

ESPIONAGE AND PRESS FREEDOM IN AUSTRALIA



SUMMARY

⇒ KEY POINTS

- The *Espionage Act 2018* (Cth) replaced Australia's four espionage offences with 27 new offences.
- The laws criminalise a very wide-range of conduct which involves 'dealing' with information for the purpose of communicating it to a 'foreign principal'.
- The laws' complex nature and uncertain scope is having a chilling effect on public interest journalism.
- The legitimate conduct of journalists and sources is at real risk of criminalisation under the laws.
- The defences to espionage do not adequately protect journalists or sources.

⇒ REFORM CONSIDERATIONS

- Introduce a **journalism-based exemption** from prosecution to protect legitimate, good faith, public interest journalism.
- **Enhance legal clarity** over certain aspects of the offences, namely:
 - The criminalisation of passive receipt of information,
 - Media organisations as foreign principals,
 - The meaning of 'prejudice' to Australia's national security,
 - International and economic relations as 'national security',
 - Whether publication amounts to communication to a foreign principal, and
 - The inclusion of false information and opinions as 'information'.
- **Introduce mental elements** to Classified Information Espionage and Trade Secrets Espionage.



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On 4 September 2019, outgoing Director General of the Australian Security Intelligence Organisation (‘ASIO’), Duncan Lewis, described espionage and foreign interference as ‘by far and away the most serious issue going forward’ for Australia’s national security, outstripping the threat of terrorism.ⁱ

These comments came just one year after the Federal government overhauled Australia’s espionage and foreign interference laws, introducing an elaborate suite of espionage offences.ⁱⁱ These reforms were justified on the basis that law enforcement and intelligence agencies ‘lacked the legislative tools they needed to act’ in order to protect Australia’s national security.ⁱⁱⁱ However, the laws have since been criticised for being over-broad, highly complex and posing a risk to fundamental freedoms and democratic principles.^{iv}

In this Policy Paper, I provide an overview of Australia’s espionage laws and explain their impact on press freedom. I then make recommendations for law reform to protect national security without unduly undermining press freedom.

What is Espionage?

ASIO defines espionage as ‘the theft of Australian information by someone either acting on behalf of a foreign power or intending to provide information to a foreign power which is seeking advantage’.^v The United Kingdom’s MI5 has similarly defined it as:

[T]he process of obtaining information that is not normally publicly available, using human sources (agents) or technical means ... It may also involve seeking to influence decision-makers and opinion-formers to benefit the interests of a foreign power.^{vi}

While the concept of ‘espionage’ generally remains stable over time, its nature and practices evolve. Today’s espionage is largely driven by modern technological and cyber capabilities – information is often stored, collected and disclosed electronically. Modern espionage can be carried out by any foreign actor and may target a range of sensitive information, including information on Australia’s defence, diplomatic relations, economy, critical infrastructure, trade secrets and scientific pursuits.^{vii}

Access to sensitive information by foreign actors can pose a very real threat to Australia’s national security. For this reason, espionage has been criminalised in Australia since 1914. Despite recorded case law showing only one successful prosecution in Australian history,^{viii} the grave threat of espionage (particularly cyber-espionage) prompted the federal government’s 2018 overhaul of these offences.

Table 1: The 2018 Espionage Offences

Underlying Offences	Section	Maximum Penalty
Core Espionage – dealing with security classified or national security information to be communicated to a foreign principal:		
a) intending to prejudice Australia’s national security or advantage the national security of a foreign country.	91.1(1)	Life
b) reckless as to this prejudice or advantage.	91.1(2)	25 years
Communication Espionage – dealing with information to be communicated to a foreign principal:		
a) intending to prejudice Australia’s national security.	91.2(1)	25 years
b) reckless as to this prejudice.	91.2(2)	20 years
Classified Information Espionage – dealing with security classified information to be communicated to a foreign principal with the primary purpose of communication to a foreign principal.	91.3	20 years
Espionage on Behalf of a Foreign Principal – dealing with information on behalf of a foreign principal, reckless as to whether this involves commission of an espionage offence:		
a) intending to prejudice Australia’s national security or advantage the national security of a foreign country.	91.8(1)	25 years
b) reckless as to this prejudice or advantage.	91.8(2)	20 years
c) no fault element as to this prejudice or advantage.	91.8(3)	15 years
Trade Secrets Espionage – theft of trade secrets on behalf of a foreign government principal.	92A.1	15 years
Espionage-Related Offences	Section	Maximum Penalty
Solicitation Offence – intending to solicit or procure an espionage offence on behalf of a foreign principal.	91.11	15 years
Preparatory Offence – intending to prepare for or plan an espionage offence.	91.12	15 years

The 2018 Espionage Act

Australia's espionage offences are found in the Commonwealth *Criminal Code* and are comprised of a highly complex suite of 27 different offences. This includes nine 'underlying' offences (some of which differ only in their mental element) and two 'espionage-related' offences – summarised in Table 1. The offence provisions prescribe maximum penalties ranging from 15 years' to life imprisonment. Four aggravating circumstances operate to increase the maximum penalty for four of the underlying offences (creating a scheme of 16 aggravated offences). All but one offence (Trade Secrets Espionage) applies extraterritorially, that is, to conduct both within and outside Australia.^{ix}

The underlying espionage offences involve *dealing* with *information* or *articles* on behalf of, or to communicate to, a *foreign principal*. Some of the offences require that the person intends (or is reckless to) their conduct prejudicing Australia's *national security*, or giving advantage to the national security of a foreign country.

The scope of each espionage offence hinges on the meanings of these key terms, all of which have been defined with staggering breadth.

Deal with has been defined to include **receiving**, obtaining, collecting, **possessing**, making a record, copying, altering, **communicating**, concealing, **publishing** or making available.^x Even mere **passive receipt** may amount to 'dealing with' information under the espionage offences.

The *Criminal Code* defines *information* as 'information of any kind, **whether true or false** and whether in a material form or not, and includes **an opinion**, and a report of a conversation',^{xi} with articles meaning 'any thing, substance or material'.^{xii} Dealing with such information or articles encompasses dealing with all or part of it, or even dealing with the 'substance, effect or [a] description' of it.^{xiii}

The crux of espionage (in contrast to official secrets offences) is that it involves a foreign principal.

Foreign principal is defined to include a foreign government principal or political organisation, as well as any public international organisation, terrorist organisation, or entity owned, directed or controlled by a foreign principal.^{xiv} 'Foreign government principal' means foreign governments (including local governments) and their authorities.^{xv} It also includes 'foreign public enterprises' which enjoy special legal rights or benefits because of their relationship with a foreign government that is in a position to exercise control over the organisation. 'Foreign public enterprises' could therefore include certain **foreign media organisations**.

CAN A MEDIA ORGANISATION BE A FOREIGN PUBLIC ENTERPRISE?

Dealings on behalf of a 'foreign principal' may amount to espionage. An incorporated media organisation will be a foreign principal where the company enjoys **special legal rights or benefits** because of its relationship with the foreign government, and:

- a foreign government holds: more than 50% of the company's issued share capital or voting power, or can appoint more than 50% of its directors,
- the directors are accustomed to act according with the wishes of the foreign government, or
- the foreign government is in a position to exercise control over the company.

Organisations which might meet this definition include:

- China Central Television,
- Al Jazeera
- Russia Today
- Pakistan Television Corporation
- Radio New Zealand
- Deutsche Welle
- France 24
- Voice of America.





The final key term, *national security*, has been defined so broadly as to encompass Australia's **international relations**.

Applying these definitions to the Core Espionage Offence reveals its potential reach. Any handling of information which is security classified or concerns Australia's international relations will amount to espionage, provided that:

- the dealing was aimed at communicating the information to a foreign principal (for instance, through open publication), and
- the person intended (or was reckless to) resulting:
 - prejudice to Australia's international relations, or
 - advantage to the foreign relations of another country.

Implications for Press Freedom

Australia's espionage laws pose two problems for press freedom. First, their **complexity** and **uncertain scope** is having a chilling effect on free speech. Second, the offences are capable of **criminalising legitimate journalism**. These risks are borne out by considering the underlying and espionage-related offences in turn.

WHAT IS NATIONAL SECURITY?

National security is defined in s 90.4 to include:

- defence,
- the protection of a country's borders from serious threats,
- protection of a country from activities such as espionage, sabotage, terrorism, political violence, foreign interference and conduct obstructing operations of the defence force,
- the carrying out of a country's responsibilities to any other country, and
- a country's political, military or economic relations with another country.

In *Thomas v Mowbray* (2007) 233 CLR 307, Gummow and Crennan JJ queried whether in a similar provision 'the Parliament has sought to over-reach the bounds of the understanding of "national security"' (at 358).

The Impacts of the Underlying Espionage Offences

Information gathering, synthesis and reporting is at the heart of journalism, meaning the espionage laws could affect nearly every aspect of some journalists' work. A journalist may satisfy the physical element of an espionage offence by merely receiving or possessing a summary of a document, or interviewing a source regarding their personal opinions. Editorial, administrative and legal personnel could also 'deal with' information if they receive, possess, copy, summarise or make efforts to maintain the confidentiality of information.

The Core Espionage Offence and Classified Information Espionage require that the information dealt with be of a certain kind – *security classified* information (for both offences) or *national security* information (for the Core Espionage Offence). While security classified information is not often communicated to journalists, it can be and when it is, it might disclose information of particular public interest.

More concerningly, information on 'national security' constitutes a considerable portion of media reporting. Journalists who report on Australia's political and economic relations, as well as more traditional aspects of national security, should therefore be wary when undertaking research, interacting with sources, and generally preparing stories for publication.

Espionage requires that either: dealing with the information results (or will result) in it being communicated to a foreign principal, or the conduct is on behalf of a foreign principal. **Communication to a foreign principal is easily satisfied in the media context where stories are published to the public at large**, which naturally includes foreign principals. Even taking steps with a view to future publication could constitute dealing with information for the purpose of communication to a foreign principal.

As certain foreign state-controlled media organisations may qualify as foreign principals, there are particular risks involved for interactions involving journalists and other staff of those media organisations. These kinds of interactions may themselves constitute communication to a foreign principal. They may also amount to conduct 'on behalf of' a foreign principal, an important requirement of Espionage on Behalf of a Foreign Principal and Trade Secrets Espionage.

Dealing with information for communication to a foreign principal are physical elements of the espionage offences. To amount to espionage, a person may also need to satisfy one of a number of mental elements – which are also potentially easy for journalists to satisfy.

"It's a real problem and I don't think there's any doubt that there's been stories which could have been told or should have been told which haven't been told because of a combination of the ASIO Act, the Espionage Bill and metadata laws. That's the chilling effect in practice. The chilling effect is a real thing... We have killed stories off because of these laws. We're not talking about trivial stories, we're talking about the important stories."

Mark Maley

Editorial Policy Director, ABC^{xvi}

DO JOURNALISTS HANDLE CLASSIFIED INFORMATION?

Important public interest journalism may be based on security classified information. Examples include:

- Edward Snowden's disclosure of top-secret documents revealing the extent of global surveillance programs run by the US, UK and their allies.
- Laurie Oakes' reporting on a lack of evidence of Iraqi Weapons of Mass Destruction.
- Annika Smethurst's articles on proposed new domestic surveillance powers for the Australian Signals Directorate.
- 'The Afghan Files' reports by Dan Oakes and Sam Clark detailing human rights violations and possible war crimes by Australian Defence Force members in Afghanistan.





The mental elements vary between the offences, but include either intention or recklessness as to whether the person's conduct will:

- i) prejudice Australia's national security, or
- ii) advantage the national security of a foreign country.

The high standard of proof required to show intention may render this element difficult to prove where a journalist and source have engaged in legitimate, good faith, public interest-based interactions. However, the uncertain nature of 'prejudice' and 'advantage' makes it unclear whether publication of a story intended to reveal, for example, systematic corruption or misconduct by Australian political, intelligence or military officials might 'intend' to prejudice Australia's foreign relations, or give a relevant advantage to a foreign country.

While intention may be difficult to establish, 'recklessness' criminalises a person's conduct where they have a much lower level of personal culpability. Journalists or sources who deal with sensitive information (such as information concerning intelligence or military agencies) could demonstrate recklessness as to potential negative impacts on Australia's national security or advantages to a foreign country. Where the information is less sensitive, recklessness may be established where an article invites the reader to criticise or pass judgment on Australia, or exposes corruption or misconduct by Australian officials.

The Impacts of the Espionage-Related Offences

Of greater concern to freedom of the press in Australia are the Solicitation and Preparatory Offences. **Both offences criminalise conduct at the earliest stages of investigative reporting** – possibly even before a story has been identified, let alone pursued.

The Solicitation Offence criminalises a mere intention to solicit or procure an espionage offence, even if it is impossible to commit the espionage offence or an espionage offence is never committed.^{xvii} However, the conduct must be engaged in on behalf of a foreign principal. Therefore, where a journalist works for a foreign state-controlled media organisation and, for example, intentionally solicits security classified or highly sensitive material from a government source, the Solicitation Offence may be engaged.

The Preparatory Offence criminalises preparing for or planning an espionage offence. It also arises where a person has not committed and may never commit espionage.^{xviii} This offence could capture a journalist's conduct before they even begin interacting with sources or colleagues in respect of a possible story, such as compiling a list of possible sources or conducting preliminary research into a national security matter. It would equally capture the conduct of sources who, for example, gather information that may (but not necessarily will) be passed on to a journalist.

Both espionage-related offences also attract **inchoate liability**, creating offences such as procuring the solicitation of espionage or conspiracy to prepare for espionage. This heightens the breadth, complexity and uncertainty inherent in the provisions.

Defences to Espionage

Only three defences exist in relation to the espionage offences, although not all apply to every offence and none apply to Trade Secrets Espionage.

The first defence applies to information dealt with under a Commonwealth law, Commonwealth agreement or in the person's capacity as a public official. It is likely to be more useful to sources, particularly government sources, than journalists per se.

The second defence arises where the information was already communicated to the public with Commonwealth authority.

The third defence – Prior Publication – also concerns information that has already been communicated to the public, although not where the information was obtained as a result of being a Commonwealth Officer (so would not assist government sources). This defence could assist journalists who are effectively republishing information already publicly available.

Recommendations for Reform

The over-breadth, complexity and uncertainty of Australia's espionage offences creates a need for reform so that the laws adequately protect national security without unduly undermining press freedom. This could be achieved in several ways.

First, the uncertainty and extraordinary breadth of the espionage offences could be addressed by **enhancing legal clarity** over, for example: the criminalisation of passive receipt of information; media organisations as foreign principals; the meaning of 'prejudice' to Australia's national security; international and economic relations as 'national security'; whether publication amounts to communication to a foreign principal; and the inclusion of false information and opinions as 'information'.

Second, the breadth of Classified Information Espionage and Trade Secrets Espionage could be narrowed by **introducing mental elements** to these offences.

The third, and most effective, way of protecting press freedom would be to introduce a **carve-out from the offence framework** to recognise in law that legitimate, good faith, public interest journalism is not a crime. This could take the form of a News Reporting Defence that protects both professional and non-professional journalists who report on public interest issues, although not if this is done to assist foreign intelligence agencies or military organisations. Such a defence would appropriately balance protecting legitimate journalism and protecting Australia from genuine espionage. It could be modelled on the News Reporting Defence (s 122.5(6)) to the General Secrecy Offence (s 122.4A) of the *Criminal Code*. In its 2020 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press' Report, the Parliamentary Joint Committee on Intelligence and Security recommended the Government give consideration to whether the s 122.5(6) defence should be applied to other secrecy offences, including espionage.

THE NEWS REPORTING DEFENCE

The revised General Secrecy Offence in s 122.4A of the *Criminal Code* is subject to a News Reporting Defence in s 122.5(6), which provides a defence where the person:

- Dealt with the information in their capacity as a 'person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media',

And, at the time:

- They reasonably believed that engaging in the conduct was in the public interest, or
- They were a member of the administrative staff of an entity engaged in the business of reporting news and they acted under the direction of a journalist, editor or lawyer who reasonably believed the conduct was in the public interest.

In 2020, the PJCIS recommended the Government give consideration to whether a similar defence should be applied to other secrecy offences, including espionage.





About the Author

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About the Series

Press Freedom Policy Papers offer short, evidence-based insights and recommendations informed by scholarship and consultation.

Reform Briefings present targeted, evidence-based recommendations for law reform to enhance the appropriate protection of press freedom.

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- ii See *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) ('*Espionage Act*').
- iii Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13145 (Malcolm Turnbull).
- iv See, eg, Sarah Kendall, 'Australia's Espionage Laws: Another Case of Hyper-Legislation and Over-Criminalisation' (2019) 38(1) *University of Queensland Law Journal* 125; Rebecca Ananian-Welsh, Sarah Kendall and Richard Murray, 'Risk and Uncertainty in Public Interest Journalism: The Impact of Espionage Law on Press Freedom' (2021) 44(3) *Melbourne University Law Review* (forthcoming).
- v Australian Security Intelligence Organisation ('ASIO'), *Counter Espionage* (2019) <<https://www.asio.gov.au/counter-espionage.html>>.
- vi MI5, 'Counter-Espionage' (2020) <<https://www.mi5.gov.uk/counter-espionage>>.
- vii For discussion, see Kendall (n iv) 130-2.
- viii *R v Lappas* [2003] ACTCA 21.
- ix *Criminal Code Act 1995* (Cth) ss 91.7, 91.10, 91.14, 15.4 ('*Criminal Code*'). Trade Secrets Espionage only applies to conduct within Australia, or conduct that occurred outside Australia and the result occurred in Australia or the person was an Australian citizen or resident at the time the conduct occurred: ss 92A.2, 15.2.
- x *Ibid* s 90.1(1) (definition of 'deal').
- xi *Ibid* (definition of 'information').
- xii *Ibid* (definition of 'article').
- xiii *Ibid* s 90.1(2).
- xiv *Ibid* s 90.2.
- xv *Ibid* s 90.3.
- xvi Ananian-Welsh, Kendall and Murray (n iv).
- xvii *Criminal Code* s 91.11(3).
- xviii *Ibid* s 91.12(3).



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