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MEDIA DIVERSITY AND PRESS FREEDOM:

THE DEBATE OVER AUSTRALIA'S
NEWS MEDIA LANDSCAPE

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Introduction

Recent calls for a so-called 'Murdoch royal commission' have revived the perennial discussion about Australia's news media landscape. As usual, the latest incarnation of this debate has triggered a string of pronouncements about 'diversity', 'accountability' and 'standards' in the Australian media. And as usual, the implication is that these 'problems' require regulation, censorship and sundry other forms of state intervention.

This report will:

1. Explain the importance of free speech in general and press freedom in particular
2. Respond to various claims in the current media debate
3. Address the role of public broadcasting in the news landscape and
4. Outline current barriers to press freedom in Australia.

Part one – Principles of press freedom

Freedom of speech and freedom of the press

The freedom to think and speak is fundamental to the Australian way of life. It is an indispensable prerequisite to our values of freedom, democracy and egalitarianism, and a part of the fabric of our common western heritage. It is more than just one value among many, it is a reflection of the human liberty and moral autonomy without which a free society cannot exist. As one US Supreme Court justice wrote, freedom of speech is 'the matrix, the indispensable condition, of nearly every other form of freedom'.¹

We may think of press freedom as a subset of freedom of speech – a related and self-evidently inseparable value on which a free and open democracy relies. It is significant that the High Court of Australia has recognised freedom of political communication as a right implied by our Constitution's requirement that members of the Commonwealth Parliament be 'directly chosen by the people of the Commonwealth'.²

Freedom of communication as an indispensable element in representative government... Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives... That is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion.³

This of course echoes centuries of thought on the nature of representative democracy, not least of all by the fathers of the American Revolution. Benjamin Franklin observed, for example, that '[r]epublics and limited monarchies derive their strength and vigour from a popular examination into the action of the magistrates,⁴ and Thomas Jefferson wrote that 'our liberty depends on the freedom of the press, and that cannot be limited without being lost'.⁵

We must therefore think of freedom of the speech and press as fundamental to our liberty, both to that of the individual and that of a free society, enabling the popular expression of democratic will.

1 *Palko v Connecticut* (1937), 302 US 319, 327.

2 Australian Constitution, s 24.

3 *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* (1992), 177 CLR 106, 37-39.

4 *Pennsylvania Gazette*, 17 November 1737 – 8 December 1737.

5 Letter to James Currie, 28 January 1786.

'Media influence' – A centuries'-old debate

However, as our understanding of free and open debate has evolved, so too have calls for censorship. One way in which this is dynamic currently reflected is the misguided notion that the free press nefariously influences the public debate, as opposed to reflecting or providing a conduit for it.

The debate over the 'influence' of the media on politics and public policy is therefore not new. It has been a habitual hobby horse of the political and cultural elite since Johannes Gutenberg unveiled the printing press in 1450. Current campaigns for greater media regulation can be traced back to the earliest days of the printed word.

Proposals by Italian bishop Niccolo Perotti in 1470 for a papal authority to 'oversee the work' of printing classical texts to address 'reckless editorialising'⁶ are a precursor to recommendations such as those in 2012 by retired Australian judge Ray Finkelstein for a de facto newspaper licensing scheme in response to claims of 'irresponsible reporting'⁷.

The grievances of the church in the 13th century were obviously different to those of the Gillard government that gave rise to the Finkelstein inquiry, but the underlying principle is the same. Perennial demands for greater press regulation are invariably driven by the assumption – express or implied – that an unrestricted media landscape risks a proliferation of 'bad' information that will contaminate popular thought.

It is in this context that we can best understand the latest push to restrict press freedom in Australia, driven largely by former prime ministers Kevin Rudd and Malcolm Turnbull. In particular, Mr Rudd is astonishingly – and openly – fixated on one particular media company, NewsCorp Australia, a peculiar vendetta around which he has constructed a confected and confused 'crisis' in our national media landscape.

Mr Rudd's main grievance with NewsCorp seems to be its coverage of 'climate policy'. In a typically cantankerous opinion piece recently, for example, Mr Rudd's appeared to suggest that NewsCorp proprietor Rupert Murdoch was – for reasons he failed to articulate – systematically manipulating the debate around areas such as energy policy in Australia and elsewhere:

Murdoch has ruthlessly deployed his monopoly control of daily newspaper circulation to sow doubt about climate science and destroy politicians who take the problem seriously. Even as our nation was besieged by megafires that burned out almost as much land as the United Kingdom, these newspapers heaped doubt on climate change and spouted trumped up claims of mass-arson.⁸

It is particularly telling that, elsewhere in the piece, Mr Rudd takes describes NewsCorp's coverage of 'climate policy' as 'reckless coverage', echoing Niccolo

6 John Monfasani, 'The First Call for French Censorship: Niccolo Perotti, Giovanni Andrea Bussi, Antonio Moreto, and the Editing of Pliny's Natural History,' *Renaissance Quarterly*, v41 n1 (1988).

7 The Hon Ray Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation*, 28 February 2012. Accessed 30 November 2020, http://www.abc.net.au/mediawatch/transcripts/1205_finkelstein.pdf, 11.13.

8 Kevin Rudd, 'Why I'm taking on Rupert Murdoch', *NikkeiAsia*, 22 November 2020. Accessed 30 November 2020, <https://asia.nikkei.com/Opinion/Why-I-m-taking-on-Rupert-Murdoch>.

Perotti's concern over 'reckless editorialising'. Just as papal authorities in the 1400s were concerned that the printed word could trigger rejection of Catholic doctrine, Mr Rudd in 2020 appears to be suggesting that one particular media outlet is preventing its audience from 'accepting the science' of 'climate change'.

The myth of 'media accountability'

It is in this context that we have seen periodic calls for 'media accountability', made in large part by our elected representatives and the ancillary web of public servants, quangos, taxpayer-funded academics and sundry other self-interested groups that otherwise subsist off the public purse.

The current Senate inquiry into media diversity in Australia and the proposed 'Murdoch royal commission' are just the latest in a string of similar inquiries with which the political class has been preoccupied for decades. Examples include the Norris inquiry into ownership and control of Victorian newspapers in the early 1980s,⁹ the House of Representatives Select Committee on the Prime Media in the 1990s,¹⁰ and most egregiously of all the Finkelstein inquiry in 2012.¹¹

Mercifully, these inquiries have amounted to very little, but the very fact that they were held at all is a perverse reflection of the attitude of the powerful towards an independent press and freedom of speech. It is media's role to hold the government to account, not the other way around. Having the media inquire into the activities of government is a basic staple of democracy. Having the government inquire into the activities of the media is inherently tyrannical.

9 See Public Record Office Victoria, 'Norris Inquiry into Ownership and Control of Newspapers in Victoria', accessed 7 December 2020, <https://researchdata.edu.au/general-records/152910>.

10 See Parliament of Australia, 'House Select Committee on Print Media', accessed 7 December 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=reports/1992/1992_pp53report.htm.

11 See Parliament of Australia, 'Report of the independent inquiry into the media and media regulation', accessed 7 December 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/lcatalog/00380162%22>.

Part two – The current news media debate

Media diversity has never been greater

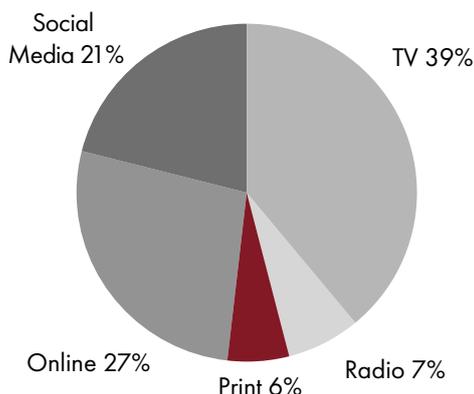
The perennial debate over media ‘influence’ is often predicated on the notion that government intervention is needed to ensure greater ‘diversity’ in the media landscape. The great absurdity is that such debates invariably spawn public policy ‘solutions’ aimed at taking dissenting voices off the air.

Proponents of greater ‘media diversity’ by government edict often cite the existence of media ‘monopolies’ to support the case for government intervention into the news landscape. Such claims are as disingenuous as they are demonstrably false.

Kevin Rudd, for example, has argued for a ‘Murdoch royal commission’ in part on the basis that ‘Australia’s print media is overwhelmingly controlled by News Corporation... with around two thirds of daily newspaper readership’. It does not seem to have occurred to Mr Rudd that if this is indeed the case, then it may be because consumers simply prefer them to their competitors, with metropolitan ‘dailies’ like the *Daily Telegraph*, *Herald Sun* and *Courier Mail* vastly outperforming their counterparts, and the *Australian* dwarfing the readership of other national newspapers.

But more importantly, newspaper readership is just one segment of the news media landscape, and a poor proxy for media diversity. In fact, readership of print newspapers is in decline, and now represents a tiny proportion of Australians’ ‘main source’ of news (see Figure 1).¹²

Figure 1: ‘Main’ source of news



Source: University of Canberra

¹² University of Canberra News & Media Research Centre, *Digital News Report: Australia 2020*, accessed 7 December 2020, https://apo.org.au/sites/default/files/resource-files/2020-06/apo-nid305057_0.pdf, p 50.

Of course, print newspapers have a substantial presence online, but they are far from the most dominant voices. As shown in Table 1, Australia’s top ten online news sources are a blend of television broadcasters, recent market entrants like *The Guardian* and *Daily Mail Australia*, and existing news brands.¹³ Relevantly for Mr Rudd, the neither of the two print brands in the top ten are owned by NewsCorp, and only one – news.com.au – is.

Table 1: Top 10 Australian news websites

Rank	Site	Viewers
1	ABC News websites	13,767,740
2	Daily Mail Australia	11,344,263
3	nine.com.au	10,671,916
4	7NEWS	10,646,021
5	The Guardian	10,254,940
6	news.com.au	10,100,274
7	smh.com.au	9,353,985
8	The Age	5,164,565
9	Australian Community Media Network	4,894,827
10	Yahoo!	3,972,078

Source: Nielsen Company

Similarly, a survey by the University of Canberra in relation to online news brands accessed in the past week demonstrates that Australians are getting their news from a broad mix of established news brands, smaller independent players, and overseas outlets (see Table 2).¹⁴

Table 2: News brands accessed in the past week

News outlet	Percent of respondents visited
News.com.au	23
ABC News online	23
nine.com.au	18
7News.com.au	14
BBC News online	12
Guardian Australia online	12
Sydney Morning Herald	12
Sky News Australia	9
Daily Telegraph	9
BuzzFeed News	9
The Australian	8
The Age	8
Herald Sun	8

¹³ Nielsen Digital Content Ratings, April 2020, accessed 7 December 2020, <https://mumbrella.com.au/wp-content/uploads/2020/06/nielsen-april-dcr-data-top-10-current-events-and-global-news-tagged-april-2020.png>.

¹⁴ Above n 12, p 55.

CNN	8
Other regional or local newspaper website	7
New York Times	6
Courier Mail	6
The New Daily	6
Huffington Post	5
PerthNow.com.au	5
10Daily.com.au	4
Australian Financial Review	4
Vice News	4
The Conversation	4
The Advertiser	4
Mail online	3
Other online sites from outside country	3
BrisbaneTimes.com.au	3
Junkee	2
The Saturday Paper	2
Crikey	2
Other non-English news sites	2

Source: University of Canberra

Finally, emerging news sources are benefitting from substantially lower barriers to entry. Whereas once new players in the media market needed a broadcasting tower or printing press, now all that is needed is an internet connection and something to say. This democratisation of the news media may pose challenges for legacy media outlets, but it has turbocharged media diversity.

‘Misinformation’ and ‘disinformation’ – The new moral panic

Permeating the debate over the contemporary media landscape is the spectre of false or misleading information allegedly proliferated via social media, alternative news sites and even mainstream media outlets. Such concerns are at best exaggerated and at worst deeply opportunistic.

The terms ‘misinformation’ and ‘disinformation’ are similar, but their differences are important. Misinformation is false information that is spread regardless of whether there is an intent to mislead. For our purposes, this includes unintentional errors in reporting and other poor journalistic practice.

Disinformation is false information that is *deliberately* spread with an intention to mislead. This refers in part to ‘fake news’, which is properly understood as fabricated stories that are deliberately designed to resemble bona fide pieces of journalism, that are produced for nefarious purposes.

The problem is that the two terms have not only been used interchangeably, their very existence has become increasingly 'in the eye of the beholder'. They have become politically-charged buzzwords used to dismiss matters of opinion rather than fact, or worse still events that are true, but inconvenient for a given political narrative.

Worst still, the terms 'misinformation' and 'disinformation' are increasingly used by the political and cultural elite to delegitimise democratic will. The implication is that the electorate didn't *really* mean to vote for a particular candidate, party or policy proposal, but they were swayed by false information that contaminated the public debate.

Concerns about misinformation and disinformation – often referred to as 'fake news' – appears to have emerged in direct response to the election of Donald Trump and the success of the Leave campaign in the UK. This opinion piece, written for the *Guardian* in late 2016, is a typical description of the perceived problem:

The most interesting question about 2016 is... whether this will go down as the year democracy revealed itself unworkable in the age of the internet – in which reality, already engaged in a life-or-death struggle with inverted commas, finally gave way to 'alt-reality'.

[...] The collective postmortem – on the left and right of politics – has focused on... the accidental or deliberate propagation of misinformation via social media. Many millions of people saw and believed fake reports that the pope had endorsed Trump; Democrats had paid and bussed anti-Trump protesters; [and] Hillary Clinton was under criminal investigation for sexually assaulting a minor. About the only accusation not levelled at Clinton was implication in the murder of JFK, and that was because Trump had already used it against his Republican primary rival Ted Cruz. If democracy is predicated on reliable information, it's in serious trouble right now.¹⁵

Claims like these have more recently been borne out in the debate over the Australian news media. Kevin Rudd, for example, has alleged that NewsCorp outlets have been deliberately proliferating disinformation for political purposes, and claims that as a result the organisation is a 'cancer on democracy'.¹⁶

This is a misguided and possibly disingenuous use of the term 'disinformation'. There is no evidence that NewsCorp – nor any other mainstream Australian media outlet – is deliberately invoking false facts. In fact, the limited 'evidence' of disinformation that Rudd has put forward is patently false.

For example, Rudd has claimed that NewsCorp newspapers 'heaped doubt on climate change and spouted trumped-up claims of mass-arson' in its coverage of the 2019-20 bushfires.¹⁷ In fact, only 3.4 per cent of stories in NewsCorp newspapers

15 Andrew Smith, 'The pedlars of fake news are corroding democracy', *The Guardian*, 26 November 2016, accessed 8 December 2020, <https://www.theguardian.com/commentisfree/2016/nov/25/pedlars-fake-news-corroding-democracy-social-networks>.

16 See above n 8.

17 Ibid.

mentioned 'arson' or 'arsonists'¹⁸ – and many arrests were made of people suspected of deliberately lighting many of the fires.

In the absence of any actual evidence of false reporting, Rudd's frustration seems to be with the editorial positions of certain NewsCorp outlets in general and its opinion content in particular. This is evidenced by Rudd's particular focus on opinion presenters and columnists, rather than its journalists and 'straight news' coverage.

Malcolm Turnbull, who has joined Kevin Rudd in calling for a 'Murdoch royal commission' argues that audience fragmentation in the news media market is giving exacerbating bias in news coverage. In a speech attacking the 'right-wing media [and] principally the Murdoch media', Turnbull suggested that the underlying problem was – ironically – unprecedented media diversity:

Mr Turnbull said that, until 20 years ago, people got information from 'curated media' such as *The Sydney Morning Herald* or the ABC whereas now 'people are able to choose the news they want; they can select their own facts'.¹⁹

However, bias has always been a feature of the news media. In fact, journalism, reporting and news without any bias whatsoever is arguably impossible. No matter how much airtime, column space or bandwidth is available, no journalist or news organisation could address every single aspect of every single news story. Any narrative, by its very nature, requires some level of editorial discretion.

All this suggests that the likes of Kevin Rudd and Malcolm Turnbull are not concerned about 'accountability' for dishonest reporting, but rather the stifling of 'bad' opinion and 'problematic' editorial decisions. Their campaign does not seem aimed at genuine 'media diversity', but rather apparently seeks to narrow the range of viewpoints in the public square.

18 'Alternative facts do not belong in serious debate', *The Australian*, 14 November 2020, accessed 9 December 2020, <https://www.theaustralian.com.au/commentary/editorials/alternative-facts-do-not-belong-in-serious-debate/news-story/4d9b0c43545c4595fcd2f83f5053cb34>.

19 Jacqueline Maley, 'Politicians "from Donald Trump down" who insult Greta Thunberg are "absolutely ridiculous", says Malcolm Turnbull', *The Sydney Morning Herald*, 7 February 2020, accessed 27 November 2020, <https://www.smh.com.au/politics/federal/politicians-from-donald-trump-down-who-insult-greta-thunberg-are-absolutely-ridiculous-says-malcolm-turnbull-20200207-p53yqp.html>.

Part three – The role of public broadcasting

The case for reform

It is time for a rethink of state ownership of the Australian Broadcasting Corporation (ABC). A media organisation owned and operated by the government that every taxpayer is forced to fund through their taxes is incompatible with a free society.

For this reason, the Institute of Public Affairs supports the continued existence of the ABC, but not one that is funded by taxpayers.

Many supporters of the ABC will claim that it is the 'most trusted' news source for Australians.²⁰ This is based on polling. Trust is more easily decided by the voluntary viewing decisions Australians make, and what news they choose to digest. On these metrics, the ABC substantially underperforms its commercial rivals. The ABC's news bulletin on its main television channel consistently ranks below the nightly news of both Seven News and Nine News.²¹

Table 3: Audience Share 10/02/2019 – 30/11/2019

	Seven Network	Nine Network	Network Ten	SBS Channels	ABC Channels	Subscription Channels
Audience Share	22.7	21.3	13.3	5.1	15.4	19.9

Source: Oztam measuring audiences Consolidated Metropolitan Total TV Sharing of All Viewing 5 Cities Report.²²

Audiences consistently choose the Seven Network channels and Nine Networks as preferred viewing choices despite trustworthiness ratings. Even combined subscription television attracts a larger audience share than ABC channels.

So while ABC supporters boast a high percentage of trust levels, in reality only 15.4% of Australians are choosing to watch it.

With an audience share average of 15.4% percent across all ABC channels, the ABC would undoubtedly be a viable competitive and commercial media organisation that could operate independent of taxpayer funds.

If the ABC is as trusted as its staff and supporters claim it is, then it has nothing to fear from privatisation or reform.

20 TV Tonight, 'ABC, SBS lead most trusted news', accessed 7 December 2020, <https://tvtonight.com.au/2020/06/abc-sbs-lead-most-trusted-news.html>.

21 TV News Ratings <https://tvtonight.com.au/category/ratings/>

22 Consolidated Metropolitan Total TV Share of All Viewing 5 City Share Report - All Homes 2019 <https://oztam.com.au/documents/2019/OzTAM-20191124-D2MeITVShrCons.pdf>

In the United Kingdom there are plans to reform their publicly funded BBC to a subscription model. This idea should be taken up in Australia as well.

Polling data collected by Sydney research and marketing firm Dynata, commissioned by the IPA²³, asked Australians to agree or disagree with the statement “The ABC does not represent the views of ordinary Australians.” The results were that:

- 30% agree
- 32% disagree
- 38% neither agree nor disagree

Only 32 per cent of Australians believe the ABC represents their views, yet 100 per cent of Australians are forced to fund it.

‘Crowding out’ rival media outlets

It is argued that state ownership makes the ABC ‘an independent alternative’, as it effectively insulates it from the commercial considerations that influence other media providers.

Astonishingly, the 2019 Inquiry into the Competitive Neutrality of the National Broadcasters found that:

Given their market shares, and other factors, this Inquiry considers the National Broadcasters are not causing significant distortions beyond the public interest.²⁴

Common sense suggests that people are going to be reluctant to take out a subscription to the Nine Newspapers if they can access a wide range of news content for free on ABC websites.

Fairfax (now Nine), argued in its submission to the Competitive Neutrality Review that by chasing clicks with online news articles that had only “entertainment value” — and paying to promote them on Google or Facebook to generate traffic back to the ABC site — the public broadcaster was stealing audience from the commercial operators. “Any time that a story is being promoted on Google, the purpose is to outbid a competitor — the story would reach the audience regardless.”²⁵

Yet the ABC’s advertising spend to compete with other media organisation has significantly increased since 2018. The ABC’s 2019-2020 annual report reveals an advertising spend of \$5.5 million, which is a significant increase from a \$2.7 million advertising spend reported from 2018-19.²⁶

23 Poll: Only 32% Of Australians Believe The ABC Represents The Views Of Ordinary Australians – IPA Today – 27 February 2020 <https://ipa.org.au/publications-ipa/poll-only-32-of-australians-believe-the-abc-represents-the-views-of-ordinary-australians>

24 Inquiry into the Competitive Neutrality of the national Broadcasters – report by the Expert Panel – Department of Communications and the Arts - 2018

25 Fairfax Media joins criticism of ABC-SBS’s market ‘distortion’ – The Australian – 9 July 2018 <https://www.theaustralian.com.au/business/media/fairfax-media-joins-criticism-of-abc-sbs-market-distortion/news-story/eb06d3196b671f20fb8f56855de13bef>

26 ABC Annual Report 2019-20, page 199 https://about.abc.net.au/wp-content/uploads/2020/10/ABC9864_v8_FILM_Revised_WEB_v3.pdf

ABC compete against private media organisations for this advertising with taxpayer funds. This crowds out emerging and competing media in Australia's private media market.

Over the past five years many news organisations have moved to digital subscription-based models. Offering free digital versions of content provides a significant distortion by government in Australia's media market, putting private media organisations at a significant disadvantage.

While expanding into areas that are already crowded in the media market, like ABC Life, it has withdrawn from many areas which are underserved, like reporting of state politics. ABC supporters often claim that the ABC's taxpayer funding is essential to its editorial independence. Do any ABC staff also believe that the SBS's editorial independence is corrupted by the fact it runs advertising?

The ABC is not the only media outlet that has some sort of bias – far from it – but it is the only media outlet that every taxpayer is forced to pay for.

The ABC's existence as a taxpayer funded organisation does not mean that it is independent.

Many supporters of the ABC boast that it is 'free from commercial influence',²⁷ supposedly making its news editorial stances fiercely independent.

One of the ABC's key editorial standards is to "[e]nsure that editorial decisions are not improperly influenced by political, sectional, commercial or personal interests."²⁸ Yet the ABC have lobbied for its inclusion in the Federal Government's proposed mandatory code which allows media outlets to receive payments from tech giants such as Google and Facebook for content on their platforms.²⁹

This means that a key revenue stream for the ABC will be dependent on the commercial success of Google and Facebook. Causing a direct conflict between its supposedly independent editorial stance and commercial interest.

The IPA believes a better outcome for both the ABC and taxpayers would be privatisation, reform of the ABC into a subscription service, or to allow the ABC to air advertising, since they are so keen on a slice of advertising revenue for advertising that they are prohibited from airing.

While the ABC alleges that media organisations such as Nine Group and NewsCorp present their news in a way that is skewed to reflect the views of their advertisers,³⁰ the ABC's detachment from economic reality appears to affect news coverage.

27 ABC Chairwoman Ita Buttrose, Ramsay Centre for Western Civilisation Lecture, 12 November, 2020 <http://about.abc.net.au/speeches/the-abc-democracy-and-the-importance-of-press-freedom/>

28 ABC Editorial Guidance note: Key Editorial Standards <https://edpols.abc.net.au/guidance/external-work-and-editorial-conflicts/>

29 *Google and Facebook news payments to include ABC and SBS after change to draft code*, Guardian Australia <https://www.theguardian.com/media/2020/nov/25/google-and-facebook-news-payments-to-include-abc-and-sbs-after-change-to-draft-code>

30 ABC Chairwoman Ita Buttrose, Ramsay Centre for Western Civilisation Lecture, 12 November, 2020 <http://about.abc.net.au/speeches/the-abc-democracy-and-the-importance-of-press-freedom/>

During the entire COVID-19 pandemic, the ABC has run a pro-COVID elimination, pro-lockdown narrative, while it remains almost untouched by the pandemic.

Its bias favouring lockdowns was obvious in the ABC's coverage of the IPA's calls to begin to end the lockdown, on a video released on 2 April 2020.³¹

On the 6 April 2020, ABC Radio's Nicole Chvastek interviewed infectious diseases expert Mark Pellegrini from the Eliza Hall Institute about the IPA's video on the lockdown.³² The following excerpt from the video was played prior to the interview on ABC Radio Melbourne:

It's time these restrictions were eased. It's time to allow for the sensible reopening of churches, reopen the restaurants, cafes, bars and community sport. Do it safely, but do it; not in six months, not in one month, now.

Here is what the IPA's Director of Policy Gideon Rozner actually said in the video:

It's time these restrictions were eased. It's time to allow for the sensible reopening of churches, reopen the restaurants, cafes, bars and community sport. Do it safely, **with appropriate social distancing measures in place**, but do it; not in six months, not in one month, now.

Presenter Nicole Chvastek then said the IPA's position was to open up "pretty much everything" and asked the guest three times whether the IPA's position on the lockdown was irresponsible.

One could understand if a clip was shorted from end to end, many networks do this. But on this occasion the ABC has literally taken a very important qualifying phrase from the middle of the clip and removed it, which completely changes the context of what Mr Rozner was saying in order to make the IPA's position on the lockdown seem unreasonable.

A complaint was lodged by the IPA and the ABC apologised following a report by the ABC's *Media Watch* and Sky News *Kenny on Media*. The ABC responded with:

On review of the edited clip and the interview with Professor Pellegrini, Audience and Consumer Affairs agree that Gideon Rozner's qualifying phrase "with appropriate social distancing measures in place" should not have been omitted. The focus of the interview with Professor Pellegrini was on the specific quote from Gideon Rozner and the IPA's call for restrictions to be eased; the reference to social distancing was *materially* relevant to the IPA's position. On this aspect, the approach of the program was not in keeping with the ABC's editorial standards for accuracy. ABC Radio Melbourne apologise for this error of judgment.

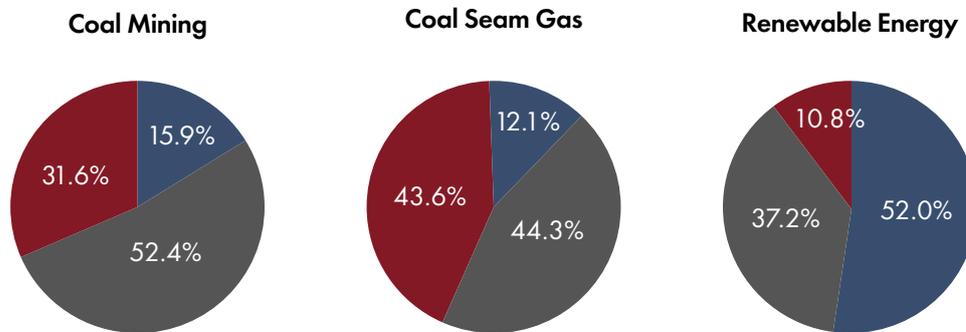
The ABC's preoccupation with a left-wing, progressive world view is revealed in its coverage of nearly every policy issue in Australia. For example, a 2014 analysis

31 'Begin To End The Lockdown Now!', Institute of Public Affairs, 4 April 2020, accessed 10 December 2020, <https://www.youtube.com/watch?v=Nn5adebL-Co&t=24s>

32 ABC apologises to the IPA – IPA Today - <https://ipa.org.au/publications-ipa/opinion/abc-apologises-to-the-ipa>

by iSentia for the IPA³³ of the ABC's news coverage found that 52% of coverage of renewable energy was favourable, in comparison to 12.1% for coal seam gas and 15.9% for coal mining.

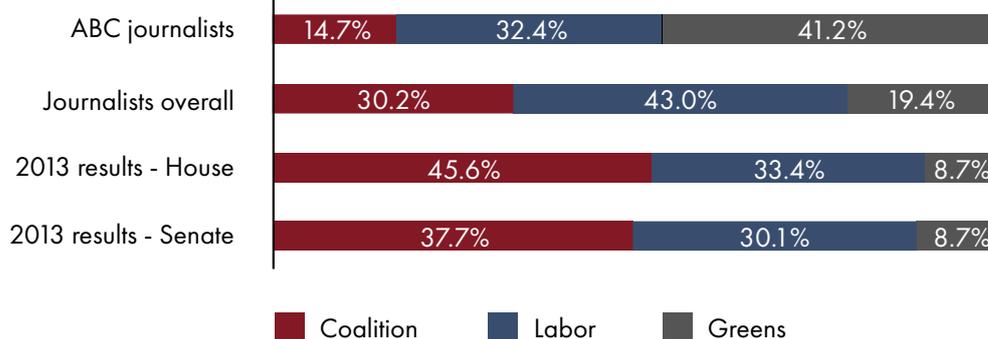
Figure 2: Analysis of ABC coverage of energy-related stories, showing favourable (blue), neutral (grey) and unfavourable (red) treatment.



Sources: iSentia, Institute of Public Affairs.

A 2013 study demonstrates that voting intentions of ABC journalists substantially favour the Greens, especially when compared to other journalists and the population as a whole.³⁴

Figure 3: Journalists' voting intentions at the 2013 federal election, compared with actual results.



Sources: Berg and Davidson, Hanusch, Australian Electoral Commission.

The IPA believes the systemic nature of bias at the ABC demonstrates that only structural change will resolve these persistent problems.

Another key example of bias at the public broadcaster is the existence of the staff-led "Climate Crisis Advisory Group". On 17 November, 2020, Melbourne-based radio producer Barbara Heggen sent an email to an ABC-wide list inviting staff to:

Gather together the brains trust of ABC staffers to develop ways to report on and inform Australians about the climate crisis using a solutions journalism approach.

³³ *Public broadcaster or green activist?* IPA Report - <https://ipa.org.au/wp-content/uploads/archive/IPA-Public-broadcaster-or-green-activist-How-the-ABC-spins-Australias-energy-choices-August2014.pdf>

³⁴ Folker Hanusch, 'Journalists in times of change: evidence from a new survey of Australia's journalistic workforce' (2013), *Australian Journalism Review*, 35(1) 29-41, as cited in Chris Berg and Sinclair Davidson, *Against Public Broadcasting: Why We Should Privatise the ABC and How to Do It* (Melbourne: Connor Court, 2018), 99-100; 'Official 2013 federal election results', Australian Electoral Commission, accessed 9 July 2018, <https://results.aec.gov.au/17496/Website/Default.htm>.

To report back to ABC management our ideas and strategies for responding to the climate crisis both internally and externally.

In a worrying sign, many staff responded with glee at the flawed idea of “solutions-based journalism for climate change reporting.

After some of the emails were leaked to *The Australian*,³⁵ ABC chairwoman Ita Buttrose ruled out³⁶ the group. She even said, “The ABC leadership team and managing director (David Anderson) have thought otherwise.”

An Institute of Public Affairs Freedom of Information request reveals the groups is well and truly still going, with meetings planned for as recently as January 2020.

Despite the direction of the ABC’s chairwoman and managing director, the ABC appears to be completely run by a staff collective.

It was revealed in the FOI that ABC News Director Craig McMurtrie suggested that there was legitimate debate between staff that the ABC would follow ‘*The Guardian model*’ of journalism, which even the ABC admit “tends towards more advocacy journalism”.³⁷

The fact that the ABC would even consider following an activist form of journalism would not only be a breach of their charter but proves how completely out of touch ABC staff are.

The responses from ABC staff and endorsement of a biased form of reporting prove that they are completely at odds with mainstream Australians.

The cost of climate policies was a central issue that the May 2019 federal election, something that the ABC almost completely missed. How can Australians expect the ABC to cover very serious policy discussions like the cost of climate policies impartially, when so many staff hold an activist position on the topic?

On 12 October 2020, ABC journalist Lincoln Rothall replied to an internal news alert noting Pop Francis has met Cardinal Pell. Mr Rothall replied all with:

“I would have voted Covid for the Nobel if it killed Pell”

An Institute of Public Affairs Freedom of Information request revealed some of the responses to this.

Best newsbreak ever. Hope Adelaide is treating you well?

One staff member responded with.

35 *ABC Staff push for climate group* – *The Australian* – 18 November 2019 <https://www.theaustralian.com.au/business/media/abc-staff-propose-climate-group/news-story/50af6696dbff695d103f9fba77f1ed05>

36 *ABC staff climate crisis group won't happen, says chairwoman Ita Buttrose* – 21 November 2019 <https://www.theaustralian.com.au/business/media/abc-staff-climate-crisis-group-wont-happen-says-chairwoman-ita-buttrose/news-story/6650b3cab3a7e03efd6780ea92b2b5a>

37 *ABC Climate Activism Unearthed By IPA FOI* – IPA Today – 18 May 2020 <https://ipa.org.au/publications-ipa/opinion/abc-climate-activism-unearthed-by-ipa-foi>

ABC Director of News Gaven Morris clearly was not impressed, replying with:

Lincoln, I am not sure you intended to copy your appalling response to the network .. but you have, it's been shared with hundreds of people and you need to delete it.

It contravenes almost every editorial and email policy and we'll follow up tomorrow. In the meantime, you need to remove the email and stop emailing anything at all.

On the assumption you're based in Adelaide, I am copying in Nick Harmsen and Genevieve Hussey, who will be in touch.

This highlights the kind of attitudes taken by ABC staff regarding the Pell matter, and reflective more broadly on the green-left approach ABC staff take to public policy issues.

The fact that 77 ABC staff expressed interest in the 'Climate Crisis Advisory Group' is another example of this.³⁸

³⁸ ABC journalists' climate crisis group survives political heat – Guardian Australia – 22 November 2019 <https://www.theguardian.com/media/2019/nov/22/abc-journalists-climate-crisis-group-survives-political-heat>

Part four – Barriers to press freedom in Australia

Defamation Law

Defamation is a civil action that is available to an individual whose reputation has been lowered in the eyes of ordinary people through the publication of defamatory material. According to the Australian Press Council, media organisations accounted for 25.9 per cent of all defendants in Australian defamation cases between 2013 and 2017.

Prior to 2005 the defamation law framework varied between the states which led to concerns about ‘forum shopping’ (a practice whereby potential plaintiffs choose a jurisdiction based on the ease of bringing a claim and the likelihood of success). While the nationwide amendments to unify state defamation laws have reduced the opportunities for forum shopping in Australia (plaintiffs can still bring a claim in the federal court³⁹), the changes have ultimately given Australia a reputation as a plaintiff-friendly jurisdiction, leading some, including in a 2019 opinion article published in *The New York Times*, to call Australia the defamation capital of the world.⁴⁰

According to Dr Matthew Collins QC, Victorian barrister and defamation law specialist, this characterisation is confirmed by the frequency of defamation issues arising in cases. For instance, between 2014 and 2018, superior courts in the United Kingdom considered 268 defamation law issues. But in Australia, with a population less than half of the UK, superior courts considered no fewer than 577 defamation law issues over the same period, 312 of which came are accounted by New South Wales alone. On a per capita basis, defamation laws issues were considered by superior courts in Sydney more than 10 times more frequently than in London.⁴¹

The uniform defamation laws that were passed in 2005 were the result of compromise that failed to achieve coherence. Because of the commitment to maintaining legal uniformity – which in principle require all jurisdictions to agree to and adopt any changes – defamation have not been meaningfully changed since their introduction in 2005. Because of this the flaws that have been identified in the legislation have not been cured by amending legislation,⁴² and it has been left to the judiciary to adapt the legislation to deal with the growing online media marketplace.

In interpreting Australian defamation legislation, Australian courts have dramatically expanded the reach of defamation law in online contexts. This presents a significant challenge for the press. Recent judicial decisions has meant that media companies

39 See *Wing v Fairfax Media Publications Pty Ltd* [2017] FCAFC 191.

40 Louisa Lim, ‘How Australia Became the Defamation Capital of the World’ *The New York Times* (5 March 2019) <<https://www.nytimes.com/2019/03/05/opinion/australia-defamation-laws.html>>.

41 Matthew Collins, ‘Nothing to Write Home About: Australia the defamation capital of the world’ (Speech delivered to the National Press Club, 4 September 2019).

42 See *Ibid* for a list of flaws in Australian defamation laws.

have been liable for comments made by third parties on the social media pages they manage,⁴³ and that the use of a search engine (or any website that includes a search functionality) might attract liability under defamation if the search found defamatory material published by another person.⁴⁴

A central flaw in Australian defamation law is the preference for monetary damages as a form of compensation. While the harm suffered is generally non-economic, there have been several high-profile defamation cases that have resulted in significant compensation awards.⁴⁵ While a statutory cap on the amount of damages for non-economic loss has been set (currently at approximately \$400,000⁴⁶) the cap can be set aside and uncapped aggravated damages can be awarded where the judge considers the conduct of the defendant to have exacerbated the subjective hurt of the defamed party. Additionally, the statutory cap can be circumvented by plaintiffs bringing multiple proceedings in relation to the same material: for instance where a defamatory material is published by several mastheads belonging to the same parent company.

The preference for monetary damages incentivises publishers to err on the side of caution and publish fewer opinions in fear of expensive and time-consuming defamation litigation.

Compounding the chilling effect on media freedom is the burden under Australian defamation law places on defendants to displace the presumption that defamatory publications are false. The presumption of falsity is the reverse of good law and is analogous to a reversal of the presumption of innocence.

In the absence of express terms in legislation, defendants in all areas of civil law are presumed to not be liable, and the plaintiff must prove—generally on the balance of probabilities—the defendant is liable, and that they have suffered some kind of harm before they are entitled to damages. In defamation law in Australia, the burden lies with the defendant to prove that the defamatory publication is true. In other words, the law presumes that every defamatory publication is false, and that every defamatory publication has caused damage to the plaintiff's reputation, a presumption which in Australia is irrebuttable.⁴⁷

At the heart of defamation law is the legal fiction that a person possesses a proprietary interest in their reputation, and that defamatory material is harming to the persons reputation. But it is just a fiction: a person does not—and cannot—possess a proprietary interest in their reputation, because a reputation is comprised of a multitude of opinions that are held by individuals. If a person has an opinion about another person, the opinion belongs to the opinion holder, not the subject of the opinion.

43 *Voller v Nationwide News and Ors* [2019] NSWSC 766.

44 *Trkulja v Google Inc* [2018] HCA 2.

45 *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496. Actor Geoffrey Rush was awarded \$2.9 million after the judge, Wigney J, found that the cap on non-economic damages did not apply.

46 See for instance Defamation Act 2005 (NSW) s 35.

47 Matthew Collins, 'Nothing to Write Home About: Australia the defamation capital of the world' (Speech delivered to the National Press Club, 4 September 2019).

While the legal fiction may be necessary to understand defamation law as a concept, it also adds weight to the argument that Australian defamation law should place a greater burden of proof on plaintiffs and a greater tolerance for freedom of speech, including that published in the press.

Freedom of Information Laws

Freedom of Information (FOI) laws allow individuals and organisations to request access to information and documents held by government officials, departments and agencies. FOI laws are an important mechanism for transparency in government activities and decisions and enable issues to be brought to the attention of the public.

A key function of the media in a liberal democracy is to hold the government to account and inform the public on its operations. This includes elected politicians as well as the unelected bureaucracy and civil servants who play a role in applying and administering laws. One objective of FOI laws is to give the media and other affected and interested parties access to the information and documents that was used before, during and after ministerial and bureaucratic decisions were made or actions were taken.

There are two broad issues associated with these regimes. The first is that the exemptions that appear in the legislation are both vague and broad. The second is that the effect of these very broad exemptions is that it allows departments to delay or refuse FOI requests. Many documents when given are redacted so as to make their information incomprehensible.

The Freedom of Information Act 1982 (Cth) (the “FOI Act”) contains two types of exemptions. The first are blanket exemptions found in Division 2 of the FOI Act. Documents not subject to FOI requests under Division 2 include the protection of sensitive material. This includes documents which affect matters of national security (section 33), public safety (section 37), are subject to legal professional privilege (section 42) or electoral rolls and related documents (section 47A).

The second type of exemption are the conditional exemptions found in Division 3 of the FOI Act. Access to documents that fall into one of the Division 3 categories can be refused if the decision maker would consider it in the public interest to refuse access. Alternatively, information that is either exempt from the FOI on statutory grounds or irrelevant to the FOI request can be redacted.

There are also certain agencies that are exempt from the FOI legislation altogether while some other agencies are exempt from releasing certain documents. Schedule 2 of the FOI Act fully exempts national security agencies such as the Australian Security and Intelligence Organisation, while also exempting unrelated organisations such as the National Workplace Relations Consultative Council and the Parliamentary Budget Office.

Part II of Schedule 2 of the FOI Act gives significant scope to agencies to argue that requested documents are exempt. For instance, Australia’s public broadcasters—the

Australian Broadcasting Corporation and the Special Broadcasting Service—both can rely on exemptions relating to documents which are “program material and its datacasting content.”

According to the public broadcasters, this exemption has broad scope: a freedom of information request submitted to the SBS in 2019 in relation to decisions about why it edited an article on its website was rejected on the basis that the request referred to “program material.” The SBS’s argument was severely flawed on several levels, including to claim the power to decide which of its activities are programs and which are not, and to claim that any document which has some kind of relation or reference to a program must be program material as referenced in the legislation. In this instance the SBS have used a limited carveout as a *carte blanche* exemption from releasing documents to taxpayers who, as unwilling donors of the SBS, have a special interest in overseeing how government entities such as the SBS are operating.⁴⁸

Agencies can also refuse to grant an FOI request on practical grounds, such as not being able to divert resources required to fulfil them. Likewise where the statutory time limit for a decision regarding an FOI request lapses it is deemed a refusal under the law.

The FOI request data for 2019-2020, available from data.gov.au, illustrates that for many agencies a greater percentage of requests are denied or only granted in part (for example by way of redacted documents) than fulfilled. This imbalance does not just apply to agencies that handle classified information (such as the Department of Defence): for instance the Department of Agriculture only granted 6.5 per cent of FOI requests in full, 47.8 per cent of requests were partially provided and in 45.65 per cent of cases the request was refused altogether. Some agencies have an even higher refusal rate, for instance the Minister for the Environment refused 90.6 per cent of requests.

The protection of classified or privileged information is clearly in the national interest. However, when the Australian Broadcasting Corporation or the Special Broadcasting Corporation can find more grounds to refuse FOI requests (53.8 per cent and 70 per cent refused respectively) than the Department of Home Affairs (9.7 per cent refused) it is clear that the FOI exemptions are not necessarily aligned with national interest considerations.

The effect of these myriad blanket and conditional exemptions combined with the ability to refuse requests on practical grounds is that the legislation gives too much leeway to bureaucrats to reject, delay, and redact the release of documents. This is a significant impediment to the ability of journalists to report on government activities which are in the public interest.

48 Morgan Begg and Evan Mulholland, ‘SBS is mocking “Your Right to Know”,’ *The Spectator Australia*, 10 March 2020.

Suppression orders

Courts are capable of granting numerous kinds of orders which have the effect of limiting what may be published about ongoing court proceedings.

- Suppression orders are an order granted during a court proceeding that prohibits the disclosure of information that would otherwise be subject to an open hearing of the court.
- Non-publication orders are a restricted form of a suppression order, but instead of prohibiting the disclosure of information, they prevent the further publication.
- Additionally, a court may in some cases issue a super-injunction, which prevents the publication of the order itself as well as the information that it is supposed to protect.

The first problem with suppression orders, including non-publication orders, is the grounds on which they can be ordered are subjective and open to interpretation which leads to potentially more orders than are necessary. For instance, in New South Wales, the grounds for granting a suppression order are found in section 8 of the *Court Suppression and Non-publication Orders Act 2010* where:

- a. the order is necessary to prevent prejudice to the proper administration of justice,
- b. the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,
- c. the order is necessary to protect the safety of any person,
- d. the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of sexual nature...
- e. it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

The requirement to determine what is “necessary” is not to be interpreted narrowly.⁴⁹ Meanwhile the objects of the provision—including to safeguard the “proper administration of justice” or what is “in the public interest”—are elastic concepts. In other words, the courts are required to broadly ascertain what is necessary to achieve what are broad goals. The result is a statutory scheme which is in danger of favouring suppression or non-publication orders over the principle of open justice.

Court rules surrounding the availability of suppression orders vary by state. So too does the frequency in which suppression orders are granted. While 189 suppression orders were granted by NSW courts in 2018, 443 such orders were granted in Victoria. Meanwhile, Western Australia and Tasmania recorded only one suppression order in 2018.⁵⁰ The Victorian parliament responded to the problem of perceived excess in the granting of suppression orders in Victoria by passing the *Open Courts and Other Acts Amendment Bill 2019*. The new law amended the *Open Court Act 2013* by removing the “presumption in favour of disclosure of information” and inserting instead

⁴⁹ See for instance *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 per Bathurst CJ at [9].

⁵⁰ Kirrily Schwarz, ‘The storm around suppression orders’ *Law Society Journal Online* (30 April 2019).

that the “principle of open justice prevails unless circumstances require displacement.” It remains to be seen how effective this amendment will be as the new wording appears to convey a meaning which is not too dissimilar to the previous wording.

Globalised media have called into doubt the efficacy of suppression orders. Media entities that exist outside the jurisdiction can not be restrained from publishing suppressed material, and a person within the suppressed jurisdiction can easily access the material on the internet. Courts have responded to such jurisdictional limitations through the use of super-injunctions or world-wide injunctions. The legitimacy or public interest basis of such orders are difficult to assess given they are by their nature secretive.

There are legitimate occasions where material should be suppressed, but the statutory framework in some states are broadly worded and are contrary to the concept of open justice which is at the heart of the common law justice system. These orders also impede press freedom in a vital area of public interest journalism which is reporting on the administration of justice by courts.

Vilification laws

Anti-vilification laws are statutory provisions which make it unlawful—either under civil or criminal law—to engage in conduct which vilifies another person because of their membership of a protected characteristic. The wording of vilification laws vary by jurisdiction and each jurisdiction may only apply to certain characteristics: for instance, in federal the main anti-vilification is section 18C of the *Racial Discrimination Act 1975* (the RDA) which prohibits

Laws against vilification are notoriously vague and subjective which enable the arbitrary judgment of courts to determine when speech is lawful and when it is not. There is no objective test for determining whether a person has been vilified and this inherent uncertainty makes it an inappropriate term for use in legislative provisions without specific guidance as to its meaning. This was a point identified in legal advice from Susan Reye, a former senior general counsel from the Australian Government Solicitor agency when the term was being considered for inclusion in the *Disability Discrimination Act 1992* in 2004, who said “the ordinary meaning of the word ‘vilification’ is not sufficiently clear to be relied on in a legislative provision, especially one that imposes liabilities or penalties.”⁵¹

While state legislation generally provide a definition for what vilification means, the definitions are broad and fail to provide meaningful specificity as to what it means in practice. For instance, in Victoria, prohibitions on conduct which is likely to incite hatred or severe ridicule on the basis of a persons racial or religious identity,⁵² fails to establish an objective standard for unlawful speech. In practice there is no meaningful distinction between an act that is likely to incite hatred, or vilify, or even offend or insult

51 Susan Reye, Legal Advice to the Productivity Commission, *Review of the Disability Discrimination Act 1992*, 1 March 2004, 2-6.

52 *Racial and Religious Tolerance Act 2001* (Vic) s 7-8.

because the standard is based on an emotional response. In each case a judge or government official is required to import their own values into a determination about whether an expression is likely to elicit an emotional reaction in another person.⁵³

The subjective nature of vilification leads to markedly different and unexpected outcomes across the various jurisdictions. For instance, the *Australian Financial Review* published in December 1998 commentary by columnist Tom Switzer which asserted the Palestinians were “the true culprits in derailing efforts to reach an agreement over Gaza and the West Bank” and that it “would appear that the Palestinians remain vicious thugs who show no serious willingness to comply with agreements.” In 2000, the Administrative Decisions Tribunal of New South Wales upheld a complaint against the newspaper that it was in breach of section 20C of the *Anti-Discrimination Act 1977* (NSW).⁵⁴ In contrast, a seemingly more belligerent article was published by the *Australian Macedonian Weekly* in May 2009 which referred to “Greek zealots,” “Greek deranged bastardly monsters” and Greek “freaks of nature”. But the Victorian Civil and Administrative Tribunal held in September 2011 dismissed the complaint, noting that it is a “grave matter to restrict or control the free expression of political thought.”⁵⁵

A further complexity in Australian vilification law is availability but limited efficacy of the defences for fair comment or reporting on a matter of public interest. For instance section 18D(c) of the RDA provides that an act prohibited by Section 18D will not be unlawful if the defendant can prove that the act is said or done in good faith and is a “fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.”⁵⁶ However there is “significant” conflict in judicial opinion about the way in which Section 18D might operate.⁵⁷ For instance there is a question over whether it should be construed broadly on the basis that it is an “exception to an exception” to the common law principle that people should enjoy freedom of speech,⁵⁸ or narrowly on the basis that it is an exception to remedial legislation.⁵⁹ Moreover the requirement to act in reasonably and in good faith imports subjective assessments about whether the person seeking the defence has earned their right to freedom of speech. The fragility of the Section 18D as a defence was highlighted in the 2011 case of *Eatock v Bolt*, where Australian columnist Andrew Bolt and his publisher the Herald and Weekly Times Pty Ltd was the subject of a Section 18C complaint because of articles published in the *Herald Sun* and at a *Herald Sun* blog. There the Federal Court made numerous imputations or inferences from the articles that demonstrated a failure to act in good faith, including a reference to language which was in the judge’s view conveyed a “derisive tone”,

53 Morgan Begg, Submission No 18 to the Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections*, 19 December 2019, 4.

54 *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77.

55 *Australian Macedonian Advisory Council Inc v LIVV Pty Limited trading as Australian Macedonian Weekly (Anti-Discrimination)* [2011] VCAT 1647.

56 State vilification legislation uses similar wording in applicable defences.

57 *Prior v Queensland University of Technology & Ors* [2016] FCCA 2853 [80]-[81].

58 *Bropho v Human Rights and Equal Opportunity Commissioner* [2004] FCAFC 16 per French J at [72].

59 *Kelly-Country v Beers* (2004) 207 ALR 421, per Brown FM at 447.

“provocative and inflammatory” and that “insufficient care and diligence was applied to guard against the offensive conduct.”⁶⁰ No reference to such criteria is found in the legislation but is developed by the judges.

It is in the context of this considerable uncertainty that presents a significant challenge to high profile and high volume mass-communication entities, such as media publishers. The operation and knowledge of a law which is not clearly defined but imposes costs in relation to legal proceedings and reputational risk of being labelled a bigot may lead to overdeterrence. This was understood at the time Section 18C was introduced in 1994 by way of the *Racial Hatred Bill 1994*. In submissions to the Senate Legal and Constitutional Legislation Committee’s 1995 inquiry into the *Racial Hatred Bill 1994*, the Australian Press Council and others argued that section 18C would have a chilling effect on free speech as publishers and the media would suppress certain points of view for fear of attracting complaints, even when such complaints are unfounded and ultimately dismissed. The submitters correctly argued that the fact that a person cannot claim costs in relation to proceedings before the anti-discrimination commission which administers the vilification law would mean that the risk of a complaint is sufficient inducement to avoid all discussion of issues, even when hatred or offence is not intended.⁶¹

Role of press regulators and broadcasting codes

Regulation of the press is primarily achieved through two organisations: the Australian Communications and Media Authority, a federal government entity which regulates operators of broadcasting licences, and the non-government Australian Press Council, which has a regulatory role over print publishers.

Australian Communications and Media Authority

The Australian Communications and Media Authority (ACMA) was established in July 2005 through the merging of the Australian Broadcasting Authority and the Australian Communications Authority. In 2019-20 the ACMA employed 428 people and received \$133.4 million in federal government funding.

The ACMA’s main function is to regulate broadcasting, radiocommunications, telecommunications, and online content through enforcement of various Act of Parliament and legislative instruments including the *Broadcasting Services Act 1992*, *Radiocommunications Act 1992*, *Telecommunications Act 1997*, and the *Telecommunications (Consumer Protections and Service Standards) Act 1999*.

The ACMA places tight regulations on radio and television broadcasters through its enforcement of industry codes of practice. Codes of Conduct impose a range of obligations on regulated entities, which include the following:

⁶⁰ *Eatock v Bolt* [2011] FCA 1103 at [425].

⁶¹ Senate Legal and Constitutional Legislation Committee, Commonwealth, *Racial Hatred Bill 1994* (1995) 8.

- News must be presented accurately and impartially
- Factual material must be clearly distinguishable from commentary and analysis
- Reasonable opportunities for significant alternative viewpoints must be presented when dealing with controversial issues of public importance.

The ACMA can receive codes and launch investigations relating to suspected or alleged breaches of the Codes. Between 2006-07 and 2015-16 ACMA had

- Received 14,597 complaints from audiences,
- Undertaken 1,777 investigations, and
- Found 571 code breaches.⁶²

All complaints must be reviewed or responded to by the broadcaster. A single complaint is sufficient grounds for ACMA to launch an investigation, and in the course of an investigation, the ACMA can compel the production of documents; run hearings; and impose penalties. Penalties include amendments to the terms of the broadcasters' licence or even revocation of the licence altogether.

Some investigations are trivial. A common breach occurs where a sponsorship advertisement exceeds the allotted five minute per hour allowance. Other investigations risk censoring serious public policy analysis: the 2GB network has been investigated numerous times for commentary on the NBN and climate change.⁶³

Dr Chris Berg, Senior Research Fellow at RMIT University, argued in 2011 that "the right to freedom of speech is meaningless without the right to choose that speech. No-one should be forced to say something they do not believe as a condition of saying something they do."⁶⁴

Australian Press Council

The Australian Press Council (the APC) was established in 1976 as a non-government self-regulatory body in response to a proposal from the federal government to establish a statutory authority to regulate the press. The APC is a voluntary body which is responsible for promoting good standards of media practice, community access to information of public interest, and freedom of expression in the media. The APC is also the principal body responsible for responding to complaints about Australian newspapers, magazines and associated internet and digital outlets.

The Australian Press Council currently has 22 members comprising the Chair, one vice-chair and eight other public members unaffiliated with a media organisation, nine members nominated by media organisations, and three independent journalist members. The APC is funded by its constituent bodies, who are publishers and other organisations in the media industry, including Fairfax Media, News Corp and the Australian Associated Press.

⁶² Daniel Wild, *Abolish the Australian Communications and Media Authority* (Institute of Public Affairs Parliamentary Research Brief, 7 April 2017).

⁶³ Daniel Wild, *Abolish the Australian Communications and Media Authority* (Institute of Public Affairs Parliamentary Research Brief, 7 April 2017).

⁶⁴ Chris Berg, "Media Watch: Everyone loves it until they advocate censorship," *The Drum Unleashed* (28 March 2011).

While the Australian Press Council is a private and voluntary body, media outlets are strongly incentivised to join the APC as the only viable alternative to government regulation of print media. Because of this the APC can claim a significant role in press regulation. While this is preferable to government regulation of the press, the APC has misused its position and demonstrated instances of bias or misjudgement which are a cause for concern. These instances include:

- An APC ruling in December 2012 to declare that it was unacceptable for *The Australian* to publish an opinion article by James Delingpole which compared renewable energy to a ponzi scheme, and that people should not be allowed to quote people who equate others with paedophiles.⁶⁵
- It appointed social activist and deputy chairwoman of left-wing campaign group Carla McGrath as a public member in May 2017, which presented a significant conflict of interest between McGrath's political activism and the APC's stated principles relating to fairness and balance.
- An APC ruling in February 2019 that decided that news media can't identify someone as transgender unless that fact is "relevant" to the subject matter of an article.⁶⁶ Vague requirements to withhold facts on the basis of their relevance presents a conflict with the APC's own mission to promote the freedom of expression through the media and its commitment to accuracy and clarity in news reporting.

⁶⁵ John Roskam, 'Delingpole Press Council ruling shows threat to free speech,' (Institute of Public Affairs Media Release, 20 December 2012) <https://ipa.org.au/wp-content/uploads/archive/1355964603_document_media_release_-_delingpole_press_council_-_20_december.pdf>.

⁶⁶ Australian Press Council, Adjudication 1756, 4 February 2019 <<https://www.dailymail.co.uk/news/article-6662429/Press-Council-Adjudication.html>>.

MEDIA DIVERSITY AND PRESS FREEDOM

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The Institute of Public Affairs is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom.

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