Review Article

The pedagogy of media law

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Students often find it difficult to recognise fully the socio-political forces that help to shape the policy contexts and institutional practices from which media legislation is produced. Three new titles on Australian media law significantly challenge simplistic assumptions concerning the cultural neutrality of law. Providing a diverse and comprehensive examination of the legislative regime which regulates media law, these books consider such topics as the impact of media convergence on defamation law and privacy issues; celebrity culture, media intrusion and the tabloids; ‘libel chill’, free speech and publishing ethics; intellectual property law and journalistic practices; and the impacts of the wide ranging broadcast media reforms of 2006. Insightful and well written the books under review represent an invaluable resource for teaching and researching media policy and law.


During a recent media lecture I asked students whether they thought celebrities should have a right to privacy. The responses were unanimous and, perhaps, predictable: ‘no, the loss of this privilege is the price one pays for fame’. What if, I posed, the celebrity’s photographic image is used without their consent? Again, these future journalists, web designers, script writers, PR consultants, game producers and radio broadcasters were unequivocal in their judgment that the celebrity image exists within the public domain and so it is, in some sense, deemed ‘public property’. But, in any case, they reasoned, isn’t it against the law to use someone’s photograph without their knowledge or approval?

This assumption was troubled, when, as a tutorial exercise, we considered an Australian ‘personality rights’ case1 currently before the courts. In Bingle

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1 Although Australian law has no direct equivalent to the US right of publicity, celebrity persona has been protected through a number of comparable areas such as the tort of passing off, certain provisions of the Trade Practices Act 1974 (Cth), applicable areas of intellectual property law and defamation. For two excellent comparative analyses on the treatment of celebrity image rights, see D Caudill, ‘Once More into the Breach: Contrasting US and
v Emap Australia, Australian model Lara Bingle is suing Emap, publishers of men’s magazine, *Zoo Weekly*, for unauthorised use they have made of topless photographs of her posing on a beach, the images accompanied by sexually suggestive captions. Bingle, famous for her Tourism Australia advertisement that asked ‘Where the bloody hell are you?’, is bringing action for misleading conduct under the Trade Practices Act 1974 (Cth); passing off; copyright infringement and defamation. Echoing earlier high profile media cases, Bingle claims the publication includes an imputation that she is ‘the sort of model who would allow herself to be photographed for a magazine scantily clad and making an overtly sexual invitation’. Although Bingle consented to the shooting of the original photographs and, indeed, copyright in these appears to be owned by the photographic company for whom she posed, she did not authorise their publication in the magazine or associated promotions. Discussing the cultural and political implications of this case, students were shocked both at the invasion of privacy perpetrated against Bingle by the magazine and by the precarious nature of the legislative and regulatory protection available to her. For many of these students ‘legality’ is perceived as an unambiguous institutional force of good. Although they extol the utility of theories such as the contextual meanings of media consumption, the mediated nature of representation or will argue that emerging forms of technological communication produce a new visual culture, the languages and practices of law are immutable.

In their differing ways, three new books on Australian media law help to challenge simplistic notions of law’s neutrality. As Scott Beattie and Elizabeth Beal explain in their recent book, *Connect and Converge Australian Media and Communications Law Handbook*, ‘regulation is a social phenomenon’ that operates ‘as a form of communication’ through the ‘expression of legal voice’. Hence, ‘like all communications, it is inexact, incomplete and bound by the rules of the language in which it is expressed’. Taking as a central theme the impact wrought by new communication technologies on the legislative and policy frameworks of Australian media law, Beattie and Beal argue that the notion of ‘regulatory networks’ is a productive way to overcome the ‘strict legal/illegal split’. Instead of focusing solely on the ‘direct intervention’ of case law, litigation or legislative regimes, understanding how regulation functions as a network reveals the multiplicity of regulatory powers operating across media law, such as codes of practice or the norms held by a particular creative community.

As the title suggests, *Connect and Converge* is thematically structured
around the twin logics of connectivity and convergence and how these spatiotemporal constraints reconfigure the regulatory frameworks of Australian media. Converged media is defined as the ‘tendency for media technologies to overlap and create new media platforms’ while ‘connected media . . . refers to the extent to which media permeates our everyday life, that is, the number of “connections” made between media outlets and individuals’. This intertwined dynamic, ensures that ‘not only are there more points of connection with media, but convergence means that these connections are networked together in combinations previously unheard of’.

Each chapter, therefore, considers how connectivity and convergence affects the regulatory practices of particular media sites of production and consumption. In Ch 2, ‘Truth, Media and the Public Interest’, for example, media convergence and connectivity makes problematic the verification of facts and hence emphasises the need to understand defamation law. While in Ch 8, ‘Audience and Community’, the efficacy of current regulatory regimes of censorship are challenged by new platforms for delivery and consumption, prompting the authors to argue that since:

state content regulators are . . . being sidestepped by international media sales and Internet downloads . . . and are struggling to find a new role outside the traditional ‘book burner’, then perhaps their remit should be reconceptualised to that of ‘expert advisors and participants in media creation rather as police officers’.

Connect and converge is informed by a ‘constructivist’ pedagogy which aims to engage students in ‘active participation’ through ‘problem based learning’. Although, as a teaching academic, such terms usually fill me with dread at the prospect of yet another powerpoint presentation on ‘real world outcomes’ (ironically often couched in surreal and incomprehensible language) this book is a welcome resource for teaching media policy. In particular, each chapter presents case studies relevant to the legal area under examination, summaries of key concepts and exercise questions. The latter are designed expertly to suit both assignment work or as the bases of tutorial discussions. For example, the chapter entitled ‘Creators’ Rights’ that deals with the legislative and policy frameworks for intellectual property outlines ‘the Panel Case’ to illustrate the complexities involved in the application of the fair dealing provisions under the Copyright Act 1968 (Cth). Unfortunately, it appears the book was written before the Copyright Amendment Act 2006 was passed which effected major reforms to Australia’s copyright regime, specifically, the introduction of new fair dealing exceptions, under ss 41A and 103AA, to copyright infringement for parody and satire. Since the judicial and legislative treatment of the defences of parody and satire have proved unpredictable in jurisdictions such as the United States, it would have been

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10 Ibid.
11 Ibid, p 51.
interesting to read the authors’ discussion of these reforms in relation to copyright regulation.

However, this omission does not diminish the overall pedagogical strength of the book since its major attribute is presenting to students a critique of some of the fundamental assumptions underpinning the legislative regulation of cultural production, a critique, moreover, that is located within current media research rather than focusing solely on statutory analyses. In their chapter, ‘Satire and Other forms of Expression’, for example, there is a strong recognition that, as contemporary media research has demonstrated, parody and satire are increasingly dominating the thematic output of the film and television industries.14 Yet, as the authors explain, causes of action such as defamation may be ill-equipped to deal adequately with this significant vernacular due to the competing powers at play. As they put it, ‘tension arises where laws designed to protect business interests ... are used to quell political critique of business misconduct’.15 The exercises contained in this chapter could work productively in tutorial situations since these deal with the risk management of satire in relation to contemporary sites of media production such as The Chaser, fan fiction communities and culture jamming, more generally.

Similarly effective are the exercises provided within Ch 4, ‘Investigative Journalism, Tabloid media and the Public’s right to know’. Following the material which sets out how case law and legislation treat the regulation of privacy, students are presented with a series of locations throughout Australia — for example, ‘Central train station, Sydney’; ‘Inside the No96 tram, Melbourne CBD to St Kilda’; ‘Uluru, Northern Territory’ — and asked to consider whether these constitute private or public space for the purposes of filming.16 Also helpful in this chapter is the attention Beattie and Beal pay to ‘the celebrity as a commercial interest’17 through examination of the leading Australian decisions on the unauthorised use made by the media of the celebrity image. As paradigmatic of the era of ‘public privacy’,18 the celebrity occupies an ambiguous position between ‘private ownership and public image’19 making regulation of such appropriation a complex economic, legal and cultural challenge. Moreover, the ‘celebrity figure’ functions as the exemplar for the pedagogy of a broad range of contemporary media issues such as copyright (to what extent does your own image belong to you?) privacy (does the public’s ‘right to know’ always justify media intrusion?) or user led content (does citizen journalism transform everyone into a celebrity?). In other words, asking students to consider the rights and privileges of celebrity culture functions as a case study for mapping the

15 Beattie and Beal, above n 6, p 58.
16 Ibid, p 74.
17 Ibid, p 77.
institutional, economic and political conditions producing the media sphere. Connect and converge provides valuable assistance in this regard.

As Beattie and Beal argue, a consequence of media convergence is that the boundaries hitherto distinguishing categories such as producer and consumer are increasingly blurred. This socio-technological situation makes The Journalist's Guide to Media Law by Mark Pearson suitable for both communications students and journalists. Pearson has substantially updated and revised his 2004 edition by covering recent legislative reforms to defamation, anti-terrorism and intellectual property together with consideration of significant High Court decisions and key international policy and regulatory developments.

One of the most pleasing aspects of Pearson’s book is conveyed through the subtitle: ‘dealing with legal and ethical issues’. Despite, or perhaps because of, the popularity of satirical news commentary produced by programs such as The Chaser Network, Frontline, The Colbert Report (US) or The Thick of It (UK), there remains a widely held view that journalists should operate in the public interest and, moreover, that they uphold those same standards they demand of others. Pearson argues cogently that a ‘sound working knowledge of law and ethics should strengthen, rather than shackles, the practises of the professional journalist’. For Pearson, it is ignorance about the scope of media law which can have a ‘chilling effect’ on free speech. Instead, journalists and media students should learn how to ‘work to the edge of the law and the limits of a defence, all within an ethical framework’. Pearson continues this argument particularly forcefully during the chapters concerning defamation law. ‘The worst result of this book’ he writes ‘would be to make journalists so cautious in their work that they did not pursue important news stories to their potential’. According to Pearson, ‘too many journalists and publishers suffer from “libel chill” — the phenomenon where reporters and their news executives become overcautious in their work for fear of defamation action’. For anyone who has been ‘legalled’ this is a refreshing exhortation.

Adopting a pedagogical approach that is similar to Beattie and Beal, The Journalist’s Guide to Media Law is informed by ‘reflection-in-action’: the ‘phenomenon of the professional’s ability to reflect in the midst of action to solve a problem that has arisen’. For the intended audience of the book this is the aim that journalists ‘should be able to recognise situations where legal or ethical issues might arise and be equipped to deal with them’. To this end

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22 Ibid.

23 Ibid, p 240.


25 Ibid.
Pearson presents case notes; exercise questions; and ‘lessons for journalists’, the latter deserving a special mention. As law students can attest, accurately identifying the ratio decidendi within particular cases is not necessarily a straightforward task. Pearson is to be commended, therefore, for the conceptual work he performs in synthesising each case note presented into these concise ‘lessons for journalists’. The copyright implications for journalists of the notoriously complex and lengthy ‘Panel Case’, for example, are succinctly outlined through concrete advice that news producers examine closely the issue of ‘substantiality’ when they use material from another’s broadcast. Impressive also are the summary tables he has compiled which present in a very useful manner complex legal material synthesised from different industry sources. In particular, a substantial amount of work has gone into producing the table entitled ‘Key privacy factors gleaned from regulatory codes’ since it is often very difficult to determine the precise legal scope enabled by the web of relevant Codes of Practice operating across the diverse sectors of the Australian media industry.

Rather than focus narrowly on statutes in isolation, The Journalist’s Guide to Media Law is structured around five key aspects of journalist practice as each of these intersect with the law. So, for example, Part 1 introduces the reader to the Australian legal system and its sources of law with particular attention paid to the sites of legal power that concern journalism such as the series of High Court decisions through the 1990s dealing with political free speech. This section also presents a very useful comparative overview of ‘free speech’ across other jurisdictions such as the United Kingdom and United States. In Part 2, ‘Reporting crime and justice’, the notion of ‘open justice’ is explained as ‘the principle that the justice system benefits when publicity is given to court proceedings’. This principle is then historically mapped through the English Courts of the sixteenth century and briefly contextualised through ‘Article 14 of the International Covenant on Civil and Political Rights’ and relevant Australian case law. The principles of open justice provide a counterpoint for the discussions in the following chapters on the various restrictions and challenges facing journalists such as the laws of contempt of court, protocols of court reporting and the identification of jurors. Part 3 on ‘Journalists and Reputations’ provides a detailed, practical overview of the laws of defamation, taking into account the 2006 introduction of near-uniform defamation laws throughout all Australian jurisdictions. According to Pearson defamation is the ‘area of law most commonly associated with journalists and their work’ since they are in ‘the business of publishing controversial news stories about people and their activities’. Again, the material is supplemented by a concise flow chart — ‘Defamation in Action’ — which charts the possible legal or regulatory outcomes for

26 Ibid, pp 396–400.
27 For a comprehensive examination of the limitations within the Australian Commercial Radio Codes of Practice, see L Hitchens, ‘Commercial Broadcasting-Preserving the Public Interest’ (2004) 32 Federal L Rev 80 at 80.
29 Ibid, p 59.
30 Ibid, p 175.
journalists who have written potentially defamatory news material.\textsuperscript{31} Particularly timely is Pearson’s discussion focused on the concept of ‘libel chill’ since, at the time of writing, the local and international media industries appear to be threatened with legal action over the publication of Andrew Morton’s book \textit{Tom Cruise: An Unauthorized Biography},\textsuperscript{32} which illustrates well the comparative chill of Australian defamation law in comparison with the US law.\textsuperscript{33}

If the act of revealing sensitive information may form the basis for a cause of action, so too is the keeping of secrets a legally fraught area. In Part 4, ‘Investigative Journalism’, significant cases in Australian contempt of court law are examined. Pearson argues that these cases, some of which have resulted in the jailing of journalists, represent the ‘ultimate clash of interests in an important three-way relationship between the journalist, the journalist’s sources and the legal system’. What drives the litigation is a legal conflict of interests: ‘on the one hand, the law recognises that some relationships and information must be kept confidential, but on the other hand, insists that confidential information be revealed in a court if such revelation is necessary in the interests of justice’.\textsuperscript{34}

The recent decision in one of these cases seems to indicate that law favours the latter principle at the expense of the former. In \textit{R v McManus and Harvey}\textsuperscript{35} two \textit{Herald Sun} journalists were found guilty of contempt of court for refusing to reveal their sources in a 2004 story the two wrote, entitled ‘Cabinet’s $500-million rebuff to war veterans’ exposing a government plan to refuse entitlements to Australian war veterans. Although the pair did not face jail terms, they were fined $7000 each in a decision that drew intense criticism from key industry associations. For example, Chris Warren, federal secretary of The Media, Entertainment and Arts Alliance (MEAA), argued the journalists should not have been charged in the first place. It was clear, he asserted, that they had been ‘caught in the middle of a campaign by the Federal Government against whistleblowers and as a result of that campaign they were charged’\textsuperscript{36}. In addition, the decision was highlighted during the recent \textit{Independent Audit into the State of Free Speech in Australia} conducted by major print and broadcast partners across diverse sections of the Australian media industry. This audit reported unfavourably, finding that ‘free speech and media freedom are being whittled away by gradual and sometimes almost imperceptible degrees’ and concluded that their audit ‘should ring alarm bells for those who value free speech in a democracy’.\textsuperscript{37} Pearson echoes this view on the parlous state of free speech in the Australian media arguing that

\begin{itemize}
\item \textsuperscript{31} Ibid, pp 250–1.
\item \textsuperscript{33} The ‘chilling effect’ has also been shown through researching newspaper content, see C Dent and A T Kenyon, ‘Defamation Law’s Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers’ (2004) 9 \textit{MALR} 89.
\item \textsuperscript{34} Pearson, above n 21, p 256.
\item \textsuperscript{35} [2007] VCC 619.
\end{itemize}
governments at all levels have acted to stop the free flow of information about their activities in Australia — a democratic nation that often lectures its South Pacific island neighbours about the need for transparency in their governments. Strict regulations against public servants leaking information to journalists, measures against journalists for refusing to identify those who give them off-the-record information . . . and the huge national investment in government-sponsored public relations (‘spin’) make a mockery of claims by parties of any political persuasion that Australia has a system of ‘open government’. 38

The important lessons for journalists here, he argues, are to ‘beware of relationships of confidence’ and to ‘negotiate confidentiality’ with sources. 39

Part 4 also considers further restrictions placed on the news production of journalists by examining the impact of Australian anti-terrorism laws and race hate laws.

In the final section, Part 5: ‘Ethics and the Law’, the book concludes by examining how Australian intellectual property laws play out in the ‘age of cut and paste’. 40 This section contains very helpful, practical guidance for journalists on how IP functions both for the ‘protection of their own work and for the licence to use the work of others’. 41 If ethical dilemmas confront the journalist in the form of copyright laws — ‘to what extent can we borrow someone else’s creative work without owing some moral debt to them?’ 42 — then privacy considerations are an equally pressing ethical issue for the media sector. The point of departure between these areas is that while IP regimes are statutorily regulated, Australia has not recognised a distinct legislative or judicial right to personal privacy. Instead, as Pearson explains, there are other ‘privacy-related laws’ to which ‘victims of media intrusion’ may turn, including defamation, breach of confidence, intellectual property, trade practices laws and ‘even obscenity and indecency laws’. 43 While Australian law does not yet clearly accept a tort for invasion of privacy, Pearson joins other commentators who argue that the decision in ABC v Lenah Game Meats 44 may leave open this as a legal possibility for the future. 45 Indeed, the Victorian County Court has struck out on that path in a case involving the

39 Ibid, p 301.
40 Ibid, p 338.
41 Ibid, p 345.
42 Ibid, p 338.
44 (2001) 208 CLR 199; 185 ALR 1.
media, although the case awaits appellate consideration.\textsuperscript{46}

If, as the dust jacket to \textit{The Journalist’s Guide to Media Law} tells us, Pearson is ‘still firmly on the journalist’s side’ the final text under consideration is definitively on the side of the law student. Now in its third edition, \textit{Australian Media Law} by Des Butler and Sharon Rodrick is an invaluable guide to all areas of Australian media regulation aimed at both law students and practitioners. Although the doctrinal approach, typographic conventions deployed, indexical organisation and lengthy table of cases situate this book within law schools rather than media departments, this does not mean it is without rigorous media critique. Indeed, the explanations of significant High Court decisions and close examinations of policy and statutory development ensure that \textit{Australian Media Law} presents a nuanced overview of the intersections between law, culture and media. In particular, Ch 8, ‘Media and National Security’ invites readers to consider carefully the consequences of amendments enacted through the Anti-Terrorism Act 2005 (Cth). As the authors explain ‘following the terrorist attacks in the United States on September 11, 2001 there have been a number of world events, including terrorist attacks in Bali and London, and the Australian involvement in Afghanistan and the Iraq war’ which have raised concern about the ‘best way in which to safeguard national security’ in Australia. However, ‘such safeguards may have the collateral effect of restricting freedoms previously enjoyed, including freedom of speech and freedom of association’. Furthermore, these legislative developments could have ‘serious implications for the media in general, as well as individual journalists, editors or executive producers seeking to report on matters in the public interest’.\textsuperscript{47}

Butler and Rodrick organise their material in a manner comparable to the other media books reviewed here. There are chapters, for example, examining legislative and judicial regulation of free speech, defamation, contempt of court, copyright and privacy. However, arguably, it is at the level of doctrinal detail by which \textit{Australian Media Law} is distinguished from the other two titles. The authors provide extensive, focused statutory analyses, both from an historical perspective and taking into account contemporary developments, as well as widening the analytical lens to include exploration of the regulatory culture framing the Australian media. Chapter 14, ‘Regulation of the Media’, for example, begins by considering the policy rationales for the ‘extensive government involvement’ in the regulation of the Australian broadcasting sector. As a number of policy commentators have pointed out, for many Western media sectors, there is a differential which appears to exist between the regulatory regimes affecting electronic media as opposed to those regulating print media. That is, as Eric Barendt puts it ‘broadcasters are generally subject to constraints which are not imposed on their colleagues in the press’.\textsuperscript{48} The explanations for this statutory disparity are underpinned by a fundamental belief in the different qualities and characteristics of the two platforms. Broadcasting, particularly the visual impact of television, is seen as exerting a more powerful influence over the creation of public opinion and

\textsuperscript{46} Jane Doe v Australian Broadcasting Corporation [2007] VCC 281 per Hampel J.
values than that exerted by the print media. Indeed, the Productivity Commission investigation into Australian broadcasting regulatory regimes found that ‘free to air television is presumed to have the most influence and thus attracts most regulation’.49 According to Butler and Rodrick the ‘unique capacity to influence public opinion and public values has resulted in broadcasting licences being perceived as being in the nature of a public trust’ requiring a ‘high degree of government control and accountability’.50 While this rationale is accepted by certain media stakeholders, the authors argue that the ‘notion that a broadcasting licence is in the nature of a public trust is often resisted by broadcasters, who regard themselves as running a business and as having a right to conduct that business in such a way as to maximise profits’.51

However, the authors question the relevance of the long standing regulatory policy rationale known as ‘spectrum scarcity’. Since the broadcasting spectrum is a finite resource, the argument posits, regulation must allocate licences or other modes of access to the spectrum through an equitable and competitive process. However as Butler and Rodrick explain, the spectrum scarcity justification for broadcasting regulation is now ‘obsolete’ due to technological developments such as the ‘opening up of the FM band to radio broadcasting services’; ‘commencement of ultra high frequency (UHF) transmission’; ‘cable, satellite and microwave distribution services’ operating as alternative platforms for delivery; and ‘the advent of digital television and radio’. This technological transformation ensures ‘there are no longer significant technological restraints on the number of broadcasting services that can be provided’.52

Also useful within this chapter is the detailed account of the Broadcasting Services Act 1992 (BSA) which is the primary legislative instrument for the regulation of the commercial, public and community broadcasting sectors in Australia. Butler and Rodrick comprehensively describe the objects, definitional scope and broadcast categories provided for by the BSA noting the significance of political and cultural contexts within which these laws are written and enforced. That is, in relation to the statutory objects set down under s 3 of the BSA there is the possibility for tensions to emerge between certain aims. For example, one of the objects seeks ‘to encourage diversity in control of the more influential broadcasting services’53 while another aims ‘to provide a regulatory environment that will facilitate the development of a broadcasting industry that is efficient, competitive and responsive to audience needs’.54 There is, the authors point out, some ‘variance between encouraging diversity in control of the more influential services, yet at the same time promoting an efficient and competitive regulatory environment’.55 Moreover, ‘economic forces favour concentration of ownership, as concentration of ownership tends to increase economies of scale so that if primacy is given to

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50 Rodrick and Butler, above n 47, p 527.
51 Ibid.
52 Ibid.
53 BSA s 3(c).
54 BSA s 3(b).
55 Rodrick and Butler, above n 47, p 528; Kitzmann, above n 17.
the need for economies of scale, there will inevitably be a cost in terms of diversity’. 56

This argument is further developed throughout the following chapter, ‘Media Ownership and Control’ where Butler and Rodrick detail the legislative and cultural impacts of the ‘new post reform era’, 57 namely, the wide ranging media reforms of 2006 enacted, predominantly, through the Broadcasting Services Amendment (Media Ownership) Act 2006. In particular, the chapter examines the policy rationales advanced by the Howard government in support of the repeal of cross media and foreign ownership rules. Not surprisingly, one of the major justifications articulated concerns the autonomy and power of free markets. As they explain in relation to foreign ownerships and content regulations, ‘it is often maintained that all media owners will respond to commercial imperatives; accordingly, if consumers demand content of relevance to Australians, the owners will provide it, irrespective of their nationality’. 58 Public concern over media concentration, however, remains strong as shown recently through research into smaller Australian markets. 59 In summary, Australian Media Law provides an excellent resource for demonstrating to students how law-making does not exist in a vacuum but is always the result of the intensities of socio-political and economic power.

Indeed, the strength of all three books under review is that they contribute to the exploration of what Rosemary Coombes has called the ‘social intersections of law, culture, and interpretive agency’. 60 Although many media students easily recognise the ‘interpretive agency’ at play in the representation of law through popular culture — whether this be the flexible legal awareness practised by Vic Mackey 61 and Tony Soprano, 62 the maniacal appeal to justice made by Lt Daniel Kaftee, 63 or even the actions of celebrity models — it is often difficult to persuade them that perhaps media legislation, itself, is similarly mutable and hence, requires analytical attention. These new media law titles offer just such persuasive power.

56 Rodrick and Butler, above n 47, p 632–3.
57 Ibid, p 631.
58 Ibid, p 635.
59 T Dwyer, D Wilding, H Wilson and S Curtis, Content, Consolidation and Clout: How will regional Australia be affected by media ownership changes, Communications Law Centre, Melbourne, 2006.