

Australian Broadcasting Tribunal v Alan Bond

Giles Tanner and John Corker discuss this recent case on fitness and propriety and judicial review of the ABT

If the catch-cry of the eighties was "let the free markets roar!", the nineties may be shaping up as the decade of "let the regulators regulate" - that is, if the High Court's recent Bond judgment is anything to go by.

The judgment is the culmination of a two-year Australian Broadcasting Tribunal inquiry into the fitness and propriety of radio and television stations associated with Mr Alan Bond to continue to hold broadcasting licences.

Narrowed scope

This case has significantly narrowed the scope of decisions that can be challenged by way of judicial review under the Administrative Decisions Judicial Review Act (the ADJR Act).

The Tribunal found that Mr Bond had deliberately given false and misleading evidence to it, that he agreed to pay Sir Joh Bjelke Petersen \$400,000 to settle his defamation claim believing that if he did otherwise, the Premier might harm his interests in Queensland, that Mr Bond threatened to use his then TV staff to gather information on the AMP Society and to expose them by showing the results on television and that Mr Bond was no longer a fit and proper person to hold a commercial television licence.

However, the High Court ruled that none of these findings of fact by the Tribunal were reviewable as they were not "decisions made under an enactment" in accordance with section 3 of the ADJR Act which provides that:

"decision to which this Act applies means a decision of an administrative character made, proposed to be made, or required to be made, as the case maybe (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General or" [certain decisions prescribed in that Act].

The Tribunal findings were considered as only steps along the way to reaching a decision that the licensees were no longer fit and proper persons to hold the licences and thus only this final decision was reviewable. It is now clear that unless a statute provides for the making of a finding or ruling on that point, it will not be reviewable under section 5 of the ADJR Act.

Administrative law in this country is relatively new and to date the courts have

been keen to expand the scope of review available to ordinary persons. It is ironic that the Broadcasting Tribunal, whose job it is to protect the public interest, is the body whose decisions have led to a narrowing of the scope of judicial review.

Perhaps this is not surprising. The judgment indicates, there comes a point where the greater risk that the efficient administration of government will be impaired prevails.



Alan Bond

Conduct

For those seeking to review the conduct of a decision maker pursuant to section 6 of the ADJR Act, this concept is now clearly elucidated in the judgment and is restricted to matters that are essentially procedural in character. Conduct points to action taken rather than a decision made and looks to the way in which proceedings have been conducted.

A nice point that flows from this is that under section 13 of the ADJR Act, a decision maker is not compellable to provide reasons for a decision made that is purely to do with the conduct of the matter, such as a refusal to grant an adjournment. A person aggrieved is only entitled to reasons for a decision made which is a decision under an enactment. As reasons cannot be obtained for such decisions, it makes it harder to prove that the decision maker's discretion has miscarried or that there has been a denial of natural justice.

Fit and proper person

In the commercial broadcasting context, the High Court has favoured a wide view of matters potentially relevant to the fitness and propriety of a licence holder. It strongly affirms that broadcasters have a duty to the public, attendant on their power to influence public opinion.

Justices Gaudron and Toohey noted the significant role broadcasters play in the dissemination of information and ideas, a dissemination vital to the maintenance of a free and democratic society. Characterising this role as an obligation to the community, they said that the community was entitled to expect that a licensee would discharge its obligation and that it would not abuse its influence.

Chief Justice Mason referred back to the 1954 Royal Commission on Television, which described the possession of a broadcasting licence and the privileges it conferred as "in the nature of a public trust for the benefit of all members of our society".

It follows that the question for the Broadcasting Tribunal is not whether improper conduct has occurred, but whether the general community will have confidence that it will not occur. Amongst other things, character and reputation (because they provide an indication as to public perceptions of the likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to hold a commercial broadcasting licence.

Corporate veil

The Court also confirmed that the Tribunal is entitled to lift the corporate veil in determining whether a licence holder is a fit and proper person. The question of what matters go to fitness and propriety will be one of fact, dependant on the particular circumstances of each case. In appropriate circumstances, said Justices Toohey and Gaudron, the question may be determined by reference to the conduct, character or reputation of a single person associated with a company. This is in contrast to the Federal Court's position, which was that the Tribunal erred in not examining and taking into account the character, reputation and performance of the boards and management of the licensee companies.

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