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Fit and proper person

Senator Richard Alston, Shadow Minister for Communications, suggests the "Fit and Proper Person" requirement in the Broadcasting Act has been abused by the Australian Broadcasting Tribunal. An alternative approach is outlined.

In 1987, the Prime Minister acknowledged the archaic state of the Broadcasting Act and promised that the Government would urgently reform "this nightmarish legislation".

But for the last two years, it has stood by and done nothing. Meanwhile, the Bond saga has slowly wound its way through the Australian Broadcasting Tribunal and the courts.

Such protracted and expensive courtroom battles are commercially debilitating. Senior executives of a licensee are required to devote many months to protecting a company's legal position rather than pursuing its business interests: an outcome not in the interests of shareholders, the community or the national economy.

It is surely in the community's interests to resolve allegations of breaches of broadcasting standards as expeditiously as possible. This cannot be done while even a relatively minor infringement could in theory lead to a licence cancellation.

Instead of legislating to give the ABT a broader range of discretionary powers or to allow the Federal Court to punish specified transgressions, the Government has allowed the perpetuation of an all or nothing approach. This is not only demoralising and distracting for broadcasters but prolongs the state of crises and uncertainty which continues to bedevil the industry.

The Current position

As a result of the 1981 amendments to the Broadcasting Act, the ABT may refuse, in the public interest, to grant, renew or transfer a television or radio licence to a person (or corporation) unless satisfied that such person is "a fit and proper person to hold a licence".

The phrase "fit and proper person" is not defined in the Act and has been criticised on the grounds that:

- It is so broad as to be quite unpredictable in its ambit. People should not be required to labour under laws and regulations, the scope and meaning of which are not capable of ready comprehension and reasonably precise definition. They have the right to know "where the line has been drawn" so that they can ensure that they do not step over it.
- It inevitably involves a subjective and therefore variable assessment of character and morality.
- Persons have a right not to be subject to onerous penalties for conduct, the legality of which is ruled on subsequently and then applied retrospectively.
- That it judges villains rather than villainy.
- Offenders should not be punished for the same transgression twice. The ABT has in a number of inquiries into fitness and propriety cast its net extremely widely to include consideration of previous convictions for conduct unrelated to broadcasting.

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The rationale

In 1984 the ABT issued Policy Statement 9 which endeavoured to spell out the relevant principles. The rationale for introducing a broad and subjective requirement was expressed in these terms: "The privileged position afforded to licensees, and the nature of broadcasting itself, mean that the standards of conduct and responsibility to the public required of licensees are different to those expected in many other areas of business, where entry is less restricted and public impact not so great".

The scarcity argument is weak. There are many areas of commercial endeavour where entry is restricted by the Government without such a requirement being placed on those enjoying privileged access eg, domestic and international air services into and through Australia; telecommunications and postal services.

The capacity to influence public opinion is admittedly significant but newspaper proprietors have never been subject to this type of regulation. Further, it would be easy to guard against the abuse of media power by developing program standards such as contained in s. 4(2) (d) of the New Zealand Broadcasting Act which requires broadcasters to ensure that their programs are consistent with: "the principle that different points of view be aired on controversial issues (not necessarily in the same program)."

The Tribunal regards itself as having a very wide discretion as to the qualities which

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it can take into account. It has defined the relevant test as being: "is it likely that the existence or non existence of the quality under examination will adversely affect the manner in which the licence is conducted?" However, it concedes that the test does not make it clear what kinds of matters are to be taken into account.

It has identified the two essential elements of fitness and proprietory as trustworthiness and candour.

Trustworthiness of Broadcasters

According to the Tribunal "a licensee must be a person who can be trusted to:

(a) comply with the requirements of the Act, licence conditions and program standards, and
(b) provide the best possible service to the public, within reasonable financial bounds".

While the relevance of breaches of broadcasting laws is clear the Tribunal has, however, gone well beyond this domain. For example:

- by imposing licence conditions requiring a director of a radio licensee to resign from the board of directors following his conviction for failure to lodge income tax returns;
- holding the use of film tax minimisation schemes by two Packer companies as relevant although such activities were not illegal and did not bear on the performance of Broadcasting Act obligations.

The Tribunal insists that a licensee be trustworthy because the licensee has to be trusted to comply with the Act, standards and licence conditions and to provide the best possible service.

It is not clear, however, why the Tribunal must "trust" licensees in these respects, as licensees are explicitly enjoined to comply with all of these requirements elsewhere in the Act. There is thus unnecessary duplication: licensees must not only comply with the Act but there are separate provisions requiring them to be trusted to do so. This is an unnecessary gloss upon the substantive requirements in the Act.

Candour of broadcasters

The United States approach, adopted by the ABT, has been to impose a duty of candour on a licensee to inform the regulatory body of facts of which it ought to be aware in order to protect the public interest. This amounts to two basic duties:

(a) to notify the Tribunal of any matters which, to the knowledge of the person, might amount to a breach of the Act; and
(b) to supply full and accurate answers to any request by the Tribunal for information which properly relates to the Tribunal's functions.

Even if it is accepted that such obligations are appropriate, it does not follow that they should be imposed under the rubric of the fitness and propriety test. It would be a relatively simple matter for a licence to contain standard conditions imposing such requirements and specifying the consequences of deliberately withholding certain categories of information. The most appropriate regime would probably be a broad range of fines for all withholding offences with only repeated infringement jeopardising the licence.

The ABT argues it is appropriate for it to be able to rely upon licensees to provide full and accurate information when requested and even to volunteer relevant information when not requested. Given, however, the extensive powers of the Tribunal to conduct investigations, compel witnesses to give evidence on oath, to compel the production of documents and the ease with which third parties may make submissions to inquires, it is difficult to see why the ABT is peculiarly dependent on the candour of those it must regulate.

The Relevance of criminal conduct

The 1984 guidelines argue that any criminal conviction may jeopardise a licence - whether it does depend on the circumstances of the case, the nature and seriousness of the offence, how recently it was committed and the circumstances surrounding its commission.

Moreover, the commission of offences involving dishonesty by a director or senior executive are to be taken into account in assessing the trustworthiness of the corporation. Other serious offences would also be relevant if committed by a person in a position to exercise control over the operations of the licensee. This is a thoroughly vague and unsatisfactory situation.

In the absence of specific statutory or licence transgressions the current situation amounts to a pre judgement of guilt. This is analogous to the now discredited notion of consorting which presumes present criminality on the basis of past behaviour.

Nature of the licence

The fitness and propriety test has also been used as a means of achieving policy objectives. For example, the proposed structure of an applicant can be crucial where community participation is regarded as important. The Tribunal has even rejected an applicant as not fit and proper because it did not satisfy the Tribunal's special requirements for a TV repeater station.

These policy objectives could be achieved quite simply by the inclusion of special licence conditions. They have nothing to do with fitness and propriety in the sense that the term is used elsewhere and their employment as a device for ensuring social objectives is a clear abuse of the concept.

Similarly, the fitness and propriety formula has been used to ensure a preferred level of local involvement and association with a service area. Once again, such objectives can be specifically catered for without resort to the fitness and propriety requirement.

Cross media ownership

On the basis of a 1982 Administrative Appeals Tribunal decision the ABT considers that "depending on the particular circumstances" it may take into account the effect of a person's cross media interests when assessing fitness and propriety.

It simply does not make sense to suggest that a company's shareholding interests can be indicative of any moral shortcomings. Not only is this simply an artifice to achieve another policy objective which is easily capable of clear specification, but it once again introduces profound uncertainty into the corporate planning process.

An alternative approach to criminality

In so far as the ABT currently finds it necessary to investigate criminal conduct, it is not well equipped to do so. Such investigations are more appropriately the responsibility of the criminal justice system. Subsequent court proceedings could be seriously prejudiced by ABT inquiries, especially having regard to the increasingly high profile such inquiries are being accorded in the media.

Equally the abuse of "media power" to further a licensee's extra-broadcasting business or political interests would ordinarily be covered by State laws. Had Bond's alleged threat to investigate the AMP Society been established in court of law in New South Wales, it may well have constituted an offence under s.100A of the NSW Crimes Act, 1901. To the extent that existing laws do not

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The law of contempt

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In other categories of media contempt, the proposed shift of emphasis from the protection of the administration of justice; in general to protection of individual rights does not furnish easy and immediate answers to the question of what prohibitions on publication, if any, should apply.

An example is the difficult category of reporting of jury deliberations. Yet even here, it seems to me that the most constructive approach is to analyse carefully the possible detriment to the rights of the prosecutors and defendants - in particular, in cases where jury secrecy prevents the disclosure and reporting of misconduct in the jury room - and balance them against considerations in the opposite direction for example that it may be oppressive to individual jurors, and possibly detrimental to the proper discharge of their functions, to allow the media to report indiscriminately on what happened or allegedly happened in the jury room.

Contempt Law Reform and the Attitudes of Goverment

The Report of the Australian Law Reform Commission on Contempt, for which I took primary responsibility as Commissioner in Charge, was tabled in the Commonwealth Parliament in June 1987. Looking back on it from a distance of nearly two years, I have some regret that in its discussion of media contempt it did not draw sufficiently clearly and firmly the distinction which I have just elaborated - between protection of individual rights and protection of the system of administration of justice. But its recommendations did, on the whole, fall in line with the approach adopted in this paper.

The fate of the Report is not encouraging. Its official status within the Commonwealth Attorney-General's Department is that of being "under consideration". The Report recommendations in relation to contempt of Family Court orders, however, have been included in a Bill to amend the Family Law Act recently tabled in the Federal Parliament. There has also been some discussion at the State level in Victoria and, more recently, in New South Wales of a partial implementation of the Report but there has been no legislative changes as yet.

There are, I suppose, two main reasons why reform in this area is not attractive politically. One is that, particularly in the absence of high-profile cases such as those of Gallagher and Wran, there are not may votes to be gained from contempt reform. The other is that the majority of the members of an important, albeit muted, interest-group - the judiciary - have no wish to see their contempt powers curtailed by legislation.

Neither of these reasons is sufficient to justify perpetuation of an archaic approach, via the law of contempt, to the particular issues of media law which this paper has discussed. It is, I think, time for some renewed pressures upon Commonwealth and State governments to be exerted by media organisations and other concerned with the cause of freedom of the media and with the competing argument that such freedom should always respect the rights of individuals appearing in our courts.

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prohibit such conduct, specific provisions could be inserted in the Commonwealth Crimes Act so that the conduct can be adjudicated upon by the Federal Court rather than the ABT.

Offences to be specified

While standards compliance and service provisions are clearly of fundamental importance there is no reason why minimum requirements cannot be spelt out with precision. There may be some breaches which would warrant cancellation of a licence and these could be clearly specified.

Most contraventions, however, would be deserving of something less. It could be provided that all breaches other than those specified should be dealt with by a fine or other lesser forms of sanction.

Such an approach would make clear the consequences of particular kinds of delinquent conduct without putting a licensee in jeopardy for every transgression. If certain conduct is regarded as disqualifying a person from being a director, eg having a criminal conviction or being an undischarged bankrukpt, then the legislation should say so.

"The time has therefore come to scrap these regular rounds of morality plays and substitute a clearly specified range of offences ...."

The present provisions are little better than a charade because it is widely believed that a government conscious of viewer and employee outrage would not allow a station to go off air. But the fact that the Tribunal's punitive options are presently limited effectively to licence cancellation or a reprimand, leave open the possibility of the former, with perhaps catastrophic share price consequences in the event of a licensee being forced into a fire sale.

Irrespective of the degree of culpability attached to an individual proprietor, there is scant justice in a system which inflicts massive share losses on innocent and unsuspecting minority shareholders.

Conclusion

"Fit and proper person" inquiries have become a media circus attended by enormous publicity and damaging speculation about the ultimate outcome which, under the current cumbersome legislative minefield, are almost certain to take a number of years to resolve.

Such a broad and potentially all embracing test serves no useful purpose. Leaving high flying media proprietors to twist in the wind may gratify those seeking theatrical entertainment but it does nothing to achieve a quick and effective decision which meets legitimate community concerns and allows licence holders to get on with, or to get out of, the broadcasting business.

The time has therefore come to scrap these regular rounds of morality plays and substitute a clearly specified range of offences which are deserving of punishment by the ABT or preferably by the Federal Court. In the vast majority of cases, a fine, sometimes very hefty and perhaps geared to revenue or profits would be a more than adequate penalty as well as a significant deterrent to future unacceptable conduct.

Licence cancellation should be only a last resort imposed because of the repeated commission of serious offences.