

Cross-Mining and Media Ownership, and the Public Interest: *A Case of Mein Kraft?*

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Abstract:

This paper is concerned with convergence patterns in natural resources and popular media industries in Australia. It examines the subsequent effects on public policy in these two influential arenas which already display concentrated ownership. The relationship between mining magnates and media moguls has strengthened in recent years; calling for renewed debate about whether this development is in the best public interest given that only a handful of powerful persons control the bulk of mining and media. If rapid consolidation under a weak regulatory and governance framework is permitted, then effectively, only a few natural and artificial citizens, as übercitizens, will culturally represent the interests of Australians generally concerned about the future of natural resource exploitation.

Interest in concentrated cross-media ownership is not new. Interest in the staggering wealth created by mining booms is not new either. However what remains underdeveloped in the literature is a consideration of the current synergies between the two industries. This paper examines these recent developments. Given the overwhelming dominant status quo in both arenas, the potential for elites to influence public debate and therefore shape attitudes and beliefs about the impact of natural resource development is worthy of greater critical political and economic analysis. Mining-media convergence in a weak regulatory environment essentially becomes a “game about placing blocks to build anything you can imagine” (a bit like the computer game *Minecraft* - but only real).

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Magnate/n...1. *A very important or influential person in any field or activity, esp. in a large business.*

Mogul/n...2. *Powerful or important person esp. one with autocratic power.*

Tycoon/n...2. *A wealthy and powerful industrialist, financier etc.*

Consider the synonymous and interchangeable nature of these words as defined in the Collins-Webster dictionary. In the Australian natural resources sector (namely the industry classified as *Mining* (ANZSIC, Division B)), personalities such as Gina Rinehart and Clive Palmer¹ immediately spring to mind. In the world of media, traditionally, the Murdoch, Packer and Fairfax clans symbolise the omnipotence of a few elite personalities both nationally (and in Rupert Murdoch's case, internationally).

Indeed, the leadership Zeitgeist in these two distinct arenas of powerful corporate enterprise has been quite favourable for a handful of players given that historically, political and economic conditions have allowed for an overt display of *Mein Kraft*. (Two German words, when combined, literally mean "my strength" in a politico-economic sense.) In other words, mining magnates (or moguls) or media moguls (or magnates), respectively, have largely been left alone to do what they are very good at: the ongoing pursuit of business opportunities and the creation of bespoke wealth worthy of all great dynastical tycoons.

¹ N. Khadem (2012) provides a fascinating cover story on this magnate for *Business Review Weekly*.

Australia provides a fascinating and well-grounded empirical arena for the study of the corporate machinery of media and mining governance, and the people driving these dominant modes of capitalist enterprise. These industries are worthy of critical analysis not only because the personalities represent the richest entrepreneurial class in Australia (and some are the richest in the world), but mainly because these industry leaders possess a political capacity within Australian society. Interest in the topic of media assets ownership and the public interest stems not from acknowledging the hyperbole of the mind boggling wealth capitalist elites enjoy, but from the fact that these citizens occupy an extraordinary cultural position in capitalist society. Their industrial craft is their entrepreneurially political “Mein Kraft”.

This paper examines the intersection between mining and media interests in the light of recent developments in these two respective arenas. Two hotly disputed issues concerning media and mining regulation have gained wide public attention; not least of all because government leaders are seriously rebuked by elites whenever industry status quo is challenged. The first challenge relates to the highly contested notion of imposing a super profit tax on natural resources exploitation. The *Minerals Resource Rent Tax* was passed as law in 2012 but had been the subject of wide debate in Australia since (then and now) Prime Minister Mr Rudd initially raised the idea of a super tax for super profits. “Kevin 07's” Resource Super Profit Tax was squarely defeated, but former Prime Minister, Julia Gillard’s version was passed in 2012 (Minerals Resource Rent Tax) (refer to Mineral resources rent tax at www.ato.gov.au for background information).

The second contentious matter relates to the new round of cross-media ownership reforms. These reforms have brought to the surface unresolved issues in the current popular media governance arena. Like the initial mining super tax reforms, it appears

this Bill in its current form will also die a certain death. Legislative reforms in the social responsibility realm of wealth redistribution and public interest tests evoke a deal of emotion for elites it would seem. One fact can be agreed upon, and that is the parallels of political dissent in these two arenas are extraordinary when the corporate status quo appears to be challenged by government, and in these two cases, a Labor government.

Key business figures have been pivotal in attacking the reforms, and as individuals or a class, are capable of dooming any policy shift which is against their economic interests in a far greater capacity than any other group in a pluralist democracy. Elites' corporate personalities are also political personalities. This observation may be trite, but the manner in which they do their political work is worthy of greater examination. In other words, magnates are good at something else other than capitalistic enterprise by virtue of their individual strengths. Such elites possess the increasing economic capacity to shape attitudes and beliefs within a broader democratic governance framework.

Section One sets the scene and provides some introductory observations concerning media and mining elites. The second section outlines the themes and issues raised about the implications of a powerful elite owning an already established status quo of corporatized media ownership. The result of weak, or rather, belated media ownership regulation has led to a “strategies of power” exercised by magnates in a Foucauldian sense. This section affirms the observations made in the literature about how governments have accommodated a concentrated status of media moguls by providing favourable legislation concerning media and trade practices regulation.

The third second section examines some of the key figures in the current mining boom, and the manner in which industry leaders possess the capacity to shape public opinion in order to challenge unfavourable governmental influence. The "Axe the Tax" campaign best epitomizes the cultural role elites play in Australia. It then discusses the curious interest in media ownership by mining magnate, Gina Rinehart, who appears desirous of controlling significant chunks of various media - not only in terms of assets consolidation; but also boardroom control.

Section Four section descends into what might be described as an examination of the formal façade of corporate governance and corporations laws which attempt to prevent undue influence or at least, overt influence within artificial (corporate) citizenry. It explores the artificial prism in which corporate divisions reside, and the subsequent potential for elites as powerful shareholders to be provided with more room to influences attitudes than ordinary shareholders (or rather, citizens) ever could.

The final section provides an overview summary of unresolved issues which are important in evaluating the dangers of mining and media industry convergence given the distinct role the media plays in democratic societies; and the overwhelming wealth natural resources creates for the major benefactors. Media ownership issues are of particular importance in the Australian setting because Australians live in a society where the right to freedom of expression and communication rights generally are only implied, and not constitutionally guaranteed yet the environment in which media ownership resides is one of the most concentrated in the world.

One: Introductory Observations and Theme

Increasing profitability for mining and media industry leaders is indeed a display of one's own mighty Kraft. This observation is both empirically grounded and factually correct given that Gina Rinehart was described as the world's richest woman in 2012 (Business Review Weekly Rich 200), having increased her wealth three-fold to \$29.17bn² in the most recent "mining boom" (Heathcote, 2012). Ms Rinehart is thus by far the richest person in Australia.³ Rinehart's identity extends beyond ordinary Marxist conceptions of elitism. Her extraordinary economic status redefines neo-liberal conceptions of power and influence. Ms Rinehart is best described as *überelite*.

Australian "National Living Treasure" and Queensland's Clive Palmer is another person who falls into this mining magnate billion dollar category. His overt display of Mein Kraft has now transcended into the public arena as his "Clive for PM" campaign gains momentum (refer to his website *palmerunited.com*). Similarly, media magnates have also accumulated vast amounts of personal wealth, and as salaried Chief Executive Officers of large corporations. Former Australian citizen and global media baron Rupert Murdoch, is reportedly worth just over \$11 according to Forbes (2012). These elites might best be described as corporate royals because of their special status. And if one were to draw parallels with Hollywood, elites are not just the stars of Australian industry – they own the political economy of Australian enterprise.

² In May this year in a news article entitled "How did Gina lose 7bn in 365 days?", it was reported her personal wealth dropped to \$22.02 billion in 2013 due to a slowdown in the mining sector. Suffice to say, Rinehart's wealth makes her the richest Australian by a long shot (refer to news.com.au (23/05/2013)).

³ Her father, West Australian miner, Lang Hancock was arguably the richest man in Australia in 1975 according to Connell.

This paper explores the flurry of recent activity in media ownership. Even in a strict economic sense, it is argued that a convergence of the twain is somewhat an unusual development in that *mining* as a top-end multi-billion dollar industry does not usually integrate downwards with *media* - which is a bottom-end multi-billion dollar industry. Mining has never relied on media assets for economic prosperity let alone survival anywhere in the Western developed world, and especially Australia. Put in another context, and by way of example, Gina Rinehart's wealth in the mining sector tripled in 2012 yet in the same year, the combined value of the big four or five media "giants" collectively as corporate citizens, decreased by one third to a paltry \$6.5bn that year (Tabakoff, 2012).

Financial excursions by entrepreneurs into non-traditional arenas generally arouse interest, and this paper is particularly concerned with downstream (mining to media) horizontal integration. To add greater depth to the bottom dollar line scenario, hypothetically, (that is, in the absence of robust trade practices and cross-media ownership restrictions)⁴, it would not be unreasonable to suggest that a company such as Hancock Prospecting Pty Ltd (Rinehart's parent company) possesses the financial capacity to largely subsume a sizeable portion of the entire Australian traditional media industry. For example, Mrs Rinehart is capable of buying Fairfax Media Limited and Network 10 outright (refer generally to journalist Colleen Ryan's most recent work, *Fairfax: the Rise and Fall* (2103)).

But why the volatile media market which currently is being technologically challenged due to the pervasive nature of the Internet (Cvetkovski, 2013)? Curiously, Rinehart's actions are not alone. Internationally, take the example of metals, oil and chemical

⁴ As was actually the case in the late 1970s and mid-1980s respectively.

industrialist Len Blavatnik's group *Access Industries*. It recently purchased the Warner Music Group for \$3.3bn yet the music industry has not recovered since the advent of online media consumption in the late 1990s (Cvetkovski, 2007). These actions symbolise a broader of example of billionaires' interests in popular media (Forbes, 2011). According to Forbes (2011), Mr Blavatnik's worth is \$16bn – significantly higher than Rupert Murdoch's, but not anywhere near the dizzy heights of Gina Rinehart.

One obvious reason for interest in the media is that it makes commercial sense in a world of late stage or advanced transglobal capitalism to seek convergent or synergetic business opportunities. So why not combine natural resources, television, radio and print media? However it is interesting to note media empires are largely founded on mutual or symbiotic allied entertainment and publishing enterprises – and not natural resources or related industrial exploitation. Similarly miners seek synergies with like-minded enterprises (consider Clive Palmer and the giant Chinese industrial conglomerate CITIC).⁵

Cross-mining/media convergence is something of a unique development because mining moguls appear to be acquiring interests in the media and not vice-versa. It is therefore worth examining this development given the media's unique position in democratic society.

Business investment opportunities aside, this paper raises the argument that another explanation for mining interests aligning with media interests is that a tycoon, magnate or mogul simply is desirous of acquiring an interest in an influential cultural

⁵ One might understand an iron ore company buying a zinc smelter or a nickel refinery, and media companies have invested in publishing, entertainment, recording and electronic device manufacture for decades. But a convergence of the twain is indeed an interesting development.

arena for political gain or for commercial reasons commonly associated with power and influence. For example, a desire to combine commercial decision making with an interest in being heard in the public arena exists for leaders in the mining sector.

This desire is no different to media moguls who are interested in disseminating information about certain agendas and political issues.⁶ To be heard essentially means to spread the word. And at the risk of descending into popular culture, it is worthwhile situating the debate with an extract from Lewis Carroll's *Through the Looking Glass* where Humpty Dumpty and Alice have the following exchange:

'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master — that's all' (Carroll, 2010 [1871]: 90).

The permutations and combinations in the application of words, or rather who or what produces words, or rather who employs the producer of words becomes endless. If ownership of the media matters because of its status as 'the fourth estate' (Di Mauro and Li, 2009), then it should really matter even more so who or what owns the bulk of media given that the media is (quite properly) described as “a public institution responsible for informing the public, facilitating public debate and keeping those in power accountable for their actions” (Schultz (2002) cited in Di Mauro and Li, 2009: 195).

⁶ That is if Murdoch owns the vehicle to disseminate views and opinions about cross-media ownership rules, then Rinehart surely equally possesses an interest in publicly shaping views in the natural resources sector. And Palmer is so controversial that he is guaranteed a free ride in the media vehicle in any event. In whatever capacity, moguls are assured media publicity simply by virtue of their financial and personal status.

When one further considers the inherent complexities of the constitutional make-up of bodies corporate as legal persons in the form of artificial citizenship, the issue of media ownership becomes even more fascinating. Questions such as who are the directors, shareholders, executive officers quickly manifest themselves into more direct concerns such as how influential or active are these particular stakeholders, and why do these separate corporate personalities have a vested interest in the Fourth Estate? Are these interests purely financial or are there other motives? These are valid questions given that influential corporate leaders can be described as “charismatic leaders”. In a Weberian sense, dominant corporate leaders such as Rinehart, Palmer, Stokes and Murdoch are persons of great political and economic influence, and capable of activism on the Australian socio-political, cultural and economic landscape. In a democracy, the State which has exclusive jurisdictional authority or sovereignty within its territory does not have exclusivity on ownership of the so-called Fourth Estate, notwithstanding government places limits on it.

According to Weber, citizens obey the commands of their sovereign because those commands are regarded as legitimate (Tucker, 2002). But people are also motivated to obey charismatic persons of authority where policies or even laws might be shaped on emotional reactions to the personal qualities of prominent persons rather than the political or legal authority of Government. Kevin Rudd’s Carbon Tax was partly doomed thanks to a massive advertising campaign spearheaded by several mining magnates including Gina Rinehart and Andrew Forrest. Media influence even along Weberian lines of formal rationality has become an increasingly important basis for authority in Western societies with the progression of capitalism. It is argued elites not only know this to be true, they are capable of personifying authority and control. And they do.

These great figures border on the iconic considering they are immortalised in popular culture (consider the teleseries “Howzatt, Kerry Packer's War (2012) or Claudia Karvan’s current project concerning Gina Rinehart (with the working title “Mother Monster Magnate” (as reported in *The Courier Mail* (12/06/2013)). How one is portrayed in the media represents a value consensus. As these larger than life figures are not ordinary community stakeholders in a political sense, let alone ordinary shareholders in an economic sense, it is fair to query their motives for many reasons but especially because, “In all societies the questions of who owns and controls the media, and for what purposes, have been political issues” (Herman and McChesney, 1999:18).

In Australia, these issues are particularly relevant because of the special status mining and media industries share. Drawing on Durkheimian concepts, as the history and culture of communities contribute to the development of values, the media reflects the prevailing moral standards within society. Media as an integrative force provides the foundation for social interaction, or in other words a key institution in the form of a fourth democratic pillar. In *The Division of Labour in Society* (1893) Durkheim argued that law is a form of social solidarity and reflects the "collective conscience" (Jones, 2003). It might be trite to declare the Law is a formal and direct instrument of hegemonic control, but what about the situation when Bills and legal proposals are defeated by virtue of a vociferous elite minority capable of either controlling the media or paying for overt media attention? Thus parallels with the Fourth Estate as an integrative political force can be drawn. By extension, collective conscience also includes thoughts, beliefs and sentiments in a media setting because people consume the dissemination of news and information which comprise a set of ideas, values and beliefs. Media achieves a sense of informal or indirect solidarity as

opposed to direct hegemonic control; and whilst it does not work within the formal three arms of power (executive, legislature and judiciary), it works within an overall governance framework because it is capable of formulating attitudes and beliefs which impact the formal structures of government (Feintuck, 1999). As mentioned, one only has to reflect on the 2010 mining “Axe the Tax” media campaign led by the world’s richest corporate and natural citizens.

The media can therefore be regarded as a mechanism for unifying society around common norms and values, or as an instrument of domination for powerful groups, or as an ideology capable of shaping the beliefs of society. In Australia, the concentrated media ownership landscape which exists is essentially a monopoly over the bulk of traditional media outlets. Political parties know all too well that the media can be seen as a mechanism of social construction, which moulds attitudes and views. A handful of dominant players rather than *one* Citizen Kane controlling the bulk of broadcast is strictly speaking not a monopoly. But a concentrated oligopoly with a remarkable capacity to "co-operate" so as to limit entry to independent players for the purposes of diverse cultural and economic public opinion is hardly an equitable state of play.

Two: Media Concentration in Australia - *The more things change the more they stay the same*

That access to media remains a fundamental human right in a pluralist democratic environment goes without saying. Benthamite arguments about the role of freedom of speech in promoting democracy are well entrenched in classic conceptions of liberalism (Berlin, 1969). John Stuart Mill's *On Liberty* (1859) firmly establishes the

fundamental tenets surrounding a free and transparent media for public interest and responsible government in order to ensure public faith in the democratic system.

But these 19th Century ideals are now nothing more than ideological aspirations in advanced capitalist society. In a world of multinational magnates, media ownership is firmly situated in a neo-pluralistic universe where a dominant few are seen as metagovernors. Post-World War II cross-media ownership of print and broadcast in Australia (and internationally) is best described as an environment that has always been controlled by an elite corporate few (Feintuck, 1999). A core feature of modern oligopolies in open market economies is the level of concentration and inter co-operation among the corporate citizens who control the industry (Tonking, 2002). And whilst trade practice legislation forbids collusion and sharp trading, the overwhelming level of camaraderie is staggering.

Nevertheless Milllean and Benthamite notions of a plural, diverse and competitive Australian media landscape were realised in Australia to a large extent some 90 years ago. It is interesting to note that in 1923, Australia had 26 metropolitan dailies owned by 21 different entrepreneurs (Ashbolt, 1975: 183). Today, Australian media ownership is arguably one of the most concentrated in the world (Donovan, 2011). This snapshot rebuts any presumption that Australian media exists in a pluralistic, diverse and competitive background. In other words three of four media families have had such a head start in ensuring media ownership is so heavily concentrated that substantive cross-media laws to meaningfully promote public interest would be difficult to attain. One wonders what the substantive value of media ownership laws is given the increasing capacity for elites to consume even greater chunks of media assets.

So what happened in Australia so that the nation strayed from these noble liberal notions and into an anti-competitive realm? The short answer is nothing happened. Australia's constitutional arrangements and relatively weak regulatory governance framework have facilitated the creation of one of the most concentrated media status quos in the world.⁷ The die for the golden media ingots, or rather, the "stage" was set within the powers of formal government in 1901, and not by moguls.

Two heads of power concerning media regulation and ownership are relevant in Australia (see the *Australian Constitution*, s 51(v) postal, telegraphic, telephonic and other like services, and s 51(xx) (corporations power)). Section 51(v) gives the Commonwealth *wide* general power to make laws with respect to media regulation. This responsibility is therefore left to the political party in Government.

Section 51(xx) is relevant because federal Parliament has the power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". The section enables regulation of corporations within a liberal democratic framework. Corporations are constitutionally sanctioned to possess fundamental legal rights as artificial citizens. The High Court has confirmed Commonwealth power under s. 51(xx) of the Constitution essentially extends to protect the corporate governance structure of artificial citizenry. It is then up to government to regulate (or not) these corporate citizens, widely or narrowly (see *Actors and Announcers Equity Association* case, 1982).

⁷ For example, according to Harding-Smith, print media in Australia is calculated at 98% of the top 3 newspaper companies and 62% in the UK (2011: 9).

The Australian Constitution thus assists in identifying the governance of mass media ownership intersects traditional or established activities in the fields of: a) trade, commerce, and corporate regulation, and administration of associations and organisations, and b) 'postal, telegraphic, telephonic and other like services. An important reason for examining media industries is that one of the more dynamic features of media controllers is the desire to preserve ownership concentration through cross-media ownership of print media, television and radio broadcast. Media organisations constituted as corporations essentially run the media because they trade in business and commerce. Thus media (and for that matter any magnate by extension) have express constitutional rights to run the media (or mining or any business activity); whereas all other citizens' rights for example in so far as free speech and communication are concerned are implied. Corporate citizens have, in some respects, a Constitutional head start over natural citizens in Australian society in so far as the governance of communication rights is concerned.

The media as the Fourth Estate was born of ideals that in wide compass embrace liberalism by providing impartial, or rather, unbiased and objective news and information, including transparent and accountable delivery news media (Ward, 2006, McQuail, 2004 and Tiffen, 1989). Its role as a cultural and political and overall public watchdog (Wheeler, 1997) in relation to activities undertaken by Officers of the Executive, Legislative and Judicial branches of power as set out in the Constitution should be acknowledged. But unlike the role of formal institutions such as Parliament (Chapter 1), The Executive (Chapter II) and The Judicature (Chapter III), the Australian Constitution is silent on any specific reference to a Fourth Estate, its rights and *limits*, and especially the regulation of the media as a separate arm of power.

As mentioned, this is left to federal Parliament which is “capable of making laws with respect to radio and television broadcasting, and telecommunications, by virtue of its power under s 51(v) to legislate with respect to 'postal, telegraphic, telephonic and other like services’” (Kildea and Williams, 2013: 2). In other words, Australia’s rights to freedom of speech and communication are implied rights in the absence of a Bill of Rights. The interesting point here is that whilst constitutional rules determine the limits of political authority, rights and limits to media ownership are arbitrarily imposed by successive governments. In some ways, media owners have enjoyed a corporate revolution in that the only limitation placed on them is policy and statutes - both of which are capable of being manipulated for commercial exploitation (see especially Tiffen, 1989).

By way of recent history, Australian media ownership regulation was only openly and comprehensively placed on the national agenda as recently as 1985 following (Jones, 2005). In so far as America is concerned, Howard notes that in the US concentrated media ownership was very high at the time and local ownership was at an all time low (1989, 792). This is an important observation given that Rupert Murdoch renounced Australian residency and then citizenship in favour of US citizenship in the 1980s. Media concentration ambitions could also be equally considered as global governance rather than just sovereign state issues given that Australian and the US governments have been most accommodating to Murdoch’s needs.

Concerns about concentrated ownership and control of commercial television especially culminated in the enactment of the *Broadcasting (Ownership and Control) Act 1987* which amended the *Australian Broadcasting Act 1942*. In the 1980s, the

Executive and Parliament meaningfully recognised the need to implement stricter controls on cross-media ownership, and subsequently monitor and review subsequent deals - presumably not only to ensure the public's interests are expressed in a culturally diverse and pluralistic democracy, but to also delimit any barriers to entry caused by an oligarchic and concentrated media ownership status quo. The overriding philosophy of cross-media ownership appears to be to ensure cultural diversity which obviously is in the best public interests because independent players are theoretically afforded the opportunity to compete in the market place. This then allows for a competitive and a more democratic media governance framework. As Yates (2011) correctly notes, "At present, media proprietors can own only two of radio, television or newspaper main media outlets in a given area. There is also a requirement for five diverse media voices in each capital city and four in a regional area."

Prior to the 1980s, dedicated or express media ownership regulation was virtually non-existent thereby creating naturally occurring monopolies free of government fetter. Such conditions indeed made it possible for media dynasties to thrive and prosper. Before the 1980s, only the *Trade Practices Act 1974 (Cth)* (TPA)⁸ provided prosecuting authorities with enough teeth to identify and investigate collusive trade

⁸ The *Trade Practices Act 1974 (Cth)* was the first meaningful piece of legislation to address anti-competitive corporate trading. A previous 1965 Act implemented by a Liberal Government was relatively toothless in the jaws of big business. However it is worth acknowledging Australia's first anti-trust legislative attempt. The *Australian Industries Preservation Act 1906* was successful in prosecuting coal and shipping companies for collusion and general cartel-like price fixing behaviour in the marketplace in the first decade of federalism. But the High Court overturned all the decisions because it said the prosecutions were unconstitutional (*Attorney-General v The Associated Northern Collieries and Others* (1911 14 CLR 387), and *Huddart Parker and Co Pty Ltd v. Moorehead* (1909 8 CLR 330). The High Court focussed on narrow constitutional issues rather than forensically analysing the harm caused by anti-competitive behaviour. The Act never gained momentum despite attempts to level the playing field. This early recognition of an acute disinterest in issues relating to competition and diversity set the corporate scene for the next 100 years.

practices generally – but not necessarily reverse any concentrated cross-media concentration trends (which would probably have been challenged in the High Court in any event by media moguls).

Currently, and as its name suggests, the *Broadcasting Services Amendment (Media Ownership) Act 2006 (Media Ownership Act)* specifically sets rules on media mergers and acquisitions. It also runs parallel with general federal competition laws (the TPA was recently amended and renamed the *Competition and Consumer Act 2010 (Cth)*).

Yet commenting on the status quo in 1975 (and just one year after trade practices legislation was introduced), Ashbolt notes how "how functional diversity is contradicted by an oligopolistic structure of ownership, in which four main commercial groups guide the interlocking connections of newspaper chains, radio and television networks (1975: 181).

The media magnates prior to the 1985 reforms were Packer, Murdoch and Fairfax. So whilst this legislation was the first of its kind in Australia to cut restrictions on media ownership, the stark reality is that in the year 2015, Packer, Murdoch and Fairfax will no doubt remain synonymous with media ownership. So despite formal conceptions of diversity and public interest being guaranteed, when one appraises the last two centuries of media ownership and its subsequent ideological reinforcement, history reveals there has been no substantive diminution in the pathological pursuit of profits as the primary interest for a handful of elites. The main reason for this is that private media depends on advertising revenue which are sanctioned by corporations laws.

Corporations laws insist artificial citizens actively engage in the pursuit of profit – otherwise the entity might be described a sham. But what about a diverse media voice in a world of capitalism which is supposed to be underpinned by liberal values? Cultural diversity is embedded in notions of social responsibility and has no specific legal compass. The need for cultural diversity by corporations as recognised by the Constitution is residual to the extent it does not conflict with the legitimacy of the pursuit of profit.

In some respects who or what owns the media should be irrelevant if the media was considered independent, culturally diverse and always acted in the best interests of the community. If journalistic autonomy and editorial discretion were constitutionally guaranteed, then there would be no issue. Limit on the powers of owners so as to protect the natural freedom of the individual journalist is an important tenet of liberalism. This view of individual freedom is concerned with limiting external influences by those seeking to impose restrictions on independence. One way to separate the machinery of ownership interests from editorial activities is to request owners, chairpersons, directors, executive officers and all other non-media delivery representatives sign undertakings so as to ensure independence to those whose business it is to disseminate information in a democracy.

That the owner's role is to be limited to that necessary for maintenance of the corporation seems to be the answer to journalistic independence and freedom of communication. A legislative rather than self-regulatory approach might ensure independence is enshrined - formally at least. If the force of the law was behind journalistic independence, regulation and the appointment of a Regulator (as an objective process by an authority or commission) could assess whether impartial

dissemination of information is being exercised. Legalising this classic liberal view of the media rather than relying on customs and practices could work in a market economy because journalists' own personal skills and such their knowledge would remain intact. These issues intersect Lockean notions of individuals enjoying the fruits of their labour. But such an approach is not entrenched in our democratic framework. Independence is codified in a self-regulatory capacity. The Australian approach is a private rather than public rights approach to communication rights.

But why shouldn't owners of media have the right to meddle and interfere in the hard work by journalists to ensure business interests are preserved as they are the employer? The contentious question is this; when there is no independent or limited voice, how does one ensure freedom of communication of independent news dissemination given the capacity for tacit interference in the corporate governance setting?

In the absence of substantive ownership restraint, the fallacy of laws attempting to implement cultural diversity and the paradox of value-free news and entertainment in Australian society is obvious when concentrated ownership remains. And remarkably whilst the old guard has been succeeded by sons (and their sons) as heirs to media empires, new players (Stokes, Bond, and even Skase) have not diluted or diminished concentrated ownership in a purportedly anti-competitive arena. They have thrived in it. So whilst limiting any single owner from having control over several media, the laws have done nothing more than fine tune limits to cross-media ownership for newspaper, radio and TV licences definitionally in light of the definition of 'control'. Control tests, and caps in media market are substantively meaningless if

concentrated ownership of the Fourth Estate has been firmly established in Australia, and in the Fairfax example, since the 1850s (Ryan, 2013).

Federal government media law reforms are supposed to be a response to changes in corporate ownership so as to ensure diversification in information dissemination and cross-media ownership and competition which act in the best interests of ordinary Australians as natural citizens (Tonking, 2002). In other words, media ownership is always concerned with corporate regulation. What is in the best interests to the public is considered as a consequence of corporate organisation and not the other way around. The power to regulate cross-media ownership it seems enables the federal Parliament to tailor media regulation to suit corporate citizens' interests.

Federal legislation could limit the power of a media corporate citizen but given this citizen's constitutional right, it is more likely than not federal laws would be enabling and favourable to a media entity rather than restrictive. One important feature of the current media ownership laws is the "5/4 rule" purportedly aimed at limiting media concentration and thereby promoting competition (Tonking, 2002). The so-called 5/4 rule provides for a minimum of five separate traditional media "voices" in metropolitan radio licence areas and four in regional licence areas (Di Mauro and Li (2009) and Jones 2005). However, the *Media Ownership Act* works only to the extent that it aims to prevent further unacceptable media concentration. Yet after a few years, the same issues of media concentration have been revived, and it is difficult to see how this new round of rule tweaking will improve the status quo.

According to Di Mauro and Li (2009), the effects of the legislation in reducing media diversity are clearest when considered in the context of Australia's larger cities and most influential licence areas (Sydney and Melbourne). In both these areas of licence, the *Media Ownership Act* permits the impediment to entry of several independent media owners because the reach of corporations with cross-media interests can be more than halved for 36.88% of the Australian population (Di Mauro and Li, 2009: 199). In terms of legal realism, the laws are quite academic about satisfying 5/4 rule given the status quo has largely remained intact for two centuries in Australia. The Fairfax, Packer and Murdoch families have always been part of the well established institutional elite.

Any social responsibility philosophy in cross-media ownership that might exist is obviously to ensure diversity in ownership. But the fallacy in these policies of course is the fact that media ownership has always been concentrated and not very diverse. Its political economy (not surprisingly) remains similar to the popular media industry, especially film, music and gaming where up to 90% of the market is controlled by a few transnational corporations (Cvetkovski, 2013).

It is still important to acknowledge the Australian Competition and Consumer Commission (ACCC) continues to hold an important role under trade practices legislation in ensuring a robust competition framework to assess the competitive impacts of cross-media ownership transactions such as mergers and corporate raids. It will no doubt monitor and review examples of recent attempts by the (now former) Labor government to introduce a Bill so as to promote the public interest, cultural diversity (notwithstanding the Bill has met fierce resistance by the major players). But

the reforms probably will not go so far as to meaningfully redefine "access" as the term is used in the laws to augment cultural diversity to a greater capacity. At best new reforms would do no more than tweak the ownership boundaries whose foundations have been institutionally entrenched for decades. The question of editorial independence according to classic conceptions of liberalism or at least in a Lockean or Millian sense in Australia will not be answered in the immediate future.

And so herein lies the paradox in applying liberalism ideals in a neo-pluralist corporate environment. Guaranteed autonomy cannot be objectively delivered because of economic imperatives. Imagine a journalist on Murdoch's payroll writing a critique on promoting the merits of cross-ownership laws in the 1980s or a reporter employed by a Packer paper producing a story on too much media concentration in the 1990s. The fact that Gina Rinehart refused to sign a charter of independence when her company purchased a sizeable chunk of Fairfax is quite a rational decision as none of the media moguls have signed editorial independence undertakings. Cross-media ownership and editorial independence are at cross-purposes in the market place and cannot mutually co-exist on a level playing field despite social responsibility endeavours.

So what really are the dangers of an überelite enjoying an unfettered monopoly to access to cross-media ownership? In a Foucauldian sense, questioning media concentration as an overt display of media bias is essentially an exercise in questioning the very possibility of objective truth by privately owned media giants. Truth represents the right to refute error, the right to define what is accorded value and attributes status to those who speak what is considered truth within different discourses (Foucault, 1986a:72-3). Foucault extends this problematic to the "political, economic, (and)

institutional regime of the production of truth" (Foucault, 1986a:75). Truth and power are interrelated. Statements made in news stories are made not only because they may be true (or false in some cases), but rather because they contain the effects of power which attaches itself to the truth.

Foucault's power-knowledge matrix (Sheridan, 1980:220) also shows that power and production of news have a commonality. The *words* presented by media outlets have "strategies of power" that actually produce knowledge. In a sense, there are only forms of truth and these forms of truth are constituted by power relations (Foucault, 1986b:56).

By then analysing power in a neo-pluralistic media setting, it may be understood how power's persuasive ability functions. Power, in Foucauldian terms produces reality. To this end, the concentration of media interests by exceptionally successful entrepreneurs should not, theoretically at least, be a surprising development in late capitalism.

As such, cross-media ownership and the union of media and mining is worthy of political scrutiny because the political, economic and legal considerations that may follow from such convergence are capable of shaping Australian policies concerning the regulation of the mining industry and the environment. In other words if dominant mining interests and agendas were to be presented one dimensionally because active media ownership and concentration resided with mining magnates, then the potential for bias and public detriment is potentially high.

Put another way, irrespective of whether legislation (including future Bills) develops several prescriptive tests concerning media ownership, unless there is an increase in

independent media ownership, there can never be "true voices". The government does not issue licenses arbitrarily or more relevantly, ordinary citizens do not possess the capacity to own media outlets. Only cashed-up entrepreneurs can afford to dip into the big media pond. One such class of course has been mining entrepreneurs. Ryan's reference to Rinehart being capable of reaching "into her petty cash tin" to not just become the largest shareholder of Fairfax Holdings, but an extraordinary shareholder capable of buying the entire corporation is no exaggeration (2013, 1).

Of course the ACCC has the power investigate matters if the market becomes less competitive. But as perfectly narrated by Ryan and empirically validated by McQuail (1994), Ward (2006) and Windschuttle (1988), governments on both sides of the fence have always had media mates because favourable publicity is guaranteed during elections. More importantly, the High Court should not be regarded as democracy's saviour either. It is not an interventionist institution. History has revealed one consistent fact, the Fourth Estate is capable of making and breaking politicians, and politicians are capable of making and breaking media ownership rules.

The marketplace politics of media ownership is so embedded in Australian society, that a democratic media industry is nothing more than an impotent political daydream. In other words, media regulation does not alter an entrenched status quo - it merely affects any potential bottom dollar line scenario. Magnates alter the state of play of the Fourth Estate and not the other way around; ironically and not least of all because of Australia's constitutional framework.

The argument here is that the Australian legislature is reactive in regulating cross-media ownership. Media moguls such as Rupert Murdoch and the late Kerry Packer

are widely believed to have exercised political influence over the directions of media regulation (Ryan, 2013, Tiffen 2005). Whilst Australian media policy has attempted to check and balance media ownership, it is doubtful whether governments are capable of making a level playing field so as to promote cultural diversity in the best public interest. Who would be stupid enough to take on Mein Kraft? Which politician would be brave enough to be Icarus and fly too near the sun - despite his or her forefathers' warnings?

Three: Mining Industry - Shaping Australian Attitudes and Beliefs

How then is this central bureaucratic power to be broken? It could be broken by obtaining control of the media and then educating the public (Wake up Australia!, Lang Hancock, 1979: 48-49)

Develop North Australia, embrace multiculturalism and welcome short term foreign workers to our shores, To benefit from the export of our minerals and ores, The world's poor need our resources: do not leave them to their fate, Our nation needs special economic zones and wiser government, before it is too late (Our Future, Gina Rinehart (2012)

In 1983, Australia (most notably Western Australia) was the largest producer and second largest exporter of iron ore in the world (Smith, 1989, Thompson, 1983). Australia's first international minerals boom occurred in the 1960s and Lang Hancock was instrumental in engineering this outcome along with joint ventures established by Broken Hill Proprietary Ltd (BHP) (Thompson, 1983). It should come as no surprise that the beneficiaries of this boom were the dominant natural and corporate citizens,

their successors and heirs. The multinational conglomeration BHP Billiton is now globally the largest citizen and worth \$220 billion (Frith, 2010 & 2008).

It is somewhat misleading to speak about post-war mining booms and busts given the sheer size of these enterprises in Australia; (just as it is somewhat an inexactation to suggest popular media industries are incapable of adapting to technological change in a world convergent digitalization - despite the challenges (Cvetkovski, 2013)). The mining industry in the past 50 years has been incrementally growing notwithstanding seasonal adjustments in relation to supply and demand. In short, irrespective of political climate (or party), mining is as big as any business can get in the domestic and global setting. Natural resource exploitation is truly of titanic proportion because no sooner does one natural resource opportunity slow down, another picks up. Cumulatively and conjunctively, iron ore, coal, gas, zinc, lead and silver discoveries, and an assembly of other mining opportunities are made on a regular basis in Australia.

Indeed BRW's Rich Lists (2010-13) provide the best evidence to refute any allegation that the mining industry is vulnerable in Australia. Otherwise why would chart topping prospectors such as Rinehart Senior and Junior, Forrest and Palmer publicly agitate to resist any challenge to a status quo of huge profitability? Also, little weight ought to be placed on assertions made in the media by these individuals that there is a sense of social responsibility to the business of mining in any primary sense. There might be some sense of altruism in a residual capacity but Native Title governance, for example, compels miners to give back to the indigenous, and not a sense of community worth – or warm inner glow. Miners are in the business of making money within the confines of the law, just as media moguls are there to exploit news and

entertainment. And there is nothing wrong with that in any capitalist sense. In this light, concerns about any community ideals and cultural diversity as reflected in Rinehart's polemical poem appear odd given the subject matter.

Indeed, on the issue of agenda, West Australian Lang Hancock's polemical extract also reads like something from a political personality rather than that of a mining magnate. It is worth re-iterating the same observation as was made about the media industry - ordinary citizens cannot shape or influence attitudes and beliefs in any atomistic capacity; however magnates can. In an assessment of the capacity of one man exerting influence, Colin Friels in a compelling SBS three part documentary superbly narrates the following a story about Lang Hancock and his stoush with the then Premier of Western Australia, Richard Court: "Hancock now uses his advanced wealth to buy influence. He takes over *The Independent* newspaper in Perth to use as a mouthpiece to attack the Government. The powerful tentacles of mining are now spreading" (2013).⁹

In the last year or so, Gina Rinehart invested significantly (from a millionaire's perspective), but insignificantly for a person worth in excess of \$20 billion in broadcast and print media. Interestingly, it was reported that Ms Rinehart was advised by an experienced media executive to "Stay away from Ten and if you must invest in Fairfax, make a full takeover bid and buy the company outright (Leys, 29 June, 2013). But as Leys went on to note, "Mrs Rinehart ignored Mr Chisholm's advice and went on to purchase not just 10 per cent of Ten, but almost 20 percent of

⁹ However Kohler contends: "I used to work for Lang Hancock in the seventies on the one newspaper the family actually owned the *National Miner* when he was at the peak of his political powers, such as they were, and Gina was a young heiress learning the business and starting a family of her own". Technically *The Independent* was owned jointly with another mining entrepreneur, Peter Wright. But I think the documentary producers' point is clear.

Fairfax". The concurrent path to media acquisition in two large media companies commenced in 2010 and continued into 2012.

After some share allotment adjustments, Ryan also notes Ms Reinhart is by far the largest shareholder of Fairfax Media (almost 15%) and the Ten Network (10%) (2013) (see Chapter 18 of Ryan's book for a detailed examination of how the deals transpired). As a significant investor, one view is that it is little wonder then Rinehart demanded at least two seats on the Fairfax board (Ryan, 2013).

But it is doubtful whether Ms Rinehart has made high yield media investments compared to say her mining projects under Hancock Prospecting. The media stablemates, Ten and Fairfax would be embarrassingly underperforming compared to the minerals and industrial investments. Why buy in a volatile industry? Given the family's polemical history, it is fair to infer there were possibly also political reasons for the reactive flurry of activity in combined media investment.

Rinehart is most vociferous on several issues including climate control, tax and what is perceived as government interference into capitalist enterprise. The "Axe the Tax" mining campaign was supported by Gina Rinehart, but it is important to acknowledge other mining magnates and corporate citizens were equally active. Murray's 2012 article "Rinehart's money is where her mouth is" targets another equally compelling reason for Rinehart's interests in popular media industries, and it is worth quoting the following extracts:

Rinehart carries on a strong tradition of moguls in the Australian media...Rinehart has made no secret of her political agenda. She is vehemently opposed to the minerals resource rent tax and believes income and company taxes should be lowered across the board. She believes

concessions should be given to businesses operating in a zone across northern Australia and has lobbied against the introduction of the carbon tax.

Her views are clearly expressed via the right-wing group Australians for Northern Development and Economic Vision...Rinehart has been accused of flexing her muscles at Ten. Soon after she joined the board, the television network gave right-wing newspaper columnist Andrew Bolt a Sunday morning program. Some sources close to the company suggest she may even have been involved in the decision to axe George Negus' current affairs program... But she'll have as much influence as one can with one board seat.

As the multimillion dollar campaign to "Axe the Tax" in 2010 culminated in a crescendo of corporate activism ironically more associated with plebiscite campaigns, or vox populi style "fight the power" demonstrations, it has become abundantly clear to the Australian public that mining magnates are not shy, shrinking violets or retiring wall flowers. "Twiggy" (Forrest) replete with his Hi-Viz "work clobber" and "working class man" persona and Rinehart with her megaphone-style protest strongly suggest to ordinary citizens that these corporate veterans could easily dominate the boardroom as active shareholders vicariously, or directly as directors. It is difficult to imagine how these powerful shareholders would *not* ensure that boards represent their interests.

The key speakers at the demonstration were indeed hyperbolic. Andrew Forrest's¹⁰ impassioned speech at a West Australian mining rally strongly suggests when interests are threatened, entrepreneurs mobilise very quickly:

"I ask you which communist is turning capitalist and which capitalist is turning communist" (Collin Forrest, CEO, Fortescue Metals Group, *Lateline*, 2010 broadcast).

It seems being difficult "if someone tried to take something from you" as declared by Lang Hancock (quoted in old footage from the documentary "Dirty Business (2013)) is

¹⁰ Worth in excess of \$6 billion according the BRW 2012 rich list and ranked third wealthiest Australian.

a reaction. It bears striking similarities to current mining magnates' attitudes who fear a red peril. Forrest also said in the same speech, "In China right now there's a fierce debate about how to lower their resources tax to encourage the mining industry". The imagery of the peril of "Yellow" and "Red" emerges on the popular cultural landscape. It may not be the Cold War style rhetoric espoused by conservative governments of that era, but it is fair to observe that whenever "Communism" is raised in the media, a certain nervous tension is felt by Australians.

Given these recent developments, perhaps Marxist-Leninist appraisals of class struggle are more relevant to the critical study of the political economy of Australian capitalism than ever before. If so then a direct Marxist response to Rinehart's 2012 polemical poem is found in *Imperialism, The Highest Stage of Capitalism Selected Works* where Lenin observes advanced capitalist states "increase immigration to these countries from the more backward countries where lower wages are paid" (pp758-59). Indeed natural citizens cannot voice concerns like very influential business figures in any capacity let alone an artistic way. When mining magnates wish to vehemently protest against government decision making, media ownership does matter therefore – not because they are ventilating their concerns publicly per se, but because they can buy the means of ventilation.

Four: The Artificial Prism in which Corporate Governance Resides

The law is well established in that "persons" includes various artificial entities as "citizens" including a body politic or body corporate. It follows then corporations may also be "treated as rogues and vagabonds" (*Mutual Loan Agency Ltd v Attorney-General (NSW) (1909)*) just as much as they may be described as "good citizens". In

other words a corporation is to be treated as a distinct person with its own rights, responsibilities and obligations. But the legal reality is that a corporation is nothing but a shell, and cannot function without decisions made by human beings who act as executive officers in various capacities. A corporation for example cannot be imprisoned (*Sheen v Geo. Cornish Pty Ltd (1978)*), but can obviously be fined or enter into enforceable undertakings. They are artificial citizens with specific rights and obligations capable of suing, being sued, and they appear to know right from wrong. Sometimes the entity's veil is pierced and a director, for example, will be held accountable for a transgression. But this is the exception and not the norm.

In other words when one thinks of corporations, the Chairperson, Chief Executive Officer (CEO), Managing Director or any other authorised officer as agent should be regarded as the company's alter ego. The relationship is based on mutualism, and whilst a corporation has its own rights and responsibilities which cannot be assigned to another person or personality, the personality of a person can clearly be felt on the corporation. The larger the personality, the greater the impact. Otherwise omnipotent personalities such Rupert Murdoch would not been called to provide assistance in Parliamentary inquiries concerning the media (consider this CEO's (ongoing) evidence before the British Parliamentary Inquiry into phone hacking). The point here is that whilst the law recognises humans and non-humans as persons, the stark reality is that authorized agents, that is senior or chief executive officers do the bidding and actual actioning for an on behalf of these "persons".

This is why for example when one thinks of Rio Tinto, the powerful corporate leader Marius Kloppers springs to mind; or in Channel 7's case it is really Kerry Stokes one thinks of (Kitney, 2010). Fortesque Metals Group did not get onto the back of "Axe the

Tax” truck – its affable CEO, Andrew Forrest did. Gina Rinehart spoke to the people – not anyone else representing her mining interests. The mining magnates’ plaintive cries were heard – not the cries of an artificial citizen. And in the case of the recent media acquisitions by Hancock Prospecting Pty Ltd, Rinehart is instantly the subject of media attention (not the company). The point to these examples is that whilst a corporate person is legally different for the purposes of say taxation, its personality, “character, age, health or mental condition” are (see even for example s19B of the Customs Act (1901) given *birth* by the powerful individuals who own or vicariously shape the artificial entity with their own attitudes, values and beliefs in an hegemonic way.

In this light a good definition for the popular term “corporate governance” is found at the Australian business government website:

Corporate governance is about good decisions being made by the right person.

Following this line of reasoning, ordinary shareholders cannot influence board decisions. A shareholder requires a seat (or two) on the board to make any impact. Murray argues, "directors are unduly powerful" because the law "empowers directors by recognising their power to control the company" (2009: 178). As Ryan correctly observes when:, [G]ina Rinehart appeared in the Fairfax register...a small invest just \$50 million for 2 per cent of the company...This first purchase made on 7 December 2010, was really just a clearing of the throat by Rinehart, a calling card slipped under the front door...she would make serious move, and she would bring a coterie of connections with her that had the potential to change Fairfax forever (Ryan, 2013 (18): 2)".

But only weeks prior Rinehart snapped not only 10% the Ten network, she was also offered a seat on the Ten Network Board (Ryan 2013). Company policies are moulded directly in the boardroom or indirectly at shareholder meetings. Corporate governance in which the media ownership model is framed is self-regulatory in that the corporate citizen is free to choose who is appointed on the Board (provided the person meets the requisite standard (no conflict, of good character and so on) (Francis and Armstrong, 2009).

Like all citizens, directors and other officers are required to comply with the Corporations Act and the general law. But the term “director” is defined in s.9 of the Act to include persons with significant interests. Potentially persons with large interests could become nominee directors because of special circumstances (for example, size of the shareholding). In other words, the corporations laws in Australia are enabling in the sense that even if a formal voice at the boardroom table is not awarded by s 9, the *Corporations Act* potentially provides scope for tacit participation. So whilst there is no legal capacity to actively influence board decisions without being a director, when an elite person looks into a company, the company’s board looks back.

Yet the class of persons not included in the operational structure of the corporations are the shareholders. But shareholders are the life-blood of corporations and deemed as “persons” according to law. As natural and corporate citizens they are powerful – especially the magnates. Wheeler (2011: 168-69) best describes the arena in which elite shareholders reside:

"The tests are not tests of network independence or of the loose social ties that might exist outside that particular boardroom. There is an acknowledgment that the corporate sector is embedded in social relationships and social networks...Independent directors are likely to be influenced by executive voices around them..."

The greater the holding, the larger the voice, and the greater the right to insist a seat at the table. At annual meetings, shareholders for example potentially possess the right to dismiss directors, but a shareholder with the right to vote as director wields a significantly greater power than the power of ordinary ones and appointed professional directors with or without significant holdings in the company. Thus any undue influence activities on the part of corporate elite networks indeed are difficult to monitor and detect – if they should be regulated at all (see Davis and Greve, 1997).

The collective voice of shareholders symbolise true or “real” power vested in artificial entities. Formally, directors work to ensure their best interests are met (see McConvill and Bagaric (2004)). But the façade of artificial citizenships is that it does not really matter that shareholders do not sit on the board of directors. Adopting a legal realism approach, it is fair to argue as Glasbeek correctly does that “In the corporate setting, not only does the law not make shareholders responsible for each other, it makes them virtually irresponsible for the corporation's behaviour” (2012, p.18). In other words, the class of persons not involved in the daily operation, and not capable for sued for any alleged wrongdoings wield a tremendous amount of power. CEOs and directors attract liability (one only has to reflect the BP oil disaster which claimed several lives – the entity and executive officers attract prosecutorial action – not

shareholders). Accordingly, “the sway that shareholders have militates towards failure for the social responsibility and stakeholder movements” (Glasbeek, 2012: 18).

Given their lack corporate accountability, large shareholders are potentially a more formidable force than the duty-bound executives and the flotilla of senior managers who are held accountable for decisions made the corporation. Incorporation and limited liability, as Glasbeek, points out, privileges shareholders by removing that accountability from them. This creates uncertainty in corporate law and governance.

How are they so influential? A few shares, here and there, means little or no voting interest sway. But owning a significant stake in an organization such as 10% commands presence. It may not matter that a powerful shareholder is not on the board approving decisions formally. What is relevant is that a major shareholder is potentially capable of shaping attitudes, beliefs and opinions by simply being the most vociferously influential “owner” of the corporate entity. When a mogul takes an interest in a company and makes a significant investment in a media company, therefore, the Board stands to attention and public interest is abuzz with rumour and speculation about the express wishes of the largest shareholder.

The potential for shareholder activism should not be ignored in the corporate setting. Directors or indeed any anyone with a duty are required by law and especially the *Corporations Act 2001* to avoid a conflict between their personal interests and their duty to the company. (It is doubtful conflicts would extend to personal beliefs, attitudes, morals or even values.) For example under general legal principles a director must not enter a sale of property if it is to somehow gain pecuniary advantage for self financial gains (selling personal interests at a ramped price).

But there would be no conflict of interest for example if a director sits on a board of media company where editorial independence might be a problematic issue for example by a dominant shareholder. That is, a majority shareholder with sway may demand certain boardroom appointments who in turn may wish to promote say a mining agenda over an environmental issue. These directors will then appoint editors with the relevant sympathies. A majority shareholder without a seat may also be persuasive at shareholder meetings concerning the future direction of the company. This personal interest is harder to regulate - if at all in liberal democracies.

The *Corporations Act* uses the expression “material personal interest”, but provides no definition of that term (see s.182). Obviously detriment and harm which may flow from say a bad editorial appointment might be an example. But bad for whom – society or the company? One only has to consider the divisive nature of Alan Jones or John Laws or shock jocks such as Kyle Sanders to determine "detriment" in the Act relates to financial harm and not issues of moral turpitude. Indeed looking at the legislation and the regulations, conflicts relate more to financial and commercial transactions rather than personal values to the extent they do not contravene for example anti-discrimination legislation (see ss 182-83, 190-193 of the *Corporations Laws 1993*).

The fallacy of creating a “Chinese wall” between magnate shareholders’ interests and freedom of speech preservation becomes easier to appreciate in the media ownership setting. Artificial structures of corporate citizenship legally at least prevent the convergence of the respective rights and obligations of the different players. However, actions, reactions, negotiations and other typically human behaviours performed at arm’s length cannot be regulated. That is, corporate governance

“etiquette” requires companies to document correct behavioural protocol, but the reality is dominant and active shareholders especially when they are also directors are in a position to informally exert influence (Rodrigues, 2008).

Consider a scenario where a budding and tenacious TV news reporter has a highly newsworthy but potentially contentious story about a mining company that also happens to be the largest shareholder of the network. The story is arguably in the public interest according to senior management, and furthermore it is hot and contains all essential factual and titillating ingredients to create very bold headlines. The witnesses are credible and statements are corroborated. In the circumstances there should be no reason why the story would be canned.

But it is highly likely several legal, commercial and no doubt ethical hurdles will be put in the path of the story makers. First, given that Australia has no express Bill of Rights, all rights to freedom of communication are implied (not express). The journalist has no fundamental communicative "human right" to be guaranteed publication – notwithstanding it might be in the national interest.

Secondly, given that defamation proceedings are not only one of the most technically difficult types of legal cases, they are probably the most expensive, it is likely the network's lawyers might consider it too risky (notwithstanding the objectivity of the story). (This is not a theoretical but actual risk given the sheer financial and legal clout of billionaires.)¹¹

¹¹ As an aside, take the example of mining magnate Travers Duncan. He (unsuccessfully) initiated legal proceedings to attempt to “shut down” a corruption inquiry in NSW (McLymont, 2013). He has the legal capacity to explore his options, and thus has far greater access to justice than ordinary citizens.

Thirdly and in addition to legal reasons, there is a strong chance the story will be canned for commercial and ethical reasons. The issue is whether the station is able to run a story on one of its largest shareholders. This means a person who is owed a fiduciary duty by the board would probably have an action against it and its directors jointly and severally as a shareholder (in addition to any defamation action).

This is the most stark example of how freedom in reporting might be restricted – especially when billionaire litigants are armed to the teeth with a flotilla of Queen's Counsel. Perhaps there may have been a time when individual TV station owners may have run the story in the cavalier style of “publish and be damned”, but in economic rational times where multinational corporations own media rights, it is highly likely stories so close to home would be binned, or at least *sanitized* (the latter being the likely outcome).

This is not mere speculation given the legal, financial and influential capacity of magnates in all arenas. For example, in relation to shareholders as power brokers with greater say, Thomsen argues , “the 25 per cent threshold is too low and open to abuse by shareholders who target boards for reasons *unrelated* to pay – such as when Fairfax Media’s biggest shareholder, Gina Rinehart, denied a seat on the company’s board, used her voting power to force a first strike against Fairfax (publisher of BRW) at last year’s AGM” (2013, 26-7, emphasis added).

Elite holders are entitled to be dominantly active because the law is silent on this point. Australian legislation and corporate governance practices and the practice by Australian media company boards might present guarantees to ensure independence (which they do not), but the reality is that elites do more than just express an interest

in "making an investment towards the media business given its importance to the nation's future" as set out in Hancock's Prospecting statement (Rinehart's purchasing vehicle) (Ryan, 2013, 4-26).

Companies therefore comprise several players both at the executive and non-executive level; all of whom are capable of influence (Francis and Armstrong, 2009). This might best be described at the corporatisation of directorship. As mentioned, the largest consideration that may affect independence of the Board is the size of the equity enjoyed by the largest shareholder. If the shareholder is a tycoon with vast connections to corporate memberships with great reach, then a perfect storm of influence is created. It is not unreasonable to suggest "independence" in so far as executive appointments made to control the charter of the company might be tailored to suit the needs and interests of the dominant shareholder. Murray (2009: 180) is correct when observing that the, "The nature of executive appointments and working relationships between directors affect the overall independence of board members".

The composition of boards is always a contentious issue, and in the light of Fairfax Media, quite tense given that Rinehart owns enough shareholding to be allocated a seat on the board. One of the reasons why a seat has not been given is because Rinehart has not been prepared to sign a charter for journalism independence (Ryan, 2013). On that note, who would be naive enough to think Stokes, Packer or Murdoch would sign an enforceable undertaking to ensure editorial independence?

Concluding Remarks: *Social Responsibility v Corporatisation of Public Interest*

People will think what I tell them to think.

Charles Foster Kane, Citizen Kane, 1941

At the very least magnates should be classed as elite shareholders, directors and CEOs capable of extraordinary influence in all arenas, most notably in the media. For this reason ownership of the media becomes that much more relevant. To use a most basic example, if a mining magnate with interest in one or more capacities in the media has a strong view on an issue that may border on bias, and therefore not in the public interest, how can the public be assuaged that issues are properly agitated in an unbiased fashion in the public arena? In other words, whilst the formal façade of media governance purports to allow for editorial discretion and reporting independence, the empirical reality is that media executives are not tenured like members of the judiciary or career public servants, for example, who are assured of independence – irrespective of political persuasion. Journalists can quite easily be replaced, and editorial boards can in one way or another be stacked to ensure certain attitudes, beliefs and views are ventilated to the public.

The obvious fear in terms of corporate governance in media ownership is the ongoing balance to maintain reporting independence. But this attempt to strike a balance in Australia has always been elusive because the Fourth Estate has never been a level playing field. Apart from the ABC, special ethnic broadcasting services and community radio, media tycoons have always possessed a vested interest in ensuring their respective views are ventilated to the public. This is why members of media staff in private settings, are not *prima facie*, independent disseminators of information. They are employed by the company who is legally obliged pursuant to its corporate charter to pursue profit. Journalists might subscribe to a codified ideal to supply objective reporting and are certainly free to do so - but not at the expense of any interest, business or other relationship which could interfere with the owner's interests. Family ties in cross-media mining ownership does matter because the

convergence of two of the most dominate fields of economic enterprise essentially means a site for political struggle - or in the "Axe the Tax" campaign - a battle ground.

Through an interlocking mining and media controlled political economic landscape, independence concerning information about the Australian economy is capable of becoming less transparent. Shareholders stacking boards with less than independent directors, and directors appointing executives with less than independent views transcend beyond the rhetorical flourish of concerned scholars and academics. They become a core feature of the Australian democratic framework.

The fact that in less than two months two senior journalists have written about media dynasties is reason enough to suggest that media ownership and control is as much a matter about social responsibility as it is about commerce and corporate governance per se (Francis and Armstrong, 2009). In relation to journalist Pam Williams' (2013) expose (which depicts a Murdoch and Packer jnrs firmly shaking hands suggesting a "done deal", Mayne observes, "... it is also most unfortunate that Williams, a Fairfax veteran, has allowed herself to be used by Australia's self-serving and thuggish media oligarchs for what they regard as a seminal propaganda victory over a mortal enemy...The key lesson for Fairfax shareholders is the need to have genuinely independent directors who are skilled up in the media industry and dedicated to resisting the self-serving requests coming from the Packer and Murdoch camps". Mayne's concludes, "Here's hoping Williams' book will inadvertently blow the whistle on the underbelly of Australian media and fire up those who genuinely believe in independent public interest journalism."

Whether mining-media magnate convergence impacts independent and balanced journalism will probably be more a question of fact than law given that the most recent round media of reforms incorporating a public interest test are in hiatus (and probably permanently stayed). The rhetoric contained in "poetic" lines such as "The world's poor need our resources, do not leave them to their fate. Our nation needs special economic zones and wiser government, before it is too late" (Gina Rinehart, "Our Future", 2012) mean nothing in a political sense when ordinary citizens recite them. But they become potentially political when the wealthiest überelites espouse socio-economic and legal philosophies as megamagnates who happen to possess interests in industries sectors of immense public interest.

And what about Clive Palmer? He is one man capable of investing in media, but is not a magnate who has pursued cross media-mining ownership, but nevertheless has strong views about media influence. As Palmer is guaranteed publicity by virtue of his political ambitions, he probably does not need to acquire any media assets. He is not only controversial but is already regarded a "Living National Treasure" (despite being unendorsed by the Australian Council of National Trusts but nevertheless as voted by the Australian public or at least by those who read the widely circulated *Woman's Day* - the sponsors of the list icons). Mining magnates have landed on the media landscape. It should not be forgotten the widely socially networked imagery of Andrew Forrest demonstrating against policies concerning taxation and generally against issues concerning redistribution of wealth.

With such popular cultural influence exerted by magnates, I am reminded of some lines from a song by popular UK electronic music band, *Depeche Mode*:

*You can't change the world
But you can change the facts
And when you change the facts
You change points of view
If you change points of view
Then you may change a vote
And when you change a vote
You may change the world*
(New Dress, 1986)

In the case of Rinehart, powerful friends, business advisors and of course apparatchiks such as public relations consultants easily defend sizeable chunks of proprietorship in media companies as rational business transactions in a laissez-faire fair capitalist economy. After all there is no such political party as the “Über-rich Australians Party”, and there is certainly nothing illegal about pursuing profit in any ideological sense. The question about motives must remain objectively open – notwithstanding reasonable pointers in the right direction suggest Rinehart’s interest in media ownership is more than simply business.

Mass media resemble more than just a business commonly associated with advertising agendas. It has evolved into its own sophisticated political economic industry which incorporates a neo-pluralistic apparatus for the true titans of capitalism. What is not regulated of course are notions of social responsibility. So

whilst proponents of economic interests and structures in the media industry often argue that competition law is sufficient to regulate and maintain diversity in the media industry, the reality is lines between the corporate and political personality have blurred, or rather commenced an ongoing path of convergence. Acquisitions by mining tycoons demonstrates that while economic interests are obviously relevant factors, influencing legislative policy or shaping public opinion is clearly an important consideration too. Thus economic and political factors are inextricably linked. If they were not then there would not be such wide interest in moguls.

The challenge for those working within the formal pillars of power under a system of Responsible Government is to balance the fostering of cultural diversity and public interest in the media without affecting the rights of corporate citizens including mining elites who for all intents and purposes advance Australia's economic growth. Criticism that policies are either too socio-political or too commercial will always be ventilated by all sides. The legal and political reality is that these issues are at cross-purposes because they generate competing aims for media ownership regulation. The objectives are incompatible yet should be reconciled. Let's not "Shoot the Bolshevik! Hang the Profiteer!"¹² in the process.

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¹² Taken from H. McQueen's title (1978: 185).

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