

## CHAPTER TWO

### IDENTIFIED PROBLEMS AND ACTION TAKEN

#### GENERAL COMMENTS

2.1 Professor Dennis Pearce's two reports and the reports by Mr Hutchinson and Ms Goode identified significant problems within the Department of Transport and Communications. The problems primarily involved errors of judgment and inadequacies in Departmental administration. There was no suggestion by Professor Pearce of impropriety in these problems or the satellite and MDS tender processes which exposed them.

2.2 Professor Pearce also identified deficiencies in the operation of the Minister's office.

#### Impact upon Department

2.3 The significance of the impact that the identification of these problems had upon a Department which had been responsible for other major reforms in the transport and communications sector cannot be understated. The Secretary, Mr Graham Evans wrote to the Minister on 25 May 1993 that:

the last few weeks have been an immensely traumatic experience for all of the senior officers in the Department, and for the Department generally. There must be few recent occasions when an aspect of the work of a Department has been subjected to such intense Parliamentary, public and internal scrutiny.

Mr Evans elaborated on this view before the Committee when he said:

We have taken a lot of pride as a department in the way that we have restructured ourselves and addressed a lot

of the policy reform issues that have been on the Government's agenda for the last five years... We have tried to do that in a professional way... Therefore it is a very traumatic experience for us to find that we were involved in a process which had gone wrong and which has ongoing consequences... Something like this reflects on the professionalism of public servants and, where we attach a high importance to that, it has a quite profound effect (Hansard, 6 August 1993, p.247).

### **Sources of advice**

2.4 In responding to the problems identified in the Pearce and other reports, the Department sought expert advice from other Commonwealth departments including the Attorney-General's Department, the Public Service Commission (PSC), the Australian National Audit Office (ANAO) and external consultants - including Professor Pearce who acted as an adviser on a number of the matters raised in his reports.

2.5 Mr Bill Blick, from the Department of the Prime Minister and Cabinet, was seconded to the Department as an acting Deputy Secretary to perform a range of special duties relating to the Pearce reports.

2.6 When developing guidelines and taking action on the matters, the Department found that for some aspects there was no precedence in the public service. Consequently, some guidelines have been developed from scratch and have been, or will be when finalised, provided to the Management Advisory Board which has specific responsibilities in regard to the administration of the public service. The Ministers and their offices have also been involved in the development and approval of various guidelines.

### **Costing**

2.7 The Department advised that the training and external consultancies undertaken by it has not involved any additional cost to the Commonwealth. The

funding for the training programs has been met through a reallocation of priorities and the time for officers participating in the seminars and workshops falls within the Department's commitment to all staff for ongoing training and skills development. The cost of external consultancies has been absorbed within the department's running costs. External legal costs are a separate issue for which preliminary estimates are being prepared (Hansard, 15 November 1993, p.400).

### **Background to action taken**

2.8 Three general points were made by the Department concerning the direction of the action to be undertaken. These related to management of policy reform, pressure on legal resources and market responses to emerging technologies and the regulatory framework.

2.9 Firstly, the Department's overall management of policy reform and implementation on behalf of the Government was noted. An ambitious program of transport and communications sector reform had been undertaken by the Department in 1992-93. The Department's resources were stretched to the limit during that period, with a number of senior officers working under immense pressure for long periods of time. Mr Evans believed that the errors in judgment in the tendering processes were, in part, a consequence of those pressures. However, as Professor Pearce indicated, the events surrounding the tendering processes highlighted a need for a clearer understanding in the Department of its statutory obligations, administrative responsibilities and other issues. How these issues have been addressed is discussed in this chapter.

2.10 Secondly, a different legal environment is now operating in the transport and communications sector. Legal considerations, which were relatively straightforward when transport and communications was primarily in the hands of publicly-owned monopolies, are now quite complex. The introduction of greater competition and more private ownership, has resulted in legislation and regulatory

arrangements being closely scrutinised by potential new entrants and existing players to maximise the opportunities available to them.

2.11 It was evident from the tendering processes that the Department's use of legal and commercial advice has been inadequate. The Department has taken steps to ensure that additional legal resources are available and that they are properly utilised to safeguard the Commonwealth.

2.12 Thirdly, the relationship between emerging technologies in the communications sector, market responses and the regulatory framework needs consideration. The approach taken in recent years to the development of a regulatory framework has been to seek to create a technology-neutral environment, within which service providers can make the most appropriate technology choice on a commercial basis.

2.13 Recent events indicate that as convergence in communications, computing, and information and entertainment media become a reality, there is an expectation that the Department should be more active publicly in contributing to an understanding of emerging technologies and likely market responses, that may affect the future regulatory structure for communications. The Department's response to this perceived need is discussed later (DTC1: paragraphs 5-10).

### **Corporate goal of Department**

2.14 The events surrounding the tendering processes led to the Department's corporate goal being amended through the inclusion of three additional points:

- . the Department is to ensure that the development and implementation of reform has proper regard for the commercial environment, and is soundly based in terms of statutory requirements and administrative procedures;
- . there is to be proper accountability within the Department; and

the export of Australian services is to be supported, taking advantage of our improved international competitiveness.

2.15 The revised corporate goal now reads as follows:

To support the Government's objectives for the restructuring and growth of the Australian economy by accelerating changes towards a transport and communications sector which, by best world standards, is:

- Competitive;
- Efficient;
- Customer-oriented;
- Aware of safety requirements; and
- Environmentally responsible.

In promoting this change, the Department will ensure that:

- The ability to safeguard public interest, including the interests of disadvantaged members of the community is maintained;
- The development and implementation of reform has proper regard for the commercial environment, and is soundly based in terms of statutory requirements and administrative procedures;
- The export of Australian services is supported, taking advantage of our improved international competitiveness;
- The services the Department directly provides are required to be responsive to needs and conducted, where practical, on a user-pay basis;
- There is proper accountability within the Department, and
- It involves and treats its staff fairly and equitably.

## **SPECIFIC PROBLEMS IDENTIFIED AND ACTION TAKEN**

2.16 The report will now outline the problems identified by Professor Pearce including those matters listed in term of reference (1)(b) and describe the action taken to rectify the particular problem.

## i. Tendering arrangements for price-based licensing allocations

### The problems

2.17 The tendering process used by the Department in licence allocations prior to the satellite and MDS tenders had had regard to the regulatory framework and the nature of the market to which the licence was to give access. Professor Pearce noted that Departmental officers had expressed to him the view that the experience of the Department gleaned from recent successful commercial ventures, such as the sale of AUSSAT, grant of third mobile telephone licence and conversion of AM radio to FM, indicated that the system for sale had to be carefully tailored to the particular venture. There was no standard pattern that could be followed (Pearce 1: 33).

2.18 The satellite tender process did not include, nor had there been considered, a requirement for a deposit. Nor had there been included prequalification conditions to be satisfied by a prospective tenderer, in particular any requirement for a financial or business plan. These matters were discussed in the Committee's First Report. The possibility of 'cascading' bids through multiple bidding had also not been considered (Hansard, 6 August 1993, pp. 261-262).

2.19 In relation to the MDS tender, aspects of the Ministerial Determination were inconsistent with the Government's policy intention in regard to the proposed allocation arrangements and technical discrepancies were identified between the Ministerial Determination and the Invitation to Tender. These discrepancies were outlined in Mr Hutchinson's report as:

- inconsistency between the pooled method of allocation, with ex poste nomination of frequency, that was implicitly intended, and the scheme that was provided for in the Determination which required tendering for specific licenses, identified as to frequency,
- a failure to specify each "licence" precisely by frequency,
- doubt that specification of "area" by city name only was sufficiently precise.

2.20 A major factor in these problems was a perceived lack of understanding of legal and formal processes in preparation of the tender documentation, particularly within the Radiocommunications Division of the Department (Hutchinson Report: 30-38; see also First Report Chapter 4 and Pearce 2: 21-24).

### **Action taken**

#### **(a) Developments with satellite and MDS tender processes**

##### **The satellite tender**

2.21 The announcement on 30 April 1993 of UCOM and HiVision as the successful bidders for the satellite licences A and B became the subject of parliamentary and media criticism primarily because there was no requirement for a deposit as part of the tendering process. Legislation was enacted in May 1993 to provide that any new bidder offered licence A or B in the event of a default by either of the highest bidders must pay a 5% deposit of their bid price within 3 days of notification.

2.22 On 30 June 1993 the Australian Broadcasting Authority announced that UCOM and Hi Vision were suitable to be allocated the licences and they were given 30 days to pay the full bid price. When payment was not received by 2 August 1993, in accordance with the May legislation, the two licences were offered to the next highest bidders upon payment of a deposit of 5% of their bid price. No deposit was received. This process 'cascaded' through six rounds of offers before deposits were lodged on 30 August 1993 by UCOM and an associated company New World Telecommunications (DTC1: 21-24).

2.23 By 18 November 1993 UCOM had failed to pay the balance of its price for the A licence which cascaded through further bidders until UCOM lodged a deposit on 3 December after striking a deal with a United States cable company Century Communications. The B licence has been acquired from New World

Telecommunications by a deal involving Australis Media Ltd and the US-based Lenfest Group and Tele-Communications Inc. Both arrangements are awaiting Australian Broadcasting Authority and Trade Practices Commission approval that the new company structures meet foreign and cross-ownership requirements.

### **The MDS tender**

2.24 The tender process for the allocation of MDS licences was abrogated on 17 May 1993. The new process is being conducted formally by the Spectrum Management Agency (SMA), supported by the resources of the Communications Selection Team (CST) from within the Department. Legal and technical capacity has been added to the CST for this exercise. The planning and supervision of the new process is being undertaken by a high level steering committee chaired by the Acting Spectrum Manager and with representation from the Department, SMA, CST and Attorney-General's.

2.25 On 25 June 1993 a discussion paper was sent to the 200 parties who expressed interest in the abrogated process and to any other interested party. Twenty-five parties provided comment addressing technical matters and suggesting changes to the selection process outlined in the discussion paper.

2.26 An "Information Document" describing the new process has been finalised, subject to Ministerial consideration. There have been a number of changes to the proposed process including the details of proposed locations from which licensees will be authorised to operate in each area, the proposed coverage areas in some locations and the arrangements affecting permitted transmitter power. Further technical work has also been undertaken to better define the potential for interference among certain MDS services, and between MDS services and pre-existing radiocommunications services in adjacent areas, so that more information can be provided to applicants.



2.27 Industry consultation was undertaken to enable parties to contribute to the development of the process, to test a proposed approach to the process and to identify what changes to the process might be appropriate. An issue that arose during the consultation was the wish of some applicants to apply for a number of channels in each area, rather than applying for single channel lots in each area separately. An approach is under consideration which would see the allocation of single licences in a sequential process conducted in a manner similar to an auction. Following the Minister for Communications' agreement this approach is being developed to the stage of preparation of the necessary documentation.

2.28 The timing of the implementation of the new process is under consideration by the Minister for Communications. There are two views on the timing. Firstly, to delay the allocation of the additional MDS licences until the outcome of the satellite pay TV licence allocation is settled. Secondly, to seek the earliest allocation of the MDS licences, to allow early use for non-pay TV purposes and to allow advance planning for pay TV uses (DTC1: 25-32; DTC2: 30-34).

**(b) Guidelines for future price-based tender processes**

2.29 Draft guidelines for future price-based tender processes have been developed based on continuing evaluation of the satellite and MDS tender processes and by extending the Australian National Audit Office (ANAO) guidelines 'Best Practices for the Sale of Commonwealth Assets as Business Ventures'.

2.30 The purpose of the guidelines is to assist future price-based allocation processes in achieving efficient and cost-effective outcomes that are consistent with government policy requirements and can sustain public, parliamentary and other valid scrutiny - including the possibility of legal challenge. The guidelines will need to be applied and adapted to the specific allocation process in hand, having regard to what is to be allocated, the relevant legislation, regulatory arrangements, market conditions and other factors.

2.31 The guidelines address the four stages identified by the ANAO guide, but have been extended to provide guidance for price-based allocation processes. They are:

- (a) identification at a policy or strategic level of:
  - (i) what it is that is to be allocated;
  - (ii) specific objectives;
  - (iii) roles and responsibilities; and
  - (iv) need for external advisers.
- (b) planning, including detailed consideration of all substantive and process issues in a fully informed legal and commercial context;
- (c) implementation, including operational procedures and provisions for ensuring probity and an audit trail; and
- (d) review, in the context of formal evaluation processes.

2.32 The ANAO structure is varied by suggesting that more detail can be finalised at the 'planning' stage, so that implementation can be expedited. In an allocation exercise, unlike a privatisation, information preparation and legal documentation can largely be finalised at the planning stage.

2.33 The ANAO, and the Departments of Administrative Services, Attorney-General's and Finance were asked to comment on the draft guidelines. The ANAO has provided general advice but without formally endorsing the guidelines so as not to pre-empt any future scrutiny. Attorney-General's provided detailed comments concerning common and administrative law issues.

2.34 A particular problem raised at the hearings concerned multiple allocations and the rights of multiple and individual bidders. It was said that there is a series of complex interactions between the multiple right and the individual right that makes it very difficult to determine an allocation process which is fair and consistent and in which the outcome is predictable. This problem needs to be clarified before the guidelines are finalised (Hansard, 15 November 1993, pp.420-421).

2.35 The Department advised the Committee that it expects the guidelines to be finalised following receipt of the remaining comments and on the completion of the satellite and MDS tender processes, although it does not anticipate, barring the most unforeseen developments, changing them greatly. It indicated that they have gone about as far as they can in degree of specificity without becoming too prescriptive and ruling out the possibility of adapting each individual allocation process to specific circumstances. A copy of the draft guidelines as revised by 20 October 1993 is at Appendix 5 (DTC1: 33-36; DTC2: 26-29; Hansard, 15 November 1993, pp.412-414).

## **ii. Understanding of administrative and commercial law**

### **The problems**

2.36 The problems under this heading which were identified by Professor Pearce ranged from specific problems within the tendering processes to what he called "the administrative culture". They occurred within sections of the Department, between policy sections and the Department's Legal Branch and between the Department and the Attorney-General's Department and included:

- . Flawed assumptions by Departmental officers over which sections of AG's would consider the draft Determination relating to the satellite tender (Pearce 1: 26-27).
- . A number of errors, omissions and oversights in the MDS tender process were described by Professor Pearce as affected by the want of compatibility that can exist between legal and administrative cultures. He wrote that some Departmental officers do not seem to appreciate that actions they take must adhere to relevant legal requirements. This is manifest through the attitude that administrative practice is regarded as being more important than legal niceties. (Pearce 2: 16, 25-27)
- . This lack of complete understanding of the significance of law in the administrative policy making process was described by Pearce as a systemic problem in the licensing allocation section of the Radiocommunications Division (Pearce 2: 30).

2.37 Professor Pearce suggested that it would be desirable to introduce training programs to increase the awareness of officers of the significance of legislation and other legal requirements (Pearce 2: 31).

2.38 Problems involved in preparing the October 1992 MDS Determination and surrounding the drafting of the Invitation to Tender and its publication in the Gazette (as described in the Hutchinson report) led to a further suggestion by Professor Pearce that there should be a review of the role and function of the Legal and General Branch. He proposed that Branch members should be brought into the policy formulation process at an early stage and treated as having equal status in the determination of that policy. As Professor Pearce noted, having a cell of in-house lawyers is only going to be worthwhile to the Department if it has in place an understanding of their role and a system that engages their skills appropriately (Pearce 2: 29 and 32).

2.39 Professor Pearce also remarked that it would seem appropriate for the Department to draw on its experience of current litigation to reach some understandings with the Attorney-General's Department on procedures for obtaining and implementing advice and the respective responsibilities of the two Departments (Pearce 2: 52).

#### **Action taken**

2.40 Professor Pearce's suggestions relating to training programs and legal services were accepted by the Department and addressed in the following manner.

##### **(a) Training programs**

2.41 Training programs for departmental officers to ensure a proper understanding of and commitment to comply with their statutory obligations and administrative responsibilities under delegation have been undertaken. There have been two categories - legal awareness seminars and program specific workshops.

## **Legal Awareness Seminars**

2.42 A one day training seminar in legal awareness, entitled "Statutory Obligations and Administrative Responsibilities - A Regulatory Role in a Commercial Environment", was developed in conjunction with the Public Service Commission (PSC), Professor Pearce and Mr Shane Carroll, Senior Lecturer in Law at the Victorian University of Technology.

2.43 The objectives for the seminar were:

- . to sensitise staff to greater awareness and consciousness levels of the complex policy, commercial, administrative and legal framework in which decisions are taken within the portfolio;
- . to clarify the linkage between the policy framework, administration of that policy and the operation of the law; and
- . to increase information flow and to provide for contacts/networks with other policy makers/decision makers and resource personnel.

2.44 The contents of the seminar included discussion of the importance of legal constraints on decision making; accountability issues such as the relevance of ministerial, cabinet and parliamentary processes; working within the legal framework; scope of the administrative law framework; records management and integrating policy and legal expertise. A copy of the seminar's agenda is at Appendix 6.

2.45 The Department conducted over twenty seminars during July to September 1993 with over 1,120 staff participating. Attendance was mandatory for staff at ASO4 level or above. Participants were grouped by different program and classification level and were also drawn from the Australian Broadcasting Authority and Austel.

2.46 The Spectrum Management Agency has run the seminar for its central office staff and in State capitals as more than half the SMA's staff are regionally based. Minor modifications were made to the seminar content presented to the regional staff to ensure that it was relevant to the nature of the work they undertake (SMA2: 4-7).

2.47 The seminars have been evaluated in terms of the relevance of the content of the course (by the participants) and the identifiable impact on the work of the Department's officers (by senior managers). Evaluation was undertaken through independent analysis by the Public Service Commission (PSC) of questionnaires completed by participants. The response by participants indicated that the seminars were a success, with 88% reporting that they had been beneficial to them and the objectives had been met. A consistent theme in the responses was that the seminars helped make participants more conscious of the potential impact of the law, in particular of administrative law, on their work.

2.48 The PSC also prepared a questionnaire for the Department's senior managers seeking their perceptions of the impact on their staff of attendance at the seminars. The questionnaire focussed on observable differences in the way staff undertook their jobs as well as on any observable differences in the way they talked about or understood the impact of the law on their daily work. The senior managers reported that -

- . staff were now talking about the legal implications of decisions or policy options in a way they did not before;
- . staff who had not been taking legal implications into account in their work were now doing so;
- . there was also a discernible increase in the extent to which those who were previously taking legal implications into account were now doing so; and
- . there was a greater level of communication by staff with the Department's Legal and General Branch.

2.49 The PSC, whilst recognising that the seminar program was a short term course and given that attendance was mandatory, concluded that the seminars could be seen as a success, both in raising participants' awareness of their statutory obligations and administrative responsibilities and in changing the way in which they work within the Department (DTC1 : 40-43; DTC2 :4-12 and Attachments B and C).

## **Program Specific Workshops**

2.50 A series of workshops tailored to the needs of specific sub-programs were developed in conjunction with the Attorney-General's Department and Professor Pearce, to compliment the legal awareness seminars. These workshops are designed for Senior and SES level officers and involve particular focus on the legislation administered by individual programs.

2.51 The objectives of these workshops are to:

- . raise awareness of the legal background to, and the legal requirements in, the Department's different programs;
- . develop strategies to identify areas of legal risks and to manage that risk through use of legal advice and appropriate decision-making processes;
- . increase participants' awareness of the use and importance of legal advice, whether from in-house services or from the Attorney-General's Department, in all stages of formulating and implementing government policy; and
- . ensure that participants understand the possible implications for their work in the industry/commercial environment within which the Department functions.

2.52 Workshops have already been conducted for the aviation, broadcasting and radiocommunications programs and the Spectrum Management Agency, with further workshops for other programs scheduled for later in the financial year. The workshops have covered a range of external perspectives with presentations from the Attorney-General's Department and other legal practitioners, officers from government business enterprises and regulatory agencies and even private sector competitors. A copy of the agenda for the workshop conducted for the aviation program is at Appendix 6.

2.53 Initial evaluation indicates that nearly 90% of participants felt that the objectives had been met and that the workshops were beneficial to them. Further

evaluation will be included in the Department's 1993-94 Annual Report (DTC 1: 44-49; DTC 2: 14-15; Hansard, 15 November 1993, p.403).

2.54 The Spectrum Management Agency developed a more specifically targeted workshop which included a case study dealing with the development of a price-based allocation system under the Radiocommunications Act. This was chosen due to its relevance not only to the allocation of MDS licences but also as a general illustration of designing market-based processes for access to spectrum. Given the SMA's particular staffing profile and the nature of its work in the regions, attendance at the workshops was extended beyond senior and SES level officers (SMA1: 20-22; SMA2: 8-11).

2.55 The competency requirements from these training programs are being incorporated into future staff development programs, and the workshops will be offered on a regular basis. Elements of the seminars and workshops will be included in staff induction courses.

### **Secondments to the Ombudsman and Auditor-General's Offices**

2.56 A secondment program has been initiated with the Commonwealth Ombudsman and the Auditor-General to further enhance the awareness of officers to the external review environment and the importance of due process (DTC 1: 50-51).

### **(b) Legal Services to the Department**

2.57 The action taken in relation to legal services is intended to strengthen the legal resources available to departmental staff and ensure that those legal resources are engaged in appropriate cases and used effectively.

2.58 After discussions with the Attorney-General's Department it was decided that there was a need for early augmentation of the dedicated, high-level legal advice available to the Department. Arrangements were made for the secondment, for an



initial period of 12 months, of a senior Attorney-General's officer as General Counsel to the Department. An officer commenced duty as General Counsel on 16 August. This position has strengthened the Department's links with the Attorney-General's Department and access to the legal expertise it provides. The role and functions of the General Counsel are referred to in the minute at Appendix 7 (DTC 1: 54; DTC 2: 17; Hansard, 15 November 1993, p.408).

2.59 It was also agreed with the Attorney-General's Department that the existing client services agreement, which expired on 30 June, should be extended until details of the new arrangements were more settled (DTC1: 55).

2.60 A review of legal services within the Department was undertaken by a group chaired by Professor Pearce and with representation from Attorney-General's and the Department. The terms of reference for the review were as follows:

1. Are the current functions of the Department's in-house legal unit in the Legal and General Branch appropriate in the context of the requirements of the Executive and Sub-program managers and the appointment of an outposted lawyer from Attorney-General's Department?
2. Is the current organisational structure appropriate for the performance of the unit's proper functions?
3. What is an appropriate level and mix of staff resources for the performance of the unit's proper functions?
4. What are the necessary arrangements for ensuring that all officers in the Department have a proper understanding of matters that should be referred to the Legal and General Branch, and matters that should be referred to the Attorney-General's Department (possibly through the Branch)?
5. Are there any changes that ought to be made regarding the unit that would improve the performance of its functions?

2.61 The review group reported on 30 July 1993 making ten recommendations which were accepted and are being progressively implemented. A minute, based on the review group's recommendations, was circulated to all sub-

program managers on 25 August providing instructions on obtaining legal advice and other legal services. It also addresses the appropriate roles of the Legal and General Branch and the Attorney-General's Department, including the seconded General Counsel. The impact of the recommendations will be reviewed within 12 months to assess their effectiveness. A copy of the minute together with the review group's executive summary and recommendations is at Appendix 7 (DTC1: 56-59; DTC 2: 18).

2.62 A further minute was circulated on 18 October, copy at Appendix 8, addressing the respective roles of the Legal and General Branch officers, the General Counsel and areas of the Attorney-General's Department. It outlines arrangements that had been made between the Legal and General Branch and the General Counsel to ensure there was a coordinated and cooperative approach to meeting the needs for legal services to the Department.

2.63 The Committee was advised that the perception of Legal and General Branch officers is that there has been a general increase in demand for legal services encompassing both requests for advice on a wider range of issues, and also requests for involvement earlier in policy and operational processes, thereby meeting suggestions made by Professor Pearce (Hansard, 15 November 1993, p.409).

### **iii. Proper management of documents, files and records**

#### **The problems**

2.64 The problems identified by Professor Pearce under this heading fall into two general categories.

2.65 Firstly, there was a lack of adherence to usual public service paper procedures, particularly state of presentation of departmental files and notes not being made of the outcome of meetings (Pearce 1: 15). Policy relating to the calling of tenders and allocation of licences was not committed to writing despite the fact that it had to be authorised by a Determination. Common practice is to prepare drafting

instructions for the technical drafting officers to prepare those instruments so the policy is articulated and fully tested then put into statutory form. This was not done with the MDS process (Pearce 2: 21-24; Hansard 20 August 1993, p.351).

2.66 Secondly, original Determinations were buried in files along with other departmental material. Professor Pearce suggested that the Department should have in place a system by which all signed delegated legislation instruments were kept together and were readily available (Pearce 2: 28).

### **Action taken**

2.67 The Department has taken a number of actions which are outlined in this section to improve its records management systems.

#### **(a) Records management**

2.68 The legal awareness seminars included a short segment on records management. A similar segment will also be included in departmental induction courses.

2.69 Opticon Australia was engaged to examine current practices and procedures for managing records. The review concluded that current policies and procedures are adequate to meet accountability and legislative requirements, however the implementation and adherence to those policies and procedures was less than effective.

2.70 As a result of the consultants' review, the Department's Planning, Evaluation and Audit Committee (PEAC) agreed to implement a number of measures including:

- the current Records Management Manual will be redeveloped, and issued as an instruction on departmental policy, including the guidelines on documenting the business of the department on files;

- . records management functions are to be integrated as part of each sub-program administrative support unit and the term "Information Centre" discarded;
- . a feasibility study will be undertaken to determine the requirements for a replacement computerised records management system;
- . current separate sub-program recording and management systems will be integrated into the departmental system as soon as practicable; and
- . enhanced training will be developed at three levels and will address the separate needs of records management staff, action officers and new staff.

2.71 A program of audits on records management practices within sub-programs has commenced. These audits are conducted by records management staff of the Internal Audit Unit. The results will be considered by PEAC and reviewed in 1994 as part of the Departmental Evaluation Plan.

**(b) Documenting the business of the Department on files**

2.72 In addressing this matter, the Department found that although there was considerable guidance available within the public service on the maintenance or destruction of Commonwealth records once they had been created, there was limited information on what records officers should create in the first place.

2.73 As a result, guidelines documenting the business of the Department to be recorded on files have been developed following comment from the Departments of the Prime Minister and Cabinet, Finance, Attorney-General's, ANAO, PSC and Australian Archives. The guidelines, a copy of which is at Appendix 9, focus on documenting the business of the Department, including records of meetings, telephone conversations and consultations involving the Minister, through the creation and maintenance of appropriate Commonwealth records on departmental files. The guidelines also provide instruction on the handling of draft documents and electronic mail, what documents should or should not be put on file and reminds staff of the

application of freedom of information privacy principles and the need for the production of documents through court actions. (DTC 1: 60-65, DTC 2: 19-23; Hansard, 15 November 1993, p.405).

2.74 The Spectrum Management Agency, having participated in the Opticon Australia consultancy, is, as an initial response, examining the desirability of extending the existing computer records system throughout all its offices, and has instituted national procedures for file creation. It has also commenced work on preparing an SMA-specific manual and associated policy documentation (SMA2: 16-17).

### **(c) Handling of Statutory Instruments**

2.75 The Department has established a specific register and storage arrangement to maintain original copies of statutory instruments. It comprises a two-tier system involving a central register in the Parliamentary Liaison Section, as well as registers in some sub-program areas.

2.76 The central register will contain instruments of a legislative character (e.g. terms and conditions to apply to the holding of a specified office), instruments containing delegations and authorisations; instruments of appointment to statutory offices; instruments containing directions or notifications of Government policy to portfolio agencies, Secretary's Directions and the like; and, instruments relating to the establishment or structure of portfolio agencies (e.g. transfer of property). The registers in sub-programs will contain documents of a more administrative nature such as licences, permits and timetables.

2.77 Approximately 570 originals of statutory instruments have been lodged in the central register where details are recorded on a computerised data base to allow tracking and provide a search capability.

2.78 The Department has also instituted a requirement for officers sending advice to Ministers concerning delegated instruments to highlight the fact that a

statutory instrument is involved by affixing a special stamp to the front of the advice and processing it through the Parliamentary Liaison Section. Upon their return, those instruments intended for the central register are extracted and copies forwarded to the originating sub-program.

2.79 Professor Pearce was consulted on these arrangements, and instructions on procedures for handling statutory instruments were issued to all sub-programs on 3 August. A copy of the instructions is at Appendix 10 (DTC1: 66-71; DTC2: 24-25).

2.80 The Spectrum Management Agency has arranged for original statutory instruments to be placed in a central register in its legal unit. It is proposed that these instruments will also be recorded on a computerised database to provide a readily accessible tracking and search facility. The SMA has adopted a procedure similar to the Department whereby officers sending Minutes to Ministers concerning statutory instruments are required to highlight the fact that such an instrument is involved (SMA2: 18-19).

#### **iv. Public service accountability**

##### **The problems**

2.81 The problems identified by Professor Pearce and Mr Hutchinson in their reports which raise accountability questions are varied. They range from decisions and actions of individual officers to questions of process including administrative operations and management of the Department.

2.82 Matters raised by Professor Pearce and Mr Hutchinson which could be gathered in this category include:

With the satellite tender, the differentiation of processes relating to tendering as distinct from policy issues as to the form of any system was not understood by the Department and thus not considered by the

Department in providing advice to the Minister. Professor Pearce referred to this as an "error of judgement" (Pearce 1: 37, 44-48, 53-55). Professor Pearce noted that Mr Hutchinson's report was critical of the performance of a number of officers and of the procedures followed in the preparation of the MDS Determinations and Invitation to Tender. Mr Hutchinson was of the view that a detailed underlying project management and process control approach was not adopted, and that the question of process and administration was given insufficient attention at sufficiently senior levels ((Pearce 2: 17-18; Hutchinson, 41). Professor Pearce noted that the decision taken regarding the line of argument to be pursued in the Cosser Court action was a tactical error and that the subsequent Court order was misunderstood as validating the continuation of the MDS tender process in its original format (Pearce 2: 36-46).

Mr Hutchinson noted that the need to amend the 1 October 1992 MDS Determination had arisen by late October. However, the Minister was not advised immediately of the flaws in this Determination and a revised Determination was not prepared for the Minister's signature until early January 1993 (Hutchinson, 58-59). The Committee has noted that the Minister had not had other important information or advice brought to his attention. In particular was the November 1992 advice relating to prequalification conditions in the satellite tender and the February 1993 advice relating to the technical deficiencies of the MDS tender (see First Report: paras 4.12, 4.17 and 4.31).

The Radiocommunications Division was caught unaware by the decisions in November 1992 to proceed immediately with the process for calling for MDS tenders. Professor Pearce noted that the need to deal with MDS matters in haste arose at a time when the Division was heavily involved with other major projects (outlined in Hutchinson: 72-76). The section handling MDS matters had been deliberately reduced in size with officers assigned to other projects, because MDS was not at the time a priority. Problems with the MDS Gazette Notice stemmed partly

from the changed timetable and the staffing and management shortfalls existing at the time. Mr Hutchinson conceded that insufficient heed had been paid to periodic representations of work overload in the Division on the grounds of relative workload elsewhere in the Department. (Pearce 2: 18 and Hutchinson: 88 and 91).

2.83 The Public Sector Union (PSU) has referred to comments made by Professor Pearce and Mr Hutchinson in their reports which suggest that the "alleged errors" were made by people working in an environment of high workload, involving tight and often changing deadlines and in areas where resources, which were already inadequate, were stretched beyond the limit. The PSU submitted that unless measures are taken by the Department to address its serious resource shortfalls, similar "errors of judgment" may eventuate if officers are forced into situations where they are asked to meet increasingly unrealistic deadlines (Public Sector Union Submission, pp. 1-6).

#### **Action taken**

2.84 The Secretary to the Department, Mr Graham Evans wrote in a letter to the Minister dated 25 May 1993 that when responsibility for certain judgment and actions has been identified as clearly as is possible, consideration of accountability, and any consequent steps, necessarily follows. There should be no suggestion that ultimately there is not accountability in the current framework of public administration that applies within the Commonwealth.

2.85 Mr Evans advised the Prime Minister that there were some senior officers who had accepted specific responsibility and, therefore, accountability for their judgments and actions. He continued that any view of the extent of the accountability of individual officers needs to have proper regard for whether these were 'one-off errors of judgment or whether such errors of judgment or inadequacy of program administration have occurred over an extended period.



2.86 Mr Evans had previously accepted responsibility for certain judgments and actions taken by the Department during the tender process and offered on 17 May 1993 to stand down as Secretary to the Department and be transferred to other duties. The Prime Minister decided not to accede to the request (Evans to Senator Collins 25 May 1993; Goode: Attachment 18).

**(a) Performance appraisal**

2.87 In considering the position of individual officers, Mr Evans saw it as appropriate for accountability to be reflected in the performance appraisals and performance pay of these officers. After discussions with the Public Service Commissioner, it was decided that it was appropriate to focus on the aggregate performance of officers against their performance agreements and reflect any judgment about the impact of the particular circumstances of the tendering processes in adjustments to performance ratings against those agreements.

2.88 With the performance assessment of senior officers concerned having just been completed, an independent review of the officers performance against their agreements was undertaken, having regard, in respect of the tendering matters, to both relative seniority and degree of involvement. This process resulted in a downgrading of assessments in several cases which was reflected in their performance pay. Similar principles are being applied to the performance appraisals of SES officers which are currently being undertaken. The Department has advised that an aggregate figure for the reduction in performance pay for officers involved in the satellite and MDS tender processes will be about \$25,000.

2.89 Mr Evans notes that the extensive public scrutiny and comment to which a number of officers have been subjected has almost certainly had a far more profound effect than is likely to result from performance pay adjustments (DTC1: 72-77; Hansard, 6 August 1993, p.248 and 15 November 1993, p.400).

**(b) Preparation of Advice to Ministers**

2.90 As a result of the circumstances surrounding the initial non-requirement of a deposit for the satellite tender, specific guidelines have been developed for officers preparing advice to Ministers. The guidelines, copy at Appendix 11, set out the format, content and overall style of such advice. Compliance with the guidelines is routinely checked by the Parliamentary Liaison section and if necessary documents are returned to the author for revision. In addition to these guidelines advice to Ministers should now be prepared by officers with a greater understanding of legal and administrative requirements resulting from the seminars and workshops referred to earlier (DTC 2:16; Hansard, 15 November 1993, pp.427-428).

**(c) Establishment of Spectrum Management Agency (SMA)**

2.91 The SMA was due to commence operation from 1 July 1993. However, with certain criticisms levelled at the Radiocommunications Division which was to be transferred as the basis of the SMA, Coopers and Lybrand were engaged on 3 June 1993 to undertake an urgent re-examination of the capacity of the SMA's proposed organisational structure, personnel and financial systems and to report on the adequacy of the proposed arrangements for the proper development and implementation of the spectrum licensing systems and price based licence allocation methods provided for in the Radiocommunications Act. The consultants reported on 22 June, the major findings being:

- . that the broad structure being implemented is suitable;
- . that the existing financial systems and the improvements planned adequately meet the needs of the introduction of spectrum licences and price based allocation methods;
- . short seminars should be run as soon as possible covering commercial and administrative practices, marketing and working with lawyers;
- . extra internal legal resources are required;
- . a person with identified commercial skills should be employed in the Marketing Group;

the skills of the Communications Selection Team (CST) should be transferred to the Marketing Group;  
it is not necessary to put in place a short term management team or an advisory group; and  
consideration should be given to carrying out a 'dry run' tendering process.

2.92 The Steering Committee responsible for overseeing the establishment of the SMA addressed a number of issues prior to the 1 July establishment day including: its budget needs, skill requirements, transfer of corporate management support and preparation and finalisation of statutory instruments, delegations and authorisations (DTC1: 14-20).

2.93 In a separate submission Ms Christine Goode, Acting Spectrum Manager, discussed a range of issues raised in the Coopers and Lybrand report and involving the SMA during its set-up phase including: level of legal skills required, continued legal support from the Department, demand upon the Attorney-General's Department for legal advising, use of the Department's Communications Selection Team in designing and executing the price-based MDS licence allocation, continuation of SMA implementation team and involvement in the 'post Pearce' training seminars and workshops (SMA1: 5-22).

2.94 Since its establishment and in order to fulfil its responsibilities it has been necessary to streamline the SMA by providing fewer, but larger and more strategically located offices. Fourteen former district radio inspector offices will be closed by the end of 1993 with new Area Offices scheduled to open. Staff involved have relocated to other offices or retired under voluntary redundancy arrangements (SMA2: 12).

2.95 The SMA's action in addressing other matters raised by Professor Pearce are referred to under the relevant headings throughout this chapter.

**(d) General staffing and workload matters**

2.96 The general question of staff shortages and work overload has been addressed in the following ways. Firstly, there has been a substantial increase in training programs to lift the skill levels of all officers which will improve the capacity to use staff in areas where the nature of the work is changing. Creating a wider base of staff with increased skill levels will help overcome a reliance on staff who possess particular skills and overloading them. Secondly, where it can be justified in cost effective terms external consultants are used. Thirdly, after having reviewed the workload of some areas of the Department a decision has been taken to increase the number of staff (Hansard, 15 November 1993, p.429).

**(e) Departmental Evaluation Plan**

2.97 The Departmental Evaluation Plan, which is a three year forward program for the evaluation of the efficiency and effectiveness of the Department's processes, has been amended to provide that in about twelve months after the initiatives described in this report have been operative there will be an evaluation of staff awareness of their statutory obligations and administrative responsibilities as a result of the legal awareness training and workshops and similar on-going training. It is also intended to test and evaluate the improvements in records management procedures, the revised arrangements for the provision of legal services using the in-house resources, the General Counsel service and the working arrangements with the Attorney-General's Department (DTC1: 78-79).

**v. The Minister's Office**

**The problems**

2.98 Professor Pearce has indicated that there appeared to have been a breakdown in the system for bringing matters to the Minister's attention. At the very least, the recording of the movement of documents in and out of the Minister's Office

was defective, as seen with the treatment of the 4 January 1993 minute on the draft satellite Determination. The Office was short-staffed at the time due to many of the Minister's staff being on leave (Pearce 1: 29, 40, 42).

2.99 The Minister has also stated that he was "profoundly distracted" by the forthcoming election campaign (Hansard, 6 August 1993, p.292).

### **Action taken**

2.100 The Minister has indicated that new and improved paper flow arrangements have been made in his office as a result of the Pearce inquiry, including a log-in system, copying of all material signed by the Minister and improved coordination for the flow of documentation between the Canberra and Darwin offices. There has been a general review of the need for advisers to review briefs that deal with significant policy issues. The Minister was adamant when he said -

I can assure the Committee that rigorous attention has been paid to implementing changes in the office procedure that will, so far as I am aware, avoid a similar situation happening again.

2.101 The Department's advice was sought and it cooperated with the implementation of these changes to office procedure.

2.102 The Minister has also indicated that measures have been put into place to ensure that such distractions and staff absences will not affect the future operation of his office. A communications adviser has been appointed and a new system has been set up to ensure that sufficient advisory staff are in the office throughout the year (Hansard, 6 August 1993, p.292; 20 August 1993, p.319 and 15 November 1993, pp.436-439).

2.103 Staff from the Minister's office have also attended the legal awareness training seminars (DTC2: 4). The Minister emphasised the important role of his

advisers' in representing him at conferences and meetings and in the close liaison with the other portfolio ministers.

2.104 The guidelines on advice to Ministers referred to earlier should also assist in ensuring that all important matters are satisfactorily flagged for Ministerial attention. The Minister advised the Committee that he thought that there had been an improvement in advice from the Department since the introduction of the new guidelines.

#### vi. Future aspects

2.105 As noted earlier in this chapter the pace of technological change in the communications sector, the commercial development of that sector, and the convergence of all aspects of communications, computing, and entertainment and information media is now accelerating rapidly.

2.106 Accordingly, the regulatory framework for telecommunications, broadcasting and radiocommunications created during 1991 and 1992 also provided for a number of reviews from 1995. These include a telecommunications policy review prior to 1997; a review of commercial television broadcasting competition that is legislated for prior to 1 July 1997; a legislated review of Australian content on pay TV as soon as practicable; and a review of the operation of spectrum management reform set down for 1995.

2.107 The Department considers that it is clearly important that the community in general, and the Government and the Parliament in particular, should be as fully informed as is possible about the technological changes occurring in the field of communications, the potential market responses, and the regulatory options that may need to be considered over time.

2.108 An Optic Fibre Expert Group is to be established to develop a technical and commercial blueprint for extending Australia's optical fibre network to the majority of houses, businesses and educational institutions.

2.109 A Communications Futures Project, under the auspices of the Bureau of Transport and Communications Economics (BTCE) and with additional resources from the Department and the SMA, has been initiated with a broad mandate to explore the technological changes occurring in the field of communications, the potential market responses and the regulatory options that may need to be considered over time. The particular objectives of the Project are:

- (a) to upgrade understanding of future economic, technical, commercial, regulatory and policy implications of emerging information and communications services and technologies, and of the linkages and dynamic interactions between these;
- (b) to stimulate and inform public and parliamentary debate;
- (c) to develop a market informed understanding of the factors influencing the decisions of market participants, in particular
  - (i) the likely underlying cost and demand forces driving market structure and investor behaviour towards key technologies; and
  - (ii) the way in which strategic corporate considerations and policy factors are likely to modify those underlying market imperatives;
- (d) to identify key issues for government and industry arising from the emergence of new information and communications services and technologies;
- (e) to contribute to the development of policy frameworks within which these issues might be addressed.

2.110 The work of the Optic Fibre Expert Group and the BTCE Communications Futures Project will be complementary. As the BTCE will be publishing the results of its research at regular intervals, these should form a useful

input into the work of the Optic Fibre Expert Group, as well as performing their specific function of ensuring a better-informed policy debate on future regulatory options in communications (DTC1: 80-86, DTC2: 35).