Chapter Ten

The Media and the Constitution

Professor David Flint, AM

As the Chairman has said, I am the new Chairman of an independent statutory authority, the Australian Broadcasting Authority. But that is not how some in the media saw it. They impugned our independence, as in the cartoon you see before you. I assume that it is my hand coming up from below the head of the table. It is both factually and politically correct, for there is no woman member there to represent Ms Kerrie Henderson.

I am unsure who it is who is bursting in demanding, "Who's the Authority here?". He is not Sir Lawrence Steet, the Chairman of Fairfax, for Sir Lawrence is far too elegant and courteous to do that.

Nor is it the President of the Federation of Commercial Television Stations, whose coiffeur is much more generous.

After some reflection, I think I know who it is. It's Mr Stuart Littlemore, QC, the ABC media critic![1]

My subject, *The Media and the Constitution*, raises, I believe, four major issues. I propose therefore to attempt to answer four questions.

First, why is there no express guarantee of the freedom of the press in the Constitution? (I shall use the words "press" and "media" to include both the print and electronic media.)

Second, what protection does the Constitution give to the media?

Third, would the media be better protected with an express constitutional guarantee?

Fourth, do the media deserve their freedom?

1. Why is there no express guarantee of the freedom of the press in the Constitution?

An earlier contributor to this series referred the Society to this definition of the word "Constitution" once enunciated by Viscount Bolingbroke:

> "By Constitution, we mean, whenever we speak with propriety and exactness, that assembly of laws, institutions and customs, derived from certain fixed principles of reason ... that compose the general system according to which the community has agreed to be governed."[2]

Mrs Wade added:

> "The written Constitution is only part of the compact between the government or governments and the people."

In this sense the concept of a "Constitution" transcends and means more than a single document. This concept not only includes the State and federal Constitutions, but it also includes the *Statute of Westminster Adoption Act* 1942 and the *Australia Act* 1986. But of course this is not all. It also includes the conventions which govern the exercise of power.

The Constitution thus described can only be understood in its historical context. Unfortunately, our Constitution is not widely understood. I find myself in full agreement with his Honour Mr Justice Kirby when he laments "the shocking level of ignorance about civics [which] reveals itself in what passes for the constitutional debate' in this country".[3]

The French are celebrated for attempting to codify the broad principles of the law, apart from administrative law. In their latest Constitution, *Constitution du 4 Octobre 1958* --the sixteenth -- it seems that even the French leave certain vital matters vague or unsaid. For example, the concept of the President's *domaine reservé*, particularly in matters of foreign affairs and defence, or the apparently unfettered power of the President to dismiss the Prime Minister.[4]

One line of criticism in the present constitutional debate in Australia is that, if we knew nothing about the country and only read the Constitution, we would completely misunderstand our political system. The government would be run, it would seem, by the Governor-General. For example, he could dissolve the House of Representatives at will, and veto any proposed legislation. He could control the army. But as Justice Gaudron notes, "fundamental constitutional doctrines are not always the subject of exhaustive constitutional provision, either because they are assumed in the Constitution or because what they entail is taken to be so obvious that detailed specification is unnecessary".[5]

Rather than trying to fill the Constitution with the assumptions the founding fathers made, as well as with the obvious, it would be preferable to instruct our citizens, particularly our children and our immigrants, about the history of this nation. This should include a study of the institutions and laws we have imported and adapted. Although it may upset some, unless we know the history of the battle between the Parliament and the Stuart Kings, we will never understand our Constitution -- or indeed, that of the United States.

Our British forebears saw no need to put their basic law into one document. When the United States became independent, they adopted a Constitution under which they retained both the rule of law and the need for checks and balances on power. As we know, they gave constitutional effect to the checks and balances in their political system through a formal separation of powers.

This concept of checks and balances was the great contribution of Anglo-American society -- the rejection of the platonic ideal of the guardians, or the ideal benevolent dictators, a theme which flows through Plato, the French revolution, to the 20th Century totalitarian ideologies. As Lord Acton so succinctly put it, "Power tends to corrupt and absolute power corrupts absolutely".

The American founding fathers distributed state power to the three institutions or branches "to save the people from autocracy".[6] They also adopted a Bill of Rights by way of a series of amendments to the Constitution. In fact, without the Bill of Rights there would have been no federation. This contained those rights the former colonists believed they already enjoyed. They now formally declared them, particularly for the purpose of restraining the new federal institutions from abusing them.

And they decided, in the First Amendment, to give constitutional recognition and protection to a fourth unofficial institution, the press. This was to be a formidable check on the power of the new federal state.

They sought to ensure that the press would be free, at least from prior restraint by the federal authorities. They would have agreed with Carlyle, who later wrote:

> "Burke said, there were three estates in Parliament, but in the reporters' gallery yonder, there sat a fourth estate more important far than they all."

So the First Amendment provides that "Congress shall make no law abridging the freedom of speech, or of the press". Justice Brandeis explained the reasons for the First Amendment in these words:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties and that in its government the deliberative forces should prevail

> over the arbitrary. They valued liberty both as an end and as a means. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and the spread of political truths; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty and that this should be a fundamental principle of the American government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognising the occasional tyranny of governing majorities, they amended the Constitution so that free speech and assembly could be guaranteed."[7]

I have no doubt that had the founding fathers of the Australian Constitution heard these words, written three decades after their work, they would have applauded these sentiments.

And why then did they not incorporate the First Amendment into our own Constitution?

There are a number of reasons. The British had learned from their failure to grant freedom to the Americans, so that Canadians, Australians and New Zealanders did not have to fight for their freedom. (Not that the American colonists lived under the yoke of repression -- they were very much autonomous colonies. Two of the colonies even elected their own Governors!) The Australian Constitution was drafted by Australians and for Australians. I have to point this out for the record. Our Constitution was not a British creation imposed by the Foreign Office, as a former Australian Prime Minister claimed.

And in designing our federal Constitution the founding fathers had few models to choose from. Previous constitutional declarations of human rights were at best of neutral effect, at worst abused by tyrants. For example, article 11 of the *Declaration des droits de l'homme et du citoyen du 26 août 1789* certainly guaranteed freedom of expression. It provided:

> *"La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme: tout citoyen peut donc parler, écrire, imprimer librement, sauf à reprendre de l'abus de cette liberté dans les cas déterminés par la loi."*

These fine sentiments were followed by two centuries of uncertainty and chaos. Neither the terror, the Bonaparte dictatorship, the white terror on the Restoration, the second Bonaparte dictatorship, nor later the Vichy dictatorship, respected this guarantee.

And across the Atlantic there was little in the application of the U.S. Bill of Rights which would have encouraged our founding fathers. The leading cases on human rights which we know so well were decided in the twentieth Century, and most in the last half. Perhaps later events justified this restraint on the part of our founding fathers in not rushing to copy the Americans. As Daniel Lazare observes:

> "Over the *longue durée* of the twentieth Century, moreover, the discrepancy between U.S. and British practice [in the field of human rights] is even more striking. Despite the absence of a Bill of Rights and judicial review, the British somehow found it within themselves not to throw thousands of radicals in jail immediately after World War I; not to make hundreds of thousands of arrests as part of an absurd crusade against alcohol; not to hound thousands of

accused Communists out of jobs and into jail in the forties and fifties; and not to arrest millions more people as part of a neo-prohibitionist war on drugs. The United States did all these things and more, despite being blessed with the most glorious Constitution and Bill of Rights since the dawn of creation. Despite the existence of sizeable black communities in Liverpool and London, the British also found it within themselves not to lynch a dozen or more blacks a year during the 1930s.'[8]

But it was not only that on any reasonable assessment, Bills of Rights had not performed; they had even been used to restrain liberal government measures -- for example, factory regulation. The founding fathers rejected the need for a comprehensive Bill of Rights not only for these reasons, but more importantly, because they had confidence in the efficacy of the Westminster system. In the words of Justice McHugh:

"... they did this because they believed in the efficacy of the two institutions which formed the basis of the constitutions of Great Britain and the Australian colonies -- representative government and responsible government -- and because they believed that the interests of the people of the States would be protected by the Senate as the States' house. The result, as Professor Harrison Moore pointed out in *The Constitution of the Commonwealth*,[9] was that:

Further declarations of individual rights, and the protection of liberty and property against the government, are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the Constitution ensures him.' "

Justice McHugh concluded:

"The share in the government which the Constitution ensured was the right to determine who should be the representatives of the people in the Houses of Parliament."[10]

But what then can the people do if their representatives abuse their power? The answer is in the power the people enjoy through the ballot box. As the High Court said almost eighty years ago, if ever the elected representatives were to use their powers "to injure the people ... it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper". [11]

Justice Dawson explained the application of this principle in relation to any unacceptable intrusion into freedom of speech and of the media in these terms:

"The right to freedom of speech exists here because there is nothing to prevent its exercise and because governments recognise that if they attempt to limit it, save in accepted areas such as defamation or sedition, they must do so at their peril ... the fact, however, remains that in this country the guarantee of fundamental freedoms does not lie in any constitutional mandate, but in the capacity of a democratic society to preserve for itself its own shared values."[12]

2. What protection does the Constitution give to the media?

Notwithstanding the absence of an express constitutional guarantee of free speech and of the media, the High Court has in recent years found a freedom of political communication in the federal Constitution, a freedom which of course applies to the media.[13]

After finding a freedom of political communication to be implied in the Constitution, the High Court grappled with the application of this law in two actions for defamation in 1994, *Theophanous*[14] and *Stephens.*[15]

In *Theophanous* the Court established a new constitutional defence in action for defamation. They held that there was implied a freedom to publish material:

(a) discussing government and political matters;

(b) of and concerning Members of the Parliament of the Commonwealth of Australia which relates to the performance by such members of their duties as members of the Parliament or parliamentary committees;

(c) in relation to the suitability of persons for office as members of the Parliament."

They then established the new constitutional defence in actions for defamation where such material was published. This was available if the defendant established that:

(a) it was unaware of the falsity of the material published;

(b) it did not publish the material recklessly, that is, not caring whether the material was true or false; and

(c) the publication was reasonable in the circumstances.

Although the Court ruled in favour of the defendant by a majority of 4 to 3, it decided three years later that the two decisions did not contain a binding statement of constitutional principle. Why? Because one of the judges in the majority, Justice Sir William Deane, would have gone further than the other three, Chief Justice Sir Anthony Mason and Justices Toohey and Gaudron. His Honour had been unable to accept the need for a defendant to have to satisfy the court on "matters such as absence of recklessness or reasonableness" -- that is, the second and third aspects of the defence. However, he decided that the appropriate course was to lend his support to the other three (Mason CJ., Toohey and Gaudron JJ.).

In the next few years, it became clear that some of the other Justices wished to have the question reconsidered. That opportunity arose in two cases, *Lange*[16] and *Levy*.[17]

In these cases the Court accepted the argument that the earlier cases, *Theophanous* and *Stephens,* had in fact established no constitutional principle:

"Although Deane J. may have intended his concurrence with the answers in *Theophanous* to extend to the explanation of them in the joint judgment, the absence of an express agreement with the reasons in that judgment raises a question as to the extent to which he concurred with the terms of the answers."[18]

The reasoning which gave rise to the answers in *Theophanous* therefore had the direct support of only three of the seven Justices.

Lange was a unanimous decision. The Court confirmed that the Constitution intended to provide for the institutions of representative and responsible government. This, Their Honours observed, was made clear by both the Convention debates and by the terms of the Constitution itself. Freedom of communication concerning political or government matters between the electors and their representatives, electors and candidates, and between electors themselves, they ruled, is central to the system of government. The Constitution protects freedom of communication which enables the people to exercise a free and informed choice as electors. This cannot, Their Honours held, be confined to the election period, otherwise electors would be deprived of the greater part of the information necessary to make an effective choice at an election. They then held the common law

rules of defamation, and any statutory law on this, must conform to the requirements of the Constitution.

Whether *Lange* gives a better protection to the media than *Theophanous* has been debated, and will be debated elsewhere. I interpret *Lange* as a counsel to lower courts on the interpretation of defences such as that contained in s. 22 of the *Defamation Act* 1976 (NSW), and on qualified privilege at common law.

Lange differed from *Theophanous* in one particular aspect. The Court now said that the Constitution did not confer personal rights. Rather, it acted as a restraint on legislative or executive power. This case may well have signalled the end of the Court's flirtation with the concept of implied rights.

3. Would the media be better protected under an express constitutional guarantee?

Let me raise the question whether some express guarantee should now be inserted into the Constitution. Today most countries do so, even including dictatorships. For some time even the British have enjoyed access to the European Court of Human Rights, under the *European Convention on Human Rights.* This is now to be incorporated into Britain's domestic law. Australia will then be one of the few countries without a comprehensive Bill of Rights, either in our Constitutions or in our laws. I doubt, however, whether this difference from other countries is of much importance in itself.

The Australian people have only once had the opportunity, since federation, of including a guarantee of free speech and of the press in the Constitution. A proposal was made in 1944 to amend the Constitution to prevent any Parliament from making "any law for abridging the freedom of speech or expression".[19] But this was part of a wider proposal to transfer, for five years, certain State powers to Canberra and was rejected.

The principal issue in the current constitutional debate is whether to remove the Crown from the Constitution. This is proposed to be done in such a way that we will not notice. Under the minimalist proposal there will be an election at a joint meeting of the Parliament with only one candidate, nominated by the Prime Minister. In effect, the candidate will be chosen after a deal between the leaders of the political parties. The proposition that without further and substantial amendment this will not significantly change the office of Governor-General or President is hotly challenged by some, and not only constitutional monarchists. They say that under a minimalist change there will be a significant empowerment of the new President.

But if the change to a minimalist republic were to be benign, as the minimalist Republicans argue, a Bill of Rights would presumably have a more tangible effect. It would affect rights and responsibilities. But there would be a long debate as to what rights should be incorporated into the Bill. When the Government proposed three rights for inclusion into the Constitution in 1988, the right to trial by jury, to freedom of religion, and to fair terms for government acquisition of property by the State, the referendum was overwhelmingly rejected.

But if a referendum to provide an express constitutional guarantee were approved, much would depend on the form of the guarantee and, above all, its interpretation. Perhaps the widest protection for the press is contained in the First Amendment to the U.S. Constitution as presently interpreted by the Supreme Court. It would be more likely that any guarantee would be along the lines of Article XIX of the *International Covenant on Civil and Political Rights*, which provides:

> "1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) for respect of the rights or reputations of others;

(b) for the protection of national security or of public order (*ordre public*), or of public health or morals."

Whatever the form, Parliament could enact this by statute. This of course could be repealed, expressly or by implication. A federal statute, relying mainly on the external affairs power, could restrain the State Parliaments. If the guarantee were along the lines of Article XIX, it is however doubtful whether the States' powers to legislate would be much more restrained than they already are by the present implied freedom of political communication restated in *Lange*.

So would an express constitutional guarantee give greater protection to the media than now exists? Let us assume for the sake of argument that we did import the American constitutional guarantee. In the final analysis, its meaning would still depend on the High Court.

Justice Potter Stewart has explained the purpose for the American First Amendment as part of a deliberately created internally competitive system.[20] These checks and balances were put there to save the people from autocracy. The purpose of the constitutional guarantee of a free press was similar -- to create a fourth institution outside government. This was to be an additional check on the three official branches.

Potter Stewart further says that the Constitution frees the press to do battle against secrecy and deception in government. As Justice Black observed in the *Pentagon Papers Case*:

> "In the First Amendment the founding fathers gave the press the protection it must have to fulfil its essential role in our democracy. The press was to serve the government, not the governors. The government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."[21]

Potter Stewart also warns the press not to expect any help from the Constitution so that it will succeed in its battles with government. Thus the Constitution forbids prior restraints on publication -- except in the rarest of cases. But there is no constitutional right to freedom of information. Nor does the Constitution protect journalists from having to divulge confidential sources except perhaps in limited cases.

While the Constitution therefore frees the press, it does not help it in its battles with the state.

Whether the High Court would interpret a constitutional guarantee any more generously than the present implied protection is not at all clear. Certainly the guarantee would extend to non-political matters. In the United States the doctrine of the "public figure" plaintiff in defamation and privacy cases goes far beyond political figures, which I believe is a weakness. And the U.S. media's protection against defamation actions seems at first glance to be wider than in Australia. Here it is limited to material published in the course of political communication.

But in practice, is the American defence more useful? The freedom is lessened by the propensity of jurors to find in favour of a plaintiff. As a result, the media often appeal on the constitutional aspects of the case.

Now a "public figure" must prove the newspaper acted maliciously. This means the newspaper must have known that the publication was false, or that it was recklessly indifferent as to its truth or

falsity. So the trial typically involves a minute examination of what happened during the news gathering and editorial process. Worse, there is usually a long and highly expensive interlocutory phase. This seems to allow a scattergun approach, indeed a fishing expedition. And the plaintiff's hidden weapon -- or should I say, his attorney's hidden weapon -- centres around the cost rules.

Costs are not awarded against a losing plaintiff. With contingency fees, a plaintiff can litigate without responsibility. Imagine teams of "ambulance chasing" lawyers suggesting to potential clients that they sue for some slight, and being able to offer the plaintiff a complete indemnity from any liability. I can imagine the proposal. "Listen, you stand to gain up to $2,000,000, less of course my percentage. Don't worry, it won't cost you anything. Just sign the contingency fees agreement." So of course the media settles libel cases -- the earlier, the better. The actual burden on the media is heavy.

So in defamation cases at least, I am not confident that the importation of American constitutional law, even with its jurisprudence, would better protect the media -- at least if other aspects of American law and practice came with it.

It could be that in the area of contempt law, and parliamentary privilege, the courts could offer some winding back of the restrictions on the media. Once again, there is no guarantee that this would occur.

A glance at some recent cases where judges have aborted trials because of media reports shows no readiness on the part of at least those judges to allow some relaxation in this area, if such a relaxation were thought desirable.

The one definite advantage of an express guarantee is that it would lock in the protection. The likelihood however of the High Court reversing its unanimous decision in *Lange* is, I suspect, not high -- at least for the foreseeable future.

4. Does the media deserve its freedom?

The Act which established the Authority which I have the honour to chair indicates that the role of the media is to provide entertainment, education and information. To paraphrase the *Letter to the Corinthians*, the greatest of these is to inform. After all, what is the purpose of media freedom if it is not the right of the people to be informed?

Mercifully, we hear no more today of the cultural cringe. But it still lingers, I suspect, in Australians' attitudes to the Australian political system and to our media. The occasional survey of peoples' perceptions of different professions, particularly politicians and journalists, undertaken by *The Bulletin* illustrates this. I shall return to this. In the latest *Silent Majority Report*,[22] six media related issues are identified as among the top 40 problems perceived by Australians. Media issues were never before identified in the 30 years during which the series have appeared.

When I last visited Sir Henry Parkes' office in Macquarie Street, and saw the Old Cabinet Room, I was struck by one thing: that, only a few decades after the founding of the penal colony, our forefathers had established a society which was soon to be in the forefront of the world's advanced democracies.

Almost 170 years ago the sky of Sydney was bright with fireworks and bonfires. Governor Darling had been recalled. The people were not saying a fond farewell. They were saying good riddance.

Governor Darling's attempts to muzzle the Australian press in various ways had proved a failure. His liberal predecessor, Governor Brisbane, and the founding fathers of the free Australian media had triumphed. We should remember them, especially Edward Smith Hall of *The Monitor*, and William Charles Wentworth, who with Robert Wardell together founded *The Australian*.

Not only are we one of the six or seven countries in the world which have enjoyed such a long uninterrupted period of democratic government, we are also one of the few countries which have enjoyed a free media for the greater part of the 19th and so far all of the 20th Centuries.

We are world leaders in political culture and in the media. I read in *The Economist* that the world's media is dominated by the Americans, the British and the Australians! Well, I for one am not ashamed of that. I am proud that Australians are so successful and so innovative. When broadcasting itself was established, we soon moved to a regime where both commercial and independent quality public service broadcasting co-existed. Other countries were to follow us, some of the leading countries of Europe doing this only in the last few years.

And we also lead in self-regulation. I have constantly seen reference to and use of Australian research and experience, including that of the Australian Broadcasting Authority and the Australian Press Council.

We have to accept that the price of a free press is that some of the press will be irresponsible.

Nevertheless, the press, the media has done a great service to this nation. In its best moments it has covered itself in glory -- for example, its work in exposing corruption. Fortunately, corruption is still an aberration here. The media plays an important role in alerting us to this, and of course to any mismanagement in public life.

The only consistent and objective reports on the responsibility of the press and the media generally are in the reports of the Australian Press Council, the Australian Broadcasting Authority and its predecessor.

Those of the Press Council do not indicate a practice of consistent or gross irresponsibility on the part of the press as a whole, or in any section of the press. The Press Council has attempted to verify its own performance, most importantly through an independently managed survey of complainants it undertook in 1996.[23]

This showed that 69 per cent were glad that they had complained to the Press Council. This demonstrates a considerable degree of confidence in the objectivity of the Press Council rulings.

One litmus test of media responsibility is the degree to which it intrudes into personal privacy. Unlike the press of some other comparable countries, the Australian media cannot be said to be an intrusive one. Nor is there a section of the media which practises intrusion to the degree that significant parts of the British and American media do. The recent media intrusion into the personal life of the British Foreign Secretary is inconceivable here. Australian public figures need not lie awake at night wondering whether the media will expose their private lives. (Although the media may well investigate whether they actually paid for their beds from their travel allowances.)

Having praised the Australian media, let me register two reservations.

The first is the phenomenon of the "feeding frenzy" -- which is not only Australian but is a worldwide phenomenon. The second is the need for fairness, especially when the journalist has strong personal views on the matter reported.

The rise of Pauline Hanson is an example of a "feeding frenzy". Now I disagree with the fundamental tenets of Mrs Hanson's policies. For example, I see every advantage from our immigration programme.

But Mrs Hanson is entitled to have a different view. As I have said, the reporting of her rise constitutes, I believe, an example of the phenomenon which Professor Larry J Sabato describes as a feeding frenzy.[24] He defines this as "press coverage attending any political event or circumstances where a critical mass of journalists leap to cover the same embarrassing or scandalous subject and pursue it intensely, often excessively, and sometimes uncontrollably".

L'affaire Hanson was and may still be such a feeding frenzy. A good portion of the reporting exaggerated her message, which was presented in some quarters as if it were the voice of Satan. In fact, her policies are more moderate than those of many right wing parties in Western Europe. Jean

Marie Le Pen, for example, is not only against immigration; he wants immigrants sent back, and their children! Worse, the reporting exaggerated her importance.

Mrs Hanson is, after all, only one independent Member of Parliament. She is in the House of Representatives, where she enjoys no balance of power and where her vote is of no importance. Of our many State and federal politicians she is alone, or almost alone. We shall see how many votes "One Nation" polls in the next elections. I doubt if she will achieve nationally the votes recorded by much more extreme parties in recent elections in Europe. Yet she has been portrayed as if she were an extremely significant politician.

We have had media commentators calling on the Prime Minister to come out hard, to stop her. I asked one how any Prime Minister could have stopped her, what were the few words he should have said. The reply:

> "He should have said on Day One that her views were completely unacceptable in Australian society."

That such a statement would have had any effect in restraining Mrs Hanson from continuing to advance her views is extremely doubtful.

The unfortunate result of this feeding frenzy was that Asian English language newspapers, which serve an élite, finally took notice. How could they not? The frenzy had dominated our media. And the word was passed on. Mrs Hanson was portrayed as a significant and powerful Australian politician, who was enunciating racist views. There was a suggestion that such views were widely held in Australia.

Any damage to Australia was not the result of inaction of the Prime Minister, or indeed of the Leader of the Opposition. It was not even the direct result of Mrs Hanson's words. It was the media indulging in its own fantasies, believing its own stories, which turned Mrs Hanson into a spectre stalking the land.

My second reservation is the need for fairness, especially where journalists and editors feel strongly about the issue. An early example was during the last months of the Whitlam Government. The press was fully entitled to publish the news, which was often unfavourable to the Government, and to take editorial positions. But some went overboard, so determined were they to see the end of that Government. Another was the report that, when the native title legislation passed the Senate, the press gallery stood and applauded. If so, it was both unwise and unprofessional.

As I mentioned, *The Bulletin* regularly publishes surveys of the public's assessment of the integrity and honesty of different professions. Professors, I must say, are ranked quite high, as are judges. But journalists are ranked low, especially print journalists. I think, unfairly so. Yet it cannot be that they intrude excessively into people's privacy -- they have a much better record on this than those of other countries.

Perhaps it is because of the feeding frenzies. But these are not so common. I suspect that it may be a perception of unfairness, perhaps of bias.

There is obviously a fine line between reporting the news and great national debates, and weighting that reporting too heavily on one's own side.

Professor Henningham's survey of journalists suggests a substantial difference of opinion between journalists and members of the public on a wide range of issues.[25] For example:

	Percentage in favour	
	blic	**journalists**
death penalty	60	21
royalty	46	25
strikes	19	45

If there is such a divergence on an issue, then there is a corresponding obligation on the media to present the news on any such issues fairly, and to report both sides of great national debates.

Let me give a current example. We are about to elect our Constitutional Convention. We know that much of the media today supports a change to a republic. There is then an onus on the media to ensure that their reporting of the campaign, and of the issues, is fair. That is, after all, the essence of our national identity, expressed in the *argot* -- "a fair go".

If the story were merely about a factional branch in a political party, we would still expect that it be reported fairly.

But this is about a fundamental aspect of our Constitution, about the removal of one of the pillars of the "indissoluble federal Commonwealth under the Crown" which our forefathers established. A change of such importance needs not only to be carefully considered. It also needs to be reported fairly. The public is entitled to be informed, particularly on that part of the debate which relates to the checks and balances in the Constitution. (I must admit a personal interest in this -- I am a candidate in the election.)

But I return to my original assessment. That is that, while not perfect, the Australian media has acquitted itself well.

Let me conclude with one point that I made frequently as Chairman of the Press Council. Whatever the faults of the media in departing from the highest ethical standards, they cannot be cured by state regulation, which in any event would run the risk of breaching the Constitution.

As that great liberator, himself a journalist and a lawyer, Mahatma Ghandi wrote:

> "The sole aim of journalism should be service. The press is a great power, but, just as an unchained torrent submerges the whole countryside and devastates crops, even so an uncontrolled pen serves but to destroy. If the control is from without, it proves more poisonous than want of control. It can be profitable only when exercised from within."

Endnotes:

1. It is, in fact, Mr Kerry Packer, although Professor Flint was far too courteous to say so. (Editor).

2. Hon. Jan Wade, MLA, *The Future of the Federation*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 6 (1995), ix at xxiii.

3. Hon. Justice Michael Kirby, speech at Queensland University of Technology, 16 August, 1997.

4. Pierre-Henri Chalvidan, *Droit Constitutionel*, Nathan Université, Paris (1996), p. 223.

5. *Australian Capital Television Pty Ltd v. Commonwealth of Australia* (1992) 177 CLR 106, 209.

6. *Myers v. United States* (1926) 227 US 52, 243 per Brandeis J..

7. *Whitney v. California*, 274 US 357 at 375, Brandeis J. concurring.

8. Daniel Lazare, *The Frozen Republic*, Harcourt Brace, Orlando, Florida (1996), pp. 216-217.

9. Harrison Moore, *The Constitution of the Commonwealth* (2nd edition, 1910), p. 78.

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