

4. Censorship in Australia

Intrusions into media freedom flying beneath the international free expression radar

Abstract: Australia has ranked among the top 30 nations in recent world press freedom surveys published by Reporters Without Borders (RSF) and Freedom House and is broadly regarded as a substantially free Western liberal democracy. This article considers how the methodologies of those organisations assess the impact upon media freedom of a range of recent decisions and actions by Australian politicians, judges and government agencies. There is considerable evidence of a shift towards official secrecy and suppression of information flow. However, according to this analysis such developments are unlikely to impact significantly on Australia's international ranking in media freedom indices. This article uses the methodologies of RSF and Freedom House to explore whether the international free expression organisations' criteria are justifiably weighted towards violence against journalists, their imprisonment and formal anti-press laws and might allow for a nuanced comparison of other evidence of constraints on the news media in developed democracies.

Keywords: asylum seekers, Australia, democracy, freedom of information, media freedom, media law, media regulation, press freedom, secrecy, suppression orders, surveillance, terrorism

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THIS ARTICLE aims to assess how several key impositions on media freedom in Australia throughout 2013 and 2014 impacted upon Australia's reputation as a democracy placing a high value on press freedom. It uses the methodologies of two of the world's leading free expression agencies to assess their potential application to these identified developments. It begins by detailing recent decisions and actions by Australian politicians, judges and government agencies affecting the state of media freedom. These have included the issuing of broad suppression orders, the jailing of a journalist/blogger, increased national security and surveillance powers, the intimidation of journalists and politicians by public servants and the withholding of public information. It then summarises the methodologies used by Reporters Without Borders (RSF)

and Freedom House for compiling their annual world press freedom rankings before considering how the recent Australian developments might fare under those criteria. It concludes by recommending the introduction of a more nuanced comparison of impositions on the news media in developed democracies accommodating longitudinal consideration of systemic changes and cultural shifts that might escape adequate attention in stark year-on-year comparisons.

Free expression in Australia

A succession of political leaders from both Labor and conservative parties have striven to position Australia as a leading Western democracy placing a high value on free expression. For example, in a joint press conference with Foreign Minister Julie Bishop in 2013, Prime Minister Tony Abbott described both Australia and Indonesia as ‘robust democracies’ with a ‘robust free press’ (Abbott, 2013). More recently, on the release of Australian journalist Peter Greste employed by Al Jazeera English after 400 days in an Egyptian jail in 2015, Abbott told the National Press Club in Canberra:

... sometimes as Australians we do take our most precious freedoms for granted. And as a former journalist myself it would be remiss of me at such a gathering of journalists not to express my personal delight and our nation’s relief at the overnight release of Peter Greste and to reiterate our support as a government and as a people for a free media and a free press. (Abbott, 2015)

Similar expressions of a commitment to freedom can be found in the election manifestoes of the major political parties. For example, the Liberal-National Coalition in its 2013 election manifesto promised to ‘protect the freedom of speech to strengthen our vibrant democracy’ (Coalition Plan, 2013, p. 44). Labor vowed to ‘protect freedom of speech’ by moving to ‘recognise the public interest in giving the community appropriate access to information’ and to ‘review secrecy laws and laws that criminalise disclosure of matters of public interest’ (Australian Labor Party National Platform, 2011, p. 187). Australia has also spent millions of dollars over two decades in the interests of promoting good governance, transparency and media freedom in developing countries in the region, including its most recent \$11 million Pacific Media Assistance Scheme (PACMAS) initiative (Robie, 2013). However, despite the rhetoric and the investment in aid programmes, there is strong evidence that Australia is failing to practise what it preaches about the important role of the Fourth Estate in a functioning democracy.

As Pearson (2014a) noted, ‘there are some telling signs that media freedom is on the decline’ with several events over the past two years supporting the view that key Australian institutions have become eroded to the extent that free expression has become seriously compromised. Given that Australia regularly features in the world’s top 30 countries in media freedom agencies’ rankings (RSF, 2014a; Freedom House, 2014a) serious questions arise about the extent to which such indices reflect systemic shifts within developed

democracies as distinct from the murder, jailing and torture of journalists that weigh so heavily against more despotic regimes in their press index rankings. Australia's reputation as a Western democracy valuing free expression has been eroded significantly by a raft of new laws and policies which might not be reflected in forthcoming media freedom rankings because of the methods used by free expression organisations and their weightings on various levels of press freedom threats.

The malaise at the heart of the assaults on free expression afflicts both sides of politics. The conservative Abbott government—which mounted a concerted campaign against its predecessor's attempts to rein in the media—has itself gone on to make serious incursions into media freedom through legislative and policy changes. Some of these shifts threaten core democratic values—including the role of the Fourth Estate. Labor, when it was in power, sought to introduce a raft of six Bills ostensibly aimed at improving media regulation, but its attempts failed spectacularly due to opposition to what was perceived to be its draconian reach and it resulted in the abandonment of four of the Bills (Fernandez, 2013a, p. 55). It also pursued the implementation of an internet filtering scheme between 2007 and 2012 (Coorey, 2012). In summary, we divide the present discussion into four key areas that impact heavily on freedom of expression: (a) suppression of information, including suppression orders issued by the courts; (b) official surveillance on communications; (c) erosion of the principle of separation of powers; and (d) official spin. We then consider how the RSF and Freedom House media freedom index methodologies apply in these contexts.

Suppression of information

The power of the courts to issue and enforce suppression orders is a systemic issue in Australia that has been complicated by the advent of online publications and social media spanning the jurisdictions of state and territory courts, the broadening of enforcement powers through post-2001 anti-terrorism legislation and the lack of any national suppression order notification register for the benefit of media outlets and other publishers (Pearson & Graham, 2010; Bosland & Bagnall, 2013; Robin, 2014). While the Australian judiciary operates relatively independently of the executive and the Parliament under the separation of powers doctrine, governments can broaden the powers of the courts to suppress certain kinds of proceedings, and it takes the leadership of a Commonwealth government to initiate reforms across jurisdictions via the Council of Australian Governments (COAG) and its subsidiary Law, Crime and Community Safety Council (LCCSC), formerly the Standing Council on Law and Justice (LCCSC, 2014).

During the period of its first year in office the Abbott government showed a willingness to do the former via tougher national security laws while demonstrating no initiative to institute a national suppression order notification scheme to alert publishers to the existence of orders. The national security thrust came through its *National Security Legislation Amendment Bill (No. 1) 2014, Counter-Terrorism Legislation Amendment*

(Foreign Fighters) Bill 2014, and Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014.

It also took a significant step towards politicising the suppression order process by seeking one from the Supreme Court of Victoria in order to ‘prevent damage to Australia’s international relations’ (Booth, 2014). Wikileaks defied the order by publishing its details internationally on its website, material that cannot be published in this article under the terms of the order (Ackland, 2014; Booth, 2014). Blogger and journalist Derryn Hinch breached a suppression order related to a high-profile murder trial. He refused to pay a \$100,000 fine for the breach and was then jailed for 50 days in default (*The Queen v Hinch*, 2013; *The Queen v Hinch*, 2013, No 2). A blogger and website owner was convicted of contempt for breaching a suppression order on details of a defamation action to which he was a party (*Justine Munsie v Shane Dowling*, 2014).

Even sections of a leading media law textbook had to be withheld, copies circulated to reviewers redacted, and reprinted with deletions, because it was discovered they were in breach of a suppression order issued in one state in mid-2014, a fact the authors and publishers only managed to discover by happenstance (Pearson & Polden, 2015). That episode highlighted the archaic system of suppression order notifications in Australia, which makes it difficult for publishers to know about orders issued by courts in other jurisdictions and even difficult for non-mainstream outlets and social media participants to know about suppression orders in their own jurisdictions.

While some of these cases could have occurred in other Western democracies, the Australian Commonwealth government chose to extend court powers of suppression in relation to national security and terrorism matters as a key feature of its three tranches of anti-terror laws introduced in 2014. The new laws included new powers for the courts to suppress information about terrorism and security-related trials and direct suppression of key news information, including a five-year jail sentence for anyone reporting on what the government deemed to be a ‘special intelligence operation’, increased jail terms for whistleblowers’ leaks about security matters, and a new gag on so-called ‘incitement to terrorism’ (Griffiths, 2014).

On the suppression of names, numerous Australian jurisdictions have long suppressed a range of basic facts in a select range of case types, including those involving children, sexual offences, mental health patients, family law and some coroners’ proceedings (Pearson & Polden, 2015). This is a systemic issue in Australian justice, complicated by the fact many of the laws apply differently across the nine jurisdictions operating at Commonwealth, State and Territory levels. Thus, for example, it is very hard to expose the wrongful detention of people with mental health conditions because of the limits on identifying them or covering proceedings in many cases (Pearson, 2012b).

The matter has become politicised in recent years through the anonymisation of asylum seeker names. In November 2014 immigration lawyer Kerry Murphy explained the dehumanising nature of anonymity requirements stemming from June 2013 amendments

to the *Migration Act 1958* where the term ‘offshore entry person’ was replaced with the term and subsequent acronym ‘unauthorised maritime arrival (UMA)’. Murphy wrote:

With the arrival of the Coalition government, the legal term UMA remains unchanged in the Act. But the new minister insisted on calling people ‘illegal maritime arrivals (IMA)’ despite no such term appearing in the Act or Regulations. In fact the term ‘illegal’ has not been in Migration Law since 31 August 1994.

She said one client she called ‘Ali’, because his real name was suppressed, had effectively lost his identity in the process.

His self-esteem was destroyed by a long period in immigration detention. His identity is now also gone. I recently received a letter for him where he was referred to only by his boat number and the term ‘illegal maritime arrival (IMA)’. His name was nowhere to be seen on the letter and so he is now just a boat number and a derogatory three letter acronym.

In other examples of suppression via public policy, the Abbott government moved to stop not-for-profit organisations advocating against government policy in their service agreements, meaning they would effectively lose funding if they criticised the government; and proposed to abolish the Office of the Australian Information Commissioner (OAIC), the agency responsible for administering Commonwealth Freedom of Information processes and reviews (*Freedom of Information Amendment (New Arrangements) Bill 2014*). The Labor government’s reform initiative that created a FOI Commissioner and the Office of the Australian Information Commissioner to champion freedom of information now ‘lies in ruins’ with the OAIC defunded, its staff of 70 or so facing retrenchment or dispersal and the FOI Commissioner transferred to another agency (Holmes, 2015). A government FOI review claimed that FOI ‘reforms have been operating as intended and have been generally well-received’ (FOI Review, 2013, p. 3). The Media Entertainment and Arts Alliance (MEAA), however, noted a growing gap between the intent of Freedom of Information law ‘and the practical application of the law’ and noted a common complaint was that FOI requests ‘often become log-jammed in the office of the relevant minister’ (Press Freedom Report, 2014, pp. 17-18).

Surveillance

The extent of surveillance of news media by police and security agencies has sometimes bordered on intimidation, often under the auspices of national security laws. The reforms under the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015* give the government access to all of Australia’s networks with a single warrant and the telecommunications companies and internet service providers will be expected to retain metadata—including computer and telephone data and IP address and technical details—for two years so as to make it available to investigators.

Surveillance powers of national security agencies have been increased under the *National Security Legislation Amendment Bill (No. 1) 2014*, triggering a joint submission from major media groups expressing their alarm at the long and intrusive surveillance reach potentially compromising sources and representing a real threat to media freedom because of the Bill's ability to 'undermine confidentiality of journalists' sources and therefore news gathering' (Joint Media Organisations, 2014, p. 4). The reforms also reverse the onus of proof about the purpose of their journey for anyone, including journalists, travelling to Syria or Iraq, again potentially triggering a threat to journalists' sources, fixers and associates. As MEAA noted:

The implications not just for whistleblowers seeking to legitimately shed light on wrongdoing but also for journalists and media organisations whose work could be criminalised are grave. The assaults on press freedom that would arise from this legislation are real and pose a threat to the fourth estate's ability to operate in a manner expected in a healthy, functioning democracy. (Media Entertainment and Arts Alliance, 2014, p. 9)

Notwithstanding this, the Statement of Compatibility accompanying the Bill declares that it is 'compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

Many major whistleblowers have been detected in recent years in Australia, including Victorian detective Simon Artz who admitted being the source of leaks about a major anti-terror operation to *The Australian* newspaper in 2012 (Pearson, 2013). In 2014, a squad of Australian Federal Police raided the headquarters of the Seven Network in Sydney and seized computers and data because of a suspicion that journalists there had been engaged in 'chequebook journalism'—that they had paid somebody for a story involving convicted Australian drug smuggler Schapelle Corby. The allegation, later shown to lack substantiation, was not over any pressing concern of terrorism or major criminal activity—it was over a potential commercial transaction, which might have breached federal proceeds of crime laws. Eventually the AFP apologised 'unreservedly ... for the unnecessary reputational damage to Seven' (Rao, 2014). A further disturbing aspect of official surveillance is the incidence of routine applications by Australian authorities to international social media and internet platforms for information on users. These offshore corporations have voluntarily acceded to thousands of such requests per year. Facebook alone acceded to more than 60 percent of 610 Australian government requests related to 650 users and accounts over the first half of 2014 (Coyne, 2014; see also Wroe, 2013).

Separation of powers erosion

The doctrine of the separation of powers owes its theoretical origins to Sir William Blackstone and James Madison and is explicitly endorsed in the Australian Constitution

in chapters II and III detailing the distinct powers of the executive government and the judiciary, although its application to the separation of the legislature and the executive has been contested in High Court decisions (Gelber, 2006, p. 439). The extent to which public servants are permitted to engage directly with the media in support of the policy objectives of the government of the day has not been clarified. Two matters in 2014 appeared to put the separation of powers doctrine to the test in different ways—one involving communications between a senior public servant and a politician and the other involving communication between a different senior public servant and a journalist.

In February, secretary for the Department of Immigration and Border Protection (DIBP) Martin Bowles wrote a threatening letter to freelance journalist for *The Guardian* Australia, Asher Wolf, over an article she wrote about the Immigration Department accidentally releasing identity details about asylum seekers. The public service chief suggested in his letter that Wolf may have accessed her source material for the story by ‘dishonest or unfair means’ and insisted she not publish the details and ‘return all hard and soft copies of the information’ including any of her storage devices. *The Sydney Morning Herald* later reported that the DIBP was employing contractors to search social media and then order pro-asylum seeker activists to remove their politicised posts (Pearson, 2014b). In March, then Defence Chief General David Hurley wrote to warn Palmer United Party Senator, Jacqui Lambie, about her criticisms of the military in the news media (Pearson, 2014b). Such incidents appear symptomatic of senior public servants acting directly to stem the flow of information that might counter or question the policies of the government of the day.

Spin

The Abbott government’s stranglehold on information about the fate of asylum seekers attempting to reach Australia by sea amounted to a near-blackout and created a cumulative effect on the level of information management—government spin—that had been gradually increased over several years of earlier governments. Successive Australian governments from both sides of politics managed or spun immigration information using a range of devices, including limited access to immigration detention centres, carefully managed statements to the media, and (as noted above) the use of dehumanising acronyms to refer to de-identified individual asylum seekers. The small island state of Nauru—host to an Australian immigration detention centre for asylum seekers who had been unsuccessful in reaching Australia by sea—increased its visa fee for media from \$200 to \$8000 in early 2014. This was reported as both a grab for cash and as an attempt to deter news coverage of the fate of asylum seekers in the centres (Freedom House, 2014d; ABC News, 2014).

Australia has used both its government rhetoric and its aid budget to spin the line that it is a democracy that cherishes media freedom and is an exemplar of transparency and good governance throughout the Asia-Pacific region. It has spent millions of dollars

on aid projects with these aims, including the \$11.37 million PACMAS project and a more recent \$3 million Transparency International project (Pearson, 2014a). The irony is that the Australian government agencies operating the projects include a gag clause on consultants discussing such projects with the media without the explicit permission of the sponsoring agency—AusAID or the Department of Foreign Affairs and Trade. For example, the recent Asia Pacific Grant Agreement 63133 with Transparency International for a \$3 million project ‘strengthening civil society networks to address corruption in Asia Pacific (2014–2015)’ states:

4.6 The Organisation must ... discuss any matters relating to publicity or media relations before any publication or media release.

4.7 The Organisation must ensure it does not attribute, as funded or supported by AusAID, any activities conducted by the Organisation before discussing it with AusAID. (DFAT, 2012)

The PACMAS project states its goal is ‘to support better governance in the Pacific ... by supporting the development of a diverse, independent and professional media that promotes informed and meaningful public discourse throughout the region’ (DFAT, 2015). Restrictive, or ‘gag’, clauses such as the ones above would seem to achieve anything but that end.

Across a range of often quite politicised topic areas there is evidence of a shift to shut down public debate, to diminish transparency and to deprive media (particularly public media) of resources necessary to undertake investigative journalism and to call power to account. Most concerning on the latter front were the Abbott government’s cuts to the national public broadcasters’ budgets, resulting in more than 400 redundancies including more than 100 news personnel at the ABC (Kidd, 2014).

A major systemic issue compromising media freedom in Australia is that, unlike most developed Western democracies and many smaller democracies and developing nations, Australia has no constitutional provision at a national level protecting free expression or a free media. Countries like the United States, the UK, Canada and New Zealand have such words enshrined in their constitutions or in a human rights instrument that has been ratified and forms part of their political and judicial system. In Australia, the media need to look for protection for their free expression on a case-by-case basis to the courts—unless certain rights or privileges form part of individual items of legislation (HRC, 2015). With the exception of shield laws and some media exemptions to privacy and consumer law, however, there are few express protections for free expression, a free media or the function of journalists in a democracy. To the contrary, those few mentions are considerably outweighed by hundreds of publication restrictions across numerous legislative instruments at Commonwealth, State and Territory levels. While international free speech barometers consistently rate Australia higher than many countries, there is the view that it still has some way to go to be able to proclaim a stout commitment to

POLITICAL JOURNALISM IN THE ASIA-PACIFIC

this ideal (Fernandez, 2013b, p. 18). Two jurisdictions—Victoria and the ACT—have enacted human rights instruments acknowledging free expression, but these are essentially aspirational documents that are not binding on the courts or the Parliament in either state or territory. They are:

Charter of Human Rights and Responsibilities Act 2006 (Vic), section 15(2): ‘Every person has the right to freedom of expression ...’; and
Human Rights Act 2004 (ACT), section 16: ‘Everyone has the right to freedom of expression.’

For several decades, civil liberties advocates have pushed for a bill of rights at a national level, but the movement has not gained political momentum. The major political parties have differing views on the desirability of a human rights act, with the Coalition parties failing to see the need for it, while the Labor Party made a commitment in 2007 to gauge the need and support for the statutory protection of rights (Margarey & Jordan, 2010).

There are arguments that free expression is a ‘free standing right’, but as Buss (2006, IIC) has noted, the Australian High Court is distinguished from the US Supreme Court in this area because it has chosen to interpret it as a ‘limitation on legislative authority’ rather than as a ‘free standing personal right’. Rather than an explicit statement of free expression, Australians have an ‘implied freedom to communicate on matters of politics and government’ developed by the High Court in a series of cases since 1992. Sadly it has been interpreted narrowly in decisions since 2012 (Pearson & Polden, 2015, pp. 47-49).

Press freedom indices and their methodologies

Two main media freedom indices are cited internationally as indicators of the relative state of press freedom and free expression internationally. They are issued by the Paris-based *Reporters Sans Frontières* (RSF—Reporters Without Borders) and by the US-based Freedom House. Each has fine-tuned its rankings system over time and we summarise their methodologies here. The RSF World Press Freedom Index was first published in 2002. On its launch RSF explained:

The index was drawn up by asking journalists, researchers and legal experts to answer 50 questions about the whole range of press freedom violations (such as murders or arrests of journalists, censorship, pressure, state monopolies in various fields, punishment of press law offences and regulation of the media). The final list includes 139 countries. The others were not included in the absence of reliable information (RSF, 2002a).

It went on to detail its methodology as essentially a qualitative one based on its contacts in each country assessed and its headquarters staff. The index measured the ‘amount of [media] freedom’ in each country and the respective governments’ efforts to observe that

freedom (RSF, 2002b). Its questionnaire sought details on: direct attacks on journalists (e.g. murders, imprisonment, physical assaults and threats) and on the media (e.g. censorship, confiscation, searches and other pressure); the degree of impunity enjoyed by those responsible for such violations; the legal environment for the media (e.g. punishment for press offences, state monopoly and existence of a regulatory body); the state's behavior towards the public media and the foreign press; threats to information flow on the internet; and the activities of armed movements and other groups that threaten press freedom (ibid).

Clearly, RSF's emphasis from that early stage was on clear physical threats against journalists and major legal measures taken against the media in the surveyed countries. Australia ranked 12 out of 139 countries ranked in that first survey. New Zealand and other Pacific Island nations were not ranked because of a lack of information collected on them. The following year New Zealand debuted at position 17, while Australia had been demoted to 50 of 166 nations ranked (RSF, 2003).

RSF changed its ranking methodology significantly in 2013, when it ranked Australia at 28 out of 179 countries, and it is that revised approach which will be used for our discussion here about the potential assessment of Australia's performance. It explained a shift to a new questionnaire and approach, with Paris-based staff quantifying the numbers of journalists killed, jailed, exiled, attacked or arrested, and the number of outlets directly censored (RSF, 2013). Other important criteria formed the basis of questionnaires sent to outside experts and members of the RSF network, including 'the degree to which news providers censor themselves, government interference in editorial content, or the transparency of government decision-making'. Legislation and its effectiveness, concentration of media ownership, favouritism in subsidies and state advertising and discrimination in access to journalism and training were the subject of more detailed questions (RSF, 2013).

RSF then uses a complex algorithm to assign a score out of 100 to every country, drawing first on six general criteria of pluralism, media independence, environment and self-censorship, legislative framework, transparency and infrastructure; and then factoring in a special 'violence score' with a weighting of 20 percent, calculated using a formula taking account of violence against journalists in the following declining weightings: death of journalists, imprisonments, kidnappings, media outlets attacked and ransacked, journalists who have fled the country, arrests, and attacks (RSF, 2013). An additional co-efficient takes account of respect for freedom of information in a foreign territory. In short, the algorithm strives to add quantitative mathematical rigour to a process that is largely qualitative, with a stronger weighting on acts of violence than upon legislative and systemic anti-media features. The approach incorporates difficult and problematic comparisons of the value of the murder of a journalist *vis a vis* laws of censorship.

Freedom House was founded in 1941. Its comparative assessments of global political rights and civil liberties were introduced in 1972 as 'Freedom in the World' reports, which in its 41st edition in 2014 Freedom House described as 'the oldest, most authoritative

POLITICAL JOURNALISM IN THE ASIA-PACIFIC

report of democracy and human rights' (Freedom House, 2014a). Its 2014 Freedom in the World report profiled Australia and awarded it 16 out of 16 points for Freedom of Expression and Belief, although it noted some shortcomings:

While the constitution does not protect freedoms of speech and the press, citizens and the media can freely criticise the government without reprisal. Some laws restrict publication and dissemination of material that promotes or incites terrorist acts. Ownership of private print media is highly concentrated. There are numerous public and private television and radio broadcasters. Religious and academic freedoms are respected. Anti-terrorism laws bar mosques and Islamic schools from spreading anti-Australian messages. (Freedom House, 2014b)

Freedom House started its narrower and distinct Freedom of the Press reports in 1980 and has produced them annually since then (Karlekar & Dunham, 2014). Its 2014 press freedom index listed Australia at 33rd of 197 countries, with New Zealand ranked 22nd. Both countries were categorised as 'free' (on a three-point scale of 'free' / 'partly free' / 'not free') under the Freedom House methodology for its rankings (Freedom House, 2014c). In that document, Freedom House described its methodology as 'a multi-layered process of analysis and evaluation by a team of regional experts and scholars'. It conceded 'an element of subjectivity inherent in the index findings' but stressed its process 'emphasises intellectual rigor and balanced and unbiased judgments' (Freedom House, 2014c). It claimed it used its New York-based team and outside consultants totalling more than 60 analysts to prepare draft ratings based on information from professional contacts internationally including the International Freedom of Expression Exchange (IFEX) network which were then reviewed at six regional meetings.

The methodology included 23 methodology questions and 132 indicators divided into three major categories of the legal, political and economic environments, with points allocated accordingly to what Freedom House described as 'the entire "enabling environment" in which the media in each country operate' (Freedom House, 2014c). Of special relevance, the legal environment category questioned laws and regulations including constitutional guarantees of free expression and the potentially negative impact of security and other laws, while the political environment section considered access to information and sources and the ability of journalists to cover news without harassment (Freedom House, 2014c). We consider specific questions in our discussion below.

The respective RSF and Freedom House indices are cited internationally in political speeches and academic works (Burgess, 2010, p. 4). For example, Belgian scholar Dirk Voorhoof linked high media freedom rankings with global reputation for human rights protection when he wrote:

... the countries with a high level of press freedom, as shown in the international ratings of Reporters without Borders (RSF) or Freedom House, are countries in

which democracy, transparency, respect for human rights and the rule of law is strongly rooted, institutionalised and integrated in society. (2009)

However, despite assurances from both RSF and Freedom House that their reports and indices were undertaken with independence and rigor, they have come in for criticism from some quarters. For example, Schönfeld (2014) took issue with Russia's rankings in both indices on the basis of a potential Western bias. She cited rumours that the Freedom House index was sponsored by the US government (p. 99):

The whole questionnaire presumes a comprehensive concept of media freedom, claiming that the media have to be embedded in a democratic society. (p. 100)

She raised similar concerns about the RSF index, again citing a rumour that 'the organisation contents itself with three or four completed questionnaires per country to the same target group' (p. 100). She drew comparisons between the RSF and Freedom House approaches:

The conformity between these two indices is not astonishing, as the underlying concept of media freedom, methodology, and the target group are nearly the same. (Schönfeld, 2014, p. 100)

Burgess (2010) canvassed the academic literature on media freedom indices and found a host of criticisms, including poor survey design, and recommended they 'should continue to work to increase technical sophistication, validity across time, and transparency of sourcing, wherever possible without creating threats to the security of people who help in compiling them' (Burgess, 2010, p. 50). Pearson (2012a) offered reasons as to why the RSF index could not be a precise scientific measure.

It could never be, given the enormous variables at stake, and has to rely on an element of expert qualitative judgment when making the final determinations of a country's comparative ranking. If it was purely quantitative, for example, there would be an in-built bias against the world's most populous countries because the sheer numbers of journalists and media organisations involved would increase the statistical likelihood of media freedom breaches or incidents involving journalists.

Further, the individual rankings of countries in any particular year are subject to the performance of the nations above and below them. In fact, a country might well decline in the real state of its media freedom but be promoted in an index because of the even worse performance of countries ranked above it the year prior. As Burgess noted, however, the indices were cited widely on their release each year and thus represented a useful tool for promoting the value of media freedom internationally (Burgess, 2010, pp. 6-7). Pearson (2012a) stated:

Governments might take issue with the methodology and argue over their precise rankings, but the index draws on the energies and acumen of experts in RSF's Paris

POLITICAL JOURNALISM IN THE ASIA-PACIFIC

headquarters and throughout the world; and is thus taken seriously in international circles. It serves to raise awareness about media and internet freedom, which cannot be a bad thing in an age of government spin.

Of course, any press freedom index is really only a continuum because media freedom is not an absolute, scientifically measureable criterion and there is no haven of free expression or press freedom internationally. Indeed, established international instruments reflect the non-absolute nature of free speech. For example, the Universal Declaration of Human Rights provides that everyone has a right to freedom of expression (Article 19). However, this right is qualified. For example, Article 12 provides that no one shall be subjected to attacks upon ‘honour and reputation’. Likewise, the International Covenant on Civil and Political Rights qualifies the freedom of expression right in Article 19(2), with a provision stipulating that that freedom ‘carries with it special duties. It may therefore be subject to certain restrictions ... such as are provided by law and are necessary’.

Applying media freedom NGO methodologies to Australia

When we apply the two NGOs’ methodologies to the recent impositions upon media freedom in Australia several issues merit consideration.

Considering the RSF approach firstly, it is likely the algorithm’s weighting of violence against journalists would lessen the impact of many of the systemic and legislative impediments to a free media listed above. As noted above, a single journalist (Derryn Hinch) was jailed in Australia during the period of the Abbott government’s first year in office and a single media outlet was raided (Seven Network) and no journalists were killed or physically attacked in the course of their work. Both of the above events, it is safe to say, occurred without direct government intervention or direction and the jailing of Hinch followed a state-based court process where he elected to go to jail in default of paying a \$100,000 fine (*The Queen v Hinch (No 2)*). (As one reviewer of this article correctly pointed out, under Australia’s federal system of government, the Commonwealth government cannot be held responsible for a state court’s decision to jail a journalist. However, the RSF and Freedom House processes do not focus on a particular government’s actions—rather they factor in the free expression infringements occurring in the country as a whole over the period of their annual survey.)

The RSF algorithm (RSF, 2013) would seem to discount developments such as the impact upon media of new anti-terror laws and their associated suppression of important national security trials, increased surveillance power for police and spy agencies, breaches of the separation of powers doctrine with public service chiefs threatening politicians and journalists, and the government’s withholding of information from the media about the fate of asylum seekers in detention centres and at sea, and its proposed axing of the Office of the Australian Information Commissioner (OAIC). Rather, the RSF focus is on violence against journalists, direct government attacks, outright censorship, ownership

and control of media, government manipulation of media outlets through licensing and ownership regulations, advertising and subsidies. That is not to say these factors do not figure in the RSF equation. Indeed, Section E of its questionnaire is devoted to ‘Legal doctrine and practice’ and internet surveillance of journalists and whistleblowers is covered within Section F ‘The internet and technical resources’ (RSF, 2014b). However, the algorithm allocates violence against journalists 3/15 (one fifth) of the overall score allocated to a country and threats to media pluralism 4/15. The lesser weightings for media independence (2/15), environment and self-censorship (2/15), legislative framework (2/15), transparency (1/15) and infrastructure (1/15) cover most of the themes of concern arising in Australia in recent years, thus making them less likely to impact upon its overall ranking.

The Freedom House methodology comprised 23 broad questions and 132 ‘indicators’ divided into three broad categories: the legal environment, political environment, and economic environment (2014c). Its methodology seemed to offer the prospect of reflecting Australia’s recent impositions on the media more accurately than the RSF algorithm, but for the fact that its recent reports of similar events did not prevent it awarding Australia 16/16 points for free expression in 2014 (Freedom House, 2014b). Table 1 presents 18 questions selected from the Freedom House survey’s list of 23 questions which could impact significantly on Australia’s ranking if they were more appropriately acknowledged, taking into account that the listed questions and the indicators remain highly relevant to any evaluation of the extent of media freedom in a country.

In summary, both the RSF and Freedom House indices have ample room to accommodate a more accurate reflection of intrusions into media freedom in Australia, but the RSF methodology places a much lower weight on the types of incidents and reforms stated. The Freedom House process, while drilling down into these kinds of matters in some areas of its questionnaire, is a substantially qualitative procedure which fails to properly capture the impact on free expression resulting from anti-terror laws and a lack of constitutional protection for free expression.

Conclusion

Several important inroads into media freedom occurred over the period after the Abbott government came to office in 2013. The conservative government placed its stamp on media law and free and open public commentary with several retrograde changes in both legislation and policy. Australia’s reputation as a Western democracy valuing free expression was significantly eroded by a raft of new laws and policies, but such developments risk being under-represented in the main indices of these two important NGOs because of inadequacies in their methodologies and their application. (In fact, as this article was under review, RSF released its 2015 World Press Freedom Index and, despite these erosions in media freedom throughout 2014, Australia actually rose three positions in the rankings from 28 to 25 (RSF, 2015).

Table 1: Selected Freedom House survey questions, 2014

Freedom House 2014 survey question	Authors (Pearson & Fernandez comment)
Does the constitution contain language that provides for freedom of speech and of the press?	No, generally.
Is libel made a criminal rather than a civil offence?	Yes, although prosecutions for criminal defamation have been few, and although some jurisdictions have abolished the crime, it remains on the books (see Burgess, 2013).
Do high-level government leaders contribute to the hostile environment of the press, for example, by engaging in repeated animosity toward or negative verbal rhetoric against the media?	Yes, particularly on immigration and detention issues and on the national broadcasters' coverage.
Do laws restrict reporting on ethnic or religious issues, national security, or other sensitive topics?	Yes, through a Racial Discrimination Act and more than 50 national security laws since 2001.
Do the authorities restrict or otherwise impede legitimate press coverage in the name of national security interests?	Yes, through new suppression powers under anti-terror laws.
Are writers, commentators, or bloggers subject to imprisonment or other legal sanction as a result of accessing or posting material on the internet?	Yes, potentially so under anti-terror laws.
Are writers, commentators, or bloggers subject to imprisonment or other legal sanction as a result of accessing or posting material on the internet?	Yes, potentially so under anti-terror laws.
Are contempt of court charges filed against journalists who attempt to cover court proceedings or cases?	Yes, journalist Derryn Hinch jailed for contempt in default of paying a \$100,000 fine in 2014 for revealing the criminal record of a high profile accused in breach of a suppression order.
Are bans on coverage or gag orders frequently imposed by the judiciary on legal cases?	Yes, hundreds of suppression orders are issued each year nation-wide.
Are journalists able to secure public records through clear administrative procedures in a timely manner and at a reasonable cost?	No, the system is far from adequate.

Are journalists' or bloggers' professional actions or means of communication subject to either electronic or physical surveillance with the object of interfering in their work or ascertaining their sources?	Yes, through surveillance by intelligence agencies and police, and new powers granted under reformed anti-terror laws.
Are the activities of government – courts, legislature, officials, records – open to the press?	Partly yes, but FOI laws contain many exemptions.
Is there a 'culture of secrecy' among public officials that limits their willingness to provide information to media?	Yes, public officials operate under strict policies controlling their communication with media and this has been most profound in relation to Immigration matters.
Do authorities hold regular press conferences or other briefings to inform the media?	Yes, partly, depending on portfolio, but a remarkable lack of such briefings in immigration matters.
Does the regime influence access to unofficial sources (parties, unions, religious groups, etc.), particularly those that provide opposition viewpoints?	Yes, some NGO contracts state they will default if they criticise the government policies and consultants bound by AusAID gag clauses.
Are there shutdowns or blocking of internet sites or blogs, or of mobile-phone networks?	Yes, the ACMA runs a blacklist of banned internet sites.
Are certain geographical areas of the country off-limits to journalists?	Yes, several under anti-terror laws and others such as detention centres under immigration laws.
Is there surveillance of foreign journalists working in the country?	Yes, there is surveillance by national security agencies and police.
Have media companies been targeted for physical attack or for the confiscation or destruction of property?	Yes, Seven Network headquarters raided by Federal Police over an unproven allegation of chequebook journalism, later withdrawn.

The observations above moot for a review of both the RSF and Freedom House index processes to allow for more studied consideration of such laws and policies, some of which are part of the very fabric of the legal system that has produced them. It is understandable that methodologies would be skewed towards highlighting the murder of journalists, physical threats against them, and their incarceration. These are alarming acts and should rightly impact upon the rankings of the worst-ranked nations in such indices. The RSF index, however, does not allow for nuanced consideration of shifts against free expression within a functioning developed democracy and systemic changes and cultural shifts that might not lend themselves to stark year-on-year comparisons. The weightings of each country's legislative framework and transparency policies in

POLITICAL JOURNALISM IN THE ASIA-PACIFIC

the RSF algorithm also merit review. Freedom House might consider reviewing its processes that allowed for the award of 16/16 scorecard in its 2014 *Freedom in the World* report despite its acknowledgement that Australia had no free expression protection in its Constitution and had introduced anti-terror laws infringing on media freedom (Freedom House, 2014d).

The media freedom indices appear to be better equipped to deal with the explicitly legislated censorship and secrecy that occurs in nations like Malaysia and Singapore, for example through their *Official Secrets Acts*, than with the kinds of clamps on the flow of information adopted by governments in a Western liberal democracy such as Australia via restrictive national security laws, suppression orders, official spin and manipulation, and the thwarting of access to information. Further, neither NGO's year-on-year comparisons allow for a more general build-up of pressure on the media in democracies. Countries occupying the upper echelons of the respective rankings may experience more detrimental rankings if their *information flow/state secrecy* credentials were taken into full account by considering the cumulative impact of a series of stems on the flow of information over several years. A clearer foregrounding of the media's concerns in this domain ought to give nations more food for thought about where they actually stand in the international rankings and where they might aspire to be. An important issue is the nexus between press freedom and secrecy. It would be impossible to speak realistically about informed discussion without also considering access to information and freedom of information. Former Chief Justice of the Australian High Court Sir Anthony Mason noted:

Information, of its nature is not freely available, unless the person who has it is either willing to make it available or is subject to some kind of enforceable duty to make it available. (2000, p. 233)

He made another important observation that needs constant reinforcing in countries that purport to subscribe to democratic ideals:

The ability to criticise government and to participate effectively in government, if only indirectly by expressing one's views, depends upon the provision of adequate information about the workings of government and its decision-making processes. (2000, p. 230-1)

Citizens can quite legitimately ask: Can there really be informed discussion on matters of public interest and concern in a climate infested by considerable blocks to the flow of information and by the growing propensity for spin and obfuscation? This study offers evidence that RSF and Freedom House might review the design and application of their respective indices, in light of the foregoing arguments, in the interests of ensuring that countries do not occupy undeserved elevations in their rankings. This would be in the interests of preventing continuing encroachments into media freedoms by countries like

Australia that seem to be lulled into a sense of ‘free expression complacency’ simply because they are Western democracies.

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