Fun and Profit with Libel

John Wicklein gives an American view of Australia's defamation laws

U.S. journalism without the First Amendment would look a lot like journalism in Australia, where judges have no inhibitions about ruling in favour of prior restraint and politicians and others routinely use suits to make aggressive libel reporters back off. Former Prime Minister Hawke, premiers of several of the six states, cabinet ministers, and other members of parliament have all sued media organisations to good effect, collecting hundreds of thousands of dollars. Hawke is reported to have boasted about his Truth Memorial Swimming Pool, paid for by a settlement from the sensational Melbourne tabloid named *Truth*. Not long ago he sued *The Sydney Morning Herald* for reporting a state legislator's remark criticising the PM's close friendship with an airline owner.

This is similar to President Bush suing *The New York Times* over a piece which suggested that Bush's behaviour in the Persian Gulf crisis had been influenced by his friendships with oil company executives.

Prolific litigation

By a recent count, 142 defamation actions against newspapers, most of them filed by politicians and businessmen, were pending in Sydney, which has been called the libel capital of the world. This is nearly twice the number of libel suits filed in the entire United States in any one year. In 1989, the John Fairfax Group, which published the *Sydney Morning Herald* in Sydney and *The Age* in Melbourne paid out $2.6 million in settling such suits.

Politicians say that defamation suits are the only way they can protect their reputations against irresponsible attacks in the press. Critics counter that the actions are not taken to protect reputations but to prevent reporters from disclosing further facts — and, not incidentally, to line the pockets of politicians. "Public officials feel that, sometime in their careers, they'll hit the jackpot," says Brian Toohey, editor and publisher. "Someone will defame them and they'll win a big settlement that will set them up for the rest of their lives."

Use of defamation suits to intimidate the press has gone on since colonial times. The way it works is like this: a newspaper publishes a story charging say, that some politician has taken a bribe to support the transfer of a television licence. The politician immediately files a defamation action. The paper's lawyers, who sit in the newsroom every day to check out stories for libel, panic. They tell the editors not to print anything more on this investigation, because such publication could aggravate the penalties assessed. The paper then buys off the politician with an out-of-court settlement.

All of which is why, according to Ben Hills, an investigative reporter for the *Herald*, there is so little investigative reporting. If Watergate had happened in Australia, he says, the public would still not know about it. Stronger news organisations, such as the *Herald*, *The Age*, the Brisbane *Courier-Mail*, and the Australian Broadcasting Corporation, do conduct investigations despite attempts to intimidate them. But reporters and editors in Sydney, Melbourne, Brisbane and Hobart all told me the same thing: defamation laws are so stringent and confusing that they cannot tell whether the stories they publish — even the most painstakingly documented reports of corruption — will bring judgments against them.

No constitutional guarantees

Since no laws guarantee freedom of expression, newspapers and television stations that take their cases to trial usually lose. Alan Bond, the financially troubled entrepreneur who owned a television station in Brisbane, paid Sir Joh Bjelke-Petersen, the former premier of Queensland, $400,000 rather than defend in Court a story the station believed to be true: that Sir Joh had taken official trips to Japan to negotiate a private business deal for his son.

"It's unhealthy for democracy when the media are scared from their most basic obligation, which is to expose wrongdoing and corruption," says Peter Cole-Adams, an associate editor of *The Age*.

To reduce the threat, Queensland Attorney-General Dean Wells, has led the way in recommending changes to defamation laws. But other restrictions would remain in place — prior restraint, for example. In 1988 Brian Toohey published in *The Eye* internal papers in which a former foreign minister remarked, "There's no doubt about it, the Indonesians are erratic, hostile people to deal with." The Hawke government rushed into court and got an injunction forbidding further publication from the papers. Under the *Official Secrets Act*, all information held by a ministry — not just "national security" information — can be designated confidential and be withheld from the press, if the minister chooses to do so.

Prior restraint protects business interests, as well. In March 1990 a state justice banned publication by *The Melbourne Sunday Herald* of an internal document of Tricontinental, a commercial subsidiary of the State Bank, containing names of persons in default of millions of dollars. The newspaper argued that since taxpayers would have to make up the losses guaranteed by the state, it was in the public's interest to publish names of the defaulters. The justice, however, said confidentiality of a business operation was an important value to be preserved, and saw no overwhelming reason why the financial dealings of corporation should be made public.

The heavy restraints on press freedom have grown out of English common law and parallel those seen today in the United Kingdom. For the press to fight them effectively would require adding a Bill of Rights, with First Amendment guarantees, to the Australian Constitution — which, unlike Britain's, is a written document. But government officials, who benefit most from the restrictions, show no interest in that sort of change.

John Wicklein is writing a book comparing press restrictions in the United States and British Commonwealth countries. He spent four months studying in Australia as a Fulbright Senior Scholar and teaches at the School of Journalism at the Ohio State University. This is an edited version of an article published in the Columbia Journalism Review.