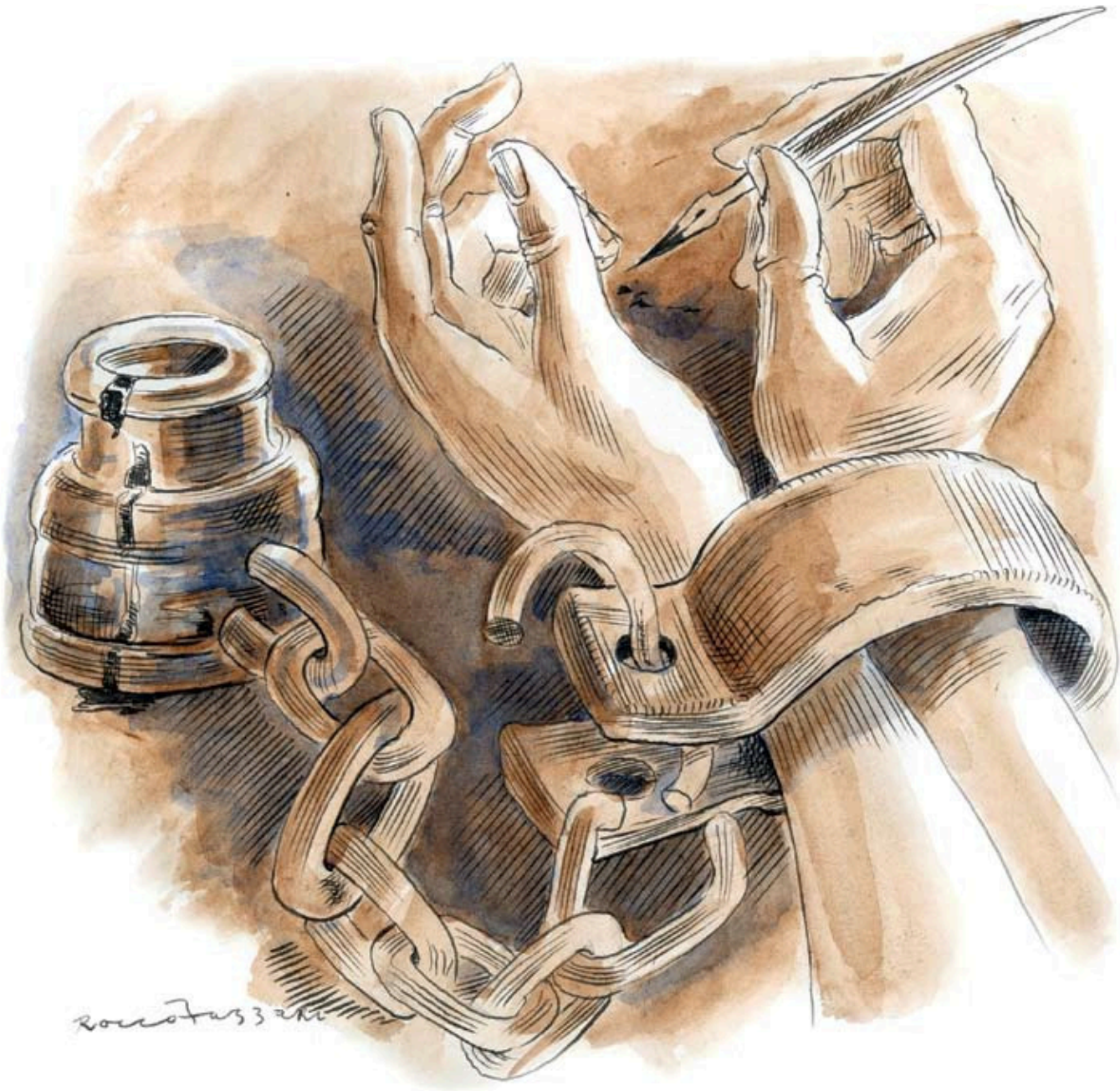
Breaking the shackles

the continuing fight against censorship and spin



The Media, Entertainment & Arts Alliance

2008 report into the state of press freedom in Australia

Contents

2008 Australian Press Freedom Report

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1.0 Introduction

"Some positive signs have started to appear ... but we hope for a marked improvement"

Were this to be a school report card, after years of under achievement this year's card would still read: "Could do better", but would note that: "Some positive signs started to appear before the end of last term ... we hope for a marked improvement next year."

The first big achievement in the past 12 months was to see how the erosion of press freedoms in Australia burst into public attention, largely due to a number of high-profile cases and the formation of the Right to Know Coalition which teamed the Alliance with News Ltd, Fairfax, the ABC, SBS and a range of other large media organisations concerned at the levels of restriction and spin facing journalists trying to get at the truth in this country.

The coalition hosted a dinner at which Geoffrey Robertson linked Australia's failing reputation for press freedom to our reputation in international jurisprudence and called for a bill of rights to enshrine, absolutely, those press freedoms we should – but can not – take for granted in a true democracy: the freedom to obtain and publish information that is in the public's interest to know, and the protection of journalists – and their sources – who publish in the public interest.

Shortly after that Irene Moss published the findings of her independent audit into the state of free speech in Australia, finding – as we'd been highlighting in these annual reports since 2005: "that free speech and media freedom are being whittled away by gradual and sometimes almost imperceptible degrees".

Then, within a month of the audit being made public, we had a new Federal Government which had promised as part of its election campaign to work towards a more open government and pledged to introduce measures to foster press freedom. The ALP's commitment to freedom of information reform now seem scheduled for the statue books this year and will go a long way towards fostering a more open government in this country.

At the same time, the Queensland Government review of freedom of information ordered by new Premier Anna Bligh presents the most comprehensive blueprint for a rethink of freedom of information – a rethink with the public's right to know at it's centre.

There was some movement on shield laws, for journalists, with the Standing Committee of Attorneys General committing to adopting the, admittedly limited, protection in the NSW Evidence Act. However, these needs to be linked to genuine protection for whistleblowers who go public and the response of all governments – both old and new – has been, so far, underwhelming.

We're still waiting for a proper response to all those laws passed in the past seven years in the name of fighting terror, although there have been promising noises about the ill-considered sedition laws adopted in the last term of the Howard Government.

And, as the Moss Report found, the scale and all-pervasive nature of legislative restrictions in both private and public sectors was truly shocking. These are as common at the state as the federal level, and we're still wating for a response from any level.

The ubiquitous spin also makes it increasingly difficult for journalists to get through to the truth. In reality there is very little we can do about this legislatively although a little less management of the news would go an awfully long way.

Still we're right to be optimistic. But it will need hard work to see better next term.

Christopher Warren, Federal Secretary
Media, Entertainment & Arts Alliance

Fighting for the right to know

IRENE MOSS

In the four months we researched the audit for our report on the state of free speech in Australia, we spoke to, or received submissions from, several hundred journalists, lawyers, public servants, academics, and others.

We considered many hundreds of documents, letters, books and academic theses.

From the outset, it was clear that freedom of speech is something that people feel passionate about. Our work was welcomed. Some expressed relief that it was being done. There was a consensus that this was overdue.

When I came to this project I already believed in the principle of free speech. Who doesn't?

But I doubted there was a serious problem in Australia. We enjoy a free and open society with a clearly robust and opinionated media.

I wondered if the media in fact needed reining in sometimes and I suspected their complaints about censorship, secrecy and restrictions on the flow of information were, to use their own language, a bit of a beat up.

But as the audit progressed I witnessed a very complex picture unfolding. The evidence, and the research we conducted ourselves, bore out many of the suspicions aired by journalists and their media chiefs.

We reviewed the hundreds of laws and regulations that impact on the media, and also the daily practices by the courts and government which affect the type of information that reaches the public. There are at least 500 pieces of legislation in Australia which restrict the media and, at any given time, there are at least 1000 court suppression orders.

The audit revealed that there are some big issues that need to be addressed, but also some which might appear to be relatively minor but which nevertheless will impact significantly if not resolved. The devil can be in the detail as, for example, in the need to amend a range of legislation to have effective shield laws. Freedom of Information laws need to be able to sit comfortably with privacy laws and so forth.

With some of the priority areas identified by the audit, the next step is persuading governments to separately deal with them or where there are inter-jurisdictional inconsistencies and cross-border issues, having them referred to the Council of Australian Governments, not to be buried in endless debate, but to be constructively resolved.

But to do this we need commitment to the principles of free speech at the very top, which will then flow down to their proper administration.

The Coalition now faces the most difficult part of this initiative: influencing governments and government agencies including the judiciary, to embrace changes that will enhance the public's right to know.

The most difficult challenge will be to influence a cultural shift towards a more open and accountable approach to information gathering, dissemination and communication. Only with this cultural change, will the rest follow: improved policy and legislation in the identified areas and then improved administration of the policies and laws.

In the run up to the federal elections, several state governments, as well as the then Labor opposition, responded by commitments in response to the Right to Know Coalition's initiative, touching on some of the areas identified by the audit. These commitments are welcome.

The strength of will of the leaders of governments and their agencies together with the determination of the Right to Know Coalition partners will be the key drivers of success.

Irene Moss AO was the chair of the independent audit on the state of free speech in Australia. She is a former commissioner of the Independent Commission Against Corruption, NSW Ombudsman and federal Race Discrimination Commissioner.

The Australia's Right to Know campaign is a joint initiative of News Limited, Fairfax, the Alliance, the ABC, Commercial Radio Australia, SBS, Sky News, APN, AAP, The West Australian and Astra, and was launched in May 2007 to fight back against attacks on free speech in Australia.

Police blockade the entrance to Sydney's Castlereagh Street at an anti-APEC protest during the APEC Summit in Sydney in September 2007. Photo by Jon Reid/*Sydney Morning Herald*.

2.0 Legislation and the Courts

2.1 Anti-Terror Legislation

Opposition to anti-terror legislation remains in 2008 despite an expensive and costly public-awareness anti-terror campaign. As Wil Anderson wrote in an online blog recently, "For all the lofty rhetoric, national security hotlines, adverts and fridge magnets, hundreds of days in court and millions of dollars of public money spent, Australia's anti-terrorism laws have so far resulted in a grand total of only one conviction". [1]

The Australian Press Council reported that "Anti-terror laws have again been a key theme in 2006-2007, although the implication that the terrorism threat in Australia has increased, or even genuinely warrants the existing restrictions on personal and media freedom, is doubtful". The Press Council expressed its concern that anti-terror legislation shields governments from scrutiny and goes further than necessary, intruding excessively into freedom of expression.[2]

In an address to the Sydney Institute, the Australian Federal Police Commissioner, Mick Keelty, stated: "I am not saying that the correct processes and procedures should be cast aside, nor should public institutions be immune from public accountability in the discharge of their public service, but I am saying a public discussion about them should be delayed, in defence to judicial process. Not subjugated, not quashed, not silenced; just delayed until the full gamut of judicial process has been exhausted." [3]

Section 3ZQT of the *Anti-Terrorism Act* 2005, for example, prevents the disclosure of the fact that an individual has received a notice to produce documents to the Australian Federal Police in relation to a terrorism investigation.[4]

Yet in the past media have been tipped off prior to terrorist arrests and used as a platform by politicians to promote anti-terror rhetoric.

The APEC summit held in Sydney from September 2-9, 2007, raised more questions about anti-terrorism laws. Debate began over the severity and effectiveness of the laws and whether or not they should in fact be made tougher in light of the summit. During the summit, The BBC's news service described Sydney as being "fenced in". [5]The Australian government devoted $216.3 million toward security for the summit, only to have the fenced in walls penetrated during the Chaser stunt which all Australians are now familiar with and which sparked commentary and debate in the media all around the world. [6]

The Alliance is concerned by increased difficulties for journalists including the over-use of suppression hearings, 'closed' terrorism case hearings, closed courts and restricted access to documents and information.

The Australian Press Council stated that, "in addition to the hearing of terrorism cases in secret, closed courts, poor access to court documents and extensive use of suppression orders continue to frustrate journalists attempting to report matters of public interest in Australian courts". The Australian Press Council also released figures showing that the News Limited database recorded at least 221 new suppression orders that had been issued by Australian courts between 1 January and 1 September 2007.[7]

Getty photographer Paula Bronstein was assaulted by police on the APEC Saturday whilst covering a protest rally. Photo by Peter Rae/*Sydney Morning Herald*

Breaking into Fortress Sydney

CHRIS REASON

The last time Sydney hosted a major international gathering - the Olympic Games - the city earned itself a glowing reputation.

But it's difficult to think what the world would have concluded after the APEC conference.

Is it possible for a city to come of age one year, then slide backwards over the next seven?

We thought it was bad enough when the IOC demanded a dedicated traffic lane. But APEC took over the lot.

"Fortress Sydney" screamed *The Daily Telegraph*, and they weren't far wrong.

A 5km mesh wall winding through the CBD. Identity searches to enter city high-rise buildings. Water cannons. Prison buses. Snipers hanging from helicopters.

The irony, of course, is that all that security, backed by the unprecedented new anti-terror bills, was meant to prevent a public relations disaster.

Instead, it created an entirely new one.

All of which, of course, was good fodder for the media.

Or was it?

I don't think there has been a time in recent history where Australia has offered such an oppressive reception for the media – local or visiting.

For me, the enduring image of the APEC week was provided by a photographer from one of the international news agencies. But it's not one of her photographs that I'm talking about. It was the shots *we* took of *her* flying through the air and smashing into the ground after being thrown by a police officer.

The occasion came late in the afternoon of the day we came to call "Showdown Saturday".

It was, if you like, the summit's summit, APEC's apex. The day the world's leaders would gather for their team photo on the steps of the Opera House, while protesters in their thousands gathered for theirs at the other end of the city.

One of those demonstrators had pierced the police lines - and Getty Images photographer Paula Bronstein went in for the photo. But the police jumped first – and in one seamless move, picked her up and hurled her 10ft onto the concrete footpath.

Here was Paula, fresh from assignments in all the world's trouble spots (the latest being Iraq), now fully accredited to cover APEC - and instead she became the journalist who became the story.

She hit the footpath so hard you'd swear it winded every witness within 10m. The collective gasp as her head hit the concrete was frightening – right in front of one of our cameramen. It was a 10-second shot that led every Seven News bulletin in the country that night.

What is going on in a free and democratic country like Australia, when an incident like that is allowed to occur without recrimination?

There are genuine questions here, not as to whether the police stepped over the line, but how many times.

We have video of officers directing cameramen to stop filming arrests. We have several incidents where our cameramen were jostled and manhandled by plain clothes cops. Numerous times police stood in front of our cameras to prevent us recording arrests. And there were dozens of police without name tags.

Now, it's one thing to have a range of new and extraordinary powers to combat terrorist intent, but that Saturday, the police went well beyond APEC's ambit. And the targets weren't young jihadis with backpacks full of Semtex – they were everyday citizens.

Who's to blame? Most point the finger at the former Howard government, pushing an anti-terror agenda for political capital. But the NSW State Government was driving the security line just as hard. Accident-prone premier, Morris Iemma, couldn't afford another political disaster. And the Police Commissioner, Andrew Scipioni, was just as tense – it was his first week in the job. After the international humiliation of the riots at Redfern and Cronulla - the NSW Police Force didn't want strike three.

Instead, they employed 'zero tolerance' tactics that would guarantee an incident-free APEC.

Chris Reason is a senior correspondent with Channel Seven News

Cartoon by Jon Kudelka

"It is no longer necessary to prove an intention to promote ill-will and hostility to establish seditious intent"

2.2 Sedition

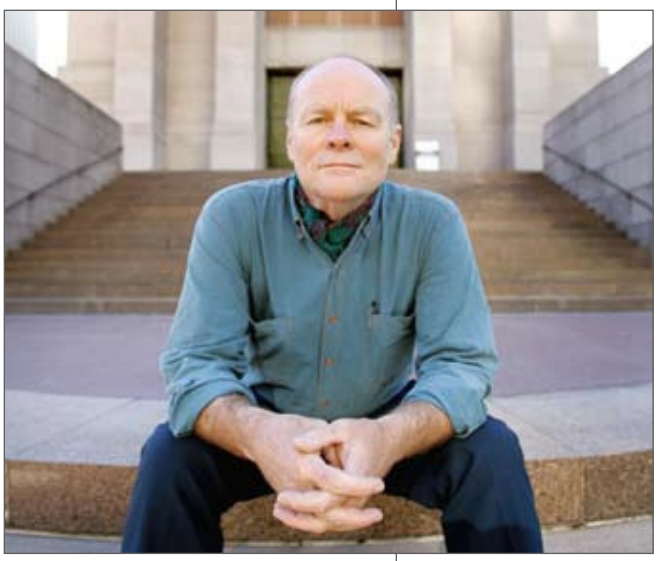
Despite ongoing and widespread criticism of the sedition section of the Anti-Terror Act, there have been no moves to have the section removed or modernised during the past year.

Since the new sedition provisions were introduced in the *Anti-Terrorism Act (No 2) 2005,* former attorney-general, Phillip Ruddock, while in office, consistently ignored calls from a Senate Committee, the Australia Law Reform Commission, media organisations and civil libertarians to review the changes and assess whether they compromise the democratic freedoms of speech.

In its audit of the state of free speech in Australia, released in October 2007, the Right to Know coalition stated: "The effect of anti-terrorism legislation means we are almost certainly unaware of the number of cases in which the legislation has been applied and the extent to which reporting on them has been prevented."[8]

The report identified the principle problems with the provisions - which aim to legislate against those "intentionally urging others to use force or violence against any group within the community":

- the imprecision of the key verb "to urge";[9]
- it is no longer necessary to prove an intention to promote ill will and hostility to establish seditious intent;
- there is no requirement that the person "urging" have any particular intention, such as in the previous Crimes Act;
- violence need not be violence incited within the Australian community – it would suffice that the urging occurred to a group of a different nationality or political opinion to use force against any other person in any other place, the effect of which would "threaten" the peace of the Commonwealth;
- the urging need only be to engage in conduct that provides assistance to a (vaguely defined) organisation engaged in armed hostilities against the Australian Defence Force. This could extend to verbal support for insurgent groups who might encounter the ADF in their country;
- inciting terrorism is unlawful under pre-existing law. This indicates these provisions will extend to the murkier concept of "indirect urging" as well as condoning or justifying terrorism or even abstract opinions about that conduct;
- section 80.4 extends the geographical reach of the provisions via the Criminal Code so any "offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia". It covers any person of any citizenship or residence. There is no foreign law defence. It in effect creates a universal jurisdiction.



Former customs officer Allan Kessing was found guilty of leaking two highly classified reports to *The Australian* newspaper and was handed a 9 month suspended sentence in June 2007. Photo by James Croucher/*The Australian*

2.3 Protecting Whistleblowers

In June 2007, former public servant Allan Kessing was sentenced to a nine-month suspended jail term after being found guilty of leaking a confidential report on airport security to *The Australian* newspaper. The sentence was a timely reminder of the need for proper legislative protection of whistleblowers. *Sydney Morning Herald* journalist David Marr described it as "a big win in the Howard government's long war against whistleblowers". [10]

During the 15-day trial at the NSW District Court, Kessing's lawyer Peter Lowe argued that the disclosure of the report "had a tremendously beneficial effect", but Justice James Bennett said he was "sympathetic" to imposing imprisonment.[11]

In the wake of Kessing's sentence the Alliance established a "Confidentiality of Sources Appeal" which raised $40 000 for his legal fees. Kessing has vowed to appeal his sentence.

In November 2007, Stephen Keim SC – the barrister for Mohamed Haneef – agreed to work for free on Keesing's Supreme Court Appeal after being approached by the Alliance.

"He exposed light on something the government wanted hidden. I am delighted he is going to help me." Kessing told *The Australian.*[12]

Mr Keim was responsible for releasing to *The Australian* a transcript of Dr Haneef's interview with the Australian Federal Police which exposed flaws in the Crown's case against Dr Haneef. The case against him eventually collapsed and all charges were dropped, but

Courts in the act: a legal year in review

PETER BARLETT and VERONICA SCOTT

This has not been a good year for the media.

The Communications Legislation Amendment (Content Services) Act 2007: The Act passed to amend the internet provisions of the Broadcasting Services Act to regulate internet and mobile content following what was described as a "turkey-slapping" incident on *Big Brother*. The incident appeared on the *Big Brother* website but not on television so the TV Code did not apply. That incident did not justify legislation preventing internet and mobile phone providers selling MA15+ content to youths without the youths first proving that they are 15 or older. Youths can now download a show on the internet. Why would they bother to prove that they are 15, to then pay for the same show? Also, the classification and restricted access requirements only apply to those content providers with an Australian connection, imposing additional costs and regulatory burdens on Australian provider and undermining their ability to compete with overseas providers.

Suppression orders: Suppression orders are a significant issue, especially in Victoria and South Australia. Why is it that those states issue far more suppression orders than other states and territories? *Underbelly* was a significant loss for Nine; the judge and the three appeal judges had little doubt that the series was prejudicial. Never before has a judicial decision led to such widespread breach of copyright. It is very easy to obtain a copy of the series in Victoria. The Courts don't appear to be coping with the reality of a borderless internet that suppression orders cannot contain.

Freedom of Information Acts: The Acts are misnamed, similar to the tobacco companies' document retention policy. The ALRC has also inquired into the Acts and FoI practices across Australia which include considering harmonisation and how they might be improved. The ALRC has already said in its Privacy review that the privacy provision in the Acts have lead to inconsistency, for example in relation to disclosure of personal information, including of deceased people, which the ALRC recommend be amended. A discussion paper on the FoI review is imminent.

Protection for journalists' sources: *Herald Sun* journalists Gerard McManus and Michael Harvey were convicted of contempt and fined $7,000 each by the Victorian County Court but avoided jail terms. The judge said there was no lawful protection for journalists whose code of ethics prevents them from identifying sources. They should never have been charged. New federal shield laws which followed provide limited protection and in particular neglect to protect whistleblowers.

Statutory restrictions on publication: There are hundreds of acts of Parliament that restrict publication or have secrecy provisions. The list is still growing. We doubt that all of the restrictions are really necessary or justified.

Thou shall not speak: A growing number of bodies can prevent journalists telling their editors, news directors *or family* that they have been summonsed to appear before them. This may be justified in some circumstances. In others, it is not.

Recently there was a story that the budget to build the Fiona Stanley Hospital in Perth had been blown out by some $200m. The public had a right to know about this. The leak was referred to the West Australian Corruption and Crime Commission. The journalist is likely to be called and asked to disclose sources.

Defamation: The book *Tom Cruise, An unauthorised biography* was released in the United States. Following claims by Tom Cruise and the Church of Scientology that the book contained defamatory material, Australian book stores decided not to stock the book.. This illustrates that the balance in Australia is tilted towards reputation whereas the balance in the United States is tilted in favour of the public's right to know. Even the United Kingdom in the Reynolds case and in the Wall Street Journal Europe v Mohamed Jameel have tilted the balance to a more even keel. The Canadian and South African courts are following the UK, specifically rejecting the High Court's restrictive approach in Lange v ABC. Some well known media lawyers were up in arms when the New South Wales Court of Appeal in Gacic v Fairfax distinguished between "business defamation" and "personal defamation". This issue is to be further argued.

Judge Judith Gibson appears to have decided the first case under the Uniform Defamation Act, awarding $25,000 to the plaintiff in Martin v Bruce.

Corporations: Now that corporations of any significant size cannot sue for defamation, they are looking at the Trade Practices Act, injurious falsehood and potentially negligence.In TCN Nine v Ilvariy Pty Ltd, the New South Wales Court of Appeal found that Nine was not able to rely on the media defence in the Trade Practices Act where *A Current Affair's* staff member used deceptive conduct to gain access to premises.

Contempt of court: Like a tiger woken from a good sleep, Victoria – after years of basically no prosecutions for contempt – has taken on the media. There is a clear perception in the judiciary that the media has stretched the boundaries and that it should be reined in.

Privacy: The dark clouds are building. We have seen the NSW Law Reform Commission looking at a statutory tort of Privacy for NSW. That is, in circumstances where the state and territory borders are largely irrelevant to the media. Such legislation would affect the media across the country. The ALRC has now proposed a federal statutory tort. A District Court judge in Queensland and a County Court judge in Victoria have said that there is such a tort at common law. The High Court has said, in certain circumstances, there could be such a tort. The ALRC and Privacy Commissioner are looking at a restrictive definition of "journalism".

The media needs to monitor developments closely.

Peter Bartlett is a Partner and head of media and communications at Minter Ellison. Veronica Scott is a Senior Associate in the Group.

Cartoon by Peter Nicholson

former Federal immigration minister Kevin Andrews still cancelled Dr Haneef's visa.

A complaint about Keim's conduct was made to the Queensland Legal Services Commission (QLSC) by AFP Commissioner, Mick Keelty and a Queensland solicitor, but in February the barrister was cleared of any professional misconduct.[13]

The Moss Report says there was a "dogged refusal" by the [Howard] Government to provide legal protection for whistleblowers, and a "relentless determination" to track down those responsible for leaking information in the public interest.[14]

Responses to questions in Parliament indicate that in the space of four years the Howard government spent more than 2,100 police hours and $2 million trying to track down whistleblowers. [15]

The question of employers' access to staff emails will be addressed by the Government later this year in "counter-

To shoot the messenger

HEDLEY THOMAS

On July 19, 2007, readers of *The Australian* were treated to a cartoon by Peter Nicholson that perfectly nailed the cant and hypocrisy of the then Howard government and the Australian Federal Police in the non-case of Dr Mohamed Haneef.

Nicholson's perceptive drawing appeared a couple of days after Dr Mohamed Haneef's Brisbane lawyer, Stephen Keim, gave me permission to publish the full record of interview between the Gold Coast Hospital registrar and two officers from the AFP's counter-terrorism team. The 142-page record of interview was a powerful statement. With the publication of some of their questions, the officers – well-intentioned and courteous, but out of their depth – contributed to the AFP's embarrassment over the conduct of the investigation.

With his openness, patience and complete answers (and his polite refusal in the beginning to engage legal counsel), Dr Haneef came across to many as a scapegoat; the election-fodder that some of us suspected he was becoming in the months before the national poll.

Thanks to the interview being published as a PDF on *The Australian's* website, anybody could read it (many did), and nobody could accuse the media of providing half the available story.

The release of the document angered AFP Commissioner Mick Keelty. Senior AFP officers were ordered to start a complaints process, a vindictive pursuit in my view, to have Mr Keim formally investigated, potentially disciplined by a powerful legal tribunal in Queensland and struck from the roll of barristers.

Given that the AFP had been leaking like drunken sailors in ways which had the effect of further blackening Dr Haneef's hitherto-unblemished name, it is important to ask: why was Mr Keelty so angry about the record of interview being put into the public arena?

The answer in my view is that Mr Keelty knew on the morning of *The Australian's* publication of the PDF file that his own reputation, the reputation of the AFP, and the confidence Australians might have had in the investigation, hung in the balance. Accordingly, the AFP chief and his political masters worked overtime to condemn the publication of the record of interview, and hoped like hell other leaks would not further erode the bogus case they had attempted to inflate.

Fortunately, they were on a hiding to nothing. Stephen Keim's decision broke the AFP's non-case. In the ensuing days as journalists compared it with grossly exaggerated "evidence" and testimony, which had been produced earlier by the police and prosecutors in the Brisbane Magistrates' Court while Dr Haneef was in custody and being depicted as public enemy No.1, the truth emerged. By the end of July, Dr Haneef was being freed from custody, and the DPP expressed regret over its actions.

We would not learn until months later that three days before the record of interview was published, the most senior officers in the AFP were well aware of the weaknesses of the non-case against Dr Haneef.

"There is no currently available information held by law enforcement to suggest Dr Haneef has been involved in, or engaged in planning of, violent/terrorist conduct in Australia," AFP counter-terrorism chief, Frank Prendergast, wrote in a Protected document, which was subsequently released under Freedom of Information laws.

"As detailed above, there is no information available to law enforcement at this time to indicate that he presents a danger to the community or that he would engage in acts of violence. The evidence relates to his alleged association with, and support to, members of an alleged terrorist organisation in the United Kingdom."

The political connivance in the case of Dr Haneef, the politicising of a mighty police force, the sloppy work of the AFP and the Office of the Commonwealth Director of Public Prosecutions respectively, the misleading and vicious leaks (one account had Dr Haneef plotting to blow up a Gold Coast skyscraper!), and the attempts to shoot the messenger of the truthful story, Stephen Keim, should be grist for the mill of a Royal Commission-style public inquiry. There is much, much more.

But the travesty in this first term of the new government of Kevin Rudd is that the inquiry in its current form is a sop. It can only give comfort to those who have most to fear from the truth being revealed. Dr Haneef, the man falsely accused of terrorism, wants openness and transparency in the inquiry process. Hardly the actions of someone fearing the worst.

Hedley Thomas won a Gold Walkey award in 2007 for his coverage of the Haneef affair.

terrorism" legislation that will include changes to the Telecommunications Act that would allow companies providing services critical to the economy to read workers' emails. This has become the focus of serious debate and has been condemned as "snooping" by civil liberties groups. The question of how this might impact on journalists has already been the focus of discussion at Fairfax Media, where a senior journalist was accused of leaking embarrassing information to a rival publisher late last year. The accusation arose after the company had examined the journalist's emails and, wrongfully, identified him as the source of the leak. The Fairfax executives involved apologised to the journalist once it was established he wasn't the source of the leak, but staff remain concerned that management monitoring of their private emails will put in jeopardy the confidentiality of their sources, which is a fundamental principle enshrined in the Alliance Code of Ethics. The Alliance sought a legal opinion on the issue from Jim Nolan of Denman Chambers in Sydney, who suggested several changes to the company's computer policy. The key alteration states that while the company may, from time to time, monitor staff emails, access to individual accounts will be by a limited number of authorised employees, only when there is a "reasonable basis to suspect that the employee concerned has engaged in serious and willful misconduct as an employee. Under no circumstances will the names of any recipients or informants of any journalists be recorded, unless these are directly relevant to the investigation of an incident of serious and willful misconduct."

The Alliance supports the Rudd Government's election commitment to improve whistleblower protection and has met with the Attorney-General recently to lobby for the review of whistleblower legislation, including the limiting of criminal charges for leaking official information with protected disclosure laws.

"One of our great concerns is the number of our colleagues who could potentially be in danger for reporting on government matters in the future"

2.4 Shield Laws

A federal shield law for journalists – called the Evidence Amendment (Journalists' Privilege) Bill 2007 – was introduced by former attorney-general Phillip Ruddock in May 2007 "after the government was embarrassed by legal action against *Herald Sun* reporters Michael Harvey and Gerard McManus."[16]

At the time Alliance federal secretary Christopher Warren said "The Government has decided to crack down on leaked information, but failed to see the inevitable consequence of this is that journalists will go to jail."

State of suspicion

COLLEEN EGAN

WA's fledgling graft-fighting body, the Corruption and Crime Commission, has provided great fodder for Perth's media with its public hearings into disgraced former premier Brian Burke and the wrongful murder conviction of Andrew Mallard.

But we are beginning to realise a dangerous downside to the CCC, which was established in the wake of the state's police royal commission. The body has awesome powers to force testimony and insist on secrecy; powers which have been used to the detriment of reporters who have simply been doing their jobs.

There is a real fear that some time soon, one of us could be jailed for refusal to betray a confidential source.

At least five Perth journalists from three media outlets have been threatened with three years' jail and $60,000 fines in the past year. There may well be more journalists facing similar dilemmas – but an offence would have to be committed for us to know about it.

The five were threatened with long jail terms and massive fines if they told their bosses, workmates or even their families about their summonses to the secret hearings.

One inquiry turned to farce when it became clear no leak had occurred: the case merely suggested that the CCC's investigators have no idea how the media works.

Yet three journalists were threatened with jail if they didn't reveal private conversations.

One of the five journalists also faces a second, ongoing threat of jail, fines or being barred from doing his job as a political reporter at Parliament House for revealing details of a secret parliamentary inquiry.

The journalists' union and National Press Freedom Committee have called on WA Attorney-General Jim McGinty to urgently enact shield laws to protect journalists where they are acting ethically and in the public interest.

Union secretary Mike Sinclair-Jones and I met with Mr McGinty and urged him to put aside his public stoush with *The West Australian* newspaper and send a signal to the CCC that press freedom is a cornerstone of democracy.

One of our great concerns is the number of our colleagues who could potentially be in danger for reporting on government matters in the future.

The CCC Act dictates that all potential misconduct must be reported, which has already seen former Health Department boss Neale Fong refer the story of a finance blow-out to the CCC. The *West Australian* revealed in November 2007 that the Fiona Stanley Hospital could cost up to $700 million more than the Government had budgeted – a great yarn undoubtedly in the public interest. The information supposedly came from a whistleblower in the public service and Dr Fong said he was "obliged to report all allegations of misconduct to the CCC".

We don't yet know the outcome.

Imagine if every story based on a government leak resulted in a CCC inquiry, with journalists and whistleblowers subjected to secret hearings under the threat of jail.

It's a scary prospect indeed.

Colleen Egan is a senior journalist with the Sunday Times newspaper in Perth and sits on the Allliance Press Freedom Committee

Journalists are "inadequately served" by the shield legislation introduced by former Attorney-General Phillip Ruddock, the Moss Report says. Photo by Ben Rushton/*Sydney Morning Herald.*

Harvey and McManus were convicted of contempt of court and fined $7000 for refusing to reveal the key source of a leaked story about a federal government proposal to slash war veterans' benefits.[17]

The Moss Report says that even if the federal shield law had been in place at the time, it would not have helped Harvey and McManus:

"Journalists in Australia are inadequately served by shield legislation…particularly in relation to the new shield provision…since any unauthorised communication of information remains criminalised even where it is a PID [Public Interest Disclosure]. This exception seems bound to apply in nearly all cases of leaks of information to journalists. Hence the privilege apparently offered is a sham," [18]

The Alliance has also previously raised concern that the federal shield law relies too heavily on judicial discretion, giving it little real force.

The Alliance renews its calls for the shield law to be accompanied by protected disclosure laws to prevent whistleblowers from being hunted down and prosecuted, because as The Moss Report states: "There is ultimately little point in providing a shield for journalists if they are not the ones being bayoneted."[19]

The Alliance has also expressed serious concern about the sweeping powers of other statutory bodies such as WA's Crime and Corruption Commission and its intimidation of journalists. In the past year alone, at least five journalists have been brought before the commission and threatened with fines and jail for refusing to reveal their sources.[20] Journalists who are appear at the secret hearings are also threatened with fines and imprisonment if they disclose their attendance. The Alliance has met with WA Attorney-General Jim McGinty to express concerns about the actions of the CCC and to lobby for effective shield laws. The Alliance says the rules of the CCC should be changed so journalists can tell their union and employer if they are called to appear.[21]

For effective shield laws, the Alliance supports the Right to Know's recommendation for

Duty to protect

CHRIS MERITT

Right now is probably one of the most dangerous periods in the long struggle to give reporters the legal right to protect their sources. With a Labor government in Canberra, many reporters might believe that the fight for shield laws is as good as won.

A charter of rights is on the cards and Labor has promised a new era of openness. But while those things might sound good, they are no substitute for some black-letter law aimed at preventing judges jailing reporters for maintaining professional confidences.

A charter of rights – even one that says nice things about free speech - will not give reporters legally enforceable rights. The way forward is through old-fashioned lawmaking. And that requires old-fashioned deal-making.

Just like the conservatives, Labor has been unable to accept that there is a real public interest in enacting a shield law that gives reporters a legal right to maintain professional confidences.

The policy on shield laws that Labor took to the last election is only marginally better than the ineffective law that was enacted by the conservatives.

The task that confronts the media is to help Labor evolve.

This debate needs to be kept in perspective. In certain associated areas of policy, such as freedom of information and the protection of public service whistleblowers, Labor is looking good. But Labor's policy on shield laws is the one that counts. A successful outcome here will prevent reporters from being hounded through the courts.

In this crucial area, Labor has promised to dress up the coalition's ineffective ``shield'' law with a non-enforceable protocol outlining the circumstances in which reporters will not be prosecuted. That might sound comforting. But it is mere aspirational blather. It would not be much help to a reporter who is prosecuted and jailed in circumstances that breach of the protocol.

The media should be aiming to bring the law into line with reality. And that might require the some difficult decisions.

The first step is for reporters to understand where they stand. Legally, we are on our own. When push comes to shove, our ethical obligation to maintain confidences is extremely unlikely to be recognised and respected by a court.

It is merely a factor that judges consider when exercising their discretion to allow – or not to allow – a journalist to remain silent about the identity of a source.

There is a clear public interest in ensuring courts are aware of relevant evidence. This is based on the right to a fair trial.

But there is an equally important public interest in protecting journalists who maintain professional confidences. And this public interest is based on the right to free speech.

The way forward is to show Labor how to break with the conservative past and reconcile these public interests. They both underpin all free societies.

The only way of striking this balance is to take shield laws seriously.

There are lessons in the way the legal profession has accommodated apparently conflicting public interests. The clients of lawyers enjoy a form of privilege that is not absolute. But those aspects of the lawyer-client relationship that are vital are protected.

To win something similar – a legally recognised right to protect confidences – journalists would also need to accommodate the needs of the courts. At law, no privilege can be absolute.

It might sound like a deal with the devil. But it would be better than the current system where the fate of journalists is left to the discretion of judges.

On the whole, judges are no friends of the media. So why not limit their influence by doing a deal with Labor?

In return for a legally recognised right to protect confidences in specified circumstances, journalists – just like lawyers – would need to accept that this new privilege would not be absolute.

Chris Merritt is legal affairs editor of The Australian.

a "shield law regime based on a presumption that sources should not be revealed and a journalist could only be ordered to do so by a judge on strictly limited grounds of compelling public interest." [22]

2.5 Excessive Prosecution

With the world looking on as the region's leaders gathered for the APEC conference in Sydney, *The Chaser* sent in the clowns. The authorities were not amused. [23]

The ABC TV satirists earned themselves international notoriety and criminal prosecution when they drove a fake motorcade past security into the shutdown CBD, one of the crew dressed as Osama Bin Laden. Eleven people were charged with entering an APEC-restricted area without justification: eight cast and crew and three drivers.

At the time of printing it appeared likely the charges would be dropped ahead of a two-week hearing scheduled for July 7. There had already been several adjournments and all 11 accused have pleaded not guilty.[24]

In January, a NSW magistrate dismissed charges of offensive behaviour against *The Chaser*'s Chas Licciardello who had been charged after trying to sell fake "supporters' kits" outside the Canterbury Bulldogs' ground which included knuckledusters, flares and balaclavas. Magistrate Joanne Keogh found that although not everybody may have understood the joke, it was not offensive conduct.

In July 2007, a journalist and photographer from the *Daily Telegraph* were charged with trespass after easily accessing potential terrorist sites at Sydney Airport for a story.[25]

David Penberthy, the paper's editor, criticised the government for "using the law to persecute journalists for bringing vital information to the public's attention" after Justin Vallejo and Toby Zerna were charged with trespass.[26] They had used nothing more than photo ID to reach Sydney airport's jet fuel tanks, 747 aircraft, refuelling stations, baggage cars and customs areas.

"I refuse to believe that they were not involved in the airport's decision to set the Australian Federal Police on to our staff," Penberthy said, citing the Howard government's "extensive form" on excessive prosecution of journalists.

A Sydney magistrate found the pair not guilty of trespass when the case came to court at the beginning of April.

In March this year, the NSW Supreme Court called for new powers to fine the media when court cases are forced to go to retrial after news reports.[27]

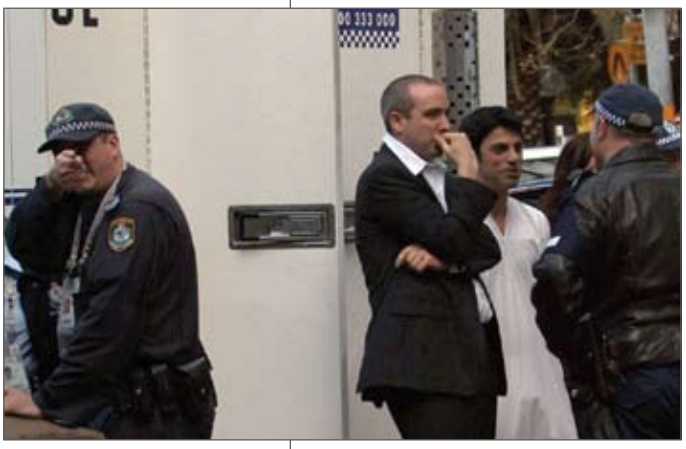
Judge Roderick Howie found the *Sydney Morning Herald*'s Elisabeth Sexton not guilty of criminal contempt over an article that led to a trial being aborted, but called her either incompetent or arrogant. Howie wants powers to "make orders against the publisher for the financial consequences of publishing an article which results in the discharge of a jury even though the article does not amount to a criminal contempt."[28]

Press Council chairman Ken McKinnon showed Australian and New Zealand research, however, that indicated jurors were not influenced by media reports.

With the change of federal government it remains to be seen what improvements will be made on this issue.

The Rudd administration is making noises about pushing a "pro-disclosure culture" throughout bureaucracy, and addressing privacy, FoI and shield laws. "A Rudd Labor Government will also ensure a protocol is in place so that a responsible journalist presenting news in the public interest is not prosecuted by Federal agencies where the information presented is merely embarrassing to the government."

But the disclaimer comes in the next line: "This will not cover reportage that jeopardises law enforcement, national intelligence or security, military operations of intelligence or diplomatic relations." [29] That's a loophole that experience shows will fit a very large truck.



The Chaser's Julian Morrow and Chas Licciardello are detained by police after they drove a motorcade through an APEC security zone, pretending to be a Canadian APEC delegation, and impersonating Osama bin Laden. Photo by Andrew Meares/*Sydney Morning Herald.*

"When push comes to shove, our ethical obligation to maintain confidences is extremely unlikely to be recognised and respected by a court"

2.6 Uniform Defamation

The uniform Defamation Act introduced in January 2006 is a significant improvement upon the previous defamation legislation which lacked consistency and left publishers open to prosecution. However in June 2007 the High Court potentially reversed some of the Defamation Act's improvements when it dismissed a jury verdict and opened the door to business defamation.

This was in the case of John Fairfax Publications Pty Ltd v Gacic, where the owners of Coco Roco in Sydney's Darling Harbour sued Fairfax's *Sydney Morning Herald* for defaming their restaurant in a bad review[30]

Nicole Kidman leaving the Supreme court in Sydney after giving evidence in a defamation case between photographer Jamie Fawcett and Fairfax Media. Photo by Dean Sewell/*Sydney Morning Herald*

The action was taken under former NSW defamation (System 7A) legislation where a jury decides whether something is defamatory. The jury found that the 2003 restaurant review did not defame the owner but the NSW Court of Appeal decided, remarkably, to dismiss the jury's verdict, ruling that no reasonable jury could find it was not defamatory to say a restaurant served bad food and offered poor service.

The High Court upheld this ruling 6-1. Only Justice Michael Kirby disagreed, saying: "Astonishing as it may seem, judges may occasionally lack a sense of irony or humour."[31] This case occurred under the old laws but the new uniform Defamation Act (in some states and territories) also allows juries to decide if something is defamatory, which is possibly why *The Australian's* Janet Albrechtsen wrote that the High Court's "disdain for a jury verdict …sends a chilling message".[32]

Fairfax faced another high-profile defamation case when celebrity photographer Jamie Fawcett claimed he had been defamed by an article in the *Sun Herald* article that described him as "undoubtedly Sydney's most inventive and most disliked freelance photographer" and asserted he had a "determination to wreak havoc on [Nicole] Kidman's private life." [33] A jury found that six defamatory meanings were conveyed in the article, but in February 2008 the NSW Supreme Court ruled that the stories about Fawcett were in the public interest and that Fairfax had successfully established some of the meanings were true. Fawcett was order to pay Fairfax's legal costs.[34]

"Astonishing as it may seem, judges may occasionally lack a sense of irony or humour"

Justice Michael Kirby

Freedom to suppress

LINDSAY FOYLE

Letter writers to the newspapers probably do not give a second thought to freedom of the press when they send their missives off telling the government what they think of them. The fact that secret police do not arrive the next morning is another side benefit to freedom of the press. We do not have letter-writing re-education facilities nor do we have political learning centres where people can rot for decades. Not that there have not been attempts to control the press in Australia. There has always been people who have tried to pretend if you do not read it in a newspaper, is has not happened.

Australia's first newspaper was *The Sydney Gazette*. It was first published in 1803 by the authority of the Governor, and survived largely on Government proclamations and handouts. These days it would be described as a smorgasbord for press secretaries. With the population only 7,000 a weekly newspaper could hardly have enjoyed independence back then even if it had not been printed with Government ink on Government paper at Government house.

Then came the four-page weekly *The Australian* (edited by Dr Robert Wardell and WC Wentworth) and *The Monitor* (edited by Edward Smith Hall), which joined the other two in 1826 and were founded without the Governor's permission.

Unlike the editor of *The Sydney Gazette* the editors of these new publications felt free to print anything they liked. Unhappy with what they liked to print, the then governor, Sir Ralph Darling, tried to introduce a system of licenses for newspapers that could be withdrawn at the Governor's pleasure. Darling also pushed to have articles signed so that their authors could be proceeded against in person.

These measures were in contradiction of the laws of England and the Chief Justice of the colony Sir Francis Forbes refused to give them his assent.

Darling did not give up. He had a second attempt to impose controls on the press by introducing a system of stamp tax, but again his efforts were rejected. So Australia retained its free press. Without that freedom we would not have the political comment, letter writers and cartoons we do today.

Darling was not all that different from many judges, magistrates and politicians of today who say they support freedom of the press. The reality is many confuse it with the freedom to suppress.

Lindsay Foyle is a senoir writer and cartoonist with The Australian newspaper

2.7 Freedom of Information

Excessive delays and high costs continue to limit the effectiveness of Australia's Freedom of Information legislation. The Moss Report acknowledges that the state of press freedom in Australia is seriously impacted upon by the problems with FoI laws. The report suggests a number of reasons for the laws' ineffectiveness, beyond delay and high cost, including legal technicalities, design flaws, political intervention and a culture of secrecy. It states that: "A range of factors limit their [the FoI laws] effectiveness in ensuring access to documents relevant to government accountability – the very reason they were set up in the first place.

"No Government, federal, state or territory has taken sustained measures to deal with an 'enduring culture of secrecy' … leadership on FoI is lacking".[35]

A number of examples from the past year, support the Moss Report's conclusion. The most glaring example was the Howard government's refusal to release the results of the surveys done on its $32m ads promoting WorkChoices until after the 2007 federal election. Applications made by journalist Mark Davis and *The Sydney Morning Herald* were rejected on the grounds that it was contrary to public interest and would leave the public with "misleading impressions". "Why you'd get a misleading impression from detailed survey results is not easily explained. The department made no attempt to do so." the Herald's FoI editor Matthew Moore wrote.[36]

Cartoon by Alan Moir

Fighting for open government

MATTHEW MOORE

If Australia's Freedom of Information laws are ever going to be improved, then this is the year. With a new Government in Canberra and new premiers in most of the states, there's a rare sense of urgency to reform the laws.

Kevin Rudd applied the chloroform to Queensland's FoI laws when was working for the State's former Premier Wayne Goss. But, as Prime Minister, he has repeatedly promised to improve the 25-year-old Commonwealth Freedom of Information law and to break the public service culture, where the desire for secrecy has become ever more obsessive.

In his first week in office, he said he was determined, "to do something about freedom of information … to encourage a culture of disclosure within government departments."

Since then he's taken the FoI Act away from the lawyers in Attorney-General's Department and given it to his new cabinet secretary, John Faulkner. Faulkner's office has now promised the Act will be reformed before year's end, that the Government will scrap conclusive certificates (those sweeping power given to ministers to block access simply by certifying release of documents is not in the public interest), will create a position of Information Commissioner and will implement its election promise for greater transparency in government.

These commitments to change the laws are welcome, but it is now more than four months since the Government was elected and while there's plenty of talk, there is not much evidence of new legislation in the making. And the one undeniable truth about Freedom of Information is that each day a government spends in power, the less attractive Freedom of Information reform becomes.

After 11 years in which the Howard government refused to implement any of more than 100 recommendations from the Law Reform Commission's report into the FoI law, any improvements to the existing Act will be welcome. But changing the law is one thing, changing the public service culture is quite another and there's no revolution underway there.

One most encouraging sign the government is trying to be a bit less precious was the decision by Treasury to release parts of what's known as the "red book", a document prepared at each election to brief an incoming government of the major issues.

The idea of the secrecy-obsessed Treasury ever releasing such a document under the Howard government would have been fanciful, so it was refreshing to see Channel Seven's Michael McKinnon get access to even a heavily edited version of what was previously regarded as highly confidential material.

While Kevin Rudd is still talking modest change, Queensland's Premier Anna Bligh is poised to do something more dramatic. On taking office in September, she appointed Dr David Solomon, a lawyer, journalist and political scientist, to undertake a complete overhaul of the state's FoI law.

That's what he did in a discussion paper that is very broad and picks up the best bits of FoI laws from all parts of the world. Unless Anna Bligh loses her nerve in the next few months, or the bureaucrats can bring her to heel, Queensland looks like getting the most progressive law in the land. Kevin Rudd may well find his promised changes run a poor second to those in his home state.

Victoria's new Premier, John Brumby, also promised to change the FoI Act and then came up with legislation to abolish $22 application fees, but with a trade-off to extend the time allowed for departments to respond to requests to 75 days.

The idea of giving department two-and-a-half months just to respond to a request was met with howls of protest and the Upper House blocked the whole bill which means nothing has come of the government's modest package of reforms.

It is situation normal, a bit like NSW except that the NSW Government does not feign any interest in conducting a serious review of its Act at all, even though it will be 20 years old next year.

The only prospect for change in the biggest state is that the the moves in Queensland and in Canberra may embarrass the Iemma Government into long overdue review of its laws.

Matthew Moore is FoI Editor for the Sydney Morning Herald

"If justice has a soul, it is publicity. A basic principle of Australian law is that courts should be open to the public, and, in practice, the media"

In November 2007, the Howard government was also successful in keeping documents secret which discussed options for WorkChoices to go further. The government used conclusive certificates to reject Michael McKinnon's FoI application, claiming the documents' release "would lead to speculation about possible future workplace relations reforms which are not government policy".[37] The Labour Party's federal election information policy promised to abolish conclusive certificates.

In reviewing the Howard's influence on public debate, Fairfax journalist David Marr perhaps best describes government attitude to FoI: "Governments have claimed since the beginning of time that the last thing they're doing is censoring. There's always some explanation for information withheld: security, morality, respectability, order, fair play, care for the vulnerable, the rights of business, the rights of government." [38]

The often prohibitive cost of an FoI application was also made apparent with many examples in the Moss Report. The most shocking; the $1.25m fee quoted to the *Herald Sun* for access to information about the travel of federal politicians.[39]

The problems with delay is also supported by the report which says "In 2005-2006, 25 per cent of applications to Federal Government agencies for non-personal documents took longer than 90 days to process, three times longer than the statutory time of 30 days." [40]

The Alliance has met with the government and they have pledged to reform the FoI laws this year, as outlined in their pre-election policy which said a Rudd government aimed "to promote a culture of disclosure and transparency" [41] The FoI reforms included abolishing conclusive certificates and appointing an independent FoI commissioner.

2.8 Suppression Orders

The extensive use of suppression or "non-publication" orders by Australian courts continues to undermine the principles of open justice and, in many cases, unnecessarily restricts the media's ability to report on matters of public interest [42]The News Limited database recorded at least 221 new suppression orders issued by Australian courts between January 1 and September 1 2007.[43] And at the time of the Moss Report's publication, there were over 1,000

Justice must be seen to be done

ANDREW KENYON

If justice has a soul, it is publicity. A basic principle of Australian law is that courts should be open to the public – and in practice open to the media, which can act as the public's eyes and ears in reporting the courts.

This means the legal bases are limited to close court hearings and make suppression orders, or orders to limit media reporting. At common law, suppression orders can be made only when necessary for the administration of justice in the case at hand, such as in litigation about trade secrets and in certain recognised categories including hearings involving police informers. Embarrassment to parties or witnesses is not enough to suppress publication at common law. But in a trade secret case, unrestricted reporting would mean the secret was lost in practice whatever the result of a trial.

In many Australian jurisdictions, this common law power is supplemented by statute. But common law principles remain important for interpreting the statutes. Some statutes prevent reporting unless a court orders otherwise, creating a presumption of non-publication in particular proceedings. This approach exists in areas such as sexual offences, family law and proceedings involving children. Other statutes give courts power to suppress publication, but publication is not limited unless an order is made.

At common law and under statue the legal tests for suppression are strict. However, concerns have long been raised about suppression order law and practice.

At least five criticisms can be made. First, orders may occur too frequently, especially in lower courts and in NSW, Victoria, South Australia and Western Australia. It appears that up to 1,000 orders have been made annually in recent years. This understandably concerns journalists. But it has also prompted comment by senior judges. Second, the legal basis for making suppression orders varies enormously across Australia – NSW in particular, has a complex mix of common law and statutory provisions. The variation appears to limit clear and comprehensive analysis during litigation, which could lead to unwarranted orders. Third, orders may be sought and given with inadequate argument and reasoning and without due regard to open justice. Fourth, the scope and duration of orders have been criticised, with orders being framed in wide terms when narrow and time-limited orders would achieve what is needed in the litigation while better accommodating the public interest in publicity. And fifth, the media faces challenges in keeping track of all current orders. Some courts have developed systems for notifying the media, but a secure internet-based national database of orders appears worthy of serious consideration. Neither the courts nor the media have any interest in inadvertent breaches of suppression orders.

These five criticisms appear all too valid. It is true that critics have often relied on anecdotal evidence of the problems, but that is all that has been available and there is an urgent need for further research into suppression orders across Australian states and courts. In addition, the number of orders made in recent years may be linked, to some extent, to particular trials such as gangland hearings and security-related proceedings. However, there are too many pieces of evidence, from too many sources, to dismiss the complaints about suppression order practice, at least without closer investigation, and it is far from clear that particular trials explain the prevalence of orders. Media and legal observers rightly remain concerned at unwarranted inroads into open justice in Australia.

Andrew T Kenyon is director of the Centre for Media and Communications Law at the Melbourne Law School.

suppression orders in operation.

Journalists who contributed to the report recognised the validity of suppression orders in number of instances, such as identifying children or sexual assault victims, but expressed concern about the way the orders are handled. The report says: "Journalists and media commentators have said that suppression orders are often badly drafted, unnecessary, continue after proceedings have been finalised or have no expiry or review date attached and are, except in some states, poorly communicated to the media."[44]

Of the increasing number of suppression orders issued in Australia, international human rights campaigner Geoffrey Robertson said: "This is disturbing because it is a fundamental principle of open justice that justice must be seen to be done."[45]

Geoffrey Robertson says the increasing number of suppression orders in Australia is "disturbing". Photo by Mayu Kanamori/ *Australian Financial Review*

2.9 Privacy Laws

The Alliance will closely monitor moves by the Rudd Government to fulfill its commitment to protect and disclose matters of public interest, in order to ensure it makes takes measures to implement genuine reform.

An issue confronting the Australian media is privacy law, as courts proceed to evolve what may become a common law tort of privacy. According to the Australian Press Council, "The case of *Doe v ABC* [2007] VCC 281 concerned the identification of an individual in breach of s4 (1A) of the *Judicial Proceedings Reports Act* 1958 (Vic.), which prohibits the publication of information identifying victims of sexual offences. There is no novelty in restrictions on the publication of details of this nature. What makes the case a matter of concern for press freedom is that one of the causes of action cited and accepted by the court was for breach of the plaintiff's privacy. This was in spite of the availability of a cause of action for breach of statutory duty". [46]

In May 2007 the New South Wales Law Reform Commission released a consultation paper specifically relating to the introduction of a statutory cause of action for breach of

Looking for the big picture

ANDREW NEMETH

It's fascinating that in the age of image saturation, so many people recoil so thoroughly from having their likeness captured. For whatever reason, be it a fear of creeps, or privacy invasion, or child protection issues or even ending up on the wrong website with an unflattering caption. Yet there is a measure of schizophrenia in this too; these same people also preen for months to get onto reality TV, take countless MySpace arms-length-self- portraits, or indiscriminately flood the net with the latest snaps of their bundles of joy.

This has been happening for so long that whingeing about it is useless. What I find interesting though is that the anti-photo hysteria seems to be dying down. Of course we still have occasional outbreaks of public concern over upskirting teachers or image-deleting APEC cops, but there also appears to be a broad groundswell by photographers to swing the pendulum back.

The evidence? In the last few years many websites have been established which deal specifically with photographer's rights. My own site (www.photorights4020.net), covering the NSW/Australian situation gets a traffic spike every time someone mentions the issue, on any blog anywhere in the world. Photographers are so fed up with being stigmatised, that they want to know what the limits are and what they can and cannot do. And they are starting to answer back.

The rule of lawyers has also softened. Australian defamation laws are now standardised such that truth alone is a sufficient defence in all states. So provided you stay clear of digital manipulation or unflattering captions, photographers can breathe a little easier.

Likewise Privacy Laws still don't apply to the actions of individuals. Further,when the ALRC Privacy Inquiry tables its final report in mid 2008, no one is expecting it to outlaw "unauthorised" photography. Even back in the dark days of 2005 the NSW Commissioner for Children admitted "that for any society to function in a 'free and open manner' there cannot be a legal requirement for consent to being snapped".

Most tellingly, the Surf Life Savers Australia Photography Draft Policy, released in March 2008, is so reasonable it's startling. You would expect an adoption of the harsh 2006 anti-photo policy of their Queensland brethren, but cooler heads have prevailed. The draft SLSA policy even reminds clubbies that beaches are public spaces and that photographers have rights too. This would never have happened three years ago.

In April 2005 I was shoved around and had my Hasselblad yanked out of my hands after pointing it at a bloke at a street cafe in Lakemba. Luckily there was a happy ending in that I eventually got the camera back, in one piece.

Maybe there is an even happier ending coming soon, when all photographers can take similar photos in other parts of our cities and no longer have to worry about being jumped or humiliated, merely for pressing a button on a light-tight box.

Andrew Nemeth is a photographer, lawyer and blogger on photographers' rights

"Preventing information flow, communication or the exchange of art, film and writing on the internet is a task only King Canute would attempt"

Bob Debus, as NSW Attorney General, 2003.

privacy. This would mean imposing a statutory cause of action in cases where there has been an interference with an individual's home or family life, the individual has undergone unauthorised surveillance or sensitive information about the private life of the individual have been disclosed. According to the Press Freedom Council: "of particular concern to the media, is that it appears to be seeking to subvert the reforms put in place by the uniform defamation laws making truth alone a defence, by introducing in another form the former requirement that to establish the truth defence it was necessary also to demonstrate a public interest in the material".[47]

3.0 Government Actions Restricting Press Freedom

3.1 Internet Restrictions

"Preventing information flow, communication or the exchange of art, film and writing on the internet is a task only King Canute would attempt." - Bob Debus, (then) NSW Attorney General, Speech at the OFLC International Ratings Conference 2003.

With a new government and a new year, the Federal Broadband Minister, Stephen Conroy, announced the Federal Government's plans to introduce legislation requiring all Internet Service Providers (ISPs) to provide a mandatory filter to block Internet access to a "blacklist" of websites created and maintained by the Australian Communications and Media Authority (ACMA).

The Government's plan for ISP censorship has been criticised as a direct attack on freedom of expression. Photo by Glenn Hunt/*Australian Financial Review*

Said to be a measure to protect children from internet pornography and X-rated violence, the ACMA blacklist would be updated in consultation with the Australian Federal Police and international agencies such as Interpol and the FBI.[48]

However, the government plan to censor local internet access has been criticised by some as a direct attack on freedom of expression. Labor's proposals are not dissimilar to measures used in China, Japan, Iran and Singapore which prevent open access to the internet.

When it comes to censoring the internet for the sake of protecting minors and preventing people from accessing exploitative websites, there is little consensus on how to do so in a way that won't restrict access to legitimate sources, or whom is the best authority to enforce and monitor such regulations.[49]

Three studies have been carried out by ACMA in the past eight years which examined filtering systems to block access to certain sites and each of the studies found that is was unable to establish such a system without also blocking legitimate content. It also found that filtering systems led to network speeds being considerably slowed, in some cases by as much as 78 per cent.[50] For workers and businesses relying on high-speed internet for daily activity, a drop in performance speed is unacceptable.[51]

Concerns have been raised over how far internet censorship may eventually go if censoring goes ahead. There are already plans to include gambling and cyber-terrorism related sites on the ACMA black-list which currently blocks around 1,000 child-pornography sites. It has been estimated that if the government succeeds in implementing its plan to expand the blacklist, the total number of blocked sites could run into the tens of millions.[52]

Technology journalist and former IT Editor of *The Australian* Newspaper, Ian Grayson, wrote that Australia risks its reputation as a free and democratic country if it implements a system of internet filtering. In an online blog he wrote, "Just as China has suffered from its decision to patrol the internet and block anything deemed inappropriate, so Australia's image would be tarnished. With investments in online business increasing exponentially, we can't afford for this to happen".[53]

But, at the beginning of 2008, the Federal Broadband Minister, Stephen Conroy, said "Labor makes no apologies to those who argue that any regulation of the internet is like going down the Chinese road. If people equate freedom of speech with watching child pornography, then the Rudd-Labor Government is going to disagree". [54]

One of the primary concerns at the moment is that the government's plan for ISP filtering is not fool-proof and there's no way to ensure banished content stays that way or that legitimate content isn't accidentally blocked by the system. What exactly will government filtering mean for our everyday lives on the internet and will we even be aware that our access to websites is being hindered when it happens? Is child-pornography just a smoke-screen for the government to block anything it deems as unsuitable? Included in the government commitment of up to 4.7 billion dollars toward high-speed, broadband internet[55] is a commitment to implement new internet regulations and it will be important

to monitor and scrutinise how a government-controlled filtering system affects our access to, and freedom to explore, information.

3.2 Government Censorship

The new information policy flagged by Kevin Rudd prior to the 2007 federal election and his promise to "end the culture of secrecy" [56] was welcomed by many journalists and media organisations frustrated by 11 years of censorship and media management by the Howard government.

Since the Alliance's Press Freedom Report was released last year there were acts of censorship by the Howard government right up until the election, which demonstrated not only a determination to silence leaks, but also an obsession with restricting access to government information and an intolerance to critical views.

Cartoon by Peter Nicholson

The Channel Nine feed of the election debate was cut by the National Press Club because the network used its "worm" after being asked not to do so by the government. Nine's news chief, John Westacott, called it a "blatant act of political censorship".[57]

Earlier in 2007 the Howard government banned online politics and media commentary site *crikey.com.au* from the annual budget lockup for the third year in a row. *Crikey* has a subscription base of 45,000 readers and uses material written by an accredited press gallery journalist.[58]

But it was APEC which saw the most heavy-handed attempts at both state and federal government levels to restrict media access and accreditation, mostly for the purpose of avoiding possible embarrassment. Throughout the summit in early September there were numerous reports of photographers and reporters being excluded from press conferences and photo opportunities. On September 3, internet reports revealed that an Australian filmmaker producing a documentary about Tibet was refused accreditation because of "space, security and protocol restrictions". Four days later Sydney's *Daily Telegraph* reported a secret blacklist entitled "CHINESE MEDIA - Do not register" of Chinese media organisations and journalists who were banned from APEC because they had the potential to embarrass the visiting Chinese President[59] The names of members of the ABC's *The Chaser* television show were also distributed so they could not enter (they found a way around this blacklisting) and one of Sydney's main commercial radio stations was barred from taking the place of another radio station in the event that another station from a pool media group couldn't make it.[60]

Two weeks later the government was embarrassed by reports that it had delayed a visa for internationally-respected Palestinian journalist Abdel Bari Atwan.[61] "I am not a terrorist and I visited every corner of the world, so this is racial discrimination and I am going to fight it" he told ABC Radio**.** Atwan missed two talks he was due to give at the Brisbane Writers' Festival to discuss his book The *Secret Life of al-Qa'ida* but was eventually granted a visa six weeks after applying. He said at the time the government would not have realised their mistake without pressure from the media [62] Atwan was the last Western journalist to interview Osama bin Laden and is an outspoken critic on the war in Iraq.[63]

3.3 Excessive Spin

The run-up to the 2007 federal election saw an unprecedented amount of political advertising. Media buyer, Harold Mitchell, told the ABC's 7.30 Report in May that the Howard government had so many advertising campaigns running it was becoming difficult to place them. [64]

It was estimated at that point that the government had 18 campaigns worth a total of $111 million, chief among them a campaign to sell the government's controversial industrial relations reforms which has been estimated to cost in the region of $92 million.

Spin was identified by the Moss Report as "designed to ensure the recipient of information receives an impression that is at variance from the unvarnished truth about an issue known to the spinner (or those on whose behalf they act)." [65]As such it is at variance with absolute freedom of the press as it seeks to control the message that is imparted, through the press, to the public.

Moss noted that spin has always had a function in advocacy, and may at times serve the public interest, but "It should not be acceptable for a government to manipulate public debate by conveying merely what it wants people to know, rather than what they should know"[66]

It is almost impossible to get an accurate figure for the number of media managers and public relations professionals working for government agencies, but Canberra-based freelance journalist Bob Burton, the author of *Inside Spin, the Dark Underbelly of the PR Industry*, has written that there are now twice as many PR professionals in Australia as journalists.

"It should not be acceptable for a government to manipulate public debate by conveying merely what it wants people to know, rather than what they should know"

Irene Moss, *The Moss Report*

Barbara Bennett, director of the Workplace Authority, was the face of John Howard's controversial WorkChoices advertisements. Andrew Taylor, *Sydney Morning Herald*

"Routinely, journalists and media outlets are threatened with bans for what they write and say"

Sally Young, senior lecturer, media and communications at the University of Melbourne, wrote in *The Age* last August: "Across Australia, governments to all levels and of both major parties are collectively spending billions of dollars on advertising, media relations and PR. They are misusing the resources of office to fight a permanent campaign at taxpayer expense and they are exerting increasing control over media content."[67]

In an essay for the book, *Government Communications in Australia*, Ian Ward, of the school of political science and international Studies, the University of Queensland, traced the appointment of media minders in government to the early years of the 20th century but said the Whitlam government had taken the unprecedented step of appointing a press secretary for every cabinet minister.[68] This has since expanded. As Prime Minister, John Howard enjoyed the services of a senior communications adviser, a senior media adviser and a press secretary on his 18-strong staff. One in 10 ministerial staffers was a "media adviser". There is no reason to believe this situation has changed under Kevin Rudd.

One government media minder admitted to the writer during the preparation of this report, you are "damned if you do, damned if you don't" employ enough media liaison staff; on the one hand it looks like spin, on the other, journalists complain if you cannot respond quickly to press requests for information. However, as the Moss Report highlighted, the modern reality is that all too often media advisers are there to block access to information or to politicians themselves. "Journalists contributing submissions to this audit say that government PR staff all too often try to block or frustrate, rather than facilitate, journalistic inquiries. Directing all inquiries through ministers' offices, restricting the number of government employees with authority to speak to the media, demanding that all questions be submitted in writing, taking a long time to issue responses to questions, offering answers of little value, and completely ignoring some questions, are the common features in a long list of grievances submitted to this audit," the report stated.[69]

The conscious manipulation of information by professional "news managers" is by no means a phenomenon that is limited to the public sector. It is now regarded as essential that businesses, sportspeople, celebrities employ staff both to train them in handling media

Spinning out of the rough

NEIL BREEN

Almost the entire debate surrounding press freedom deals with governments and the obstructions they put in our way.

But through my working life, I have had much more difficulty dealing with sports and sporting teams and the obstructions they put in our way, than with government.

Sport in this country subjects the working media to more spin and control than could be imagined by anyone who has not covered sport. Media managers in sport, by and large, are dreadful, without proper training and/or experience and wear rose-coloured glasses more tinted than their colleagues in other fields.

Routinely journalists and media outlets are threatened with bans for what they write and say. Just as routinely they are, in fact, banned.

The examples are endless.

Last year the Sydney Swans requested *The Daily Telegraph* and *The Sunday Telegraph* not send a particular journalist to press conferences with Barry Hall otherwise Barry wouldn't do them. And he's supposed to big and bad and bustling. All of this came about because of things written in the wake of his woeful 2006 Grand Final performance.

I have been in charge of journalists "wiped" at the Brisbane Broncos; others told not to attend training sessions for other rugby league teams and one told by jailed swimming coach Scott Volkers "her kind" was not welcome because she did not write the archetypal slap-on-the-back stuff others willingly had for years.

I have had Leigh Matthews suggest to me who the Brisbane Lions wanted *The Courier-Mail* to hire as an AFL writer because that particular journalist wrote good things about the club (the journo was subsequently hired by the Lions in their media department) and I have had the Brisbane Bullets ask me to have the paper's basketball writer moved to something "more suitable".

One night, Brisbane Strikers soccer fans faced the press box and sang songs about how much they hated our soccer writer and then there was the time the entire Queensland rugby union community was up in arms about our rugby journalist.

All of these examples were manageable. But in the summer just past, a situation arose at *The Sunday Telegraph* which was damaging to our industry and our right to report fairly.

We had signed Andrew Symonds as a columnist. As with all Cricket Australia-contracted players, we were forced to agree his column would be vetted by Cricket Australia each week before publication, as part of the deal.

We should never have agreed, and we knew as much when Symonds became embroiled on the "monkey taunt" saga with Harbhajan Singh at the SCG.

The monkey taunt happened on a Friday and Symonds' ghost-writer, Peter Badel, a *Sunday Telegraph* sports writer, spoke to him on the Friday night. Symonds told his side of the story. The following morning, Cricket Australia's junior media man Phillip Pope informed us Symonds had been shut down and there'd be no column this week.

We didn't tell him we'd already spoken to him.

We told Pope we had a contract with Symonds and wanted a column. Pope said the only way we'd get a column would be if he, Pope, wrote it. We rejected that and sent him the one we had from the previous night's conversation between Badel and Symonds.

All hell broke loose until finally Symonds called at about 7pm and requested, as a favour to him, we do not print the column. Cricket Australia got to him, threatened him with fines and censure by the International Cricket Council. We agreed and turned his column into a news story instead.

Neil Breen is the editor of The Sunday Telegraph in Sydney.

and to handle media themselves. As Neil Breen, the editor of the *Sunday Telegraph*, writes in this report, the frustration at having to fight through levels of "spin control" when dealing with professional sports people can get overwhelming.

If a free and unfettered press is a cornerstone of democracy then the right of the Australian public to "unspun" information about politicians, public servants and prominent public figures is a key component of that. As Bob Burton writes: "If the only voices we hear in public debates belong to those with enough wealth to fund PR campaigns, and clandestine campaigns at that, our democracy will be all the poorer for it."

3.4 Attacks on the ABC

Despite putting into place its own bias review, the ABC has continued to take fire from both the conservative commentariat and the Coalition for perceived left-wing bias.

The departure of two high-profile on-camera ABC personalities: Mike Bailey and Maxine McKew, both of whom quit the public broadcaster to stand as ALP candidates prompted NSW Liberal Party Senator Concetta Fierravanti-Wells to renew her attacks of last year on the new ABC chairman, Mark Scott, speculating as to whether there might be "an ALP branch of the… over there at Ultimo".[70]

Mr Scott replied that, after a review of the matter, he had ascertained that 10 former ABC journalists had become ALP members of Parliament, nine had entered parliaments as Coalition members.[71]

Cartoon by Lindsay Foyle

Towards "Brand ABC"

QUENTIN DEMPSTER

Having survived the so-called "culture wars" waged by ranters and ideologues opposed to the very existence of taxpayer-funded public broadcasting services, the future form and function of the ABC and SBS are now in play.

As Prime Minister Kevin Rudd's Vision 2020 summit tries to focus on nation building, the crunch, as always, will come down to the adequacy of funding to meet any set objectives.

SBS is a tragedy. The decision of the Zampatti board to treat the network's television audience with contempt by breaking into all its programs with crass and repetitive advertising (erectile dysfunction, prostate remedies and funeral plans) threatens the very survival of what is supposed to be Australia's multi-cultural broadcaster. While ad revenues are undoubtedly up, political support from the audience is in freefall. The SBS board, with a wink and a nod from the former Howard government, was out to position SBS as Australia's fourth commercial channel.

It remains to be seen if the Rudd government will provide SBS with the funding necessary to rescue it from its commercial folly. It should. With 120,000 to 160,000 migrants coming each year, Australia will not be turning into a monoculture any time soon. These newcomers deserve inclusive and engaging multi-lingual services to make them feel welcome while they, and their children, figure out Aussie values.

The ABC has deferred any decision to wrap advertising in and around its now extensive broadband, internet TV or cybercasting services. ABC managing director Mark Scott has declared he will not take advertising unless funding levels drop.

With ambitious plans to exploit free-to-air multi-channelling and digital radio, the ABC is ready to take off by developing innovative multi-platform services.

But there's one disquieting aspect. And it might come down to a definitional distinction between *content* and *product*. Some mini-Murdochs on the board and in senior management still retain commercial ambitions for the ABC. They want to exploit what they call the ABC "brand". ABC Commercial, as it is now called, is tasked with monetising product, selling online news, video and audio, to mobile phone companies, shopping centres and commercial websites. This is developing as a substantial business. Already ABC Commercial commissions product with a business plan in mind. There is an obvious danger that the commercial tail will wag the Charter dog, with executives' first priority to meet customer demands before ever considering their obligations to the audience.

The ABC is not a "brand". It is a cultural institution, a creature of an Act of Parliament with clear obligations to complement the commercial sector, not copy it.

The distinction between content and product also is impacting on other material. The ABC is losing any semblance of creative independence by the outsourcing to the commercial television production sector of all drama and documentary programming. The ABC is becoming a transmitter for hire. Co-producers can leverage copyright exploitation of the most bankable product after a showing on the ABC's channels. Disingenuously the advocates for this practice say the work is going to the 'independent' sector. While some of my best friends work in this sector, let us be clear. It is the commercial or private sector, including some big production houses. These advocates say the ABC can turn one taxpayer dollar into three dollars of product on air through co-productions with state and national film commissions, government departments, lotteries funds and the 50 per cent tax rebate for drama and 20 per cent rebate for documentaries received by private financiers and investors. This appears to be in arguable. But this claim needs to be audited. Evidence is mounting that programs being funded through a mix of taxpayer and external money are being onsold immediately after their ABC transmission to pay TV outlets. The ABC does not exist to service the needs of pay TV customers.

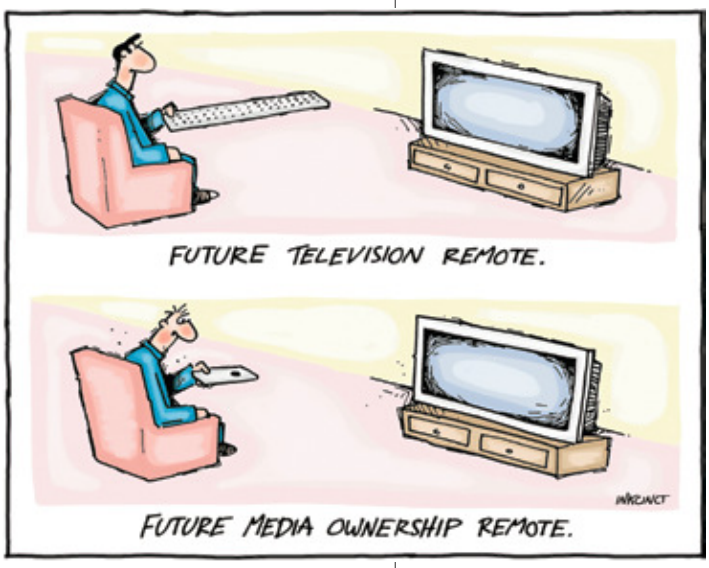
Quentin Dempster is a Walkley Award-winning journalist and broadcaster with the ABC.

"The effects of the Howard government relaxation of media ownership laws were rapid and wide-ranging"

More recently, following the Howard government's defeat, Ms Fierravanti-Wells and her political ally Senator Santo Santoro were not present at the estimates committee hearings in February where Mr Scott answered questions on proposed changes to the make-up of the board and the ABC's coverage of the 2007 election campaign. Mr Scott stated that an independent auditor had recorded the greatest amount of coverage during the campaign had been for the Coalition (45.4 per cent) with Labour second (38 per cent) and the Greens third (7.1 per cent).[72]

Accusations of bias against the ABC are not only made from the right, however. South Australia's Labor treasurer, Kevin Foley, told state parliament in February this year that: "The ABC and the Liberal party – quite often you can never tell the two apart."[73] The incoming Labor Government has promised to reinstate the position of staff-elected representative on the ABC board, but as of the time of writing legislation to put this in train has not been scheduled. The Minister for Communications, Senator Stephen Conroy has told Alliance federal secretary, Christopher Warren, that this legislation will be tabled in the second half of this year. He also said the Government would be adopting a mechanism similar to the UK's "Nolan Rules" for appointment to public boards, by which vacancies are advertised and a selection panel independent of the Minister draws up a short-list based on merit from which the Government must choose**.**

The third key point is the future of funding at the ABC. The Alliance applauds the Rudd government's decision to exempt the national broadcaster from the 2 per cent efficiency cut faced by all government departments, but note that the incoming administration has merely promised "adequate" funding of the ABC with no indication whether an increase would be forthcoming in future budgets.



Cartoon by John Ditchburn

3.5 Media Ownership

In July last year, journalist and commentator Leonard McDonnell published an article on the website of the Centre for Policy Development arguing that what the Australian media needs is more, not less concentration.[74] His rationale was that the state of Australian newspaper publishing is so parlous – due to declining revenues, circulation and competition from the web that only a large, well resourced company with many media outlets and the ability to cross subsidise, could possibly afford to pay for quality investigation and reporting.

His argument bears some force and must be weighed against the dictum that plurality of voices in a diverse media landscape is the only guarantor of the free public debate that underpins a healthy democracy.

The article came amid a frenzy of activity in the market in response to the Howard government's long-telegraphed relaxation of media ownership laws. The new rules were outlined by the Communications Minister, Helen Coonan, late in 2006 and passed into law in April 2007.

The new rules comprised amendments to the Broadcasting Services Act, 1992 and had the following effect:

- the repeal of broadcasting-specific restrictions on foreign investment in the commercial television and subscription pay-television sectors;
- the repeal of the cross-media rules in the BSA; and
- rescission of the newspaper-specific foreign ownership rules under Australia's foreign investment policy.

The new rules have the effect of restricting an individual proprietor to owning two out of three platforms in any one market. An unacceptable diversity situation is defined as less than five ownership "points" in any one metropolitan License Area or less than four in any regional License Area.

At the time, writing for the Press Council, Sam North, the managing editor of Herald Publications, speculated that the changes would "enable some new investment, it will enable some scale and scope. I do think there is some possibility of new entrants.[75]

The effects on the market were rapid and wide-ranging. In June, private equity group CVC Asia Pacific lifted its holding in PBL Media to 75 per cent. PBL controls ACP Magazines and the Nine Network.

Kerry Stokes sold a half share in the Seven Network to another private equity group, Kohlberg Kravis Roberts, and used some of the proceeds to lift Seven's holding in West Australian Newspapers, publisher of *The West Australian*, to 19.4 per cent.

Fairfax and Rural Press announced a friendly merger under the Fairfax Media banner, reducing the number of major proprietors by one and making the new company the publisher of six metropolitan newspapers, more than 200 regional and community

newspapers, more than 30 rural titles and 18 financial publications and websites. Fairfax also launched *brisbanetimes.com.au*, an on-line newspaper servicing southern Queensland.

Macquarie Media first purchased 13.8 per cent of Southern Cross Broadcasting and later joined with Fairfax in announcing a proposal to acquire, via a scheme of arrangement, the entire company. Under the arrangement, Fairfax acquired the Southern Cross commercial radio stations, including Sydney's 2UE, Melbourne's 3AW and Magic 1278, Brisbane's 4BC and 4BH and Perth's 6PR and 96FM. In addition, Fairfax gained Southern Cross's television production and distribution businesses.

Macquarie Media, acquired Southern Cross's Channel Ten affiliated television stations in regional Queensland, NSW and Victoria, as well as Seven Network affiliates in Darwin and Tasmania. It also picked up from Fairfax nine regional radio licences in South Australia and Queensland.

In March the group announced it had completed the sale of 19 Australian regional radio licences for about $34.5 million. The sale included 15 licences that were required to be divested by the competition regulator as part of Macquarie Media's takeover of Southern Cross Broadcasting on November 27, together with four associated licences.

While mindful of the need to build and foster robust media organisations with the depth to withstand the pressures of the digital revolution, the Alliance strongly believes that the health of Australian democracy is intimately bound to a media landscape offering the widest possible array of voices. We're still waiting for those new voices.

"The Alliance strongly believes that the health of Australian democracy is intimately bound to a media landscape offering the widest possible array of voices. We're still waiting for those new voices"

3.6 Access to Aboriginal Land

The question of journalists' access to aboriginal land has prompted much discussion among journalists in recent months. The permit system in the Northern Territory, whereby access to aboriginal communities was restricted to those people who applied for, and received, a special permit to visit a defined area, was enacted by the Aboriginal Land Rights Act of 1976. This was abolished last year as part of the Northern Territory intervention by the Howard government.

In March this year the Minister for Aboriginal Affairs, Jenny Macklin, on a visit to the Territory with a handful of journalists, indicated that the government was looking at a restoration of the permit system, but with an exemption for journalists.

She said at the time that the government wanted the adoption of an updated and adapted Code of Ethics with specific reference to journalists' access to aboriginal lands. A response was prepared by a small group of senior Northern Territory journalists which was passed on to the Minister's office by the Alliance. Members were notified at this point, and, after a number of objections were received, the Alliance withdrew the submission and called on members for their views. About 40 members have responded and the results are being collated into report form. The overwhelming view of Alliance journalist members is that the existing Code of Ethics, if scrupulously observed, should suffice in all circumstances.

In the interim, Ms Macklin announced she would provide blanket exemption from the permit system to journalists whose work legitimately takes them into aboriginal communities.

4.0 International Affairs

4.1 Attacks on Australian Journalists overseas

On October 16, 1975, five journalists, now known as the "Balibo Five", were killed on East Timor by Indonesian troops prior to the Indonesian invasion on December 7 that year. The group included two Australian media personnel; reporter Greg Shackleton, 27, and sound recordist Tony Stewart, 21.[76] According to the Indonesian government the five were accidentally killed when caught in exchanges of fire between Indonesian troops and FRETILIN forces, however many experts and historians have said the group were most likely killed to prevent them exposing the Indonesian incursions. Following their deaths, the men's remains were taken to Jakarta for burial, without the consent of their families.[77] In November 2007, the killings were branded as a war-crime 32 years after the tragic event. On November 16, NSW Deputy State Coroner, Dorelle Pinch, revealed her findings that the five,

Cartoon by Alan Moir

"I believe this has to be taken through to its logical conclusion. I also believe that those responsible should be held to account"

Kevin Rudd on the Balibo Five, November 2007

who were unarmed, were deliberately killed by special force soldiers after surrendering to them.[78]

Following the finding, then Opposition leader Kevin Rudd said, "This is a very disturbing conclusion from the coroner. It may now be 32 years ago, but this is a matter of concern to all Australians, not just those in journalism, but everyone who is concerned about the proper reporting of events around the world. I believe this has to be taken through to its logical conclusion. I also believe that those responsible should be held to account." [79]

It is vital that the government now follows through with this and pursues the prosecution of those responsible. However, foreign affairs experts have said it is unlikely Australia would launch any war crimes prosecution against Indonesians for fear of hindering the relationship between the two countries. It is important that this case is not allowed to fade into the background now that the findings have been revealed, and even though the case is over three decades old, relatives of those involved have a right to respond to the coroner's findings and take relevant action.

In February 2008 Australian *Fiji Sun* journalist Russell Hunter was deported to Australia in what he says was a move by the country's interim government to muzzle free speech. Hunter believes he was deported in relation to articles that were published by the *Fiji Sun* that alleged Former Prime Minster Mahendra Chaudry was involved in tax evasion and held secret overseas band accounts. In an article that appeared on the *Fiji Times Online,* Fiji Times Limited publisher Evan Hannah said Mr Hunter's treatment was appalling and the manner he was detained was disgraceful, shocking and that his family would be traumatised. "This is a sad day for media freedom in Fiji, regardless of the commander's view that nothing has changed for our media," Mr Hannah said.[80]

Hunter was detained by seven officials on February 25, 2008, and was taken away from his home for questioning before eventually being deported, despite an official order issued by the high court to stop his expulsion. He was taken by authorities without any advice to the Australian government and without providing any consular access.[81]

The Pacific Islands News Association (PINA) strongly condemned the deportation Hunter without a formal explanation from the interim government as a serious threat to freedom of expression. The action went against a commitment by the interim government to uphold media freedom in Fiji. [82]

The Alliance and the IFJ also strongly condemned Hunter's deportation as a "grave threat to freedom of speech in Fiji".

5.0 Attacks on Press Freedom in the Asia-Pacific region

5.1 A Summary from the International Federation of Journalists

Deadly violence against journalists, media workers and their families in the Asia-Pacific region worsened during 2007 and has remained high in 2008. In almost all cases, attacks are intended to intimidate journalists and media institutions into silence.

Thirty-one journalists and media staff were killed in the region in 2007. This makes Asia-Pacific the second most dangerous region after the Middle East. Of those killed, almost half were working in Pakistan or Sri Lanka, where the alarming number of deaths indicates heightened insecurity in the region. These numbers do not reveal the reality of journalists who are reported missing and whose whereabouts remain unknown. Sri Lanka and Pakistan have now eclipsed the Philippines as the most dangerous places in the region for journalists to work.

Journalists arrested in early November are taken to court in Karachi wearing handcuffs. Photo courtesy of Pakistan Federal Union of Journalists.

The International Federation of Journalists (IFJ) Asia-Pacific is hosted in the Alliance office in Sydney. IFJ Asia-Pacific manages projects across the region, working with IFJ affiliates to promote press freedom, trade union development, safety and human rights, gender equity and independent and ethical journalism.

Pakistan's rising death toll in recent years and the declaration of emergency rule by President Pervez Musharraf last year led the IFJ to send a mission to the country in November 2007. The mission team held discussions in Islamabad, Lahore and Karachi with journalists, media owners, civil society representatives and officials of what was by then the caretaker government. The IFJ sent a second mission to Pakistan in March 2008 and has laid out a media reform and safety plan for the first 100 days of the new government. The mission won concessions from Pakistan's new leaders to reduce the power of the Pakistan Electronic Media Regulatory Authority (PEMRA), which had sought to censor the media via legal amendments made under emergency rule.

How we helped

Support from the Alliance Safety and Solidarity Appeal is crucial to the work of IFJ Asia-Pacific, especially in aiding projects to protect journalists in danger and their families. The fund was set up in 2005 and is administered by IFJ Asia-Pacific.
In Sri Lanka, violence, murders, targeted attacks and censorship have become a way of life for journalists. In 2007, the Alliance Safety and Solidarity Appeal helped to establish a press freedom office responsible for monitoring and disseminating timely information on press freedom violations and journalists' safety. This office also provides emergency assistance for journalists under threat.

In the Philippines, death threats are routinely delivered to journalists. In 2007, six journalists were killed and many others wounded. The Alliance Safety and Solidarity Appeal has established an office, in cooperation with the National Union of Journalists (Philippines) and with the support of the Norsk Journalistlag, to monitor and report on attacks, as well as to support journalists and their families and to lobby the Government to end the culture of impunity.

In Nepal, journalists have often been caught up in violent struggles between forces of the Government and insurgent groups, and they are increasingly targeted for attack when their reporting is seen as a threat to various groups. The Alliance Safety and Solidarity Appeal is currently developing a program to support the education of children of journalists killed in Nepal. The first stage is expected to provide 28 families with assistance. The fund will also produce a report on the long-term effects on the families and prepare strategies for assistance in the future.

In China, the Alliance Safety and Solidarity Appeal assisted IFJ Asia-Pacific to establish an office in Hong Kong to monitor violations of media rights and journalists' safety. The office will also provide on-the-ground organisation for campaigns and protests leading up to and beyond the Beijing Olympics in August 2008.

In Sri Lanka, the working environment for journalists and media workers is deadly. In the zones where fighting between government forces and the Liberation Tigers of Tamil Eelam (LTTE) resumed in mid-2006, a culture of impunity prevails as media institutions and their staff are targeted according to the ethnic divisions that characterise the war. In 2008, media violence has reached crisis point with as many as 10 journalists and media workers from the state television station, Sri Lanka Rupavahini Corporation (SLRC), being threatened or physically attacked. IFJ Asia-Pacific is leading a global campaign entitled Stop Killing Journalists to draw attention to the continuing crisis in Sri Lanka.

6.0 The Way Forward

On 26 October 2007month before the Federal Election, Labor leader Kevin Rudd and Shadow Attorney-General Joe Ludwig, launched the ALP's information policy document, "Government information: Restoring trust and integrity".

The policy, outlined in this document, pledged to bring together the functions of privacy protection and freedom of information in an Office of the Information Commissioner, to preserve the existing role of the Privacy Commissioner and to appoint a Freedom of Information Commissioner – as a statutory office holder responsible for freedom of information law, similar to the Privacy Commissioner.

In addition, the ALP promised to abolish conclusive certificates and to implement the Recommendations of the 1996 ALRC Report, *Open Government*, which had been commissioned by the Keating government but largely ignored under John Howard.

The policy document also pledged to implement public interest disclosure reform for whistleblowers; and introduce further reform to provide shield protection for journalists and other professionals.

The announcement was welcomed by the media. Alliance federal secretary, Christopher Warren said: "These are reforms that were suggested more than a decade ago. Left to languish for more than a decade, we have seen this country's press freedoms diminished; our access to important information eroded and courageous whistleblowers prosecuted."

In his news blog, the *Sydney Morning Herald*'s FoI writer, Matthew Moore cautioned that, while the policy promises sounded positive, there was a lack of detail in some areas that was cause for concern. Also, he noted: "The critical issue is when this policy will be enacted. Oppositions are huge fans of tough FoI laws but regularly experience a dramatic change of heart the moment the first government limo turns up. This policy needs a six month money-back guarantee." [83]

"Left to languish for more than a decade, we have seen this country's press freedoms diminish, our access to important information eroded and courageous whistleblowers prosecuted"
Christopher Warren, federal secretary, Media, Entertainment & Arts Alliance

In January the government announced that FoI reform would be shifted from the Attorney-General's Department to the Department of the Prime Minister and Cabinet and will be overseen by the Special Minister of State, John Faulkner.

However a spokesperson for Senetor Faulkner said requests for information would continue to be dealt with by individual departments: "The [freedom-of-information] unit has been moved from Attorney-General's to Prime Minister and Cabinet simply because Senator Faulkner has responsibility for the reform of the FoI Act," the spokesman said. "FoI applications are always processed through the home department or agency. That's not expected to change.[84]

On a state-by-state basis, submissions have gone from the Right to Know Coalition to the Queensland and Victorian governments calling for reforms to simplify those states' FoI regimes. The coalition has also advised the Australian Law Reform Commission and the NSW that any further privacy regulation risks imposing an "undue burden on media organisations and interfering with the fundamental rights of freedom of expression and the need for free flow of information in circumstances where there is no identifiable public interest reason for doing so".[85]

Both in its own right and as a member of the Right to Know Coalition, the Alliance will continue its fight for press freedom in Australia.

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