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# Press independence

**Max Suich discusses some of the problems facing the independence of the press in Australia**

My theme, not surprisingly, is independence and I look at that theme in two areas: prospects for new newspaper publications independent of the current major media groups, and the threat to the independence of the media generally.

I am the editor and publisher of a new monthly newspaper launched in July called THE INDEPENDENT MONTHLY. My partner is John B Fairfax, so you might reasonably ask whether I am independent of a major group. However, the actual operations of the paper and its content are very much my concern and John is a generous and disinterested, but not uninterested, supporter.

## Distribution

Much of the glib talk we hear about the opportunities presented by new technology is true. You can set up your own little computer copy processing, typesetting and makeup system for between $5,000 and $30,000. You can do your own typesetting and page makeup if you choose. Alternatively, you can find low and very competitive prices these days from external typesetters and makeup services.

There are therefore few barriers to starting a small suburban newspaper - apart, of course, from the market power of the established suburban groups. You could also establish a small industry newspaper or magazine. But for a paid daily or weekly paper going to a national or Statewide market, distribution is a serious problem. There is only one distribution system independent of the three major newspaper and magazine publishers in the country: NDD, a subsidiary of Eastern Suburbs Newspapers.

NDD will never be a true competitor to the major groups. You can't do daily national distribution unless you have a successful daily paper to underwrite it. This lack of competitive alternatives in distribution is in distinct contrast to the competitiveness in the printing and typesetting industries. Frankly, distribution problems prevent the launch of a major daily or weekly with a national or capital city circulation at the present time unless you have working capital of at least $50 million up your sleeve.

Professor Bob Baxt, head of the Trade Practices Commission, has suggested that the *Queensland Wire v BHP* (1989) case has set a possible precedent for new players looking to solve their distribution problems. By this he means that the High Court's finding under s.46 of the Trade Practices Act in the *Queensland Wire v BHP* case might allow a new publisher to impose on News Limited, The John Fairfax Group or Australian Consolidated Press the obligation to offer a fair commercial price for the distribution of a rival publisher's products.

Distribution, however, is a service not a product and there is more to it than merely taking delivery of a ton of wire. There is plenty of room, obviously, for the majors to provide both quotes and a quality of service which would dissuade a new publisher from using them.

## In this Issue –



At this stage it is hard to believe that even with the High Court decision in *Queensland Wire v BHP*, a publisher planning a rival to the dailies or weeklies could, in reality, impose such obligations on one of the major publishers.

For those who are not direct rivals that may not be necessary. For instance, I have negotiated with The John Fairfax Group to distribute my paper, on satisfactory terms.

## Legal costs

The other major barrier to independent publishers will be no surprise to you. It is the libel laws. Having been a journalist for 30-odd years and an editor and senior executive for almost 20 of those years, the laws themselves were no surprise to me. The surprise lay in their cost, both financially and intellectually.

The financial cost arises not necessarily from losing any case. There is a significant cost in obtaining advice *prior to publication*. There is an even greater cost in taking advice if a writ should drop and an exponentially greater cost if an experienced Q.C. is engaged for, first, advice, and then the preliminaries to court action.

If the case should go to court it is often subsidised by the plaintiff's corporation, union, or organisation, which means the plaintiff does not bear the cost out of his or her own pocket.

A mischievous try-on by a wealthy plaintiff which is withdrawn or left to languish just before an actual court appearance, could easily cost $35,000: a significant burden to a small newspaper. Of course if it goes to court but is then settled on the basis of each paying their own costs, the bill might be $100,000

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or more. Just as expensive to a small newspaper defendant is the time and intellectual energy spent on such actions.

As the Federal Government has clearly learned in its harassing of Brian Toohey and The Eye, an average case accompanied by an unlimited budget, can impose on a small publisher just as great a burden as an excellent case.

For a small publisher the greatest need in the reform of the libel laws is not only liberalisation, but new methods for speedy adjudication which allow the matters to be run as cheaply as possible.

## Do we need a royal commission?

This brings me to the second aspect of my theme. There are many critics of the media in Australia today and there are not a few enemies. At their simplest, many want a royal commission into the press. Those who know how the press works find it difficult to think of a good reason why we should have a royal commission - after all, what royal commissioner, judge or QC, or his or her counsel assisting, is going to find out more about the press than the industry already knows.

What conclusions might be drawn by such a legalistic inquiry? And what opportunities for restraining the press might such an inquiry provide to assiduous politicians?

While we in the industry know how the press works and recognise the shortcomings of royal commissions, many outside the media regard the press as a great mystery, a source of great conspiracies - and great power, exercised unchecked.

To these people a royal commission is the answer to finding out how the great conspiracy works. And not a few eminent lawyers who might be appointed as a royal commissioner or counsel assisting, would take the same view.

I suspect that sooner or later the press will get a royal commission in Australia, if only because Britain has had three. In fact if we need an inquiry at all, we need something like The Economist Intelligence Unit inquiry of the 1960's to look at the realities of the economics of the press, as has occurred in Britain.

At different times the Labor Caucus has sought to get the Trade Practices Commission to do such an inquiry. Though uncongenial to some, this would be a far preferable solution to a royal commission. It might properly look at barriers to competition and to the practical economics and restrictions on competition that arise from competitors sharing printing and distribution facilities.

## Lawyers and the press

If the press has sectoral enemies then the two most significant are probably politicians and lawyers. Sometimes they are both. I do not have to explain why politicians try to control and manipulate the press, but I should emphasise how important they are in imposing restrictions on the press and how frequently they resort to the libel courts and contempt of court actions to protect their own, as distinct from the nation's interests. Lawyers are a more complex and less clearly defined enemy. I argued at a Press Council seminar last year that there is significant bias within the bench, the bar and the Crown Law offices against the press.

Encounter a libel lawyer at a party after a drink taken and he or she will generally tell you that journalists usually get it wrong (sometimes maliciously wrong), get sued, complain of this unfairness, ill prepare for the case and then blame the lawyers if the case is lost.

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Many judges who hear our cases have either shared that view as practising barristers or acquired it from their colleagues who have worked for or against the press.

The knowledge the legal profession has of journalism is almost entirely based on experience of legal conflict, mainly of experience at the libel bar. Few have encountered the more normal atmosphere of day-to-day publishing.

Thus, disapproval and cynicism about the press - from the bench and the bar - is considerable, not least from those on the bench and at the bar who have practised politics at some time in their career. There is at least a handful of senior lawyers and judges in State and Federal jurisdictions who, I believe, from my personal experience, have strong animus towards individual newspapers or the press as a whole, which arises from their experience in politics, at the bar or both.

This is not the only reason but it is a major reason why I think we will see over the next few years, lawyers in the vanguard of arguments in favour of new privacy, right of reply and official secrets legislation. Draconian official secrets legislation has already been recommended here by former Chief Justice Gibbs of the High Court. It is of course natural for lawyers to seek to introduce these ideas from Britain.

These issues are pressed here, despite our different circumstances, because of the cultural cringe towards English law, because the politicians prefer more restraint on the press, and because it is good for the legal business.

## How should the press respond?

The obvious response of the press to these threats is twofold. One is to use its undoubted power to restrain politicians from enacting more and more confining legislation. This can be done at one level by arguing rationally in our opinion columns and presenting opinions to the likes of the Gibbs Committee on the Official Secrets legislation. But this is quite often not enough.

The uniform defamation legislation as it was finally fashioned by the then Attorney-General, Gareth Evans, would never have been demolished by mere rational argument. It took the united, persistent and high level pressure from the media groups to persuade the Attorney-General that the legislation was unacceptable.

The second means of having less restrictions is for the press to live up to its responsibilities. Although it is often proprietors who get the bad press, poor journalism is the fault more of journalists and editors than proprietors. A responsible press is a product of a newspaper's staff rather than the result of directions from above. And in Australia today newspaper and broadcast journalists are more free of intervention from management and proprietors than ever before. This is a fact rarely mentioned by journalists when they make claims for more freedom.

The truth is, though, that the public is out of sympathy with the media's claims for greater freedom. The oligopoly in press and broadcasting, the sleaze that creeps into journalism – not just in tabloid TV – the consistent attacks on the press by politicians and by libel barristers and judges, influence the public to think: "Do we want to give journalists more freedom or more power?" The answer is generally no.

*Max Suich is the editor of The Independent Monthly and is a former editor of The Sydney Morning Herald.*

(Ed: The Trade Practices Commission is currently reviewing the authorities granted under the Trade Practices Act 1974 for the distribution of newspapers and magazines in Australia based on its 1980 decision *Re John Fairfax & Sons Ltd.* The Commission has released an issues paper to elicit contributions to this review.)