BRITISH MODEL NOT THE WAY TO GO

We shouldn't go down the UK road in the pursuit of media regulations

STEPHEN HORNSBY

POLITICIANS and policy-makers in the advanced democracies have two major concerns about the media.

The first is its alleged political influence and the belief that media support is necessary for a political party to get elected — although the same point could be made equally about banks.

The second is the alleged lack of diversity of ownership of the media that is reflected (so it is said) in the uniformity of certain political perspectives. If true, this would be a problem in democratic societies.

Both these concerns are discussed in the Convergence Review, which is causing a great deal of comment in Australia and beyond. To a foreign observer, what is very surprising is that perceived shortcomings in the current regulatory system in Australia have led the review to conclude that the British system of regulation is the way to go.

What is being proposed in Australia is quite remarkable; it will give Australia perhaps the most comprehensive panoply of media regulatory restrictions in the world. In addition to competition law and "minimum number of owners" requirements, it is proposed to have an over-arching "public interest" test against which changes of ownership of national significance are to be assessed.

The review recommends that the "public interest" test be administered by a body that is explicitly modelled on Britain's Office of Communications (Ofcom) without much detail being provided on what the "public interest" test may involve. Before looking at that test, the key section of the review needs quoting in full.

"The former UK communications minister Lord Stephen Carter has attributed the success of the communications regulator in the United Kingdom (Ofcom) to the creation of an entity:

"Independent of government in staffing and financing and in authority and therefore the brave decisions can be made independently of the political cycle in much the same way as they are made in financial services.

"Accordingly, careful consideration needs to be given to any circumstances in which the regulator may be subject to government direction in the performance of its functions."

The review fails to mention that Carter was not only a minister but also the first chief executive of the organisation that he is praising here so lavishly .

Moreover, financial services regulation in Britain is generally regarded as a disaster: so the British model's apparent success merits a closer look.

As far as the claimed independence from government is concerned, both chief executives of Ofcom to date have had very close links to the Labour government that appointed them. Indeed one of them, the incumbent chief executive, Ed Richards, worked for the Labour government for several years as an adviser. This could appear to undermine independence in an organisation where some key decisions require government approval. Indeed, even if there were to be no close personal links at a high level, there is a risk that the regulator will tend to second-guess what the government wants if the government has the final word.

As to the bravery of Ofcom's decision-making, this claim does not stack up either. Two of the major interventions undertaken by Ofcom during the course of its existence (the attempt to curtail British Telecom's monopoly and Sky's strong position in the broadcast of film and sports that are not subject to anti-siphoning legislation) are very popular — though neither has proved successful after years of effort.

So despite the opinion of its first chief executive, Ofcom is neither manifestly independent as an organisation nor particularly brave in its interventions.

This leads us to the "public interest" test and consideration of Ofcom's popular preliminary decision to refer to the Competition Commission News's attempt to acquire those shares of Sky that it did not already own. Before looking at the deficiencies of such a widely drawn test that gave News's commercial rivals (such as British Telecom) a potent stick to beat it with, it is necessary to go back a few years.

Up until 2002, the test for assessment of all mergers in Britain was indeed a "public interest" test. The test was loathed by businessmen and their advisers on the grounds of its vagueness and was criticised by international regulatory bodies too. Succeeding governments attempted to introduce some certainty into the process by providing guidance that changes of ownership were likely to be subject to lengthy investigation by the Competition Commission only where there were competition concerns in all but exceptional cases. In 2002, the government proposed putting these guidelines on a statutory footing. However, as a result of lobbying, a government minister was given the power to intervene in certain media mergers and could require them to be investigated by Ofcom on grounds that media plurality was threatened. Ofcom could then refer that particular merger to the independent Competition Commission, which could then make recommendations. These recommendations in their turn could be ignored by the minister.

Returning to the News bid for Sky, the competition aspects were swiftly dealt with in Brussels by the European Commission and there was no problem from this perspective. Possible media plurality concerns in Britain were identified in relation to broadcast news; however, by any measure, by far the dominant provider of broadcast news is the BBC in Britain. How, then, could Ofcom fail to bravely recommend that the bid be allowed to proceed?

The question became acute because at this point there was understandable outrage at the behaviour of News's journalists in Britain and the potential involvement of top management in phone hacking. All hell would have broken loose in Britain had the bid been given the green light. The problem for Ofcom therefore was to find a rationale for referring the merger to the Competition Commission against this particular background when a merged Sky-News would have a market share of broadcast news less than half that of the BBC's.

Ofcom decided on a preliminary basis that whereas the BBC under its charter was bound to be impartial, a broadcaster that was ultimately owned by a "strong proprietor" (although subject to the same rules as impartiality in news and current affairs as the BBC) would be likelier to break those rules and that this issue therefore required examination by the Competition Commission. As a result, the bid required detailed examination and delay, and in the end this proved fatal as a storm of criticism engulfed News.

Ofcom's preliminary finding was not based on any statutory guidance: the width of the "public interest" test enabled Ofcom to invent it.

It is interesting to see that one feature of the "public interest" test proposed by the review is whether there is significant risk that the merged enterprise would not comply with its obligations becaue of the identity of the company acquiring control of it.. So there are obviously substantive parallels here.

A key consideration here is that it is well recognised that whatever the law says on the need for impartiality in broadcast news, it can't prevent an "unacknowledged partiality" (a phrase invented apparently by James Murdoch) arising out of the selection of stories and their running order. In Britain it is a widely held view that despite its charter and its impartiality obligations, the BBC is on the left of centre in the views it is able to project by its selection of stories and running order. If this is correct, and Ofcom was right about the threat to impartiality posed by a "strong proprietor", Ofcom's preliminary finding has the paradoxical effect of maintaining the BBC's dominance of broadcast news and actually reducing plurality. Even News's commercial opponents in Britain recognise that the "public interest" test is discredited and are now advocating a "bright line" market share test to replace it (from which the BBC would naturally be exempt).

The lesson that really should be drawn from the British experience is that serious problems are inherent in a system where an "independent" regulator administers a totally vague test subject to some degree of political control. The consequences could lead to the protection of media companies that are financed by the taxpayer that are more inherently malleable to politicians than those that are privately owned. Australia should therefore take the opportunity to fashion its own course in the regulation of the media.

British athletes may be appropriate role models Down Under, but not our media regulators.

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CARR'S CO-OPERATION RECIPE FOR A CALMER SEA

Labor has founded an unruffled and constructive relationship with China

GREG SHERIDAN
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THERE are some international problems that are intractable. They cannot be solved in the short term, or perhaps for a very long time. Attempts at final resolution can even be counterproductive. Instead they need to be managed and interested parties should look for constructive actions that make things a bit better.

Such a problem is the conflicting claims to sovereignty over the South China Sea. China, Taiwan, Vietnam, The Philippines, Malaysia and Brunei all claim parts of the South China Sea. Recently it has been the scene of the most dangerous and disorderly naval and other clashes in the Asia Pacific. Countries, particularly China, are becoming much more assertive about their rival claims. This has led to the incursion by Chinese commercial and fishing vessels into waters other countries regard as their territory. When Southeast Asian coastguards and the like try to expel such vessels they are often blocked by the Chinese navy. Similarly, Chinese ships have harassed commercial exploration vessels operating within the exclusive economic zones of Vietnam and The Philippines, because these areas also fall within EEZ areas that would belong to China if all the islands in the South China Sea were sovereign Chinese islands.

The South China Sea is enormously important for three reasons. Something like one-third of the world's shipping trade passes through the area.

Second, it is known to hold important fish stock and is believed to contain substantial oil and gas deposits. And finally, because Beijing has decided to make such a chest-thumping nationalistic issue of it all it has acquired huge political and symbolic importance.

Beijing's position is inherently unreasonable. Way back in 1948, the then government of China published a map with nine dashed lines that enclosed almost all of the South China Sea as sovereign Chinese territory. In 2009 the Chinese government sent a note to the Secretary-General of the UN re-stating the claim. On its face, the claim is just absurd. The nine dotted lines that China include on the map embrace virtually the whole South China Sea, including areas adjacent to the coast of The Philippines, Malaysia, Brunei and Vietnam. And the justifications Beijing sometimes offers for these claims — alleged historic tributary relations, the claimed presence of Chinese artefacts here and there — are just about laughable.

So what should Australia do about all this?

The Foreign Minister, Bob Carr, outlined a helpful approach in a speech to the ANU this week. Australia's formal position is not to take sides on the merits of the individual territorial claims. Given the inherent absurdity of some of Beijing's claims, this may appear weak. But I think it is sensible.

First, not all of China's claims are absurd. And the other nations themselves have overlapping and conflicting claims. There is absolutely no need for Australia to try to adjudicate such claims and no one would thank us if we did. The US, like Australia, does not take a position on the merits of the conflicting claims as such.

However, Carr also said: "We call on countries to pursue their territorial claims and accompanying maritime rights in accordance with international law, including the United Nations Convention on the Law of the Sea."

Given the extreme difficulty of reconciling Beijing's claims with international law, just saying that is probably saying enough.

Carr then outlined two ways the contesting parties in the South China Sea might move forward. One was modelled on the Antarctic Treaty, which is designed to secure and manage the Antarctic towards agreed ends, such as keeping it demilitarised, promoting scientific research, etc. But the more important model was that of "joint development zones".

Carr said: "To advance, it can often be better for parties to 'agree to disagree' and to focus on how all parties can benefit . . .

"Joint development zones are designed to facilitate equitable and mutually beneficial development — a concept that is expressly provided for in the UN Convention on the Law of the Sea. Zones are operating successfully around the world, including in Southeast Asia, Africa, northern Europe and the Caribbean."

Carr then described a number of such zones and commented: "With our neighbours, East Timor, we are jointly developing Timor Sea petroleum resources for the mutual benefit of both countries — based on groundwork laid with Indonesia."

Australia is likely to make a low key effort to explore a dialogue on such proposals. Senior Indonesians have been considering the idea of a "one and a half track dialogue" — so called because it involves both officials and private experts — to workshop the issue.

None of this may work. But it is worth a try. It is a constructive effort. It is more likely that Southeast Asian nations would consider such a proposal than China itself. But it may also help forge ASEAN unity. At the last ASEAN meeting the group's foreign ministers for the first time ever could not even issue a joint communique, because Cambodia was doing Beijing's bidding and would not agree to any united ASEAN position. ASEAN is working on Cambodia's leader, Hun Sen, to bring Cambodia back into the ASEAN consensus.

The low-key, under-stated nature of this Carr initiative is one of its serious strengths. Indeed the Gillard government generally is handling Beijing in a cool, calm fashion at the moment and that is the right way to proceed.

Beijing has reacted with unreasonable annoyance to the announcement that up to 2500 US marines will eventually be rotated for several months each year in northern Australia. The Chinese are giving Australia a bit of a poke about it. Some of our more excitable commentators regard this as a looming crisis or at least a sign of incompetence on Canberra's part.

Instead, the unruffled tone, exemplified by Carr, is something the Gillard government is getting right. Next month Dennis Richardson, the head of the Department of Foreign Affairs and Trade, will travel to Beijing to explore a new set of consultative mechanisms between Australia and China. But as Carr said this week: "We are relaxed about the timing" of such mechanisms. In other words, if Beijing doesn't want to build new bilateral architecture right now, that's OK. This is the right tone for Canberra with Beijing — positive, constructive but ultimately unruffled, and unintimidated.

THE CASE THAT BROKE THE HEART OF A NAZI HUNTER

An eight-year pursuit of Karoly (Charles) Zentai found me pitted against his children

EFRAIM ZUROFF

AT the end of next week I will have spent 32 years as a "Nazi hunter" trying to facilitate the prosecution of people who in the service of Nazi Germany or in alliance with its regime engaged in persecuting and/or murdering innocent civilians categorised as "enemies" of the Third Reich.

I have dealt with many dozens of cases of all sorts of criminals from many nationalities and walks of life, from mass murderers to people who were charged with the murder of a single person. To this day, my policy has always been to never let any of these efforts become personal or to turn them into some sort of holy mission. The task, I believe, is important enough and does not require an emotional component more likely to harm myself and my family than to increase the chances of success.

I applied this approach to all of the cases I dealt with through the years, even when the war criminal sued me personally for libel (Sandor Kepiro in Hungary) or took out a lawsuit that blocked the publication of a book I wrote (Lithuanian Antanas Gecas in Scotland). I also applied it in the cases I was connected to in Australia, even those of mass murderers such as Latvian death squad officer Karlis Ozols or Lithuanian murder squad operative Leonas Pazusis.

But there was one case in Australia I found myself more personally involved in than I ever wanted to be, the case of Karoly (Charles) Zentai, whose extradition to Hungary was blocked by the Australian High Court last week. On the surface, the Zentai case should not have drawn undue attention, let alone emotional involvement, because of the limited scope of the crime.

Yes, there were testimonies that Zentai was an avid participant in the 1944 manhunts in Budapest for Jews who were caught outside the local ghetto and brought to his barracks, where he was among the Hungarian soldiers who severely beat them. However, there was concrete evidence of only one case in which Zentai had committed murder. Not that the crimes of a murderer of only one person should ever be ignored, but in a tragedy of the scope of the Holocaust such a person's case normally would not stand out.

Yet the unique circumstances of this crime, and the manner in which it came to my attention, aroused my curiosity and interest. Several weeks after launching "Operation Last Chance" in Hungary on July 13, 2004, I received an envelope from Budapest with a collection of yellowing pages in Hungarian and a cover letter in English. The documents were a 1948 indictment in Hungary of Karoly Zentai for the murder of 18-year-old Jewish teenager Peter Balazs, and accompanying witness statements that confirmed his role in the crime. But it was the identity of the sender and the source of the documents that proved to be particularly intriguing. The documents had been collected by the victim's father, Dezso, a lawyer who, after surviving the Holocaust, sought to discover the circumstances of Peter's death and bring those responsible to justice.

His efforts convinced the Hungarian authorities to indict Zentai and ask the US authorities in occupied Germany, where Zentai had fled, to send him back to Budapest for trial. That never took place and, in 1958, the Balazs family was informed that Zentai was living in Riverton, Western Australia.

The request I received was heart-rending. Dezso Balazs had died in 1970 and it was his son, the victim's brother, who sent me the documents in the hope that I could determine whether Peter's murderer was still alive and, if so, help bring him to justice.

It is extremely rare to receive such a plea from a first-degree relative of a victim, but such a person can significantly empower an effort to bring a murderer to trial. Imagine my disappointment to learn that Peter's brother insisted on anonymity because his family was afraid that Zentai would arrange to murder them.

I had to respect their wish and thus suddenly found myself the main advocate for the Balazs family. Representing Holocaust victims was not unusual for me, but I never had a case in which I felt that I personally knew the victim, his father and brothers. Another reason for the issue becoming personal were the active efforts of the Zentai children to prevent their father's extradition. All of a sudden, I found myself pitted against them in the fight for public opinion, with the odds heavily against me. They were an ostensibly normal Australian family trying to save their elderly father from prosecution for a crime committed decades ago in a foreign country, where they claimed he would not get a fair trial. They were present at all the proceedings and always easily available to the local media.

Peter Balazs, on the other hand, was at best an image who was unable to physically attend any hearing, whereas I was a foreigner pleading for a just, but difficult to accept, cause. The ultimate clash took place in Perth in 2006 when I met three of Zentai's children at their request, and I realised that, in their mind, I was responsible for the predicament the family faced.

Of course, it was Hungary that had asked for Zentai's extradition, but they believed that if they could convince me of their father's innocence, the case would disappear. That did not happen. But one comment made by Ernie Steiner, Zentai's youngest son, made clear to me how important it was to advocate for Peter Balazs. "OK," he said to me at one point in the discussion, "we concede that the Holocaust took place; now will you stop?"

Last week after the heartbreaking decision of the High Court, which brought this eight-year saga to an ignominious end, I shared my pain and frustration with a colleague, who asked whether I would have conducted the same campaign to bring Zentai to justice had I known from the start that it was doomed. "Of course I would have," I responded, "it is our obligation to the victims and their families."

Efraim Zuroff is the chief Nazi hunter of the Simon Wiesenthal Centre. His latest book, Operation Last Chance: One Man's Quest to Bring Nazi Criminals to Justice (Palgrave/Macmillan), deals with the Zentai case and the efforts to bring to justice Holocaust perpetrators who migrated to Australia after World War II.
www.operationlastchance.org

OLYMPIC DECISION MARKS BOOM'S END

The ambitious project was no sure thing but its shelving may mark a turning point

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THE go-ahead for the $43 billion Gorgon gas project in September 2009 was celebrated by the government as demonstrating the resources boom would not be halted by the global financial crisis.

China's industrialisation would survive the economic ups and downs and Australia's resources would provide the essential inputs for it and other emerging powers such as India.

Since the GFC the total value of resource projects under construction or with firm approvals has soared from $70bn to $260bn. No other country has seen anything like it.

Until Gorgon was announced, Woodside's North West Shelf had been Australia's biggest single project. The past five years have been like six or seven North West Shelves.

The Olympic Dam project was never on that list of firm projects. It was always a highly ambitious undertaking, among the largest earthmoving projects in history. It could yield vast profits eventually, but only after many years of costly toil. It was always going to require a board that was extremely confident of its markets, capital costs and engineering.

BHP Billiton's decision to shelve the project nevertheless marks a turning point in the resources boom. The confidence in the outlook for commodity markets has been shaken and capital markets have become warier. Had Olympic Dam come before the board a year ago, it likely would have been approved.

It has long been known that stratospheric commodity prices would not last indefinitely and that prices would decline as new supply came on stream.

Treasury has been working from an estimate that prices would dip by a steady 2 per cent a year for a decade, with this still leaving the returns to Australia's exporters more than double their long-term average. But since August last year, Australia's terms of trade (export prices compared with import prices) has plunged by 15 per cent, with no sign the descent has stopped.

BHP Billiton is not making decisions about projects expected to last for decades based on yesterday's copper price, but the speed with which sentiment has soured in commodity markets has influenced ideas about where prices may eventually settle.

China no longer looks like quite the sure bet it appeared, even as recently as a year ago when commodity prices reached a peak. The build-up in its industrial capacity and its infrastructure during the past decade was phenomenally rapid. In just two years it lifted steel production by more than 100 million tonnes, which was more than the total output of second ranked Japan.

But now there appears to be large excess capacity in China's steel industry. There are plausible scenarios in which growth is quite modest across the next decade.

New supplies, by contrast, are coming on stream rapidly, in Australia and in other resource-rich countries including Canada, Brazil and China itself. The forecast increase in supply of major commodities from new projects is much greater now than was expected 12 months ago.

BHP Billiton cited the high cost of resource development as contributing to its decision.

That is partly because of the difficulty a relatively small economy such as Australia's has had in supplying labour and materials to sustain such a crush of new resource projects. So many projects are under construction that there is neither the labour nor the construction machinery available at the prices companies were counting on when they did their feasibility studies.

While the margin between the costs and the expected returns is narrowing, investors are becoming more cautious. It is partly the euro tinder-box, which could burst into flames at any moment. There is increasing pessimism that a tolerable solution to the crisis will be found.

The 2008-09 crisis was a shock to businesses around the world that suddenly found, no matter what the strength of their financial positions, they could not access world capital markets.

BHP Billiton called off its bid for Rio Tinto in 2009 because it was not confident its bankers would agree to refinance Rio's debts.

The big multi-billion-dollar projects that won approval from bankers and investment markets a year ago must overcome higher hurdles today.

Resource investment will continue to support Australia's economy for many years to come. The Bureau of Resources and Energy Economics estimates that even if there was not another project moving off the drawing boards and into construction, there would still be about $80bn of resource-related construction in Australia in 2016. That is more than there was before the GFC.

In fact there are still new projects being approved. The Australia Pacific LNG joint venture in Gladstone gave the go-ahead to an $8.7bn expansion in July, and that will lift BREE's tally of confirmed projects further when it updates the list in November.

However, there are also likely to be more projects shelved, while few new big projects are likely to enter the lists of those receiving active consideration.

Australia will continue to benefit from the historic expansion of the resource sector for decades to come. As projects are completed, they will add to export revenue, and the profits companies make will support government tax revenue. But the more pessimistic outlook for the resource sector will have consequences for the economy's growth and government budgets.

The increase in investment has been one of the main sources of economic growth for the past five years. The Reserve Bank expects it will reach its peak in 2013-14. Declining investment, even though at historically high levels, will start subtracting from growth thereafter.

The weaker immediate and medium-term outlook for commodity prices will increase the stress on the federal budget. Mining tax will collect much less than was originally forecast. Company tax will also be considerably lower. Australia remains incredibly blessed by world standards, but the boom is now behind us.