



# Media and Accountability

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## I. Introduction

In November 1917 William Morris 'Billy' Hughes was in Warwick in Queensland during his second unsuccessful referendum campaign to persuade Australians to vote for conscription. Let the political journalist, Arthur Norman Smith, take up the story -

An egg was thrown at the Prime Minister, but missed him. Another was successful, striking his hat. There was a melee, in which fists were used freely, Mr Hughes taking a full share. A police sergeant escorted off the platform a man who was alleged to have thrown the eggs, but declined to arrest him, although exhorted to do so by the Prime Minister. Later the man was charged at the local court and fined 10s. On an official complaint against the police sergeant by Mr Hughes the State Premier asked the Police Commissioner to inquire into the incident, with the result that the police sergeant was exonerated.

It is a short and unpretentious paragraph, yet vivid with the passions of those times and the character of Hughes. A.N. Smith wrote muscular sentences dense with facts, carefully arranged. His book *Thirty Years: the Commonwealth of Australia 1901-1930* is not a neglected classic. But it is fine reporting, and that makes it precious.

If A.N. Smith were with us now he would have his own Web site. In his day, he ran his own press agency. Smith and his staff reported the events leading up to Federation and chronicled political life in those first 27 years when the Commonwealth Parliament sat in Melbourne.

Smith was among the journalists who reported the difficult birth and infancy of the Conciliation and Arbitration Act. The parliamentary reporters saw that under its protections for unionists against reprisals, journalists too would have a chance to organise to improve their woeful working conditions. From this idea came the Australian Journalists' Association in December 1910, with A.N. Smith the first General President. As an employer of reporters himself, Smith would have to pay for gains achieved by the AJA. But being self-employed he was also immune from what one contemporary called the 'managerial frown' that was directed at other office-bearers in the vulnerable young AJA.

It is an honor to contribute to the continuing conversation about journalism that the University of Melbourne opened in 1936 when it inaugurated the A.N. Smith Memorial Lecture. But I must not just tell a story, bow and pass by. We do proper honor to his memory if we reflect on what Smith contributed to the improvement of journalism in his day, in his way, and then try to emulate him in ours.

Arthur Norman Smith and his contemporaries did more than merely report the changes that the new industrial relations legislation would bring to the relative positions of

employers and employees. Smith and his colleagues adapted those changes to the newspaper industry of their day and created an organisation that, by improving the industrial and professional conditions of journalists, improved journalism itself. Their successors this century have honored them not because they added shareholder value in monetary terms, but because we can see now that they nourished the larger public interest in better journalism.

I will argue this evening that in our time, in our way, we can adapt certain contemporary developments and put them in the service of better journalism. I want to try to refresh the stale debate about how we might advance the public interest in a free and accountable media.

Journalism about journalism has improved in the past 10 years or so. Satire has also played a role. The Australian Broadcasting Corporation, through programs such as Media Watch, Frontline and the Media Report, has contributed much. The effect has been to raise public awareness of the processes of journalism. But it naturally also raises expectations. When those processes seem to fail or do harm, journalists are fairly asked what they have asked countless times of others: who will take responsibility? who is liable to be called to account?

In suggesting some reforms to methods of media accountability, I hope for dissent, contradiction, correction and improvement. It is the dreary, dreary staleness that I fear. Complacency and timidity have never been good for journalism. They sap the store of self-confidence and public confidence that journalists need to draw on when they make necessary but unwelcome disclosures. It is up to journalism to prevent a society from averting its eyes from what it wishes least to face. Journalism does much else, but this is the function that matters most.

Can the necessary confidence be expected to remain if the media community persists with methods of accountability that are inadequate when assessed charitably against what is available?

## **II. Sketch of the argument**

In outline, my argument goes like this -

- Media have four purposes besides making money. Media help civil society cohere, lubricate democracy, make and mix culture and facilitate commerce. All four purposes are consistent with media as businesses.
- To fulfil the four purposes, media must be both financially independent and free of statutory regulation of their content.
- If media do fulfil their purposes, they wield public power.
- In Australia, media power is concentrated. But it may be diluted if shareholders, through directors and/or management, voluntarily disperse it within the corporation.
- Whether wielded by few or by many in media, that public power must be accountable if it is to be legitimate.
- Unless it is legitimate it cannot properly fulfil its purposes.
- With statutory regulation of media content ruled out for good reason, accountability depends on media self-regulation.

- That self-regulation has several levels, beginning with the individual. Self-regulation at every level can improve, and media people can draw on developments in other fields, adapting them to the unique circumstances of journalism.
- At the level of self-regulation administered by the boards and managements of media companies, one fertile but neglected source is the literature on corporate governance. Its revival in management and corporations literature stems partly from the excesses of corporations in the 1980s, including media corporations. It contains the basics from which a shared language might develop for fresh discussion of media accountability.

I make some assumptions: that the people who own and manage media are democrats who value legitimacy; that their audiences expect them to be so; that it is possible to agree on some shared values such as purposes of media; and that shared purposes can make it easier to adopt shared methods, including methods to hold power accountable.

### **III. Purposes of media**

What are media for, besides making money?

If this question is taken seriously it can free up minds and assist communication between insiders and outsiders. If you treat the profit motive as a given, if everybody accepts that shareholder value is important, you can go on to ask why else media matter. I have four suggestions.

#### *Help civil society cohere*

According to one account, 'a society is civil to the extent that it allows its members confidently, securely and productively to interact with people they don't necessarily love, but don't therefore hate.' Markets are part of civil society, but not its equivalent, nor its substitute. More and more, we are realising that markets cannot thrive without civil society. Every day the practical workings of civil society are aided by news coverage and advertising. Through media, people and groups inform, announce, dispute, persuade, commiserate and celebrate. More subtle are the ways media can promote (or diminish) the vital elements identified by theorists: civility among non-intimates, social trust, tolerant pluralism. The cogs of civil society - the clubs, churches, associations and on-line gatherings - are widely diverse, even antagonistic. But media can help them interact. Even if some never interact, through media they can observe one another and learn, at one remove, to tolerate each other. The operations of civil society are intricate, delicate and valuable beyond money's measure. They make for a society that airs its disagreements, sometimes rancorously, but settles them peacefully. They are especially important in a multicultural society.

I am not here discussing the quality of the job media do. We all differ on that. I am saying that this purpose - helping civil society cohere - ought to be accepted as one purpose of media businesses. Once you embrace something as a purpose of the business, it affects the way you run the business. As the Economist observed, 'there is nothing wrong with treating news as a product for sale; but you must treat it carefully, because it contains ingredients like trust and decency that spoil easily.'

#### *Lubricate democracy*

Democracy feeds and feeds off civil society. James Warden suggests the Australian version of democracy 'rests in habits, in the peaceful nature of the state, in the

machinery of elective government and, importantly, in the web of institutions which allow protections and provide opportunities for the citizen.' Media forms just one strand, but a vital one, in that web. Media is integral to democracy when it is open and responsive because it helps to produce an 'early warning/early rethinking' effect, the characteristic that makes democracy superior to all other types of decision-making, according to the English political scientist, John Keane. He notes that although democracy allows majorities to make decisions about things they are ignorant about, democratic procedures also allow minorities to challenge ignorant majorities. Citizens can 'think twice and say no'. Says Keane:

Only democratic procedures, reinforced by a plurality of communications media, can openly and fairly select certain kinds of danger for public attention, and carefully monitor and bring to heel those responsible for managing risky situations, thereby minimising the possibility of error and reducing the chances of the big mistake.

Does anyone in contemporary media suggest that the longstanding purpose of journalism to lubricate democracy, with all the work and suffering and thrills in its past and in its future, is no longer necessary? Must we cut it from the budget? Is the *raison d'être* of journalism still part of core business?

### *Make and mix culture*

Through media we recreate. We can remember the past and imagine the future. Partly through media, we make Australia's unique culture. Partly through media, we partake of the global culture. Partly through media, we mix the two. The word 'partly' is important. A big rich conception of 'culture' is unduly limited when we slip into suggesting that, to qualify as part of culture, events must be mediated. That said, media are undoubtedly significant in culture. They can help create and maintain myths, and can help undo them too.

### *Facilitate commerce*

Commerce turns on information and persuasion, much of it carried in media, much of that advertising. Classified advertising - distributed via newspapers or the internet - is essential to thousands of transactions. Real estate changes hands or gets rented; cars are traded; employment is offered and sought. Media content presented as non-advertising, as 'editorial content', can also facilitate commerce. On one level, the current inquiry into commercial radio by the Australian Broadcasting Authority is an encounter with the dictum attributed to Lord Northcliffe: news is what someone somewhere doesn't want published - all the rest is advertising. For markets to operate successfully, the basic data must be accurate and the range of opinion informed, contending and diverse. Transitory errors of fact or emphasis are inevitable and usually will self-correct so long as there are sufficient sources in play. But when matters are too long suppressed or a particular 'spin' is protected from challenge long enough to become orthodoxy, then market operations become distorted. In practice, markets are continuously informed by the interplay of many formal and informal sources. One significant source is media, in particular the financial press, especially for the growing proportion of Australians acquiring shares as they self-fund for retirement and governments privatise large utilities. These non-specialist investors have an anxious interest in how fund managers, company executives and boards perform. Media can be an independent check on the professionals, or media can be their unthinking echo.

None of the four purposes of media I have outlined is inconsistent with building value for the shareholders of media corporations. It is plain that those who direct and manage media can be expected to develop procedures that allow them to attend to every purpose of media. It is a complex and subtle task. It requires the constructive

participation of staff and oversight by shareholders, especially institutional shareholders. Later, we will examine how that might be tried.

#### **IV. Pre-conditions for fulfilling media's purposes**

Media cannot properly fulfil the purposes I have outlined unless they are financially independent and are free of statutory regulation of their content. Financial independence means the capacity consistently to exercise independent judgment about what to publish or broadcast, especially when the material is contrary to the interests of entities that are the sources of the media outlet's funds. The ABC is financially independent because of statute and convention, though both can come under strain. Commercial outlets need to be able to withstand a boycott by a large advertiser or pressure from lenders or from the sources from which it raises capital.

Many people associate better media accountability with some kind of statutory scheme, underpinned by Parliament's will, administered by the Executive and refereed by the Judiciary. I do not. I stake my all on self-regulation. History and experience tell me that, whatever the flaws of a media free from detailed content regulation, media subject to such regulation would be worse. Politicians of all complexions would be drawn irresistibly into the use of such regulation to manipulate, to intimidate and to suppress. All roads from a so-called independent statutory tribunal lead back through a Parliament to a Cabinet room.

Large media organisations, with most to lose, can reasonably be expected to sidestep risk, at least some of the time. That sort of timidity will not fulfil the purposes I sketched earlier. I believe a statutory scheme would most often be used against the smaller outlets that commonly try to make the most discomforting disclosures, and to do so first. In other words, the likely targets would be those most likely to animate the 'early warning/early rethink' model of democracy.

But special immunity from statutory regulation does not mean escape from accountability by other means.

#### **V. Public power and legitimacy**

When media do fulfil their purposes, they wield public power. The extent of that power may be matters of perception or degree. But the power exists, and can be verified partly by the seriousness with which governments of all types have treated the media since the invention of the printing press. It can be verified too by the premiums paid for media outlets and the extent of the losses that have been commonly endured to keep a media outlet open. (As an aside, one of the most interesting features of the internet has been to watch governments and markets adjust to the fact that no one owns it.)

The fact that media wield public power is not of itself a concern. Undue concentration of media power is of course another matter. But, concentration issues apart, it is healthy that media people exercise, without government supervision, whatever power comes with having won and kept the attention of a proportion of the public. I adopt the words of the Kent Commission, which inquired into the Canadian newspaper industry in 1981 -

The basic issue here is legitimacy. The most fundamental characteristic of a successfully free, democratic society is that the people and institutions exercising power in its various forms are generally felt to do so legitimately. They earn some consensus of public confidence; their motives are trusted.

In a democracy, no public power is legitimate unless it is accountable. In a dissenting judgment in support of defamation as a brake on media, a New South Wales judge described media as 'the last significant area of arbitrary public power.'

Unless accountable, media will fail in their purposes. The Brennan Committee, which revised the Media Alliance (Australian Journalists' Association) Code of Ethics, took up this theme in its report -

Journalists have a special obligation to be accountable because it is they who claim to be one of the main methods for holding to account, on behalf of the public, others who wield power. If the public becomes convinced that journalism will not accept accountability, and is hypocritical as well, then gradually the media will be perceived as illegitimate, as lacking credibility, as being unworthy of trust. When people don't trust you, they can't rely on you. Journalists cannot fulfil their responsibilities to the Australian community unless it relies on them. Without that reliance, democracy suffers, and eventually freedom wanes.

We are not saying doom is nigh. We are saying the stakes are high.

## **VI. Dispersing power**

I have identified purposes and the requirements of independence and accountability.

It is a fact of media in Australia that ownership and control are heavily concentrated and this longstanding trend seems likely to continue. It is also unassailable that those with the property rights in media are sovereign. In principle, they can make their property say what they please, so long as journalists will do it for them.

The usual response to concerns about the potential adverse effects of concentrated media power has been for the holders of the property rights to disperse the power. The extent to which independence was granted within a group, or within one outlet, depended on the owner and the management he or she appointed. Personalities were critical to the process, so independence waxed and waned. Different media organisations developed different cultures, in particular those that were controlled by families over long periods. Rarely were grants of independence so formal as the Charter of Editorial Independence adopted by the Fairfax board in 1992 after the company was acquired by Conrad Black. But the charter, for all its worthy words, lacked any enforcement mechanism. Only industrial action, actual or threatened, underpinned it.

One other contribution to independence was the so-called separation of church and state. That is, the division of responsibility for the journalistic aspects of a media operation from responsibility for its commercial side. Editor and business manager were always different people. The theory was that this kept the editorial side of the business free of the pressures that commercial imperatives might exert. At Fairfax, the roles of publisher and editor-in-chief have been combined. Michelle Grattan has lamented this development. While cautioning against romanticising the past, she suggests that what is different 'is the trend to the formal removal of the church/state division and the apparent acceptance that this is not only a necessary but an inevitable, acceptable and desirable development.' Steve Harris, who holds the dual role at The Age, described it in the 1997 A.N. Smith Memorial Lecture as 'the natural marriage of editorial integrity with the commercial imperatives we must address to ensure not only survival, but a successful future. It also guarantees a base level of commitment of quality, no matter how difficult economic times become.'

The idea of separation, of contending but roughly equal voices within a media operation, seems to me still to have merit. The conclusion has nothing to do with the qualities of

the present or future incumbents of dual roles. It has to do with the forces their dual roles require them to reconcile, ultimately as judges in their own cause. Such forces merit an advocate each.

## **VII. Methods of accountability**

Accountability can be extracted at many levels from media. Improvement at each level can and should be constant. Level by level, I will offer some suggestions, but will expand later at the level of the corporation.

Self-regulation starts with the self. The Brennan Committee recommended that every journalist be obliged to educate himself or herself about ethics. 'One behaves ethically by learning to reflect ethically on the options presented every day of one's professional life.' Journalists exercise what I call 'the sovereignty of the contact book.' I mean the contact book in which every journalist records the details of the people he or she deals with in preparing stories. Each is a unique resource, containing the relationships of trust and confidence that the journalist slowly builds. In some ways, the new media will be purer information businesses than the old. I do not mean the information will necessarily be better. I mean that presses, paper, ink, studios and transmitters will be less and less necessary to disseminate journalism. The key asset will be the information offered. The tools for gathering and sorting it are journalistic skill and contacts. In this sense, the accountable journalist will be 'rich' as well as sovereign.

Professional organisations. The Media Alliance, of which A.N. Smith's beloved AJA is a part, has revised its Code of Ethics and must now renovate its enforcement procedures. But we should be clear-eyed about the limits of what the AJA can do about media accountability. Of course it should do better, but only its members are subject to its enforcement system. Many senior decision-makers in media are immune. The Brennan Committee said that one of the benefits of effective MEAA action, within its limited scope, would be that it would 'leave great gaps in self-regulation for all to see. Attention should shift to the inaction and window-dressing of those in the media whose genuine commitment will be necessary if self-regulation is to be effective overall.'

Individual media outlets that belong to commonly owned groups nevertheless may have the autonomy to improve self-regulation. When Steve Harris ran the Herald Weekly Times, he devised a code of practice that applied only to HWT papers, not to the rest of the News Limited stable. Regardless of company policies in any stable, colleagues in workplaces can and do teach and counsel each other in the many casual conversations that affect how they gather news material and what they publish or broadcast. That activity needs to be valued more.

Corporations comprising several different media outlets will be discussed in a moment.

Each medium - print, radio, TV - at present has separate self-regulatory structures. None reaches the benchmarks for industry-based customer dispute resolution schemes prepared in 1997 by a working party that included several experienced industry self-regulators from other fields. Media organisations, whose task it is to watch and record society, seem oblivious to developments in industry self-regulation. The potential of the ombudsman model, for example, has been barely tried in media.

This evening I want to break the pattern of 23 years of criticism of the Australian Press Council. Instead of criticising it, I want to imagine the publishers had decided to close it and think bigger. Long gone are the circumstances of 1975-76, in which threats of statutory regulation spurred its establishment jointly by largely unenthusiastic publishers and the AJA, which had been pushing for a Press Council since 1955 or so. The industry could start fresh. Create a new self-regulatory organisation that meets contemporary

benchmarks of accessibility, independence, fairness, accountability, efficiency and effectiveness. Give it only the role of complaints investigation and adjudication. Do not give it the incompatible task of defending freedom of the press as well. That just saps credibility. Make a majority from public members and the independent chair. Limit everybody's term of service. Name the people against whom complaints are made, not just the publication. Open the hearings. Do not require complainants to waive legal rights. Let the new entity make awards of compensation, enforced through private (not statute) law, as the Australian Banking Industry Ombudsman can do. Publish dissenting judgments. Draw on the best of the Press Council's work, for many of the people associated with it have contributed much. Give the new entity sufficient resources and publicity so that it can build credibility. Accept accountability.

Radio and television self-regulation is at present overseen by the Australian Broadcasting Authority, but the licensees administer at first instance their own industry codes of practice. The processes lack transparency and sanctions. Much may change in the wake of the current inquiry into commercial radio. The ACCC has already wondered aloud whether 'advertorials' should be covered by the Trade Practices Act.

In this context we should consider what side-effects may result from media organisations adopting the language of marketing for their 'information products' and neglecting the conventions and language of journalism. It may become harder to make the case for exempting media from statutory 'consumer protection' regimes. Consider, for instance, the reporter who doggedly phones or e-mails people at their homes in the evening in search of leads, corroboration, numbers or an accuracy check. How far removed is he or she from the telephone operator who falls within the new ACCC-approved code of practice for direct marketers, with its 'standards for data collection' and its aim of protecting consumers from unreasonably intrusive forms of direct marketing?

Convergence in media may lead to converging self-regulation. Radio and newspapers are both on the internet. Datacasting will spread with digital television. On-line journalism is characterised by transience, not print's permanence. This could enhance self-regulation. New potential exists to make swift corrections; or to remove that which unjustifiably breaches privacy; or to try to minimise the prejudice to a fair trial that a careless disclosure may cause. Governments have begun to regulate internet content through their legislative measures against pornography. If history is a guide, they will attempt to extend the categories of regulated content. Can effective self-regulation forestall them?

## **VIII. Adapting corporate governance**

I will conclude with a look at the corporation and its potential to improve media accountability. For present purposes, the key relationships in private media are among shareholders, directors and management. The most senior journalists are now indistinguishable from management. It is in these circles that the decisive debates about better media self-regulation will occur.

Does a community have a generalised claim on media corporations that they be accountable, as distinct from the personal claims that an aggrieved individual might have? I have discussed the need for legitimacy stemming from use of public power. The legitimacy of the corporate form itself owes something to the public interest. Can the public demand accountability in return for the privileges granted by its institutions? Among other things, the law has made corporations legal persons, separate from the natural persons who own and run them; it taxes them differently; it limits the liability of those who invest in them.



Just as history helps us analyse media's purposes, so it can assist in considering the 'corporation' in media corporation. Independence is a shared theme. Early corporate forms were granted to educational and municipal entities as a way of ensuring them a sphere of influence separate from the monarch. According to Justice Louis Brandeis, the spread of the corporate form was initially restricted by fear that aggregations of capital would encroach on individual liberty, subjugate labor and lead to monopoly:

So at first the corporate privilege was granted only sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable.

The corporate form took hold for various reasons: corporations enjoyed economies of scale; they limited the liability of investors in the risky ventures of the colonial era; they could exploit technological advances. As corporations grew, their accountability shrank. When proprietors directed their own companies, they fused shareholder and director in one. As more directors ceased to be owners, the law 'tried to develop a standard of performance for directors that would encourage the same sense of duty that they would naturally use when they were representing themselves.' Professional managers grew in power, and new struggles developed between boards of directors on the one hand and managers on the other. Institutional investors, who controlled massive amounts of capital in an increasingly flexible financial system, applied pressures of their own to boards and managements.

These are the issues that preoccupy specialists in corporate governance. The field burgeoned after the corporate collapses of the 1980s. In the United Kingdom, partly in response to the excesses of media owner Robert Maxwell, Sir Adrian Cadbury headed a London Stock Exchange committee that produced a new code of corporate governance, since reviewed. The OECD has co-ordinated an international effort. In the United States, General Motors produced corporate governance guidelines, prompting the California Public Employees' Retirement System, the country's largest public sector pension fund, to become a leading advocate for reform among the 300 companies in its portfolio. The US Business Roundtable, comprised of the CEOs of the 250 largest corporations, produced a code in September 1997.

In Australia, Fred Hilmer, now chief executive of Fairfax, chaired a similar probe. Codes followed, and the Australian Stock Exchange has required disclosure of corporate governance practices.

The quality of thought and writing that has gone into corporate governance work seems, to a relative newcomer to it, to offer opportunities for reinvigorating the debate about media accountability that we know too well. With adaptations, the corporate governance literature could inform a revived debate about media accountability, at least at the level of the corporation. The following suggestions are tentative.

- Independent directors, how to recruit and elect them, how to prevent their 'capture' by management - these are familiar issues in journalism too, but not in relation to boards. They mostly occur in the context of independence of editors or executive producers from management.
- Just as journalism worries about concentrations of ownership and control, so writers on corporate governance examine the implications of concentrations of board positions.
- Codes of best practice in corporate governance, as well as the law itself, try to prevent conflicts of interest or the appearance of them. Media codes wrestle with the same issue. Who succeeds, who fails, and why?

- Corporate governance codes tend to focus on accounting and financial reporting standards, and to require that boards form audit committees and remuneration committees. They are checks on management and, to some extent, on the directors themselves. Would it be feasible for the boards of media corporations to establish 'editorial independence' and 'journalistic accountability' standards in relation to management or editors, as the case may be?
- If journalism and its four purposes were given greater priority, and standards of independence and accountability were set, could boards establish journalism committees to monitor the corporation's compliance with those purposes and standards? Independent directors could be appointed, as they are in other contexts. In the case of a board journalism committee, an 'outsider' view would seem to be particularly important. Suitably qualified persons could advise the committee. Institutional shareholders and organised groups of small shareholders could participate in 'watching the watchers'.
- Separation of powers concerns corporate governance just as it concerns those who doubt the wisdom of combining the top editorial and commercial positions in a newspaper. Clause 1.2 of the Cadbury Committee's Code of Best Practice is of course intended to be generic, yet it seems particularly apt for media corporations with many outlets and an imperative to disperse power. The clause reads: There should be a clearly accepted division of responsibilities at the head of a company which will ensure a balance of power and authority, such that no one individual has unfettered powers of decision.
- Finally, corporate governance principles emphasise transparency and disclosure. The literature often refers to the role of media in keeping boards and managements under scrutiny. Disclosure is also a fundamental element of effective media self-regulation

## **IX. Conclusion**

I have tried to open a dialogue between speakers of two different languages - those who are fluent in journalism as public service, and those who are fluent in media as business. The two groups appear to me to have a lot to talk about.

I hope A.N. Smith would have thought it worthwhile to take the discussion further.

Thank you for the honor of giving the lecture.

Thank you for your attention.