5. Australia's media climate: Time to renegotiate control

ABSTRACT

In 2007, Australia was rated by two international media bodies as well down the chain in media freedom. Within its own borders, internal media groups—in particular the Australian Press Council and the Media Entertainment and Arts Alliance, as well as a consortium of major employer groups—have recently released reports investigating the position of media freedoms. This article examines a select few of these shrinking freedoms which range from the passive restrictions on access to documents to the overt threat of imprisonment for publishing sensitive material. In particular, it considers laws relating to freedom of information, camera access to courts, shield laws and whistleblower protection and finally, revamped anti-terrorism laws. The article maps the landscape of Australia's downgraded press freedom and suggests that laws controlling media reportage need to be renegotiated.

Keywords: Australian Press Council, anti-terrorism laws, freedom of information, media freedom, shield laws

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Introduction

MEDIA freedom in Australia is under threat. Words like 'censorship' and 'secrecy' are at the centre of current discourse about the media, following recent reports about its position as a free speech democracy. International surveys have listed Australia well down on world rankings. Of the 169 countries surveyed for its 2007 annual index of press freedom, Reporters Without Borders (RSF, 2007) ranked Australia just 28th in the world, behind Mauritius, Namibia and Jamaica, and just one position ahead of Ghana. Freedom House ranked Australia 39th out of 195 countries

it surveyed (Freedom House, 2007). New Zealand, for example, sits well above Australia on both international league tables, at 15 on the RSF scale and 9 on the Freedom House rankings.

Only since 2005 has the focus on the issue intensified, with journalism bodies (MEAA 2005, 2006, 2007, 2008) and researchers (Nash, 2005; Pearson & Busst, 2006; Abjorensen, 2007) exploring the specific laws and regulations impacting upon media freedom. In 2005, the Australian journalists union, the MEAA published its inaugural report into press freedoms. *Turning up the heat: the decline of press freedom in Australia 2001-2005* detailed a raft of government laws, policies and procedures impeding journalistic inquiry. This report highlighted the squeeze that was being increasingly placed on investigation and the impediments to publication. These included new anti-terror laws, tightening of freedom of information laws to include 'conclusive certificates' to protect documents, broadening of scope to force source-disclosure, attacks on whistleblowers, tightening and controlling ABC funding and content, reductions to diversity in media ownership, cutbacks to Australian media content due to the Free Trade Agreement with the United States, decreasing access to police activity through the use of digital scanners, and the safety of journalists (2005).

National secretary Christopher Warren urged the media to keep up the struggle for press freedom and free speech. He argued that 'a free media never emerges as a gift from government' (MEAA, 2005, p. 4) and called on the Australian media to take control over its destiny. The organisation issued annual reports on media restrictions from 2005 onwards, with the most recent being *Breaking the shackles: the continuing fight against censorship and spin* in 2008.

A consortium of Australia's leading media organisations combined to produce what has become known as the Right to Know report, the Independent Audit into Free Speech in Australia which, among many findings noted that there were approximately 500 pieces of legislation containing secrecy provisions or which prohibit the media in Australia in some way (Moss, 2007). In launching the initiative in May 2007, chairman and chief executive of News Ltd, John Hartigan, noted that the need for the investigation surpassed any competitive agendas held by media players, requiring an all-in approach to ensure the media lobby was heard (SBS, 2007).

The need to question press freedoms is an ongoing challenge in any democracy. One major difference between Australia and other leading Western

democracies is that Australia as a nation does not have a bill or charter of rights which explicitly outline free speech or media freedoms. While Australia's freedom of speech has been tested in the High Court's decisions in *Lange v Australian Broadcasting Commission* and *Theophanous v Herald and Weekly Times Ltd,* these judgments provide for political communication only and, along with few other judgments which have favored free speech, should not be considered predictable. A decade ago Australian media analyst Julianne Schultz talked about the media's role of ongoing renegotiation.

'The precise nature of the relationship between the news media and the judiciary, executive and parliament is subject to contest and renegotiation,' she wrote (Schultz, 1998, p. 19). She argued that during the 1980s the news media entered a heightened period of challenge to the authority of parliament and the judiciary (Schultz, 1998). The news media moved from a 'cooperating servant (to) an equal contender in the political system' (Schultz, 1998, p. 19). Her words then, resonate now:

> …(B)y emphasising the importance of disclosure and information provision to an informed representative democracy many journalists, especially during the 1980s, [renegotiated] as a way of reinvigorating confidence in the institutional role of the news media. (Schultz, 1998, p. 17)

Prior to this, Canadian researchers Ericson, Baranek and Chan used the title *Negotiating Control* in their often-cited 1989 book which describes the relationship between sources in the three arms of government and the media. When we consider the recent moves by the major media players outlined above, we can identify a new period of renegotiation. We might co-opt this title and reconfigure Schultz's description to describe the current Australian media climate as 'renegotiating control'.

And not before time. Hartigan noted at the start of the Right to Know process that, taken cumulatively, the legal prohibitions that limited the release of public information represented a significant threat to free speech and democracy (Australia's Right to Know, 2007). This article looks at a range of these issues which are currently at risk or in need of renegotiation—some representing passive restrictions and some all-out attacks—on free speech and open justice. It is by no means an exhaustive list and it is recognised that this article can do little more than flag the topics as worthy of deeper investigation.

The authors have intentionally chosen not to include the large and important area of defamation because it was reformed nationally in 2005 and the long-term impact of the changes has yet to be gauged.

Passive restrictions

Those prohibitions that restrict access to information may be summed up as 'passive restrictions'. While they lead to impediments to publishing, they are predominantly about the frustrations confronting journalists as they seek out information. This article reviews two such areas in the Australian media landscape: freedom of information and camera access to courts.

Freedom of Information

A landmark High Court freedom of information decision in 2006 known as the Treasury case (*McKinnon v Secretary, Department of Treasury*), sent a chilling message to journalists trying to access government documents. All State and Territory governments had introduced Freedom of Information legislation since the Victorian and Commonwealth governments paved the way in 1982 and 1985. While the laws were established in the spirit of access to the bureaucratic decisions of governments and quasi-governmental bodies, there were numerous exceptions to such transparency. Privacy, commercial sensitivity and security were examples. Applications could also be costly. Dissatisfaction with the laws peaked in 2006 when the High Court upheld the federal government's decision to stop Treasury documents being released to *The Australian* newspaper's FOI editor, Michael McKinnon (Treasury Case, 2006). The case centred on the Federal Treasurer's use of a so-called 'conclusive certificate', a power allowing federal ministers to nominate that the release of certain documents or parts of documents would be contrary to the public interest.

As Pearson (2007, pp. 295-296) explained, McKinnon had applied to the federal Department of the Treasury for documents demonstrating the extent and impact of 'bracket creep', the situation where some taxpayers drift into higher tax brackets when their income rises to keep pace with inflation. He also requested documents related to the First Home Owners Scheme, a one-off government payment to people buying their first residential property. The department itemised 40 documents relevant to the bracket creep matter, but all bar one were exempted from release under FOI. The department found 47 on the First Home Owners Scheme, claiming exemptions for most in part or

in full. However, the then Treasurer, Peter Costello, pre-empted the review of the FOI exemptions and used powers under s. 36(3) of the commonwealth Act to sign 'conclusive certificates'. These stated that disclosure of 39 of the documents would be 'contrary to the public interest'. The Treasurer argued their release would compromise confidentiality and candor among bureaucrats advising ministers and that the documents were only 'provisional' and their early disclosure would be misleading for citizens. McKinnon appealed to the High Court arguing the Treasurer did not have reasonable grounds for his public interest exemption arguments. But a 3-2 majority of the High Court dismissed his appeal, a significant blow to government transparency.

The Australian Press Council examined FOI legislation throughout Australia in 2002, and concluded governments used these devices to stymie FOI requests, using:

- Time delays;
- Prohibitive costs;
- Numerous exemptions;
- Arbitrary decision-making on classification by FOI officers; and
- Obstruction on the grounds a request would unreasonably divert an agency's resources (APC, 2002).
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The NSW Ombudsman (2006) reviewed FOI reporting for the 2004–05 period and identified 'a significant and disturbing downward trend in matters where it is reported that documents were disclosed in full' over a 10-year period (NSW Ombudsman 2006, p. 5).

The Commonwealth Government's growing culture of secrecy was further revealed in the release of 2005-2006 FOI figures (Merritt, 2007b, p. 14). The government refused wholly or in part almost half (46.3 percent) of requests for non-personal information (that is, requests by individuals other than those referred to in the documents, such as journalists). The agencies in the most sensitive (and newsworthy) areas were also the slowest in responding. The report showed more than one third (36 percent) of requests to the Department of Prime Minister and Cabinet took more than 90 days to elicit a response (Merritt, 2007b, p. 14).

Lidberg (2005, p. 31) compared FOI systems internationally and submitted similar FOI requests in five countries: Sweden, Australia, United States,

South Africa and Thailand. Just two of 12 applications in four countries produced any information. Lidberg concluded Australia was the worst FOI regime, with the government projecting 'an image of a mature functioning FOI system', but in reality the system was 'close to completely dysfunctional from a user's perspective'.

The blame was laid by FOI academic Rick Snell (2008, p. 30) upon 'complex, inconsistent and obsolete statutory provisions or charging regimes that are easily manipulated or abused by over-secretive agencies'. Snell also criticised the new Australian Federal Government of Kevin Rudd for its unfulfilled promises on FOI reform five months after winning office. At that time he suggested the government had 'made all the right noises, a few important symbolic changes and delivered the right rhetoric but appears to have changed little in the way of actual practice of FOI' (2008, p. 30).

Cameras in court

Television cameras in Australia's courts are not controlled by legislation or explicit policy but by individual judicial practice. As such, access is on a case-by-case basis, with applications to the trial judge or presiding magistrate.

The main developments in the field were in the 1990s which were, to a large extent, spearheaded by the nation's newest court, the Australian Federal Court, established in 1976. The Federal Court was well placed to steer the move to television access partly because of the lack of jury involvement which reduced potential complications relating to privacy for juries (Johnston, 2004). The states have followed with periodic coverage and often enthusiastic responses over the past decade, such as:

- The South Australian Chief Magistrate said in 1997 'televised court cases could soon become a reality' (Stepniak, 1998, p. 154).
- Western Australia Chief Justice Martin, advocating cautious progress in the field of media access, allowed television cameras to film the delivery of his appeal verdict in the high profile Walsham murder case in July 2007.

While occasional televised coverage has occurred since the early 1990s, it remains a novelty. At the same time, countries like New Zealand and Canada have undertaken serious trials and now television cameras are not

uncommon in courts in these countries while Australia has lagged in this field (Johnston, 2004). There is concern among those who work in court communications that the Australian courts have been left behind (Innes, 2007). Innes notes: 'Nothing will happen until they consider the issue and perhaps adopt a policy. So we haven't moved far since 1995' (Innes, 2007).

But some jurisdictions have not yet made it to first base with televised courts. In Queensland, according to a report undertaken by the Federal Court, courts have opposed broadcasting of proceedings attributed, in part at least, to an incident in 1998 involving Channel 9's *A Current Affair*. In this matter, District Court Judge Robert Hall was interviewed about his supposed leniency in sentencing. Judge Hall had publicly invited members of the public to phone him and arrange to observe his sentencing but he subsequently withdrew this offer after what he called an 'unscrupulous and unprincipled ambush' by the *Current Affair* interviewer (Stepniak, 1998, p. 165). He was reported as saying: 'I believe that this conduct has set back, possibly forever, any prospect that existed for good relations between the judiciary and the electronic media' (Turner, in Stepniak, 1998, p. 165). Yet Queensland's Chief Justice, Paul de Jersey, is often outspoken in favor of media access and media rights.

The authors acknowledge that the television media itself is part of the problem of limited progress in this field as found by Johnston (2004), and this is supported by research that shows that, in contrast to America and Canada, Australian television media have not put forward a strong case for camera access.

> It is in the media's own self-interest that such a right of privilege be attained, and if that institution is not eager to achieve it, there is little chance that other segments of society can be convinced that the effort is important enough to warrant support. (Linton, 1993, p. 23)

One judge has noted: 'If the right kind of collective action were to be taken, there are potentially major gains for the electronic media' but no request had been more than 'a polite request' (Teague, 1999, p. 112). Whether it's a cause or effect of the lack of camera access, the television news media, for the most part, have come to accept or anticipate rejections, leading to a *chilling effect* on reportage.

All-out attacks

While passive restrictions serve to lock the media out of access, other, more overt attacks on the media or their sources can find them before the courts and sometimes fined, jailed or threatened with legal actions. This section considers three areas in which the media and their sources have been, or are potentially at risk: the areas of shield laws, whistleblowers and anti-terrorism legislation.

Shield laws

Two prominent leaks in 2004 and 2005 led to newspaper disclosure of important matters of public interest but also to criminal charges being laid against the public servants involved and, in one case, two journalists being fined for contempt for non-disclosure of sources. While related, these two issues—shield and whistleblower laws— will be dealt with separately here.

The most recent major case of journalists being pressured to reveal confidential sources in Australia was in mid-2007. The *Herald Sun* newspaper in Melbourne published an article in early 2004 by reporters Michael Harvey and Gerard McManus about the federal government's cuts to war veterans' entitlements, based upon so-called 'secret documents', 'secret papers', 'confidential documents', ministerial 'speaking notes' and another report not available publicly. The journalists refused on ethical grounds to reveal the source of the material to Federal Police officers who were investigating the alleged leaking of information by a public servant. In mid-2004 Desmond Patrick Kelly was charged under s70(1) of the *Crimes Act* for having communicated confidential information to an unauthorised person. The journalists appeared in the Victorian County Court on 23 August 2005 and answered questions about the documents and a phone number, but refused to answer questions about the source of their information, despite directions from the judge that they do so. They were charged with contempt of court and on 25 June 2007 they were convicted and each fined $7000.

Only a week before the conviction, Federal Parliament passed the *Evidence Amendment (Journalists' Privilege) Act 2007* which might have protected the journalists from prosecution, but it did not. Attorney-General Philip Ruddock said the decision to convict had been at the discretion of the Victorian County judge who heard the matter and that it had been disposed in accordance with Victorian law. However, the Australian Press Council (APC) executive secretary Jack Herman noted: 'It's legislation that the Press Council

doesn't think will protect journalists' sources at all, since it leaves too much discretion with judges' (in Brown, 2007). He said the Federal government was displaying a clear policy of secrecy by cracking down on journalists and the whistleblowers who leak the information. Thus, there is little point affording journalists protection if their confidential sources, or whistleblowers fear being prosecuted and 'won't speak up in the first place' (Herman in Brown, 2007). The public servant involved, Desmond Kelly, was convicted of the leaking offence on the basis of other evidence including telephone records of calls to the press gallery and one of the journalists' mobile phones, in addition to some admissions of fact and some circumstantial evidence. He received a non-custodial sentence but his conviction was overturned on appeal to the Victorian Court of Appeal.

Prior to the federal bill, the *New South Wales Evidence Act 1995* had given courts in that state discretion not to order source disclosure. However, the NRMA (National Roads and Motor Association) case (2002) reverted to the old system and ordered source disclosure. Previous cases of journalists being held in contempt and fined or jailed for non-disclosure of sources include:

- Tony Barrass 1990—jailed by a magistrate in Western Australia for refusing to give details of a tax department source
- Joe Budd 1992—jailed by a judge in Queensland for refusing to give details of a source who supplied information that was central to a defamation case
- Deborah Cornwall 1993—found guilty by a New South Wales judge for refusing to supply information to Independent Commission Against Corruption (ICAC) about a police informant

It is argued that shield laws and whistleblower protection need to be considered together to ensure protection to all parties.

Whistleblower protection

The most recent instance of prosecution of a whistleblower was of former Australian Customs officer Allan Kessing who was convicted in March 2007 of leaking two classified reports in 2005, an action that led to a $200 million overhaul of Australia's aviation security (Kearney, 2007, p. 5). The reports exposed security problems at Sydney airport, including organised crime operations, surveillance shortcomings, and security lapses. Kessing received

a nine month sentence, suspended on a good behavior bond, as well as a fine. This conviction, as well as McManus and Harvey's above, expose the shortcomings of a lack of a public interest defence in the federal *Crimes Act* for such whistleblowers, the lack of any whistleblower legislation at a federal level, and major inconsistencies among the state and territory jurisdictions which did have such protective legislation (Kearney, 2007, p. 5). More alarmingly, they reveal a determination by the Australian government to pursue public servants who leak information, despite the clear public benefit gained by such secrets being revealed to the media and the general public. Importantly, Kessing has always denied leaking any information to the media and is appealing the verdict.

In June 2007 Democrats Senator Andrew Murray introduced *The Public Interest Disclosures Bill 2007* to Federal Parliament, replacing the *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002*. The Bill moves away from the negatively-charged word 'whistleblower'. Murray argues: 'In essence this Bill allows public sector officials to expose important mistakes and oversights which may otherwise never see the light of day' (Murray, 2007).

Not surprisingly, there is general public scepticism surrounding support for whistleblowers which is substantiated by research from academics such as Dr William De Maria who surveyed hundreds of whistleblowers, finding that official channels helped in less than one out of ten cases. He also found that in many instances, official channels were actually harmful (2002). More recently, research by Brown (2006) investigated the 11 legislative proposals that have dealt with the management of public sector whistleblowing in Australia since 1993. Among his findings, he noted that only one jurisdiction in Australia—New South Wales—extends protection, in certain circumstances, to officials who make public interest disclosures to members of parliament or the media (2006). Essentially then, it remains an offence in most jurisdictions to whistleblow to the media. But few whistleblowers go straight to the media, choosing to use established internal systems where possible (ABC, 2007). Nevertheless, the fact remains that governments 'will never want the information about wrongdoing … to be revealed' (in ABC, 2007).

Brown further found that even within systems that did exist for whistleblowers, support was poor. 'Practical protection is as important as legal protection … in many jurisdictions (South Australia, New South Wales, Commonwealth, Tasmania) there are no requirements for agencies to develop

procedures for the protection of whistleblowers, or other internal witness management systems' (2006).

Anti-terrorism laws

Media restrictions in the name of national security followed the terrorist attacks on the World Trade Center in New York in September 2001. After those incidents and the Bali bombings in 2002, the Australian government introduced legislation allowing for the arrest and detention of individuals (including journalists) who might have information on terrorism activity, and which also prohibited communication with detainees, their families and their legal representatives. All this featured in the *ASIO Legislation Amendment (Terrorism) Act 2003*, which amended the *Australian Security Intelligence Organisation Act 1979*. The new laws allowed any citizen over 16 years of age to be detained for up to seven days for questioning (s. 34HC) by the security force. Several major media groups drafted a combined submission opposing the Bills but the legislation was passed in 2003 regardless.

In April 2008, the Australian Parliamentary Library's Terrorism Law Directory (Parliamentary Library 2008) listed 46 counter-terrorism Acts passed by the Australian Parliament since September 2001, with two Bills lapsing at the November 2007 election. It registered 27 references to parliamentary committees over that period. The directory listed 26 federal Acts and six Regulations related to terrorism already in force before 11 September 2001. Of course, not all of this counter-terrorism legislation affects the work of journalists and media organisations.

Nevertheless, many of the statutes could potentially affect reporters chasing security-related stories, by exposing them to detention and questioning, bugging their communication, seizing their notes and computer files, breaching the confidence of their sources, banning them from covering some court cases, suppressing facts in trials, banning them from some newsworthy locations, rendering discussions with some sources illegal, and restricting their publication of quotes from sources deemed to be encouraging terrorism.

The *Anti-Terrorism Act (No. 2) 2005* prompted the most stringent attacks from groups defending media freedom and civil rights. They focused their attention on the revitalisation of sedition laws that had been unused for more than 50 years. The sedition laws were 'modernised' by being substituted by five offences prohibiting the 'urging' of others to use 'force or violence' in specified situations, albeit with a defence of 'good faith' (ALRC 2006b). Then

Attorney-General Philip Ruddock responded to the criticism by announcing the reforms would be reviewed by the Australian Law Reform Commission at some time *after* they had been passed. He went ahead and commissioned the review but did not implement any of the ALRC's July 2006 recommendations that the inflammatory term 'sedition' be erased (ALRC 2006b).

The first indications that these laws were starting to impact upon journalists surfaced from mid-2006. Both *The Age* and the ABC's *Four Corners* were served with search warrants by Federal Police demanding their interview notes and recordings as new primary evidence after an alleged terrorist had just won an appeal against his conviction because of inadmissible police interview evidence covering similar material (Burrow, 2006). Not long after, an academic researcher had to alter the research design of his $829,000 Australian Research Council project because the Attorney-General deemed his proposed interviews with foreign terrorism figures would render him in breach of the prohibitions on associating with terrorists (Edwards & Stewart, 2006). Further, Merritt (2007a, p. 13) noted two of the nation's largest terrorism trials had been cloaked in secrecy including extended sessions in closed court because of the new laws. After a large-scale Sydney terror trial was closed to the media, usual competitors News Ltd, Fairfax Media and the Australian Broadcasting Corporation joined forces to oppose moves to close to public scrutiny, the trial of 13 Melbourne men allegedly part of a terror cell. In late March 2008 the Federal Government won orders for a large part of the proceedings to be held in camera.

Clearly, none of these areas of all-out attacks have favoured free speech, choosing instead to gag discussion and debate and chill the media, further suggesting an urgent renegotiation of control between the Fourth Estate and the three arms of government.

Looking forward

The Australian media was shackled by legislative and policy restrictions under the Howard government for the decade to 2007. The record of Australian governments of all political persuasions—at both state and federal levels—and the court system in this millennium shows a slide in media freedoms through passive restrictions to accessing information and all out attacks on reportage and publication. There was hope that the Rudd Labour government which came to power in November 2007 would wind back some of the legislative restrictions on media freedoms and initiate moves to greater

transparency. A positive development was the April 2008 Australia 2020 Summit, where 1000 selected citizens gathered at Parliament House to generate ideas for Australia's future. The stream examining Australian governance took up the issue of:

> …a rigorously accountable and open government, and a strong independent media. Participants expressed a desire to revitalise the accountability of the Executive to Parliament, as well as to the public. In this they stressed the role of a stronger and more open Freedom of Information framework (Australia 2020, p. 32).

The stream proposed as its third top idea:

> Open access to Government information (complete reform of FOI laws) and strengthen protections of free press in order to facilitate a more open and publicly accountable government (Australia 2020, p. 33).

This became one of dozens of ideas from the 10 streams of the summit, so the test of its importance to this new government will be whether it is picked up and pursued as part of its agenda for its first term. Media freedom optimists will, by definition, be hopeful, but the new government's tardiness in winding back its predecessor's clamps on freedom of expression over its first few months is cause for concern.

This article has looked at a range of such restrictions: the frustration of freedom of information applications, limitations on televised court access, the pursuit of whistleblowers and lack of protection for journalists shielding their sources and a raft of anti-terrorism legislation. The evidence is apparent in the mounting body of legislation and criminal cases where government bodies have demonstrated time and again their commitment to secrecy over the free flow of important public information. One measure of the decline has been the gradual downgrading of Australia's ranking in independent international press freedom surveys.

Nevertheless, amid the erosion and gaping holes of free speech protections, are some rare advances in either process or thinking and the media and policy makers should take hold of these and not let go. The recent initiative by industry leaders to form Australia's Right to Know campaign as a research and lobbying tool was a welcome start. In bringing together various media organisations the landscape has gone beyond commercial agendas to a

bigger, more urgent call for the continuation and advancement of a democratic media. And while the media are making a statement to governments at all levels, they must also engage with the public, through schools, the wider community, in journalism education and so on, and take advantage of a growing literacy in media freedom. The media itself can use its own vehicles of communication—newspapers, magazines, television, radio, the internet, and all else—to remind all stakeholders of the importance of free speech in *their* society. There is also real scope to build on existing advances within the legislature and the courts—like increased access to cameras, new federal laws for source protection and proposals for whistleblower protections—in this climate of change. The time for a renegotiation of the status quo is now upon us, a time for renegotiating control.

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