

The Parliament of the Commonwealth of Australia

**THE ROLE AND FUNCTIONS OF THE
AUSTRALIAN BROADCASTING TRIBUNAL
SUPPLEMENTARY REPORT**

Report from the House of Representatives
Standing Committee on Transport, Communications and Infrastructure

May 1989

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CONTENTS

Preface

Conclusion and Recommendations

1.	INTRODUCTION	1
2.	THE APPLICATION OF THE TRUSTEE SYSTEM TO SHARE TRANSACTIONS	2
	Background	2
	The main report	2
	Alternatives to the Trustee System	2
	Increasing the staff of the Tribunal	2
	The superiority of the trustee system	3
	Priority for ownership and control inquiries	4
	A special case for additional resources	4
	Practical Issues of the Trustee System	5
	Provision of information	5
	Power to stay completion	5
	Selection and duties of trustee	5
	(a) Independence of trustee	5
	(b) Selection criteria	6
	(c) Method of appointment	6
	(d) Duties of trustee	6
	(e) Exemption from State stamp duty	8
	(f) Other	8
	(g) Recommendations	9
3.	THE APPLICATION OF THE TRUSTEE SYSTEM TO EXISTING INTERESTS IN LICENCES	11

PREFACE

On 1 December 1988 the Committee presented its report, *The Role and Functions of the Australian Broadcasting Tribunal*, (the main report) to the House. The report said that one of the major roles of the Tribunal is the supervision of changes in the ownership and control of licences. The report recommended, among other things, the adoption of a trustee system, modelled along the lines of that used in the United States of America, to rectify the deficiencies in the Broadcasting Act.

This supplementary report concentrates almost exclusively on ownership and control matters. It expands on the trustee system by examining the effectiveness and efficiency of alternatives and by providing detail on how the trustee system might work. This section should be read in conjunction with chapter 5 of the main report.

The primary purpose of the supplementary report, however, is to extend the trustee system to a new situation; that of interests in licences held by persons who are found later by the Tribunal to be no longer eligible or otherwise unsuitable to hold those interests. This was an issue not covered in the main report. More importantly, it is a matter not dealt with adequately in the legislation.

It should be noted that this supplementary report deals only with commercial radio and television licences, and not with public broadcasting licences. It should also be noted that the Committee did not take evidence on the issues dealt with in the report. The voluminous evidence taken on the inquiry that resulted in the main report was considered sufficient for this short and restricted supplementary report.

JOHN SAUNDERSON, MP
Chairman
10 May 1989

CONCLUSION AND RECOMMENDATIONS

Conclusion

1. As a means of correcting deficiencies in the existing ownership and control regime of commercial radio and television broadcasting licences, the trustee system is very superior to the alternative of increasing Tribunal resources because
 - the trustee system is more effective, and, more efficient in the use of scarce public sector resources.

(paragraph 2.8)

Recommendations

1. When the Minister makes the policy statement referred to in recommendation 2 of the main report, the Minister include, where appropriate, the suggestion that the Tribunal give high priority to share transaction inquiries particularly when a trustee system operates.

(paragraph 2.10)

2. Consideration be given by the Tribunal and the Minister to the appointment of associate members for particular inquiries, or classes of inquiries, or for particular periods of time; and that the Tribunal be provided with resources to hire contract staff for such purposes.

(paragraph 2.11)

3. The *Broadcasting Act 1942* be amended to provide for the appointment of a trustee who shall in specific cases hold the relevant shares or debentures of the applicant pending the completion of an inquiry by the Australian Broadcasting Tribunal.

(paragraph 2.29)

4. The *Broadcasting Act 1942* be amended to give the Australian Broadcasting Tribunal the authority to create and maintain a register of persons considered suitable to serve as trustee.

(paragraph 2.30)

5. The *Broadcasting Act 1942* be amended to provide that trustees shall possess the following qualities -

- (a) be independent of both government and the Australian Broadcasting Tribunal, and, any person connected with the relevant transaction;
- (b) have qualifications, whether formal or by virtue of long experience, in relevant areas such as broadcasting, corporate management, public administration, accountancy or law; and
- (c) have the highest degree of professional integrity.

(paragraph 2.31)

6. The *Broadcasting Act 1942* be amended to provide that –

- (a) the trustee be selected by the purchaser of the relevant shares subject to veto by the Australian Broadcasting Tribunal;
- (b) the Tribunal have a residual power of appointing the trustee;
- (c) the trustee selected by the purchaser not be restricted to those on the Tribunal's register; and
- (d) appointment of the trustee not be subject to review by the Administrative Appeals Tribunal.

(paragraph 2.32)

7. The *Broadcasting Act 1942* be amended to provide for the following duties of the trustee –

- (a) to safeguard the broadcasting assets of the licensee company;
- (b) to ensure the continuity of broadcast operations;
- (c) to facilitate the underlying transaction; and
- (d) not to undertake without Tribunal approval any significant departures from existing corporate operations or practices.

(paragraph 2.33)

8. The *Broadcasting Act 1942* be amended to provide that where the Australian Broadcasting Tribunal does not approve the transaction –

- (a) the beneficial owner should have six months from the date of the Tribunal's decision (or the end of any unsuccessful legal challenge to that decision) in which to negotiate an agreement for sale of the interests, on terms agreeable to it; and

- (b) if, at the end of six months, no agreement for sale has been made, the trustee should be under an obligation to accept the first offer that the trustee regards as fair and reasonable, after consultation with the beneficial owner.

(paragraph 2.34)

- 9. The *Broadcasting Act 1942* be amended to exempt from State stamp duty transactions transferring shares or debentures to a trustee under the Committee's proposal.

(paragraph 2.35)

- 10. The *Broadcasting Act 1942* be amended to provide that in a case where the Australian Broadcasting Tribunal has determined that a person holding a particular interest in a licence ('the interestholder') is no longer eligible or suitable to hold that interest -

- (a) the Tribunal be empowered to require that specified interests held by the interestholder be transferred to an independent trustee for sale;
- (b) the specified interests be those which will sever the interestholder's connection with the licence with the minimum adverse effect on the operations of the licensee or any third party;
- (c) the trustee for sale be a person selected by the interestholder from a list of persons generally approved by the Tribunal to act as trustee, or a person approved by the Tribunal in the particular case; and
- (d) a decision of the Tribunal to require that specified interests be transferred to a trustee for sale not be subject to review by the Administrative Appeals Tribunal.

(paragraph 3.11)

1: INTRODUCTION

1.1 The Committee's report on the Role and Functions of the Australian Broadcasting Tribunal ('the main report') was tabled in the House of Representatives on 1 December 1988.¹

1.2 Chapter 5 of that report dealt with the role of the Tribunal in the ownership and control of broadcasting under the *Broadcasting Act 1942* ('the Act'). It considered the Tribunal's powers to deal with significant changes, the administrative burden placed on it by the current system and some other specific problems. Rather than propose general recommendations, in paragraph 5.51 the Committee put forward a 'preferred package' of specific measures to reform the current system for the supervision of changes in the ownership and control of broadcasting licences. Part of the preferred package was the adoption of a 'trustee' system for share transactions, intended to protect the integrity of the licensing process while an inquiry into approval of the transaction was conducted by the Tribunal.

1.3 The primary purpose of this supplementary report is to extend the trustee system for share transactions recommended in the main report to situations not anticipated at the time that report was prepared; namely, the position of persons holding interests in licences who are found by the Tribunal to be no longer eligible, or otherwise unsuitable to continue to hold those interests.

1.4 A secondary purpose of the supplementary report is to expand on the trustee system by providing more detail on how the Committee sees the system might work.

¹ Australia, Parliament 1988, *The Role and Function of the Australian Broadcasting Tribunal: Report from the House of Representatives Standing Committee on Transport, Communications and Infrastructure*, Parliamentary Paper No 263/1988, Canberra. Referred to in later citations as the main report.

2: THE APPLICATION OF THE TRUSTEE SYSTEM TO SHARE TRANSACTIONS

BACKGROUND

The Main Report

2.1 Chapter 5 of the main report dealt with ownership and control. One of the major concerns of the Committee was the inability of the Tribunal to supervise effectively changes in the ownership and control of broadcasting licences. The Committee considered that a trustee system, modeled along the lines of that used by the Federal Communications Commission ('the FCC') of the USA, would give the Tribunal the necessary power without unduly impeding the operation of the share market.

2.2 A detailed set of recommendations, called the 'preferred package', was made in paragraphs 5.51 and 5.52 of the main report. Briefly, the trustee system works in the following way as described in the succeeding paragraph.

2.3 A person has to seek and obtain the approval of the Tribunal when any proposed transaction (in respect of shareholding, voting or financial interests) held by that person crosses specified threshold levels. A person has also to seek approval if the Tribunal considers that proposed actions would cause a significant change in the control of a licence. Under the Committee's recommendations in the main report, all share transactions which require Tribunal approval would come within the trustee system. This means that the shares or debentures will be held in 'neutral' hands - the trustee - until Tribunal approval is given. Once approval is given, the shares or debentures are transferred to the applicant and the trustee's job has been done. If the Tribunal disapproves, the shares or debentures remain in trust until the necessary approval is obtained by an alternative purchaser.

ALTERNATIVES TO THE TRUSTEE SYSTEM

Increasing the Staff of the Tribunal

2.4 The question is whether there is a simpler, quicker and less costly way of handling the present deficiencies identified in the main report. One alternative to the trustee system is to increase the staff resources of the Tribunal. The issue then is: does the trustee system or increases in Tribunal staff provide a more effective and/or a more efficient way of handling changes in ownership and control of commercial radio and commercial television broadcasting licences?

2.5 In the first instance the two alternatives should be assessed against the problem, the same problem, each of them is intended to solve. In discussing the question of post or prior approval of ownership changes the main report had this to say at paragraph 5.26:

5.26 The crucial question according to the Tribunal is the power it has to protect the public interest. By that it presumably means the power it has to ensure that the service provided to the community continues to be of a kind consistent with the licensee's obligations under the Act and the Tribunal's standards. If these powers are adequate in the period between transaction and Tribunal decision then there is no objection to a system involving approval after the event.

2.6 The main report goes on to refer to Tribunal evidence, that its powers in the interim period were not adequate, and to conclude that 'the fact that the Tribunal was powerless to control any part of the enormous restructuring of radio and television that took place in 1986-87 ... suggests that the system is unlikely to give the Tribunal the means to protect a licensee where a real and urgent case for refusing approval of a change in ownership or control arises'.²

2.7 It should be very clear by now that the major deficiency in the present system is legislative. The main report said that the 'heart of the problem lies with the Broadcasting Act'.³ No amount of additional staff, and/or increase in Tribunal members, can correct this problem, can stop the eggs from being scrambled. However quickly the Tribunal acts (and public accountability processes are not noted for their speed) it will not be quick enough. Without legislative changes, increases in staff would be unproductive and be wasteful of scarce public sector resources.

The Superiority of the Trustee System

2.8 In contrast, the trustee system solves the problem, corrects the deficiencies identified in the main report and, **does not** result in unproductive and wasteful use of public sector resources. The Committee concludes that:

- **as a means of correcting deficiencies in the existing ownership and control regime of commercial radio and television broadcasting licences, the trustee system is very superior to the alternative of increasing Tribunal resources because**
 - **the trustee system is more effective, and, more efficient in the use of scarce public sector resources.**

² The main report, p.66

³ The main report, p.66.

Priority for Ownership and Control Inquiries

2.9 Ownership and control changes in broadcasting licences, involving as they do such questions as fitness and propriety, are a fundamental feature of broadcasting regulation in Australia. Such transactions may change the control of licences serving major population centres, and possibly the control of national networks. The Committee believes that, particularly when the completion of such transactions is stayed and a trustee appointed, then the resulting inquiries should be completed as quickly as possible. It may be that there are connections between such inquiries and renewal inquiries. But given the importance of the former and the operation of the trustee system, these interconnections are not sufficient reason for delaying any transactions inquiry.

2.10 In normal circumstances the Tribunal should be expected to handle ownership and control changes by the setting of work priorities. Nevertheless, there is the question of whether the Tribunal needs some guidance on the matter of priorities. The Tribunal has argued for the Act to contain a concise set of policy objectives. This would assist decision-making by the Tribunal. In the main report the Committee supported the thrust of this proposal but said that such policy statements need to be accompanied by a more detailed Ministerial statement which explains how government proposes to implement the broad policy objectives contained in the Act. The main report, pp.18,19. There should be a ministerial statement made in the Parliament indicating the need for the Tribunal to give high priority to share transaction inquiries where the trustee system applies. The Committee recommends that:

Recommendation 1: When the Minister makes the policy statement referred to in recommendation 2 of the main report, the Minister include, where appropriate, the suggestion that the Tribunal give high priority to share transaction inquiries particularly when a trustee system operates.

A Special Case for Additional Resources

2.11 But even priority setting cannot tackle adequately major industry restructuring of the kind that took place in 1986-87; unless this is the only work the Tribunal undertakes for quite some time. What is needed in such circumstances is the appointment of associate members (appointed under S.11) and special contract staff. Although associate members have been appointed in the past for ministerially-directed inquiries (such as the Cable and Subscription Television Inquiry of 1982), no real use seems to have been made of associate members to assist the Tribunal through periods of unusually heavy workload. The Act was amended in 1987 to facilitate the appointment of associate members for such circumstances but no appointments have been made. If this is because the Tribunal has not requested such appointments the Committee encourages it to do so. Obviously, a necessary corollary to the appointment of associate members is support staff who could be appointed under contract for specific tasks. The Committee recommends that:

Recommendation 2: Consideration be given by the Tribunal and the Minister to the appointment of associate members for particular inquiries, or classes of inquiries, or for particular periods of time; and that the Tribunal be provided with resources to hire contract staff for such purposes.

PRACTICAL ISSUES OF THE TRUSTEE SYSTEM

Provision of Information

2.12 The object of the trustee system is to ensure that no person holds an interest in a broadcasting licence without the approval of the Tribunal, and that the normal operation of the share market is not unduly affected. The remaining paragraphs of this chapter deal with the major practical issues involved in the implementation of such a system.

2.13 It seems to the Committee that the information required by the Tribunal from a person entering into a transaction need be no more detailed than that contained in a notice under current paragraphs 90J(3)(a) and 92F(3)(a) of the Act, with the addition of information about the proposed trustee. At present, notices under sections 90J and 92F are precursors to an application for approval. It would be necessary only to amend those sections to make the reporting requirement independent of the requirement to lodge an application for approval.

Power to Stay Completion

2.14 In general, there should be no obstacle to a transaction proceeding within the confines of the trustee system. However, there may be situations where the Tribunal is not satisfied that the trustee arrangement proposed by the applicant is sufficiently 'at arm's length', or that there are other reasons which mean that further details should be provided before the transaction should proceed. The Committee believes that it is desirable that the Tribunal should have a residual discretion to stay completion of transactions in such cases.

Selection and Duties of Trustee

(a) Independence of trustee

2.15 The identification of a trustee could be handled in a number of different ways. It would be possible to have the Tribunal act as trustee as suggested in the main report, although this would be likely to create conflict of interest problems, even if it were thought that the Tribunal had the expertise and resources to carry out such a task. Alternatively, some other government authority could act as trustee. However, after considering the matter in more detail the Committee does not favour the use of government trustees. It would be better if the trustee was independent of both government and any person connected with the relevant transaction.

(b) Selection criteria

2.16 The appointment of a trustee should be governed by the application of specific criteria set out in legislation. The Tribunal should be given the authority to create and maintain a register of persons considered to be suitable to serve as trustee. There seems no reason why such a list should be exclusive, rather than just useful. The ranks of former broadcasting (or other) executives of long experience, senior accountants, management consultants, and lawyers or statutory trustee companies named and authorised to carry out trustee functions under legislation in each State and the ACT⁴ might provide a source of suitable trustees. In the United States of America, former senior public officials with legal and commercial backgrounds seem to be favourite choices. In summary, the Committee believes a trustee should have the following characteristics:

- a) qualifications, whether formal or by virtue of long experience, in relevant areas such as broadcasting, corporate management, public administration, accountancy or law; and
- b) the highest degree of professional integrity.

(c) Method of appointment

2.17 In the USA the selection of a trustee is up to the purchaser, subject to FCC approval. Similarly, in the Australian situation if the qualifications of trustees are carefully determined in accordance with the principles set out above, then there seems to be no reason why the intending purchaser of the shares should not select the trustee, subject to Tribunal veto. The right of Tribunal veto should not be a 'substantive power' subject to the full inquiry process, since the trustee would have no beneficial interest in the relevant shares, and would not be in control of any broadcasting asset for a long time (if at all). It should be possible for the Tribunal to peruse a resume of the proposed trustee, interview the person if thought necessary, and either indicate no objection, or else reject the trustee with brief reasons.

(d) Duties of trustee

2.18 Where the number of shares involved in the transaction is small, there is unlikely to be any significant policy or management obligation falling on the trustee, but this will increase as the number of shares involved increases. The three cardinal duties of the trustee under the USA system were set out in brief in the main report:

- a) the trustee has a general obligation to safeguard the assets of the corporation;
- b) the trustee should exercise his or her power in a manner which assures the continuity of broadcast operations; and

⁴ Letter of 26 April 1989 from the Trustee Companies Association of Australia.

- c) the trustee must act in a manner which facilitates the underlying transaction.⁵

2.19 The trustee system is not intended to prevent or obstruct a transaction from ultimately going ahead. It is essentially a neutral interim procedure. Hence the trustee should not do anything that would place an obstacle in the way of the completion of the transaction. The trustee is 'presumptively disallowed from undertaking, initiating or supporting any significant departures from existing corporate operations or practices'.⁶ The FCC has also stated that 'the trustee should not discharge key employees, such as news anchors, where such action may effectuate a significant change in the nature of the business', unless it is necessary to further one of the three principles set out above.

2.20 The USA system applicable to tender offers stipulates that there shall be no oral communications between the offeror (i.e. the ultimate holder of the shares) and the trustee, and only certain kinds of written communications. The Committee's view is that the purchaser should be able to communicate with the trustee in writing on any matter related to the progress of the application for Tribunal approval, and on the arrangements for transfer of any shares in relation to which approval is given. The purchaser should not be able to communicate with the trustee about the management and direction of the licensee company.

2.21 One of the concerns of the then government when it made the 1981 amendments of the Act was the possibility of asset-stripping prior to approval. Section 92M was enacted to give the Tribunal some powers to deal with that possibility (among others). However, past experience suggests that s.92M is less than effective. Under a trustee system, the trustee would ensure that the broadcasting assets of the licensee were preserved substantially as they were prior to the transaction.

2.22 The second duty of the trustee, continuity of broadcast operations, is related to but distinct from the first. The trustee must ensure that the broadcast operations continue much the same as they did. This would generally appear to prevent, for example, a decision to change network affiliation prior to approval, or in the case of a radio station to change its format in a radical way. However, if the trustee is of the view that some change is necessary for short-term survival of the service, then it may be possible for it to take place, after consultation with the Tribunal. That is simply another facet of maintaining continuity of operations.

2.23 If the transaction is not approved another buyer must be found for the relevant interests. The duty of the trustee should be simply to organise the disposal of the shares at the best possible price within the time allowed under the Act rather than to exercise judgement on the suitability of the prospective buyer. On this issue, it is appropriate for the beneficial owner and the trustee to co-operate closely. The

⁵ The main report, p.68.

⁶ FCC Policy Statements 'In re Tender Offers and Proxy Contests', (1986) 59 RR 2d 1536 at 1582.

Committee believes that the beneficial owner should have six months from the date of the Tribunal's decision (or the end of any unsuccessful legal challenge to that decision) in which to negotiate an agreement for sale of the interests, on terms agreeable to it.

2.24 If at the end of six months, no agreement for sale has been made, the trustee should be under an obligation to accept the first offer that the trustee regards as fair and reasonable after consultation with the beneficial owner. It may be that this price is depressed. This possibility is a commercial risk accepted by purchasers when they put themselves in the position where they will be subject to scrutiny by the Tribunal.

2.25 It should be noted that the disposal of shares, whether initiated by the beneficial owner or the trustee, still requires the approval of the Tribunal.

(e) Exemption from State Stamp Duty

2.26 Under the stamp duties legislation applicable in each State, it may be that transactions by which shares are transferred to trustees could be subject to duty. Because the trusteeship system proposed by the Committee is a compulsory process of short term duration intended to achieve a public interest purpose it is unjust to expose purchasers of shares to the liability to pay large sums of money in stamp duty for such transactions. The Committee believes that the legislation should exempt such transactions from the payment of stamp duty.

(f) Other

2.27 A potential difficulty with the system outlined by the Committee will arise where the transaction in question does not concern shares in a licensee itself, or in a licensee's parent company whose business is substantially broadcasting. Often, an interest in a broadcaster may be obtained by a transaction in the shares of a much more diversified corporation which, through a chain of other corporations, holds a traced interest in a licence. Is it justifiable to tie those shares up in a trustee system?

2.28 The simple answer is that if the Parliament regards the transaction as significant enough in relation to the affected licensee(s) for Tribunal approval to be required, then the transaction should be subject to the trustee system. The extent to which the non-broadcast assets affected by the trustee could be dealt with would become a question for the trustee to consider within the bounds of his or her mandate: see e.g. the decision of the FCC in *Re Macfadden Acquisition Corp* (1986) 104 FCC 2d 545, at 560-1. The Committee sees no reason why the purchaser could not communicate freely with the trustee in relation to those parts of the business of the relevant company which do not concern the broadcasting licences affected by the transaction. It would be a matter for the trustee to ensure that those communications stay within proper bounds.

(g) Recommendations

2.29 The Committee recommends that:

Recommendation 3: The *Broadcasting Act 1942* be amended to provide for the appointment of a trustee who shall in specific cases hold the relevant shares or debentures of the applicant pending the completion of an inquiry by the Australian Broadcasting Tribunal.

2.30 The Committee recommends that:

Recommendation 4: The *Broadcasting Act 1942* be amended to give the Australian Broadcasting Tribunal the authority to create and maintain a register of persons considered suitable to serve as trustee.

2.31 The Committee recommends that:

Recommendation 5: The *Broadcasting Act 1942* be amended to provide that trustees shall possess the following qualities -

- a) be independent of both government and the Australian Broadcasting Tribunal, and, any person connected with the relevant transaction;
- b) have qualifications, whether formal or by virtue of long experience, in relevant areas such as broadcasting, corporate management, public administration, accountancy or law; and
- c) have the highest degree of professional integrity.

2.32 The Committee recommends that:

Recommendation 6: The *Broadcasting Act 1942* be amended to provide that -

- a) the trustee be selected by the purchaser of the relevant shares subject to veto by the Australian Broadcasting Tribunal;
- b) the Tribunal have a residual power of appointing the trustee;
- c) the trustee selected by the purchaser not be restricted to those on the Tribunal's register; and
- d) appointment of the trustee not be subject to review by the Administrative Appeals Tribunal.

2.33 The Committee recommends that:

Recommendation 7: The *Broadcasting Act 1942*

be amended to provide for the following duties of the trustee -

- a) to safeguard the broadcasting assets of the licensee company;

- b) to ensure the continuity of broadcast operations;
- c) to facilitate the underlying transaction; and
- d) not to undertake without Tribunal approval any significant departures from existing corporate operations or practices.

2.34 The Committee recommends that:

Recommendation 8: The *Broadcasting Act 1942* be amended to provide that where the Australian Broadcasting Tribunal does not approve the transaction –

- a) the beneficial owner should have six months from the date of the Tribunal's decision (or the end of any unsuccessful legal challenge to that decision) in which to negotiate an agreement for sale of the interests, on terms agreeable to it; and
- b) if, at the end of six months, no agreement for sale has been made, the trustee should be under an obligation to accept the first offer that the trustee regards as fair and reasonable, after consultation with the beneficial owner.

2.35 The Committee recommends that:

Recommendation 9: The *Broadcasting Act 1942* be amended to exempt from State stamp duty transactions transferring shares or debentures to a trustee under the Committee's proposal.

3: THE APPLICATION OF THE TRUSTEE SYSTEM TO EXISTING INTERESTS IN LICENCES

3.1 In the main report the underlying principle governing changes in ownership and control of broadcasting licences was stated as the protection of the integrity of the licensing decision.⁷ As a matter of logic this principle would seem to apply to persons who are granted a licence or approved as interestholders by the Tribunal, and who are later found not to comply any longer with the basic eligibility or suitability requirements. These include the requirement to be a fit and proper person, or to have the requisite financial technical and management capabilities.

3.2 Once a person is found to be ineligible or unsuitable, that person should not be able to remain in control of a licence or hold a significant interest in a licence. To state this proposition is simply to emphasise the importance that the Parliament has already placed on such concepts as fitness and propriety in the selection of licensees and controllers of licences. It would be inconsistent to put in place an elaborate mechanism for ensuring that an ineligible or unsuitable person could not obtain control of a licence for even an interim period, without applying a similar mechanism to remove as quickly as possible an existing interestholder found to be ineligible or unsuitable, from an existing position of control over a licence.

3.3 Under the Act the Tribunal is in a very difficult position if it finds that a person is, for example, no longer a fit and proper person to hold a licence or an interest in it. The Tribunal cannot order that person to transfer the licence or some interest in it to someone else. The divestiture power in s.92N of the Act applies to existing interests only when they contravene the audience reach or cross-media limits. In all other cases, the Tribunal's powers go no further than action against the licence itself.

3.4 The Tribunal could revoke the licence under s.88 of the Act, but if the unfit person is not the licensee itself that step would be punishment for a situation that would not be the fault of the licensee or one which the licensee could rectify. Even if the unfit person is the licensee itself, the main effect of revocation is to deprive the area of a service which may take a long time to replace, given the processes involved in the grant of a new licence. The Tribunal could possibly attempt to avoid this problem by making its revocation decision operate from some future date (such as the date that the replacement service commences). However, this would leave the unfit licensee in control of the existing service for all of that period, in circumstances where there would be little incentive for the licensee to keep the service operating at a reasonable level.

⁷ The main report, p.62.

3.5 It may be that the Tribunal could impose conditions on the licensee in an attempt to 'cure' the unfitness, or to insulate the licensee from influence by the unfit person. However, a previous attempt to take this kind of action was reversed on both legal and factual grounds by the Administrative Appeals Tribunal: **New Broadcasting Ltd v Australian Broadcasting Tribunal** (1987) 73 ALR 420. Where the unfit person has no direct relationship with the licensee this remedy is clearly of no use.

3.6 Any power incorporating forced divestiture has to be sensitive to the potential for enormous injustice to be done to a licensee or interestholder. There is always the possibility that the Tribunal will make an error in reaching a decision to invoke that power. If irreversible divestiture has occurred before an error is exposed, it may be impossible to compensate the person adequately for the damage done.

3.7 Because it is neither final nor irreversible the trustee system has two advantages over a system of forced divestiture. First, it can be implemented without delay. This means that the public interest is protected by ensuring that an unsuitable person is rapidly removed from a position of control of a licence. Second, in the event that the Tribunal's decision is ultimately set aside, the interestholder can quickly reclaim the interest held in trust. This protects that person's commercial interest without compromising the objectives of the Act. For that reason, the Committee also does not believe that Tribunal decisions ordering that an interest be transferred to a trustee should be subject to review by the Administrative Appeals Tribunal. If any decision is to be subject to review on the merits, it should only be the primary decision as to eligibility or suitability.

3.8 A difficult practical issue is the determination of which interests should be put in trust. Unlike the position with a share transaction, the interests to be held by the trustee would not be pre-determined.

3.9 If the licensee itself is the subject of a finding of unsuitability, then the licence would have to be transferred to another company to be held in trust for the original licensee until such time as it could be transferred finally to another person, or returned to the original licensee (if the Tribunal's decision is overturned, or the original licensee satisfies the Tribunal that it should reverse its own decision).

3.10 If the finding of unsuitability applies to an 'up the line' interestholder, the issue becomes more complicated. It might be possible to sever the link between that interestholder and the licensee in a number of different ways with varying degrees of prejudice to the interestholder. As a matter of principle, the Committee takes it as axiomatic that if the Tribunal is to have power to require that any existing interest be put into trust in order to sever that link between an ineligible or unsuitable person and a licensee, then the interest selected should be one that will result in severance with the minimum adverse effect on the operation of the licensee or any third party. This would be a matter for factual determination by the Tribunal based on the submissions put to it following an adverse finding.

3.11 The Committee recommends that:

Recommendation 10: The *Broadcasting Act 1942* be amended to provide that in a case where the Australian Broadcasting Tribunal has determined that a person holding a particular interest in a licence ('the interestholder') is no longer eligible or suitable to hold that interest -

- a) the Tribunal be empowered to require that specified interests held by the interestholder be transferred to an independent trustee for sale;
- b) the specified interests be those which will sever the interestholder's connection with the licence with the minimum adverse effect on the operations of the licensee or any third party;
- c) the trustee for sale be a person selected by the interestholder from a list of persons generally approved by the Tribunal to act as trustee, or a person approved by the Tribunal in the particular case; and
- d) a decision of the Tribunal to require that specified interests be transferred to a trustee for sale not be subject to review by the Administrative Appeals Tribunal.

J SAUNDERSON MP

**Chairman
10 May 1989**

