Denis Muller

Dr Denis Muller is a leading expert on media ethics and worked as a journalist for 27 years including Assistant Editor at *The Sydney Morning Herald* and Associate Editor at *The Age*. Since 1995 he has conducted independent social and policy research across education, health, environment and media fields. Dr Muller teaches media ethics and is the author of *Media Ethics and Disasters*. Denis is also Fellow at the University of Melbourne’s Centre for Advanced Journalism.
Introduction

DIGITAL TECHNOLOGY HAS WROUGHT THE GREATEST REVOLUTION IN COMMUNICATIONS IN 500 YEARS.

In scale and profundity it ranks with the Agrarian and Industrial Revolutions, and is wreaking creative destruction on long-settled methods and norms of human interaction.

The challenges it throws down to public policy are correspondingly dramatic and important. These challenges confront all societies, but because of the centrality of information to the operation of democratic capitalist societies, they place acute demands on societies like Australia to get to grips with the implications for their institutional arrangements and national sovereignty. Economic globalisation magnifies the challenge.

Among the most pressing challenges – for Australia as well as other mature democracies – is how to sustain and develop the institution we call the Fourth Estate, so that it efficaciously serves its function of providing information which empowers people to participate in political, economic and social life. It is a challenge that confronts emerging democracies too.

The impact of digital technology

Between 2002 and 2010, an historic shift has occurred in the economics of Australia’s media. Digital platforms have made ever-increasing inroads into the advertising market share of traditional media: 2.2% of the total advertising market in 2002, 16.8% by 2010¹. The greatest losers proportionally have been the printed newspapers, from 43.4% in 2002 to 31.1% by 2010. While newspaper companies have been among those making money from digital platforms, their rate of earnings from this source has been far lower than what they had been able to command for print advertising.² The result has been a sharp reduction in the number of journalists employed by newspapers, as publishers cut costs in response to shrinking revenue streams.


² Ibid., Pp78-79.
At the same time, they have created digital news platforms of their own, but in doing so they have become caught in a paradox. They have no choice but to harness digital technology as a means of distribution, but in doing so they have become more fungible.

Before the digital revolution, it was impossible to find a near substitute for the vast indivisible bundle of goods that a newspaper represented. Nowhere else could a citizen obtain so comprehensive an account of the news. The citizen was also assisted in making sense of the news by its being vividly differentiated as to importance. The same newspaper also provided essential information such as weather and financial information, and a smorgasbord of features and special-interest sections. Commensurate with this breadth of editorial content was a comprehensively broad command of the advertising market.

Online, however, each of these constituent bits – editorial and advertising – is accessible with equal ease from a variety of sources, often more specialised or focused than anything the general-interest newspaper can provide. And to a large extent, this access is free. This has dramatically reduced the non-fungible territory of all media. Users can get more or less all media content from anywhere – again largely free of charge.

So far, traditional media have struggled to respond. Their initial response has been to go on providing their traditional diet of content without charge. In doing so, they have reinforced the free-lunch mentality of online users.

They also have reinforced the point that what you can get from one, you can get from the others. This is the paradox: as they have tried to adapt, they have become more like whatever else is online; the more they have become like everyone else, the less incentive people have to visit, much less subscribe to, a particular outlet.

This also has diluted the market segmentation on which traditional advertising sales strategies are built, and created homogenised content that is generally of lower quality than was the case with print-only newspapers, especially the broadsheets. In addition, professional standards of journalism have slipped in the rush to be fastest and clickiest.

So a major issue is: how will journalism – until now paid for by a business model that is broken – be sustained in a way that gives it the capacity to perform the functions democratic societies have come to expect?
These functions include:

- providing the information necessary to enable the citizen to make civic choices, participate in the economy and have an understanding of the world beyond their personal knowledge and experience;
- keeping the public up to date about what is happening;
- providing a forum for the exchange of ideas and opinions, and
- being a watchdog on others in power.

The fate of newspapers is particularly significant here. Newspapers have always provided the largest injection of new content into the daily cycle of news and information. They still do.

Other media – radio, television and online – break little news of their own. They feed off the newspapers. But the capacity of newspapers to go on providing this font of material is now in decline because of the economic factors already referred to. Their journalistic staffs are being cut severely.

For example, The Age newspaper in Melbourne had a staff of about 400 journalists a decade ago. By 2013, it had about 240. Even so, this is a much larger staff than any of the commercial radio or television services have, and it is for this reason that newspapers continue to be the main source of fresh content.

Only the public-sector broadcasters, in particular the ABC, are to some extent shielded from the direct impact on their journalism of these economic consequences, and the issue of whether governments should also fund newspapers has already been canvassed in Australia in submissions to the Independent Inquiry into Media and Media Regulation (the Finkelstein Inquiry) in 2011-12.

The Inquiry’s report found that at that stage there was no evidence to support a case for government-funded newspapers, finding instead that the newspaper industry was finding ways to adapt successfully to the new world.

Since that time, the journalistic capacity of newspapers has continued to decline, however. So the issue remains about whether models of public-sector newspaper ownership to be found in some Western European countries ought to be examined for their potential relevance to Australia.
Questions of media ownership

Media ownership is a major political issue in a broader sense, and it has been the subject of much bad policy-making in the past. For example, driven by hatred of the “old money” Fairfax and Herald and Weekly Times (HWT) newspaper houses, Paul Keating as Treasurer in 1987 enabled Rupert Murdoch to take over HWT and, coupled with his pre-existing interests, obtain control of about 70% of Australia’s daily newspaper circulation. Keating’s motive, incidentally, is a matter of public record.

It was not the only occasion on which partisan and individual political considerations afflicted media ownership decisions. The introduction of pay television was held back years to allow the free-to-air channels a longer period during which they could enjoy freedom from competition from this new service. Various models of consolidation and aggregation in the radio and television markets have been introduced in largely unsuccessful attempts to balance the financial interests of the major media owners with the public interest in the provision of local news services and a competitive media market.

The result of successive changes in the rules concerning concentration of media ownership has been a serious reduction in the diversity of big media voices. Does this need to be redressed and, if so how?

Controls on cross-media ownership were introduced by Keating in an attempt to prevent newspaper owners from controlling television stations in the same market, and vice-versa. Does cross-media ownership still have any practical meaning in the world of technological convergence? The answer is probably yes, but this is unlikely to remain the case indefinitely.

Foreign ownership is a further recurring issue in media policy. Restrictions on foreign ownership have been under pressure for decades, and the emergence of global giants such as Google in the information business has made the old restraints look quaint. What are the policy alternatives here, and what are the principles that should govern policy choices? Once more the issue of sovereignty arises: to what extent is it possible for Australian policy-makers to exert meaningful control in this area?

Constraints on the way the ABC operates as the national broadcaster are also under stress as a result of the possibilities opened up by digital technology. Its Charter places a heavy emphasis on its providing an “impartial” news service, which has
meant that until recently the ABC placed severe restrictions on the use of comment in news and current affairs. As it has sought to exploit digital technology, the ABC has had to break out of some of these constraints, which raises the question of whether the Charter is still fit for purpose. The ABC is also required by the terms of its Charter to provide services that commercial broadcasters cannot or will not provide. Does this remain a relevant requirement now that there are so many new sources of information and entertainment?

**Media regulation**

The question of media ownership and control has dogged Australian policymakers since the inception of radio broadcasting. They have never quite got abreast of the technology.

The legislation used to regulate the electromagnetic spectrum when radio broadcasting began in 1923 was the Wireless Telegraphy Act of 1905 (passed for the purpose of regulating traffic in Morse code). The rationale for spectrum regulation rested on two imperatives: the technical imperative to apportion frequencies so as to prevent jamming, and the political imperative to exert public control over what was regarded as a communications medium more powerful than any previously seen in human history.

Digital technology has more or less removed spectrum scarcity as a rationale for broadcasting control, but the Broadcasting Services Act of 1992, the Telecommunications Act of 1997 and the Telecommunications (Consumer Protection and Service Standards) Act of 1999 remain in 2013 the main legislative instruments by which the electronic and digital media are made subject to government control.

Even allowing for the fact that they have been repeatedly amended in response to successive technological developments, their origins are nearly as remote from today’s media and communications landscape as the Wireless Telegraphy Act was from radio broadcasting.

Major issues confront today’s regulator, the Australian Communications and Media Authority (ACMA). The ACMA itself was created as a “converged” regulator in 2005 in order to enable government to develop policy in respect of the four worlds of telecommunications, broadcasting, radio communications and the internet. Convergence has already happened.

It can be seen, for instance, in the fact that the television broadcasters now publish news in text form online, and newspapers now publish audio and video news content online. The contemporary challenge is to find ways of making good and relevant policy for a networked society, in which the old
centres of communication power – the newspaper houses, television and radio stations – now stand like weathered pinnacles of rock in a tumultuous sea of many-to-many communications.

This power shift and its implications present policymakers with an entirely new control paradigm. Is control any longer possible? If it is, on what basis and how should it be exercised? What meaning does the concept of sovereignty have in a world where it is no longer possible for a democratic society to close its eyes and ears to whatever is available anywhere in the world, and where digital communications are integral to globalised economics?

The ACMA is wrestling with these issues but it has yet to develop a coherent approach. How these challenges concerning control might be met presents a rich field of possibilities for research.

Media accountability

Related to this is the broader question of media accountability. The ACMA is a co-regulator of radio and television broadcasting and some online content, but in the converged media environment the boundaries of its regulatory reach are somewhat blurred. For the time being, it is operating on the basis that text content produced online by broadcasters falls within its remit, but text, audio and video content produced by newspapers does not. This falls within the remit of the Australian Press Council. In the converged environment, these old distinctions are increasingly anomalous.

There are several more policy issues concerning the ACMA. One is a matter of principle. The ACMA has the power to issue, suspend and cancel broadcast licences. This power exists not only in respect of a broadcaster’s general performance but specifically in respect of its performance in disseminating news and current affairs.

In a liberal democracy, it is oppressive that news and current affairs content should be subject to a system of government licensing. The press was freed from this yoke in the late seventeenth century because it was considered to be incompatible with the freedom of speech necessary to the fulfilment of the Lockean ideal of the sovereign people. That broadcasting should still be burdened by it is a by-product of the policy-making that surrounded the introduction of radio broadcasting discussed earlier.

Initially, radio stations did not have news services, and so the issue was not relevant. When television was introduced in 1956, licensing arrangements similar to those used for radio were simply adapted to the new medium. By then, radio stations had developed news services, even
though most commercial broadcasters relied heavily on a supply of copy from newspapers, and television carried news from day one.

In the converged environment, this by-product stands revealed as an accident of history that, as a matter of principle, needs correcting.

Three large questions of policy arise from these considerations:

i. What is the justification for continuing to have government licensing of broadcast news and current affairs?

ii. What mechanisms of media accountability are desirable in the digital age?

iii. How might such mechanisms be operationalised?

Attempts by the Labor Government of 2010-2013 to address these questions ended in disarray. However, significant policy options were developed and remain available for reconsideration.

Matters of law

Related to the issue of media accountability are questions concerning freedom of speech. Australia has no bill of rights and only narrow constitutional protections of free speech. Free speech is a common-law right, but this right is residual after statute-based limitations have been taken into account.

Beyond the common law, such general protections of free speech as exist have been created by the High Court, not by Parliament. These protections were conferred in a series of cases in the early 1990s known collectively as the “free speech” cases, the most important of which was Lange v ABC. In this case, the High Court construed the Constitution as containing an implied right to freedom of communication on matters of government and politics.

The absence of a more robust free-speech provision in Australia’s constitutional arrangements has made it more difficult than would otherwise be the case to strike the balance between freedom of speech and protection of interests that conflict with it. Two areas of immediate concern are privacy and vilification, or hate speech.

There is no general right to sue for protection of privacy in Australia. The Australian Law Reform Commission in late 2013 began a review of this matter under a reference from the Labor Government to examine possible designs for a tort. The concept of a tort was vehemently opposed by the newspaper industry on the grounds that it would unreasonable abridge free speech. This debate, however, occurred in the shadow of a High Court judgment (Lenah Game Meats v ABC) in which the Court canvassed the necessity for the introduction of a tort, and went so far as to develop
a privacy test for the purpose. In these circumstances, it is possible – even likely – that whatever the Law Reform Commission of the Federal Government do, the High Court will sooner or later recognise a general right to sue for breach of privacy.

In addition to the debate about the merits of a tort of privacy, there is also an important debate to be had about the desirability of judge-made law becoming the means by which important issues of social policy such as this are resolved.

Vilification law is another field in which the balance between freedom of speech and protection of people from harm – in this case caused by hate speech – is contested. The central issue is whether “insult” and “offence” – as currently provided for in the Racial Discrimination Act – are sufficiently high thresholds of harm to justify abridging free speech. This is a sensitive and complex issue, and affects not just racial discrimination but other forms of discrimination also.

Relevant to all these questions of law is the issue of sovereignty. The Internet is a global phenomenon. Nation states may pass laws to regulate it within their borders, but in a liberal democracy the means necessary to enforce those laws may well be considered unacceptably oppressive. For example, defamation jurisprudence has established that for the purposes of a suit for defamation, the place of publication is the place of download (Gutnick v Dow Jones). However, enforcing a judgment in a foreign jurisdiction, in the absence of any international treaty on the matter, presents formidable difficulties. What policy responses might be necessary to enable the rule of law in respect of communications to prevail across national boundaries?

**Conclusion**

A diverse range of complex and interrelated issues confront policy-makers in Australia and other mature as well as emerging democracies as a result of the digital revolution. The questions concern media functions, media economics, plurality of voices, national sovereignty, media accountability and the intersection of sometimes contending civil and political rights. The questions arise in respect of an institution that is central to the functioning of a liberal democracy. The term “the fourth estate” is not just a slogan. It describes the relationship of the media to the other three great pillars of a democracy – what we have come to think of as the first three “estates”: parliament, executive government and judiciary. It exists to perform the functions described earlier, in particular as a locus of power that holds other loci of power to account. If it is to perform those functions effectively, the policy challenges need to be taken up.
Melbourne School of Government

The Melbourne School of Government (MSoG) research agenda addresses these kinds of governance and policy dilemmas and MSoG provides training for people who must deal with these in their work.

Research@MSoG aims to provide excellent scholarship which has an impact on governance and public policy. This research underpins our ability to improve the capacity of policy makers to make sound decisions, design and deliver effective policies and programs, and build robust institutions in Australia, the region and beyond.

MSoG’s research agenda is informed by global and regional developments, in particular those associated with the ‘Asian Century’, and how country specific and regional public policy will need to adapt and change.

Within this overarching focus, there are four research themes:

- Governance and Performance (designing better governing institutions and improving policy-making and policy performance)
- Knowledge and Expertise in public policy (using different types of evidence and new approaches, and managing competing perspectives)
- Security and Political Engagement (responding to the effects of war, natural disasters, and dispossession, and improving political engagement)
- Governing Markets (improving the instruments that structure relationships between governments, governing institutions, and private actors).
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Research collaboration

Leanne McDonald
Research Development Manager
Phone: +613 9035 7677
Email: l.mcdonald@unimelb.edu.au

Executive education and partnership opportunities

Hilary Blackman
External Relations Manager
Phone: +613 9035 5428
Email: hilary.blackman@unimelb.edu.au

@Government_UoM
government.unimelb.edu.au