GOVERNMENT-FUNDED BODY POLICING THE PRESS A THREAT TO DEMOCRACY

Finkelstein's council would have the power to suppress criticism of those in authority

LAURA R. HANDMAN

EVEN in the US, Ray Finkelstein's report into the media and media deregulation made waves. The report was right to critique the failure of the press to effectively respond to complaints about inaccurate, biased or unduly invasive coverage. But its nearly 500 pages neglected to answer the most important question. Would an unelected government bureaucracy really be better at fostering an independent and responsible press? To ask that question is to answer it, as Americans have learned the hard way.

Last year, Communications Minister Stephen Conroy asked former Federal Court judge Finkelstein to investigate "ways of substantially strengthening the independence and effectiveness of the Australian Press Council with particular reference to the handling of complaints". And investigate he did.

The Finkelstein report catalogued the failures of the press in Australia and abroad. It cited surveys that show the public would like the press to be more accountable. In May, the Convergence Review final report was released, "agreeing with much of the analysis and some of the findings" of the Finkelstein report.

The problem with the report is not the diagnosis, it is the prescription. The Australian Press Council was founded in 1976 as a voluntary organisation to promote good standards of media practice. Anyone with a complaint about a member may complain to the Press Council. If it sustains the complaint, the Press Council can call for a correction, retraction or similar corrective action. Indeed, it has upheld more than 41 per cent of the nearly 9000 complaints received since 1988. Its members are committed to supporting and strengthening the council. They have agreed to increase its funding and limit their ability to withdraw from its membership.

But the Finkelstein report would transform these ethical guidelines into legal requirements. It envisions a world in which media organisations would be required to join a new body, the News Media Council, and submit to its jurisdiction. If a politician, celebrity or other person decides an article was unfair or insensitive — even if the article was entirely accurate — they could ask this government Media Council to order a media outlet to publish an apology, correction, retraction or reply. If the outlet did not obey, it could be held in contempt of court, presumably backed up by fines.

The US has flirted with this kind of censorship, often in wartime. But the American experience led to a deep distrust of the ability of government officials to act as what one court called "superior editors of the press". Our Supreme Court concluded that "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Even genuinely harmful speech is punished not by government censorship or restraints on publication but by private lawsuits for libel and invasion of privacy. This "breathing space" for speech and opinion is fundamental to our democracy.

"If there is any fixed star in our constitutional constellation," our Supreme Court ruled in 1943, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

What is truly remarkable about the Finkelstein report is not its scepticism of the press's ability to police its obligations to the public. It is the unquestioning faith in the ability to dictate what statements are incorrect, what opinions are unfair, what coverage is invasive and what positions are politically intolerable. The report would have this orthodoxy pronounced by the revamped Media Council, which would be led by "a retired judge or other eminent lawyer".

What kind of issues would this mandatory Media Council be drawn into? One need look no further than the present voluntary Press Council where many complaints are not about inaccuracies but about coverage thought to be unfair or hurtful, insensitive or derogatory.

This year, for example, the council agreed to consider the complaint from the husband of a prominent politician upset that his wife had been compared with Kim Kardashian. The council ruled the comment was "not so offensive as to outweigh the great importance in the public interest of allowing robust public discussion", but it is extraordinary that the council even accepted the complaint to consider in the first place.

The report claims such heavy-handed regulation is necessary because the time-honoured idea of a self-regulating "marketplace of ideas" has become a "romantic fiction" given the concentration of newspaper ownership in Australia. Even if this were true a few decades ago, when newspapers were the only game in town, it is self-evidently false now. There are innumerable ways that alternative ideas can get out, as the report acknowledged. Even for those who confine themselves to traditional newspapers (an ever shrinking number), stories bubble up from social or alternative media into the mainstream media.

The report also reassures the reader that this new mandatory Media Council would not constitute government censorship because its members would be independent of the government. Even if this were true in practice, is that better? If the nation is set to unleash an official body to dictate what the press may cover, is it really better that it is also totally unaccountable even to the elected government?

The Finkelstein report laments the decline of the media's watchdog function in the face of increasing financial pressures. In the next breath, however, it would impose additional financial and legal burdens on the exercise of that function. Press lawyers know all too well that even the question of what is true or false involves many shades of grey, and is fraught with the risk that disfavoured viewpoints will be censored.

Beyond the broadly shared goals of fairness and accuracy, it is hard to imagine a set of predictable, specific rules that could be formulated and applied to the nearly infinite set of variables that a reporter faces. This would leave the council with nearly unchecked discretion to suppress or punish unpopular views, including criticism of those in power.

"Democracy is the worst form of government," Winston Churchill said, "except for all those other forms that have been tried from time to time." Similarly, a free press does not persist in democracies because it is easy or always leads to the most satisfying result. A free press persists because its failings pale in comparison to those seen in regimes where the government has arrogated to itself, or its independent and unelected representatives, the power to decide what is true and false, fair and unfair, and which opinions will be permitted to be heard.

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NBN CO FAILS ON TARGET ROLLOUT

The private sector is showing how it's done properly and is doing it a lot cheaper

KEVIN MORGAN

BROADBAND Minister Stephen Conroy's reluctance to share the National Broadband Network's new corporate plan is in sharp contrast to his usual enthusiasm for spruiking the NBN. After sitting on the plan for weeks, he's due to release it tomorrow. His reluctance is understandable given it can only highlight the massive failure to reach any of the initial plan's goals.

The initial plan was released in December 2010 by Julia Gillard. That plan is now in tatters despite the fact before its release the Prime Minister's Department paid corporate advisers Greenhill Caliburn $1.1 million for an initial 11 days' work to vet the plan.

The subsequent report said: "Greenhill Caliburn believes that, taken as a whole, the corporate plan for the development of the NBN is reasonable."

Why then, if costly advice said the plan was reasonable and implicitly realistic, has NBN Co missed the targets set by that plan for mid-2012 by a huge margin? Could it be that NBN Co and its head Mike Quigley simply aren't up to the job?

Based on its original targets, NBN Co has achieved only 9 per cent of its rollout target for homes passed by fibre and 3 per cent of the planned connections where customers are hooked up to broadband. Based on its initial estimates, by June this year 317,000 households should have been passed with fibre and 137,000 homes actually connected to a broadband service. In reality, fewer than 25,000 homes had been passed and fewer than 4000 connected.

Those figures are for existing suburbs and fibre to new estates. When the figures are broken down, it is obvious this isn't just a debacle but an abject failure by NBN Co, especially in new (greenfield) housing estates. In late May, Quigley told Senate estimates: "As of the last week or so a bit over 300 services have been turned on — activated — in greenfield areas . . . and there are probably three or four times that quantity of lots that have been passed."

So less than 20 months after predicting that 172,000 greenfield premises would be passed and 132,000 connected, 0.6 per cent of the coverage target and less than 0.2 per cent of the active service target have been met.

Quigley has ready excuses. He has suggested the greenfields' failure was due in part to changes in the policy in late 2010. What he hasn't acknowledged is that NBN Co signed off on the original policy, which subsequently proved unworkable, despite advice in the $25m McKinsey NBN implementation study, which cautioned strongly against making NBN Co responsible for fibre to new homes.

And although the delays that have emerged in the rollout to existing suburbs are nowhere near as severe, 20 per cent of this year's target has been realised. Again, according to Quigley, it is not NBN Co's fault.

Quigley largely blames the protracted negotiations with Telstra over the $11 billion deal, which delayed access to the Telstra ducts.

That explanation is a furphy. As Telstra recently told the joint parliamentary committee overseeing the NBN, it had an interim agreement to give NBN Co access.

But perhaps what is of real concern is the fact Quigley, an industry veteran of 30 years, much spent at the highest levels, badly misjudged the time it would take to negotiate the Telstra deal. It is also of some concern that he failed to understand that serving up to 90,000 new homes a year with fibre was way beyond the competency of a start-up company.

NBN Co and the government have thrown money at the new developments problem to little effect. In May last year, NBN Co announced a $100m deal and a month later Quigley told the estimates committee: "the contractual arrangements with our greenfields supplier Fujitsu is working well. For this fiscal year (2011-12) we expect to pass approximately 65,000 lots and connect approximately 40,000 premises." As noted, about 1000 were passed and 300 connected.

So for the first time in 25 years, there are waiting lists for new telephone services. In many estates, homeowners are being provided with an interim mobile service by Telstra. Without a hint of irony, Quigley told the May estimates that NBN Co was "advising Telstra that they may receive requests for interim telephone services while the (NBN) network is being completed". Many new homeowners will have a long wait.

Similarly, homeowners in existing suburbs look set to be disappointed despite the fanfare that accompanied the Prime Minister's announcement in late March of the three-year rollout plan that would see "work under way or complete in areas containing over 3.5 million homes and businesses".

The reality is that little is happening. Contractors who signed up for hundreds of millions of dollars' worth of construction contracts 12 months ago have been sitting on their hands. As the joint parliamentary committee's recent report noted: "Importantly, the NBN Co is incurring contractors' late fees as a result of delays."

In effect, contractors are being paid to do little and even nothing because NBN Co cannot schedule the promised work.

But if NBN Co is failing dismally on delivering the fibre promised to 93 per cent of homes, it is at least making progress on its wireless and satellite services for the other 7 per cent.

That's because NBN Co has little active involvement in building either. These have been fully contracted out, albeit at considerable cost. The average capital cost of the wireless and satellite services will be about $14,000.

Given each service will yield less than $300 a year in revenues, these rural services will require ongoing annual subsidies of at least $3000 a year per service.

In contrast, Optus and Telstra are building far faster new-generation mobile networks at a cost in the hundreds of dollars, not thousands, for each customer.

The initial corporate plan was NBN Co's prospectus. Officers of a listed company that failed in similar fashion would be subject to severe sanctions but such is the importance of the NBN to the Gillard government that NBN Co is not accountable and can just rewrite history with a new prospectus.

We await it with interest.

Kevin Morgan was the ACTU member of Kim Beazley's advisory committee on telecommunications.

ABBOTT SHOULD DROP THE DOG WHISTLE

The Coalition's paper on foreign investment is a canine breakfast

JUDITH SLOAN
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ONE of the problems of being part of a coalition is that everyone needs to be kept reasonably happy. Compromise is often required and the give-and-take process can yield some strange results, particularly when judged from the point of view of one of the parties in the coalition.

On the face of it, the recently released discussion paper of the Liberal-National Party Coalition on foreign investment in Australian agricultural land and agribusiness looks like the outcome of a significant internal tussle. It is hard to disagree with Wayne Swan's description of the paper as a dog's breakfast.

Foreign investment is a tricky subject. Absent careful explanation, populism can quickly rear its ugly head.

Even though the discussion paper starts with the homily that "the Coalition unambiguously welcomes and supports foreign investment", the rest of the paper belies this declaration. If the Coalition is really unambiguous in its support, why the need for highly restrictive new rules applying to foreign investment in one particular sector?

Under the Foreign Acquisitions and Takeovers Act, the Treasurer already has the power to reject foreign investment proposals that are deemed to be against the national interest. In other words, it is a negative test that presumes foreign investment proposals will generally be in the national interest.

The Treasurer also has the scope to impose conditions on investment proposals to address national interest concerns. The act does not specify what is meant by the national interest but, in practice, this vagueness is a strength not a weakness.

Commentators who think we should completely free up foreign investment into Australia point to our high ranking in the OECD's assessment of countries' restrictiveness in relation to foreign investment; we are above the OECD average and just below the non-OECD (mainly developing countries) average.

But these rankings are contentious, placing significant weight simply on whether a country has a screening process. Moreover, the figures for Australia show substantial foreign investment and low rates of rejection of proposals.

Take 2010-11: there were 10,300 proposals, mostly in real estate. Only 43 were rejected and only one was outside real estate (the Singapore Stock Exchange's proposed takeover of the Australian Securities Exchange). (It should be noted that some proposals are withdrawn on advice and are not counted as rejections.)

The largest source country was the US, followed by Britain, China, Canada and India. The largest destination was, not surprisingly, the mineral exploration and development sector.

For business investment proposals, there is a threshold of 15 per cent or more of an entity valued at more than $244 million above which the proposal is vetted by the Foreign Investment Review Board. A much higher figure applies to investments sourced from the US ($1.062 billion), although this higher figure does not apply to some sensitive sectors. The higher limit will apply to New Zealand in the near future. When it comes to state-owned enterprises, all investment proposals are vetted by the FIRB, irrespective of their size. The government has issued a set of guiding principles that apply to SOEs. These cover whether the investor's operations are independent of the relevant foreign government; whether the proposal meets normal commercial and governance tests; whether the investor entity will pay normal rates of tax; whether any national security issues arise; and whether the investment affects Australian businesses and the economy, more generally.

The point is often made that the foreign investment rules of some countries, including the US, contain no special provisions for SOEs. What is generally overlooked is the scope for the US authorities, for example, to order ex-post divestments. Such scope may have a greater impact on willingness to invest than ex-ante vetting.

Having said that, the recent statement by Tony Abbott, made to a Chinese audience, that "it would rarely be in Australia's national interest to allow a foreign government or its agencies to control an Australian business" sits very uneasily with the Coalition's supposed unambiguous support for foreign investment.

At the very least, the Opposition Leader should have added the qualifying phrase, "in the absence of close examination". Investments by sovereign wealth funds (SWFs) do not raise the same degree of concern as SOEs, in part because SWFs mainly make portfolio investments and do not seek control of businesses. Moreover, SWFs tend not to have the same "institutional closeness" to governments as do SOEs.

The bottom line is that Australia's system for vetting and approving foreign investment proposals works well. There is a case for making the higher dollar limit that applies to US investments apply to all countries. Having separate rules for SOEs is sensible risk management.

While there are question marks over some of the conditions imposed more recently on some investment proposals, the arrangements overall do not appear to stand in the way of investment by foreigners to any great extent. They also reassure the public that foreign investment is subject to systematic scrutiny by government.

By contrast, the proposals in the Coalition's discussion paper defy logic. What would the proposed lower thresholds ($53m) for agricultural land and agribusinesses achieve other than to overwhelm the FIRB? Is the intention to discourage foreign investment, as is likely to be a consequence?

And what purpose would a national register of agricultural land and agricultural businesses serve? (Interestingly, the government has already established a working party to assess the feasibility of such a register.)

If the register tells us that 23 per cent of agricultural land is held by foreigners, so what? If this figure were deemed to be too high, would all further proposals for foreign investment in agriculture be then rejected?

And as for the issue of food security, this is a complete furphy. After all, we export nearly three-quarters of all the food produced in Australia and it is estimated that we could feed between 60 and 80 million people, given the present output.

Our interests are best served by free and open trade and investment channels. Should there be a situation in the future where we can produce only enough food to feed us — and heaven forbid if this were to arise, because it would suggest a dramatic slump in productivity and divestment in agriculture — then direct measures could be considered.

My advice to the Coalition is to put away the dog whistle and stick to a truly welcoming regime for foreign investment.

ARTS FUNDING A SOLID INVESTMENT, NOT EXTRAVAGANCE

We need a new dialogue that recognises the value of our cultural infrastructure

RUPERT MYER

IN Britain, next Sunday is a bad day to be a grouse. What some refer to as the Glorious Twelfth, will mark the start of the annual grouse hunt.

With seemingly ever greater regularity, the "justify public funding for the arts" season appears to have resumed in Australia.

This time around, it has been led by contrasting the value of the commonwealth government's investment in the arts with industry subsidies, notably to the automotive sector. ("What price is too much for a cultured society?", Adam Creighton, *The Weekend Australian*, August 4-5)

The assertions that there is a "paucity of information" about arts funding and that it is "not subject to the same rigorous scrutiny as automobile funding" are as inaccurate as they are galling. The grants given to arts organisations and individual artists, and the projects and programs of the Australia Council, are subject to the most detailed scrutiny while their annual reports, acquittals and evaluations are all in the public domain and subject to oversight by the Arts Minister, his department and the process of Senate estimates.

The assertion that the arts in Australia received very little from government until the late 1960s reflects a romanticised view of the past. The commonwealth established a literary fund in 1908 and the Commonwealth Art Advisory Board in 1912, which laid the foundations for present arrangements.

The nation's cultural infrastructure has been a function of continuous investment from public and private sources for more than 200 years.

The National Gallery of Victoria and the Art Gallery of NSW date from 1861 and 1874 respectively, and the Tasmanian, South Australian and Queensland galleries predate Federation. The association of philanthropy with these and other cultural institutions from the 19th century, for example the Felton Bequest, is significant and well documented.

Our national cultural memory has been formed by the appearance across the nation of art galleries and museums, public libraries, public halls and theatres, and of the performances that have occurred in them or artworks and cultural objects that have been collected by them. They represent a massive investment of cultural capital. The concurrent acts of creativity by our artists across too many disciplines to list have mostly leveraged off this infrastructure and, in turn, have contributed back to it.

To be asserting that it really started with government in the 1960s is to contribute to an unfortunate view that cultural funding is new and therefore should be the first to go, especially when times are tough.

The lessons of the past should give confidence to policymakers and the nation that the investment in the arts is wise, self-sustaining and a significant adornment to the nation's balance sheet. If anyone is left in doubt, the contribution of the arts and culture to the nation's GDP of 3.6 per cent compares favourably with agriculture's 3.9 per cent.

Total spending on the arts when stripped away of the ABC and SBS makes up less than 0.1 per cent of GDP. This is a pretty good return on investment. Finally, the claim that the arts have been privileged because "arts funding tends to have powerful and articulate backers", while flattering, is misleading. It implies that the backers of sport, health, education and defence lack the capacity to be so persuasive. This is patently not so. There don't seem to be many slouches in industry lobbying either.

Ironically, in its representations to policymakers, the arts sector has become more adept at measuring and articulating the economic impact of its contribution as well as, among much other measurable data, the educational, environmental, physical and mental health outcomes that the arts produce.

It is often less obvious how the sector should go about asserting the cultural outcomes that, in times past, were sufficient justification for substantial levels of public funding.

In today's polity, the language of cultural outcomes sounds perhaps too lofty, too long-term, too fuzzy or too personal. Such language causes discomfort and requires urgent reinvention so that the arguments can be put more convincingly.

By no means is this a complaint. These circumstances arise quite fairly as a consequence of the competitive environment for access to public funds. Indeed, it should always be so and the arts are acutely aware of the need to achieve multiple benefits for each investment made.

However, it should mean that a different type of conversation can now take place between economists, policymakers and the arts sector.

That conversation should acknowledge the value of our cultural infrastructure and the importance of maintaining it in good order. And it should elevate the debate and rid it of unhelpful mythology and misconceptions.

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