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The Social and Political Role of the Media

INTRODUCTION

This chapter introduces some key concepts relating to the social and political role of the media. The chapter considers the ideas of the media as a public sphere and as the fourth estate of government. It also discusses the characteristics of the public, commercial and community sectors in Australian media, and the more recent importance of social media and the internet. The chapter finishes by introducing the contents of this book. In doing so, the concluding paragraphs comment on the regulatory and legal traditions that affect media institutions and how these carry through to contemporary media laws. This chapter surveys territory that has been the subject of intense academic exploration. What follows is a brief introduction to broad themes, but it provides a framework for thinking about media law and policy.

1.1 Social and political

The media is often described as an ‘institution’. It is charged with social and political purposes that set it apart from most other types of enterprise. The media provides a forum for public debate. It provides the reporting, analysis and opinion necessary for citizens to make informed political decisions. At its best, it supports investigative journalism that holds powerful people and organisations to account on behalf of the public. The media can mobilise support or opposition around an issue and by doing so drive political action. All of this means the media plays an important role in a liberal democracy. A further purpose of the media is simply to entertain, but this is also important.¹ The media we consume shapes our personal and cultural identity. Content that may not intend to be political still

1 As affectionately put by Leveson LJ in his report on the culture and ethics of the press: ‘It is not necessary or appropriate for the press always to be pursuing serious stories for it to be working in the public interest. Some of its most important functions are to inform, educate and entertain and, when doing so, to be irreverent, unruly and opinionated. It adds a diversity of perspective. It explains complex concepts that matter in today’s world in language that can be understood by everyone. In no particular order, it covers sports, entertainment, fashion, culture, personal finance, property, TV and radio listings and many other topics. It provides help lines and advice; it supports its readers in a wide variety of ways. It provides diversion in the form of crosswords, games, and cartoons. In short, it is a very important part of our national culture.’ Lord Justice Leveson, *An Inquiry Into the Culture, Practices and Ethics of the Press*, Executive Summary, November 2012, [9].

comments on our relationships with each other and how we behave. In this, the media can have ‘reality-defining effects’. The media is, accordingly, not just an institution, but a powerful one.

1.1.1 The public sphere

The concept of the media as a ‘public sphere’ traces back to the work of theorist Jurgen Habermas.² According to Habermas, a public sphere developed in eighteenth-century Europe in which information about business, culture and politics was exchanged and elite citizens discussed questions of state policy and action.³ The public sphere mediated between society and the state. Habermas’s public sphere emerged in the coffee houses and salons of Europe, but the press was fundamentally important.⁴ Through the press, private opinions were transformed into public opinion. As explained by Habermas:

With the growth of a general reading public that transcended the republic of scholars and the urban bourgeoisie and who no longer limited themselves to a careful reading and rereading of a few standard works but oriented their reading habits to an ongoing stream of new publications, there sprang from the midst of the private sphere a relatively dense network of public communication.⁵

Habermas considered that the public sphere should be free from both state and private interests.⁶ Mass media was a distorting influence that manipulated and controlled mass opinion, in contrast to the early press, which had facilitated the formation and expression of organic, public opinion.⁷ As Habermas would have it, a healthy public sphere required small-scale media not motivated by commercial concerns.⁸ While mass-circulation press and broadcast media have moved away from Habermasian ideals, the understanding of the media as a forum for public debate and a mechanism for converting private opinions into public consensus (or something approaching it) remains powerful. The internet has also clearly affected the constitution and functioning of the public sphere, although both utopian and dystopian visions have been presented on the effects of the internet on the quality of public discourse.⁹

2 Jurgen Habermas, *The Structural Transformation of the Public Sphere*, translated by Thomas Burger with the assistance of Frederick Lawrence, Polity Press, Cambridge, 1992.

3 Habermas’s conception of the public sphere has been subject to heavy criticism, debate and controversy. Some notable criticisms relate to the exclusion from the public sphere of groups such as women or alternative cultures. See Nancy Fraser, ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’, in Craig Calhoun (ed), *Habermas and the Public Sphere*, MIT Press, Cambridge, 1992. A further argument is that there is no single public sphere but in fact multiple and alternative spheres. See T Gitlin, ‘Public Sphere or Public Sphericules?’, in Tamar Liebes and James Curran (eds), *Media, Ritual and Identity*, Routledge, London, 1998; Richard Butsch, ‘Introduction: How are Media Public Spheres?’, in Richard Butsch (ed), *Media and Public Spheres*, Palgrave Macmillan, New York, 2007, 4.

4 Habermas, above n 2, 181.

5 Jurgen Habermas, ‘Further Reflections on the Public Sphere’, in Calhoun (ed), above n 3, 425.

6 See Fraser, above n 3, 118.

7 James Curran, ‘Rethinking the Media as a Public Sphere’, in Peter Dahlgren and Colin Sparks (eds), *Communication and Citizenship: Journalism and the Public Sphere*, Routledge, London, 1993, 38–39.

8 Habermas, above n 2, 181–88.

9 A seminal utopian vision is provided in Nicholas Negroponte, *Being Digital*, Vintage Books, New York, 1995. Cass Sunstein argued, conversely, that the internet would lead to audience fragmentation and the destruction of common discourse: Cass Sunstein, *Republic.com*, Princeton University Press, Princeton, 2002. Yochai Benkler has written about the ‘networked public sphere’ and this has become a well-utilised theory for understanding the dynamics of online public discourse: Yochai Benkler, *The Wealth of Networks*, Yale University Press, New Haven and London, 2006, Chapter 7 (Political Freedom Part 2: Emergence of the Networked Public Sphere).

1.1.2 The fourth estate

Aside from simply disseminating information and acting as a forum for public debate, the media has an institutional role in investigating and analysing public affairs and the actions of public figures. This adversarial investigative function is central to how the media (at first the press) has historically seen itself. When the printing press was invented it was quickly recognised as dangerous and became subject to strict governmental controls. The freedom of the press from prior licensing and government interference was bound up with the philosophical and political fights over the value of freedom of expression and, more generally, with progress towards liberal democracy. As the press asserted its importance to democracy it came to be referred to as the ‘fourth estate’ of government.¹⁰ The concept of the media as the fourth estate is sometimes used as shorthand for any public or democratic role played by the media.¹¹ However, it can have a more specific meaning. At its most distilled, the fourth estate ideal holds that the media will act as a ‘watchdog’ sensitive to corruption and injustice and holding public institutions and actors to account. There are celebrated examples of investigative journalism that give the fourth estate ideal some weight, perhaps the most prominent being the Watergate scandal in the United States. This said, the aspirations of the fourth estate can also easily give way to commercial pressures and competing interests.¹² The drift in news media towards more entertainment-driven and sensationalist content is often criticised as a betrayal of the fourth estate ideal. As noted by Schultz, ‘the gap between the rhetorical claims about the role of the media and reality, is huge’.¹³

1.2 Sectors in Australian media

One of the strengths of Australian media is its sectoral diversity. Australian media can be drawn into three basic sectors: public, commercial and community, and all are well represented. The historical development and characteristics of each sector are discussed in the following paragraphs. We also discuss social media. It is a stretch to refer to social media as a sector with equivalent standing to the others mentioned. Social media does not have such clear boundaries or organising principles. The motivations for participating in social media may be public-, commercial- or community-minded, or may be something else. The terms of engagement between traditional media organisations and social media are still being negotiated. Nonetheless, social media and user-generated content are an increasingly important part of the overall media landscape. It is possible to make general statements about social media as distinct from the other sectors, and we do.

10 The other three estates were once the monarch, the clergy and the parliament; now the executive, the parliament and the judiciary: Julianne Schultz (ed), *Reviving the Fourth Estate: Democracy, Accountability and the Media*, Cambridge University Press, Melbourne, 1998, 47–48. See also R Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), [2.41]–[2.46].

11 There is a lot of cross-over between the concepts of the public sphere and media as fourth estate. As put by Gitlin, “‘The public sphere’”: the phrase has ballooned into the God-term of democratic discourse theory”: Todd Gitlin, ‘Public Sphere or Public Sphericules?’, in Tamar Liebes and James Curran (eds), *Media, Ritual and Identity*, Routledge, London, 1998, 169. Similarly, the term ‘the fourth estate’ can encapsulate a number of concepts relating to the media’s political role. See Schultz (ed), above n 10, 49.

12 As noted by Curran, ‘Even many, so called “news media” allocate only a small part of their content to public affairs—and a tiny amount to disclosure of official wrong doing’: James Curran, ‘Rethinking Media and Democracy’, in James Curran and Michael Gurevitch (eds), *Mass Media and Society*, London, Oxford University Press, 2000, 12. See also Schultz (ed), above n 10, 4.

13 Julianne Schultz, ‘Media Convergence and the Fourth Estate’, in *Not Just Another Business: Journalists, Citizens and the Media*, Pluto Press, Sydney, 1994, 15.

1.2.1 Historical development

Press independence from government, in terms of both licensing and funding, was an important part of its claim to act as a check on state power. As a result, newspapers have tended to be almost exclusively commercial operations, or at least privately funded. When radio was introduced it was less clear that private interests should have a monopoly on public airwaves. The British emphasised a model of ‘public service broadcasting’, which held that broadcasting should be a state concern and a ‘cultural, moral and educative force for the improvement of knowledge, taste and manners’.¹⁴ The Americans, by way of contrast, were happy to see broadcasting developed by commercial organisations.¹⁵

Australia navigated a path somewhere between the British and the Americans, settling on a system that included both public and private broadcasting.¹⁶ A two-tier licensing scheme for radio was introduced in the early 1920s, which created a category of service financed by listener licence fees (‘Class A’ stations) and a category financed by advertising revenue (‘Class B’ stations). After an initial period of private ownership the Class A stations were nationalised and became the Australian Broadcasting Commission. The Class B stations were left alone and continued as a parallel commercial sector. In 1954, a Royal Commission recommended that television should be structured ‘on the same fundamental basis as has been so remarkably successful in respect of sound broadcasting’.¹⁷ In accordance with this recommendation, the ‘dual system’ of national and commercial broadcasters was carried into television. Community broadcasting emerged as a third sector in Australian media in the 1970s. In 1972, the Australian Broadcasting Control Board advocated for the creation of a new type of broadcasting service that ‘would be conducted on a non-profit basis to cater for the needs of educational, religious, professional, musical and other like interests ...’.¹⁸ The outgoing Whitlam government endorsed a proposal to license 12 community radio stations in 1975.¹⁹ Since then, community media has progressed on a consistent trajectory of expansion to become a significant sector in Australian media. As this quick history indicates, each of the three primary sectors in Australian media were largely defined by government licensing of broadcasting services. However, organisations formed as public, commercial and community broadcasters have variously extended their activities into online and other services.

14 Paddy Scannell and David Cardiff, ‘Public Service Broadcasting’, in *A Social History of British Broadcasting*, B Blackwell, Oxford, 1991, 7. See also Elizabeth Jacka, ‘The Future of Public Service Broadcasting’, in Stuart Cunningham and Graeme Turner (eds), *The Media and Communications in Australia*, 2nd edn, Allen & Unwin, Crows Nest, NSW, 2006, 344–45.

15 For an account of how commercial interests came to dominate broadcasting in the United States, see Robert McChesney, *Telecommunications, Mass Media and Democracy: The Battle for the Control of US Broadcasting, 1928–1935*, Oxford University Press, New York, 1993.

16 Australia’s first attempt at a licensing scheme was something of a disaster involving ‘sealed sets’. The scheme had broadcasters selling radio sets that were fixed so that they could only receive one station. In theory, listeners were restricted to receiving only those radio stations to which they had subscribed. In practice, the sets were easily modified and many listeners illegally altered their sets so that they could receive other frequencies. The scheme gave way in 1924—about 12 months after it commenced. See Australian Heritage Council, ‘Radio and Television, 1905–1970’, in *Linking a Nation: Australia’s Transport and Communications 1788–1970*, Australian Heritage Commission, Canberra, 2003.

17 Report of the Royal Commission on Television (1954), as cited in Jock Given, *Turning off the Television*, UNSW Press, Kensington, NSW, 2003, 32.

18 Australian Broadcasting Control Board, *Report on Frequency Modulation Broadcasting*, June 1972.

19 Named the ‘Cass dirty dozen’ after Dr Moss Cass, who was Minister for Media in the Whitlam government in 1975.

1.2.2 Public service media

John Reith, the first Director General of the British Broadcasting Corporation (BBC), provided an early statement (later described as a ‘manifesto’) on the purpose of public service broadcasting in his book *Broadcast Over Britain* (1924). Reith’s vision of a public broadcasting system involved a non-profit enterprise providing national coverage. Reith was also concerned about the maintenance of standards in broadcasting. He wrote:

As we conceive it, our responsibility is to carry into the greatest possible number of homes everything that is best in every department of human knowledge, endeavour and achievement, and to avoid the things which are, or may be hurtful. It is occasionally indicated to us that we are apparently setting out to give the public what we think they need – and not what they want, but few know what they want, and very few what they need ... In any case it is better to over-estimate the mentality of the public, than to under-estimate it.²⁰

A set of cultural and social purposes have become associated with public service broadcasting that remain essentially close to Reith’s philosophy. The basic values that public service broadcasting has come to represent include universal service, an educational function and an emphasis on ‘quality’ content—particularly content serving worthy but uncommercial minority or niche audiences. Public broadcasters are charged with a key role in maintaining the public sphere. In addition, public broadcasters are meant to support arts, culture and local content and, in doing so, develop a sense of national identity.²¹ In the words of a former Chair of the Board of Governors of the BBC, an enormous amount of a public broadcaster’s work is ‘social cement of one sort or another’.²²

The public media sector in Australia amounts to services provided by the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS). The values of public service media are reflected in the respective charters of the ABC and SBS. The ABC charter is set out in the *Australian Broadcasting Corporation Act 1983* (Cth). The ABC charter states that the functions of the ABC are (among other things) to provide innovative and comprehensive broadcasting services of a high standard; to broadcast programs that contribute to a sense of national identity; and to broadcast programs of an educational nature.²³ Aside from these charter obligations, the *Australian Broadcasting Corporation Act 1983* (Cth) requires that the ABC develop and maintain an independent news service and prohibits the ABC from broadcasting advertisements.²⁴ The SBS was established in the 1970s in order to promote ethnic programming.²⁵ The charter of the SBS is set out in the *Special Broadcasting Services Act 1991* (Cth) and establishes the SBS as a multicultural

20 John Reith, *Broadcast Over Britain*, Hodder and Stoughton, London, 1924, 34. See also Scannell and Cardiff, above n 14, 7.

21 These values are neatly summarised in Department of Broadband Communications and the Digital Economy (DBCDE), *ABC and SBS: Towards a Digital Future*, Discussion Paper, October 2008, 5. See also Trine Syvertsen, ‘Challenges to Public Television in the Era of Convergence and Commercialisation’ (2003) 4(2) *Television and New Media* 155 at 157.

22 Sir Michael Swann, as cited in Scannell and Cardiff, above n 14, 10.

23 *Australian Broadcasting Corporation Act 1983* (Cth) s 6 (Charter of the Corporation).

24 *Australian Broadcasting Corporation Act 1983* (Cth) ss 27 and 31. Note that the restriction on broadcasting advertisements is subject to exceptions relating to ABC programming and activities; and does not affect international broadcasting services or non-broadcast media.

25 The SBS’s initial radio stations (2EA in Sydney and 3EA in Melbourne) commenced broadcasting in 1975. The SBS was constituted as a body through amendments made to the *Broadcasting and Television Act 1942* (Cth) by the *Broadcasting and Television Amendment Act 1977* (Cth).

broadcaster. In contrast to the ABC, the SBS operates on a 'hybrid' funding model and is allowed to broadcast advertisements during natural program breaks.²⁶

Public service media is often positioned as an important counterbalance to commercial media. As it is supposedly free from both commercial conflicts of interest and the tyranny of ratings, public service media is able to act as a neutral public sphere and an uncompromised watchdog in the best traditions of the fourth estate. In catering for niche audiences, public service media creates deep loyalties and opportunities for community-wide engagement with public life.²⁷ It is worth noting, however, that public service media is not incorruptible. As observed by Curran, there is no lack of international examples where public broadcasters have acted as little more than the mouthpieces of government.²⁸ Independence from political interference is, accordingly, a critical issue for public service media.

The corporate structures of the ABC and SBS, as set out in their respective Acts, are essentially similar. The ABC and SBS each have a board of directors responsible for their strategic direction and policies.²⁹ These boards are specifically charged with maintaining the independence and integrity of each broadcaster.³⁰ Further functions of the boards include appointing a managing director and developing codes of practice relating to programming.³¹ Appointments to the boards of the national broadcasters are generally made by the Governor-General acting on ministerial advice.³² In 2001, a Senate Committee reported a general perception that the appointment process, at least in respect of the ABC Board, had become politicised. The committee noted:

The general view of submissions to the Committee suggests that the habit of appointing political sympathisers to the Board is as old as the ABC itself.³³

The *Australian Broadcasting Corporation Act 1983* (Cth) and *Special Broadcasting Service Act 1991* (Cth) were, some years later, amended to include more structured board appointment processes.³⁴ However, this has not done much to depoliticise recent appointments.³⁵

26 *Special Broadcasting Service Act 1991* (Cth) s 45(2).

27 Georgie McClean, 'Maintaining Relevance: Cultural Diversity and the Case for Public Service Broadcasting' (2008) *Record of the Communications Policy and Research Forum* 255 at 261.

28 James Curran, 'Rethinking Media and Democracy', in James Curran and Michael Gurevitch (eds), *Mass Media and Society*, Oxford University Press, London, 2000, 125. For instance, the South African Broadcasting Corporation, modelled on the BBC, became an instrument of Apartheid: Elizabeth Jacka, 'The Future of Public Service Broadcasting', in Stuart Cunningham and Graeme Turner (eds), *The Media and Communications in Australia*, 2nd edn, Allen & Unwin, Crows Nest, NSW, 2006, 345.

29 *Australian Broadcasting Corporation Act 1983* (Cth) ss 7–10 and 12(1); *Special Broadcasting Service Act 1991* (Cth) ss 7–10 and 28.

30 *Australian Broadcasting Corporation Act 1983* (Cth) s 8(1)(b); *Special Broadcasting Service Act 1991* (Cth) s 10(1)(a).

31 *Australian Broadcasting Corporation Act 1983* (Cth) ss 9, 13 and 8(1)(e); *Special Broadcasting Service Act 1991* (Cth) ss 28, 29 and 10(1)(j).

32 *Australian Broadcasting Corporation Act 1983* (Cth) s 12; *Special Broadcasting Service Act 1991* (Cth) s 17.

33 Senate Environment, Communications, Information Technology and the Arts References Committee, *Above Board? Methods of Appointment to the ABC Board*, September 2001, [2.15].

34 *National Broadcasting Legislation Amendment Act 2012* (Cth), amending the *Australian Broadcasting Corporation Act 1983* (Cth) and *Special Broadcasting Service Act 1991* (Cth). Appointments are still basically a decision for the Minister. However, vacancies are to be advertised and a short-list of recommended candidates prepared by a nomination panel. Where the Minister intends to depart from the short-list, a statement of reasons is to be provided to both houses of parliament. The Prime Minister may also become involved in the appointment of the Chairperson of the ABC: *Australian Broadcasting Corporation Act 1983* (Cth) s 24X.

35 Members of the nomination panel may be appointed by the Secretary of the Prime Minister's Department: *Australian Broadcasting Corporation Act 1983* (Cth) s 24F, *Special Broadcasting Service Act 1991* (Cth) s 3 (definition of *nomination panel*). In July 2014 this power was used to appoint commentator Janet Albrechtsen and former deputy Liberal Party leader Neil Brown to the nomination panel, both of which were perceived to be political appointments: see Matthew Knott, 'Janet Albrechtsen Appointed to ABC and SBS Board Appointments Panel', *Sydney Morning Herald*, 2 July 2014.

Although both have developed alternative sources of revenue, the ABC and SBS are primarily financed through triennial government funding arrangements. As with board appointments, there is a risk of funding decisions being influenced by political considerations. The heavy decline in funding to the ABC in the late 1990s, for example, has been interpreted (rightly or wrongly) as a penalty imposed in response to its regular criticisms of the incumbent government.³⁶ Current debates on funding cuts are similarly controversial.

It has been argued that there is no longer a need for publicly funded media, or at least that the rationales supporting public service media need to be revised.³⁷ One of the traditional rationales for public service media is that it corrects market failure by catering for minority audiences. Multichannel programming, the community media sector and the availability of new media services may have addressed this issue. Another complaint is that the emphasis on ‘quality’ in public service media skews programming towards middle-class preferences that do not need to be subsidised by taxpayers. In support of public service media, its objectives remain relevant even if partially addressed by the commercial and community media sectors. Further, publicly funded media is proving its relevance in new ways, including by taking a pioneering role in new media services.³⁸

1.2.3 Commercial media

In order to act as an effective watchdog and effectively report and critique the actions of the state, it was traditionally felt that some distance needed to be established between the media and the government through private media ownership.³⁹ The nature of commercial media as a private enterprise with a public democratic purpose has its complications. While the commercial and social objectives of the media may coincide, often they do not. High-quality investigative journalism is expensive to produce and does not necessarily result in a commensurate increase in ratings or circulation. Commercial media is also subject to a range of corporate relationships and economic interests that have the potential to affect reporting. At worst, commercial media can become ‘corporate mercenaries’ deployed to further private interests. While it is worth noting the theoretical limitations of commercial media as a political institution, the dichotomy established between the public and private media and subsequent analysis of the democratic potential of each has its problems. The logic of media literature holds that government-funded media serves the government and privately owned media serves private interests. However, countervailing factors such as the professional concerns of journalists and the need to maintain legitimacy intervene.⁴⁰ Tiffen concludes that ‘neither public service media nor private corporations can be seen as

36 See Jacka, above n 28, 348.

37 See, for example, James Murdoch, ‘The Absence of Trust’ (2009 Edinburgh International Television Festival MacTaggart Lecture, 28 August 2009); Ross Jones, ‘Does Australia Really Need the ABC’ (1997) 4(2) *Agenda* 253; Elizabeth Jacka, ‘“Democracy as Defeat”: The Impotence of Arguments for Public Service Broadcasting’ (2003) 4 *Television & New Media* 177; FOXTEL and ASTRA submissions to the Convergence Review, cited in Australian Government, *Convergence Review*, Final Report, March 2012, 85.

38 Note the ABC *iView* and BBC *iPlayer* as examples of early and very successful streaming services.

39 Curran, above n 28.

40 *Ibid.*

automatically enhancing the democratic cause'⁴¹—but it should be kept in mind that both are capable of doing so.

The commercial models that underwrite many types of media have been and continue to be challenged by the internet. Online copyright infringement is also an issue that continues to affect revenues. Sympathy for media companies aside, there are good reasons for paying close attention to the business models that support the production of media content. The social functions of commercial media depend on sustainable revenue streams. Regulated policy objectives, such as local content quotas and children's programming standards, are also dependent on assumptions about the profitability of mass media. It is not clear whether online business models will be capable of funding professional journalism and local content production to the same level, or in the same manner, as traditional mass media systems.

1.2.4 Community media

In many respects community media continues the mission of public service broadcasting, but with greater emphasis on community participation in the production of content and the management of community media organisations. The guiding principles of community media, as stated in codes of practice for community radio, include working to contribute to an inclusive, cohesive and culturally-diverse Australian community; to enhance programming diversity; to develop local arts and music; and to increase community involvement in broadcasting.⁴² Community broadcasters are not-for-profit organisations licensed to serve specific community interests. Community media receives a nominal level of government funding. Community broadcasters can accept sponsorship and are allowed to transmit 'sponsorship announcements' (but not advertising) during natural program breaks. Aside from these sources of income, community media is supported through high levels of volunteer participation.⁴³

The community sector makes a considerable contribution to the diversity of Australian media and the provision of local content.⁴⁴ At time of writing, there are approximately 360 community radio services, three long-term licensed community television stations (broadcasting in Sydney, Melbourne and Brisbane), and two temporarily licensed community television stations (Perth and Adelaide).⁴⁵ It is difficult to get accurate audience numbers,

41 Rodney Tiffen, 'The Media and Democracy: Reclaiming an Intellectual Agenda', in Julianne Schultz (ed), *Not Just Another Business: Journalists, Citizens and the Media*, Pluto Press, Sydney, 1994, 63–64.

42 Community Radio Broadcasting Codes of Practice, B: Guiding Principles (October 2008). Similar objectives can be found in the Community Television Codes of Practice (June 2011).

43 A census conducted on behalf of the Community Broadcasting Association of Australia (CBAA) reported 19,336 volunteers at community radio stations in 2011–12: McNair Ingenuity Research, *Community Broadcasting Station Census: Survey of the Community Radio Sector for the 2011–12 Financial Year* (December 2013), 42.

44 See Michael Meadows et al, 'A Quiet Revolution: Australian Community Broadcasting Audiences Speak Out' (2008) 129 *Media International Australia* 20.

45 ACMA, *List of Community Radio Broadcasting Licensees*, 14 November 2014 (No. of Licences: 359); ACMA, *List of Community TV Broadcasting Licensees*, 18 September 2012 (No. of Licences 81: aside from the permanent and temporarily licensed metropolitan community television stations, a number of remote Indigenous television services operate under community licences). See also Rhonda Jolly, 'Media of the People: Broadcasting Community Media in Australia' (Research Paper Series 2013–14, Parliamentary Library, Parliament of Australia, 2 April 2014) 17.

but community media clearly reaches many millions of Australians each week.⁴⁶ It is one of the great success stories of Australian broadcasting.⁴⁷

1.2.5 Social media

The term ‘social media’ is conveniently broad. It covers a range of online services that involve networks of users creating and sharing content. A set of international social media sites such as Twitter, Facebook, YouTube, LinkedIn, Instagram and others have become quickly established and seemingly entrenched (even if online certainties can change quickly).⁴⁸

At the start of this chapter we listed some of the social and political functions of the media. Social media clearly fulfils or enhances a number of these functions. Social media provides a public or semi-public forum for individual commentary and debate. It promotes dialogue by allowing a two-way engagement between audiences and media content (both user-generated and professional) and, in this, social media can be seen to have enhanced the public sphere.⁴⁹ The designed emphasis of social media on assembling networks of like-minded people means that it is particularly good at mobilising support around an issue and coordinating political action.⁵⁰ A lot of early reporting on the ‘Arab Spring’ uprisings in Tunisia, Syria, Egypt and elsewhere characterised these as a ‘Twitter revolution’ inspired and facilitated by social media. There is an ongoing debate as to the role social media played in the Arab Spring.⁵¹ However, it is an interesting and important part of the story.

The relationship between social media and traditional media outlets is still being defined. However, there is research to suggest it can be symbiotic.⁵² In allowing users to share content through their networks, social media can act as an amplifier for traditional media content.⁵³ This process can also work in reverse. In reporting on the events of the Arab Spring, news network *Al Jazeera* relied heavily on first-hand social media accounts. This television

46 Jolly notes the community radio sector has an estimated monthly national radio audience reach of more than nine million: Jolly, above n 45. A survey conducted in 2008 indicates that approximately 4.5 million people listen to community radio each week: McNair Ingenuity Research, *Community Radio National Listener Survey*, July 2008, 25. The reasons cited for listening to community radio mostly relate to the availability of specialist music programs and local news or information: 35. Or, as put by Jolly, ‘Audiences cite many reasons for listening to community radio, but most of these are punctuated by the word “local”’ (Jolly, above n 45, 18).

47 Australian Government, *Convergence Review*, Final Report, March 2012, 87. The most comprehensive available study of community media in Australia was published in 2007: Michael Meadows et al, *Community Media Matters: An Audience Study of the Australian Community Broadcasting Sector* (Griffith University, March 2007).

48 These sites count their users and usage statistics in tens and hundreds of millions and enjoy correspondingly high corporate valuations. We use the word ‘entrenched’ lightly, however. The first edition of this book included MySpace in the list.

49 See Clay Shirky, ‘The Political Power of Social Media: Technology, the Public Sphere, and Political Change’ (2011) 90(1) *Foreign Affairs* 28; Yochai Benkler et al, *Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate* (July 19, 2013), Berkman Center Research Publication No. 2013, 16, available at SSRN: <<http://ssrn.com/abstract=2295953>>.

50 Shirky, above n 49, 32.

51 There is a lot of material on this subject. A number of articles discuss the central role social media played in the Arab Spring, for example: Merlyna Lim, ‘Clicks, Cabs, and Coffee Houses: Social Media and Oppositional Movements in Egypt 2004–11’ (2012) 62 *Journal of Communication* 231; Philip N Howard and Muzammil M Hussain, ‘The Role of Digital Media’ (2011) 22(3) *Journal of Democracy* 35. Others note that social media may be part of the story, but its role in the Arab Spring uprisings was far from uniform and dependent on political context: Gadi Wolfsfeld, Elad Segev and Tamir Sheafer, ‘Social Media and the Arab Spring: Politics Comes First’ (2013) 18 *International Journal of Press/Politics* 115.

52 Shirky, above n 49, 34.

53 Sitaram Asur et al, *Trends in Social Media: Persistence and Decay* (2011), available at <<http://arxiv.org/abs/1102.1402>>.

coverage dramatically expanded the audience that might otherwise have been exposed to those tweets and their subject matter.⁵⁴ This example relates to news, but similar processes can work for entertainment media. In short, social media and traditional media can play off each other. While these dynamics are not settled, they represent a significant departure from traditional methods of assembling a mass audience.

1.3 The contents of this book

This book is concerned with media law. It looks at those laws that affect media organisations and, more generally, public communications. At its most reduced, the discipline of media law asks who can say what, to whom, through what channels, on what conditions and at what cost. These are intensely political and contested questions. As we have discussed, the media is a socially and politically powerful institution. It can influence our identity and our opinions. It can cause harm to reputation and can prejudice a fair trial. It can disclose material that should be private. It can offend and can vilify. How the media is, and should be, controlled is the subject matter of this book.

As an institution that habitually oversteps lines, there is a natural instinct to control the media through law. Against this instinct, the media has the benefit of a developed philosophical defence based on the importance of freedom of expression (Chapter 2). Freedom of expression is a theme that runs through this book and is relevant to all aspects of media law. The extent to which freedom of expression should give way to other values (such as reputation or privacy) is a balancing act that calls for constant recalibration.

Part 2 of this book deals with media regulation. This Part discusses the regulatory frameworks that apply to print media and journalists (Chapter 3), broadcasting services (Chapter 4) and online content (Chapter 5). Freedom of the press was hard won and this has meant that any attempt to regulate the press has been fiercely resisted. Although print media regulation has been the subject of a number of recent reports and various law reforms have been proposed, the press remains free from any specific licensing requirements and is subject only to a self-regulatory scheme in terms of content regulation. Broadcasting, by way of contrast, was heavily regulated from the outset. The *Broadcasting Services Act 1992* (Cth) establishes a complex co-regulatory scheme comprised of statutory restrictions, regulatory standards and industry codes of practice, all of which affect the content of broadcast television and radio services. Online content services, coming from the ‘wild-west’ culture of the early internet, are not significantly regulated. Although online content services are nominally subject to a scheme under the *Broadcasting Services Act 1992* (Cth), these many pages of legislation only rarely result in any regulatory action. The different levels of regulation applied to different media platforms have never been well rationalised. However, as processes of media convergence continue, and the distinctions between media platforms blur, these inconsistencies are becoming increasingly difficult to justify. Proposals to harmonise media regulation across platforms is a running theme of these chapters. The final chapter of this Part, Chapter 6 considers the sector-specific rules on media ownership that exist under the *Broadcasting Services Act 1992* (Cth). These rules are designed to

54 Chris Stokel-Walker *The Revolution Will be Tweeted?* Lulu.com, 2011, Ch V.

ensure that broadcasting services represent a diverse set of interests and that no one media proprietor (or group) can acquire control of the airwaves. In the golden age of broadcasting, the case for media ownership laws was clear. As online services develop, however, some of the rationales that support sector-specific ownership regulation are becoming weaker. This chapter also reviews general competition laws that affect media acquisitions and the regulation of foreign investment in media assets.

Part 3 deals in detail with one of the most significant causes of action affecting media outlets' daily activities—defamation. Chapter 7 addressed the elements of liability for defamation; Chapter 8 canvasses the defences; and Chapter 9 deals with the remedies. Chapter 10 then examines other causes of action, such as injurious falsehood, misleading or deceptive conduct and negligent misstatement, which may provide additional protection for reputation or may impose liability for the publication of false statements.

Part 4 deals with another substantive area of law, which has an impact on what media outlets can publish, particularly in relation to the reporting of crime. Chapter 11 concerns the principle of open justice, a fundamental feature of the common law. It examines the ways in which this principle manifests itself to constrain or facilitate what media outlets publish, most notably suppression and non-publication orders. Chapter 12 analyses the various forms of contempt of court and the ways in which they impose liability for interferences with the administration of justice.

Part 5 deals with the different means by which Australian law protects (or does not protect) privacy. Unlike defamation law, which has protected reputation highly for centuries, it is still accurate to state that there is no direct, comprehensive right to privacy under Australian law. Chapter 13 examines the current state of Australian privacy law and questions whether courts or legislatures might develop some direct, general privacy protection. It also considers developments to protect privacy more effectively in the United Kingdom, New Zealand and the European Union. Chapter 14 then considers the utility of the existing equitable cause of action for breach of confidence to protect personal privacy. It particularly focuses the adaptation of this cause of action to achieve this end under English law. Chapter 15 focuses on the protection of personal information under the *Privacy Act 1988* (Cth), the protection of stored and real-time communications under the *Telecommunications (Interception and Access) Act 1979* (Cth) and restrictions on the use of surveillance devices under state and territory legislation.

In **Part 6**, Chapter 16 examines the regulation of offensive publications. This involves consideration of classification laws and censorship practices, as well as of common law developments regarding obscenity, blasphemy and sedition. This historical common law approach to offensive publication sits alongside more recent statutory frameworks regarding vilification, counter-terrorism and discrimination. This chapter necessarily then explores the limits to freedom of expression and challenges, both descriptively and normatively, the various rationales adopted for placing such limits.

In **Part 7**, Chapter 17 considers freedom of information (FOI). This is somewhat different to the chapters that precede it because it concerns rights of access to information, rather than legal restrictions upon what may be published and the restraints imposed by industry regulation. State and federal FOI legislation grants rights of access to documented information held by governments, subject to a range of exemptions. The system is founded upon democratic principles: that governments must be open and accountable for their

decisions and actions. The media plays an important role in this process by publishing information obtained under FOI, and by challenging the exemptions that governments seek to rely upon to avoid disclosure.

QUESTIONS

- 1 Is it possible to talk about 'the media' as a homogenous entity?
- 2 Is there a single public sphere? Or multiple public spheres? If you take the view there are many public spheres, consider how these public spheres interact. How has the internet affected the public sphere (or spheres)?
- 3 What are some recent examples of investigative journalism? To what extent is the 'fourth estate' role of the press still relevant? Does the existence of bodies such as the Independent Commission Against Corruption diminish the need for the media as fourth estate? How have social media and outlets such as WikiLeaks affected this role?
- 4 What content have you recently shared through social media? Was it news reporting or entertainment? User-generated or professionally produced? To what extent is user-generated content a substitute for professionally produced content?

FURTHER READING

- Curran, James, 'Rethinking the Media as a Public Sphere', in Peter Dahlgren and Colin Sparks (eds), *Communication and Citizenship: Journalism and the Public Sphere*, Routledge, London, 1993, Ch 1.
- Dahlgren, Peter and Olsson, Tobias, 'From Public Sphere to Civic Culture: Young Citizens' Internet Use', in R Butsch (ed), *Media and Public Spheres*, Palgrave Macmillan, New York, 2007, Ch 16.
- Finkelstein, R, *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012).
- Jacka, Elizabeth, "'Democracy as Defeat": The Impotence of Arguments for Public Service Broadcasting' (2003) 4 *Television & New Media* 177.
- Lord Justice Leveson *An Inquiry Into the Culture, Practices and Ethics of the Press*, Executive Summary, November, 2012.
- Papacharissi, Zizi, 'The Virtual Sphere 2.0: The Internet, the Public Sphere and Beyond', in A Chadwick and P Howard (eds), *Routledge Handbook of Internet Politics*, Routledge, New York, 2008, 230–45.
- Schultz, Julianne, 'The Idealised Watchdog Estate', in *Reviving the Fourth Estate: Democracy, Accountability and the Media*, Cambridge University Press, Melbourne, 1998, Ch 3.
- Shirky, Clay 'The Political Power of Social Media: Technology, the Public Sphere, and Political Change' (2011) 90(1) *Foreign Affairs* 28.