

"Sexing It Up": Lord Hutton's Report on the BBC and the Implications for the Australian Media

This is the transcript of a speech made by Peter Manning at the meeting of CAMLA on 30 March 2004 at Mallesons Stephen Jaques in Sydney.

I intend to spend little time tonight talking about the Australian media. There are so many similarities between the circumstances of the journalism of Andrew Gilligan, the BBC, the war on Iraq and the desperate search for weapons of mass destruction, the popular feeling against the war, the tension between the BBC and the Government and the position of the Prime Minister vis a vis the Bush agenda – all of that and the Australian scene as to make it almost irrelevant to spend much time recasting for Australia. The implications are all too obvious.

Instead, I shall talk about the context in which this report by Andrew Gilligan took place, the nature of the leak from Dr David Kelly to Gilligan and its circumstances, the substance of the allegations Gilligan made, the BBC's processes of editorial review, mistakes, if such they were, that were made and the implications both for the law and for national politics.

CONTEXT

Who was Andrew Gilligan – and I say "was" advisedly because his career, alone, is almost certainly ruined. The greater tragedy, of course, is the suicide of David Kelly and the continuing pain of his family. But Gilligan, too, whatever his personality and his alleged somewhat gung-ho style, is a major victim. Several BBC heads have fallen on their sword but I suspect others will rise again. So who was Gilligan? Well, he was the BBC's Defence Correspondent. In his mid-thirties, he had carriage of the most difficult specialism in the corporation, maybe only superseded by the Political Correspondent at Westminster. I say "maybe" because being a member of

the parliamentary Press Gallery gives you a collegiate protection, enables you to swim in a larger pool, gives you better warning signals that something is amiss and enables you to build a system of contacts and defences against personal vendettas.

Britain was at war in the period of Gilligan's report. Gilligan, as the Defence Correspondent of four years' standing, was a central player in the marketing game to sell a difficult war to a sceptical public, indeed to a sceptical Labor caucus. And Gilligan had already caused mayhem with the Ministry of Defence in the months and years gone by. A former Cambridge history major graduate, a former Defence Correspondent for the Sunday Telegraph, a man who had reported for the BBC from 40 countries, in the relatively short time he had been back in Britain he had broken several stories embarrassing to the Ministry of Defence (*MOD*): the ease with which you could buy illegal landmines abroad, the case of the RAF million-pound jet that couldn't drop precision bombs, and the revelation of the draft of the new European Union constitution. Number 10, run by Tony Blair's hard man Alistair Campbell as media director, responded publicly with a personal epithet: he was dubbed "gullible Gilligan". The stories stood.

So Gilligan was a thorn in the Government's side – and at a time when this was no popular Falklands war, but a highly divisive adventure back into old imperial territory. The Government was feeling the strain. Apart from the Murdoch press, there were no cowboy media calling "Gotcha!" and the BBC was part of the reflection on a debate that divided the Government, the experts, the generals and the public. Alistair Campbell went into attack mode, accusing the government-funded

media arm, the BBC, of running an anti-war agenda. Shades of Bob Hawke in 1991 and Richard Alston a decade later.

So what other contextual factors colour May 2003 – the month of Gilligan's report? Well, the dossier he reports on, of course, is the third document that the Government had put before the British public. The first had been found, embarrassingly, to be a plagiarist rewrite from the Internet of a university thesis. The second, about tubes from Nigeria, had been found to be based on false information from an unreliable Iraqi source. So the validity, status and credibility of sources were a crucial matter, not only to high-ranking journalists in the BBC but to the Government's credibility as well. The third dossier was *the* document that had to "stand up".

And then there was the situation in Iraq. It was seven or more weeks since the fall of Saddam but two factors were playing heavily against the Government: one, no WMDs were being found; and two, British and American troops were not being greeted as liberators but as occupiers – and occupiers breaking their promises of safety and good order to the people at that. Tony Blair was in Iraq that month to demonstrate his pride in British troops in Basra but there was precious little to celebrate.

And finally, it is clear from the Hutton Report that David Kelly, the Government's most highly experienced specialist on chemical and biological weapons – he was a biologist by training – was briefing several journalists about his concerns that the dossier that the Blair Government had used to justify the pre-emptive invasion over-stretched the truth. He, and others, felt under pressure to provide the case for war.

I have spent some time on this context because I believe it shows the pressures

both sides – Government and BBC – were under at the time Gilligan reported on May 28. The fact is relations between the two were poisonous. This is also shown in the tone of the letters that followed Gilligan's report. Richard Sambrook, BBC News Director, writes to Campbell plainly, a month after Gilligan on June 27, and says:

'It is our firm view that Number 10 tried to intimidate the BBC in its reporting of events leading up to the war and during the course of the war itself... we have to believe that you are conducting a personal vendetta against a particular journalist whose reports on a number of occasions have caused you discomfort.'

The BBC clearly felt under siege – and, I suspect, so did Blair and his team.

THE LEAK

When David Kelly met Gilligan at the Charing Cross Hotel on May 22 it was not the first time. While not close, they had spoken several times before. Kelly, the MOD's top weapons specialist, was meeting the BBC's Defence Correspondent. It is impossible to believe that Kelly was in any sense being "taken for a ride" by the BBC journalist. There could not have been any naïveté here. Not only did Kelly have many journalist friends and talk to them off-the-record regularly, he was letting many of them know of his concerns. Some of them, like Judith Miller of the *New York Times* were key figures in deconstructing their government's case for war. In addition, Gilligan's notes of his conversation with Kelly reveal that he went back over the tale he would publicly tell with Kelly making it clear he was to "break" a story from this classic "leak" meeting. Finally, Gilligan had just returned from a trip to Iraq and was "full bottle" on the unfolding chaos and the lack of progress on the search for WMDs.

The notes of the conversation with Kelly, tendered in several forms at the inquiry, make it absolutely clear that Kelly was saying that the Government was misrepresenting the seriousness of the threat from Saddam. In particular, Kelly himself zeroes in on the claim in the public dossier, read by Blair, that some of the dictator's WMDs would be ready within 45 minutes of an order

to use them. In further particular, he makes it plain that Alistair Campbell, Blair's media man, had been meddling with the dossier and trying to harden its case for war.

In any journalist's terms, this was a giant story. The key document used by the Government was messed with and over-cooked – or "sexed up" as Gilligan termed it. It is not clear how many people Gilligan told inside the BBC that he had this scoop. In the normal course, and for reasons of exclusivity and outwitting your competitors, you would not be going around blabbing that some time soon you would be breaking a big WMD story. That Gilligan let it be known that he had such a story was told to some because the presenters of his radio program knew about it and so did his producers from the previous night. In the night before the early morning interview, MOD media people were told a major story on WMDs would break the next morning on the "Today" program. They were duly listening.

At 6.07 am Gilligan did the following interview live to air from his phone at home, one week after talking off-the-record to Kelly:

'That's right, that was the central claim in his dossier which he published in September, the main erm, case if you like against er, against Iraq and the main statement of the British government's belief of what it thought Iraq was up to and what we've been told by one of the senior officials in charge of drawing up that dossier was that, actually the government probably erm, knew that that forty five minute figure was wrong, even before it decided to put it in. What this person says, is that a week before the publication date of the dossier, it was actually rather erm, a bland production. It didn't, the, the draft prepared for Mr Blair by the Intelligence Agencies actually didn't say very much more than was public knowledge already and erm, Downing Street, our source says ordered a week before publication, ordered it to be sexed up, to be made more exciting and ordered more facts to be er, to be discovered... essentially, erm, the 45 minute point er, was, was probably the most important thing that was added...

'Well the 45 minute isn't just a detail, it did go to the heart of the government's case that Saddam was an imminent threat and it was repeated four times in the dossier, including by the Prime Minister himself, in the foreword; so I think it probably does matter. Clearly, you know, if erm, if it, if it was, if it was wrong, things do, things are, got wrong in good faith but if they knew it was wrong before they actually made the claim, that's perhaps a bit more serious.'

Note that the claims that Lord Hutton spends 300 pages on are not the substantive claim that the dossier had been "sexed up" under government pressure, causing concern among intelligence officials. They are the added extras, that (a) the government "probably knew" the 45 minute claim was wrong; and (b) the reason the 45 minute claim was not in the original dossier draft was because it was single sourced and therefore unreliable.

THE SUBSTANCE

Did Gilligan do a 'Thorpe' or did he dive in deliberately?

His notes reveal a typical journalist's jumble of thoughts, names, quips and ideas. In my view, there is no clue there as to any hidden agenda on Gilligan's part. I'll read some:

'... transformed week before publication to make it sexier... the classic was the 45 mins most things in dossier were double source but that was single source. One source said it took 45 minutes to set up a missile assembly, that was misinterpreted... most people in intelligence weren't happy with it, because it didn't reflect the considered view they were putting forward... Campbell... real info but unreliable, included against our wishes... not in original draft – dull, he asked, if anything else could go in... etc etc etc'

The notes are classic. I suspect he was concentrating on Kelly, not wanting to get the burden of Kelly's remarks wrong, taking notes that he would "write up" later when he got back and could recall what passed between them. That's what he did. In general, to me, a

long way from Britain, his report on the "Today" show that day broadly reflected the message from the notes.

So were his additions – the ones that so enraged Campbell, Blair and Lord Hutton – sloppiness, politics or his true belief? I suspect that the circumstances – which incline towards sloppiness (the lack of a script and the need for immediacy and thinking on your feet) – encouraged Gilligan to say what he actually believed to be true: that the Government, already heavily interfering in the production of the dossier to itself, must have known that the 45 minute claim was shaky.

Gilligan, of course, had no way of knowing. Kelly was not about to offer up the single source for the 45 minute claim despite his belief that he was unreliable. Certainly, those higher in the food chain at MOD would not be offering up the source, probably yet another Iraqi refugee from Saddam's brutal regime. Gilligan may well have reasoned that if the Government was brazen enough to present the dossier as an arm's length piece of advice to the Ministry of Defence when in fact it had undergone considerable change at the hands of Number Ten and was, in major part, a production of spinmeister Alistair Campbell, then it may well have known, further, that the 45 minute claim was shaky. And if the Government had been prepared to present a university thesis as evidence for war, and then relied on an unreliable Iraqi talking of Nigerian uranium tubes, then such a Government might have no compunction about stretching the truth on the 45 minutes claim.

And when is "stretching the truth" the moral equivalent of "lying"? Kelly was not saying, certainly not in Gilligan's notes, that the Government was lying. But he was saying the truth was being stretched. Do governments and politicians lie to achieve their policy objectives and serve the national interest? Of course they do. Was this such a case?

In that grey area between exaggeration and lying, Gilligan crossed a line. He was made aware by Kelly of the politicisation of the intelligence process, a corrupting of the public service requirement to provide frank and fearless advice – indeed, many would



say, in these circumstances, a military necessity in time of impending war – and I suspect he went on a hunch born of his dealings with MOD, Campbell and the Blair Government.

I can see all the defamation lawyers in the room sighing deeply. Sydney, the defamation capital of the world, the black vortex for investigative journalists. Here we go again, the lawyers say. Gilligan crossed two lines: one, from accurate reporting of Kelly to unproven allegation; and two, from news reporting to comment. When he apologised for his errors, he was apologising for straying over these two lines. And if you ask me what drove him over the lines in that mellifluous live flow on air to his presenter, it was that Gilligan thought the Government had so polluted the normal processes that, having dived deep into the waters of the intelligence community, they must have known that a single source on this important claim of 45 minutes – since, of course, proven to be absurd – was untrue.

I think his slip is a reflection of the bitterness between the BBC and the

Government, of the politicisation of the public service, and of the madness of the drive to war despite a divided nation. The only breakdown of trust that had *not* occurred was between the Government's top weapons expert and the BBC's Defence Correspondent. It was a recipe for disaster.

THE BBC'S PROCESSES

The BBC, as we know, took a bollicking from Hutton. Its upper structure crashed to the ground. Incidentally, much was made of the unwarranted defences of Gilligan by management. It is true that Gilligan's notes and his reporting should have been compared by editorial managers prior to such stout defence. But it is also all very well for the middle program managers to be installing editorial oversight systems after the event. Someone should be asking why, if Gilligan was thought by one editor to be "too black and white" why he was allowed to run his own race for so long by himself, breaking stories, reporting MOD, going live and talking to spooks? There seems to me to be a bit of none-too-delicate blame-shifting going on pre- and post-Hutton.

But the blame game is not the point. I think some important structural points are being missed both by Hutton and by the BBC here.

First, the BBC is under massive pressure to perform in the ratings, cut costs, outflank pay TV and pay-per-view and, as a public broadcaster, be all things to all people. It is under the usual thunder from the powerful Murdoch press in Britain. Its licence negotiations are coming up. As a result its investment in labour-intensive investigative reporting of the traditional kind – the kind you see on Panorama or Four Corners – has fallen sharply in the last 10 years.

Two, the CNN revolution has transformed news broadcasting around the world. BBC World was the first response to the idea that news is covered by having a reporter on-the-spot reporting live in to what the Americans call an anchor and we call a presenter. The disease has now infected domestic reporting as well. Everything is live, instant and it's just happened.

Three, the rundown of investigative reporting and the rise of instant news and opinion is a direct result of the extraordinary technological change of the last 15 years that began with satellites, went on to sat-phones, now involves fibre optic cable and broadband and has hit the streets as videocameras and videophones. Communication from anywhere to anywhere is possible and is getting massive use and deriving massive profits for some telcos. But the real question is still McLuhan's: is the medium the message? Is anyone saying anything worthwhile? Where has the content gone?

I suspect the judicial system, and Lord Hutton in particular, have little interest or knowledge in these changing media industry processes. On the surface, they seem to have little to do with the law. We in the media have seen the revolution. We see a foreign correspondent busting his gut and risking his life to get to a war zone only to send his report and hear his foreign editor say they only need some voice over – maybe written in London or Sydney – because pictures have already come via satellite from Reuters or CNN or NBC or Sky or agencies and yours aren't quite as good.

But in the real media world – the one that consumers listen to or watch – news is quick and dirty and it is competing with such wonderful inventions as lifestyle programming, reality television and pornography on the Net. How to make it interesting? The truth is that's the industry environment Andrew Gilligan was operating in and the BBC was setting up for him. The CNN-isation of news.

MISTAKES, JUDGMENTS AND THE LAW

In this environment, the distance between the working life of Andrew Gilligan and the working life of Lord Hutton could not be more different. Yet again, the disconnect between law and journalism. I would argue that this case shows clearly the need for a re-thinking of the law of defamation. We all make mistakes. I know, I know, my audience of lawyers will say journalists make more than others. But let's just say that no-one's an island and Andrew Gilligan had a great CV. He was working in an industry undergoing great change, emphasising fierce competition in the marketplace. He was also working in an organisation at virtual war with its sponsor. He was also working in the most contentious area of Government policy. He was also working under a seeming vendetta from the Prime Minister's PR man. Was a mistake, live and unscripted, inevitable?

If we answer 'yes' to that question, should we condemn the man, sack him and hope he never darkens a media door again and tut-tut all around the world? I think not. Should we close down "live" for the BBC and put it at a disadvantage in its battle with the private sector? I don't think so.

Here's an idea. Like the Americans, we should accept mistakes honestly made (or, in this case, if I am correct, beliefs reasonably held) and make legal allowances for the consequences. The consequences could be:

- quick retraction if proven false;
- debating the allegation; and/or
- equal and appropriate space for reply.

This notion has been swirling around defamation seminars for years. It's time to do something about it. Hutton refers

derisively to recent (2001) judgments by Reynolds J about the need for protecting public reputation. This is true, but my cry is for an adult and fulsome public debate.

The BBC Defence Correspondent, in this case, believed, in my view, even though his source did not say it, that the Blair Government "probably knew" that the claim that Saddam could get chemical weapons launched within 45 minutes was nonsense. Is that thought, backed up by further evidence and argument, not worth an airing in a democratic polity? The problem was that it was tacked on to the Kelly interview but, in my opinion, had there been better editorial management, Gilligan should have been given space and time to put his view as an add-on to the Kelly report. Blair could have replied and the public could have judged. Let's not be so afraid of 'a man's reputation' (Blair's)! Politicians do lie!

CONCLUSION: GILLIGAN WAS 95% RIGHT!

These were extraordinary times. Some might wish we could wipe the slate clean and start this century again. The "big picture" was that Gilligan reported that the weapons of mass destruction were a political weapon, not a military threat to the West and that the political process was being rorted. Under Henry VIII, he would have lost his head, but that was a monarchy. Under Tony Blair, you lose your livelihood because we are in a democracy.

Gilligan listed his central Kelly charges in a letter he wrote to the Deputy Leader of the House of Commons in late June last year:

'As the transcript, available on the Internet, makes clear, I also repeated to the [Foreign Affairs] Committee the charges of my source that the dossier had been sexed up; that the 45-minute claim was uncorroborated and considered unreliable; that it was included in the dossier, in the words of the source, 'against our wishes'; that the intelligence services were unhappy with the general tone and tenor of the dossier because, in the words of my source, it 'did not reflect the considered view they were putting

forward'; and that the dossier had been transformed just before it was published at the behest of Downing Street.'

All those were true.

The editor of *The Spectator* wrote that Gilligan was 95% right. Where he went wrong was to fall foul of the politicised decision-making process that the Blair

government had installed in its drive to war. Gilligan's "added extra" was wrong-headed and mis-placed but it hit a Blair sore spot because the distinction between "lying" and "misrepresentation" had become so thin. In an environment where the WMDs didn't exist, Blair was on thin ice assuring the British public of their pre-eminence and imminent threat. I suspect Gilligan's

report was not so much wrong as too close to the Prime Ministerial bone.

Andrew Gilligan is 95% scapegoat, 5% in error.

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Case Note: Electromagnetic Radiation and Telecommunications Networks

Mary-Ellen Horvath considers the recent decision of the NSW Land and Environment Court in *Hutchison Telecommunications (Australia) Pty Ltd v Baulkham Hills Shire Council*.

In the recent decision of *Hutchison Telecommunications (Australia) Pty Limited v Baulkham Hills Shire Council* [2004] NSWLEC 104, the Land and Environment Court of New South Wales (Court) considered the "precautionary principle" and confirmed the appropriate regulatory standards to be applied to electromagnetic radiation (EMR) emissions from mobile telecommunications base stations. Importantly, the Court held that it was inappropriate and not in the public interest for the Court to attempt to impose a standard that is not recognised by a national regulatory body and, moreover, that the creation of new regulatory standards is not a matter for the Court.

BACKGROUND

On 18 February 2003, Hutchison 3G Australia Pty Limited (Hutchison) lodged a development application (DA) with Baulkham Hills Shire Council (Council) to erect a mobile telecommunications base station - a monopole, approximately 36 metres in height with three panel antennae, located on land owned by Sydney Water in Castle Hill East (facility). On 20 August 2003, the Council gave notice of its determination refusing consent for the DA, stating:-

"The Development Application has been refused on the following grounds:-

1. Based on lack of evidence.
2. Duty of care to the residents.
3. The application is not in the public interest."

On 15 September 2003, Hutchison filed a Class 1 Application under s 97 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* in the Court, appealing the Council's decision to refuse the DA.

ISSUES

In its Statement of Issues, the Council identified the following issues:-

- potential adverse health impacts of EMR;
- adverse visual impact; and
- public interest and objectors' concerns.

Two weeks prior to the hearing the Council resolved to grant consent, subject to certain conditions, many of which were disputed. In essence, the disputed conditions were that:

- the power to the antennae be limited to 10 watts;
- EMR emissions from the facility be measured at less than 1 volt metre (1V/m) in any place frequented by a member of the public (the origin of the measurement of 1V/m is addressed below); and
- future mobile operators proposing to co-locate on the new tower must

submit details of their proposal to the Council and adhere to the conditions of consent imposed on Hutchison.

The most contentious issue was the potential adverse health impacts and whether the Court had the power to impose a standard which is more stringent than the relevant standard set out in *Radiation Protection Standard - Maximum Exposure Levels to Radiofrequency Fields - 3kHz to 300 kHz* published by the Australian Radiation Protection and Nuclear Safety Agency in May 2002 (ARPANSA Standard).

Legislative framework

The Court summarised the operation of relevant legislation and industry codes (at par 17):

The provision of telecommunications in Australia is governed by a complex regime of Commonwealth legislation. It is necessary to briefly review this to understand the legal framework relevant to this development application and the limits imposed on field strength under the Commonwealth regime. The Telecommunications Act 1997 (Cth) (the Telecommunications Act) in conjunction with the Trade Practices Act 1974 (Cth) regulates the telecommunications industry whilst the Radiocommunications Act 1992 (Cth) (the Radiocommunications Act) regulates the use of the