

## Explainer: what are the media companies' challenges to the AFP raids about?

Written by Rebecca Ananian-Welsh, Senior Lecturer, TC Beirne School of Law, The University of Queensland

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In the first week of June, [the AFP raided](#) the home of News Corp journalist Annika Smethurst and the ABC's Sydney headquarters.

The raids concerned stories published over a year earlier, based on documents leaked from the Department of Defence. This week, the ABC and News Corp launched separate legal challenges to those raids. As [David Anderson](#) explained, the ABC is challenging the warrant “on several technical grounds that underline the fundamental importance of investigative journalism and protection of confidential sources”.

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The [ABC commenced proceedings](#) in the federal court, whereas News Corp took its challenge directly to the High Court. Nonetheless, both cases will raise similar legal issues, with press freedom at the heart of each challenge.

Both the ABC and News Corp are arguing that the AFP warrants infringe the “implied freedom of political communication” protected by the Australian Constitution. This challenge sets national security and press freedom against one another and could lead to groundbreaking developments in constitutional law.

But a closer look reveals the thinness of the implied freedom as a true protection for press freedom and the need for clearer protections.

## The Australian First Amendment? The implied freedom of political communication

The Australian Constitution contains very few rights. None resemble the US Constitution's First

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Amendment which protects, among other things, free speech and a free press.

In 1992, the [High Court](#) read between the lines of our Constitution to hold that it protects the free flow of political communication. This implication was justified as necessary to protect our system of representative and responsible government and, specifically, to enable voters to make an informed choice at elections.

The implied freedom is not a right to free speech. First, it only protects political communication, not speech generally. Secondly, it is not a personal right that may be wielded against the government. Instead, the implied freedom is a limit on legislative power, and not an absolute one at that. This means the Constitution only prohibits Commonwealth, state and territory governments from passing legislation that unjustifiably limits political communication.

In recent High Court decisions, [safe access zones](#) around abortion clinics were upheld as justified restrictions on political communication, and in NSW, [caps on third party political donations](#) were struck down as unjustified restrictions.

The courts will consider three questions when they determine whether the law that supported the AFP raids violates the implied freedom. It is far from clear whether the media organisations' challenges will pass this three-stage test.

### Step 1: A burden on political communication?

The first question is whether the law burdens (restricts) political communication. In this case, the burden is unclear. The warrants were issued to further investigations into government leaks and the handling of classified information, but the leaks had happened and the stories published over a year earlier. In this sense, the political communication had run its course unhindered. If no burden on political communication is established then the challenge will fail.

On the other hand, the execution of the warrants is almost certain to stifle public interest reporting. The raids may deter journalists from investigating and publishing stories based on classified materials, even where they reveal corruption or misconduct.

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Even more seriously, the raids will deter potential whistleblowers from speaking out. This impact may be too vague for the High Court to engage with – after all, how could a lawyer present evidence of a general chilling effect? Nonetheless, it is a serious and severe consequence of police crackdowns on media, with a direct impact on each voters' capacity to make a true and informed choice at the ballot box.

### **Step 2: A legitimate purpose?**

If there is a burden on political communication, the second stage of the test will ask whether the burden is for legitimate purpose – that is, a purpose compatible with our system of government.

While some may criticise the AFP raids as reflecting an illegitimate purpose of targeting journalism critical of the government, the warrants also undoubtedly had a legitimate aim: the maintenance of national security by ensuring the integrity of government secrets.

### **Step 3: A proportionate measure?**

This third stage of the test is the trickiest. It asks whether the restriction on political communication is justified and proportionate in light of its legitimate purpose. Is it tailored to that purpose? Were there alternative, less-restrictive measures that could have been adopted? In this kind of balancing exercise, reasonable minds can, and will, differ.

National security is a serious concern that goes to the very existence of the nation. It is universally accepted that some rights and freedoms must bend to the security of the nation.

Press freedom, on the other hand, including source confidentiality and the capacity to report on government misconduct, is critical to the rule of law and our democratic system. The courts will be faced with the question of when national security justifies the erosion of press freedom, and when it does not. This is no easy or predictable task.

In the context of the AFP raids, the present threat to national security posed by the published articles appears to be weak. On one view, the burden on political communication was severe and arguably unjustified, provided the court accepts the chilling effect that the raids will have on journalists and whistleblowers.

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Alternatively, the limit on communication may be nonexistent, as the raids didn't prevent the stories from being published. There are likely to be further interests and facts that weigh into this balance.

On available information, it is only clear the ABC and News Corp will face a number of complex and unpredictable hurdles in convincing a court that the warrant powers violate the Constitution.

### The protection of press freedom

The implied freedom of political communication serves an important purpose in protecting political speech from unjustified infringement. Its capacity to protect press freedom remains untested before the High Court, and this challenge presents a golden opportunity for the court to recognise the place of the fourth estate within our constitutional framework.

But the implied freedom is not a right to free speech or a free press. It hinges on the concept of "justification", and when national security is placed on the scales it is difficult to find a counterweight to meet it. Hence national security is regularly invoked to justify infringements of our basic rights and freedoms, and it is difficult to know how and when these infringements are unnecessary.

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**Read more:** [Media raids raise questions about AFP's power and weak protection for journalists and whistleblowers](#)

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Robust protection of press freedom in Australia is unlikely to be achieved through the interpretation of a Constitution that makes no reference to the fourth estate, freedom of speech, the rule of law, or other basic rights or freedoms. Clearer protections are needed. This could take the form of legislative recognition of press freedom.

Charters of Rights such as those in Victoria, the ACT and Queensland also operate to ensure basic freedoms are taken into account, not just in court but in parliament and across all public

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sector decision-making. This approach has clear advantages over the technical and unpredictable application of implied constitutional freedoms months after the event.

In the absence of these kinds of reforms at a national level, we wait to see if the High Court will once again read between the lines of our Constitution and recognise a central place for the free press in Australia.

*Rebecca Ananian-Welsh receives UQ Advancement funding.*

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