

CHAPTER FOUR

SATELLITE AND MDS TENDERING PROCESSES

4.1 Professor Dennis Pearce has conducted one inquiry into aspects relating to the satellite and another into MDS tendering processes. The first report, "Independent Inquiry into the Circumstances surrounding the Non-requirement of a Deposit for Satellite Pay-TV Licences, and Related Matters" (Pearce 1) was tabled in the Senate on 20 May 1993 and inquired into the following matters:

1. What were the processes followed by the Department in the preparation for the Minister of a draft Determination under subsection 93(1) of the *Broadcasting Services Act 1992* for a price-based allocation system for allocating subscription television broadcasting licences A and B?
2. What were the reasons for the non-inclusion in that draft Determination of deposit requirements for the tendering process?
3. What was the form of advice to the Minister for Transport and Communications in relation to the non-inclusion in the draft Determination of deposit requirements for the tendering process?
4. Was that advice sufficient to alert the Minister to the fact that he was adopting a process which did not involve deposit requirements by signing the Determination?
5. Was the non-inclusion of deposit requirements for the tendering process in the draft Determination given adequate and high level consideration by the Department given the potential implications of this course of action?

4.2 The second report, "Inquiry into Certain Aspects of the MDS Tendering Process 1992-93 Volume 1" (Pearce 2) was tabled in the Senate on 26 May 1993 and inquired into the following matters:

1. Is the material prepared by the two Deputy Secretaries sufficiently well researched and considered to support the

accounts provided by them of events relating to the MDS tender process?

2. Why were the Ministerial Determinations of 1 October 1992 and 7 January 1993 inconsistent with the Government's policy intention, and what were the reasons for the discrepancies between the Ministerial Determination and the Invitation to Tender?
3. What was the extent and timing of advice to the Minister on the 'technical' deficiencies'?
4. Were the judgements made by the Secretary and his officers in relation to the handling of the 'technical deficiencies' issue in the Perth Court proceedings reasonable in the circumstances? Was it reasonable for the Department and the Minister to assume that the Court Order of 7 April enabled them to continue with the tender process?

4.3 This report was accompanied by the "Report on Inconsistencies Involving Ministerial Determinations and Invitation to Tender Volume 2 Part A" prepared by Mr M.J. Hutchinson and "Chronology of Events from February to May 1993 Volume 2 Part B" prepared by Ms C.M. Goode.

4.4 The Committee's own terms of reference require it to inquire into "the extent to which the Minister for Transport and Communications discharged his ministerial responsibilities in relation to satellite and MDS tender processes". The Committee paid considerable attention during its inquiry to the Pearce reports and the volume of documents tabled in the Senate. It established a list of issues for consideration (see Appendix 3C). In this report it has confined itself to those matters which relate to the Ministers discharge of his responsibilities.

The Satellite Tender

4.5 The Committee focussed upon two major issues in relation to the satellite tender process: the non-inclusion in the Determination of a deposit requirement and the non-inclusion of prequalification conditions or hurdles to be satisfied by a

prospective tenderer, particularly the requirement for a financial or business plan, as part of the price-based plan.

Non-inclusion of deposit requirement

4.6 The non-inclusion of a deposit requirement was addressed in detail in Professor Pearce's first report. It appears that the idea of a deposit was not rejected, it simply was not discussed. Pearce notes (paragraph 21) that only a single unattributed document has emerged which referred to a deposit requirement. This document was circulating at about the time in late 1992 when the preferred procedure for tendering for the pay-TV licences was evolving and included the statement that tenderers "are not required to pay a deposit to enter the process". The Committee was advised that this document was the result of a 'normal practice' which allows for the development of material by officers at lower levels within a section and its refinement as it moves up the departmental hierarchy. This document did no more than set out some of the parameters the relevant officer considered might be important in structuring the Determination. It was a working document prepared by a relatively junior officer and had no other status or high level clearance (Hansard, 6.8.93, pp.236, 266).

4.7 When the draft Determination was forwarded to the Attorney-General's Department for advice on 5 January 1993 it was reviewed only by the Office of Legislative Drafting and not additionally by the Office of Commercial Law. Consequently the lack of a deposit requirement was not questioned at this stage. Departmental officers thought that the draft Determination would also be considered by the relevant policy area of the Attorney-General's Department. This understanding was based on incorrect assumptions by the departmental officers involved as described in Pearce 1 paras 26 and 27. The Secretary of the Department noted that this demonstrates a need for much greater understanding of the need to work with a number of different parts of the Attorney-General's Department (Hansard, 6.8.93, p.237).

4.8 Pearce summarises a number of reasons why a deposit requirement was not included in the draft Determination provided for the Minister's signature following its clearance through the Attorney-General's Department (Pearce 1, para. 32). These reasons were provided by officers involved in the policy discussions relating to the Determination. Pearce suggests that "to some extent this is ex post facto reasoning as the officers concerned asserted that the possibility of requiring a deposit was not discussed" (Pearce 1 para. 34). The Committee was advised that of the points listed by Pearce in paragraph 32, the following was seen as being the most significant within the department at that time:

The scheme that was adopted was seen as fitting appropriately within the mechanism of a price-based tender system while providing adequate checks on abuse of that system. The scheme involved the following steps:

- . identification of the person making the highest bid;
- . that person being subjected to ABA and TPC scrutiny; and
- . payment of the full amount bid within 30 days of advice of approval.

It was straightforward and fair.

4.9 This view that this three-step process provided adequate checks was held by the officers who had been involved in drafting the Determination (Hansard, 6.8.93, p.269).

4.10 At no stage was the Minister's mind directed to the non-inclusion of a deposit requirement. Pearce considered this matter and was satisfied that the only advice to the Minister on the process included in the Determination was that contained in the Minutes of 4 and 11 January 1993 (see Appendixes 3 and 4 to Pearce 1). He concluded that this was not sufficient to alert the Minister to the fact that by signing the Determination he was putting into operation a process which did not involve the requirement for a deposit. (Pearce 1, paras 37-48).

4.11 Pearce concluded that it was a mistake for the departmental officers not to bring certain aspects of the tendering process to the attention of the Minister. His finding was that an error of judgement had been made. The departmental officers, on a number of occasions during the hearings, accepted without qualification that an error of judgement had occurred in not advising the Minister about the non-inclusion of a deposit requirement (Hansard, 6.8.93, pp. 232, 235, 241, 284).

4.12 Related to this issue is the question of whether not having a deposit was a matter of policy or process. The departmental officers involved in the issue thought they were handling a matter of process. In hindsight, the Department now concedes that the question involved a matter of policy. The Department therefore made an error in not advising the Minister he was taking a policy decision in signing the Determination. (Hansard 6.8.93, pp. 243, 286, 291). Had the Minister been advised he was pursuing a course involving a matter of policy he would presumably have had to make a decision whether to proceed without a deposit requirement or to take the matter back to Cabinet for further consideration. This option was not brought to the Minister's attention.

Non-inclusion of prequalification conditions

4.13 The second issue pursued by the Committee in relation to the satellite tendering process concerned the non-inclusion of prequalification conditions or 'hurdles', and in particular the requirement for a financial or business plan as part of the price-based process. Reference was made to a note to the former Minister, Senator Richardson dated March 1992, prepared following an overseas visit by the Minister and departmental officers to examine various systems. This made suggestions about the appropriate selection process to adopt for the sale of the satellite licence in Australia. This note suggested the inclusion of a pre-qualification process to screen tenderers, prior to decisions being taken on price (Tabled 24.5.93, see Appendix 3D).

4.14 An undated cabinet-in-confidence document, presumed to be written in June 1992, provided a description of how the proposed price-based pay TV selection process would work. This document referred to a prequalification stage which involved shortlisting by assessment against hurdles. These hurdles included the question "Capability: Is the bidder's business plan and financial plan sound?" (Tabled 24.5.93, see Appendix 3E).

4.15 Parliament intervened in the introduction of pay TV by agreeing to the Broadcasting Services Act in an amended form in June 1992, and referring the part relating to pay TV to a Senate select committee inquiry into subscription television broadcasting services. By November 1992 after the select committee reported and pay TV legislation was again before Parliament, a preferred procedure for tendering for the pay-TV licences in accordance with the revised legislation was being considered by the Department. The Department sought legal advice from Attorney-General's on the validity of a proposed scheme, where the preferred option contained prequalification hurdles (tabled 24.5.93, see Appendix 3F). The advice provided by Attorney-General's (tabled 24.5.93, see Appendix 3G) said, in response to a specific question from the Department (see paragraph 6 of the AG's advice), it did not consider that the hurdles whereby some potential bidders were eliminated before their bids were assessed on a price basis could legally be incorporated into a prequalification stage.

4.16 Whilst the merits of this advice was the subject of debate at the hearings (Hansard 6.8.93, pp.271-274), the Department accepted it as meaning that financial capability as a hurdle could not be included in the process. However, the Department also noted that between June and November 1992 the model for pay TV proposed in the legislation had changed. Most of the conditions which had been considered earlier in 1992, such as ownership and control and Australian program content had been embodied either as legislative requirements for licensees to meet or as part of the licence conditions. Capability was not covered in legislation. The advice was seen to preclude it from the process (Hansard 20.8.93, pp. 366, 369).

4.17 This advice was not brought to the Minister's attention. During this period a range of issues relating to pay-TV were preoccupying the Parliament, the Minister and the Department. Industry development was a central concern. A paper on industry opportunities offered by pay-TV prepared for cabinet consideration referred, albeit obliquely, to the Attorney-General's advice by stating that "the price-based process cannot involve comparative assessment of individual bidders". (Tabled 24.5.93, see Appendix 3H).

4.18 The Pearce review of the satellite tendering process concluded that there was a series of mistakes, incorrect assumptions and an error of judgement by departmental officers involved. Evidence given to the Committee supported this conclusion. The Department told the Committee that remedial procedures have been implemented. These will be examined when the Committee considers part (1)(b) of its terms of reference.

Minister's responsibility in satellite tender

4.19 The next issue relates to the Minister's discharge of responsibility in relation to the satellite tender process. The Minister has conceded that "what the Pearce report has laid out clearly is that this was a systems failure and I was part of that failure ... in that sense obviously I have to share responsibility for this in a real way" (Hansard, 6.8.93, p.291). The Minister referred to two contributing factors during January 1993 when the process was being finalised. The Minister was "profoundly distracted" due to the imminence of a federal election campaign and staff were absent during the holiday period leaving the private office below strength and resulting in administrative deficiencies. The Minister has undertaken to ensure procedures are implemented so that in future similar situations are dealt with adequately (Hansard, 6.8.93, p.292 and 20.8.93, p.319).

4.20 In considering whether or not the Minister failed in his responsibilities as a minister when he signed the Determination, and is deserving of being sanctioned for doing so the following points are of relevance:

The tender process did not become the subject of criticism until after the announcement on 30 April 1993 of the highest bidders for the two licences,

The Minister did not sign the Determination without advice from the Department. Advice was provided in the Minutes of 4 and 11 January 1993. This included an outline of the process which was contained in the draft Determination. Pearce has argued that it should not be expected that a Minister would recognise the negative implications of what was being excluded, merely by the mention of what was included (Pearce 1, para 39),

The recognition by the Department of the policy significance of the no deposit requirement was only appreciated in hindsight, with the matter being regarded at the time as one of process.

4.21 It is reasonable to conclude that in signing the Determination the Minister thought he was carrying out a matter of process. This was the advice he received from the Department. He was given to understand that the tendering process was soundly constructed having been cleared through the Attorney-General's Department.

The MDS Tender

4.22 Professor Pearce's second report and the reports by Mr Hutchinson and Ms Goode outline the MDS tender process in considerable detail. They identified a range of shortcomings within the Department which will be considered in detail under part (1)(b) of the Committee's terms of reference.

4.23 The Committee has focussed on two issues - the Australian Broadcasting Corporation's input to the decision taken on 28 January 1993 to change the regulatory

arrangements for subscription TV broadcasting and to revoke the Invitation to Tender (which was successfully challenged in the Federal Court) and the process of advising the Minister of the technical deficiencies in the Invitation to Tender which led to the abrogation of the process on 17 May 1993.

ABC input

4.24 The General Manager of the ABC, Mr David Hill, advised the Committee that he had contacted Senator Collins on 25 January 1993 and subsequently written to the Minister to express the ABC's concern at the emergence of MDS in the way it had. During the debate surrounding the passage of the Broadcasting Services Bill 1992 it had been generally assumed that the broadcasting of pay television was to be by satellite. MDS which was regarded as being capable of limited market penetration and with technical limitations was seen as playing an ancillary role in a niche market. By late 1992 MDS had emerged with the potential to be operative before the satellite and if it was to end up launching pay-TV in Australia, MDS would corner a significant part of the market, especially in capital cities.

4.25 The Broadcasting Services Bill was expected to provide technological neutrality. However, by the time it was passed after being amended by Parliament, a series of conditions had been prescribed on the operation of the satellite which were not applicable to MDS, thereby disadvantaging the satellite system. MDS was now capable of being made immediately available to launch pay television with the expectation that the satellite might not be available for up to a further 18 months. MDS could now be used for a purpose other than had been envisaged throughout the pay television process. This realisation resulted in a scramble in the market place to secure the few remaining MDS licences.

4.26 The Broadcasting Services Act allocated the ABC two channels in a pay television service based on the satellite system but none on one founded on MDS. Given this Mr Hill, representing the ABC interests, contacted the Minister and told him that if pay television was launched through MDS the ABC's future in pay television

would be put at risk. He said this would be contrary to the spirit of the Broadcasting Services Act which intended to give the ABC an assured role in the provision of pay television.

4.27 At the same time Mr Hill raised a number of concerns he had about what he saw as the prejudicial impact that the advantage given to MDS by allowing its early start would have upon the provision of high quality technology for pay TV in Australia.

Technical deficiencies with MDS tender

4.28 Following the decisions on 28 January 1993 to change the regulatory arrangements for pay TV and to revoke the Invitation to Tender, the issue of the technical deficiencies in the Invitation to Tender was raised at a meeting held on 2 February 1993. Officers of the Department, the Attorney-General's Department and Mr Meagher, the Minister's adviser, were present at this meeting. The principal purpose of this meeting was to examine the legal implications of the 28 January decisions, specifically the validity of the revocation of the Invitation to Tender, and the legal actions which the Department had been advised were likely to arise from these decisions. The possibility of deficiencies in the Invitation to Tender was raised, but it was seen as a minor issue in comparison to the possibility of litigation over the revocation. (Mr Stokes commenced his Federal Court proceedings challenging the revocation on 3 February 1993).

4.29 The Secretary summarised the Department's position at this time as follows:

"On 2 and 3 February the focus the department had was on the validity of the revocation decision. In the context of that discussion the issue of possible deficiencies arose, but we regarded it as academic in that context because the view that we took was that if there were deficiencies they could be remedied in the event that a new determination was issued. But when we went to AG's, from memory, on 8 February we sought advice on both of those issues so that we could have clearly substantiated,

firstly whether the revocation was valid and, secondly, whether there were technical deficiencies and, if there were, the nature of them so that they could be picked up we were seeking to make sure that if we had to come back, as we expected we would, to remake the tender and determination we would know precisely the format in which we should do it. We were clearly proceeding on the basis - and we continued during February, particularly after we received the advice from AG's, to proceed on that basis - that the revocation decision was valid The Second set of advice we got was to ensure, once it was confirmed that we could remake the tender, that the second time around we could pick up any technical deficiencies". (Hansard, 20.8.93, pp.339-340)

4.30 From early February the department and the Minister's adviser were aware of the potential problems. The question raised was how much of this information was passed to the Minister. The Minister informed the Committee that he had been advised orally by Mr Meagher, of the substantive issues discussed at the meeting which related to the litigation. This was in accordance with the normal practice of such briefings in ministerial offices. Mr Meagher subsequently explained to the Minister that he had not drawn his attention to the possible deficiencies in the Invitation to Tender because it was seen at the relevant time as only a side issue to the major one dealt with at the meeting and in any event the extent to which it constituted a problem was yet to be determined by the Attorney-General's Department. Mr Meagher had assumed that when the official advice was received, it would be drawn to the Minister's attention (Hansard 20.8.93, pp.329, 342).

4.31 The advice was received on 22 February 1993 (see Goode, Vol. 2, Part B, Appendix 5) that the revocation was effective and valid and accurately identified the legal deficiencies in the tender process. With election writs having been issued on 8 February and the government in caretaker mode, this advice was not drawn to the Minister's attention. Similarly, the Minister was not consulted over the course of action to be pursued by the Department's Counsel in the Federal Court proceedings instigated by Mr Stokes (see Pearce 2, paras 35-37). The Minister was not advised

of the deficiencies in the process and their implications until considerably later in early May.

Discharge of ministerial responsibility in relation to tender process

4.32 The Committee has discussed those circumstances in which ministers might be expected to resign or be dismissed for the way they have met their ministerial responsibilities and in which they might be expected to suffer a lesser penalty or none at all.

4.33 The Senate has examined the Minister closely in relation to both tendering processes. The findings of Professor Pearce, the volume of tabled documentation and the evidence received by the Committee support the Minister's responses to the issues raised in the chamber about his conduct and no evidence has appeared showing that he has misled Parliament. Indeed that particular accusation has never been pressed.

4.34 The following matters are relevant to the issue of whether or not Senator Collins has failed in his ministerial duty because of shortcomings in the administration of his Department:

- Personal involvement in policy process - Aspects of both tender processes dealt with by the Committee involved policy considerations, particularly the issues referred to in the advices from the Attorney-General's Department. The Minister did not become involved in these policy considerations because they were not brought to his attention.

The signing of the Determination in relation to the satellite tender has been seen in hindsight to have involved policy

considerations. However, at the time it was perceived as a matter of process and the Minister's attention was not directed to it.

These matters are discussed earlier in this report.

Administrative deficiencies in the tendering processes - The Minister has acted upon a range of administrative deficiencies after they had been drawn to his attention. Reviews have been instigated and remedial action requested from the Department.

Accountability to Parliament - The Minister has acknowledged that he shares responsibility for the 'systems failure' which occurred with the tendering processes. Having acknowledged this point, the Minister has commenced programs to ensure that such a systems failure does not recur. Part (1)(b) of the Committee's terms of reference is to examine the adequacy of the actions taken by both the Minister and the Department to rectify these problems.

The Minister has answered to parliament for the administration of his portfolio on these issues. Over a lengthy period the Minister responded to many questions without notice, has been the subject of Matters of Public Importance debates, has been tested in debate during the passage of broadcasting and appropriation bills, has appeared before an Estimates Committee and has tabled a large volume of documentation (partly in response to an order of the Senate, and partly in response to an undertaking given by the Minister to table all relevant documents).

Operation of the Private Office - The Minister has acknowledged shortcomings which occurred in the operation of his private office, due in particular to staff absences during the January holiday period which led to breakdowns in the processing of documents through the office and to being distracted during the 1993 election campaign. Having recognised these problems, the Minister has reviewed procedures and made arrangements to ensure such shortcomings will not recur.

The Pearce Reports

4.35 The Committee has given considerable weight to the findings of Professor Pearce in his two reports.

4.36 The reports were convincing. They contained facts that Professor Pearce had ascertained himself. His analysis was sound.

4.37 Professor Pearce has great experience in administrative law. He has a high reputation for his intellectual capacity and for his integrity. It has not been suggested he was biased in any way in producing his reports.

4.38 It is desirable that where separate inquiries are held into the same matters the finding of facts be consistent. Each inquiry should bring itself to the proper degree of satisfaction as to the fact it relies on but should at the same time not put the findings of the other aside too readily. The Committee has found no reason for rejecting the findings of Professor Pearce.

Findings

4.39 In both tendering processes the Minister may have taken action different to that which was actually taken had he appreciated the full and accurate facts relevant to each. However he was not aware of them and proceeded in both cases on a version of facts which in vital respects was incomplete and inaccurate.

4.40 On the version of facts which he accepted he acted reasonably and in the circumstances prevailing at the time was reasonable in accepting this version.

4.41 The Minister is now aware of deficiencies in his Department at the relevant time and of the need to remedy them. He and the Department have taken action to rectify them and the Committee is required by part (1)(b) of its terms of reference to report on the adequacy of this action. It will proceed to do so.

Conclusion

4.42 To date the Minister for Transport and Communications has discharged his ministerial responsibilities in relation to satellite and MDS tender processes.

4.43 The Committee reserves judgment on the Minister's discharge of those responsibilities requiring action to be taken to rectify the administrative deficiencies until after it completes the second part of its inquiry.

Senator Barney Cooney
Chairman
September 1993