

HOW ARE THE MIGHTY FALLEN . . . IN THE MOST OBSCURE* PLACES!

by

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How are the mighty fallen!

Tell it not in Gath, publish it not in the streets of Askelon; lest the daughters of the Philistines rejoice, lest the daughters of the uncircumcised triumph.

. . . they were swifter than eagles, they were stronger than lions.

. . . How are the mighty fallen in the midst of the battle!

. . . How are the mighty fallen, and the weapons of war perished!¹

These words aptly describe the results of two recent licensing inquiries involving two “heavyweight” companies in Australia. The purpose of this article is to analyse the inquiry conducted by the Australian Broadcasting Tribunal (ABT) into the fitness and propriety of Alan Bond and Bond Media Ltd to hold commercial radio and television licences and the impact of the Tribunal’s decision. This will be compared and contrasted with the inquiry conducted by Victoria’s Credit Licensing Authority (CLA) into HFC Financial Services Limited’s application for a credit provider’s licence.

At first glance, one may wonder if there is any connection between Bond Media Ltd and HFC Financial Services Ltd. Similarly, one may ask, what is the connection between the finding made by the ABT and the CLA’s decision? As it will become clear in due course, this article is about the power or effectiveness of a licensing system to deal with powerful companies which are often perceived as “untouchable” by regulatory bodies. Perhaps, a more accurate title for this paper would have been: “the power of licensing”. Moreover, both Tribunals which conducted the licensing inquiries may be said to be “obscure jurisdictions”; at least until the decisions in the two cases discussed here.

I ABT and CLA, OBSCURE JURISDICTIONS?

The ABT and CLA exercise federal and state jurisdiction respectively. Both are specialist bodies which exercise jurisdiction over providers of service to the public. The former regulates broadcasting and television services in Australia, whilst the latter’s jurisdiction is confined to providers of consumer credit in the State of Victoria (it has counterparts in other States). By virtue of their specialist nature, the jurisdictions which they exercise do not directly affect the daily lives of most Australians — the ABT deals only with companies whilst the CLA deals largely with companies. Few persons have anything to do with these jurisdictions. The existence of the ABT is perhaps better known than the CLA because of the high profile of the medium which it regulates. The CLA is well and truly obscure — even to most lawyers. This is explained by the fact that it is not a forum for redressing complaints or grievances of consumers; that role is performed by the Credit Tribunal.

* The term “obscure” is not used in a negative or disrespectful way, but rather to mean, “unknown or not well known”.

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1. The Second Book of Samuel, otherwise called The Second Book of the Kings, in the Holy Bible, Old Testament, King James version, ch.1, verses 19, 20, 23, 25 and 27.

(1) The Role and Functions of the ABT in Licensing Commercial Television

The ABT is an independent statutory body established on 1 January, 1977 by s.7 of the *Broadcasting Act 1942* (Cth). It is responsible for regulating some aspects of commercial television and commercial and public radio. The ABT's jurisdiction does not extend to regulating the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS). The former is established under the *Australian Broadcasting Corporation Act 1983* (Cth) but the latter is established and its functions are defined by Part IIIA of the *Broadcasting Act 1942* (Cth). Both organisations are funded by the Federal Government.

The express functions of the Tribunal are set out in s.16(1) of the Act as follows:

- to grant, renew, suspend, revoke and accept the surrender of licences; to authorise transactions in relation to licences;
- to grant approvals and give directions in relation to the ownership and control of licences;
- to determine the standards to be observed by licensees in respect of the broadcasting of programs and in respect of programs to be broadcast;
- to determine the hours during which programs may be broadcast by licensees;
- to hold inquiries and to publish reports in relation to those inquiries;
- to assemble information relating to broadcasting in Australia; and
- to perform such duties and exercise such powers as are imposed or conferred upon it by the act and the regulations.

Licensing of Commercial Television

The decision to introduce and license television service in Australia was taken by the Menzies Government in 1953. The first four commercial television licences were granted under the *Television Act 1953* (Cth) as an interim measure². With the passing of the *Broadcasting and Television Act 1956* (Cth), the dual system applying to radio was extended to television. Under that system, the Australian Broadcasting Commission (as it was then known) would provide a national network, but commercial stations were to be licensed to serve particular areas. Under s.45(1) of the 1956 Act, the granting of a licence was reserved to the Minister.

The reasoning for the licensing system was given by Postmaster-General Davidson when introducing the Bill in 1956 as follows:

Honourable members will be aware that since 1935, there has been a restriction on the ownership or control of commercial broadcasting (i.e. radio) stations, no person being permitted to own or control, directly or indirectly, more than eight such stations in the Commonwealth. The Government considers that the ownership of commercial television stations should be much more severely restricted. . . . The Government is firmly of the opinion that the ownership of commercial television stations should be in as many hands as practicable and that it should not be possible for any one organisation to obtain control of any substantial number of stations³.

There are currently 50 commercial television licences; they are either linked through affiliation agreements or common ownership to form three national networks controlled by three major companies. Of the 50, 14 licensees serve the 5 mainland State capital cities, reaching approximately 65% of the total population. The key principles underlying the

2. Pending the outcome of the inquiry by the Royal Commission on Television chaired by Sir George G.W. Paton. The Commission recommended a dual system: a national network and licensed commercial stations. See *Comm. of Australia: Report of the Royal Commission on Television* (1954).

3. *Parl. of the Comm. of Australia Hse of Reps. Hansard* at 1537 (19 April, 1956).

system of ownership or control of Australian television have been stated as being:

- to avoid undue concentration of ownership or control of commercial television;
- to promote local ownership and favour “independent” applicants;
- to limit foreign ownership and prohibit foreign control;
- to preserve the integrity of licensing decisions; and
- to encourage a diverse shareholding in licensee companies⁴.

Criteria for Licensing Commercial Television

The ABT’s task is to screen the applicants in the selection process and then to license the most suitable applicant. Prior to 1981, the criteria used by the Tribunal in licensing were not defined; the general objects and purposes of the *Broadcasting Act* provided the parameters within which the ABT exercised its discretion⁵. In that year, amendments made to the Act, inserted specific criteria for the Tribunal to use. The aim behind the amendments was to introduce greater certainty in the licensing area. It was meant to “provide a clearer statement of Government policy in relation to the major discretionary powers of the Tribunal” by codifying the “public interest”⁶.

The “exclusive licensing criteria”⁷, so called, because the ABT can have regard only to those matters, may be summarised as:

- undertakings, to comply with the conditions of the licence, to provide an adequate and comprehensive service; and to encourage Australian programmes and the use of Australian creative resources;
- the fitness and propriety of an applicant;
- the financial, technical and management capabilities necessary to provide an adequate and comprehensive service;
- whether there is undue concentration of interest in non-metropolitan areas; and
- the need for the commercial viability of existing services in the area.

(2) The Role and Functions of the CLA

The CLA was established in February 1985 pursuant to s.17(1) of the *Credit (Administration) Act 1984 (Vic)*⁸ (the *Administration Act*). Its functions⁹ are:

- to consider applications for a grant of a licence, or re-applications where a licence has been previously cancelled;
- suspension or cancellation of licences under certain circumstances; and

4. Dept. of Communications, ‘Ownership & Control of Commercial Television — Future Policy Directions’ Vol 1: Report para. 4.4, p.41 (August 1986).

5. See the judgment of the High Court of Australia in *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45.

6. Parl. of the Comm. of Australia. Senate Debates, 2810 (9 June, 1981).

7. A 1988 Committee of Inquiry made two recommendations, namely: (1) “The licensing criteria for licence grants be made non-exclusive by allowing the Australian Broadcasting Tribunal to take into account any other matter or circumstance the Tribunal considers relevant”; and (2) “The exclusive licensing criteria be retained for licence renewals and approval of transactions but provision be made for the new matters taken into consideration in licence grants to apply to renewals and transactions, if relevant”. Parl. of the Comm. of Australia, Hse of Reps, Standing Committee on Transport, Communications and Infrastructure, ‘The Role and Functions of the Australian Broadcasting Tribunal’, Recommendations 4 & 5 (Nov. 1988). See also by the same Committee, ‘The Role and Functions of the Australian Broadcasting Tribunal’, Supplementary Report (May 1989).

8. Act No.10091. It came into force on 28 February, 1985 together with the *Credit Act 1984 (No.10097)* 1984. Section 3 of the former states that the two Acts are to be read as one. The Commercial Tribunal performs the functions of the CLA in the Australian Capital Territory, New South Wales and Western Australia. Queensland does not license credit providers; the District Court exercises jurisdiction over them.

9. Ss.44(2), 45(2), 58-60.

- disciplining of credit providers on certain specified grounds, such as reprimanding or imposing a fine on the licensee.

Licensing of Consumer Credit Providers

Section 37 of the *Administration Act* stipulates that a credit provider's licence must be obtained in order to carry on a business of providing credit¹⁰. Section 38 exempts a number of institutions from the licensing requirement — they include, banks, insurance companies, pawnbrokers and pastoral finance companies. The explanation is that these institutions are already regulated under different legislation.

The licensing of consumer credit providers was recommended by the Molomby Committee. It gave the rationale as follows:

The experience of centuries has shown that the best way of excluding the sharp and dishonest from an area of enterprise while leaving the fair and honest to carry on their activities, without an unwieldy burden of detailed regulation, is by a licensing system fairly and openly administered. This system has been widely applied to lawyers, doctors and other professional people, to money lenders, finance brokers, estate agents, banks, life insurance companies and many others¹¹.

By mid September 1990, some 267 providers have been licensed in the State of Victoria¹².

Criteria for Licensing Consumer Credit Providers

The *Administration Act* contains two sets of criteria for the CLA to use in licensing — one for natural persons and the other for bodies corporate.

A natural person must be¹³:

- a person of or over the age of eighteen years;
- not an undischarged bankrupt;
- not convicted within the last ten years of an offence involving fraud or dishonesty punishable on conviction with imprisonment for three months or more —

and if there is objection, after considering the objection and any other relevant matter —

- the Authority does not believe the applicant is not of good fame or character;
- the Authority is satisfied as to the experience of the applicant having regard to the nature of the duties of the holder of a licence; and
- the Authority does not believe that the applicant will not perform the duties of a holder of a licence efficiently, honestly and fairly.

A body corporate is required to be¹⁴:

- not under official management or in the course of being wound up;
- not a body corporate in respect of the property, or part of the property, of which a receiver, or a receiver and manager has been appointed;
- not in a compromise or scheme of arrangement that is still in operation —

and if any objection has been lodged, after considering the objection and any relevant matters —

10. Pursuant to s.38(2), a reference to providing credit, means a reference to credit contracts regulated by the *Credit Act*. There are currently moves to introduce a uniform consumer credit legislation. If implemented, the Act will cover all aspects of consumer credit. The *Draft Credit Bill* 1989 is reprinted in CCH, Australian Consumer Sales and Credit Law Reporter (continuous service) at pp.55, 502-55, 639. For commentary on its "plain English" drafting style, see David St. L. Kelly, 'User-Friendliness in Legislative Drafting — The Credit Bill 1989', (1989) 1 Bond L.R. 143.

11. The Molomby Committee Report para. 3.5.1 (1972). The Committee which submitted a Supplementary Report in 1973, was commissioned by the Law Council of Australia.

12. Information provided by Licensing Registrar. The number of applicants by mid September 1990 was 526.

13. Ss.39 & 44(2).

14. S.45(2).

- the Authority is satisfied as to the experience of the officers of the applicant having regard to the nature of the duties of the holder of a licence;
- the Authority does not believe that the applicant will not perform the duties of a holder of a licence efficiently, honestly and fairly; and
- the Authority does not believe that a director or other officer of the applicant who in the opinion of the Authority exercises control over the management of the applicant is not of good fame or character or is not likely to exercise that control efficiently, honestly and fairly.

II THE INQUIRIES CONDUCTED BY THE ABT AND CLA IN 1988/89

(1) ABT's Inquiry into Alan Bond and Bond Media

At the beginning of 1987, Bond Corporation Holdings Ltd Group's electronic media interests were two television stations, three radio stations and Sky Channel. On 20 January 1987, the Bond Group agreed to acquire all the electronic media interests of Kerry Packer's Consolidated Press Holdings Group for \$1.055 billion¹⁵. The purchase comprised two television stations, six radio stations, overseas television interests, satellite interests and various other media and media marketing interests. The Bond Corporation Holdings Ltd Group's electronic media interests were transferred to the Bond Media Ltd Group. The latter was then floated to the public. In April 1987, Bond Media Ltd acquired a 19.9% interest in Telecasters North Queensland Ltd which controlled FNQ 10 Cairns and TNQ 7 Townsville. The overall result was that Bond Media Ltd television interests covered 59.9% of the national viewing audience¹⁶.

The events which gave rise to the ABT's inquiry began on 2 February 1983. On that day, there was broadcast on television station QTQ-9 as part of the "Today Tonight" program, material alleging gross abuse of office by Sir Johannes Bjelke-Petersen, then Premier of the State of Queensland. The Premier commenced proceedings for defamation in the Supreme Court of Queensland against Queensland Television Ltd (QTL) as licensee of the station. In January 1985, Bond Corporation Holdings, of which company Mr Bond was the executive chairman, acquired through its subsidiary Bond Media Ltd and other subsidiaries the share capital of QTL. Mr Bond became chairman of the board of QTL and remained so until 31 March 1987, when he ceased to be a director. On 1 April 1986 the defamation proceedings were settled by the payment of \$400,000 to the Premier. The payment was made not by QTL but by its parent, Bond Corporation Holdings¹⁷.

In short, Mr Bond's companies "acquired" the defamation suit but settled it. On 31 July and 1 August 1986, the ABT conducted a hearing as part of its inquiry into the renewal of the licence for QTQ-9 pursuant to s.86 of the *Broadcasting Act* as it then stood. Leave was granted to the Australian Labor Party to appear as a party at the hearing. On 5 August 1986, the then Leader of the Opposition in the Queensland Parliament made allegations in that Parliament concerning the propriety of the defamation settlement. The Tribunal subsequently heard further evidence, including evidence from Mr Bond and Mr Aspinall,

15. The acquisition was prompted by the Federal Government's announcement earlier on 27 November, 1986 of its intention to modify the existing television station ownership limitations with new rules which would allow ownership of television stations covering up to 75% of the national viewing audience subject to new cross-media rules. On 1 July, 1987, the *Broadcasting (Ownership and Control) Act* (Cth) was passed. It exempted from the provisions outlined in ss92FAB and 92FAD of the *Broadcasting Act* 1942 (Cth) existing media interests as of 27 November, 1986 and limited ownership of television stations to only 60% of the national viewing audience.

16. ABT, 'Bond Share Transaction Inquiry — General Summary' (Application Registration No.1986/87 — 129-131, 168, 173, 184-185, 189, 193, 208).

17. *Bond and Others v Australian Broadcasting Tribunal*, 89 ALR 185, pp.187-188; *Australian Broadcasting Tribunal v Alan Bond & Ors*, unreported judgment of the High Court of Australia delivered 26 July, 1990, pp.2-3.

chief executive of Bond Media Ltd, and executive director of other companies associated with Mr Bond. The main issue before the ABT was whether QTL was a fit and proper person to hold the commercial television licence. On 29 May 1987, the Tribunal announced its decision to renew the licence for QTO-9¹⁸.

That would have been the end of the matter. However, on 21 January, 1988, Ms Jana Wendt interviewed Mr Bond on her television programme, "A Current Affair". In that interview, Mr Bond stated:

Certainly the Premier made it under no doubt that if we were going to continue to do business successfully in Queensland, then he expected that matter to be resolved.

As a result of viewing by the ABT of an unedited tape of the interview and having examined the transcript of the last QTO-9 licence renewal, the Tribunal commenced an inquiry into issues relating to certain commercial radio and television licences "owned by companies associated with Mr Alan Bond"¹⁹. During the course of the inquiry, other matters came to the attention of the Tribunal, which caused it to give notice from time to time of new issues to be considered.

The relevant issues for our purposes were:

- whether anything connected with the payment of \$400,000 in settlement of a defamation action by Sir Joh Bjelke-Petersen against QTL had any implications as to the suitability of companies associated with Mr Alan Bond to hold the broadcasting licences;
- whether it would be advisable in the public interest for the Tribunal to do any of the following:
 - (a) suspend any of the licences associated with Mr Bond;
 - (b) revoke any of the licences;
 - (c) impose or vary conditions on any of the licences;
- whether Mr Bond expressly or impliedly asserted to an executive of the AMP Society on or about 11 May, 1988 that:
 - (a) staff of a television station or stations with which Mr Bond was associated were at his direction gathering material on certain share transactions entered into by the AMP Society;
 - (b) the broadcasting of that material would be contrary to the interests of the AMP Society;
 - (c) he would cause that material to be broadcast by a television station or stations with which he was associated unless the AMP Society ceased to act contrary to the interests of Mr Bond and of companies with which he was associated in relation to a proposed election for the board of directors of Bell Resources Ltd;
- whether if made, anything connected with the making of these assertions had any implications as to the suitability of companies associated with Mr Alan Bond to hold the broadcasting licences. In this context it was to be considered whether Mr Bond and companies associated with him were fit and proper persons to hold the licences.

The relevant issues centred around firstly, the defamation settlement and secondly, a telephone conversation between Mr Bond and Mr Leigh Hall, an executive of the AMP Society, on or about 11 May 1988, in which it was alleged that Mr Bond had threatened to

18. *Ibid.* at 188, *Ibid.* at 3.

19. Pursuant to Regulation 9 of the *Australian Broadcasting Tribunal (Inquiries) Regulations* 1986. A challenge to the inquiry failed when the Full Court of the Federal Court held that the ABT had acted in accordance with s.17(c) of the *Broadcasting Act*. See *Australian Broadcasting Tribunal v Bond*, 81 ALR 508; (1988) 19 FCR 259.

use his television staff to gather information about the AMP Society, which was a business competitor of Mr Bond, and to expose the AMP Society by showing the results on television²⁰. The first and last issues directly raised the question whether Mr Bond was a fit and proper person to hold a commercial broadcasting licence.

On 7 April 1989, the ABT issued a 35-page document headed "Decision on facts", which contained five findings of fact. Those findings were largely subsumed in a further 14-page document entitled, "Fit and Proper Issue", published on 26 June 1989 with the following summary of findings of fact²¹:

- (1) Mr Bond agreed to pay the Premier of Queensland, Sir Joh Bjelke-Petersen, \$400,000 to settle his defamation claim not believing that sum was justified by that claim alone, but believing that if he did not settle at that figure the Premier might harm his interests in the State of Queensland;
- (2) Mr Bond sought to disguise the true amount agreed to be paid in the belief that a sum in excess of \$50,000 could not survive public scrutiny;
- (3) Mr Bond deliberately gave misleading evidence to the ABT in 1986 in relation to the events of January and February, 1986, and in relation to the nature of the meeting with Sir Joh Bjelke-Petersen on 17 February 1986.
- (4) Mr Bond deliberately gave false evidence to the ABT during the inquiry in relation to his motivation for making the offer to Sir Joh Bjelke-Petersen at the meeting of 17 February 1986 and in relation to the telex of 2 January 1986 which was relevant to a determination of the date by which agreement had been reached between Mr Bond and Sir Joh;
- (5) Mr Bond threatened to use his TV staff to gather information on a business competitor (the AMP Society) and to expose the competitor by showing the results on television.

The Tribunal then applied its decision on the facts to the statutory requirement that a licensee be a fit and proper person to hold the licence. The Tribunal held:

In relation to Mr Bond, we consider that he would not be found to be a fit and proper person to hold a broadcasting licence. The relationship between Mr Bond and the licensee companies is relevant to a consideration as to whether we can be satisfied that the licensee is no longer a fit and proper person to hold the licence. For the reasons set out, we find that the licensee company is no longer a fit and proper person within the terms of s.88(2)(b)(i) of the *Broadcasting Act*²².

(2) The CLA's Inquiry into HFC's Application for a Licence

HFC Financial Services Limited (HFC) is incorporated in New South Wales and is a wholly owned subsidiary of HFC of Australia Limited. Household Group Australia Inc. which is incorporated in Delaware in the United States is the holding company of HFC of Australia Limited and is part of the Household Group of Companies of which the ultimate holding company is Household International Inc. HFC conducts a business of providing credit almost exclusively to individuals for personal purposes through a network of branches throughout Australia. HFC applied for a credit provider's licence on 10 April 1985; and became entitled, pursuant to s.37(3) of the *Administration Act*, to continue to carry on its business pending the grant or refusal of its application.

On 10 August 1987, objections were lodged to the application by the Director of

20. Mr Hall gave evidence before the ABT and the latter stated that it was impressed by him as a witness. See *supra* note 16, at 190.

21. Australian Broadcasting Tribunal, 'Bond Inquiry — Fit and Proper Issue', 26 June 1989 at 7; *supra* note 16 at pp.195-196; at 6.

22. *Ibid.* at 13-14.

Consumer Affairs and the Consumer Credit Legal Service. The hearing commenced on 3 May 1988 and ended on 29 June 1989. The principal issue before the CLA was whether it believed that HFC, if licensed, would not perform the duties of a holder of a credit provider's licence efficiently, honestly and fairly. If it had that belief the Authority must refuse the application, but any other belief required it to grant the application²³.

The CLA found "that the evidence establishes that prior to August 1987 when HFC received the objections made to the application, it and its subsidiary insurance companies had engaged in practices which were variously dishonest, unfair and to the serious detriment of its borrowers"²⁴. The CLA went on to specify the following practices²⁵:

- the use of grossly improper collection practices and the existence of unwritten instructions which directed the use of such practices;
- the practice of adjusting cover until 31 December 1985 when insurance premiums had been incorrectly assessed;
- the failure to refund excess premiums where charged after 31 December 1985;
- the failure to adjust rebates of credit insurance where rebates had initially been underpaid;
- the failure to make any rebates of insurance where loans were not refinanced, unless borrowers specifically sought such rebates;
- the practice of inducing borrowers to continue credit insurance policies in force after loans had been discharged;
- engaging in practices which caused borrowers to believe that the taking of insurance was a condition of loans being granted;
- the conscious failure to undertake adequate training of staff, to maintain an effective system of supervision of staff and to employ accounting systems to ensure that monies obtained from borrowers for third party purposes were duly applied;
- failing to inform prospective borrowers at the appropriate times of the features of balloon loans that were fundamentally different from HFC's other fixed term loans; and
- continuing to sign up co-borrowers solely to provide security after the undesirability of that practice had been brought to its notice by the Australian Finance Conference and its own corporate attorney.

The CLA observed that, "by engaging in those practices, either directly or through its subsidiary insurance companies, HFC demonstrated that it was a corporation for which dishonesty, unfairness and sharp practice were accepted standards of behaviour"²⁶.

The Authority decided to refuse HFC's application for a credit provider's licence. The CLA stated:

In our opinion, the extent of the dishonest and unfair conduct engaged in by HFC must have instilled in the minds of HFC staff a clear understanding that such conduct was not merely acceptable but expected. The Authority, therefore, considers that the new management of HFC, supported by a now concerned Household, faces an enormous task in eliminating the culture of dishonesty and sharp practice that has pervaded HFC for so long²⁷.

23. Unreported Decision of the CLA delivered on 12 Sept., 1989, at 14-1. See also *supra* note 13 and accompanying text.

24. *Ibid.*

25. *Ibid.* 14-2 to 14-3.

26. *Ibid.* at 14-3.

27. *Ibid.* at 14-5.

The CLA formed the belief that HFC would not, if granted a licence, carry on its business honestly and fairly, at least in the short term.

III MATTERS ARISING

(1) The objective behind licensing commercial television is different from that of licensing of consumer credit providers. Whereas the former seeks to strictly control entry into the industry, to regulate ownership and control of licensees, as well as regulate program standards, the aim of the latter is basically to regulate standards. The tremendously powerful nature of television in particular, and broadcasting in general, explains the policy behind the approach to licensing. In *Australian Broadcasting Tribunal v Alan Bond & Ors*, Mason C.J. explained:

Commercial broadcasting is a very important medium in the communication of information and ideas. Moreover, a commercial broadcasting licence is a valuable privilege which confers on the licensee the capacity to influence public opinion and public values. For this reason, if for no other, a licensee has a responsibility to exercise the power conferred by the licence with due regard to proper standards of conduct and a responsibility not to abuse the privilege which it enjoys²⁸.

On the contrary, it is neither the function of the CLA to regulate the entry into the market of credit providers, nor their ownership and control — that is left to the exigencies of the market place. It is in the contexts of the different approaches to licensing in the two jurisdictions, that the significance and full impact of the decisions in the two licensing inquiries are to be understood.

(2) Until the ABT's inquiry into Alan Bond and Bond Media, the ABT was generally regarded as being just another government regulatory body with no real power. It was taken for granted. In an oft-quoted phrase, Ms Deidre O'Connor, then chairperson of the ABT reportedly described the ABT as a "toothless tiger"²⁹, calling on the Federal Government to come clean on whether it wanted an effective independent regulator of the TV industry. Some commentators went so far as to say that, "the television industry (and that includes many of the federal bureaucrats responsible for the communications industry) had consigned the Tribunal to the dustbin of history"³⁰. In one action all those doubts and criticisms were put to rest. The thoroughness and vigour with which the ABT conducted the inquiry demonstrated beyond all reasonable doubt that the tiger still had its fangs and it would snarl when the need arose. The plain irony of it all was that it was Ms O'Connor who presided over the flooring of the biggest television conglomerate and its owner at the time.

In comparison, some credit providers had assumed a right to a licence, with the expectation that the CLA would rubber stamp their applications. Thus, in *H.F.C. Financial Services Ltd v Director of Consumer Affairs & Anor*³¹, it was submitted on behalf of HFC that, as the company carried on a business of providing credit immediately before the commencement of the *Administration Act* and had applied for a licence pursuant to s.37(3), HFC became a "deemed" licence holder enjoying an acquired or accrued "right" to a licence. The Supreme Court of Victoria rejected that submission, drawing a clear distinction between "an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given"³². Credit providers fall into the

28. *Supra* note 16 at 24; see also statements made by Toohey and Gaudron JJ. at 60.

29. See eg., Kate Rice, 'Bond TV saga far from over', *The Australian Financial Review*, Tuesday 27 June, 1989, 15 and Peter Smark, 'Commission Packed More Punch than Anyone had Bargained on', *The Age* Tuesday 27 June 1989, 16.

30. Shaun Charney, "'Toothless Tiger' snarls at the biggest TV boss of all', *ibid.* at 17.

31. (1990) ASC #55-959 (58,759).

32. *Ibid.* 58,765.

second category. The CLA's decision to refuse HFC, the large multinational corporation, a licence shows clearly that, although the CLA has no power to regulate the entry of credit providers into the consumer finance market, nevertheless, the CLA would not rubber stamp applications³³.

(3) The principal issue which the ABT had to decide was whether, Alan Bond and companies associated with him were fit and proper persons to hold the television licences. As the ABT correctly pointed out, it licenses corporations, not individuals³⁴. At the outset, therefore, it was necessary to resolve the question of the relationship between certain individuals and the licensee companies. The ABT resolved the question in these words:

Mr Bond remains, by virtue of his association with the licensee companies, the only relevant individual in the sense that consideration of his fitness and propriety is relevant to the question of fitness and propriety of the licensees³⁵.

The ABT's opinion was based on Alan Bond's position in the corporate structure. The ABT found that Alan Bond owned 99.9% of the shares of Dallhold Investment Pty Ltd; he was a director of Dallhold and the executive chairman of Bond Corporation Holdings Ltd. The latter, through its wholly-owned subsidiary, Bond Corporation Pty Ltd, directly owned 45.4% of Bond Media Ltd. Bond Corporation Holdings Ltd also held 7.4% of Bond Media Ltd shares through other wholly-owned subsidiaries. Alan Bond, through his family company, Dallhold, held approximately 58% of Bond Corporation Holdings Ltd shares. Dallhold itself held 12.2% of Bond Media Ltd. Each of the licensees was a wholly-owned subsidiary of Bond Media Ltd. The ABT, therefore, took the view that, Alan Bond's position within the corporate structure enabled "him to initiate and involve himself in management decisions which affect the broadcasting activities within the group"³⁶.

In an unusually scathing attack, the Full Court of the Federal Court of Australia questioned the ABT's approach. The Full Court stated:

The tribunal went astray by equating the fitness and propriety of Mr Bond (or lack of it) with that of the licensees; having found certain facts from which it concluded Mr Bond was lacking in this respect, the tribunal then failed to look at other material before it which required consideration if its decision as to the supervening lack of fitness and propriety of the licensees was not to be regarded as perverse in the sense of the authorities we mentioned earlier in these reasons³⁷.

The Full Court noted that there was evidence before the ABT, in the main unchallenged, that the boards of the licensee companies operated in an entirely proper manner and discharged their duties in accordance with their obligations and that Alan Bond did not interfere with the performance by directors and executives of the licensee companies of their duties and responsibilities but the ABT did not take that body of evidence into account in reaching its decision.

The High Court of Australia upheld the ABT's approach. After "having read and re-read the Tribunal's statement of its reasons for making its findings adverse to Mr Bond and the licensee companies", Mason C.J. stated:

33. As at mid September 1990, two applicants have been refused a licence and five others had had theirs cancelled. See *supra* note 11.

34. S.81AA(1) provides that a commercial licence shall only be granted to a company formed within the limits of the Commonwealth or a territory and having a share capital.

35. *Supra* note 20, at 6. See *Western Television Ltd v Australian Broadcasting Tribunal* (1969) ALR 465, 472 and 473.

36. *Supra* note 20, at 5. The ABT said further: "Our view is that Mr Bond, through his shareholding, does have a continuing and substantial interest in the directions and decisions of the various licensee companies. It is also clear that Bond Media Ltd occupies an important position in the Bond Group of companies". (at 5-6).

37. 89 ALR 185, 205.

What the Tribunal found was that, by reason of his capacity to control the composition of the boards of directors of the licensee companies and his position as a key executive within the corporate structure, enabling him “to initiate and involve himself in management decisions which affect[ed] the broadcasting activities within the group”, Mr Bond’s unfitness compelled the conclusion *as a matter of fact* that each of the licensees was unfit³⁸.

Whereas in the Bond inquiry there was no suggestion that any of the licensee companies had failed to comply with any of the myriad obligations imposed upon them by the *Broadcasting Act*, or that any of them had acted in a way that was improper or dishonest, in the HFC inquiry the opposite was the case. The CLA found that there were deficiencies in the way HFC conducted its business and that the deficiencies “were to a substantial extent the consequence of neglect by HFC of its responsibilities for the proper training and supervision of staff”³⁹. The CLA referred *inter alia* to excessive vehicle security registration fees charged by HFC, wrongly imposing “close-out fees”, incorrectly charging stamp duty, wrongly charging valuation fees and other breaches of the *Credit Act* 1984 (Vic). The CLA’s finding that “HFC demonstrated that it was a corporation for which dishonesty, unfairness and sharp practice were accepted standards of behaviour”⁴⁰ was a damning indictment of the management of the company and its owners.

(4) The Fitness and Propriety Issue

The fitness and propriety of an applicant for a commercial television licence is one of the exclusive criteria which the ABT has to consider. The phrase “fit and proper person” is, however, not defined anywhere in the *Broadcasting Act*. It is beyond argument that the term is relational and imports a value judgment, but such subjective judgment has to be made in the context of the facts of each particular case and the requirements of the particular legislation in question. By leaving the phrase undefined, the legislature has given the ABT an unlimited scope.

Prior to the Bond case, the only reported decision in which the issue was dealt with was the Federal Court of Australia’s decision in *Western Television Ltd v Australian Broadcasting Tribunal*. Pincus J. stated the principle as follows:

... Fitness and propriety are concepts which, as applied to people, may have widely varying scope. Here, as financial, technical and management capabilities are separately mentioned, it appears probable that the legislature had in mind, at least principally, qualities of a potential licensee other than those capabilities. That is, a person perfectly capable of providing a proper service may yet not be a fit and proper person to hold a licence for reasons of, for example, public morality; it would be inconsistent with the intention of the statute to grant such a valuable right to a person appearing to the Tribunal to be unfit in a broad sense, however confident the Tribunal might be that the person in question would perform the licensee’s statutory obligations properly⁴¹.

The ABT applied the foregoing principle, singling out the following matters as rendering

38. *Supra* note 16, 22; Brennan and Deane JJ. agreed with the judgment of Mason CJ: see pp.66-68 for views of Toohey and Gaudron JJ.

39. *Supra* note 22, 14-3.

40. *Supra* note 25. Mr Miller was appointed in the latter part of 1988 by the parent company, Household, from the U.S. with a brief to bring HFC’s standard of business and conduct back to a satisfactory state. He gave evidence that “he was struck by the lack of discipline and organisation in the company, that morale was low, that he was disappointed by the untidiness of many of the offices and even of the personnel themselves. He summed up his views in this statement, ‘Generally I did not have a good feeling about the company. We had let our standards drop’”. (at pp.13-11 to 13-12).

41. *Supra* note 34, 471-472.

Alan Bond to be not a fit and proper person:

- Alan Bond's personal negotiation and agreement to pay \$400,000 to the Premier was improper;
- Alan Bond's subsequent attempts to disguise the agreement and payment constituted "improper behaviour of a more fundamental and damaging nature". It was an attempt at deceit driven "by expediency" which "does not exhibit qualities which we would expect to repose in the character of a fit and proper person"⁴²;
- deliberately misleading of the Tribunal by Mr Bond (and Mr Aspinall);
- the threat by Mr Bond to use his television staff against a commercial competitor.

As to the central allegation, that is the payment of the \$400,000 to the Premier, the ABT proceeded without inquiring into the purpose or motives of the Premier as to whether he had extorted or solicited a bribe. The Full Court of the Federal Court of Australia held that this was an error of law, which "was impossible both in logic and common sense"⁴³ to sustain. The Full Court's approach was strange indeed. The Premier was clearly not amenable to the ABT's jurisdictions — he had no interest in any licence or licensee company.

The High Court of Australia upheld the ABT's finding. It made some important statements on the issue of "fit and proper person". It stressed the importance of commercial broadcasting in the communication of ideas and influencing public opinion. The Court held that the statutory concept of "fit and proper person to hold the licence" takes into account qualities and characteristics of the licensee apart from the matters mentioned in s.88(2)(a), (b)(ii) and (c). Moreover, the phrase should not be narrowly construed or confined.

When the question is whether, having regard to its character or reputation, a company is fit and proper, the answer may be given by reference to the conduct, character or reputation of the persons by and through whom it acts or who are otherwise relevantly associated with it. The identity of the persons relevant to the character and reputation of a company will necessarily vary according to the circumstances of the company under consideration . . . The question whether it is sufficient to have regard to one person or necessary to have regard to others when determining whether a company is fit and proper is one that depends on the circumstances of the company and not on any legal requirement imported by the expression "fit and proper"⁴⁴.

The Issue of Performing Duties Efficiently, Honestly and Fairly

The principal issue which the CLA had to consider was whether it believed that if licensed, HFC would not perform the duties of a holder of a credit provider's licence efficiently, honestly and fairly. There was no suggestion during the hearing that any director or officer who exercised control of the management of the company was not of good fame or character. Therefore, in contrast to the Bond inquiry, the CLA's inquiry was directed towards the management structure, business systems and controls, training and supervision and business practices generally of the company itself.

A comment ought to be made that the wording of the relevant provisions is curious⁴⁵, requiring the Authority as it does, to look into the future. It is doubtless a daunting task for

42. *Supra* note 20, 9.

43. *Supra* note 20, 206.

44. Per Toohey and Gaudron JJ. at 61; see also judgment of Mason C.J. at 24.

45. *Supra* note 13.

the CLA to predict future corporate behaviour. However, it is greatly assisted by the fact that it can take “any other relevant matters” into consideration. In the HFC inquiry, the CLA was assisted also by the following *dictum* of the Supreme Court of New South Wales in *Story v National Companies and Securities Commission*⁴⁶:

Considerations of this nature incline my mind that the group of words “efficiently, honestly and fairly” must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty . . . However, in the long run it does not seem to me to much matter whether one reads the words cumulatively or disjunctively, because unless a licence holder possesses the three attributes whether as one package or as three separate parcels, the Commission can revoke his licence⁴⁷.

(5) There are common elements between “fit and proper person” and “efficiently, honestly and fairly”. Because of the grave consequences of a negative assessment, it is vital that a high standard of proof be adopted in making that assessment. In the Bond inquiry, the ABT did not make its findings on the balance of probabilities, but went one step higher. It adopted “an extremely high test that demanded a level of certainty required in our view by the importance of the issues and the seriousness of the consequences of adverse findings”⁴⁸. In contrast, the CLA pointed out correctly in the HFC inquiry that s.45(2) of the *Administration Act* requires it to grant a licence not only if it believes that the applicant will perform its duties efficiently, honestly and fairly but also “if the Authority considers the evidence to be so equivocal as to prevent it from forming a belief one way or the other”⁴⁹.

(6) Undertakings

In the course of the two inquiries, HFC and Alan Bond proffered undertakings to the CLA and the ABT respectively, which if they had been accepted, would have brought the inquiries to an end. On 20 June, 1988, after 16 sitting days of taking evidence, HFC placed before the CLA a document in which it made limited “admissions”. Two proposals were put forward. First, HFC had already taken steps within the preceding 12 months with a view to bringing to an end the practices or conduct which breached the *Credit Act* or were otherwise unsatisfactory. Secondly, the company proposed to take further measures by 1 September 1988. However the CLA rejected HFC’s proposals on the ground that there was a possibility of a case being made out on the basis of evidence already given and from indications of the nature of the evidence yet to be adduced⁵⁰.

On 1 May 1989, certain undertakings were proffered to the ABT for Alan Bond, Dallhold, Bond Corporation Holdings and Bond Media Ltd. The undertakings were put forward without prejudice and without admissions. The ABT took the view that it did not have power at that stage of the hearing to consider the undertakings. The Federal Court gave the ABT the green light⁵¹. After giving due consideration to the undertakings, the ABT did not accept them, saying that “these undertakings do not address the concerns we have about Mr Bond’s behaviour”. The ABT went on to explain that the proposed

46. (1988) 13 NSWLR 661.

47. *Ibid.* at 672.

48. *Supra* note 36 at 191. The ABT applied that standard of proof explained in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and *Edelsten v DCT (NSW)* (1989) 86 ALR 257, 264.

49. *Supra* note 22 at 4-8.

50. *Ibid.* at 20-5.

51. See unreported judgment of Pincus J., in *Bond Media Ltd v Australian Broadcasting Tribunal* delivered on 31 May, 1989.

restructuring of the boards of the companies with Mr Bond distancing himself from them, "does not avoid the fact that Mr Bond by virtue of his shareholding remains in control of the company. Apart from this we have little confidence in view of the evidence we have heard in this Inquiry in the notion that Mr Bond would not ultimately prevail in any significant area where his overall interests were involved"⁵².

A comment should be made that, in both inquiries, the undertakings seemed to have been made as an afterthought. The purpose of the undertakings was to bring the inquiries to an end without any adverse findings being made against Alan Bond and his companies and HFC. One would have expected that it would have been better strategy if the undertakings had been put forward at the very beginning or at least at a reasonably early stage. Further, in the case of Bond, some admissions or "acknowledgment of mistakes" at an earlier stage might have worked in his favour.

Certainly the ABT would have been hard pressed to ignore them. HFC, on the other hand, took the right course but in a half-hearted manner that did not give the undertakings serious credibility. In both instances, it was too little too late. In the end, both HFC and Alan Bond and his companies threw away an important opportunity for which they were to suffer immensely.

IV CONCLUSION

(a) Impact of the Decisions

It has already been noted that the inquiries conducted by the CLA and the ABT and their outcomes show that the former does not rubber stamp applications for a licence and that the ABT is not the "toothless tiger" it was thought to be⁵³. They can no longer be taken for granted.

The impact of the Bond inquiry on other television and radio licensees on the one hand, and of the HFC inquiry on other consumer credit providers on the other, need not be over-emphasised. Even the Federal Government was so concerned at the prospect of the Bond television network and radio stations being forced off the air and the licences being sold in an expensive "fire sale", that the Federal Government signalled its intention of introducing a trustee arrangement to take over the operation of the licences after the appeal process has been exhausted to no avail⁵⁴.

The result of the CLA's inquiry was devastating to HFC which had been in business as a finance company in Australia since 1979. As at the end of January 1990, the value of its consumer credit portfolio in the country was \$280.9 million. In 1989 HFC entered into some 8,864 contracts regulated by the *Credit Act* in the State of Victoria — they were worth almost \$63 million. In the same year the company entered into a total of 47,850 regulated contracts throughout Australia worth \$181.2 million⁵⁵. The immediate impact of the CLA's decision to refuse HFC a credit provider's licence was to put it out of business in Victoria. In other words, the CLA passed what may be described as the corporate death sentence. Other licensing authorities throughout Australia were alerted as to the practices of the company.

52. *Supra* note 20 at 12-13.

53. *Supra* pp.[??] The current chairman of the ABT, Mr Peter Westerway was reported to have said recently that the ABT is still a toothless tiger in most circumstances. See Jennifer McAsey, 'Tribunal a toothless tiger, says chief', *The Age*, Thursday 20 September 1990, p.5.

54. See Steve Burrell, 'Government talks of retrospective TV law change', *The Australian Financial Review*, Wednesday 28 June 1989 p.1 & 10. A Parliamentary Report of May 1989 had recommended the trustee system "as a means of correcting deficiencies in the existing ownership and control regime". *Supra* note 6 at para. 2.8.

55. Information provided by the company to the Supreme Court of Victoria, see *infra* note 60.

As a direct result of the CLA's decision, HFC set about remedying its past problems by making fundamental changes in its management structure, policies and operating procedures. An entirely new senior management was brought in and the parent company began to take an active part in monitoring policy formulation and reviewing operational effectiveness. The company completed an extensive audit of a large number of contracts entered into in Victoria and made a large number of refunds in appropriate cases. The company also began a review of its business operations in the rest of the country. The most dramatic change of all is that the company dropped the name "HFC" and adopted "Household", its parent company's name⁵⁶.

The ABT's finding that Alan Bond would not be found to be a fit and proper person and that the licensee companies were no longer fit and proper persons was equally devastating to Alan Bond and his companies. Mr Bond has been a rags-to-riches fairy tale. In June 1989 when the ABT delivered its decision, Mr Bond was unquestionably Australia's highest profile entrepreneur with the largest media empire in the land. He became a national hero in 1983 when he brought the America's Cup "down under". He was awarded the Order of Australia, and he established Australia's first private university (named after him). His corporate interests extended well beyond the Australian shores. He had a controlling stake in Chile's national telephone company; substantial brewery, gold and nickel mining interests; farming and other property interests in Australia, the United States, the United Kingdom, New Zealand, Papua New Guinea, Hong Kong, Fiji and so forth. As at 30 June 1989, Bond Media Ltd alone had total assets of \$1.68 billion, with operating revenue of some \$518 million. The television and radio licences held by Bond Media Ltd were recorded at cost and independent valuations at \$1.05 billion⁵⁷.

The ABT's decision immediately put the licences held by Bond Media Ltd at risk. The prospect of a fire sale became real. The share price of the company plummeted, with the result that the worth of Bond Media Ltd reduced to barely one-tenth of what it was two years earlier⁵⁸. The decision which has since been upheld by the High Court of Australia, has serious implications for Mr Bond's world-wide business dealings. Regulatory authorities in the United States, the United Kingdom, New Zealand and other countries, not to mention Australia, could seize upon the decision to restrict his business dealings. Certainly, in areas where a licence is required to operate Mr Bond will have an uphill battle putting his case across. Banks, insurance companies and other similar institutions which require a high level of integrity from their clients may hesitate before doing business. In short, the consequences are incalculable.

In characteristic fashion Mr Bond, described by one commentator as "an industrial Indiana Jones" in his "last crusade"⁵⁹, fought back. He took out full page newspaper advertisements in national newspapers in which he appealed direct to "fellow Australians". He complained about the "official inquisition" conducted "in the rarefied atmosphere of the quasi judicial forum" of the ABT which has "caused me great harm both personally and commercially"⁶⁰.

56. Household Financial Services — Summary Document dated 11 April, 1990; see also *infra* note 60.

57. Bond Media Ltd — Annual Report 1989, 42-43 & 78.

58. See eg., John Sevier, 'Market value of media shares has plummeted', *The Age*, Tuesday 27 June 1989, p.16.

59. *The Australian Financial Review*, Tuesday 27 June 1989, p.1.

60. 'An Open Letter to all Australians from Mr. Alan Bond AO' (advertisement) in *The Australian Financial Review*, Friday 30 June 1989, 29. The ABT's inquiry took about 18 months. By 7 April 1989, some 4500 pages of transcript had been recorded.

(b) The Aftermath

Household (formerly HFC) Financial Services appealed to the Supreme Court of Victoria. Pending the hearing of that appeal, Household was granted a stay of execution of its death sentence⁶¹. But for the stay, Household would have had to close on 9 October 1989.

Alan Bond exhausted the appeal process. He was victorious in the Full Court of the Federal Court of Australia but the High Court of Australia upheld the ABT's finding. The irony of it all is that Alan Bond has paid a high price for an interview which he gave on his own television station. The ABT's finding, the Alan Bond would not be found to a fit and proper person and that the licensee companies were no longer fit and proper persons, was only a first step. The next would be whether to suspend or revoke the licences or to impose conditions on them. In June 1990, Mr Bond lost control of the television and radio licences when he signed over control of Bond Media Ltd to Mr Kerry Packer's Consolidated Press Holdings⁶². Further hearing by the ABT into Alan Bond and Bond Media Ltd became thereby irrelevant. From then onwards, it has been all downhill for Mr Bond. On 28 September, 1990, his flagship, Bond Corporation Holdings Ltd posted a staggering \$2.26 billion loss for the year to 30 June, 1990 — then the largest in Australian corporate history. Two days earlier, Mr Bond had to resign as chairman and director of the company he founded 21 years ago⁶³.

How are the mighty fallen!

... they were swifter than eagles, they were stronger than lions!⁶⁴

61. *Supra* note 30, 58, 760. The CLA's inquiry ran for 109 days and some 87 witnesses were called. HFC's legal costs amounted to \$2.7 million. See affidavits filed with Supreme Court in support of the appeal.

62. See *The Australian Financial Review*, Monday 4 June 1990, p.1 & 5.

63. John Hurst, 'Alan Bond finally jumps off flagship', *The Australian Financial Review* Thursday 27 September 1990 pp.1 & 4; Richard Anderson, 'Bond flagship posts record \$2.24bn loss', *The Weekend Australian*, 1 & 53 29-30 September 1990.

64. *Supra* n.1.