

GRIFFITH UNIVERSITY



**THE KEY CENTRE FOR ETHICS LAW  
JUSTICE AND GOVERNANCE.**

*Proposal for an Australian Media and Broadcasting  
Ethics and Integrity Regime*

**Final submission of the Key Centre to the  
Productivity Commission Inquiry into Broadcasting.**

**February 4<sup>th</sup> 2000**



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# Introduction.

The Key Centre for Ethics, Law, Justice and Governanc (the Key Centre) welcomes this opportunity to further contribute to the Productivity Commision's Inquiry into Broadcasting.

The Centre notes that the Inquiry is concerned, amongst other issues, with the effect of legislative changes on the wider community and on public interest.

While developments in technology, ownership and universal service have prompted many submissions to this Inquiry and will no doubt be instrumental in bringing about legislative change, the Key Centre is concerned with public interest issues and the way in which the industry deals with these issues.

The AOL/Time-Warner merger has signalled a new era for the media industry, making it increasingly difficult to regulate, due not only to technological developments and globalisation of media conglomerates, but also the trend to private relationships between the suppliers of information and entertainment and their audience. However, despite these trends, and despite the commercial interests of most media organisations, broadcasting continues to play ongoing critical role in the formation of public opinion.

The Key Centre believes consideration of this role should be central to any discussion of media regulation and reform. It believes that any changes to the broadcasting legislation should recognize and enhance, rather than compromise, the integrity of the role.

In this regard, the Centre is concerned to address the public integrity and accountability of the broadcasting industry as a whole, as it relates to the formation of, and influence upon, public opinion.

This submission will therefore consider the feasibility of introducing an ethics regime to the broadcasting industry - a regime which would be effective, in a deregulated environment, in protecting public interest and social responsibility.

This submission will outline a rationale and a methodology for the institutionalisation of an acceptable and workable ethics regime within the media industry - designed to protect the integrity of that industry in a future of undoubtedly increasing commercial pressure.

These recommendations are based on world's best ethics and governance practice in the government and corporate sectors and on the latest international thinking on how that practice might be developed and enhanced. They incorporate ideas that emerged out of the Fitzgerald and 'WA Inc' enquiries and their aftermath, and from the Nolan Committee (which made recommendations for integrity mechanisms after the 'cash for questions' scandal in the United Kingdom). In particular, they draw on the OECD's recommendations for ethics and integrity systems which, in turn, derive from the work cited above. They also draw on some of the recommendations to BHP for its ethics and integrity system, under development for the past two years.

# **Rationale for establishing an ethics regime within the broadcasting industry.**

## *The intrinsic difficulties of media ethics*

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 principles for evaluating choices. The principle for democracy is 'one vote one value'; the principle for the market is 'one dollar one value'. The eternal temptation is for those who have accumulated dollars in the market to use those dollars to influence those decisions which are supposed to be governed by democratic principles. Accordingly, defining and policing the boundaries between the market and democracy is a perennial problem in modern liberal societies committed to both democratic and market principles. It gives rise to some of the most difficult and controversial issues in liberal democracies

Media institutions face particular dilemmas because they are, simultaneously, key elements of an effective democracy and, for the most part, commercial entities seeking success in the market. They play an essential role in the formation of public opinion and the influence on personal choices. Yet most of them are commercial enterprises seeking advertising revenue and seeking government decisions that suit their interests (something that is complicated by the ownership of non-media assets). The concern is that those commercial activities and interests in the market might distort the role that media institutions play in the formation of public opinion and, consequentially, in our democracy.

One of the starkest expressions of this potential problem comes from a reputed response by Lord Beaverbrook after the purchase of the Telegraph and Evening Standard. A puzzled interlocutor asked, given the apparently limited financial returns that could be expected, why he had bought it. His answer was simple: 'power'. By this, he clearly meant 'political power'. The Key Centre does not believe that this is a goal that can be justified in a democracy.

No media owner today would be as crass (or honest) as to say as much in public. It may be that no media owner would even think it in private. If politicians believe that media corporations might use that power, they may avoid actions that might conflict with the interests of media corporations.

## *Risk, not wrong-doing, the reason for regulation*

Those seeking legal or ethical regulation of the media are often met with flat denials that any problem exists. They may be asked to prove that media corporations have misused their capacity to influence public opinion - such as favouring particular candidates or supporting certain policies. Such actions are difficult to prove because they will not, of their nature, be transparent and open.

However, a demand for proof of wrongdoing misses the point. All that must be demonstrated is that there is a temptation to misuse the capacity of media organisations to influence public opinion for their own benefit. If there is the temptation, there is the risk that mere mortals will succumb to it.

A government does not have to prove that another country is planning to invade before it establishes a defence force. A board of directors does not wait for a fire before installing fire alarms. It does not even have to prove there is a risk before taking preemptive measures. It identifies, manages and avoids the risk - at the same time taking out insurance as a means of dealing with disaster, should it occur.

If we are to protect our democracy, we must deal with the risks which threaten it. Thus, the media industry should not wait until standards are breached and punitive measures required before taking preemptive action. There will always be risks wherever there is a conflict of interest - especially at the interface between the institutions of democracy and the mechanism of the market. What is required of both media regulators and media organisations is to identify those risks and develop robust risk management strategies. An ethics regime should be seen as part of a sound risk management policy for the media industry.

# Elements of an Ethics and Integrity Regime

## *Ethical standard setting, legal regulation and institutional reform – the essential trinity for an ethics regime*

An ethics regime is not merely a set of ethical standards, but includes a number of legal and institutional means to realise those standards. A 'bare code' of ethics without the support of laws that impose sanctions will become a 'knave's charter' – a guide for the good and a dead letter for the bad. Similarly, law that is disconnected from the values of those it seeks to regulate may fail for lack of ethical support. However, an ethics regime is not just legal and ethical rules. Even the best co-ordinated set of mutually reinforcing ethical and legal rules can be undermined, if those who are supposed to be guided by those rules work within unsupportive institutions where they are faced with conflicting demands or temptations to act unethically. Standards need to be built into the industry as a whole, and into the organisational and management structures of the organisations to which they apply.

Hence we have long argued that co-ordinated ethical standard setting, legal regulation and institutional reform are essential to dealing with undesirable conduct [see Sampford and Wood "The Future of Business Ethics: Legal Regulation, Ethical Standard Setting and Institutional Design" in Sampford and Coady (eds) *Ethics, Law and Business* Federation Press, Sydney, 1993].

## *Moving beyond minimum compliance*

Creating agencies which simply receive and adjudicate complaints and sanction breaches does help to establish minimum standards of conduct – especially where the sanctions have real teeth including the suspension or removal of a professional license to practice or a government license to broadcast. However, it offers no incentive to move beyond those standards and may give the false impression that meeting minimum standards is all that ethics is about. People might see themselves as ethical merely because they comply with the minimum standards for practice within their profession or industry – or even if there is the perception of compliance. So long as an existing or potential licensee is not seen as falling below the lowest common denominator in the industry, ethical issues can be ignored. Worse, there is often an uneasy suspicion that licenses and benefits are given to media organisations because of subtle threats to use media power against a government if it does not concede to the organisation's demands. Rather than rewarding media organisations for acting ethically, there is often a perception that media organisations are rewarded because they threaten to act unethically.

An ethics regime should encourage industry participants to look beyond minimum standards and encourage them to match and surpass the highest standards of the profession and/or industry.

Instead of rewarding those who threaten to act unethically, licensing systems should reward those who make the most credible promises to be good. Those seeking licenses and other benefits should show that they recognize the dilemmas and temptations (i.e. risks) in the modern media industry and come up with substantive suggestions as to how they will manage them. Those organisations which demonstrate a capacity to manage and avoid such risks should be viewed as more appropriate licensees. If the representatives of a democratic polity are to hand over public assets like broadcast bandwidth to media organisations, they should hand them over to those who are least likely to abuse the power that such assets give them. This offers the hope of a virtuous competition and ethical innovation among the companies in the improvement of ethical and governance processes.

This is not a distortion of the system for allocating licenses. It simply draws into the equation another extremely relevant factor and allows for a financially advantageous bid to be trumped by a bid that includes a more credible ethics regime. We emphasise that this is not a new factor. In addition to any personal moral reasons we may have for acting ethically, the integrity of news media is an important social and political asset. The introduction of ethics does not complicate the choices faced by media proprietors. It merely reinforces some reasons for choices and weakens others.

In the same way as licensing regimes can support corporate ethics by providing rewards for good behaviour, media organisations should, in turn, recognize and reward those staff who behave ethically.

### ***A range of standards and a standard to be raised***

A code of conduct or ethics needs an 'aspirational' component, that sets the highest standards to which a profession might aspire. Not everyone will achieve that standard (by definition, the highest standard is that which is achieved by the best). Thus, any code of ethics needs to recognize a range of relevant standards.

- Below the 'aspirational' apex of performance, lies the standard of 'good practice' which indicates a high level of professional performance that deserves to be rewarded.
- Below 'good practice' lies 'acceptable practice' – good enough to remain in practice and/or retain a license.
- Below that lies 'dubious practice' the acceptability of which is questionable.
- Below that lies the various levels of substandard behaviour that produce sanctions - from a reduced opportunity for development, to loss of license, to criminal sanctions.

These levels of standards should not be isolated but coordinated. Thus the *disciplinary* standards are clearly seen as the negation of the *aspirational* standards, and those who keep their eyes on the highest standards of the profession do not fall foul of the disciplinary ones.

The explicit aim of any ethics and integrity regime is to raise the standard of as many professionals as possible – to as near the aspirational goal as possible, and as far as possible above the level which attracts discipline. Interestingly, this renders less likely that behaviour which is in contravention of the minimum standards. Further, there is generally less sympathy for perpetrators, and whistleblowers are more secure.

### ***Moving beyond mere rules and codes***

Journalists have long recognized that their critical role in the formation of public opinion in a democracy imposes ethical obligations upon them. However, as demonstrated by the debate over whether John Laws is a journalist, there are others in the media with an equally instrumental role in the formation of public opinion. The issue is not whether John Laws is excused from journalistic ethics because he insists he is not a journalist. The issue is whether he and others have ethical obligations arising out of the part they play in the formation of public opinion, what those obligations are and how they are enforced.

How to define those ethical obligations? It would be a mistake merely to extend the journalists' code of ethics to those whose activities overlap journalism in form and/or function. Better to establish ethics regimes which specifically address the ethical issues raised by different kinds of work. In this regard, the Key Centre would argue very strongly that all in the media who contribute to the formation of public opinion should be involved in the process of formulating and enforcing such codes of ethics.

An analogy can be drawn here with the relations between medical professionals and their employers. Private hospital ownership does not override the professional duties of the medical staff. It would be unthinkable for

the owner of a hospital to interfere with the diagnosis of patients under his employee's care. Neither are ethical decisions taken alone. The hospital analogy is important because it reminds us, first, that it should be unthinkable for a media owner to determine or skew a journalist's analysis and, second, that ethical debate requires input from all the professionals involved - the integrity of the hospital depends on how they handle such issues. The same is true of media organisations.

A more specific example of co-ordinating such codes can be found in the public services of Queensland and Western Australia. In both cases, a general aspirational code has been established for the public service as a whole – that is, a statement of the ideals to which a public servant should aspire. Under the umbrella of the aspirational code, 'agency specific' codes are then developed - interpretations of those ideals for public servants in the specific agencies. Whereas a service-wide code is too general to be enforceable as such, agency-specific codes can provide the basis for disciplinary codes.

A similar general aspirational code could be devised for the media – or at least for those parts of the media involved in the formation of public opinion. This would be based on the role of public opinion in a democracy and the media's role in assisting its formation.

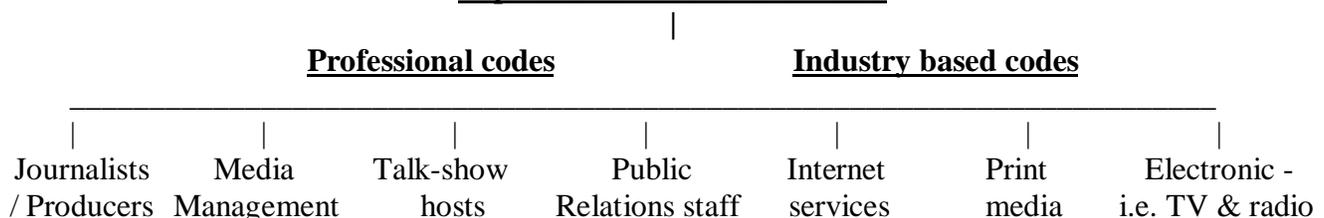
It is the norm for aspirational codes to be linked to the *raison d'être*, or the "justification" of a professional activity. Any profession or organisation needs to justify itself to the community of which it is a part. A welfare agency is justified in terms of providing a service to those who are less well off, hospitals are justified in terms of goals like the alleviation of suffering, police are justified in terms of reducing the level of crime. For the media, the justifications are based on a claimed capacity to entertain, and also to assist in the transmission of ideas and information to assist citizens to take part in the cultural and political life of the community.

Such a justification allows the co-ordination of the three essential elements of an ethics regime. It provides the principles which assist the interpretation of the legislation and regulations applying to that industry. It provides the normative basis for the institution's ethics and the positive standards by which the professionals should judge themselves and be judged. Finally, it provides a standard for analysis and review of the institutional design and functioning of media organisations.

The general media-wide aspirational code is then available to provide the bases for more specific codes for the individual organisations and professions that make up the media. These are:

- \* Codes for Different types of media industries – eg: broadcasting, TV, Print, Internet. These would, in turn, be interpreted to apply to individual media organisations, depending on audience and format.
- \* Codes for Different professions within the industry - eg. Journalists, Talk Show Hosts, Broadcasters, PR, management.

**Aspirational code for the media**



### ***Ethical leadership - a best practice approach to media ethics. Australia's competitive position***

One of the most common arguments against the setting of standards in corporate governance or accountability is that companies will flee to the least regulated jurisdiction. Some might even argue that some of Australia's media corporations would be uncomfortable with a requirement for higher ethical standards and higher ethical requirements. We would like to think that all our media companies would welcome higher ethical standards and claim that they already exceed them. Even if this is a bit optimistic, if a media corporation were to seek to locate off-shore following an increase in ethical requirements, this would not enhance its reputation - in fact integrity avoidance might ultimately be more damaging to its reputation than tax avoidance!

Integrity is more important for media with news or quasi-news functions than for most other industries. If Australia were to establish itself as 'an island of integrity' through a strong and credible ethics regime, media organisations that subjected themselves to that regime could claim greater credibility.

Indeed, if Australia were to be seen as developing a world class integrity regime for the media, it might further expand the influence which Australia has had in similar areas, such as public sector ethics. One of the great advantages of the Fitzgerald and WA Inc inquiries was that they led to deep and effective thinking about the kinds of systems required to avoid future occurrences. If the "cash for comments" scandal were to engender similar thinking about the media, it might provide a silver lining to the storms over John Laws and others.

### ***Concentration of media ownership***

The approach taken here is to use an ethics and integrity regime to minimise the likelihood that the power that comes from the media's role in the formation of public opinion will be abused. This is different to the traditional approach of minimising the power of each proprietor by insisting on diversity. Although there are other reasons for retaining diversity, some of the reasons for it are diminished. If there were a trade-off between a strong ethics regime and some further acceptance of cross-medial ownership, the Centre would unequivocally favour the former.

It would be unwise to attack those media organisations that are in the industry for profit alone. Although it would be unethical for such organisations to use the media to attack reforms that would compel them to be more ethical, it would not, of course, be surprising. Indeed it would be more surprising if such media organisations did not offer their support to a political party, even impliedly, in return for it opposing these reforms. This is why bi-partisan agreement would be extremely important, possibly crucial. If both parties agreed to refuse to modify the policy, despite promises of assistance at the next election, such inducements lose their sting. Indeed, if the parties agreed to publicize any such approaches, this would effectively deter attempts at such inducements and also make the point of why the reforms are needed.

## *The Components of an ethics regime*

There is no one perfect ethics regime for the media or for any other industry or profession. In all cases, they should try to use existing institutions which are seen to be legitimate and have established their effectiveness. The essential point is that certain functions be performed and that there be a degree of mutual support between them.

Set out below is what the Key Centre believes to be the essential components of a successful ethics regime - although modification is to be expected in the process of development, legislation and implementation. Clearly, it is not possible in a document such as this to fully describe the elements and the way they would interact, however the main elements are listed below.

### 1. Codes of ethics

These include codes for the media as a whole as well as its constituent parts and professions (to be developed by those in the industry).

### 2. Laws to support these codes

Laws should include those that: provide legal sanctions for conduct that falls below that which is set in the disciplinary elements of the codes; protect whistleblowers who report breaches; and strengthen corporate governance requirements.

The aim of an integrity regime is to fix the eyes of media personnel on the highest standards in the profession so that they remain sufficiently far above the minimum standards that they will never fall foul of them. To achieve this, however, it is necessary to coordinate the laws which impose sanctions with the aspirational codes of ethics.

Sanctions should definitely include licence cancellation. This has often seemed too dramatic and too damaging to the interests of other shareholders, however, this is where good corporate governance can come to the rescue. If the rules are set out clearly in advance, the Board is able to evaluate the risk and install a risk management strategy. If the value of their main asset is likely to be put at risk by a decision or policy of the board, the board is duty bound to avoid approving actions that might realise that risk. If the majority shareholder were to seek to influence the editorial policy to assist his other interests, that would involve a very substantial 'conflict of interest' which the other directors should never tolerate. Similarly, a proprietor who sought to influence the editorial content of the paper would, again, be facing a conflict of interest.

### 3. Organisation-specific institutional components.

These fall into two main categories:

- (i) organisation-specific institutional components, which include "Ethics Committees" and an "Incentives System" (for ethical action), and
- (ii) system wide institutions, which include a Media Integrity Commissioner, a Media Integrity Council (MIC), and licensing bodies for the various media services that required a license.

#### Ethics Committees.

We recommend that these include staff from all levels of an organisation. Functions to be allocated would be as follows:

- assisting in the development of the organisation's code
- monitoring the development of the organisation's code
- advising on difficult issues as they arise
- providing a source of advice to individual media professionals outside of the chain of command

### Incentive Structures

These need to be designed to ensure that they support rather than undermine, ethical conduct. They need:

- requirement of evidence of high standards of ethical behaviour in promotions and appointments
- requirement of evidence of such standards in general awards
- awards for the most ethically aware media agency.

### Media Integrity Commissioner.

The proposal is based in part on the Queensland Integrity Commissioner and on the Key Centre's research on best, and better, practice. A commissioner would fulfil the following functions:

- Develop ethics awareness programs
- Assist with the process of drafting codes
- Ethics co-ordination - co-ordinating approaches to improve conduct through different mechanisms.
- Provide a central source of ethics advice - a body to whom the agency in-house advisers could turn when they are uncertain
- Advise on any proposed new management processes to ensure that they further rather than retard high ethical standards. New management processes seem to emerge every few years, and it is important to know if there unintended consequences.
- Monitoring of the ethics processes within the media, receiving reports and recommending action to Parliament, ACCC, ABA or other bodies with the power or influence to improve the process.
- Ethics research - including:
  - Monitoring international best practice and communicating such to agencies.
  - Research into source of problems - this feeds into risk assessment, policy, code development and reporting
  - Promoting, and frequently providing, ethics education and training. Ethics education is essential in making an ethics regime effective. However, it can also provide some useful case studies for the research and policy development.
- Ethical audits (or "risk assessments") to anticipate potential ethical failures within media organisations in general or particular kinds of program in particular. These could be followed up with advice on how to handle the risks that were identified.

The IC would have a crucial role to play. He or she would help to drive the whole process and would assist in its development, maintenance, and improvement. However, the IC would not have a power to investigate complaints (such a role would be in conflict with the IC's role in providing advice).

### Media Integrity Council (MIC)

This body would provide an advisory board whose function would be to advise the IC in the exercise of his or her functions. It would also advise on the most difficult issues coming to the IC and to institutional ethics committees. It would perform a function similar to the Human Ethics Committee of the NH & MRC in setting guidelines for institutional ethics committees.

### Licensing bodies

It is the existing licensing bodies which would continue to make decisions on whether licenses should be issued and/or withdrawn. In addition to its usual license hearing, the licensing body should approve the codes put to it for validation and endorsement. It would also include an ethics investigation body. This should be independent of the IC and would provide individual investigations of perceived wrongdoing.

### Constitutional Constraints

One of the problems of regulating the media in Australia has been the lack of Commonwealth power over the press. However, with the growing integration of the media and its reliance on electronic forms of delivery, any media corporations which uses these could be covered by these requirements.

# Implementation

Implementation of a comprehensive ethics and integrity regime would be a major exercise. We would suggest the following as a broad set of procedures for implementation.

1. Appointment of **Media Ethics Commissioner**, Staff and Media Ethics Committee.
1. Undertake an overall **ethics 'audit'** of the Australian media to identify problems that need to be dealt with.
2. Develop an industry-wide "**aspirational**" **ethics code**.
3. Develop broad **industry-wide ethics awareness** programs. Initial sessions would educate staff on the nature of ethics, discuss ethical issues they have had to face, and inform staff of some of the means of "institutionalising" ethics in the work-place.
4. Develop **ethics committees** in individual media corporations. These would provide input and feedback. It is recommended that, in some cases, smaller groups, ('ethical circles') be formed..
5. Develop "**justification**" **statements** for each media outlet. Here, staff consider the values that "justify" the media organisation - first in ethical circles, then through the ethics committees.
6. Draft **general codes for individual organisations** based on the values that "justify" it.
7. Draft **specific codes for individual organisations**. This will generally include both aspirational and disciplinary elements (although the latter may end up included in formal rules, policies and contractual responsibilities).
8. Development of ongoing **monitoring and educational structures**, within both the office of the Media Integrity Commissioner and the individual organisations.

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The Key Centre for Ethics, Law, Justice and Governance will be pleased to provide further advice on a program of implementation, and is available to discuss work already done in Queensland and Western Australia, as well as experience gained through consultancy work done with the Nolan Committee in the UK, the OECD, and private consultation.

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