Regulatory Responses to Media Convergence in the United Kingdom and Australia: Radical or Incremental Reform?[i]

This paper considers how the UK and Australia have sought to address regulatory issues arising from media convergence. Both countries have engaged in wide-ranging investigations into the impact of technological, economic and social changes on established regulatory regimes in the media sector. The various reports that have been published illustrate not only the conceptual difficulties of developing a new framework for media regulation at a time when existing regulatory demarcations are under strain but also the political challenges of reaching agreement on an issue that polarises opinions. In particular, convergence has re-activated the debate between 'social responsibility' and 'fourth estate' models of media regulation with their proponents battling for recognition in the online environment.[ii]

In considering the impact of convergence on media regulation, three key questions need to be considered:

i) *To what extent are existing regulatory frameworks coherent and which, if any, content/behavioural standards need to be retained in the future*? Particular attention has been given to the appropriateness of continuing to apply different rules to linear and non-linear television services, with non-linear services subject to a lighter regulatory regime under the EU Audiovisual Media Services Directive (AVMSD). Alternatively, the application of similar rules across a given medium, eg broadcast television, may fail to make appropriate distinctions given the variety of services on offer, eg public service and non-public service channels etc. If a more level playing field is to be created, who are the relevant players and is the field to be levelled up or levelled down?

ii) *What is the most suitable regulatory approach*? It has been argued that given technological, industrial and social developments, greater reliance should now be placed on self, or at most co-, regulation in the media field. On the other hand, certain self-regulatory regimes, notably those for the press in the UK and Australia, have been criticised as ineffective, offering the public insufficient protection from unethical, in some cases unlawful, activities. This has led some to conclude that self-regulation should be adapted or even replaced with co-or statutory regulation in certain contexts. A related question is whether there should also be greater convergence in the regulatory bodies themselves.

iii) *How can those standards that are maintained be enforced in an increasingly global media environment?* Question of jurisdiction and evasion are addressed in the AVMSD, but the directive has limited application to service providers established beyond the EU, particularly where they do not make use of satellite facilities pertaining to an EU Member State. What scope is there for greater international co-operation at state or industry level to address this problem?

These issues are explored in turn below, though I will focus primarily on the questions of regulatory coherence and regulatory techniques.

1. The existing media environment: complexity, opacity and potential gaps.

The media regulatory environment in most countries is a complex one in that regulation has developed incrementally alongside new media services – in particular in response to the introduction of a range of electronic media in the early twentieth century. Different media products (newspapers/radio/television/film) were associated with specific delivery systems and subject to specific regulatory regimes.

Broadcast television and radio services are generally subject to the most exacting regulatory regime, in many cases in the form of state regulation, designed to guarantee certain community standards, protect consumers and third parties (for example from intrusive or inaccurate content) and ensure the provision of a range of political/ social views and domestic content. The basis for this more intrusive form of state regulation was that the broadcaster was granted use of a limited public resource, spectrum, and could thus be expected to use that in the public interest. In addition, the broadcast media have been seen as particularly influential because of the way in which they 'speak' to the audience, often in their own home, and, in the case of television, combine pictures and sound. Ease of access and a lack of control over the content made available at any given time led to an emphasis on audience, particularly child, protection.

With regard to *newspapers and magazines*, self-regulatory regimes have generally been adopted. This is largely a result of the battles for press freedom from state control in the seventeenth and eighteenth centuries, which shaped the conception of the press as a 'Fourth Estate': free to challenge and report on the state and thus needing to be free from state intervention. The focus of regulation here has tended to be on protecting third parties (and thus the protection of the industry from legal suit) with a focus on investigative reporting, accuracy, hate speech, confidentiality of sources, reporting on financial matters or judicial proceedings etc. Selection of what is to be covered is for the newspaper concerned and the reader is left to decide whether or not the standards adopted are acceptable (eg the topless page three women in the *Sun* newspaper, which would not have been acceptable on broadcast television). Self-regulation may take place through press councils or ombudsmen and/or at the level of the internal firm, with internal codes and readers' editors.

Film is primarily subject to self-regulatory regimes with an emphasis on, as with regulatory regimes relating to *videos* and *games*, the establishment of classification systems that provide the public with ratings/information about content, enabling potential viewers to decide whether this is the type of material they wish to watch. Such ratings may, of course, be then built into a regulatory system – there may be restriction on how films/videos/games with a high rating may be distributed. In the UK, for example, local councils have power to regulate cinemas in their areas and cinemas will breach their licence if they show a film that has not been rated by the British Board of Film Classification.

Content delivered over the internet, whether text, audio or audiovisual has tended to be subject to a much lighter regulatory regime, with, in many cases, the main

constraints being those of the general criminal and civil law. Bodies such as the Internet Watch Foundation in the UK help to reduce the incidence of illegal content online by providing hotlines for the public to report illegal content, notably child sexual abuse and obscene content, and informing ISPs and other content providers of the existence of illegal content on their sites. In practice, the majority of audiovisual content accessed online is provided by firms that have an offline presence – broadcasters/printed newspapers – and these firms tend to maintain a consistent approach to standards on and offline in order to maintain trust in their brand. Typically, they also offer filters for parents and access controls in relation to content that would normally have been made available after the watershed. In certain contexts, providers have developed their own private code of conduct and monitoring systems, particularly where they host third-party content.

In Europe, specific regimes have been adopted to cover *on-demand 'television –like' audiovisual content* in response to the requirements of the AVMSD. In the UK, such services are covered by a co-regulatory regime that is overseen by the self-regulatory body ATVOD, with backstop enforcement powers entrusted to the statutory communications regulator OFCOM.

The related field of *commercial advertising* has also been largely left to self-regulation. In the broadcasting sector the AVMSD imposes certain requirements relating to exposure and consumer protection and in the UK these have also been accommodated through a co-regulatory regime, with day-to-day oversight vested in the Advertising Standards Authority and back-stop oversight vested in OFCOM.

In many countries, the style, focus and intensity of regulation continues to be medium specific, with specific regulatory regimes working alongside the provisions of the general law. This tends to result in a complex regulatory environment and though complexity is not necessarily a regulatory sin, multiple regulatory bodies can result in demarcation disputes or unnecessary overlaps. Consumers and, in some cases, even the media organisations themselves, may be unsure as to who has oversight over particular services. In the UK, for example, even with regulatory consolidation under the Communications Act 2003, there are over ten separate regulatory bodies operating in the media field.

An example of a demarcation dispute that is likely to continue to be a focus of attention is whether video content posted on newspaper online websites is covered by the on-demand audiovisual regulator ATVOD, which cover television-like programme content, and the press regulator IPSO (previously the Press Complaints Commission/PCC). If the former, newspapers would potentially have had to pay for a second tier of regulation. In practice, neither regulatory regime seems entirely appropriate in relation to such video content. For example, the press code is primarily concerned with protecting children from inappropriate intrusion or publicity not, as is the case with the ATVOD code, with protecting children from exposure to potentially harmful or disturbing sexual or violent content. On the other hand, the ATVOD code does not contain standards in fields such as privacy, intrusion into grief and shock, payments to criminals, confidentiality of sources or financial journalism, which are contained in the PCC/IPSO code. These standards could well be appropriate in relation to journalistic material posted in video form on a newspaper website. In responding to a dispute relating to the video section of the Sun newspaper's website,

OFCOM concluded that this was not subject to ATVOD regulation. The section did not have the 'principal purpose of providing audio visual material', nor was it likely to be seen by its users as an alternative to watching a television programme service and was thus not in competition with those services.[iii]

The Sun video case highlights the fact that similar content can be subject to quite different regulatory requirements. As noted above, broadcast television programmes can be subject in the UK to an extensive range of programme standards set out in the BBC Editorial Guidelines and OFCOM Broadcasting Code as well as requirements relating to EU and independent productions and, in relation to the public service broadcasters, positive quotas for certain types of programming. Television-like on demand content is subject to a much more limited range of standards, which focus primarily on child protection and hate speech. The video content on newspaper websites is likely to be subject to the IPSO code, which seeks to ensure accuracy and ethical practices in the investigation and reporting of news. Not all newspapers may be part of this voluntary self-regulatory regime, however, and those which are not will be subject merely to the requirements of the general law.

This disparate framework has a number of very apparent drawbacks. Firstly, it is likely to confuse consumers. Particularly with the advent of connected televisions, offering access to both the internet and broadcast services, audiences will find it difficult to tell which regulatory regime applies and the standards that are in operation. Secondly, third party redress varies depending on the medium, the nature of the provider and substantive concern. Thus, in both the broadcast and press contexts, an individual damaged by inaccurate or intrusive reporting has access to an alternative process for resolving disputes, while no such recourse is available in relation to other on-demand content. In this latter context the individual has only the expensive and time-consuming option of commencing legal proceedings for defamation or privacy. Thirdly, it discriminates among media services depending on their mode of transmission (broadcast or on-demand) or origin (newspaper/magazine or other media organization), leading to potential distortions of the market. These observations suggest that there is a strong case for rationalization and rendering the present regulatory framework more coherent.

A rather different problem arises where increasingly divergent services continue to be subject to the same regulatory regime. As signal compression has facilitated the transmission of more broadcast channels, it has been argued in the UK that not all such channels should be subject to the exacting standards set out in the OFCOM Code - in particular, requirements of impartiality in the treatment of news. One approach here would be to distinguish public service broadcasters, which obtain some form of public support in exchange for undertaking certain programme obligations, from other commercial broadcasters that are in future likely to find themselves competing with online only services.

In this context, states, regulators, and interest groups have been considering how regulation can be made more coherent by ensuring that similar, competing services are treated equally and that services that are dissimilar are not inappropriately subject to similar rules. But if parity is to be achieved:

i) which regulations should be applied (do we adopt a social responsibility model or a libertarian fourth estate model, re-regulate or deregulate…),

ii) to which operators,
iii) employing which regulatory tools: state/co/self-regulation?
In the two sections below I briefly set out some of the proposals that have been put forward in the UK and Australia to address these issues.

2. The Response to Convergence In the UK

The present coalition (Conservative/Liberal Democrat) government has not sought to introduce radical reforms in the communications sector. Although a new communications act was initially envisaged for 2014/2015, government plans were put off course by the investigation into the phone hacking allegations led by Lord Justice Leveson, which also considered links between politicians and the press.[iv] Steps taken by the government to respond to the Leveson Report, notably the introduction of the Royal Charter for the Press and those provisions in the Crime and Courts Act 2013 designed to create incentives to join a recognised press regulator, were subject to extreme hostility and criticism from much of the press (as was the Report itself). In such a heated climate, policy avoidance may have been a tactical survival mechanism. An anticipated Green Paper was put on hold in 2012 and much of the innovative thinking has consequently come from specialist Parliamentary committees, regulatory bodies, civil society organisations and the academic community rather than government itself.

The focus of attention has been on:
i) The current rules relating to media ownership, which rely primarily on a 'media plurality' test set out in section 58 of the Enterprise Act 2002, triggered by certain media mergers. To date these rules relate to print and/or broadcast mergers and key questions for the future are whether their scope should be extended to expressly include online services, whether some more regular form of plurality review should be introduced, and whether government should continue to play a decisive role in plurality decisions.
ii) Content standards in the context of convergence, the subject of this paper.
iii) The future of self-regulation for the printed and online press.
iv) The governance and mode of funding of the BBC, with recent suggestions by the House of Commons Select Committee on Culture, Media and Sport that the BBC Trust should be replaced by an external independent regulator (report on *The Future of the BBC*, February 2015).

In relation to convergence, the House of Lords Select Committee on Communications in its 2013 report on *Media Convergence* suggested a new tiered framework, which retains separate press and audiovisual regulators but shifts the regulatory burden relating to certain broadcast and on-demand services.[v] The committee proposed that the existing regime for public service broadcasting should be retained, with other broadcast services, such as those provided by satellite broadcaster BSkyB, grouped together with on-demand television-like services to create a second unified regime. The Committee noted that 'at a certain point, the sensible course of action will be to establish a regulatory area for content inherently similar from the perspective of the audience, and to move the relevant providers into it. This will include TV-like providers and those TV broadcasters not captured by the first regulatory area by virtue of their PSB status' (para.65). A third area would be covered by the press regulator.

The fourth area, referred to as the 'open internet', would apply to all other internet content. The Committee envisaged that Ofcom and digital intermediaries, such as internet service providers, could play a greater role in monitoring services and co-ordinating self-regulatory initiatives to protect the public in this fourth domain. The Committee did not consider these reforms to require immediate implementation but recognized that, with the advent of connected-TVs they could be needed in the near future.

The Committee suggested that a new co-regulatory system be introduced for the combined broadcast/on-demand television sector, with general principles set by the designated co-regulator and a detailed code established by the industry itself. Non-psb broadcasters could be moved from a licence based to a notification based regulatory regime. The Committee was not prepared to speculate as to the content of any future code but considered it likely that this would 'ultimately be less detailed than Ofcom's Broadcasting Code', but could 'be greater in scope than ATVOD's current rules for on demand services' (para.73). It did, however, recommend that impartiality requirements be removed from non-PSB broadcasters to bring them into line with the current regulatory regime for non-broadcast news and current affairs (paras.114-116). Non-psb broadcasters would therefore benefit, while on-demand tv-like services would face a more exacting regime.

Clearly demarcation disputes are likely to remain with such an approach, particularly in relation to the nature of tv-like services, and an alternative, simplified, regulatory framework, which enforces certain standards uniformly across video, audio and text content can be envisaged. The Committee did, in fact, take a step in this direction by suggesting a *genre-based* approach to regulation, whereby news and current affairs content provided by all non-PSB providers, video as well as text, should be regulated by the new press regulator (para.118). This would not, however, reduce the overall number of regulators and could subject non-PSB television providers to two different regulators in relation to different aspects of their service, potentially creating a new set of boundary disputes. The idea of a cross media regulator specifically for news and current affairs was also considered by the Australian Convergence Review Committee and in the Finkelstein Report, considered in more detail in the section below.

Lara Fielden, who has worked both as a producer and regulator in the UK, has proposed a more radical response to convergence, which focuses on the intensity of the regulatory obligations rather than the medium.[vi] Her scheme involves four tiers of regulation, equally open to providers of text, audio and video based services. The first, most demanding, 'public service tier', incorporates both impartiality requirements and the standards currently contained in the Ofcom Code. Public service audiovisual providers would be required to be part of this tier but adherence would be optional for all other operators. The second, voluntary, 'ethical private content tier', would be somewhat more exacting than the present press regime but less so than the existing broadcast one. The third 'baseline private content tier' would maintain the minimum requirements set out in the AVMSD and would thus be compulsory for the services covered by that directive, though optional for other operators. A final fourth tier would apply to operators not caught by, or opting-in to, the other three tiers, where the general law alone would apply. Operators falling within each of the three key tiers of regulation would be able to employ standard

marks to inform the public as to the type of service they offered and Fielden proposes a number of incentives for service providers to commit to tiers one and two, such as prominence on electronic programme guides. One of the advantages of this scheme is that it would also be open to bloggers and amateur publishers who could buy into one or other of the tiers in order to benefit from the quality mark and any other advantages.

Government proposals have fallen far short of these recommendations. In the July 2013 DCMS policy paper '*Connectivity, Content and Consumers: Britain's digital platform for growth*' the government instead proposed a limited, two pronged approach to convergence, focusing on the establishment of basic standards and the provision of consumer information. Firstly, the government accepted the continuing legitimacy of differential regulation according to medium, in line with consumer expectations. It did, however, suggest that industry and regulators should 'work together on a voluntary basis to develop a more common framework for media standards, so that a more consistent approach applies across different media, reducing the likelihood of people getting caught out' (p.10). What is envisaged is a set of minimum guarantees, which would include:
'*Protection of minors*: including protecting children's exposure to material that seeks to sexualise them, strong sexual content, violence, imitable and dangerous behaviour, any specific health priorities, safety of children in content and protecting against commercial influence.
Hatred: preventing incitement to violence and extremism, abuse, discrimination, and propaganda.
Consumer protection: including protection from, for example, financial harm, health and medical risks, misleading content.
Protecting individuals: avoiding unwarranted infringements of privacy and ensuring right of reply and fair representation.' (p.33)
The government therefore proposes supporting an incremental process of industry led change. Rather more protection may be offered in areas that are currently not subject to specific regulation, though the standards may not extend much beyond those already established by the general law.

The second element is to ensure that consumers have access to relevant information about the regulatory environment and thus what they can expect. In particular, 'broadcasters, manufacturers and platform providers [are] to lead the development of consumer tools in this area, working with regulators to consider what mechanisms can be applied to clearly label regulated and unregulated content. One such mechanism, may be, for example, using the electronic programme guide itself to define the protected space.'(p.35) A degree of standardisation is also envisaged in this context as well as continued priority for psbs on electronic guides.

Major media reform thus slipped off the government agenda and with a general election shortly to take place it will be some time before the shape of media policy (in relation to media ownership and convergence) under a new government becomes apparent.

The government did, however, respond to the Leveson Report and the concerns voiced in it regarding the effectiveness of self-regulation by establishing a Royal Charter for the Press and introducing incentives (in England) for membership of a

recognised regulator through the Crime and Courts Act 2013. The majority of the press have, however, joined the non-recognised press self-regulator IPSO and the prospect of a regulatory body being recognised by the recognition body set up under the Charter remains remote. Press opposition to any form of state regulation could clearly make it difficult to develop co-regulatory regimes for content that includes online newspapers. Though the incentives relating to exemplary damages and costs contained in the Crime and Courts Act 2013 are unlikely to have much impact in practice (and the costs provisions are dependent on the creation of a recognised regulator) it is worth noting that the introduction of 'incentives' made it necessary to determine which operators could reasonably be expected to join a recognised regulator and which not. Broadly speaking the former includes publishers of news related content written by different authors that is subject to editorial control. Specific exemptions are then set out in schedule 15 that include: broadcasters; special interest titles; scientific or academic journals; public bodies and charities, company news publications; book publishers and 'micro-businesses'. This latter category comprises businesses with fewer than 10 employees and an annual turnover under £2 million which publish either a multi-author blogs or news material on an incidental basis that is relevant to the main business. The Act thus recognises that institutional size is a factor that may have a bearing on the desirability of regulation.

3. The Australian Experience

Within Australia policy debates have focused on a very similar range of issues:
i) media ownership rules,
ii) convergence and media standards,
iii) maintaining the provision of Australian content, and
iv) the future of press self-regulation, which, as in the UK, is widely considered to have been ineffective.
Three major enquiries were initiated during 2011 and reported in 2012: the Independent Media Inquiry into Media and Media Regulation (often referred to as the 'Finkelstein Review' after the inquiry chair), the Convergence Review and a review of the national classification scheme for media content.[vii]

The Finkelstein Review was set up to consider, among other things, the effectiveness of the Australian media codes of conduct, particularly in light of technological change, and the desirability of reform to the system of press self-regulation overseen by the Australian Press Council (APC).[viii] The Report recommended the establishment of a new statutory regulator, a News Media Council, with oversight of news and current affairs content on all platforms - print, online, radio and television. The powers of the Australian broadcasting regulator, the Australian Communications and Media Authority, would thus be restricted in relation to news content. The Council, which would receive government funding, would have the power to require a news media outlet to publish an apology, correction or retraction, or afford a person a right to reply. The report noted that 'In an era of media convergence, the mandate of regulatory agencies should be defined by function rather than by medium. Where many publishers transmit the same story on different platforms it is logical that there be one regulatory regime covering them all' (p. 8-9).

The Report recognised that it was not feasible, or desirable, to include all news publishers within the remit of the Council and proposed that only those news publishers with a circulation of 3,000 copies of print per circulation or internet sites with 15,000 hits per annum should be covered. Publishers not covered by these requirements would be allowed to join the regime on a voluntary basis.

The National Classification Scheme Review was set up to consider whether a regulatory framework could be devised that would ensure consistent classification across media industries, platforms and devices; meet community expectations and could be readily understood by the public. Consideration was also to be given to minimising regulatory burdens and costs, stimulating innovation and enhancing consumer trust in the system. Issues relating to convergence featured prominently in the concerns that led to the review, for instance the lack of clarity as to whether films and computer games distributed online had to be classified and the 'double handling' of films and television programmes, which required separate classification for different formats and platforms. The final report prepared by the Australian Law Reform Commission recommended 'platform-neutral laws for what media content must be classified, platform-neutral laws for what media content must be restricted to adults, and platform-neutral laws for what media content is prohibited' (p.14). The same classification would thus apply whether the content was screened in cinemas, broadcast on television, sold in retail outlets, provided online, or otherwise distributed to the Australian public. Given the extent of content now published online every day, the Report suggested that the obligation to seek classification should be confined to 'feature films, television programs and higher-level computer games' (p.15).

The Convergence Review was set up to consider the current policy framework for the production and delivery of media content and communication services in Australia in the light of convergence. It was required to take into account the findings of the other two inquiries. The Review also supported moving towards a more platform neutral regulatory system and suggested that certain regulatory requirements should be targeted at major media organisations, termed 'content service enterprises' (CSAs). CSAs are enterprises that i) control professionally produced media content; ii) attract a large number of Australian users of that content (500,000 users a month or more); and generate revenue in Australia from such content of over 50 million Australian dollars a year. The threshold adopted by the Convergence Review, considered to cover around 15 major Australian broadcast and newspaper enterprises, was thus much higher than that adopted by Finkelstein. CSAs would be subject to a number of content standards and, where they provided news content, would be required to meet appropriate journalistic standards of fairness, accuracy and transparency regardless of their delivery platform. These standards would be overseen by a self-regulatory (as opposed to statutory) body designed to oversee news and current affairs content, which CSAs would be required to join. The review thus sought to ensure greater consistency in the application of standards while ensuring that innovation was not stifled by restricting regulatory burdens to the major, and potentially most influential, industry players. Operators that fell below the stated thresholds would thus be effectively deregulated.

These proposals were heavily criticised in the media as an attack on press freedom and although a package of bills were framed around these proposals the main substantive provisions were rejected. The Federal coalition Government elected in

September 2013 indicated a preference for reducing the regulatory burden on media companies, which runs counter to the re-regulatory elements inherent in imposing a more constraining regulatory regime for news content, applicable across platforms.

4. Concluding Comments

In both the UK and Australia it is widely understood that, in light of convergence, the existing regulatory framework for the media is increasingly anomalous. Ambitious proposals have been put forward that variously suggest platform neutral regulatory regimes, either tiered according to the intensity of the standards (Fielden) or applicable to specific genres (Finkelstein and the Convergence Review). Less far-reaching reforms have also been examined that seek to address some of the more evident anomalies, the disparity, for instance, in the standards applicable to certain broadcast and on-demand television services in the UK (House of Lords Plurality Report). In both the UK and Australia, however, such proposals have yet to be taken forward successfully and such reform as there has been has been incremental and limited. State regulation is widely considered a fundamental threat to press freedom, while the internet has long been considered an environment where regulation should be kept to a minimum, restricted to the general law. Because convergence characteristically takes place in the online environment and media services increasingly combine text and audiovisual content, the scope for extending state or even co-regulatory measures may thus be (politically) limited. In this context we may have little option but to focus on how self-regulatory systems can be made more effective both procedurally and substantively and to consider what sort of incentives can be adopted to encourage meaningful adoption across the providers concerned.

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[i] Rachael Craufurd Smith, Reader in Media Law, University of Edinburgh. Draft, not for citation.

[ii] Flew, T. and Swift, AG (2013) 'Regulating Journalists? The Finkelstein Review, the Convergence Review and News media Regulation in Australia.' *Journal of Applied Journalism and Media Studies*, 2(1), pp.181-199.

[iii] See: http://www.atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf

[iv] Lord Justice Leveson, *Report into the Culture, Practices and Ethics of the Press*, November 2012.

[v] House of Lords Select Committee on Communications, *Media Convergence*, 27 March 2013, HL Paper 154.

[vi] L. Fielden, *Regulating for Trust in Journalism. Standards Regulation in the Age of Blended Media* (Reuters Institute for the Study of Journalism, Oxford, 2011).

[vii] Australian Government, *Convergence Review*, March 2012; Hon. R. Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation*, February 2012; and Australian Law Reform Commission, *Classification – Content Regulation and Convergent Media*, ALRC Report 118, Summary.

[viii] See v above.