

# Murdoch Media Inquiry Bill 2023

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Committee Secretary  
**Senate Standing Committees on Environment and Communications**

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The NSW Young Lawyers Communications, Entertainment & Technology Law Sub-Committee ('the Sub-Committee') makes the following submission to the Senate Standing Committee on Environment and Communications Legislation in response to the Murdoch Media Inquiry Bill 2023 ('the Bill').

## **NSW Young Lawyers**

NSW Young Lawyers is a Committee of the Law Society of New South Wales that represents the Law Society and its members on issues and opportunities arising in relation to young lawyers i.e. those within their first five years of practice or up to 36 years of age.

Through its 15 sub-committees, each dedicated to a substantive area of law, NSW Young Lawyers supports practitioners in their professional and career development by giving them the opportunity to extend their network, expand their knowledge, advance their career and contribute to the profession and community.

The Communications, Entertainment & Technology Law (CET) Sub-Committee supports and serves the interests of solicitors and other members of the community who work in or are interested in areas of law relating to communications, entertainment and technology. This includes intellectual property, advertising, consumer protection and media, entertainment, information and communications technology, as well as data, privacy and security. The CET Sub-Committee provides an excellent forum for professional networking, learning and knowledge sharing.

## Summary of Recommendations

The Sub-Committee makes the following recommendations:

1. To better measure media diversity, the Australian government should extend its approach to include not only diversity of ownership, but also diversity of content and consumption methods.
2. The Australian government should ensure the adequate resourcing of publicly owned media such as the Australian Broadcasting Service (ABC) and the Special Broadcasting Service (SBS) through longer term commitments of funding.
3. The Australian Competition and Consumer Commission (ACCC) should be required to consider the public interest when applying the competition framework to the media industry.

## Context

1. As it stands, the Sub-Committee submits that Australia's media landscape is heavily concentrated, lacks diversity, and provides a handful of players disproportionate power and influence over the broader population. Further, the Sub-Committee submits this undermines the health and integrity of our democracy and violates constitutional principles relating to representative government. The notion of representative government derives from sections 7, 24, 62 and 128 of the Australian Constitution and provides that parliament be 'directly chosen by the people'.<sup>1</sup> Beyond conferring a right to vote on the people, this notion has been deemed by the High Court to confer the right to a '*free and informed*' vote.<sup>2</sup> The Sub-Committee submits that, therefore, the capacity of citizens to exercise this constitutional right depends, in part, on the availability of relevant, trustworthy and diverse information.
2. Australia's media ownership laws have played an instrumental role in shaping the level of concentration in the market, along with other factors such as market size, the growth of digital platforms, and recent economic hardship. This submission discusses the 2017 reforms to the *Broadcasting Services Act 1992 (Cth)* ('BSA'),<sup>3</sup> which the Sub-Committee views contributed to an increase in the concentration of ownership, as well as the role of the competition watchdog and their capacity to consider the public and democratic interest when making an assessment of market competitiveness. Furthermore, this submission briefly discusses the metrics used to measure the level of diversity in the media landscape, recommending the present definition be expanded.

### (b) the concentration of media ownership in Australia

3. The current concentration of media ownership and correlated lack of media diversity directly impacts the range of perspectives, ideas, and content accessible to the Australian public. Imbalanced coverage of limited issues and perspectives can influence public opinion, further disenfranchise marginalised perspectives,<sup>4</sup> and project an inaccurate view of public opinion. This in turn affects policy outcomes and undermines the health and integrity of our democracy. Specifically, concentration in media ownership impacts democracy by reducing the democratic distribution of communicative power,<sup>5</sup> eroding democratic safeguards of accountability and discourse (whether in optics or in practice), and thirdly by centring profitability,<sup>6</sup> which may result in reduced investment in journalism overall.

**Recommendation:** *any measurement of 'media diversity' should include not only a consideration of the level of ownership of media outlets, but also the level of diversity in content and consumption.*

4. While diversity in ownership remains an important consideration, the proliferation of online news platforms means that measuring media diversity in terms of the quantity of sources available is no longer an adequate measure of the health of the media landscape overall. A modern approach would consider diversity in the range of topics covered, the perspectives presented, and the sources

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<sup>1</sup> Australian Constitution ss 7, 24, 62, 128.

<sup>2</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 524.

<sup>3</sup> *Broadcasting Services Act 1992 (Cth)* ('BSA').

<sup>4</sup> Jakubowicz, A., 'New groups and social cohesion in Australia', in Higley, J., Nieuwenhuysen, J., & Neerup, S. (eds.), *Nations of Immigrants: Australia and the USA Compared*, 2009.

<sup>5</sup> Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Final Report* (2019) 284.

<sup>6</sup> Steven Barnett, 'What's Wrong with Media Monopolies? A Lesson from History and a New Approach to Media Ownership Policy' (2010) 18 *London School of Economics and Political Science* 5.

of information used.<sup>7</sup> An emphasis on content diversity could encourage media outlets, including those owned by the same company, to differentiate their content and cover a wider range of stories. This would expose audiences to a greater variety of viewpoints and information, which is essential for a healthy democracy.

5. Furthermore, measuring the diversity in consumption of media would provide a better understanding of which media outlets are having the most impact in a cross-platform digital media environment.<sup>8</sup> Having a clearer picture of how, where, and when consumers access media provides greater clarity to governments as to where the regulatory focus needs to be.

**Recommendation:** *ensure the ongoing independence and adequate resourcing of publicly owned media such as the Australian Broadcasting Service (ABC) and the Special Broadcasting Service (SBS).*

6. The ABC and SBS play a crucial role in the Australian media ecosystem, providing high-quality public-interest journalism that is not typically provided by commercial broadcasters. As public broadcasters, they provide balanced and impartial news coverage on contemporary social, economic and political issues, which has become particularly important in an era of increasing media concentration and polarisation. For instance, the SBS and ABC's Code of Practice specify the broadcasters' duties when it comes to presenting balanced viewpoints and ensuring impartiality in news coverage.<sup>9</sup> The aim of providing a range of perspectives, sources and opinions is to 'equip audiences to make up their own minds',<sup>10</sup> consistent with democratic principles. Contrastingly, private broadcasters such as Channel 9 or Channel 10 are subject only to the government imposed Commercial Television Industry Code of Practice,<sup>11</sup> which contains no such provision.<sup>12</sup>
7. The public broadcasters also differ in categories of news content they present, as compared to commercial providers. A 2018 editorial review found that over the relevant time period, 23% of the SBS's network coverage was devoted to international politics and 9% to federal politics, while Channel 7 and 9 and 10 devoted between 0–2% of their airtime to international politics, and between 4–6% on federal politics.<sup>13</sup> In our heavily globalised era, issues of international significance often have an impact on our domestic economic and political landscape and, as a result, reliable international news coverage becomes crucial to staying informed.
8. Furthermore, ABC and SBS provide a platform through which to reflect and celebrate Australia's diversity. In particular, SBS plays a unique role in reflecting Australia's multicultural society, providing news and entertainment in multiple languages and catering to diverse ethnic communities in Australia. The significance of SBS lies not only in the provision of content in multiple languages but also in the fact that it empowers communities to share their stories, perspectives, and experiences with the broader Australian audience. By recognising and supporting the value of such platforms, we acknowledge their role not only in informing but also in strengthening the social and democratic fabric of our nation.

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<sup>7</sup> Australian Communications and Media Authority, 'News in Australia: Diversity and Localism – News Measurement Framework' (Report, December 2020) 11–13 <[https://www.acma.gov.au/sites/default/files/2020-12/News%20in%20Australia\\_Diversity%20and%20localism\\_News%20measurement%20framework\\_1.pdf](https://www.acma.gov.au/sites/default/files/2020-12/News%20in%20Australia_Diversity%20and%20localism_News%20measurement%20framework_1.pdf)>.

<sup>8</sup> Australian Communications and Media Authority, 'News in Australia: Diversity and Localism – News Measurement Framework' (Report, December 2020) 13.

<sup>9</sup> SBS Code of Practice, July 2021 (Amended 4 April 2022), 7; ABC Code of Practice, 8 May 2023, 7– 8.

<sup>10</sup> ABC Code of Practice, 8 May 2023, 7.

<sup>11</sup> Commercial Television Industry Code of Practice, 2015.

<sup>12</sup> Australian Communications and Media Authority, 'Impartiality and Commercial Influence in Broadcast News' (Discussion Paper, January 2020) 11–12.

<sup>13</sup> ABC, 'Diversity of Broadcast News Stories' (Editorial Review 15, March 2018) 9–13.

## **(c) the impact of Australia's media ownership laws on media concentration in Australia**

9. Over the years, changes in Australia's media ownership laws have increased the level of concentration such that Australia currently has one of the highest concentrations of media ownership in the world.<sup>14</sup> Australia's current regulatory framework in relation to media ownership, media diversity and the protection of public interest journalism is not fit-for-purpose.

### **Broadcasting Services Act**

10. Prior to 2017, Australia's media regulatory framework consisted of the following, found in the *BSA*,<sup>15</sup> and enforced by the Australian Communications and Media Authority (ACMA):
- One to a market rule: no person or company can hold more than one television licence in a licence area.<sup>16</sup>
  - Two to a market rule: no person or company can hold more than two radio licences in a licence area.<sup>17</sup>
  - The 5/4 voices rule: there must be at least five independent and separately controlled media operators in a commercial metropolitan radio licence area, and at least four in any regional licence area.<sup>18</sup>
  - The '2 out of 3' rule: a single company cannot control more than two out of three traditional platforms (TV, radio or newspapers) in the same radio licence area.<sup>19</sup>
  - The '75% reach' rule: a single company cannot control commercial TV broadcasting licenses that reach more than 75% of the Australian population.<sup>20</sup>
11. The 2017 amendments to the *BSA* repealed the '2 out of 3' rule and the '75% reach' rule in response to arguments that the laws were outdated and, given the rise of digital media, put traditional media companies at a disadvantage compared to new digital platforms. It was argued that the rise of the internet and online content giants like Google and Facebook fundamentally changed the media landscape. While traditional media may be more concentrated, it was argued Australians now have access to a wider range of news sources than ever before and this should offset concerns about media diversity.
12. However, the Sub-Committee submits that online news creates an 'apparent abundance' of media. In reality, the abundance lies only in the number of platforms, outlets, and providers of media.<sup>21</sup> There remains a severe lack of diversity in the voices, perspectives, delivery, and consumption of this content. We cannot rely on the growth in the availability of online news when 'sources of genuine, well-researched and fact-based newsgathering' have not grown or strengthened at the same rate.<sup>22</sup>

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<sup>14</sup> Media, Entertainment & Arts Alliance (MEAA), 'Truth versus Disinformation – the Challenge for Public Interest Journalism: The MEAA Report into the State of Press Freedom in Australia in 2022' (2022) 31.

<sup>15</sup> *Broadcasting Services Act 1992* (Cth) ('*BSA*').

<sup>16</sup> *BSA* s 53.

<sup>17</sup> *Ibid* s 54.

<sup>18</sup> *Ibid* s 61AB.

<sup>19</sup> *BSA* ss 61AA and 61AEA (repealed by *Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017* (Cth)).

<sup>20</sup> *Ibid* ss 53 and 55 (repealed by *Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017* (Cth)).

<sup>21</sup> Australian Broadcasting Corporation, 'Submission to the Senate Standing Committees on Environment and Communications Inquiry into Media Diversity in Australia' (Submission 14, 2020).

<sup>22</sup> *Ibid*.

## Competition framework

**Recommendation:** *The ACCC be required to consider the public interest when applying the competition framework to the media industry.*

13. Australia's media ownership laws also consist of those found in the *Competition and Consumer Act 2010 (Cth)* ('CCA').<sup>23</sup> The ACCC is tasked with enforcing these competition and consumer protection laws, which are currently the same for media and non-media industries alike. Therefore, when evaluating potential mergers, the ACCC typically considers whether proposed mergers and acquisitions would substantially lessen competition, not whether they would lessen media diversity.<sup>24</sup> As discussed above, a plurality of voices and perspectives informs a healthy debate and leads to better democratic outcomes.
14. One of the most notable instances of consolidation following the 2017 legislative changes was the merger of Nine Entertainment and Fairfax Media in 2018,<sup>25</sup> which created the largest media company in Australia, owning television networks, radio stations, and newspapers, including The Sydney Morning Herald and The Age.<sup>26</sup> From a competition law perspective, a reduction in the number of competitors in the industry can lead to adverse outcomes for consumers. Thus, there is the potential for higher prices, reduced quality, fewer choices and stifled innovation.<sup>27</sup> Nevertheless, when considering the merger, the ACCC found that while there would be reduced competition, this would not be substantial enough such that there would be a breach of the CCA.<sup>28</sup> What was not considered, however, was the impact that one company owning a significant portion of TV, radio, print, and digital media would have on the democratic health of Australian society.
15. The Sub-Committee recommends the regulator be required to consider public interest factors, like media diversity and democratic integrity, when applying the competition framework to the media industry, due to the unique harms that arise from a reduction in competition. Indeed, consumers in any industry lose out when competition is reduced. In the media market, however, the loss of diverse and quality news is damaging on a societal and democratic level.

## Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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<sup>23</sup> *Competition and Consumer Act 2010 (Cth)* ('CCA').

<sup>24</sup> Australian Competition and Consumer Commission, 'Media Merger Guidelines' (Guidelines, 2017) 4[38] <[https://www.accc.gov.au/system/files/Media%20Merger%20Guidelines%202017\\_0.pdf](https://www.accc.gov.au/system/files/Media%20Merger%20Guidelines%202017_0.pdf)>; Australian Competition and Consumer Commission, 'Submission to the Senate Standing Committees on Environment and Communications Inquiry into Media Diversity in Australia' (Submission 48, 2020).

<sup>25</sup> Australian Competition and Consumer Commission, 'ACCC Will Not Oppose Nine Fairfax Merger' (Media Release, 8 November 2018) <<https://www.accc.gov.au/media-release/accc-will-not-oppose-nine-fairfax-merger>>.

<sup>26</sup> John McDuling, 'What Does the Nine-Fairfax Merger Mean?' (The Sydney Morning Herald, 4 December 2018) <<https://www.smh.com.au/business/companies/what-does-the-nine-fairfax-merger-mean-20181204-p50k1o.html>>.

<sup>27</sup> Australian Competition and Consumer Commission, 'Merger Guidelines' (Guidelines, 2017) 45 <<https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>>;

<sup>28</sup> Amanda Meade, 'Nine's Takeover of Fairfax Media Can Go Ahead, Competition Watchdog Says' (The Guardian, 8 November 2018) <<https://www.theguardian.com/media/2018/nov/08/nines-takeover-of-fairfax-media-can-go-ahead-competition-watchdog-says>>.



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