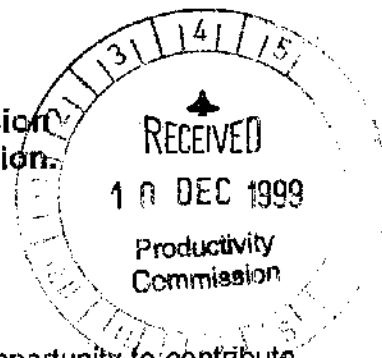


**KEY CENTRE FOR ETHICS, LAW, JUSTICE & GOVERNANCE,  
Griffith University, Queensland.**

**Submission to the Australian Productivity Commission  
Draft Report on the Review of Broadcasting Legislation.**



1 Introductory remarks.

1.1 The Key Centre for Ethics, Law, Justice and Governance welcomes this opportunity to contribute to the Australian Productivity Commission's Review of Broadcasting Legislation.

1.2 The mission of the Key Centre is to consider the challenges to liberal democratic values posed by globalisation and other forces for change, and to develop ways in which those values may be reconceived and institutionalised within the public and private sectors. It is the first research centre in either law or ethics, funded by the Australian Research Council.

1.3 The Key Centre and its institutional predecessors have provided consultancies on the development and implementation of codes of conduct, with their proposals for ethics and integrity measures being adopted by various parliamentary committees, including the Nolan Committee on Standards in Public Life in the UK, and sectors of the OECD. The Director was part of a World Bank mission to Indonesia to offer advice on governance reform. He has been principal legal advisor to the Queensland Scrutiny of Legislation Committee since 1995.

1.4 The Key Centre's interest in the Productivity Commission Inquiry arises out of a active interest in media ethics on the part of the Centre, its staff, and the Chairman of its Advisory Board, the Hon. Justice Tony Fitzgerald. The ABA's 'cash for comments' inquiry prompted the Key Centre to convene a Media Ethics Forum in Brisbane in September 1999, co-hosted by the Australian Key Centre for Cultural and Media Policy. Some of the suggestions in this submission were developed from points made during that forum. The Key Centre acknowledges the contribution of those who took part in the forum and is able to provide a list of participants on request.

1.5 The Key Centre's broad position on media ethics is that any discussion of media regulation and reform should recognize the critical role of the media in the formation of public opinion on political, economic, social and cultural issues. While most media organisations are commercial operators within the market, they are also critical to the functioning of our democracy and our culture. The Key Centre believes that any changes to the broadcasting legislation should recognize this dual role and enhance, rather than compromise, the integrity of the media's role in our democracy.

1.6 The Key Centre's concern in this submission is with those sections of the Broadcasting Services Act 1992 (BSA) that refer to : services which offer information and education; the provision of a regulatory environment which is responsive to audience needs; and the encouragement of fair and accurate coverage of matters of public interest. With regard to the Productivity Commission's Draft Report, this submission primarily addresses the issues raised in Chapter 10 (Codes of Practice and Compliance).

1.7 This submission notes the specification, contained within the Competition Principles Agreement, that legislation which restricts competition should be retained *only if the benefits to the community as a whole outweigh the costs* and if the objectives can be met only through restricting competition.

1.8 This submission also notes that the Inquiry is charged not only with identification of the effect of the current legislation on competition but with analysis of "the benefits, costs and *overall effects* of the legislation". With regard to the Inquiry Issues Paper, this submission notes the following:

- \* Section 2.2, on the issue of public interest, expresses concern regarding: plurality of opinion and concentration of political power; diversity in news, current affairs and political commentary; the adequacy of the broadcasting policy to provide for community standards; and social objectives.
- \* Section 2.3, in dealing with the economics of the industry, questions the extent to which broadcasting services are likely to become business services, rather than education, entertainment or information services.
- \* Section 2.4, in addressing the principles of regulation, asks whether the BSA adequately addresses public interest.
- \* Section 2.5, dealing with regulatory regimes, asks if the Australian Broadcasting Authority has been successful in its oversight of industry self-regulation and in its adoption of a "more market based, less interventionist approach". This section also asks whether the codes of practice achieve the objectives of the BSA in adequately reflecting community attitudes toward appropriate broadcasting.

### Key Centre Responses to the Draft Report recommendations.

#### 2. Establishing the need for media ethics in general.

This submission notes that the Draft Report does not specifically address the issue of broadcasting ethics, however the Key Centre believes that the ABA's 'cash for comments' inquiry has demonstrated a need to do so. By way of a general introduction to the issue, the Key Centre offers the following observations.

2.1 In modern liberal democracies, the majority of citizens value both democracy and the market, and there is popular commitment to the belief that politics should be dominated by democratic principles and the economy should be dominated by market principles. The difficulties arise at the interface between the two. While both democracy and the market are built on the single principle of individual choice, they involve two fundamentally different currencies. The currency of democracy is based on 'one vote'; the currency of the market is based on 'one dollar'. The temptation is for those who have accumulated the currency of the market, to use that capital to influence and to accumulate the currency of democracy. Accordingly, defining and policing the boundaries between the market and democracy is a perennial problem in modern liberal democracies.

2.2 Within the media industry, the primary goal of ethics is prevention of distortion at the interface between democracy and the market. Media institutions operate at this interface, playing an essential role in the formation of public opinion and the exercise of individual choice. Yet most seek not only economic success, but government decisions that will further enhance that success. Additional complications often arise from ownership of other non-media assets. The goal of media ethics, therefore, is to prevent distortion of the role of media institutions in the formation of public opinion and, consequentially, in our democracy.

2.3 The Key Centre believes the duty to ethics should override the duty to maximise profits. This is not necessarily anti-competitive - it simply prevents media organisations from developing illegitimate power and influence over democratic processes. It might be argued that the effect of this would be to render media organisations less economic and reduce the price of the "asset". However this would suggest that the price had been inflated in the first instance, due to the political power of the organisation. So, while conflict might arise between ethical duties and the duty to return a profit to shareholders or owners, the Key Centre would argue that profit maximisation and the rights of owners are not the only values within a liberal democracy and must not override other values.

### 3. Ethics and Professionalism

3.1 Ethical standards need to apply to an entire industry - not just one profession within that industry. While the Journalists' Code of Ethics is a well-written code, the 'cash for comments' inquiry has demonstrated that a person's perceptions of their obligations to ethical media standards can depend on whether he/she is, or is not, "a journalist." As the criteria for being 'a journalist' are arbitrary and loosely-defined, this renders largely ineffective the Journalists' Code of Ethics, despite the admirable standards expressed in that code.

However, the Key Centre believes it would be a mistake to simply formalise the Journalists' Code of Ethics and extend it to those whose activities overlap and affect journalism. It is better to establish ethics regimes within the media industry as a whole. The Key Centre would argue very strongly that all those working in the media who contribute to the formation of public opinion should be involved in the process of formulating and enforcing such ethics. The principal questions to be addressed in that process are: what ethical obligations arise from the media's role in the formation of public opinion; and how are those obligations to be enforced?

3.3 An analogy can be drawn with the health industry, where private hospital ownership does not override the professionalism of the medical staff. It would be unthinkable for the owner of a hospital to interfere in the diagnosis of patients under his employee's care. Similarly, it should be unthinkable for a media owner to determine or skew the analysis made by journalists of political, social, economic and regulatory issues.

The hospital analogy is additionally important because it demonstrates that individual professionals do not act on their own. Doctors depend on other professionals to effect treatment, and discretionary team decisions are often required. However, these issues call for ethical debate and input from the various professionals, and the integrity of the hospital depends on how they, as a body, handle such issues. Likewise, in the media, a comprehensive approach is required.

### 4 Codes of Conduct and Ethical Regimes – a methodology

The Key Centre would make several points with regard to ethical regulation, and point out that the major recommendations made in this submission draw on lessons learned in researching other attempts to introduce ethics into organisations and industries.

4.1 Codes of ethics on their own are inadequate as a means of ensuring ethical conduct. It is frequently assumed that codes alone are the answer to ethical problems, and that strict enforcement of those codes is the answer to issues of bad or questionable behaviour. Research into business ethics, public sector ethics and legal ethics has led the Key Centre to conclude that while codes have an important role, they can be effective only as part of an 'ethics regime' - or what Transparency International refers to as an 'integrity system'.

4.2 It is important to recognize that codes have a dual function – they are both aspirational and disciplinary. The aspirational elements of the code indicate the goals which a profession, organisation or industry strive to achieve. The disciplinary elements relate to that kind of behaviour which falls so far short of those aspirations as to deserve punishment.

An ethical regime is more effective if the aspirational and disciplinary elements are seen as part of a continuum of behaviour, with the implicit guarantee that those who keep their eye on the higher goals will steer well clear of behaviour that requires sanction. The goal of an ethics regime is to move the behaviour of most members of the profession or organisation as far up that continuum as possible.

4.3 Codes should be 'bottom up'. In developing codes, those to whom they apply should have the central role, because, first, they are the ones who have to internalise the ethical norms and, second, the code has to address the real temptations and dilemmas faced by individuals. This is not to say that they are the only contributors. The final code must be public and be externally validated by a relevant and authoritative body (e.g. the ABA).

4.4 We should recognize the different levels of specificity in codes. One model adopted in the Queensland public sector has particular merit. The Public Sector Ethics Act of 1994 sets out five general principles for ethical officials to follow. However, they are at a very high level of generality and intended as a guide to the individual public sector agencies in developing THEIR codes of conduct which, in turn, interpret the general principles and apply them to their own specific roles. If the Act sets out an aspirational ideal of a Queensland public servant, the individual codes should set out aspirational ideals and disciplinary minima for police officers, fire officers, teachers, etc. In particular, they can be at a sufficient level of specificity to deal with the particular ethical temptations and dilemmas that arise in their work. The codes so developed have to be approved by the minister and the CEO is responsible for educating staff as to their meaning and effect. If a similar model were applied to the media, a general set of principles could be developed for the media as a whole, with specific codes for individual media corporations.

4.5 In many industries, individuals are both members of a profession, and employees of an organisation. This often leads to further levels of specificity with sub-codes for professional employees that respect the ethical duties of membership of a profession, as well as duties incurred as an employee. Again, analogies can be drawn with members of the medical professions working in hospitals.

4.6 Codes should not be 'bolted on' but 'built in'. They should not be considered an extra (optional or otherwise). They should be built into the way we work and the way we do business.

4.7 For this reason, ethics should be seen as essentially positive rather than negative. If they are seen as a list of don'ts, as constraints on actions that are essentially determined by other motivations, they will always be marginalised. Ethics should be seen as a positive statement of how we should live our lives, how we should do our jobs. The negative side of ethical codes comes from identifying the kinds of action that clearly do not further those positive values.

4.8 An ethics regime should ideally comprise three parts. First it should involve an ongoing process in which we continually question the way we work, attempt to find honest and public answers, and to try to live by them. Second, the regime should provide ongoing opportunities and support for that process. Third, it should provide external validation for the codes and for disciplinary action.

4.9 In the case of the broadcasting industry, the Key Centre recommends that, for it to be comprehensive and effective, an 'ethics regime' should include:

- a general code
- company-specific codes as interpretations of that code
- professional codes for those involved in different activities – journalism, PR, talk show hosts
- an institution to review codes
- ethics education
- sources of ethics advice outside the chain of command
- independent sources of ethical advice on which media organisations can rely
- dispute resolution and disciplinary procedures within media organisations
- external bodies to adjudicate disputes
- ethical audits
- a media integrity commissioner to assist the process and give ethical advice on which media organisations can rely (see below).

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4.10 The thrust of this approach is to seek institutional solutions through ethics regimes, rather than individual solutions through codes of ethics.

4.11 This approach also acknowledges and encourages innovation in the development of ethical principles and in the institutional means for their support.

4.12 The Key Centre recommends that the development of such organisation-specific codes and the institutional means for their implementation should be a pre-condition of the issue or renewal of licences. Where there is competition for licenses, preference should be given to those who can convince the licensing authority that they can better fulfill the public role of the media and protect their integrity from inappropriate commercial influence.

4.13 Adherence to the ethical regime should be a matter of corporate governance, for which the board of the licensee is responsible. If the board does not ensure observation of ethical standards and the licence is lost, then the board would have to answer to the shareholders.

4.14 The Key Centre recommends the establishment of an Office of Ethics & Integrity Commissioner. The concept of an Ethics Commissioner, while new to Australia, is well established in Canada (Office of the Ethics Counsellor). Following the recommendations of a collaborative research project involving the Queensland Office of the Public Service and the Key Centre's predecessor (the National Institute for Law, Ethics and Public Affairs) the Queensland Parliament recently passed legislation to establish the office of the Queensland Integrity Commissioner as part of the statutory public ethics framework in that state. The Commissioner is available to offer prior advice on matters of conflict of interest and other ethical matters. An official who substantially complies with the Commissioner's advice is accorded conditional protection against liability in a civil action or administrative process. (See Queensland Public Sector Ethics Amendment Bill 1999).

4.15 A Media Ethics and Integrity Commissioner would be assisted by an Ethics Advisory Board or Community Advisory Panel to consider ethical issues arising in the media. The Commissioner would provide an independent source of advice on which media organisations could rely, and would generally assist the development of a media ethics regime. The Commissioner's office would also carry out ethics audits and ethical risk assessments.

### Conclusion.

The Productivity Commission Broadcasting Inquiry Issues Paper was clear in its concern that any changes to the legislation contained within the BSA should take into account issues of public interest and regulatory regimes.

The Key Centre strongly believes that, if broadcasting legislation is to take into account its effects on the community as a whole, then a clear and public broadcasting ethics regime is necessary. It also believes that, in light of the 'cash for comments' inquiry, this is an appropriate time to introduce such a regime.

The Key Centre looks forward to having the opportunity to elaborate further on these points at the public hearing in Brisbane.

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