MICHELLE ROWLAND MP - SHADOW MINISTER FOR COMMUNICATIONS
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Old media, New media, Not media: Rethinking policy for the public interest

CAMLA has a long and distinguished history of informing debate on media and communications in Australia; sectors which play a critical role in our economy and society and, more fundamentally, our democracy.

The Communications Law Bulletin has been published by CAMLA for over 37 years, since April 1981, tracking developments across free speech, defamation, privacy, competition, copyright, broadcasting, telecommunications and the internet, amongst other issues.

The CAMLA community needs no convincing or reminding that the regulatory framework for media and communications is no longer appropriate and in need of reform.

Indeed, this understanding was old hat when the infamous 'Turkey slap' incident brought the issue to prominence, care of *Big Brother*, over a decade ago.

To continue with the Big Brother theme, the September 1992 issue of the Communications Law Bulletin contains an article by Professor Mark Armstrong, which said of Australia's then recently enacted *Broadcasting Services Act 1992*:

> "The laws we have are not suited to the new media environment. For example, old media like broadcasting which attracted separate rules are combining with new services like telecommunications. … "Yet "letting nature take its course" may produce Orwellian results. The natural economies of telecommunications and media transmission are towards concentration".

About a decade later, the March 2001 issue of the Communications Law Bulletin contained a piece by Suzanne Shipard asking whether new legislation was required to accommodate the rapid convergence of broadcasting technologies.

Yet another decade later, in 2011, the ACMA released its Broken Concepts paper, highlighting how many legislative concepts – the building blocks of communications and media regulation – are broken or strained as a result of convergence pressures.

Over 25 years since it was enacted, the BSA is still with us, straddling the worlds of old media and new media; as well as being tinkered with, here and there, in recognition of the impact of that which is argued not to be media – the digital platforms and the data and algorithms that underpin them.

The BSA continues to be subject to the September 2000 Ministerial Direction which decrees that 'internet services' are not 'broadcasting services', yet a number of its Schedules do regulate the internet, to a limited degree, and it's about to have a brand new Part tacked on for the administration of grants for the publishing industry.

Over roughly the same 25 year period in the EU, by contrast, the Television Without Frontiers Directive has been introduced and superseded by the Audio-visual Media Services Directive – which in turn is being revised as part of the Digital Single Market strategy.

This framework covers both traditional television broadcasts and on-demand audiovisual media services, including online platforms disseminating audiovisual content, and imposes a set of minimum rules on both types of services to achieve a balance between competitiveness and consumer protection.

Australia is barely playing catch-up when it comes to the design and implementation of a coherent, 21st century policy and regulatory framework that levels the playing field between content providers, sustains the broader ecosystem and utilises innovative data-driven advancements to enhance outcomes for industry, citizens and consumers.

What reform activity there has been, of late, has been characterised by inconsistency, delay and a lack of coherence – partly because the old questions still linger and the new questions are so many.

Working through the layers:

The second Exposure Draft of the Radiocommunications Bill is yet to emerge, and the broadcasting policy piece has been kicked into the long grass to be worked out later.

A trial of next generation broadcast technology has recently been announced by FreeTV and Broadcast Australia however there has been no clear signalling from Government around the planning or timing of broadcast standards evolution or related matters. While overseas jurisdictions have set dates for DVB-T2 switchover, there has been a distinct lack of activity on this front in Australia.

Media law changes, last year, were essentially in the nature of piecemeal deregulation or regulatory housekeeping. Labor supported all bar one of the measures, taking an evidence-based approach that supported industry while maintaining a key public interest safeguard in our democracy.

Labor opposed the repeal of the 2 out of 3 cross-media control rule

because Australia already has one of the most concentrated media markets in the world and evidence shows the majority of Australians still rely on traditional media for news and current affairs; the majority of the top ten news websites accessed by Australians are owned by traditional media platforms and the Department found 'the diversity-enhancing potential of the online space is yet to be fully realised'.

The Australian and Children's Screen Content Review is ongoing but, so far, there has been no public release of the report of the review, or its consultation. This Review is occurring in reference to an outdated regulatory framework and lacks a critical policy development step: public consultation on options, which might usefully have fostered a constructive dialogue on the way forward, with various interest groups advancing ideas beyond their opening positions.

Similarly, had the Government commenced an inquiry into competition in the Australian media market when Labor called for it, in August 2016, it could have been finished by now.

Coming up to two years ago, I publicly called for a thorough examination of the state of the Australian media landscape, noting there had not been a comprehensive inquiry into ownership, concentration and competition in the Australia media market since the late 1990s. I said that the government should ask an independent body, such as the ACCC or the Productivity Commission to assess the state of play so parliamentary decisions could be evidence-based. But the Minister for Communications rejected this suggestion, saying "All the relevant facts are known".

Given the ACCC's issues paper for the digital platforms inquiry contains around 48 questions on the digital media environment, and given the complexity of the fact-finding mission has been allowed 18 months to report, clearly all the facts were not known when the Government embarked on changes to Australia's media laws and clearly Labor's call for evidence on the state of competition in the media industry had merit.

Finally, for a Government that says it wants to de-regulate and promote self-regulation it is curious indeed that they ran straight for the legislative drafters when presented with their first key test in bridging the regulatory divide between broadcasting and online services in the content space.

The Act to restrict gambling promotions during live sport, which passed Parliament earlier this year, enables the ACMA to make online content service provider rules that impose the restrictions on 'online content service providers' and then to decide who to exempt from those rules. A 'regulate first; exempt later' approach.

The Act goes so far as to regulate SBS directly, despite the legislated independence of the SBS, the distinct treatment of the national broadcasting services in the BSA and the fact the SBS already had a code of practice in place to regulate its online content.

As I've noted in other fora, the Government, now well into its fifth year in office, has failed to produce a Communications Policy Roadmap to guide the transition of the sector in this time of change, despite the Minister's acknowledgment of the need for one and statement that it's something the Government is working on.

A Government with a coherent vision for its industry, consumers and citizens would signal its intentions and lay out its program – particularly in a sector with such high value benefits at stake.

The Government has imposed this discipline on the ACMA when it comes to laying out a five year spectrum work plan, yet it doesn't lay out its own plan.

A Government with a vision would put its APS staff to work within the ecosystem, drawing on the best expertise and ideas to progress the broad reform project that has lay before us for so long now.

But then, does a Government that knows what it stands for attempt to increase the level of advertising on SBS one day – then launch a broad-brush inquiry into its competitive neutrality the next?

Does a Government that knows what it stands for propose a Safe Harbour for Google and Facebook one year – then launch an inquiry into digital platforms the next?

Does a Government that knows what it stands for call for the abolition of section 18C on free speech grounds then threaten journalists with criminal sanctions simply for doing their jobs – as they did with the original Espionage and Foreign Interference Bill 2017?

At time of great upheaval, Government needs to promote the public interest as it supports industry.

It goes without saying that we need both a vibrant media sector to foster public interest objectives, but the public interest should neither be an afterthought to, nor a casualty of, reform to prop up commercial interests.

Unfortunately, the non-contestable grant of $30 million to Fox Sports, the deliberate and ideological exclusion of certain outlets from the Regional and Small Publishers Fund and the questionable motivations of some behind the bills, cuts and inquiries now faced by the national broadcasters has done little to engender trust in Parliament or the media – indeed it is likely to have undermined it.

While private media groups, digital platforms and advertising companies answer to shareholders, the role of Government is to act in the public interest at large.

Labor is proud to have supported a number of sensible changes to media law to support commercial media – particularly given its key role in the Australian content ecosystem – but

shares concerns that other players in the value chain, similarly disrupted by digitisation, have been neglected and that the public interest has been actively undermined over recent years.

It is way past time the Federal Government commenced a public dialogue to promote public interest outcomes in the contemporary media environment.

With more players in the media and communications ecosystem, there are potentially a greater number of contributors, and new ways of achieving outcomes.

Are all players doing their bit?

Can policy and regulation help traditional players innovate and move out of sector silos?

And can policy and regulation help new players – whether new media or not media – contribute more to public interest outcomes?

Digital media platforms demand a rethink about what we are trying to achieve, and how, and some interesting ideas have been advanced overseas as well as in submissions to the digital platforms inquiry, which the ACCC is now examining.

Data has been collected and used to promote a range of interests since the Domesday Book of 1086, and the power of data and algorithms today presents a new suite of new tools to promote public interest objectives in ways we never imagined. Proposals around a new data right are now being explored, as questions of human rights and ethics in the era of artificial intelligence are coming to the fore.

Meanwhile, with 4G well-established and 5G on the near horizon, we need a sensible dialogue about the future of our media and how best to serve our communities with the suite of complementary platforms and new applications that will be available.

In all of this, Government needs to be guided by clear principles and values, and have a vision to help shape public interest outcomes in the Communications Portfolio

The Curtin Labor Government introduced the *Broadcasting and Television Act 1942* and, fifty years later, the Keating Labor Government introduced the *Broadcasting Services Act 1992*.

It is my sincere hope that a Shorten Labor Government will have the opportunity to introduce the next Act in the series – after drawing on the expertise of government, industry, the not-for-profit sector and academia – to craft a coherent, principled and evidence-based way forward.

There is plenty of work to be done to guide a transition in the sector where all players in the ecosystem do their bit, and I am confident CAMLA will continue to provide thought leadership.

On 1 June 2018, CAMLA Young Lawyers held its annual CPD seminar with this year's topic on Privacy Law Essentials

Our speakers for the morning's seminar included a number of respected names in the data and privacy space: **Peter Leonard** (Principal, Data Synergies), **Veronica Scott** (Special Counsel, Minter Ellison) and **Anna Johnston** (Director, Salinger Privacy). The speakers were introduced by CAMLA Young Lawyers committee member **Ashleigh Fehrenbach** (Senior Associate, Minter Ellison).

In the spate of several recent privacy headlines (including the Cambridge Analytica scandal and the commencement of the application of the General Data Protection Regulation on 25 May 2018), the seminar provided attendees with practical insights into privacy law, including the general framework of privacy law in Australia, practical tips and traps in privacy law, and issues beyond the law including the ethical use of data.

Veronica Scott kicked off the seminar, taking attendees through what practitioners need to know about privacy law, with a detailed walk through of the privacy framework in Australia and its practical application. Anna Johnston provided practical tips and dispelled the major sources of confusion and related traps relating to privacy policies, consents and notification statements. Peter Leonard's part of the seminar focused on the issue of the ethical use of data, and the importance of fostering public confidence in the use of personal data by businesses as against strict compliance.

Anna's blog post on her presentation topic can be accessed at: https://www.salingerprivacy.com.au/2018/07/12/privacy-policy/.

CAMLA Young Lawyers would like to extend its thanks the morning's speakers for providing their insights, and to Minter Ellison who hosted the morning's event.