lyne, New South Wales, Independent)

Senator Barnaby Joyce, (Queensland, Nat)

Senator Matt Thistlethwaite, (New South Wales, ALP), to 14 May 2013

Senator Scott Ludlam, (Western Australia, AG)

Tony Zappia, (Makin, South Australia, ALP)

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## Senate Environment and Communications Legislation Committee

### Members

**Chair**, Senator Doug Cameron, (New South Wales, ALP)

**Deputy Chair**, Senator Simon Birmingham (South Australia, LP)

Senator Catryna Bilyk, (Tasmania, ALP)

Senator Bridget McKenzie, (Victoria, Nat)

Senator Lisa Singh, (Tasmania, ALP)

Senator Larissa Waters, (Queensland, AG)

### Substitute members

For 18 March 2013

Senator Scott Ludlam, (Western Australia, AG), for Senator Waters

Senator Ursula Stephens (New South Wales, ALP), for Senator Bilyk

### Participating members

Senator George Brandis, (Queensland, LP)

Senator Bill Heffernan, (New South Wales, LP)

Senator John Madigan, (Victoria, DLP)

Senator Fiona Nash, (New South Wales, Nat)

Senator Anne Ruston, (South Australia, LP)

Senator Glenn Sterle, (Western Australia, ALP)

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