

# Freedom of the Press in Australia

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Freedom is an abstract ideal, but more importantly it is a material experience. Freedom is both a lack of constraint in the execution of activity, and an expansive approach to the contemplation of what activity might be possible. The security of any freedom is dynamic: it depends on the constant formulation and assertion of one's rights and responsibilities to occupy a social space in ways that preclude its encroachment and diminution. Therefore the maintenance of freedom is a continual process, a contest between those asserting autonomy of action and those who wish to limit or constrain it.

In any contest, there is both an immediate object or issue at stake, and there is the terrain or field within which the contest occurs. The way one particular issue is contested and resolved will influence the terrain on which another issue may be contested. There is the role played by the protagonists, and relative advantage/disadvantage conferred on the protagonists by the terrain, and these factors interact to determine the outcome of any contest.

In appraising the freedom of the press, therefore, one has to consider both the field on which struggles to assert autonomy take place, and the activities of the protagonists in that struggle. Ultimately, any press is only as free as the activities of its members determine: freedoms not used will fall into abeyance, and conversely, in testing restraints on their freedom journalists and their public define and stake out a territory to be occupied.

Freedom of the press is important because media reporting and representation are an exercise of power. The visibility or secrecy, clarity or opacity of an issue; the ways in which different audiences are told (or not) that their interests are at stake and may be mobilised into a response; the ways in which social groups are included or excluded in the targeting and construction of audiences, indeed the very construction of audiences as composed of citizens and/or consumers—these are all matters of intense relevance to decision-making processes, and to the conduct of social and political life.

Freedom of the press as a principle supports the construction of an open terrain of accountability, to the advantage of the public against vested interests. It is an institutionalised extension of rights to freedom of expression and communication. There are broadly two approaches to its conceptualisation: to minimise the prior constraints on publication of information (the so-called 'negative' conceptualisation), and to maximise the opportunities for deliberation (the 'positive' conceptualisation).

## Legal protections

No Bill of Rights
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Australia is one of literally a handful of states that does not have a legal instrument (either a constitutional or statutory bill of rights)

asserting the range and scope of its citizens' freedoms, including freedom of speech. Other common law systems, including the United Kingdom, Canada and New Zealand, have a Bill of Rights included in their legal framework in some form. Some of these provisions restrict themselves to freedom of speech, expression or communications; others, such as the US First Amendment, specifically provide for freedom of the press.

All parliamentary attempts to introduce a Bill of Rights in Australia have been made by the Australian Labor Party, have lacked bipartisan support and have failed, whether they were by referendum (federally, in 1944 and 1988), or by legislation in various parliaments (Williams, 2000: 27-34). Except in the Australian Capital territory where such a Bill is being introduced, there appears to be no political will on the part of any major political party to move in this direction. Conservative opposition to the establishment of a bill of rights is based on populist arguments against empowering an 'unelected', 'activist' judiciary at the expense of an elected legislature, and discounts arguments about the importance of the separation of powers to establish checks and balances to government power.

Indeed, it has been the High Court of Australia since 1992 that has recognised an implied right to freedom of political communication in a succession of cases, fuelling conservative attacks on an allegedly activist judiciary. The extent and effect of that right have been interpreted by the court in subsequent cases as it develops its thinking on this matter. Most commentators agree that *Lange* in 1997 restricted the interpretation of *ACTV* and *Theophanous*, though some argue that the *Lange* definition is broader than might appear at first sight (Chesterman, 2000: 18). Either way, the Australian parliaments have a much broader power to restrict freedom of expression and the press than the legislatures in other liberal democracies.

The most recent demonstration of this is the passage of the ASIO Act in 2003, which gave the government's major domestic intelligence agency the power to arrest and detain people for extended periods of time in order to gather information about suspected terrorist activities. These powers exceed those granted in the US under the Patriot Act (2001) or in the UK under similar legislation, both countries which have more far-reaching experience of terrorism within their borders than Australia, but both of which have legislative protection for citizens' rights.

### **The identity of sources**

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 (Bacon and Nash, 1999). 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 powerful organizations is effectively weakened. It's 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.

## Shield laws

Precisely this situation arose in a succession of US cases from the 1960s and 70s where the Supreme Court developed its approach to the confidentiality of sources under the First Amendment, when the FBI was pursuing journalists to reveal information about the Black Panthers, a militant and armed African-American organization. The US law (both statutory and common) recognising a right of journalists to preserve the confidentiality of sources has developed considerably in the last few decades, but even so the Supreme Court has held (in *Branzburg v Hayes* 408 US 665 (1972)) that this right is not mandated by the First Amendment, nor when it does exist does it imply an automatic privilege to preserve confidentiality (Chesterman, 2000: 162). Some Australian and US state legislatures have enacted so-called ‘shield laws’ recognising more or less limited rights to confidentiality, and the torts of contract have been used in some cases to uphold an agreement to preserve confidentiality.

Of course, it is not surprising that the three separated locations of government power—the legislature, executive and courts – are ambivalent about recognising and extending a power that constitutes itself in defiance of their own. In declining to identify their sources when ordered to do so by a court, journalists lay claim to a relationship to the ‘public right to know’ that precedes in principle the formation of the state and the rights of any government. Even the limited Australian recognition of an implied right to freedom of political communication acknowledges the pre-existence of a public with a right to free communication flows via the media. This principle explains why journalists are reluctant to acknowledge any right by legislature or court to enact or invoke ‘shield laws’—it would undermine their argument that their rights pre-exist the formation of government, and so shift the terrain on which they are contesting their case. Given the paucity of constitutional protection in Australia, this battle over the structure of the terrain has particular importance.

## Martyrs to free speech

In Australia, the various shield laws have not been invoked by journalists to date, and conversely recognition by the courts of the so-called ‘newspaper rule’ has been limited. In a review of its code of ethics during the 1990s the Australian Journalists Association considered diluting the obligation to maintain confidences in all circumstances (Chadwick, 1994) but decided against doing so. In the 1990s judges were willing to sentence journalists to gaol or community service orders for refusing to disclose the identity of their sources. Nonetheless, journalists and publishers continue to assert their rights to do so, which places plaintiffs and the courts at risk of constructing journalists as martyrs to free speech if they impose penalties for doing so.

## Accountability

Confidentiality of sources is meant to protect weak and powerless sources of information from retribution. In fact, unnamed sources are now a staple in parliamentary press gallery reporting. Powerful politicians speak ‘off the record’ to avoid taking responsibility for assertions they are making. In these circumstances the confidentiality principle arguably subverts the accountability of government, the very position it is intended to buttress. Journalists, by the way in which they use the right to protect sources, are undermining the political relationship with the public that constitutes the essence of their professional role in a democracy. It’s an instructive example of how the way in which protagonists conduct themselves in a contest can change the terrain on which future

protagonists will have to fight—in this case one in which the media can be seen as part of the problem of the unaccountability of power, rather than part of the remedy.

#### 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 (Lennane, 1995; Dempster, 1997). There is whistleblower protection legislation in some States but it affords little protection from the personal and professional catastrophes most whistleblowers suffer. 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, and if they decide to proceed should not trust internal complaint mechanisms, should gather as much documentary evidence of their allegations as possible and then take a very public stand through the media (Lennane, unpublished paper). This advice is an affirmation of media power, and of the profoundly conflictual basis of public affairs. The contrasting experiences of two whistleblowers/media sources in the debate about the justification for the 2003 invasion of Iraq—Andrew Wilkie in Australia and David Kelly in the UK—illustrate the range of consequences that confront whistleblowers.

#### 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 involved (Snell, 2002; de Maria, 2002; Martin, 2003), and in some instances for political interference (Sharah, 2002). 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 (Lidberg, 2003).

There is substantial pressure now building for reform of the national FOI legislation (first enacted in 1982), with organizations such as the Australian Press Council, the Australian Law Reform Commission, the Administrative Review Council and even the Commonwealth Ombudsman supporting reform. The Australian Democrat Senator Andrew Murray has introduced a private member's bill into the Senate, which has focussed the debate on the precise issues. From the media's point of view, two of the main problems are the delays in processing their requests (44% of non-personal requests take 60 days or more to process [McKinnon and O'Brien, 2003]), 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 the terrain for a contest can be constructed to the advantage of governments or resource-rich plaintiffs, and to the disadvantage of the public and less affluent (or more parsimonious) media. Some journalists, notably Ross Coulthard of the *Sunday* program on the Nine network, now represent themselves before the AAT as a way of overcoming the cost factor and also acquiring the skills to contest government secrecy within the judicial domain.

### **Legal restraints**

The restraints outlined so far relate to the terms and limitations of getting access to information. There is a set of restrictions that apply to the publication of information, involving legal restraints on the one hand, and commercial ones on the other. Legally, there are restraints on publishing material that is violent, obscene or blasphemous, or involves racial vilification. The laws vary by State, but since January 1996 there has been a national classification scheme for the regulation of films, videos, computer games and publications. The interpretation of the law usually invokes the test of community standards. Since 1995 there have been a number of films refused classification (banned) for commercial and/or film festival release, even though they have been screened overseas in North America and Europe. These decisions have been controversial, and in some cases have been resisted by community groups that have organised public screenings in defiance of official censorship (eg for the film *Ken Park* in 2003).

The community defiance and activism identifies the space of absent freedom, but at the same time allows conservative politicians to demonstrate to their supporters that they are standing up for censorship. In this way the conflict itself is valuable to them, allowing them to mobilise their support base around the symbolic struggle to maintain a terrain that favours their social values. The conservative Howard government has proven adept at foregrounding such cultural and symbolic contests as a way of rallying its electoral base. Constitutional protection of freedom of expression would limit the availability of symbolic contests on such issues.

Perhaps the most powerful inhibition on publication of information and analysis flows from the law on defamation. It is State-based law, and there has been pressure from media proprietors for sometime for a national approach to law reform, which has so far come to nothing. The Australian situation is generally more repressive of publication than in most liberal democracies (Manning, 2003; Chesterman, 2000), though it has improved since the High Court's recognition of the implied right to freedom of communication on political matters. The defences to the publication of defamatory material vary from State to State, but the main categories are 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 US since the celebrated Sullivan case in 1964 (Lewis, 1992; Chesterman, 2000).

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 often run into hundreds of thousand of dollars). The impact of the 1999 amendments to the NSW Defamation Act (commonly referred to as Section 7A amendments), highlight where the real penalties lie. Presented as an improvement of the operation of defamation litigation, the changes separate out a determination of fact by a jury from a subsequent determination of the legal issues by a judge, which means that all cases have to be defended before a jury before the chances of a legal victory in the court can be assessed by the protagonists. Media companies keep very private their expenditure on legal costs, but informally indicate that their legal expenditure

has increased drastically under the new regime. Undoubtedly over time this will have a chilling effect on journalists, and the preparedness of proprietors to risk defamation suits.

### **Commercial restraints and media concentration**

Within the framework of liberal democratic theory press freedom is secured by economic independence from government. This flows from the way in which the press developed in the struggles against absolute monarchy in the sixteenth century England (Keane, 1991), and manifests itself today as privately owned media corporations, or government-supported, statutorily independent public media (in Australia the ABC and SBS). This framework barely recognises the issue of economic power (Schauer, 1994), which is now a major factor in the era of transnational media oligopolies based on mass advertising revenues.

<p>Concentration of media ownership</p>	<p>Since the middle of the twentieth century Australia has had a concentration of media ownership almost without parallel in liberal democracies. News Ltd dominates the newspaper market with over 75% of metropolitan circulation, competing with Fairfax publications in Sydney and Melbourne and shifting ownership of the <i>Canberra Times</i>. A small number of companies control the commercial radio and television networks. 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. In the 2001 election campaign, for example, only 9 percent of the electorate used the internet to get information about the election and of these more than half did so only once or twice (Bean and McAllister 2002).</p>
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The cross-media ownership rules introduced by the Labor Government in 1987 prohibit 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, without success to date. The corporations controlling the media outlets are multi-national conglomerates with interests in a range of industries nationally and internationally. 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.

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 (Davis, 2000). 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 (Hallin, 1995). 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.

Restricted choice of employers

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

At the same time as commercial and financial pressures have been increasing in the private sector, public broadcasting has endured sustained cost cutting. The Australian Broadcasting Corporation estimates that it has suffered a 25% 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. The Special Broadcasting Service, 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. The Minister for Communications is now reported to be circulating 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 (Jones, 2002).

### Conclusion

In short, 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 governments on public media alternatives has been detrimental. The terrain on which the contest for freedom of expression and the press occurs is hostile to the public compared to other liberal democracies. Nonetheless, there is a strong commitment to the role of an independent, querulous media in some sections of the Australian press, though notably in the media speaking mainly to an affluent audience. The metropolitan broadsheets, the financial press, the public broadcasters and the *Sunday* program on the Nine television network exemplify searching investigation and critical analysis, even if limited by the resources available.

Perhaps most encouraging is the support among journalists themselves for reporting on the media that 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. And 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

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 enquiry 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, will give a degree of detailed investigation into media-government relations that we are yet to see in Australia. The media coverage and books (Marr and Wilkinson, 2003; Weller, 2002) related to the so-called 'children overboard affair' during the 2001 Australian federal election certainly took a probing and investigative tack, but lacked the access to official documentation and intra-governmental communication that the Hutton enquiry 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 states. 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.

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