

A person suitable for broadcasting?

Giles Tanner reviews the suitability test under the *Broadcasting Services Act*

The announcement that two unknown companies had won the bidding contest for two satellite pay television licences focussed media attention not only on the Government's tender system but also on the new licence allocation processes under the *Broadcasting Services Act 1992*. In contrast to the intensive vetting of would-be broadcasters that characterised the old *Broadcasting Act 1942*, the only requirements of the new Act are a green light from the Trade Practices Commission and a test of suitability administered by the Australian Broadcasting Authority ("ABA").

The test for suitability

At face value, the words "suitable person" encompass a range of considerations also relevant to fitness and propriety as it was understood under the *Broadcasting Act*. Indeed, the words would probably cover the other requirements under that Act of financial, technical and managerial capability.

However, the *Broadcasting Services Act* has given the words a narrower, statutory meaning. The Act deems a pay television licence applicant to be 'suitable' unless the ABA has decided that section 98(2) of the *Broadcasting Services Act* applies to it. The ABA may do this if it finds that allocation would lead to a significant risk of an offence against the Act or regulations, or a breach of the conditions of the licence occurring. In deciding whether such a risk exists, the ABA is required to have regard to the business record of the applicant and its controllers and their record in situations requiring candour. It appears that the ABA may have regard to other matters as well.

Offences in the Act relevant to a pay television licence relate to compliance with the ownership and control limits on pay television and to the reporting and notification of changes in control. The applicant must also be capable of complying with all of its conditions, which in the case of pay television relate mainly to programming (such as anti-syphoning rules, no R-rated material until and unless both Houses of Parliament approve its transmission and no advertising or sponsorship before 1997). Of some relevance is the requirement that the service is not to be used in the commission of an offence.

The Bond case

The differences between the old and the new tests can be illustrated by looking at two of the findings in the Australian Broadcasting Tribunal's *Bond* inquiry. Those findings were that Mr Alan Bond deliberately gave misleading evidence to the Tribunal, and that Mr Bond threatened to use his television staff to gather information on a business competitor and to expose the competitor by showing the results on television. Both findings were held to be relevant to whether Mr Bond was a "fit and proper person" to control a television licence.

The first finding would fall clearly within the matters the ABA must have regard to in section 98(3), as it relates to the record of a person in a position to control the licence in a situation requiring trust and candour. The second might conceivably fall within the concept of the 'business record' of a person in a position to control the licence. If it does not, the ABA could still have regard to it, as the list of matters it may take into account is open ended.

However, before deciding Mr Bond was not a suitable person, the ABA would have to go a step further and decide there was a significant risk of an offence against the Act or a breach of the regulations being committed. The first finding might suggest an increased risk of non-compliance with a reporting requirement, such as the requirement to notify control changes in section 112. Whether the particular risk is "significant" would be a question of fact for the ABA to determine. It is not clear how the second Bond finding could give rise to a significant risk in the terms of section 98. Even if Mr Bond's threat contravened a code of practice, compliance with codes is not incorporated as a condition of a licence.

Why was the new test adopted? A booklet published by the Department of Transport and Communications states that a "suitability test, which is clearly relevant to the obligations of a broadcasting licensee, replaces the unwieldy mechanisms of the 1942 Act." The booklet describes the fit and proper person test as "vaguely defined and widely interpreted".

A limited approach

The new approach, which links licensee suitability directly with relevant offence provisions and licensing conditions, addresses

criticism of the unnecessarily wide scope of the term "fit and proper person" made by the Australian Law Reform Commission in a different context. In its ALRC Discussion Paper 41, *Customs and Excise Licensing Provisions*, the Commission proposed that the "fit and proper person" test be replaced by a concept aimed more directly at the concerns of the *Customs Act*.

The question remains whether a test that is directed solely to compliance with the offence provisions and licence conditions in the *Broadcasting Services Act* adequately addresses all the "concerns" of that Act. Take for example one of its stated objectives, in section 3: 'to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest...'

To return to the Bond inquiry findings, the misuse by a proprietor of a television network's journalistic resources and power of news dissemination would appear to pose a direct threat to this objective. However, it is not clear how it would render that proprietor "unsuitable".

Giles Tanner is a lawyer with the ABA. The views expressed are his own, not those of the Authority.

Thank You

On 28 April 1993
Julia Madden
retired from the
presidency of CAMLA,
after serving two
consecutive terms.

We wish to thank Julia
for her energy and
dedication to CAMLA
over this period.

Details of the 1993
CAMLA
Executive appear overleaf.