



Not good news: Australia's shrinking media freedoms

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A creeping authoritarianism and a pronounced lack of diversity are making their impact felt on Australia's already fragile media landscape.

Despite Australia's traditions of freedom and its status as a long-time liberal democracy, its ranking in terms of press freedom has fallen below that of many newer democracies. In an international survey by Freedom House¹, Australia ranked 39 out of 185 countries surveyed, and in the annual survey by Reporters Without Borders,² its 2006 ranking had fallen from 31 to 35. The main reason cited for Australia's relegation was the introduction of anti-terrorist laws seen as potentially dangerous for journalists. As we shall see, there is no general legal protection of the freedom of the press in Australia and Australia also has an extreme concentration of media ownership for a western democracy. In Australia, investigative journalism is hampered in a number of ways. They include commercial pressures, the nature of Australia's defamation laws, a lack of legal protection for journalists, and a relatively weak freedom of information (FOI) regime. All of these factors have made it more difficult for journalists to perform their democratic role in providing the information needed for governments to be truly accountable to the people.

The state of press freedom

Press freedom in Australia operates by convention rather than by constitutional guarantee. Australia is anomalous in that it is the only western democracy that does not have a legal instrument (either a constitutional or statutory bill of rights) that protects freedom of speech or expression. Canada has a Constitutional Charter of Rights and Freedoms while the UK and New Zealand have Human Rights Acts. The United States First Amendment specifically provides for freedom of the press. The only Australian jurisdictions with a Bill of Rights protecting freedom of expression

¹ Freedom House, 2007, *Freedom of the Press 2007: A Global Survey of Media Independence*, <http://www.freedomhouse.org>

² Reporters Without Borders, 2006, *Annual Worldwide Press Freedom Index*, October, Paris, http://www.rsf.org/rubrique.php3?id_rubrique=639

are Victoria and the Australian Capital Territory, with Western Australia having foreshadowed similar legislation.

Freedom of political communication is the one form of speech in Australia that has received some protection. The High Court of Australia has recognised in a succession of cases since 1992 an implied right within the Constitution to such freedom. The extent and effect of that right is still evolving with successive interpretations. In general, however, Australian parliaments have a much broader power to restrict freedom of expression and the press than the legislatures in other liberal democracies, and the absence of any free speech provisions in the constitution, or a national Bill of Rights, means that the common law remains markedly more restrictive.

Addressing these perceived shortcomings, in 2007, the heads of eight Australian media groups issued a joint statement drawing attention to restrictions on free speech, and calling for an independent national audit. The key issues cited were:

- the effectiveness of freedom of information laws – given that freedom of information is at risk of becoming an oxymoron;
- the principles of open justice and the public's right to know how courts operate;
- the tendency by courts to restrict public access using broad suppression orders;
- the level of transparency in criminal and family law cases;
- the risks that journalists and whistleblowers face jail even though they are acting in the public interest;
- the impact of new sedition laws on freedom of expression in media reporting and the performing arts;
- the risk that Australians can be detained without charge and reporting of such occurrences is illegal;
- whether defamation laws achieve the right balance between freedom of expression and the need to protect the reputation of individuals (even allowing

for recent welcome reforms that created much greater uniformity across the country); and

- the need for suppression, contempt and other state based restrictions to be reformed and made uniform across the country.³

Security concerns have come to the fore in recent years, and their impact has been felt on the media. Since the attack on New York in September 2001, 41 pieces of anti-terror legislation have been enacted by the federal parliament. The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*—usually referred to as the ASIO Act — gave the government’s major domestic intelligence agency, ASIO, the power to arrest and detain people for extended periods of time in order to gather information about suspected terrorist activities. The Media, Entertainment and Arts Alliance views two offences under this Act as causing the most alarm. First, no information relating to an ASIO warrant can be disclosed for 28 days after the warrant has been issued. This section prevents ‘those who have been questioned by ASIO and/or their lawyers from talking to the media’. Furthermore, disclosing ‘operational information’ may result in a five-year prison term. Second, operational information cannot be disclosed for a period of two years after the expiration of a warrant. Again, a five-year gaol term is imposed for this offence.⁴ These powers exceed those granted in the United States under the PATRIOT Act (2001) or in the UK under similar legislation. Both countries have more far-reaching experience of terrorism within their borders than Australia, but also have more protection for freedom of speech.

Of particular relevance to journalists is the section of the ASIO Act providing for gaol terms of up to five years for refusing to answer questions about certain matters. This issue goes to the heart of a journalist’s rights and responsibilities to preserve the confidentiality of a source’s identity, a crucial dimension of freedom of the press. Unless the press can protect the sources of its information from retribution, its capacity to research and report on matters against the will of government and other

³ ‘Australia’s Right to Know’, 2007, <http://www.australiansall.com.au/australias-right-to-know/#bio>

⁴ Media Entertainment and Arts Alliance, 2005, *Turning Up the Heat: The decline in press freedom in Australia from September 11, 2001-2005*, Media Entertainment and Arts Alliance, pp. 5-6.

powerful organisations is effectively weakened. It is not difficult to foresee a situation in which a journalist might wish to preserve the confidentiality of a source relating to what s/he perceives as a political matter that a security agency might construe as related to potential terrorism.

In addition to the *ASIO Amendment Act*, the *Criminal Code Amendment (Terrorist Organisation) Act*, and the *Telecommunications (Interception) Amendment (Stored Communication) Act* all inhibit journalists' ability to report. The latter act allows the government to obtain a warrant for access stored communication 'threatening the anonymity of sources as well as exposing journalists to prison terms for associating with a terrorist organisation'.⁵ Under the new Counter-terrorism laws passed by federal parliament in December 2005 provisions relating to sedition leave journalists vulnerable to gaol terms of up to seven years.

Journalists and the law

There is a long tradition in Australia of tensions between the legal profession and journalists.⁶ Both regard their area of professional expertise as having primary importance for a functioning democracy. Legal commentator Georgia Price has characterised the tensions succinctly.

Journalists are convinced of their social utility in upholding the public interest in the free flow of information, and judges regard themselves as vehicles for ensuring the proper administration of justice. Both public policies are equally basic ingredients of free and democratic societies.⁷

The common law's reluctance to recognise anything but a limited right of confidentiality for journalists has been a source of frustration and resentment for journalists and a common response has been outright refusal to comply with court demands. The Media Entertainment and Arts Alliance (MEAA) contends that protecting sources is difficult where courts increasingly use the threat of contempt to

⁵ Media Entertainment and Arts Alliance, *Turning Up the Heat*, pp. 9, 6.

⁶ A useful discussion is in Kirsty Magarey, 2007, 'Evidence Amendment (Journalists' Privilege) Bill 2007', Parliamentary Library, Parliament of Australia, Bills Digest, No 172, 2006-07.

⁷ Georgia Price, 2003, 'Pack your toothbrush! Journalists, confidential sources and contempt of court', *Media And Arts Law Review*, Dec, v.8(4), p. 278

seek to compel the disclosure of sources but notes that this trend is also occurring in other developed countries. Since 1989, at least three journalists have been gaoled for refusing to divulge their sources and others have received suspended sentences or been fined. While the NSW's *Evidence Act Amendment (Confidential Communications) Act 1997* sought to provide some protection to journalists, the Supreme Court in 2002 ordered journalists Belinda Tasker (Australian Associated Press), Anne Lampe and Kate Askew (both *Sydney Morning Herald*) to divulge the sources for a story on the board of NRMA, a motorists' organisation. The court also argued that the leakers could have breached the *Corporations Act 2001 (Cth)*.

A case involving *Herald Sun* journalists, Michael Harvey and Gerard McManus, highlights some of the problems with evidence acts, defamation laws in particular. These journalists faced gaol when they refused to reveal to a court the sources of their report which revealed that the government has ignored a recommendation to increase war veterans' benefits by \$650 million, and had intended to present cabinet with a plan to spend only \$150 million. Following publication of the story, a senior public servant was charged, found guilty of leaking the document, but acquitted on appeal. The journalists refused to answer questions relating to the identity of their source during preliminary hearings, and contempt charges were brought against them. The two were convicted and fined \$7000 each. Handing down his judgment, Judge Michael Rozenes of the Victorian County Court said courts in England and Australia had made clear statements to the effect that journalists were not above the law and may not without penalty be permitted to follow 'their personal collegiate standards' where those standards conflicted with the law of the land.

The judges are required by the law to administer the law and if that law is to be changed, as the journalists would have it, then their plea must be to the legislature, a plea which I note has been most recently rejected. Until that law is altered, if it is ever to be, then journalists remain in no different position than all other citizens.⁸

⁸ *R v Gerard Thomas McManus and Michael Harvey*, 2007, VCC 619, pp. 19-20.

Their conviction led the chief executive of News Limited, John Hartigan, to question whether the public's right to know how it was governed could prevail in the face of growing censorship and secrecy by government.⁹

This case points to the need for changes to and the development of a uniform Evidence Act, a greater understanding of the role of the media in revealing information in the public interest and the need for greater protection of whistleblowers. This view was supported by the Federal Attorney-General who issued a statement pointing out that submissions made to the court by the Commonwealth Solicitor-General made it clear that the government believed national reform to evidence laws was 'necessary to ensure journalistic sources were protected in certain circumstances'. He also drew attention to amendments to the *Evidence Act 1995* which involve a new confidential relationships privilege which allow the courts to balance the public interest in ensuring a free press against the public interest in ensuring all relevant evidence is before the courts.¹⁰ However, it is unlikely that this would have had any effect on the case of the two journalists.

With one exception, Australian law does not specifically protect the confidentiality of journalists' sources. In 1997, New South Wales enacted the *Evidence Amendment (Confidential Communications) Act* which amended that State's *Evidence Act* to allow judges to exclude evidence of confidential communications between professionals and their clients. The court must not order that confidential communication be revealed if there is any likelihood of harm and the nature of this harm outweighs the desirability of having the evidence released. However, this provision has been of little use to journalists who are bound either by their union's code of ethics or their employer's codes of conduct to respect all confidences.

Journalists generally are unable to claim privilege to avoid disclosing their source of information if they are called before courts, Royal Commissions or parliamentary inquiries. To keep the confidence in such a circumstance the journalist will have to

⁹ *Herald-Sun*, 2007, 26 June.

¹⁰ 'Harvey/McManus Case', 2007, Attorney-General Media Release 121/2007, 25 June.

commit contempt of court and suffer the consequences which may include a fine or even a prison term. One commentator has written that judges have consistently demonstrated little understanding of how journalism works or that there is any value in the public knowing how government functions.¹¹

While the Standing Committee of Attorneys-General has agreed to legislate to legislate for some protection for journalists who report well-founded but confidentially sourced information that authorities, or others, seek to keep from the public, the Australian Press Council has criticised the proposal, as it stands, as ineffectual. In a letter to the Standing Committee, the Council argued that a shield law based on the existing section of the NSW *Evidence Act*, as recommended by the Australian Law Reform Commission, was too general to successfully protect journalist sources.

The relevant clauses leave open what might happen. It merely says that judges 'may' take into account the desirability of not calling professionals (in this case, journalists) to reveal sources. Powerful advocacy by senior barristers of the need to put journalists in the dock will in the Council's view more often than not persuade judges to allow the messengers to be put in jeopardy. This will make them subject to contempt of court charges for failure to divulge sources, simply, in most cases, because the litigants are unwilling to do the work to unmask the sources. In short, the relevant clause in NSW *Evidence Act* is no real protection at all.¹²

Around the world there is growing concern about the need to better protect journalists. In the USA, where there is already the strong protection of free speech via the First Amendment, Congress is currently in the process of passing a new law (the *Free Flow of Information Act*) specifically to give better protection for journalist sources and work-related material. Currently, 33 of the 50 American states, of different political persuasions, have passed similar shield laws. In New Zealand, parliament in 2006 passed a new *Evidence Act* that in Section 64 made protection of sources the default position from which courts can only move, in the interests of justice, in the most dire of circumstances.

¹¹ Matthew Moore, 2007, 'Truth comes at a high price', *Sydney Morning Herald*, 26 June.

¹² Australian Press Council, 2007, 'Protection of Journalists Sources', <http://www.presscouncil.org.au/pcsite/fop/shield.html>

Whistleblowers

A complementary aspect of the vulnerability of sources is the protection of whistleblowers. Whistleblowers almost always come to personal and professional grief as a result of the public stand they take against their employer. As noted in Chapter 2, there is whistleblower protection legislation in most States (see Table 2.2), but it affords little protection from the personal and professional pain most whistleblowers endure.

Since September 2001 Australian governments, the federal government in particular, have taken a harder line on message management. This line is apparent in relation to the growing number of attacks on whistleblowers. Journalists faced prosecution for revealing or receiving leaked information under the Federal government's proposed *Criminal Code Amendment (Espionage and Related Offences) Bill 2001*. While the provision relating to journalists was withdrawn after a sustained campaign by media organisations and press freedom groups, no protection was afforded to whistleblowers.

In 2002 the Senate Privileges Committee investigated the leaking of a Senate committee report to an *Age* journalist. It did not find either the journalist or the publication in contempt. Yet in 2005 a new inquiry was referred to this committee to examine proposals for prohibiting any unauthorised disclosure of parliamentary committee reports.

On 11 November 2004 the Australian Federal Police raided the offices of the *National Indigenous Times* to seize two leaked cabinet-in-confidence documents about an Aboriginal welfare plan. Shortly after this raid the Secretary of the Department of Prime Minister and Cabinet, Peter Shergold, said that the police would continue to be called on to deal with leaks. The *National Indigenous Times* also worked on a story relating to Aboriginal affairs and the Crime Commission. A week after questioning the Federal government the paper received a notice of audit from the ANAO. While

the paper was not forced to take part it was warned that the federal government, as the paper's largest advertiser, would withdraw advertising if it did not. Centrelink and the Department of Education, Science and Training then withdrew their advertising. On 22 March 2005 a Melbourne radio station, 3CR, was raided by the AFP with a warrant to seize an interview with Rob Stary, the lawyer for terrorist suspect, 'Jihad Jack' Thomas. In a question on notice during May 2004, Labor Senator, Jacinta Collins asked the Minister for Justice and Customs, Senator Chris Ellison, how many investigations the AFP had conducted into suspected leaks of information from government departments and agencies. She also asked how many staff hours were spent on these investigations and the costs the AFP incurred in relation to the investigations. Senator Ellison's reply in August 2004 was 111 investigations (1997-2004). Total staff hours were 32, 987 (2000-2004) and total costs were \$183 118 (2000-2004).¹³

In May 2005, two journalists with *The Australian*, Martin Chulov and Jonathan Porter, published a series of articles on lapses in airport security which had been concealed after a secret report by Customs two years earlier. A week after publication the government appointed a British aviation security expert to examine Australia's airport security, and who later confirmed that the warnings contained in *The Australian's* reports were accurate.¹⁴ Subsequently, the government accepted the expert's recommendations and earmarked more than \$200 million to improving aviation security. In 2007, a retired Customs officer, Allan Kessing, was convicted of leaking two classified reports to *The Australian*, and given a nine-month suspended prison sentence. Mr Kessing faces more than \$44 000 in legal expenses as a result of the case.

The secretary of the Media, Entertainment and Arts Alliance, Chris Warren, said his union had opened an appeal to help defray Mr Kessing's legal bills, and he urged the government to use the case as an opportunity for reform. He also urged the Government to combine protection for whistleblowers in the federal public service

¹³ Media Entertainment and Arts Alliance, *Turning Up the Heat*, pp.10-11.

¹⁴ *The Age*, 2007, 24 May.

with meaningful shield laws for journalists.¹⁵ Whistleblowers Australia recommends that those contemplating taking a dissident stand against their employer on an issue of principle should think long and hard before doing so.

Media Ownership

Australia has a concentration of media ownership almost without parallel in liberal democracies. It has experienced a gradual but dramatic reduction in the number of newspaper titles. In 1923, there were 26 metropolitan daily newspapers in Australia owned by 21 proprietors. By 1950, the number had fallen to 15 metropolitan dailies having 10 owners. By 1987, there were only three major proprietors of metropolitan dailies: the Herald and Weekly Times Limited, News Limited and the John Fairfax Group. In 1987, News Limited took over the Herald and Weekly Times with the agreement of the then Hawke Labor government which had regarded the Herald group as ‘anti-Labor’. In the two decades since, more metropolitan newspapers have closed, including all afternoon papers. With the exception of Sydney and Melbourne, no capital city now has more than one daily newspaper. There are only two national dailies, the *Australian* and the *Australian Financial Review*. Only the *Canberra Times* and the *West Australian* stood outside ownership by the two major groups, but in 2007 the owner of the *Canberra Times*, Rural Press Limited, merged with the Fairfax group. News Limited dominates the newspaper market with around 70 per cent of metropolitan circulation against 21 per cent for Fairfax. The two big groups also own many provincial papers as well as almost all suburban titles. A small number of companies also control the commercial radio and television networks. Pay television is dominated by Foxtel and Optus and ‘the four highest rating on-line news services are owned by the existing players’-the ABC, Fairfax and ninemsn.¹⁶

Such concentration of ownership means that unelected media proprietors exercise an enormous amount of political power. The implications of such power over elected governments have been a consistent theme in evaluations of Australian democracy.¹⁷

¹⁵ The *Australian*, 2007, 5 July.

¹⁶ Media Entertainment and Arts Alliance, *Turning Up the Heat*, p. 14

¹⁷ Hindess, 2004, *Corruption and Democracy in Australia*.

Table 1: Australian media ownership – Major players as at June 2007

News Corporation – controlled by the Murdoch family

Pay television – 25% of Foxtel

Newspapers – *Daily Telegraph* (Sydney), *Herald Sun* (Melbourne), *Advertiser* (Adelaide), *Courier-Mail* (Brisbane), *Mercury* (Hobart), *The Australian* (national)
Northern Territory News (Darwin) plus significant capital city suburban papers

Publishing and Broadcasting Limited – formerly controlled by the Packer family, now in a private equity partnership

Pay television – 25% of Foxtel

Free-to-air television – Channel Nine network (most capital cities)

Magazines (produced by Australian Consolidated Press), including – *The Bulletin*, *Money*, *Australian Women's Weekly*, *Cosmopolitan*, *Cleo*

John Fairfax Holdings

Newspapers – *Sydney Morning Herald* (Sydney), *The Age* (Melbourne), *Australian Financial Review* (national), *Canberra Times* (Canberra) and regional newspapers in important cities such as Newcastle and Wollongong as well as suburban weeklies in Sydney and Melbourne

Magazines, including – *Business Review Weekly*, *Personal Investor*

Southern Cross Broadcasting

Radio – 2UE (Sydney), 3AW and Magic 693 (Melbourne), 4BC (Brisbane), 6PR and 96FM (Perth)

Television – Channel 9 (Adelaide), Southern Cross Ten (regional areas of NSW, Victoria and Queensland)

Apart from the direct political consequences of media concentration there have been a number of other ramifications. Diversity has been reduced through the concentration

of operations. In radio particularly there has been a rapid shift to networked programming, especially of news content, and in all media there is an increased concentration of supply of international news from corporate stablemates or syndicates, facilitated by new information technologies. While it is true to say that the internet provides an almost endless supply of alternative sources of news and information, its effective penetration is limited to the small numbers of people seeking alternatives from the mainstream media. While penetration of internet access into Australian homes had reached 56 per cent (65 per cent of which was broadband) by 2005,¹⁸ the 2004 Australian Election Study showed, for example, only about 10 per cent of the electorate using the internet to get information about the election and only about 3 per cent using it frequently for that purpose. However, the significance of the internet explosion in terms of media ownership is that newspaper companies are rapidly transforming into multi-media companies, which means that the same pattern of ownership is reflected in the new media as it is in the old.

The cross-media ownership rules introduced by the Labor Government in 1987 prohibited the control of more than one of a commercial television licence or a newspaper or a commercial radio licence in the same market. The current Coalition government has been seeking to liberalise these rules since 1996, and in 2006 introduced sweeping changes, largely of a deregulatory nature, to media ownership laws, sparking a flurry of speculation and a series of mergers and mooted acquisitions. In the biggest markets of Sydney and Melbourne the proposed changes could more than halve the number of independent voices from the existing 12 or 13 to five.¹⁹ The rules preventing anyone controlling more than one commercial television station in a market or two commercial radio stations will remain. A new rule will require at least five independent commercial media groups in metropolitan markets and four in non-metropolitan markets (the '5/4 voices test'). Certain restrictions on foreign ownership

¹⁸ Australian Press Council, 2006, *State of the News Print Media in Australia Report 2006*, Ch 2.

¹⁹ Media Entertainment and Arts Alliance, 2006, *The media muzzled: Australia's 2006 press freedom report*, pp.18-19.

remain and are subject to the general law of foreign acquisitions and takeovers, overseen by the Treasurer.²⁰

While the two most prominent owner families, Murdoch and Packer, are generally perceived to affect the broad political orientation of their outlets, the extent of editorial interference by media owners is much reduced from the situation of decades ago. In all private media corporations, there has been a shift to greater influence for financial institutions, as shareholders or bankers, whose fiduciary interest and responsibility lie in the level of profit, not the public role of the media. Indeed, the former chair of Fairfax, Professor Fred Hilmer, once described journalists as ‘content providers’.²¹ The major pressure on editors these days is for cost cutting and income maximisation to deliver ‘shareholder value’. Cost cutting limits the resources available to journalists to investigate and report, and maximises the use of syndicated material across corporate mastheads and markets. Income maximisation leads to the targeting of affluent audiences to the exclusion of less affluent ones, and the tendency to constitute audiences as consumers rather than citizens. Away from the hard news and current affairs content areas, it tends to promote the mix of editorial content with advertisements or product promotion—so-called ‘advertorial’—which is particularly prevalent in print and television magazine content, and indirectly in the supplements of the metropolitan newspapers.

The ultimate impact on journalists from oligopolistic media ownership is the severe restriction on choice of employers—if you want to work in the industry you have to make sure you keep out of conflict with your few potential employers, whether it be on professional, political, industrial or personal grounds. There is evidence emerging that freelance journalists, particularly in specialised areas of content like health and lifestyle, fashion, trade journals, etc, are coming under increasing pressure to accommodate product promotion, and the rationalisation of industry ownership often

²⁰ Jock Given, 2006, ‘Media laws: Should we reply on the regulators?’, *Australian Policy Online*, 11 September, http://www.apo.org.au/webboard/results.shtml?filename_num=100607

²¹ See reference to comment in the ABC’s Media Report, 2006, 20 April <http://www.abc.net.au/rn/mediareport/stories/2006/1619017.htm#>

presents few employment choices for journalists who might be inclined to take a principled stand on the issue of commercial interference in news content.

A survey of journalists found an overwhelming majority (82 per cent) of the opinion that the changes would have a negative impact on the integrity of reporting, and an even larger number (85 per cent) saying the reforms would reduce diversity.²²

Public Broadcasting

Australia has a strong tradition of public broadcasting, with the Australian Broadcasting Corporation (ABC) having operated since 1932. However, it has suffered severe funding cuts, and in 2006 it was stripped of its only staff-elected board position. The ABC estimates that it has suffered a 25 per cent reduction in real funding from government since the mid-1980s, and the latest round of cuts has seen the axing of programs in core areas.²³ It has been argued that the Howard Government has conducted a sustained campaign against the ABC. In 1997, for example, it slashed ABC funding by \$55 million (or 12 per cent), and has not increased it since. Independent research by the London office of McKinsey and Company has shown the ABC to compare favourably in terms of cost with other public broadcasters, costing Australian taxpayers less than 10 cents a day per capita against 14.4 cents for the CBC (Canada) and 33.4 cents for the BBC (Britain).²⁴

In addition to a cut in funding, there have been continuing allegations of bias made by government ministers and the continuation of the trend that commenced under previous governments of making political appointments to the ABC Board—the most recent being conservative polemicists Keith Windschuttle and Janet Albrechtsen, who was in dispute with the ABC's *Media Watch* at the time. The government has rejected a Senate committee recommendation that it follow the rules of public advertisement

²² Roy Morgan Research, 2006, 'Journalists Strongly Oppose Government's Media Laws', Article No 541, 10 August, <http://www.roymorgan.com/news/press-releases/2006/541/>

²³ Friends of the ABC, 2006, *ABC Funding for the 2003-2006 Triennium*, <http://www.friendsoftheabc.org/fund2003.pdf>

²⁴ Glenn Withers, 2000, 'A political price for the ongoing financial squeeze', *ABCzINE*, Winter .

and merit selection of agreed criteria.²⁵ The Coalition is also committed to introducing a new regime of external investigation of bias and balance of both the ABC and the Special Broadcasting Service (SBS), the other publicly-funded broadcasting network.²⁶

Focusing on the allegations of bias, the most notable of these has been former Senator and Communications Minister Richard Alston's complaints against the radio current affairs program, *AM*. The ABC's Complaints Review Executive investigated the complaints, upholding only two of the 68. Unsatisfied, the Minister referred 43 complaints to the Australian Broadcasting Authority, which upheld only six and found that the ABC had breached impartiality guidelines four times in its coverage of the Iraq war. The report failed to recognise that Senator Alston had a vested interest himself and failed to sufficiently take into consideration the pressures journalists face on a daily basis, especially when covering conflicts.

The Special Broadcasting Service (SBS), with a mission to address Australian audiences in their full cultural and ethnic diversity, is increasingly dependent on advertising revenue, minimising any opportunity the broadcaster might want to take to diversify its television programming away from the highly educated, English-speaking, affluent audiences it currently attracts. Allowed by the former Labor government to accept commercial sponsorship, SBS has since then accepted limited advertising, but in 2006 the government announced it would relax restrictions on how this advertising could be shown which would enable commercials to be shown during programs rather than only before and after. Critics point to the influence of advertising as pressure to show populist content in prime time to maximise audience and therefore advertising revenue, a move in conflict with the public service imperative that should inform all decisions about content. Originally comprising members from non-English backgrounds, today's SBS board is made up almost entirely of Anglo-Australians with expertise in the commercial sector, all appointed

²⁵ Media Entertainment and Arts Alliance, *Turning Up the Heat*, p. 11. The MEAA quotes a 30 per cent reduction in real funding since 1985.

²⁶ Media Entertainment and Arts Alliance, *Turning Up the Heat*, p. 11.

by the Howard Government. Consequently, its appointments to management positions over the past five years have reflected a focus on revenue raising through commercial operations rather than a commitment to public broadcasting.²⁷

There has been speculation that the government is considering the idea that the ABC should seek subscription funding, similar to the Public Broadcasting Service in the United States, which would mean in effect the dispossession of the ABC as the national broadcaster to community broadcasting status. This contrasts with the positive or deliberative role of press freedom that is recognised in some European countries. A former Chief Justice of the High Court, Sir Anthony Mason, identified this trend a decade ago and warned of its deleterious implications for good government.

Free speech is of course the essence of modern democratic government and the very spirit of our social life. All the rhetoric about electoral mandates, which of course is legitimate political argument, should not be allowed to obscure the basic proposition that government is undertaken by our political representatives in the interests of the people. This means that good government requires that people are entitled to the provision by government of relevant information, to informed commentary, to the benefit of continuing discussion and debate on public affairs and to the impact that that discussion and debate (have) on the decision-making process of government. *In other words we should aspire to the ideal of a deliberative democracy.* Unfortunately that ideal has not always flourished in Australia in recent decades.²⁸

Diversity of opinion

As we have seen, the public broadcasting services, such as SBS, with its mission to address Australian audiences in their full cultural and ethnic diversity, have been increasingly starved of funds. Greater diversity of opinion may be found on the internet than in the commercial media, but in 2007 only 58 per cent of Australian households had internet access.²⁹ A survey conducted by the Democratic Audit of the opinion pages of the *Australian* newspaper, the only national newspaper apart from the

²⁷ Emma Dawson, 2006, 'For public broadcasters, time to tune in to other sources of money', *Sydney Morning Herald*, 5 June.

²⁸ Cited in Paul Jones, 2003, 'The Implied Constitutional Freedom of Political Communication and Australian Media Policy', University of Technology, *Sydney Law Review* 4. .

²⁹ *The Age*, 2007, 26 June.

Australian Financial Review, showed the disproportionate access provided to neo-liberal and neo-conservative think tanks. In the two years January 2003 to December 2004 and excluding articles on foreign affairs, 126 articles were published by authors associated with neo-liberal and neo-conservative think tanks and journals. For example, 37 articles were published by authors associated with the Centre for Independent Studies. By contrast, only seven articles were published over this period by authors associated with 'progressive' think tanks, comprising two from the Australia Institute, two from OZ Prospects and three from the Jesuit Social Justice Centre, UNIYA.

Investigating government and powerful corporations

The Australian constitutional framework for freedom of the press is weaker than in other liberal democracies, the commercial pressures are strong and the legislative and financial impact of recent national government policies on public media alternatives has been detrimental. Major problems for investigative journalism in Australia include not only the character of defamation and freedom of information laws and the commercial pressures already touched upon, but also with an obsession for official secrecy that permeates all levels of government. Recent surveys have found, for example, more than 150 secrecy provisions in Commonwealth acts and regulations, 160 such provisions embedded in Queensland law and more than 100 in Western Australian legislation.³⁰ Indeed, a Senate committee as long ago as 1978 was critical of a

fashionable contemporary drafting practice ... making it an offence for an official...to disclose without authorisation any information of which he has gained knowledge officially.³¹

Freedom of Information

Freedom of Information (FOI) legislation exists in all States, Territories and at the national level, conferring rights of access to government documents for citizens and the media. It has been extensively criticised for the delays, omissions and costs

³⁰ Bill De Maria, 2002, 'Rescuing FOI: Rescuing Democracy', *The Drawing Board: An Australian Review of Public Affairs*, Vol. 2, Number 3, March, p. 171.

³¹ Senate Standing Committee on Constitutional and Legal Affairs, 1978, *Report on Aspects of the Freedom of Information Bill 1978 and the Archives Bill 1978*, p. 233.

involved, and in some instances for political interference.³² The Australian situation varies according to jurisdiction, but is generally considered more restrictive than in the United States and the UK, let alone the Swedish situation that guarantees access to most government documents within 24 hours. Among the more contentious issues involving the use of FOI is the use of ministerial ‘conclusive certificates’, designed to protect documents which, if released, would, in the opinion of a minister, threaten national security or act against the national interest. But evidence suggests they are increasingly used for political reasons. Between October 1996 and September 2006 the Howard Government issued 13 such certificates, with an increase in FOI refusals from four per cent in 1996-7 to six per cent in 2004-5.³³

There is substantial pressure for reform of the national FOI legislation (first enacted in 1982), with organisations such as the Australian Press Council, the Australian Law Reform Commission, the Administrative Review Council and even the Commonwealth Ombudsman supporting reform. From the media’s point of view, two of the main problems are the delays in processing their requests, plus the costs involved in appealing a refusal through the Administrative Appeal Tribunal (AAT).

The use of bureaucratic obfuscation of requests for politically sensitive material, and the costs and procedural difficulties in proceedings before the AAT, exemplify the ways in which FOI can work to the advantage of governments or resource-rich plaintiffs, and to the disadvantage of the public and less affluent (or more parsimonious) media. As the Media Entertainment and Arts Alliance argues, FOI legislation ‘fails to hold authority accountable. Through lengthy time delays, excessive costs and the expansion of the exempt document categories, the Government has watered down the legislation’s effectiveness and thwarted attempts by the media to gain access to important documents’.³⁴ For example, the *Herald Sun* abandoned a two-year campaign seeking information about travel perks of Federal

³²Rescuing FOI: Rescuing Democracy, p.178.

³³ MEAA, 2007, *Official Spin: Censorship and Control of the Australian Press 2007* (2007 Australian Press Freedom Report), p. 10.

³⁴ Media Entertainment and Arts Alliance, 2005, *Turning Up the Heat: The decline in press freedom in Australia from September 11, 2001-2005*, pp. 6-8.

politicians after it was quoted a fee of \$1.25 million, which amounted to 32 years of full time work for one public servant.³⁵

Defamation law

In a move hailed as ‘a landmark achievement for Australian press freedom...and a strong foundation for free expression’,³⁶ uniform defamation laws came into effect in 2006 in all Australian States and Territories after some three decades of debate. Prior to this, each jurisdiction had its own distinct defamation laws, with wide variations on offences, defences and penalties..

The complementary legislation sets out to simplify and limit defamation actions, alleviating to some extent the threat of SLAPP (strategic litigation against public participation) writs which have been used by large corporations to intimidate or silence critics, and which have been used against the news media. The uniform scheme has garnered the support of media organisations for striking a successful balance between individual rights and freedom of expression. It also sought to balance public interest arguments. The new laws make it easier to raise defences against defamation proceedings. Truth alone is now a complete defence in all states, with defendants no longer required to prove the additional requirement of ‘public interest’.³⁷

The UDAs create a more stable environment for publishers and people who are the subject of publication in Australia by offering a uniform definition of what is defamatory, clarifying when a cause of action arises and outlining the defences which can be relied on by publishers to justify the publication of defamatory material. The Acts reinstate the common law approach to determining whether material is defamatory: material that exposes the person claiming to be defamed to hatred, contempt or ridicule; lowers the person claiming to be defamed in ‘the estimation of a

³⁵ *Weekend Australian*, 2001, 22-23 September.

³⁶ Media Entertainment and Arts Alliance, *The media muzzled*, p. 11.

³⁷ Media Entertainment and Arts Alliance, *The media muzzled*, p. 12.

right thinking member of society'; or causes the person claiming to be defamed to be shunned or avoided without any moral discredit on his/her part.³⁸

Generally, however, the Australian situation remains more repressive of publication than in most liberal democracies,³⁹ although it has improved since the High Court's recognition of the implied right to freedom of communication on political matters. Until the uniform laws were adopted, the defences to the publication of defamatory material varied from State to State, but the main categories were truth, fair and accurate reports of court and parliament, fair comment on a matter of public interest and common law qualified privilege (including the implied right to freedom of communication on political matters). There is no 'public figure test' such as exists in the United States since the celebrated Sullivan case in 1964.

The major 'chilling effect' on publishers and their journalists from the defamation laws flows from the economic costs of litigation (which can run into the millions of dollars) and the potential size of penalties (which have often run into hundreds of thousand of dollars). Under the uniform code, new controls have been imposed on awards of damages, now capped at \$250 000 unless there are aggravating circumstances. Exemplary and punitive damages are now abolished in civil defamation proceedings.

Restrictive laws, harassment and intimidation

Australian journalists have generally been relatively free to report the news except in wartime. However, a number of recent events suggest government censorship of the media, albeit indirectly, is on the rise in Australia. In 2006, for example, an Internet website that satirised the website of the prime minister, and featured a soul searching 'apology' speech for the war in Iraq was shut down under orders from the Australian Government, specifically the Prime Minister's Office (PMO), citing 'intellectual

³⁸ Rhonda Breit, 2006, 'Uniform Defamation Law: Does it have the balance right?' February 2006.http://www.brisinst.org.au/resources/brisbane_institute_defamation.html

³⁹ Peter Manning, 2003, "'Reasonableness" and "Malice": and analysis of why defamation law refuses to reform', *University of Technology Sydney Law Review* 86; Michael Chesterman, 2000, *Freedom of Speech in Australian Law: A delicate plant*, Aldershot, Ashgate.

property' concerns.⁴⁰ Later in the same year, a comedy show on ABC television, which was alleged to have an anti-government bias, was taken off the air. The decision by ABC management to scrap the popular show was taken only one day after a government senator accused one of the co-hosts of being guilty of a serious conflict of interest for having appeared in a union campaign against the government's workplace relations laws. The Prime Minister denied applying pressure to have the show removed.⁴¹ In 2007, the publishing arm of the ABC announced it had abandoned plans to publish a critical biography that it had commissioned of controversial broadcaster, Alan Jones, known to be a friend of the government. The decision to abandon the book was reported to have been made by the government-appointed board of the broadcaster after letters from lawyers acting for Mr Jones arguing that the book was defamatory.⁴² The book was subsequently published by a commercial publisher, even though the ABC had already spent \$100 000 on the project.

In assessing the state of world press freedom, Reporters Without Borders compiled a questionnaire with 50 criteria for assessing the situation in each country. It includes every kind of violation directly affecting journalists (such as murders, imprisonment, physical attacks and threats) and news media (censorship, confiscation of issues, searches and harassment) (Table 2).⁴³

A second international survey, by Freedom House, placed Australia 39th on a list of 185 countries, citing concerns about restrictive laws and censorship. The Freedom House survey determines ratings on the basis of an examination of three broad categories: the legal environment in which media operate, political influences, and economic pressures (Table 3).

⁴⁰ *Sydney Morning Herald*, 2006, March 17.

⁴¹ News.com.au, 2006, November 1, <http://www.news.com.au/entertainment/story/0,23663,20681474-10388,00.html#>

⁴² *Media Watch*, 2007, 3 March.

⁴³ Reporters sans frontières (Reporters Without Borders) <www.rsf.org>

Table 2: World Press Freedom Ranking

N°	Country	Score
1	Finland	0,50
-	Iceland	0,50
-	Ireland	0,50
-	Netherlands	0,50
5	Czech Republic	0,75
6	Estonia	2,00
-	Norway	2,00
8	Slovakia	2,50
-	Switzerland	2,50
10	Hungary	3,00
-	Latvia	3,00
-	Portugal	3,00
-	Slovenia	3,00
14	Belgium	4,00
-	Sweden	4,00
16	Austria	4,50
-	Bolivia	4,50
-	Canada	4,50
19	Bosnia and Herzegovina	5,00
-	Denmark	5,00
-	New-Zealand	5,00
-	Trinidad and Tobago	5,00
23	Benin	5,50
-	Germany	5,50
-	Jamaica	5,50
26	Namibia	6,00
27	Lithuania	6,50
-	United Kingdom	6,50
29	Costa Rica	6,67
30	Cyprus	7,50
31	South Korea	7,75
32	Greece	8,00
-	Mauritius	8,00
34	Ghana	8,50
35	Australia	9,00
-	Bulgaria	9,00
-	France	9,00
-	Mali	9,00
39	Panama	9,50
40	Italy	9,90
41	El Salvador	10,00
-	Spain	10,00
43	Taiwan	10,50
44	South Africa	11,25
45	Cape Verde	11,50
-	Macedonia	11,50
-	Mozambique	11,50
-	Serbia and Montenegro	11,50
49	Chile	11,63
50	Israel	12,00

Table 3: Media operating environment

<p style="text-align: center;">Australia</p> <p style="text-align: center;">Status: Free</p> <p style="text-align: center;">Legal Environment: 6</p> <p style="text-align: center;">Political Environment: 9</p> <p style="text-align: center;">Economic Environment: 6</p> <p style="text-align: center;">Total Score: 21</p>
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Legend

Status Free (0-30) / Partly Free (31-60) / Not Free (61-100)

Legal Environment: 0-30

Political Environment: 0-40

Economic Environment: 0-30

Total: 0-100

Source: Freedom House, 2007, Global Press Freedom

Journalists continue to be impeded in their legitimate activities. Two Australian Federal Police officers raided the Sydney offices of the *Australian* newspaper in March 2007, attempting to serve a subpoena on a reporter as part of legal action against a public servant accused of leaking a report on airport security. The agents allegedly refused to answer questions on what they knew about the requirement of journalists to protect their sources, and did not produce their badges until requested.⁴⁴ On Australia Day, 2002, journalists were harassed by Australian Protective Services officers while trying to cover protests at the Woomera immigration detention centre. For a week the media had been reporting from their designated area of 800 metres away from the centre. The media moved behind a hessian-lined fence when they were asked to do so by lawyers for the detainees who felt the media's presence was inciting detainees' violence. Despite such cooperation, the AFP moved the media further 200-300 metres away, making it too hard to film. One journalist from ABC Radio refused to move behind the AFP line and was arrested for trespass.

⁴⁴ Media Entertainment and Arts Alliance, *Official Spin*, p. 21

Police in most jurisdictions are implementing secure digital technology for radio communication, meaning that media can no longer scan police radio. In 2004 Queensland's Beattie Government accepted recommendations of the Crime and Misconduct Commission that curtailed press freedom. Under these recommendations the Police are able to withhold information about certain job types and can release information about others after one hour. Police could have the authority to withhold or exclude a job from release. Without the ability to scan communication, journalists lose the ability to report news in real time whilst paying due attention to accuracy and acting with discretion in relation to sensitive matters, which normally occurs when reporting on crime.⁴⁵ As several incidents over the past two decades suggest, a balance between police powers and journalistic freedom is required. It might be true that certain types of sensitive matters should be excluded from the media.

In Queensland, a documentary film-maker was taken into custody in 2005 while visiting a prisoner and charged with conducting an illegal interview, even though she had no camera, tape recorder or even a notebook. Charged under the State's Corrective Services Act, which provided for a prison term of up to two years, she was convicted, but without a criminal conviction being recorded. The law prevents the media, and other legitimate researchers, from gaining access to the State's prisons, effectively concealing what is going on inside the gaols.⁴⁶

Safety abroad and at home

In a tragic reminder of the very real daily risks journalists face working in foreign countries, Morgan Mellish of the *Australian Financial Review* and Jakarta embassy spokeswoman, Liz O'Neill were killed when a commercial airliner crashed in Yogyakarta, Indonesia, in March 2007. A *Sydney Morning Herald* journalist Cynthia Banham, was critically injured. The three were covering a visit to Indonesia by foreign minister Alexander Downer.⁴⁷

⁴⁵ Media Entertainment and Arts Alliance, *Turning Up the Heat*, pp.14-5.

⁴⁶ Media Entertainment and Arts Alliance, 2006, *The media muzzled*, pp.14-5.

⁴⁷ Media Entertainment and Arts Alliance, *Official Spin*, p. 20.

The protection of journalists covering war zones remains an issue. The importation of flak jackets into Australia for use by news organisations remained prohibited, forcing many teams, such as those working in Iraq, to obtain their protective equipment overseas.⁴⁸ Photojournalist, Paul Moran, and sound recordist, Jeremy Little, were both killed in 2003 while covering the Iraq war. A year later an SBS journalist, John Martinkus, was kidnapped in Baghdad while other Australian journalists in Iraq have been placed under house arrest or expelled from the country.

Covering the news has also become more dangerous in Australia. An SBS camera crew was attacked outside a western Sydney mosque on 16 August 2002, while trying to balance the negative coverage received by the Muslim community. There were several instances of physical assaults on members of the media in 2005, most notably during race riots in the Sydney suburbs of Cronulla, Lakemba and Macquarie Fields, as well as during raids on suspected terrorists.

Australian journalists covering regional news stories have also experienced harassment and intimidation. For example, an SBS television journalist investigating logging activities and alleged corruption in Papua New Guinea had her passport seized by Papua New Guinea authorities while boarding her flight home in 2004. In the same year a freelance journalist was deported from East Timor while investigating the Timor Gap negotiations, amidst charges of possessing weapons and illegal documents.⁴⁹ In May 2006, a gang attacked an ABC television news crew in Dili, East Timor, injuring a reporter and camera operator.⁵⁰

Media intrusion and harassment

Privacy regulation in Australia is generally comparable with similar countries overseas. Data protection laws are extensive, broadly at EU levels (while US law offers less protection). There also are laws on surveillance, which can affect the

⁴⁸ Media Entertainment and Arts Alliance, *The media muzzled*, p. 21.

⁴⁹ Media Entertainment and Arts Alliance, *Turning Up the Heat*, pp. 16-21.

⁵⁰ Media Entertainment and Arts Alliance, *Official Spin*, p. 22

media. However, protection for intrusions on privacy is generally both limited and piecemeal in Australia. There is no clearly established ‘tort of privacy’ available against the media, for example. Law reform commissions are currently examining the issue, and some consideration is being given to a possible statutory action under which individuals could sue the media for publishing private facts or intruding on their privacy.

Journalists also incur public resentment. Research by Denis Muller interviewed on ABC Radio’s *The Media Report* in 2005 highlights some of the reasons why the general public are mistrustful of journalists. Journalists and members of the public were asked a series of questions relating to the performance and accountability of journalists in Australia. Questions relating to performance including shifting fact from propaganda or spin, coverage on important issues that are ongoing, providing voters with the information necessary to enable them, to cast their vote, interviewing or photographing someone without revealing that you are a journalists, etc. On the performance questions, the public consistently rated journalists well below the level at which journalists rated themselves. Turning to accountability mechanisms, both journalists and the public had little knowledge of such as bodies as the Press Council, the Australian Broadcasting Authority and the ethics branch of the Media, Entertainment and Arts Alliance. Most people were, however, aware of *Media Watch* and rated it highly.⁵¹

The journalistic culture

The news media have themselves become news, and journalists have shown a willingness to look critically at their own industry. This is now a feature of both newspapers and broadcasters, notably the weekly Media supplement in *The Australian*, *Media Watch* on ABC TV and *The Media Report* on ABC Radio. Beyond these specialist outlets, most coverage of major events and processes these days includes an analysis of the patterns of media coverage. This indicates both a level of self-reflection by the media themselves, but more fundamentally encourages public

⁵¹ Richard Aedy, 2005, ‘Disconnected: Journalists & the Public’, *The Media Report*, ABC Radio National, 25 August.

discussion and awareness of the principles and ethics underpinning journalism practice. It carves out a space or terrain on which the activities of the media have to be explained and justified according to principle and ethics. It demonstrates that journalists are professionally prepared to hold other journalists accountable for their ethical and professional standards, an essential component of a free press.

The 2003 Hutton inquiry⁵² in Britain into the death of Dr David Kelly, apparently over the controversy surrounding media reporting on the British government's arguments for launching the war on Iraq, provided a degree of detailed investigation into media-government relations that we are yet to see in Australia. The media coverage and books written about the so-called 'children overboard affair' during the 2001 Australian federal election campaign adopted a probing and investigative tack, but lacked the access to official documentation and intra-governmental communication that the Hutton inquiry has been given.

The contrast between the investigation that the British government was forced to accommodate with what the Australian government was able to get away with is a clear indicator of differences in the political terrain between the two countries. All the available indicators suggest that the journalistic culture in both countries is willing and able to hold government accountable, but in Australia journalists fight on a terrain stacked against them.

(The above report is drawn from the forthcoming State of Democracy survey by the Democratic Audit of Australia, to be published in 2008).

⁵² <http://www.the-hutton-inquiry.org.uk/>