

MEDIA OWNERSHIP AND RIGHTS OF ACCESS

by Paul Chadwick¹

Introduction

We are supposed to be on the verge of another media ownership upheaval. Lobbyists are out in force in Canberra. Control of the Fairfax newspapers is the chief prize, but there may be knock-on effects in other areas of the press, radio and television.

We will soon be hearing three related arguments from media voices with a considerable stake in the outcome -

- 1 Media concentration is not all that bad;
- 2 Even if concentration is unhealthily intense, technology will soon replace scarcity with plenty;
- 3 Whatever happens, Parliament has no business interfering because that would breach free speech principles.

¹This article was first presented as a contribution to the Free Speech Forum, *The State We're In*, hosted by the Communications Law Centre, Free Speech Committee of Victoria and Victorian Council for Civil Liberties at the State Film Centre, East Melbourne, on 8 December 1996

Today, in a kind of pre-emptive dissent, I will tackle each claim, arguing :

- Concentration is indeed serious, has been for some time, and should not be permitted to worsen;
- The potential for technology alone to improve matters is greatly overstated;
- Free speech principles are consistent with some statutory measures, both to prevent further concentration and to confer on Australians an enforceable right of reply.

I will restrict the argument to the print media, partly for time reasons, but also because we tend to underrate the continuing significance of the press. It is a source of basic data on which other media feed. The press remains an agenda-setter. So often, what the papers cover becomes the fodder for that morning's talkback radio and that evening's TV news.

If we are concerned for diversity we must give the term 'diversity' practical meaning. This is one of the prime tasks of the current federal inquiry into the cross-media rules. Certainly, diversity means that the widest possible range of opinion gets a voice. But those opinions must be based ultimately on information. Australian sources of basic information in wide circulation seem to be shrinking, even as the technical means to disseminate information grow.

Extent of concentration of print media²

- Newspapers

News Corporation dominates. In the different categories of newspapers, I will give the proportion controlled by News and then the proportion controlled by its nearest rival in that category. The measure is the percentage share of total circulation.

Metro dailies	67.4 percent	(Fairfax 21 percent)
Sundays	76.2 percent	(Fairfax 22.5 percent)
Suburbans	48.8 percent	(Fairfax 16.4 percent)
Regional dailies	22.2 percent	(O'Reilly 30.8 percent)

²Data from *Communications Update*, Communications Law Centre: for ownership statistics, see February 1996 issue, with an update due in February 1997; for tables of closures, see September 1996 issue.

In the bush, Rural Press, controlled by John B. Fairfax, has grown to dominance in recent years, with 98 regional newspapers and 23 other agricultural publications. It has been adding radio stations lately and has 22 regionals.

- Magazines

Among the top 30 magazines, Kerry Packer's PBL controls 47 percent of circulation and News is second with 26.2 percent.

Cross media ownership between newspapers and radio, which the law is supposed to prevent, has begun to develop in regional areas. In the cities, Kerry Packer, owner of the Nine Network, has pushed his holding in Fairfax to the limit permitted and is awaiting political and legislative developments. Rupert Murdoch has done the same at the Seven Network and waits.

Closures

At the same time as this concentration has grown, the fatality rate among newspapers has been more severe in the past 10 years than at any time since at least 1920. Since 1987, 14 metropolitan newspapers have been closed, eight dailies and six Sundays. This is contrary to the claim that concentration of media ownership actually assists free speech and diversity because the largest groups, if permitted to grow, will cross-subsidise weaker titles within their stables.

In magazines, we have seen additions by the major publishers to the number of titles within already crowded categories, especially so-called women's magazines. Australian editions of established foreign magazines have appeared.

But at the same time, small independent local magazines have fared badly. Among those to have closed since 1990 are: Brian Toohey's *The Eye*; *Modern Times*, formerly *Australian Society*; *Australian Left Review*; *Ita*; and most recently Max Suich's *Independent Monthly*.

It is not to the point whether you or I liked these magazines. They were the type of voices that contributed to what the philosopher, Max Charlesworth, recently called 'the civic conversation'.

There are some still, but the number is diminishing.

Why concentration matters

The list of potential adverse effects of concentration, distilled from the literature by the 1990 Mathews Committee in Victoria:

- (a) concentration of power unacceptable in a democracy,

- whether or not that power is used;
- (b) insufficient channels for the expression of opinion;
- (c) economic forces creating barriers to entry for others who might dilute that power and open new channels;
- (d) diminished localism of content and accountability caused by a group's size and pursuit of economies of scale;
- (e) debilitated journalistic culture caused by reduced competition, self-censorship, lack of alternative employment;
- (f) conflicts of interest for owners with non-media interests. Although not caused by concentration, such conflicts grow in their potential adverse effects in proportion to concentration.

To me, this list is powerful enough for the onus to lie on those who would worsen concentration to demonstrate how, despite what I have listed, such a worsening would serve the public interest.

Technology won't solve it alone

Technology alone won't fix the concentration problem, contrary to what we are constantly assured.

In Australia, the pattern remains that when a new medium is introduced it is exploited first and best by the dominant players and this reinforces their dominance. The wireless was soon absorbed by the press groups. They swallowed free-to-air TV from 1956. Pay TV is in the same familiar hands. Both News and Fairfax are active in on-line information technologies, gathering the classified advertising from their many papers and providing them in one convenient virtual site.

Broadband technologies do offer tremendous potential for diverse and independent 'publishing' and 'broadcasting', and yet history advises caution. Much will depend on access, both for the audience and potential suppliers. This is especially so in Australia because we did not separate carriage from content. Telstra and Optus are laying the broadband cables which everyone will need. Yet both are also linked to the largest content providers and have a vested interest in steering audiences to those suppliers and in frustrating access to competing suppliers.

Media in democracy

The role of media in lubricating democracy has long been recognised. Theoretically at least, media are central to an informed electorate and

to the checking and counter-checking among institutions wielding power in a free society.

Media hold the critical power of disclosure, and the fact that the outlets may be privately owned, and that those who run them are neither elected nor appointed by those who *are* elected, does not mean that they do not wield public power.

It follows that media have public responsibilities.

To be legitimate, media power must be accountable.

On the whole, media self-regulation in Australia is poor. When cries are raised for statutory regulation of media content, the media reply that, since media is an essential watchdog on government, it cannot be safe to hand government powers over content which it might use as a muzzle.

Concentration of media ownership increases the power in media, yet for reasons of democratic theory and freedom-of-the-press principle, public institutions are said to have no proper role in holding that power to account.

If unaccountable, is the power legitimate? The point was made elegantly by the Canadian Royal Commission on Newspapers in 1981:

The most fundamental characteristic of a successfully free, democratic society is that the people and institutions exercising power in its various forms are generally felt to do so legitimately. They earn some consensus of public confidence; their motives are trusted.

That sense of legitimacy in their role cannot be generally attached to Canadian newspapers in the present extent an form of their concentration. The large proprietors do not claim that it can. They say only that they do not use their power. But those who work for them, who gather the news and select and edit it, know that the power is there, setting the parameters of policy. That knowledge shapes the cynicism of the press. It is the journalists' sense of the lack of legitimacy that saps away the contribution that newspapers could and should make to the vitality of the country.

We cannot deny the Australian press its power. But we *can* deny it legitimacy.

A right of reply

Our denial of legitimacy, unless it is reinforced by a refusal to buy, will have no immediate effect. (Over time it would diminish the cachet, and eventually the share prices, of the mass media). As a practical matter, for many who wish to engage with public affairs, or even just to use other parts of the information and entertainment offered by mass media, refusal to buy is not a meaningful option.

So the problem of concentration of ownership of the mass media, together with the seriousness of the potential adverse consequences, requires further measures.

I think friends of free speech can conclude, along with the US Supreme Court among others, that a principle that government should not impede the free flow of ideas does not mean that private power itself should be permitted to do so.⁴

I propose that one response to the concentration of ownership and control of mass media in Australia is the introduction of a statutory right of reply.

Parliament would require that a named person or organisation the subject of media coverage must be given a fair and reasonable opportunity to reply in the media outlet involved, whether or not the media outlet invited, or wanted, or approved, the reply.

Such a statutory scheme, properly designed, would be consistent with free speech principles. With a colleague, Jenny Mullaly, I have put the case in detail in a Communications Law Centre paper entitled *Access to the Media and Right of Reply*⁵ Here, I will put the argument in summary form:

- A statutory right of reply is consistent with democratic theories of participation
- Freedom of the press is more than the freedom of the publishers. It involves the freedom of society to inform itself in order to undertake democratic governance.

⁴*Associated Press v. United States* 326 US 1, 20 (1945).

⁵Published in July 1995 and available from the Centre in Melbourne 03 9248 1278 and in Sydney 02 663 0551.

- Right of reply combats several of the potential harmful effects of concentration (listed above).
- In particular, it diminishes the distorting effect of the gatekeeper's role exercised by those who operate the few mass media outlets which are available. Those who exercise the right of reply 'choose themselves' and need not rely solely on being allowed through the gate.
- A right of reply would impose on mass media a 'common carrier' obligation. This is justifiable in markets which have been described officially as not contestable because of barriers to entry.⁶
- A right of reply is consistent with the High Court's recent line of cases which have found an implied guarantee of political free speech in the Constitution⁷. The court has re-balanced defamation law away from reputation and towards freer speech, at least in relation to political discussion.⁸ Similar thinking would support a statutory right of access.
- A right of reply statute must not restrict speech, or punish it. It *adds* speech.
- If technology does produce diversity and plenty, let the sun set on the right of reply. But not until then. It is needed in the meantime.

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⁶House of representatives Select Committee into the Print Media (Lee Committee), March 1992.

⁷*Australian Capital Territory Television v. Commonwealth* (1992) 177 CLR 106; *Nationwide News v. Wills* (1992) 177 CLR 1.

⁸*Theophanous v. Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v. West Australian Newspapers* (1994) 182 CLR 211.

Theophanous was expected to be reconsidered by the High Court in early 1997.