The immortal grandfather: A case for euthanasia

Leo Grey examines the grandfather clauses in the Broadcasting and Television Act and asks have they outlived their usefulness

In that lost age when the law of broadcasting was relatively simple, when people trusted in the efficacy of rules that said you could not buy television stations without prior approval, and gentlemen did not take the Control Board or the Tribunal to court every week, there was one sub-section in the Broadcasting & Television Act, namely s.92(3), which was known affectionately as "the grandfather clause". Purists in the bureaucracy preferred to call it (inaccurately) "the freezing provision", but the image of a grandfather clause sitting quietly in the Act, rocking its way inconspicuously into retirement and eventual repeal was far more attractive.

That original grandfather was born in 1965, when all the new ownership rules based on the concept of a "prescribed interest" were enacted. It had a relatively uncontroversial life, and passed away quietly in 1984, buried by the cold anonymity of the *Statute Law (Miscellaneous Provisions) Act (No 1) 1984*. But in this era of the titanic struggle to build a new broadcasting system, where each of the last few years has seen massive legislative and commercial offensives, where the map of broadcasting is now pitted with shell craters and sown with unmarked minefields, and everyone dreams of the "law to end laws", the descendants of the old grandfather have turned into monsters.

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The facts are these. There is now a complete Division of Part IIIB of the Act, divided into four Sub-Divisions, comprising 14 sections and 38 1/2 pages of legislation, entitled "grandfathering provisions": see ss.92ZA-92ZN. It would be pointless for an article like this to try and explain how these provisions operate upon the substantive limits in the Act - the complexities of the grandfathering provisions and the obscurity of the language are almost mind-numbing. Suffice it to say that they are all intended to prevent the new limits from applying to interests existing before certain "grandfathering days".

There are, as I read it, at least nine different grandfathering days. Four of these days are fixed for particular purposes: **28 November 1986** for the first overall television limit and the television/newspaper cross-media limits; **2 June 1987** for the MCS limits; **4 August 1987** for certain "one to a market" limits; **29 October 1987** for the overall radio limits and the radio/television and radio/newspaper cross-ownership limits. The remaining grandfathering days are dependent upon the dates of Ministerial declarations or notices. At least one of these provisions (the television population limit) will create a new grandfathering day every time the Minister publishes a notice under s.91AAD (i.e. after each Census).

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Moreover, none of the grandfathering provisions contains any "sunset clause", that is, a provision stating that the grandfathering of interests exceeding the new rules will cease on a particular date in the future. Neither do they operate on the basis that they "freeze" existing excess shareholdings as the old grandfather in 2.92(3) (may it rest in peace) was always thought to do until reassessed after its demise. A person who holds grandfathered interests does not kill off his grandfather by acquiring additional interests above the limit. All that happens is that the grandfather takes a holiday, and the person is then in breach of the Act. But if the interest drops back to the level that had been grandfathered, the grandfather returns as hale and hearty as ever. These grandfathers are, to all intents and purposes, immortal.

The only way that grandfathers may age and die is through the operation of a legislative "ratchet". That is, if a grandfathered interest is reduced to another level which is still above the new limit, the grandfather applies in the future only to this lower level. It is not possible to go back up to the former grandfathered level and claim the original protection - the movement is only one way, hence the notion of the "ratchet".

Considering all that, the question has to be asked - can it be justified on policy grounds?

The policy proposition which led to the original grandfather in 1965 was a simple one which, reduced to its essentials, seems sensible and fair at first glance: if the ownership rules change, those people holding pre-existing interests which complied with the old rules but not with the new rules should not be unfairly penalised. This policy is still the basis on which the hydra-headed scheme described above is based.

As with many apparently simple policies, there is a gulf between concept and practice in this case which requires the answering of certain difficult questions: How important is it that the new ownership rules should apply to everyone? What would be the consequences to individual interestholders of applying the new rules to everyone? Are those consequences unfair when balanced against the public interest embodied in the new rules? Would it be unfair to require people to bring themselves under the new rules within a certain period of time? Should people be allowed to regain the protection of a grandfather clause if they buy additional interests after the new rules come into effect?

One might assume the Government has answers to all these questions. Some can be implied from the mere existence of the grandfathering provisions. But I am not aware of any real analysis and balancing of competing interests done by the Government and placed on the public record. Moreover, I doubt that anyone in the Department of Transport and Communications and the Australian Broadcasting Tribunal has any definite idea what existing interests are, or might be, covered by the grandfathering provisions.

The Government places great weight on its new ownership rules. But what is their worth if the real position is that the law retains in practice a mixture of old and new limits, possibly in perpetuity? What does it say about the Government's commitment to breaking the cross-media links, if it is thought acceptable to allow existing links to survive forever wherever they may be?

Whatever might be my view about the grandfathering provisions, I do not suggest that all of them should be repealed tomorrow. My solution is to put a sunset clause in Part IIIB Division 7. A generous period of time could be allowed - say five years from each of the specified grandfathering days. At the expiry of that period, if a person still retained an interest exceeding the new limits, divestiture would be required. It may well be that at the end of five years there will be few interests left exceeding the new limits, in which case the sunset clause will be uncontroversial.

If, on the other hand, there are extensive

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Nine Network - heaven help The Age if someone actually does spend 700-million dollars odd to buy it! and then seeks a satisfactory return.

On a lighter note and speaking of competition, for 2 cars and the Sale of the Century cash you are invited to identify the last two shadow ministers of communications - that is since Ian MacPhee was relieved of his crusading role.

The Hawke Government also recently changed horses but that is an easier question. The admirable Michael Duffy was taken over by the Evans juggernaut - Gareth is happy to hold forth on any subject so why not the media even if the PM/Keating alliance makes the media decisions.

By the way, the answer is Julian Beale and Tony Messner, with one out of two being a good pass.

I end this review, as I began it. It is all well and good assessing a policy document prepared while parties are in opposition, but how much of it will be implemented?

Neither the current media position for the Opposition's vision even remotely satisfy the most basic tests as to community need or public interest.

Let's hold Australia's first Royal Commission into the Media - electronic and print - and bring it all out in the open away from politics. Then let's actually do something to solve the problem - for problem there is.

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interests still exceeding the new limits after five years, that just confirms the need for a sunset clause in order to ensure that stated policy of Parliament embodied in the substantive rules for the ownership of broadcasting is reflected in the real world. Let's not pretend that anyone in Government or Parliament considered the grandfathering provisions as an intrinsic part of the policy (if they even bothered to read them) - they were just there to smooth the passage.

A Government lacking the intestinal fortitude for even this moderate measure could add a provision allowing the Tribunal to defer the sunset date for up to another six months or a year, where certain economic damage can be proved that was not the result of procrastination or other default on the part of the interestholder.

Without a sunset clause on excess interests, the new ownership limits may be no more than symbolic policy. In my opinion, the Government should prepare its broadcasting grandfathers for a dignified but definite end.

Leo Grey