# Chapter 7

# Australia's taxation system and legal framework, and the potential for indirect assistance measures

7.1 This chapter discusses potential reforms to Australia's taxation and legal systems that could encourage a healthy and prosperous public interest journalism sector.

7.2 It first discusses a number of potential amendments to Australia's tax settings that were proposed in evidence received by the committee, which could encourage an innovative not-for-profit news media sector. Proposal suggested that this would be achieved by incentivising private philanthropy for not-for-profit media, offsetting the employment of journalists for some companies, and broadening eligibility for Australian consumers to claim tax rebates for new or ongoing news subscriptions.

7.3 The chapter then outlines potential reforms to Australia's legal framework raised in evidence, particularly in the areas of national security, libel and freedom of speech, as well as through whistleblower protections and shield laws for journalists.

7.4 Lastly, this chapter briefly discusses a number of other measures proposed by submitters regarding Commonwealth protocol or administration.

## General support for indirect measures

7.5 Whereas there were divergent views on whether the Commonwealth should use direct subsidies to encourage public interest journalism, as discussed in the last chapter, witnesses and submitters to this inquiry were overwhelmingly in favour of the Commonwealth investigating the use of indirect measures, particularly those potentially on offer through reform of our tax and legal systems.

7.6 The Australian Treasury noted that the Commonwealth has already instigated some tax measures 'that benefit a broad range of entities, including those that may undertake public interest journalism', including:

- Reducing the corporate tax rate;
- Lifting the annual turnover limit from $2M to $10M [i.e. the threshold for entities to claim lower corporate tax rates] and expanding access to concessions for small businesses;
- Increasing the unincorporated tax discount for small business; and
- Extending the $20,000 instant asset write-off to 30 June 2018.[1]

7.7 However, it was repeatedly put to the committee that these measures could be supplemented by new policy, particularly indirect measures encouraging market-based solutions to a disrupted media sector. This, it was argued, would minimise the risk of impinging on the freedom and independence of the press or distorting the market

1 The Treasury–answers to questions on notice (received 22 December 2017), p. 1.

unnecessarily, noting that direct subsidies had the potential to compromise–or raise serious questions about–editorial independence.[2] Additionally, some witnesses and submitters suggested that indirect measures would be able to be implemented at a low cost to the Commonwealth Budget, and perceived more favourably by the general Australian public than direct subsidies.[3]

7.8 Ms Megan Brownlow, a partner with PwC with long experience consulting on the media sector, noted that the Commonwealth had used indirect measures successfully to support other industries, which shifted decision making to the market, rather than using direct measures that could interfere with editorial independence:

> So in the film and television production sector, for example…we have shifted Screen Australia from a very direct approach of subsidising film and television to a much more indirect market-driven approach that you would have to say, on all assessment, is really successful. That is where there are production offsets and tax rebates for supporting Australian productions that are great employers of Australians. They are the sorts of solutions, I think, that would probably meet with favour by Australians.[4]

7.9 Regarding proposals to encourage a healthy public interest journalism sector through indirect measures, Professor Lawrie Zion, the Lead Chief Investigator of the New Beats Project, noted:

> I certainly think that those kinds of models or suggestions should be really seriously considered, because it is really clear that not doing anything at all is going to continue to have really adverse consequences. I also appreciate that the range of options offer a mixed bag of different approaches. And you need to get something, as I think I heard the committee say earlier, with a revenue neutral kind of outcome as well. But it certainly makes sense to me to investigate what pulling particular levers will do for the sustainability of journalists' employment.[5]

7.10 Some evidence suggested that tax reform alone would not address the challenges the media sector faces. For instance, even though Mr Greg Hywood, the Chief Executive Officer and Managing Director of Fairfax Media, voiced general support or the Commonwealth considering tax support for the sector, he argued that,

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2 For general support for indirect measures see: Dr Colleen Murrell, Co-Secretary, JERAA *Committee Hansard*, 11 July 2017, pp. 49–50; Ms Jacqui Park, CEO, Walkley Foundation, *Committee Hansard*, 22 August 2017, p. 36; Mr Paul Murphy, Chief Executive, MEAA, *Committee Hansard*, 17 May 2017, p. 12; Ms Megan Brownlow, Partner, PwC, *Committee Hansard*,11 July 2017, p. 4. See also Mr Ray Bange, *Submission 47*, p. 8; michaelwest.com.au, *Submission 22*, p. 6; The District Bulletin, *Submission 23*, p. 1; Professor Peter Fray and Professor Derek Wilding, *Submission 34*, pp. 6–7.

3 See, for example, Ms Brownlow, Partner, PwC, *Committee Hansard*, 11 July2017 , p. 5; Mr Tim Burrowes, Founder and Content Director, Mumbrella, *Committee Hansard*, 11 July 2017, p. 5; Dr Christopher Berg, *Submission 16*, p. 5.

4 *Committee Hansard*, 11 July 2017 , p. 4

5 *Committee Hansard*, 21 August 2017, pp. 55–56.

absent reform to Australia's media laws, this would do little to 'level the playing field':

> As a commercial organisation our priority is to compete effectively with all comers. That is what the Australian media needs now. It needs a level playing field. We have media legislation at the moment which was put in place effectively prior to the advent of the internet. It has diversity at its centre. Diversity is no longer an issue; people can get content from wherever they want globally. The issue is scale and whether media organisations in this country can work together—who knows what the mix would be—to get the right range of assets across multiple platforms to compete at scale with the major international over-the-tops: Google and Facebook. That is the essential bottom line. Unless we can compete effectively, tax breaks here and bits and pieces there are not going to address the fundamental problem.[6]

## Adjusting Australia's tax system

7.11 There was a general consensus in the evidence considered by the committee that the Commonwealth could adjust the tax system in a number of ways to create the conditions for a more vibrant and innovative news media sector, including by:

- Extending Deductible Gift Recipient (DGR) status for organisations producing public interest journalism, particularly the not-for-profit sector;
- Offering accelerated tax write-offs or concessions for media companies employing journalists, which could be modelled on the research and development tax incentive (R&DTI) available for business sector; and
- Broadening eligibility for tax rebates for subscriptions to news publications online for all Australians, as well as for DGR donations to eligible media outlets.

### *Deductible Gift Recipient (DGR) status*

7.12 The committee heard compelling evidence that the health of public interest journalism could be reinvigorated through the provision of tax concessions for philanthropic donations to not-for-profit producers of quality journalism. The easiest way to do this would be by making it easier for some types of media organisations to claim DGR status, particularly not-for-profit organisations, to encourage diversity and sustainable business models in the public interest journalism sector.[7]

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6 *Committee Hansard*, 17 May 2017, p. 21.

7 See, for example, Dr Bill Birenbauer, *Submission 1*, p. 4; Public Interest Journalism Foundation, *Submission 13*, p. 18; michaelwest.com.au, *Submission 22*, p. 6; Professor Peter Fray and Professor Derek Wilding, *Submission 34*, p. 7; JERAA, *Submission 39* attachment 1 ('Support for public interest journalism–an international summary'), pp. 34–35; Independent Australia, *Submission 55*, pp. 5–6; Mr Andrew Elder, *Submission 61*, p. 5; The Conversation, *Submission 68*, p. 5; Dr Christopher Berg, Senior Fellow, Institute of Public Affairs, *Committee Hansard*, 21 August 2017, pp. 18 and 23.

7.13 It was argued that this reform would make it more attractive for private and corporate donors to make philanthropic donations to eligible media providers, and in turn revitalise Australia's journalism sector, as similar policies have done in the US.

7.14 For example, the Journalism Education and Research Association of Australia (JERAA) noted that there would be benefits in making donations to 'non-profit or low-profit journalism organisations tax-deductible or exempt'. It highlighted that the US example had revitalised journalism there, and that this had not only been recognised by the media sector, but also by the US government:

> The fact that donations to non-profit media are tax-deductible serves as an incentive for citizens to lend financial support to organizations whose missions they value.[8]

7.15 A number of other small media organisations noted that DGR status would benefit them significantly and more broadly encourage diversity of local media voices and a more informed general public.[9] For example, Mr Jack Latimore, representing Indigenous X, observed that his organisation's lack of DGR status had dissuaded potential donors who had inquired about making contributions.[10]

7.16 Dr Bill Birenbauer noted that only a few Australian media organisations had been granted DGR status by the Australian Tax Office (ATO), as the current eligibility criteria 'do not fit well with the purpose and functions of news organisations'.[11]

7.17 The Conversation is one of the few media organisations to have DGR status. It submitted that this status was also a way of reinforcing its accountability mechanisms, as it required a reputation for quality and reliability among its readers and donors:

> The deductible gift recipient status granted to The Conversation by the ATO has been useful in enabling The Conversation to raise much-needed funds from our audience. This is a particularly effective way of supporting public interest media because there is an accountability mechanism built in: success in raising donations depends, at least in part, on the media outlet's ability to generate trust among readers.[12]

7.18 Submitters addressing DGR status were generally supportive of limits to eligibility for DGR status, to ensure that the measure was focussed and effective. For example, Dr Birenbauer submitted that the Commonwealth should make eligibility for DGR status contingent on a number of governance and ethical conditions, to ensure

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8 *Submission 39* attachment 1 ('Support for public interest journalism–an international summary'), pp. 34–35, citing the US Federal Communications Commission, *The information needs of communities: The changing media landscape in a broadband age* (2011).

9 See, for example, Indigenous X, *Submission 42*, p. 6; Independent Australia, *Submission 55*, pp. 5–6.

10 *Committee Hansard*, 21 August, p. 7.

11 *Submission 1*, p. 4.

12 *Submission 68*, p. 5.

journalistic products were consistent with industry standards and free from editorial interference:

> In order to qualify for such status, non-profit media organisations should be properly constituted with boards and should be staffed by journalists who adhere to the MEAA's code of ethics. Conditions for tax deductibility would include that the centres adopt normal journalistic practice and make editorial decisions independent of funders.[13]

7.19 Professor Birenbauer set out a number of conditions that he judged should be satisfied by any applicant for DGR status:

> - The history and background of the applicant as a journalist, particularly adherence to professional and ethical standards.
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> - The applicant's ability to produce investigative and public interest journalism.
>
> - Whether the organisation has editorial processes that create stories that are in the public interest and educate audiences rather than covering news of popular interest.
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> - Introducing a commitment that funding sources, including publication of the identities of donations of more than $1000, be published on the non-profit's website.
>
> - A commitment to publish on their websites information about spending and revenue, as provided each year to the ATO and/or the Australian Charities and Not-for-Profits Commission.
>
> - Individuals and organisations that advocate particular causes should not be granted DGR status under any media category. The guidelines used by the IRS are useful in this regard.
>
> - Anonymous grants or funding from political and other entities where the source of the funding is not transparent should be banned.[14]

7.20 Professor Peter Fray and Professor Derek Wilding proposed that DGR status could be contingent on media organisations providing 'proof of overt innovation and 'public service' if not 'public interaction' as a pre-requisite'.[15]

7.21 Dr Christopher Berg, a Senior Fellow at the Institute of Public Affairs, advised that, even though DGR status had 'much to recommend it'–even for overtly political not-for-profit organisations–the Commonwealth should be careful about the benchmarks used for eligibility and the nature and operational guidelines of the designated approving body:

> DGR status would be available to media outlets professing any political slant. DGR status would encourage media firms to self-fund, to be accountable to their supporters and readers, and it would not constitute a

13 *Submission 1*, p. 5.

14 *Submission 1*, p. 6.

15 *Submission 34*, p. 7.

> direct call on public revenue. One concern with this model, however, is that it would require an authority to decide which media outlets are legitimate public interest journalism outlets and which are illegitimate ones. Poorly designed, this could easily transform into a de facto licensing body through which the government may be able to exert some influence over the press.[16]

7.22 A number of submissions highlighted the successful US model of encouraging philanthropic funding of media not-for-profits by offering tax breaks. Dr Birenbauer provided a comprehensive outline of the ways that this system is overseen by the US tax department, the Inland Revenue Service (IRS), which has:

> …four-part test to determine if activities by news organisations are educational. First, that the content of the publication was educational; second, the preparation of the material followed methods generally accepted as educational in character; third, the distribution of the materials was necessary or valuable in achieving the organisation's educational and scientific purposes; and fourth, the manner in which the distribution was accomplished was distinguishable from ordinary commercial publishing practices.[17]

7.23 In this, Dr Birenbauer noted that the IRS also has stringent criteria to distinguish 'education' from 'advocacy':

> 1. Whether a significant portion of the communication consisted of 'viewpoints unsupported by a relevant factual basis';
>
> 2. Whether the facts relied on are 'distorted';
>
> 3. Whether the organisation 'makes substantial use of inflammatory and disparaging terms, expressing conclusions based more on strong emotional feelings than objective factual evaluation', and
>
> 4. Whether the 'approach to a subject matter is aimed at developing an understanding on the part of the addressees, by reflecting consideration of the extent to which they have prior background or training'.[18]

7.24 Dr Birenbauer also commented that the government could consider allowing DGR organisations to carry advertisements, as long as the amount was considered 'insubstantial' and any profits declared and accounted for as unrelated business tax. He also noted that not-for-profit media organisations were not able to participate in political campaigns, promulgate 'propaganda', or attempt to influence legislation– although this was 'not absolute'.[19]

7.25 The Treasury provided the following information to the committee on notice, regarding the ability of some media companies to seek DGR status:

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16 *Committee Hansard*, 21 August 2017, p. 18.

17 *Submission 1*, p. 3.

18 See Dr Bill Birenbauer, *Submission* 1, pp. 2–3; see also, for example, michaelwest.com.au, *Submission 22*, p. 5

19 *Submission 1*, p. 3.

> Organisations providing public interest journalism have the ability to seek DGR status under the existing legislative framework.
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> DGRs can either be endorsed under a general category or specifically listed in the tax law.
>
> While there is no specific general category of DGR endorsement for media organisations, media organisations can seek DGR status if they meet the requirements of one of the established general categories or through specific listing in the income tax law.
>
> For example, some media organisations may be endorsed as a DGR through listing on the Register of Cultural Organisations (ROCO).
>
> The Minister for Revenue and Financial Services and the Minister for the Arts approve new additions to the ROCO, and the Department of Communications and the Arts administers the ROCO.
>
> Alternatively, organisations can seek to be specifically listed as a DGR by name where an organisation is unable to be endorsed under one of the general categories.
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> For example, the Conversation (registered as the Conversation Trust), a media outlet that publishes news and views sourced from the academic community, has DGR status through specific listing.
>
> For an organisation to become a DGR listed by name, Parliament must amend the tax law to include the name of the organisation in the law.
>
> As noted above, public interest journalism organisations have the ability to seek DGR status under the existing legislative framework.
>
> The Australian Taxation Office (ATO) is responsible for endorsing organisations as DGRs under the general categories. Generally, the Australian Charities and Not-for-profits Commission (ACNC) does not have a direct role in DGR endorsement.[20]

### *R&DTI-style accelerated tax write offs for organisations employing journalists*

7.26 There was a great deal of support in evidence for the Commonwealth to consider offering tax concessions to media companies employing journalists, as a cost-effective, targeted means of encouraging a reinvigorated public interest journalism sector.[21]

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20 The Treasury–answers to questions on notice (received 22 December 2017), pp. 4–5.

21 As well as the examples cited below, see: Mr John Jo (JJ) Eastwood, Chief Executive Officer, HuffPost Australia, *Committee Hansard*, 17 May 2017, p. 52; Ms Megan Brownlow, Partner, PwC, *Committee Hansard*, 11 July 2017, p. 4; Professor Matthew Ricketson, *Committee Hansard*, 21 August 2017, p. 6; Mr Paul Murphy, Chief Executive, MEAA, *Committee Hansard*, 22 August 2017; JERAA, *Submission 13*, p. 18.

7.27 Some advocates suggested this could be modelled on the R&DTI tax concessions already offered by the Commonwealth.[22] This incentive tax is jointly administered by the Australian Tax Office (ATO) and the Department of Industry, Innovation and Science.[23] It is designed to encourage companies to boost competitiveness and improve productivity across the Australian economy by:

- encouraging industry to conduct R&D that may not otherwise have been conducted;
- improving the incentive for smaller firms to undertake R&D; [and]
- providing business with more predictable, less complex support.[24]

7.28 The Treasury noted that some media organisations may already be eligible for the R&DTI:

> …if they were developing new software, technologies or platforms. The Australian Taxation Office and AusIndustry have released extensive guidance in respect of what activities may qualify.[25]

7.29 The Public Interest Journalism Foundation also advised that the tax offsets for Film Industry support outlined in the *Income Tax Assessment Act 1997* provide a model for a tax mechanism to strengthen support journalism.[26]

7.30 In particular, the committee explored the following model, which it put to a number of witnesses: offering a 40 per cent write-off for up to $2.5 million spent on employing journalists, which would give up to $1 million of deductions on the R&DTI model, with a threshold of at least $300,000 turnover at the lower end for eligibility, and a maximum $25m turnover ceiling for larger organisations.[27]

7.31 Mr Paul Murphy, the Chief Executive of the Media, Entertainment & Arts Alliance (MEAA), suggested that tax incentives for employing journalists would be a

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22 The Public Interest Journalism Foundation highlighted Division 376 of the Income Tax Assessment Act as being a potential model to support public interest journalism, *Submission 13*, p. 18

23 Australian Taxation Office, *Research and development tax incentive, About the program*, www.ato.gov.au/business/research-and-development-tax-incentive/about-the-program/ (accessed 13 December 2017).

24 Australian Taxation Office, *Research and development tax incentive, About the program*, www.ato.gov.au/business/research-and-development-tax-incentive/about-the-program/ (accessed 13 December 2017).

25 The Treasury–answers to questions on notice (received 22 December 2017), p. 5.

26 Division 376–2 of the *Income Tax Assessment Act 1997* outlines these refundable tax offsets for Australian expenditure on: making an Australian film (the 'producer offset' of 40 per cent for feature films and 20 per cent for other films); any film (the 'location offset' of 16.5 per cent of the company's qualifying Australian production expenditure); and for expenditure on post, digital and visual production (the 'PDV offset' of 30 per cent of the company's qualifying Australian production expenditure in relevant areas).

27 For example, see *Committee Hansard*, 22 August 2017 pp. 35–36; pp. 16–17; and pp. 53–54.

way of assisting the media sector to become more flexible in addressing the pressures of technological and structural change:

> On the surface, I think that sounds like a very attractive idea and a very appropriate one, particularly in an industry that is experiencing such rapid technological change and development. The way that you distribute your content is changing all the time. In that context, that idea sounds like one that is very worthwhile investigating.[28]

7.32 Mr Misha Ketchell, the Editor of The Conversation, thought offering tax incentives to employ journalists would be a practicable and positive step towards addressing the challenges to the media industry from digital disruption:

> I think that's an excellent idea. I think it's excellent for two reasons, one of which is that it's a practical mechanism I could see working. The other is that it goes to the heart of the changes that have got us to the situation where we feel that there is an issue around public interest journalism. That is that the digital disruption has displaced the role of professional journalists as information handlers, as honest brokers, as people who will sort out what is reliable, what you can trust and what you can't…Something that goes to the heart of targeting that journalistic function is employing individuals whose role is to sort information, to check it, to make sure it's accurate and to disseminate it, I think, sounds like a very innovative and potentially desirable way forward.[29]

7.33 Ms Rebecca Costello, the Chief Executive Officer of Schwartz Media, outlined the substantial benefits that would accrue to her organisation from R&DTI-style tax breaks:

> For us, something like a 40 per cent tax offset for the first $2.5 million spent on our journalism would allow for rich newsrooms. It would allow us to bring on more people and to invest in training the next generation of journalists. It would allow us to break more stories. It would also allow us to commit to stories that are important but expensive. This is where the country's press is strained and where it needs to be repaired. As it stands, on the margins we operate, we might look at a story that will cost $20,000 or $30,000 to cover and decide that we cannot commit to it. An important issue will go unreported as a result or will be not reported as deeply as it could be. This is where we, as small publishers, need assistance. This is where we will spend money and produce better journalism.[30]

7.34 Ms Costello indicated that this measure would allow her organisation more space in their operational budget to expand the size of its publications with more stories, and perhaps consider publishing more often. Additionally, she highlighted that it could assist in developing a cadet program to develop young journalists.[31]

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28 *Committee Hansard*, 17 May 2017, p. 18.

29 *Committee Hansard*, 21 August 2017, p. 34.

30 *Committee Hansard*, 21 August 2017, p. 39.

31 *Committee Hansard*, 21 August 2017, p. 39.

7.35 Representatives of Crikey told the committee that this kind of initiative would 'help us enormously' as most of its resources were spent on employing journalists.[32]

7.36 Mr Ben Taylor, the President of the Country Press Australia (CPA), suggested that these kinds of tax breaks would be welcomed across the CPA's membership, and were worthy of further consideration by the Commonwealth. However, he did express some concerns that the threshold for eligibility should be set with consideration for smaller papers with a circulation of under 2,000 per week (which he noted would translate to an annual turnover of under $350,000).[33]

7.37 Some evidence questioned whether R&DTI-style tax incentives would genuinely encourage a healthy, innovative and vibrant news media sector. Dr Berg, opposed the idea of offering R&DTI-style concessions for employing journalists, advising that other measures would be more effective with less risk of compromising the freedom of the Fourth Estate.[34]

7.38 Mr Gerard Ryle, the Director of the International Consortium of Journalists, suggested R&DTI rebates would simply support existing organisations rather than encouraging new enterprises or innovation:

> …I would be worried that what you are doing there [with tax concessions for employing journalists] is really propping up existing players. If you are here to help journalism, then you have to make it easier for journalists to be journalists.[35]

### *Tax deductible expenditure for consumers*

7.39 Many Australians are already eligible to claim rebates on work-related expenditure on news media subscriptions and periodicals as part of their annual tax return.[36] There was some support for the eligibility for these rebates to be broadened, to encourage more people to invest in subscriptions or memberships for news providers, and thereby contribute to the financial stability of many organisations delivering public interest journalism.[37]

7.40 For example, the MEAA stated that:

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32 Ms Tamsin Creed, General Manager, Private Media and Ms Cassidy Knowlton, Editor, Crikey, *Committee Hansard*, 21 August 2017, pp. 27–28.

33 *Committee Hansard*, 21 August 2017, p. 59.

34 *Committee Hansard*, 21 August 2017, p. 23.

35 *Committee Hansard*, 22 August 2017, p. 55.

36 See ATO, *Books periodicals and digital information*, www.ato.gov.au/Individuals/Income-and-deductions/Deductions-you-can-claim/Other-deductions/Books,-periodicals-and-digital-information/ (accessed 14 December 2017).

37 See, for example, Mr Paul Murphy, Chief Executive, MEAA, *Committee Hansard*, 17 May 2017, p. 12; Ms Megan Brownlow, Partner, PWC, *Committee Hansard*, 11 July 2017, p. 5; Ms Denise Shrivell, Founder, Mediascope, *Committee Hansard*, 11 July 2017, p. 13; Ms Cassidy Knowlton, Editor, Crikey, *Committee Hansard*, 21 August 2017, p. 26.

> We do think we should look at the issue of tax deductibility for new subscriptions for individual members of the public who take out subscriptions to established news services….[38]

7.41 Ms Brownlow thought that tax breaks for consumers would be popular with many Australians, and could be a good incentive for consumers to pay for access to news once again:

> My initial reaction is that individual Australians do love a tax break. It is about consumer psychology. There is no sensible reason why we are perfectly willing to step across the road and pay $3.50 for a coffee, yet many people are not prepared to buy a newspaper anymore….If we can give people a way of reframing how they are spending their money, even when it is relatively small amounts, that does instinctively feel like quite an interesting idea.[39]

7.42 However, Ms Costello suggested this measure would only have a limited effect, as many subscribers could already claim media subscriptions as tax deductions:

> I suppose it's absolutely a factor, but, with the industries that our audience work in, the majority of those readers would have that benefit based purely on the industry that they're in. From the research we've conducted through the 20,000 readers we've surveyed over the last two years, we know that the industries that they're in–the media, politics and education–are all areas where they would probably be able to do that. But that's certainly an option.[40]

7.43 In answers to questions on notice, Treasury commented that tax deductions could be claimed already 'for expenses incurred while producing income', although noted that the Commonwealth does not maintain figures on the cost of these deductions to the Budget.[41]

## Australian laws that potentially restrict public interest journalism

7.44 Some submitters suggested that some elements of Australia's legal framework had a 'chilling' effect on journalists reporting freely in the public interest. These included: recent reforms to national security legislation; defamation and libel provisions, as well as inconsistency across jurisdictions; shield protection and whistleblower provisions covering journalists and their sources; as well as copyright provisions.[42]

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38 Mr Paul Murphy, Chief Executive, MEAA, *Committee Hansard*, 17 May 2017, p. 12.

39 Ms Megan Brownlow, Partner, PWC, *Committee Hansard*, 11 July 2017, p. 5.

40 *Committee Hansard*, 21 August 2017, p. 39.

41 The Treasury–answers to questions on notice (received 22 December 2017), p. 5.

42 Professor Mark Pearson, *Committee Hansard*, 11 July 2017, pp. 32–33 (see also his *Submission 7*); Australian Lawyers' Alliance, *Submission 24*, p. 7; Public Interest Journalism Foundation, *Submission 13*, p. 4; MEAA, *Submission 64*, pp. 24–25.

7.45 The broad range of laws that potentially impinged on journalists was outlined by Professor Mark Pearson, a Professor of Journalism and Social Media at Griffith University:

> The key areas of the law that I see as problematic are clearly the suite of national security laws, which, interestingly enough, do have an independent national security monitor as an interface between the public and the parliament on the application of those laws. Other Commonwealth laws include consumer law, privacy law and intellectual property law. Then you start going into state laws like defamation, for which there are uniform defamation laws–not totally uniform. The Commonwealth have played a key role in making them relatively uniform through the former COAG system. Then you get the various areas of the common law that apply to the media as well. I neglected to say two important Commonwealth laws there: the evidence law to do with source protection for journalists, which some of you senators would have been involved with in its more recent iteration; and, of course, freedom-of-information laws, which impact upon journalism…and whistleblower protection laws, which interface to some extent with the journalism source protection laws.[43]

7.46 Professor Pearson provided some examples of how these laws prevented journalists from investigating and writing significant stories:

> The legal impediments are so important and occupy so much time. You have someone like the former *Four Corners* journalist Chris Masters who spoke to students and said that he was spending–I forget the percentage he said–a large percentage of his time dealing with lawyers trying to navigate all these different laws for important parts of journalism. He would have created much more public interest journalism if he hadn't had to deal as often with lawyers and spend as much time there, let alone the times he was having to appear in court to defend his work.[44]

### *Impact of new national security laws on journalists*

7.47 Ms Anna Talbot, a Legal and Policy Adviser for the Australian Lawyers Alliance (ALA), outlined to the committee the importance of freedom of expression to public interest journalism:

> Public interest journalism shines a light on government and ensures that it operates within the confines of the law and in the public interest. True accountability…requires vigilant protection of the rights to both freedom of speech and privacy for both journalists and the general population. Journalists should not be punished for any public interest reporting that might cause embarrassment or reveal human rights violations, misappropriation, gross inefficiency or other wrongdoing. They should be able to speak freely with sources who provide such information, and the sources themselves should not risk criminal sanctions for revealing the crimes or wrongdoing of government actors. That is one of the reasons why

43 *Committee Hansard*, 11 July 2017, p. 32.

44 *Committee Hansard*, 11 July 2017, p. 35.

> we think it is important to consider the broader legislative context in which journalists operate.[45]

7.48 The ALA submitted that the recent passage of national security laws undermined public interest journalism by compromising freedom of expression and restricting how journalists can report on particular issues:

> The Commonwealth government has passed a swathe of laws in recent years that restricts the ability of journalists and others to report on matters that are in the public interest. These laws fall into two broad categories: those that restrict the ability of journalists to report on certain facts, and those that undermine the ability of journalists to communicate confidentially with their sources.[46]

7.49 These laws, the ALA submitted, have come about partly through amendments to the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) and the *Australian Border Force Act 2015* (Border Force Act).

7.50 The ALA argued that Section 35P of the ASIO Act, under which persons who reveal information about special intelligence operations are liable for a maximum five-year prison sentence, does not include a public interest exception, and does not require that national security be compromised by the disclosure. It noted the *Public Interest Disclosure Act 2013* provides only limited protections for whistleblowers disclosing information related to the above acts. The ALA proposed that all reporting on these issues should be considered legal unless there is a demonstrable threat to national security.[47]

7.51 Despite recent reforms Dr Andrew Morrison, a Spokesperson for the ALA, was concerned that the current iterations of the ASIO and Border Force Acts would continue to:

> …inhibit whistleblowers, public comment and the disclosure of information which would generally be in the public interest and yet would not, in practice, have any significant effect upon national security or, indeed, border force operations in the true sense.[48]

7.52 The ALA also expressed its concern that, under the *Telecommunications (Interception and Access Act) 1979*, ASIO and enforcement agencies may access metadata stored by telecommunications providers without a warrant. The metadata could include information such as who a person has contacted and, if they are using a mobile device, the location of the individual.[49]

7.53 Although a provision of the Act limits access to metadata regarding journalists, the ALA suggested that the definition of journalist was unclear and would

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45 *Committee Hansard*, 23 November 2017, p. 7.

46 *Submission 24*, p. 4.

47 *Submission 24*, p. 13.

48 *Committee Hansard*, 23 November 2017, p. 11.

49 *Submission 24*, pp. 8–9.

likely not 'provide sufficient protection to everyone who engages in public interest journalism'.[50] The ALA noted a case in 2017 in which an AFP officer requested and obtained the call records of a journalist without a warrant, without facing any disciplinary consequences.[51]

7.54 The ALA advised the committee that freedom of speech laws should be consistent across different areas of application:

> There does seem to be a bit of a disconnect in focusing on the importance of freedom of speech in particular areas and yet having limitations on other areas. Clearly the most important thing is for law to be applied evenly across the different subject matters, whether it's unionism, national security or border protection. Clearly, there are some sensitivities around that, but, to have the fundamental premise of freedom of speech being the presumption and then any limitation on that being clearly demonstrably necessary in proportion to the risks that are faced is essential for the integrity of the legal system more broadly, and for the integrity of the journalists' ability to report fairly and freely on government activities.[52]

### *Defamation and freedom of speech laws*

7.55 A significant number of witnesses and submitters stated that Australia's defamation and libel laws played a significant part in curtailing journalists' efforts to pursue public interest stories.[53] This was not necessarily due to the damages awarded for publication of material found to be libellous, but the legal costs of defending defamation cases.

7.56 Professor Michael West, an investigative journalist with two decades of experience working for large Australian mastheads, submitted that Australia's defamation framework was far more restrictive for journalists than the US model:

> In Australia journalists can be sued whether a story is true or not. The costs of paying lawyers and defending lawsuits are prohibitive. Law firms are shutting down bloggers. Even the threat of litigation is often enough to deter journalists from writing the truth. It leads to self-censorship.

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50 *Submission 24*, pp. 8–9.

51 Luke Royes, 'AFP officer accessed journalist's call records in metadata breach', *ABC Online*, 29 April 2017, http://www.abc.net.au/news/2017-04-28/afp-officer-accessed-journalists-call-records-in-metadata-breach/8480804 (accessed 4 January 2018).

52 *Committee Hansard*, 23 November 2017, p. 9.

53 See, for example, Ms Rebecca Costello, Chief Executive Officer, Schwartz Media, *Committee Hansard*, 21 August 2017, p. 41; Schwartz Media, *Submission 10*, pp. 1–2; Mr Ian Skurrie, *Submission 33*, p. 2; Professor Peter Fray and Professor Derek Wilding, *Submission 34*, p. 12; Freeline Group, *Submission 51*, p. 3; Ms Prue Davidson, *Submission 52*, p. 6; Ms Sally McCausland and Mr David Vaile, *Submission 53*, p. 2; MEAA, *Submission 64*, pp. 24–25.

> In the US, it is far harder to sue journalists. The bar is higher and requires evidence of malice on the part of the journalist rather than claims of reputation damage.[54]

7.57 Dr Berg also suggested that some features of Australia's legal system made it difficult for private media organisations to compete on a level playing field, in particular its 'onerous defamation law', as well as section 18C of the Racial Discrimination Act.[55]

7.58 The Freeline Group and Independent Australia both made submissions that drew out the significance of this for journalists who were not backed by a major publication and independent publishers. Independent Australia wrote:

> Lastly, a reform of defamation law would also encourage public interest journalism. Since journalists can be sued regardless of whether a story is accurate, they are often reticent to investigate sensitive issues or powerful people. Legislation should protect the ability of the fourth and fifth estates to expose truth, especially with regard to powerful institutions or individuals, without threat of costly litigation. Legislation to restrict the ability of powerful and well-funded parties to limit public interest journalism through expensive litigation would be of great benefit to publications.[56]

7.59 The Freeline Group submitted that Australia's libel laws were the 'major single barrier to independent publishers', highlighting that this was noted by Max Suich in 1990, who wrote:

> The surprise [barriers from libel laws] lay in their cost, both financially and intellectually. The financial cost arises not necessarily from losing any case. There is a significant cost in obtaining advice prior to publication. There is an even greater cost in taking advice if a writ should drop and an exponentially greater cost if an experienced Q.C. is engaged for, first, advice, and then the preliminaries to court action.
>
> If the case should go to court it is often subsidised by the plaintiffs, corporation, union, or organisation, which means the plaintiff does not bear the cost out of his or her own pocket.
>
> A mischievous try-on by a wealthy plaintiff which is withdrawn or left to languish just before an actual court appearance, could easily cost $35,000 [1990]: a significant burden to a small newspaper. Of course if it goes to court but is then settled on the basis of each paying their own costs, the bill might be $100,000 [1990].[57]

7.60 Regarding the effects of defamation laws on journalists, Professor Pearson told the committee:

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54 *Submission 22*, p. 6.

55 *Submission 16*, p. 5.

56 *Submission 55*, p. 7. See also Freeline Group, *Submission 51*¸ p. 3.

57 See *Submission* 51, p. 6. See also Max Suich, 'Press Independence' in the Communications and Media Law Association (CAMLA), *Communications Bulletin*, vol. 10, no. 2, Winter 1990, p. 1.

> There are enormous problems with what is called the 'qualified privilege defence'. It has a reasonableness component which courts can have read down. Nevertheless, it is an attempt to allow for situations where overwhelming matters of public interest might be excusable in defamation terms because there is such public concern that the matter should be reported upon.[58]

7.61 Professor Pearson proposed to the committee that:

> …in light of the lack of constitutional protections for public interest journalism in Australia, the Commonwealth should build into every identified restriction on media freedom a 'public interest journalism' defence, which would excuse a 'legitimate and demonstrated public interest in freedom to communicate on this occasion', where the court would take evidence on the importance of the matter of public concern, the publisher's genuine track record of adherence to professional ethical standards, its resolve to remedy past breaches (if any), and its commitment to train their staff in legal and ethical issues. It should encourage other Australian jurisdictions to take a uniform approach.[59]

7.62 The MEAA noted that Australia's 'uniform national defamation law regime' commenced operation in January 2006 by Council of Australian Governments (COAG) agreement. Its submission highlighted that any changes to the law must be universally agreed by jurisdictions. The MEAA suggested that this framework should be reviewed, noting that an ongoing review by New South Wales, which was to serve as a template for broader discussions for reform with states, appears to have not progressed since 2015.[60]

7.63 Some other measures were advocated for in evidence. For instance, Schwartz Media submitted that any reform of defamation provisions should include a strict cap on damages and the introduction of a tribunal system to avoid using and paying lawyers for cases that could be resolved outside the courts.[61] Mr Tim Burrowes, the Founder of Mumbrella, suggested that a professional membership of some bodies could potentially include support or additional protections for members involved in libel cases. He added that some of these initiatives were currently in the early stages of implementation overseas, or had been discussed among APC members.[62]

7.64 In respect of libel laws, the Attorney-General's Department informed the committee that

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58 *Committee Hansard*, 11 July 2017, p. 33.

59 *Submission 7*, pp. 1–2.

60 MEAA, *Submission 64*, p. 25.

61 *Submission 10*, p. 2.

62 *Committee Hansard*, 11 July 2017, pp. 3–4.

> Defamation is the responsibility of the states and territories. Uniform legislation was agreed between the states and territories in the then Standing Committee of Attorneys-General to regulate this issue.[63]

### *Protection for whistleblowers and journalists' sources*

*Whistleblower protections*

7.65 Carrying on from the discussion above, the committee received some evidence suggesting that current whistleblower protections are similarly fragmented across sectors and jurisdictions, insufficiently robust in particular sectors, and had been weakened by Commonwealth national security laws introduced in 2014–2015.[64]

7.66 Ms Talbot argued that it was not only journalists who should be protected by law, but also their sources:

> It's not only the journalists themselves that need protection; there's also a need to make sure that people who are making disclosures that are in the public interest don't suffer penalties from that. In the legislation, we've highlighted perhaps some of the starkest examples of when people who are disclosing injustice, or even criminal activity in terms of special intelligence operations, themselves become subject to criminal laws. The integrity of the entire processes all around becomes undermined, because if there's illegal activity happening, and there's no threat to national security if that illegal activity is revealed, there's a clear public interest in understanding that illegal activity has happened.[65]

7.67 Ms Talbot highlighted in particular that current provisions were too fragmented across sectors and jurisdictions:

> The public sector, the private sector and corporations—yes. One can never be certain that, once they go through those steps, they'll have done it in an adequate manner and will enjoy the limited protections that do exist. So there is definitely a need to clarify and unify whistleblower protection—and across the jurisdictions as well.[66]

7.68 In his submission, Professor Joseph M. Fernandez cited the findings of the MEAA regarding whistleblowers and recent national security legislation:

> We've seen the greatest assault on press freedom in Australia in peacetime. The Government's pursuit of whistleblowers through legislation has been unprecedented. As MEAA has argued, when you go after whistleblowers

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63 Attorney-General's Department–answers to questions on notice (received 21 December 2017), p. 10.

64 See, for example, Professor Mark Pearson, *Submission 7*, pp 2–3 and *Committee Hansard*, 11 July 2017, pp. 32–33; Professor Joseph M. Fernandez, *Submission 35*, p. 8; Ms Clare O'Neil, Director, Corporate Affairs, SBS, *Committee Hansard*, 23 November 2017, p. 21; Dr Andrew Morrison RFD, SC, Spokesperson and Ms Anna Talbot, Legal and Policy Adviser, Australian Lawyers Alliance, *Committee Hansard*, 23 November 2017, pp. 9 and 11.

65 *Committee Hansard*, 23 November 2017, p. 9.

66 *Committee Hansard*, 23 November 2017, p. 9.

> you go after journalism. In recent times a variety of federal laws designed to hunt down whistleblowers and prosecute them were passed with bipartisan support. This has undermined journalists' ethical responsibility to protect their confidential sources. In essence, what we're seeing is the criminalisation of journalism, and the criminalisation of truth telling.[67]

7.69 Professor Fernandez also highlighted the recent 'grim' findings of the MEAA:

> Many whistleblowers have been sacked or forced to leave their job; some have received death threats, been diagnosed with post-traumatic stress disorder and have had their names and reputations tarnished within the industry, effectively preventing them from finding employment in the same field.[68]

*Shield Laws*

7.70 Australian shield laws at a Commonwealth level offer discretion for the courts to excuse a journalist from disclosing the identity of sources, in consideration of 'the public interest in the communication of facts and opinion to the public by the news media'.[69] Professor Pearson submitted that it was difficult for journalists to know what protections shield laws could offer them, as they differed so much between jurisdictions:

> The other big area, of course, is the shield laws at the Commonwealth level, where you invite a court to essentially weigh the importance of the confidentiality of sources–that relationship between journalists and their sources as an example of important public confidence–and weigh that against other interests that might be at play in a particular case. That's what most shield laws try to do in one way or another. There is another great example of where state and Commonwealth laws differ in their wording and in their application, and it is so difficult for a public interest journalist or any journalist operating in the modern environment where their work transcends borders, but all of these different kinds of laws, restrictions and permissions or exemptions apply at different levels to their work as their work is published in these different jurisdictions.[70]

7.71 Moreover, his submission suggested that these protections could be broadened to categories of people other than journalists, given that academics, non-government organisations, journalism students and 'serious bloggers' were also undertaking good public interest journalism in the modern digital era.[71]

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67 Interview with Mr Paul Dobbie, Communications Officer of the MEAA, cited in *Submission 35*, p. 8.

68 MEAA, *The Chilling Effect: The Report into the State of Press Freedom in Australia in 2017*, 2017, p. 55, cited in *Submission 35*, p. 8.

69 *Evidence Act 1995*, section 126K, cited by Professor Mark Pearson, *Submission 7*, p. 3.

70 *Committee Hansard*, 11 July 2017, p. 33. See also the view expressed by Ms O'Neil, SBS, *Committee Hansard*, 23 November 2017, p. 21.

71 *Submission 7*, p. 4.

7.72 Dr Fernandez submitted that shield law provisions have been 'whittled down over the years', including through recent national security laws introduced between 2014 and 2015, referred to above. He commented that ongoing cases may prove instrumental in determining whether shield laws were sufficiently robust:

> While it is said that applications for disclosure of sources have largely failed since the introduction of shield laws in most states and territories, some pursuits for journalists' confidential sources are in progress…[72]

### *Copyright Law*

7.73 A number of submitters and witnesses drew the committee's attention to the matter of copyright.[73] These submissions focused on two related issues: the reproduction of material by news aggregators, leading to a loss of revenue by the producer of the original material; and the use and reproduction of stories by journalists–whether by modification or direct plagiarism–without acknowledgement of sources.

7.74 Some evidence considered there may be number of gaps and/or loopholes in current legislation allowing aggregators to re-use written work without paying for it. One submitter argued that, although news photographs, videos and artwork are protected by copyright law, written work is not.[74] Another noted inconsistent requirements between online and offline organisations:

> There is a gap in current legislation that allows online content aggregators to operate without the same accountabilities and respect for copyright that offline organisations are bound to. This has shifted the profitability from content creators to content aggregators, even though they do not produce the same level of value to the public.[75]

7.75 Another submitter explained that the common practice of internet aggregators to present 'collections of headlines of stories' in e–newsletters and websites, with links to the original stories:

> …would appear to be blatant breach of copyright but it is legal because common law has established that a single line of text – a headline – is too short to be copyrighted. Australian aggregators also are excluded from recent amendments to the Copyright Act which provide for courts to order internet service providers to disable sites located outside Australia and which provide access to copyright material. Aggregation therefore is a legal practice which is able to operate on a low cost, high margin basis largely by

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72 *Submission 35*, p. 8.

73 See, for example, Mr Chris Snow, *Submission 4*, pp. 1–2; *Submission 11*, p. 1; *Submission 17*, p. 2; *Submission 32*, p. 7; Free TV Australia, *Submission 45*, p. 8; Ms Jane Canaway, *Submission 48*, p. 2; Freeline Group. *Submission 51*, p. 4; Digital Industry Group Inc., *Submission 63*, pp. 3–4; MEAA, *Submission 64*, p. 11; Mr Roger Colman, *Submission 69*, p. 10; Ms Jane Schulze, *Committee Hansard*, 11 July 2017, p. 22; Mr Ross Mitchell, Director, Broadcasting Policy, Free TV Australia, *Committee Hansard*¸ 11 July 2017, p. 41.

74 *Submission 17*, p. 2.

75 *Submission 32*, p. 7.

> using genuine journalists' and publishers' material while profiting from advertising sales.[76]

7.76 In 2017, a number of journalists whose work had been copied by others without acknowledgement, payment or authorial consent, took to Twitter to share their experiences with the hashtag #journotheft. In its submission, Freeline Group gave an example of this happening to one of their members:

> Recently a freelance journalist in this group publicised the fact that she had a major investigative story almost immediately copied by other Australian outlets. It was a sensitive story that required several months of painstaking investigation and building up the trust of informants. The original quotes and most of the information from the story was republished by a number of media outlets, rewritten slightly but not substantially different to her original story. The copies either carried no byline or were published under a staff byline of the copying site. This was done without the consent of the freelance journalist or any attribution or payment to her.
>
> We are concerned that there seems no effective mechanism to regulate publishers or journalists that repeatedly engage in such breaches.[77]

7.77 This report has noted efforts to reform EU, as well as Spanish and German copyright law (Chapter 5). A submission to this inquiry by two academics argued that the development of a similar licensing scheme in Australia requiring aggregators to pay a fee for use 'would need to grapple with the existing debate over the merits of the current fair dealing regime', which provides exceptions for use of copyrighted material. They further noted that '[S]ome current practices may well not amount to fair use, but this appears not to be an option local publishers wish to explore'.[78]

## Other Commonwealth policies

7.78 Some evidence advocated for the Commonwealth to more freely and publically share data collected through the Australian Bureau of Statistics (ABS).[79] This, they suggested, would encourage innovation in journalism and also allow fact-checking of media stories. Ms Jacqui Park, the Chief Executive Officer of the Walkley Foundation, told the committee:

> One of the programs we've supported through our innovation program is a tool to unlock the ABS data and provide it in infographics so that any news organisations can pick that up. For example, we could be thinking about something like an arm's length news service that has access to data out of

76 *Submission 4*, pp. 1–2.

77 *Submission 51*, p. 4.

78 *Submission 32*, p. 13. For a discussion of the fair dealing regime, see Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report*, ALRC Report 122, November 2013, Chapters 5 and 6.

79 Ms Jacqui Park, Chief Executive Officer, Walkley Foundation, *Committee Hansard*, 22 August 2017, p. 36; and Mr Andrew Elder, *Submission 61*, pp. 4–5.

> the health department. You can imagine the kind of very useful journalism that could come out of that.[80]

7.79 The Freeline Group noted a number of fees that could be reduced by the Commonwealth, to assist independent journalists pursue stories, including Freedom of Information requests, ASIC company searches, and digital court transcripts.[81]

## Committee view

7.80 In general, the committee heard compelling evidence that the Commonwealth should consider making some adjustments to taxation and legislative systems, in order to encourage a healthy and diverse public interest journalism sector in Australia.

7.81 These kind of policy changes would assist the sector in indirect, market-based ways, which would not only come at a comparatively low-cost to the government and taxpayers, but would also go some way to ensuring that the Commonwealth's general policy approach to support for media would not directly compromise the principles of freedom and independence of the press.

### *Tax settings*

7.82 It was clear to the committee that there was real potential for the Commonwealth to encourage a healthy news media sector by making moderate adjustments to certain tax settings. This approach was generally supported by evidence, as a low-cost, market-based approach to assisting journalism that would maintain the principle of government non-intervention in the media sector directly.

7.83 It is clear to the committee that the Commonwealth should consider broadening the eligibility criteria for DGR status, to encourage more private support for not-for-profit media organisations. Although Australia does not historically have the high levels of philanthropy that the US does, this is clearly a policy option that the Commonwealth has to potentially unlock philanthropic funding to revitalise the media sector.

7.84 Of course, this should be done judiciously, so as to make eligible only providers of quality journalism, and ensure that private companies cannot exploit the measure as a tax loophole.

7.85 Similarly, the committee considers that offering a tax rebate for all Australians subscriptions to quality news providers should be at least considered by the Commonwealth. This should include a cost-benefit analysis that models its effects for the news sector and cost to the Commonwealth Budget.

### Recommendation 4

**7.86 The committee recommends that the Commonwealth develop and implement a framework for extending deductible gift recipient (DGR) status to not-for-profit news media organisations in Australia that adhere to appropriate standards of practice for public interest journalism.**

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80 *Committee Hansard*, 22 August 2017, p. 36.

81 *Submission 51*, p. 12.

**Recommendation 5**

**7.87 The committee recommends that the Treasury undertake cost-benefit modelling on extending the tax deductible status of news media subscriptions to all Australians, not just those who can already claim the cost of subscriptions through existing income tax arrangements, for subscriptions to news media organisations in Australia that adhere to appropriate standards of practice for public interest journalism.**

***Laws restricting freedom of expression***

7.88 This committee received evidence expressing concern that journalists wishing to investigate some public interest issues may be unduly inhibited by current laws.

7.89 In particular, submitters emphasised that despite recent reforms to attempt to moderate some of the more severe prohibitions on reporting in the ASIO Act and the Border Force Act, the law remains sufficiently oppressive that journalists are reluctant to report relevant stories–even when reportage would not negatively impact national security or border protection.

7.90 In considering this evidence, the committee affirms the paramount importance of laws related to national security and border protection, and reiterates that some sensitive material is not suitable for public release on account of national security.

7.91 However, the committee also notes that freedom of political expression and freedom of the press are fundamental democratic rights that Australia holds dear, so that any limitations on these rights must be both demonstrably necessary and proportionate. The committee is of the view that a lack of clarity in these laws and the perception that anyone reporting on national security matters may be penalised, regardless of whether reporting of a story actually poses any security threat, may inhibit some journalists from reporting issues of significant public importance.

7.92 Given the potential harm this chilling effect of national security laws may have, the committee considers there is a need for an audit of the current laws that impact on journalists reporting on matters that touch on or focus on national security and border protection, to identify unjustifiably harsh or draconian laws, inconsistencies in the law or and any lack of clarity in the law, and to consider whether there is a need for further reform of the way relevant laws apply to journalists. The committee considers that the Australian Law Reform Commission is the most appropriate body to undertake such a task.

**Recommendation 6**

**7.93 The committee recommends that the Australian Law Reform Commission conduct an audit of current laws that impact on journalists reporting on matters that touch on or focus on national security and border protection, to identify and analyse unjustifiably harsh or draconian laws, inconsistencies in the law and any lack of clarity in the law regulating the work of journalists in this context, and to consider whether further reform is needed to achieve an appropriate balance between the need to preserve national security and the need for journalists to be able to carry out their work in the public interest.**

### *Defamation laws*

7.94 The committee notes that the Commonwealth worked closely with the states and territories to develop a uniform set of defamation laws in 2005.

7.95 The committee notes indications that there appears to be an appetite for COAG to review the framework of existing defamation laws, especially considering this framework has been implemented for more than a decade without assessing potential areas that could be improved.

7.96 Given the National Uniform Defamation Law 2005 was agreed in the COAG context and given that it covers the majority of defamation law in Australia, it would be appropriate for the Commonwealth to investigate how it can work through this forum to assist the states and territories to review and reform our defamation laws, or to reinvigorate efforts already underway to do so, to ensure those laws are consistent with a viable, independent public interest journalism sector, work appropriately with whistleblower protection regimes, and generally operate effectively in the digital age.

**Recommendation 7**

**7.97 The committee recommends that the Commonwealth work with state and territory jurisdictions through the Council of Australian Governments to complete a review of Australian defamation laws, and subsequently develop and implement any recommendations for harmonisation and reform, with a view to promoting appropriate balance between public interest journalism and protection of individuals from reputational harm.**

### *Protections for whistleblowers and sources*

7.98 The committee received evidence that the fragmented nature of current legal provisions concerning whistleblowers and journalistic sources, both across sectors and jurisdictions, can lead to a great deal of uncertainty for some journalists pursuing stories. The committee considers that the Commonwealth should look to harmonising these laws, in part to make it easier for journalists to pursue legitimate stories in the public interest.

7.99 The committee is aware that the Parliamentary Joint Committee on Corporations and Financial Services (JCCFS) completed an inquiry into whistleblower protections in September 2017.[82] Although the JCCFS report did not consider the effects of current provisions on journalists in great depth, this committee notes and endorses that committee's recommendation that Australia's whistleblower framework should be harmonised across sectors and jurisdictions.

7.100 The committee also notes that in its 2009 report on a comprehensive scheme for whistleblower protection in the Commonwealth public sector, the House of Representatives Standing Committee on Legal and Constitutional Affairs also suggested that extending whistleblower protections to the private sector was a matter

82 Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections*, September 2017.

that should be considered in the future. At paragraph 9.30 of its report, that committee stated:

> Australian legislation on protection for disclosures concerning misconduct within the private sector appears piecemeal. In view of the concerns raised on the issue during the course of this inquiry, the Committee considers that protections for the disclosure of wrongdoing within the private sector could usefully be reviewed in the future.[83]

7.101 The committee notes that the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 was introduced to the Senate on 7 December 2017, to be considered fully in 2018. This legislation would extend the limited corporate whistleblower protections in the Corporations Act 2001, and broaden existing protections for the kind of individuals making disclosures, and the types of disclosures that can be made.[84] However, members of this committee will also look to the Commonwealth's response to the JCCFS report, to see if the in-depth recommendations made by its report have been appropriately considered.

**Recommendation 8**

**7.102 The committee recommends that the Commonwealth look at ways to expand whistleblower and shield law protections, and to harmonise those laws between the Commonwealth and state and territory jurisdictions, noting the work in this area already underway.**

***Copyright***

7.103 The committee received some evidence on enhancing Australia's copyright regime. This focussed heavily on the difficulty for publishers and journalists in monetising content published through aggregators, and in dealing with the reproduction of stories or, indeed, with cases of direct plagiarism.

7.104 The committee is aware of the recent report by the Productivity Commission into intellectual property, which may lead to some administrative and legislative reform in the area.[85]

7.105 Additionally, the committee understands that copyright legislation is currently being considered by the European Union which is intended to address the use of news content by aggregators through asserting publishers' rights. This overseas experience may provide policy options that can be applied locally in the future, and should be monitored.

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83 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, 25 February 2009, p. 178.

84 See the second reading speech made by Senator the Hon Mathias Cormann, *Senate Hansard*, 7 December 2017, p. 63.

85 Productivity Commission, *Intellectual Property Arrangements*, Productivity Commission Inquiry Report, No. 78, 23 September 2016. See also Australian Government, *Australian Government Response to the Productivity Commission into Intellectual Property Arrangements*, August 2017.

7.106 The committee would also like to note that, as discussed earlier in this report, there seems to be a growing willingness on the part of aggregators to cooperate with elements of the media sector and journalists to assist in building more sustainable models of monetising original content. This is a positive development, and should be encouraged going forward.

7.107 There may very well be a role for the Commonwealth to play in this space in the future. However, beyond the matters discussed, the evidence received by this committee about this complex policy matter did not go to a level of specificity or depth that would enable the committee to reach firm conclusions about whether reform to copyright law is desirable or practical at this stage.

**Senator Catryna Bilyk**

**Chair**