THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE SELECT COMMITTEE ON MATTERS ARISING FROM PAY TELEVISION TENDERING PROCESSES

SECOND REPORT

TERMS OF REFERENCE PART (1) (b)

DECEMBER 1993

ISBN 0 642 19648 6 (Set)

0 642 19884 5

This document was produced from camera-ready copy prepared by the Senate Select Committee on Matters Arising from Pay Television Tendering Processes Secretariat, and printed by the Senate Printing Unit, Parliament House, Canberra.

TERMS OF REFERENCE

(1) That a select committee, to be known as the Select Committee on Matters Arising from Pay Television Tendering Processes be appointed to inquire into and report upon the following matters:

(a) the extent to which the Minister for Transport and Communications discharged his ministerial responsibilities in relation to satellite and MDS tender processes having particular regard to the appropriate contemporary definition of ministerial responsibility and including any different responsibility which might attach to the role of a Minister during the caretaker period of an election; and

(b) the adequacy of action taken by the Minister and the Department of Transport and Communications to rectify any problems identified in the reports by Professor Dennis Pearce tabled in the Senate on 20 May 1993 and 26 May 1993 respectively, including but not limited to the following matters:

(i) tendering arrangements for price-based licensing allocations;
(ii) understanding of administrative and commercial law;
(iii) proper management of documents, files and records; and
(iv) public service accountability.

(2) (a) The inquiry into the matters described in paragraph (1)(a) shall commence forthwith for report to the Senate by 2 September 1993; and

(b) the inquiry into the matters described in paragraph (1)(b) shall commence on receipt of reports by the Minister for Transport and Communications and the Secretary of the Department of Transport and Communications on those matters, or on 6 September, whichever is the sooner, for report to the Senate by 25 November 1993.

MEMBERSHIP OF THE COMMITTEE

Senator Barney Cooney (Chairman), ALP Victoria

Senator John Tierney (Deputy-Chairman), LP New South Wales

Senator Richard Alston, LP Victoria

Senator Vicki Bourne, AD New South Wales

Senator Stephen Loosley, ALP New South Wales

Senator Jim McKiernan, ALP Western Australia

SECRETARIAT

Elton Humphery, Secretary

Winifred Jurcevic, Executive Assistant

The Senate
Parliament House
Canberra ACT 2600

CONTENTS

RECOMMENDATIONS

The Committee recommends -

1. That the Department of Transport and Communications continue legal awareness training for its staff through the conduct of seminars and workshops on a regular basis. In conducting this training the Department should make provision for more intensive legal training for staff at the ASO4 and above levels, and particularly for the Senior and SES officer levels.

2. The Department of Transport and Communications expedite the finalisation of the Guidelines for Price - Based Allocation Processes and revise these if necessary when the satellite and MDS tendering processes are finalised.

3. That the Management Advisory Board and Public Service Commission be made aware of the guidelines and seminar programs developed to meet the problems identified by Professor Pearce. These bodies should consider the application of this material for service wide use.

CHAPTER ONE

INTRODUCTION

1.1 The Senate Select Committee on Matters Arising from Pay Television Tendering Processes was established by resolution of the Senate on 27 May 1993. The Committee's terms of reference are printed on page iii.

1.2 The Committee presented its First Report to the Senate on paragraph (1)(a) of the terms of reference on 7 September 1993. The introduction to the First Report covered the background to the inquiry and the initial activities and hearings of the Committee. The report discussed matters relating to ministerial responsibility, caretaker conventions during an election period and the respective role and responsibility of the Minister for Transport and Communications, Senator Bob Collins and the Department of Transport and Communications in the satellite and MDS tendering processes. These issues were also addressed in a dissenting report by Senators Alston and Tierney.

1.3 Following the presentation of the First Report the Committee received some correspondence from the Department of the Prime Minister and Cabinet relating to the caretaker conventions during an election period. In order to complete the information on this area a copy of the correspondence is at Appendix 3.

1.4 In the First Report it was indicated that further material would be provided on the concept of ministerial responsibility. Interpretation of evidence relating to the concept was discussed in the First Report and Dissenting Report and was the subject of considerable debate when the First Report was tabled. A reference paper on the major issues associated with the concept of ministerial responsibility which were raised before the Committee or appear in the literature on the subject together with a bibliography are at Appendix 4.

1.5 Paragraph (1)(b) of the terms of reference require the Committee to inquire into the adequacy of action taken by the Minister and the Department to rectify problems identified in reports by Professor Dennis Pearce. These reports were "Independent Inquiry into the Circumstances Surrounding the Non-requirement of a Deposit for Satellite Pay-TV Licences, and Related Matters" (Pearce 1) and "Inquiry into Certain Aspects of the MDS Tendering Process 1992-93 Volume 1" (Pearce 2). Volume 2 of the second report consisted of reports prepared by Departmental Deputy-Secretaries, Mr M.J. Hutchinson and Ms C.M. Goode. Many of the problems referred to in paragraph (1)(b) were also considered by the Committee during the first stage of its inquiry.

1.6 The Committee received submissions in relation to matters in paragraph (1)(b) from Mr Graham Evans, Secretary to the Department of Transport and Communications dated 6 August 1993 and 1 October 1993 (DTC1 and DTC2) and from Ms Christine Goode, Acting Spectrum Manager, Spectrum Management Agency dated 6 August 1993 and 19 October 1993 (SMA1 and SMA2). Appendix 1 lists all individuals and organisations who provided written submissions or material to the Committee.

1.7 The Committee held a further public hearing with the Minister, Senator Bob Collins and officers from the Department in Canberra on 15 November 1993. Appendix 2 lists all individuals who appeared before the Committee at public hearings.

1.8 On 25 November 1993 the Senate agreed to extend the time for the presentation of the Committee's final report until 16 December 1993.

1.9 The Committee would like to acknowledge the co-operation it has received from Senator Collins and staff from his office and from Mr Graham Evans and officers from the Department during the course of the inquiry.

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 unforseen 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).

CHAPTER THREE

CONCLUSIONS AND RECOMMENDATIONS

3.1 Specific problems were identified in respect of the satellite pay TV and MDS tendering processes by Professor Pearce and in the reports by Mr Hutchinson and Ms Goode. The problems were regarded as significant deficiencies in the Department's operation and procedures.

3.2 In the satellite and MDS tender processes a number of the specific problems which were identified had combined to adversely affect both tender processes. Senator Collins drew an analogy with an aircraft disaster. "An aircraft disaster is very rarely caused because of one significant failure. The reason that you rarely have an airline disaster is that it is a collection of a whole series of failures" (Hansard, 6 August 1993, p.291).

3.3 The impact upon the Department of these problems has been referred to in paragraph 2.3. The remedial and preventative measures the Department has taken to rectify these problems have sought to address all aspects of its management. The action taken by the Department as outlined in the submissions and described to the Committee addresses the problems identified by Professor Pearce.

3.4 In determining the action to be taken, the Department undertook consultation with and sought assistance from a wide range of sources. These included Professor Pearce and other external consultants, the Departments of the Prime Minister and Cabinet, Attorney-General's and Finance, the Public Service Commission and the Australian National Audit Office.

3.5 The effectiveness of the action which has been taken can only be judged over a period of time. Early evaluation of some aspects, such as the legal awareness training programs, indicate that initially they have had a positive outcome. The real impact of such training will only become evident in the future. The Committee notes

the importance of the evaluation and review mechanisms which have been put in place. These mechanisms are intended to ensure that the Department adheres to the measures which have been implemented and that the beneficial effect they have on the attitude and work practices of the staff persist.

3.6 Valuable lessons have been learnt from these events. It is expected that the actions subsequently undertaken will result in a more efficiently administered Department with a heightened understanding of its role and responsibilities in operating in an environment of constantly evolving technologies and policy change.

3.7 Mr Evans advised the Committee:

> I think we have gone further than a lot of other parts of the Public Service now have in regard to issues such as how documents are kept, how Ministers are notified of statutory obligations, what sorts of records are kept of meetings, how they are cleared, what the working relationship is with the Attorney-General's Department, and so on.
>
> I say this quite honestly: while going through all of this has been a pretty traumatic experience for us, I actually think the department will be significantly better run (Hansard, 6 August 1993, p.245).

3.8 The Committee was concerned to learn of the non-existence or limited availability within the public service of guidelines or of information relating to important aspects of public administration. This was particularly so in addressing the problem areas identified by Professor Pearce. The Committee is of the opinion that the various guidelines, instructions and seminar and workshop programs which have now been developed by the Department in conjunction with other agencies provide a valuable resource for service-wide use to improve public administration generally. These have been included as appendixes to this report. The guidelines relating to the creation by officers of records concerning decision making processes are particularly useful. Similarly, the format and content of the legal awareness seminars and workshops

which address the lack of understanding of the differences between legal and administrative cultures referred to by Professor Pearce are a positive development.

3.9 Mr Evans indicated to the Committee that this material has been or will be provided to the Management Advisory Board and is available for use by other areas of the public service. The Management Advisory Board has the responsibility for developing policy guidelines for the public service and advising the government on significant issues on the management of the Australian Public Service. Mr Evans believes that benefits will also flow from the Department's action in terms of the management of particular aspects within the public service.

3.10 The Committee supports the provision of this material to the Management Advisory Board for inclusion in guidelines to cover the entire public service and to the Public Service Commission which coordinated the legal awareness seminars and is responsible for various staff development issues within the public service. The Committee believes that this material would serve a useful purpose if it was made available to and promoted within all sectors of the public service.

3.11 The Committee notes Mr Evans' comments that he has been 'proselytising his peers and colleagues' about the Department's particular experience and the wisdom of Commonwealth departments operating in more competitive structures having a much greater regard for, a much higher level of skills in and a much better understanding of where to access a wide range of commercial and legal advice (Hansard, 15 November 1993, p.425).

3.12 An integral part of the responsibility and accountability considered in the Committee's First Report was the need to take action to rectify the identified deficiencies in administration and process and ensure that systems were fixed to prevent their recurrence.

3.13 The Committee believes that in these terms the Minister has properly discharged his responsibilities through the action he and the Department have taken to rectify the problems identified in the reports by Professor Pearce.

3.14 The Department has made a considerable effort to address the problems directly affecting it. The matters specifically referred to in the terms of reference have been addressed in Chapter 2. The Committee believes that the action taken in respect of each matter has been adequate. However, the Committee notes that the draft guidelines developed for tendering arrangements for price-based licensing allocations will not be finalised until the completion of the satellite and MDS tendering processes. With the timetable for the completion of these tendering processes still uncertain and given the Department's indication that they do not anticipate changing them greatly, the Committee believes that the completion of these guidelines should be expedited. Any revision which may be required following the completion of the tendering processes could be made at that time.

3.15 The Committee is of the view that a single day seminar may not provide staff with a sufficient understanding of administrative and commercial law. The extent of the lack of appreciation of legal issues within the Department was identified by Professor Pearce. The requirement that attendance at the seminars was mandatory for staff at ASO4 level and above indicates the seriousness with which the problem was regarded by the Department. Whilst the objective of sensitising staff to a greater awareness appears to have had success in the short term, the Committee believes that it is important that this initial action is built upon through ongoing and more intensive legal training, particularly for senior officers. The Committee notes that the evaluation of the effectiveness of this training as part of the Departmental Evaluation Plan will play an important role in monitoring any future shortcomings in staff awareness of their statutory obligations and administrative responsibilities.

Recommendations

The Committee recommends -

1. That the Department of Transport and Communications continue legal awareness training for its staff through the conduct of seminars and workshops on a regular basis. In conducting this training the Department should make provision for more intensive legal training for staff at the ASO4 and above levels, and particularly for the Senior and SES officer levels.

2. The Department of Transport and Communications expedite the finalisation of the Guidelines for Price - Based Allocation Processes and revise these if necessary when the satellite and MDS tendering processes are finalised.

3. That the Management Advisory Board and Public Service Commission be made aware of the guidelines and seminar programs developed to meet the problems identified by Professor Pearce. These bodies should consider the application of this material for service wide use.

Senator Barney Cooney
Chairman

December 1993

APPENDIX 1

INDIVIDUALS AND ORGANISATIONS WHO PROVIDED WRITTEN SUBMISSIONS OR MATERIAL TO THE COMMITTEE

Bradbury, Mr J.K., McCullys Gap, NSW

Brady, Mrs M., South Perth, WA

Cole, Mr D., Goulburn, NSW

Department of Transport and Communications, Canberra, ACT

Lindeberg, Mr K., Alexander Hills, Qld

Parker, Professor R.S., Curtin, ACT

Paynter, Mr T., Glebe, NSW

Public Sector Union, Haymarket, NSW

Spectrum Managment Agency, Belconnen, ACT

Uhr, Dr J., Canberra, ACT

APPENDIX 2

INDIVIDUALS WHO APPEARED BEFORE THE COMMITTEE AT PUBLIC HEARINGS

20 July 1993, Parliament House, Melbourne

The Hon. John Cain, Premier of Victoria, 1982-1990

The Hon. Sir Rupert Hamer, AC, KCMG, Premier of Victoria, 1972-1981

Dr Michael Macklin, Deputy Leader of the Australian Democrats, 1986-1990

Mr John Nethercote, Deputy President, Institute of Public Administration

The Hon. Gough Whitlam, AC, QC, Prime Minister of Australia, 1972-1975

The Hon. Neville Wran, AC, QC, Premier of New South Wales, 1976-1986

21 July 1993, Parliament House, Canberra

(Round Table discussion held in conjunction with the Institute of Public Administration Australia (ACT Division)

Dr Michael Coper, Councillor, Institute of Public Administration

Professor Paul Finn, Professor of Law, Research School of Social Sciences, Australian National University

Professor Brian Galligan, Federation Research Centre, Australian National University

Mr Gerry Gleeson, AC, Secretary, NSW Premier's Department, 1977-1988

Mr John Nethercote, Deputy President, Institute of Public Administration

Ms Barbara Page, Senior Lecturer, Department of Government and Public Administration, University of Sydney

Professor Robert Parker, MBE, Professor Emeritus of Political Science, Research School of Social Sciences, Australian National University

Dr Gwyn Singleton, Lecturer, Faculty of Management, University of Canberra

Mr David Solomon, Chairman, Queensland Electoral and Administrative Review Commission

Sir Arthur Tange, AC, CBE, Secretary, Department of External Affairs, 1954-1965; Secretary, Department of Defence, 1970-1979

Mr Jack Waterford, Deputy Editor, Canberra Times

Professor Patrick Weller, Centre for Australian Public Sector Management, Griffith University

Sir Geoffrey Yeend, AC, CBE, Secretary, Department of the Prime Minister and Cabinet, 1978-1986

Friday, 6 August 1993

Mr David Hill, Managing Director, Australian Broadcasting Corporation

Senator the Hon. Bob Collins, Minister for Transport and Communications

Department of Transport and Communications -

Mr Graham Evans, Secretary

Mr Roger Beale, Associate Secretary

Mr Mike Hutchinson, Deputy Secretary, Communications

Ms Christine Goode, Acting Spectrum Manager, Spectrum Management Agency

Mr Anthony Shaw, First Assistant Secretary, Broadcasting Policy Division

Mr Chrisopher North, Principal Adviser, Broadcasting Policy

Friday, 20 August 1993

Senator the Hon. Bob Collins, Minister for Transport and Communications

Department of Transport and Communications -

Mr Graham Evans, Secretary

Mr Roger Beale, Associate Secretary

Mr Mike Hutchinson, Deputy Secretary, Communications

Ms Christine Goode, Acting Spectrum Manager, Spectrum Management Agency

Mr Anthony Shaw, First Assistant Secretary, Broadcasting Policy Division

Mr Christopher North, Principal Adviser, Broadcasting Policy

Monday, 15 November 1993

Senator the Hon. Bob Collins, Minister for Transport and Communications

Department of Transport and Communications -

Mr Graham Evans, Secretary

Mr Mike Hutchinson, Deputy Secretary (Communications)

Mr Bill Ellis, First Assistant Secretary, Corporate Management Division

Mr John Doherty, Assistant Secretary, Legal and General Branch

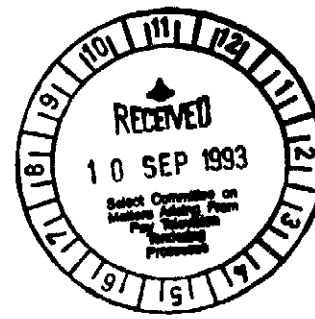
APPENDIX 3

THE DEPARTMENT OF
THE PRIME MINISTER AND CABINET

CANBERRA A C T 2600

OFFICE OF THE SECRETARY

21 July 1993



Senator Barney Cooney
Chairman
Senate Select Committee on Matters
Arising from Pay Television Tendering Processes
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

The Prime Minister has asked me to reply to your letter of 6 July 1993 inviting him and his Department to lodge a submission on your Committee's reference.

I have recently forwarded to you a copy of the paper *Accountability in the Commonwealth Public Sector* which was launched by the Prime Minister on 1 July. I have also sent you a copy of the statement *Performance and Accountability in the Public Service* made by the Prime Minister on that occasion. The Prime Minister does not wish to add to those remarks.

Your letter made particular mention of the role of a Minister during the caretaker period of an election. Your Committee's terms of reference allude to the question whether there is any different responsibility which might attach to the role of a Minister during the caretaker period. I think the following comments on that matter may be of assistance to you.

By way of background I attach a copy of a special article published in this Department's 1986-87 Annual Report which outlines the caretaker conventions and gives some relevant background to them.

The practice adopted for this year's election, based on what has been done for many past elections, was that the Government noted the conventions in a meeting of the Ministry held just before the dissolution of the House of Representatives and I wrote to my colleagues drawing the conventions to their attention. A copy of that letter is attached.

The main purpose of the caretaker arrangements is to enable governments to avoid the controversy that would inevitably accompany decisions taken immediately before an election of a kind which would limit the options available for an incoming government. In the main, their effect is to defer the taking of

decisions which are likely to have continuing effect and where some delay can be accommodated. Whether or not a particular decision should be taken during the caretaker period is ultimately a matter for considered judgement by a Minister consulting with colleagues and the Prime Minister if the matter so requires. This Department provides advice drawing on basic principles and precedents.

Sometimes it is not practical for a decision to be deferred until after an election. In these cases, especially if the matter is potentially controversial, adherence to the convention would require the Government to seek ways of minimising the long term effect of the decision or reducing the potential for controversy. For example, where a new appointment cannot be delayed it may be appropriate to make the appointment for a short period, or consult the Opposition before making a longer term appointment.

For the most part, the caretaker conventions will apply with similar force whether the matter is normally dealt with by Ministers or by officials. Generally, if the effect of the convention is that a particular matter should await the outcome of the election, then that will be the case whether or not the matter is one which would normally be dealt with by a Minister or a public servant.

The conventions do not of course effect any formal or legal change in the respective responsibilities of Ministers and public servants during the caretaker period. Ministers still retain their overall responsibility for their departments and constitutionally remain in charge of them until the swearing in of the new ministry. Statutory powers required to be exercised by the Minister personally will still have to be dealt with by him or her. Matters requiring consideration by the Executive Council will still have to be the subject of a recommendation from the Minister. There is generally very little Executive Council business during the election period, for example only two meetings were held during the 1993 election period, dealing with some ten items.

The conventions do, however, have the effect of reducing the level of contact between Ministers and departments by requiring that matters upon which departments would normally provide a full range of services, such as policy development and implementation of major policy changes, are suspended while the caretaker period continues.

This in its turn serves to reduce the scope for controversy about the role of the Public Service in providing support to the Government during election campaigns.

Your Committee would also, of course, recognise the plain fact of elections, that all those involved are extremely busy, out of Canberra, and quite legitimately preoccupied with campaigning. It would be quite unrealistic to assume otherwise and the Public Service responds to that fact by doing all it can to avoid unnecessarily taking up Ministers' time. Senior officials exercise even more judgement than usual about what they should draw to Ministers'

attention, what matters can be deferred, and what matters it would be appropriate for them to take decisions on themselves. The Public Service for its part has its own separate task of ensuring that it is ready to serve the incoming Government of the electorate's choice.

Against that background, I think it would be fair to conclude that while the caretaker conventions do not of themselves change the nature of ministerial responsibility, the need for clear distinctions between the Government, the Public Service and election activities, and the general circumstances of election periods will have the effect of reducing Ministers' direct involvement in the affairs of their departments and their knowledge of departmental activities during that period.

Your letter sought a departmental contact officer. Martin Bonsey, Acting First Assistant Secretary, Government Division can be contacted on 271 5761.

Yours sincerely

signed 21 July 93

M S Keating

THE DEPARTMENT OF
THE PRIME MINISTER AND CABINET

CANBERRA, A C T 2600

OFFICE OF THE SECRETARY

Telephone (06) 271 5200
Facsimile (06) 271 5935

«permhead»
«title»
«department»
«address»

Dear «salutation»

The Governor-General has agreed to the Prime Minister's recommendation that he dissolve the House of Representatives on Monday 8 February 1993 and that an election for the House of Representatives and half the Senate be held on Saturday 13 March 1993.

I attach, for your information, a copy of a note concerning the handling of business during the election period which I have circulated to officers of my Department. It includes a summary of the caretaker conventions, which it is planned will be noted at a Ministry meeting on Monday. I have also attached a copy of the special article on caretaker conventions and other pre-election practices, published in this Department's 1986-87 annual report.

Any enquiries or requests for further information may be addressed, in the first instance, to

- Bill Blick (telephone 271 5761)
  First Assistant Secretary
  Government Division, or

- Philippa Horner (telephone 271 5532)
  Assistant Secretary
  Legal and Administrative Review Branch.

Paragraph 18 of the circular states that all Cabinet documents should be back in the Cabinet Office by c.o.b. Friday 5 March 1993. This instruction applies to this Department. Within your own organisation, I suggest you arrange the return of Cabinet documents from your Divisions to your Cabinet Liaison Officer, for custody on behalf of the Cabinet Office until the result of the election is known. Cabinet Office (Peter Jackson, 271 5328) should be notified when this has been done.

A matter not dealt with in the departmental circular, but which I need to mention, concerns the position of Departmental Liaison Officers (DLOs) in ministers' offices.

These officers are provided by departments to assist ministers' officers with necessary liaison work. Insofar as there is ongoing work of that kind for them during the campaign I see no difficulty with them remaining with ministers' offices. They are, however, public servants and not Members of Parliament (Staff) Act employees. As such it is important that they understand that their duties do not extend to assisting in ways which could lead to allegations that public servants are being employed for party political purposes.

Yours sincerely

M S Keating
8 February 1993

APPENDIX 4

MINISTERIAL RESPONSIBILITY

Introduction

This paper aims to outline a range of issues associated with the concept of ministerial responsibility. It also provides a list of references related to these issues which were raised in the evidence received by the Committee or are seen as important in the literature on the subject. The references are listed in full in the bibliography attached to this paper. There is no attempt to interpret or endorse particular views as this was done in the Committee's First Report, Dissenting Report and debate in Parliament when the first report was tabled.

The concept of ministerial responsibility is regarded as an important component of our political system. But what does it mean and what does it involve? The Longman Cheshire Dictionary of Australian Politics provides the following definition:

> A principle central to the *Westminster system* of responsible government, namely that individual ministers are answerable to parliament for the handling of their portfolios, for the activities of public servants in their departments, and for their personal behaviour as it affects their public standing. If criticisms arise, one of four courses is followed: (i) the minister resigns, either voluntarily or at the request of the Prime Minister or Premier; (ii) the minister offers to resign, an offer that may or may not be accepted by the Prime Minister or Premier; (ii) the minister succeeds in riding out the storm; (iv) the Prime Minister or Premier dismisses the minister.

Yet is it possible be definitive when considering this concept?

Ministerial responsibility has been variously described as a changing concept, convention or doctrine; flexible; ambiguous; as uncertain as it is dynamic; meaning different things to different people at different times on different issues; not susceptible to objective assessment; of a subjective and political nature; a matter of convention rather than law.

History of Ministerial Responsibility

The development of the concept of ministerial responsibility appears to have been influenced by the record of British governments between 1832 - 1867 and the political changes brought about by the reforms to the franchise in 1867 and 1884. Professor Reid noted that the expression "ministerial responsibility" did not begin to appear in text books in Britain until the 1860s and 1870s.

Reid referred to the writings of A.V. Dicey who defined ministerial responsibility as meaning 'two utterly different things'. Firstly, "it means in ordinary parlance the responsibility of ministers to parliament, or the liability of ministers to lose their offices if they cannot retain the confidence of the House of Commons" ... "the cabinet are responsible to parliament as a body for the general conduct of affairs". Secondly, "it means, when used in the strict sense the legal responsibility of every minister in every act of the crown in which he takes part".

Reid notes that Dicey's two vague conventions have maintained a persistent influence under the labels "collective ministerial responsibility" and "individual ministerial responsibility".

The development of party organisation and discipline towards the end of the nineteenth century significantly impacted upon the concept of ministerial responsibility.

Professor Finn has written on the development in the nineteenth century of the distinctive characteristics of responsible government in Australia including principles of ministerial responsibility.

Westminster system

Ministerial responsibility is seen as a principle central to the westminster system of responsible government. Whilst it is often stated that Australia has a westminster system, the Australian system departs from that model in fundamental ways.

Uhr has noted that Report of the Royal Commission into Australian Government Administration (Coombs 1976) was the first great public articulation of the limitations of 'the westminster system' as the basic organising category for Australian government. It held that 'westminster' was no longer relevant as the appropriate standard for describing and evaluating Australian political practices. In addition to federalism and bicameralism where both houses were elected, two other key reasons were the truncation of ministerial responsibility through ministers being held not liable before parliament for all administrative malpractices and policy failings of officials and the corresponding growth in the responsibility borne by officials with an increased burden of open, public accountability placed on them.

Thompson uses the expression the 'washminster' mutation, noting the "separation of powers between the Australian state and federal governments, between lower and upper houses and between the chief executive and the parliament all of which are exactly (more or less) specified in a written constitution".

Elements of the classic westminster model have been carried over into Australian practice. However the Australian political system is developing its own characteristics. Reid and Forrest offer the view that "in terms of the Australian experience there is no reason to suppose that the concept of ministerial responsibility has any prescriptive significance. It is not a legal or conventional imperative, but rather an integral part of the political rhetoric which derives its significance from the electoral process and not from any apparent British antecedents".

Previous Parliamentary Reports

Previous parliamentary and related work which has commented upon ministerial responsibility and its operation in an Australian context include the Coombs Royal Commission into Australian Government Administration which as early as 1976 stated -

> In recent times the vitality of some of the traditional conceptions of ministerial responsibility has been called into question, and there is little evidence that a minister's responsibility is now seen as requiring him to bear the blame for all the faults and shortcomings of his public service subordinates, regardless of his own involvement, or to tender his resignation in every case where fault is found. The evidence tends to suggest rather that while ministers continue to be held accountable to Parliament in the sense of being obliged to answer to it when Parliament so demands, and to indicate corrective action if that is called for, they themselves are not held culpable - and in consequence bound to resign or suffer dismissal - unless the action which stands condemned was theirs, or taken on their direction, or was action with which they ought obviously to have been concerned. (RCAGA report, 59-60)

A research paper was prepared by Professor Emy for the Royal Commission which studied the problems of accountability in a westminster system of government. He addressed the concept of ministerial responsibility and its surrounding conventions, including those involving the relationships between the public service and elected institutions (the Executive and Parliament), and more generally the conventions relating to the political control of the service.

The Senate Select Committee on Off-Shore Petroleum Resources commented on ministerial responsibility in 1971 with submissions on the subject having been provided by Professors Geoffrey Sawer, Jack Richardson, Zelman Cowen and Gordon Reid.

The Senate Standing Committee on Constitutional and Legal Affairs in its 1978 report on Freedom of Information commented on ministerial responsibility and the impact of the proposed Freedom of Information legislation.

Collective ministerial responsibility

Collective ministerial responsibility traditionally holds that a ministry is collectively responsible to parliament, and through it to the people, for all its actions, programs and policies. It implies that the ministry will observe the convention of cabinet secrecy, and that ministers should fully support cabinet decisions and if they disagree with a decision should resign. It now extends beyond cabinet to encompass all ministers. There is an expectation that ministers collectively resign or the government asks for a dissolution if defeated on a confidence motion.

Practice in Australia has modified this traditional approach. Cabinets do leak and the media constantly reports different personal attitudes held by ministers to issues being discussed by cabinet, but who publicly support the cabinet consensus.

Collective responsibility is still effective. Prime Ministers use it as an instrument of discipline. Ministers do defend collective decisions. When it comes to an election voters consider the collective performance of the government over the previous years.

Collective responsibility has been described as a political necessity and a rule of political prudence for ministries who want to stay in office.

Individual ministerial responsibility and ministerial resignation

Individual ministerial responsibility holds that ministers are individually responsible to Parliament and through it to the people for their own actions and those of their departmental officials. Traditionally, this means for every public act of a public servant. Whether and in what circumstances a minister should resign under this doctrine is the subject of contention, particularly when an act by the minister's department is involved.

Emphasis is sometimes placed upon resignation as being paramount to the operation of ministerial responsibility. The media, in particular, often consider the concept only in terms of resignation. Ministerial responsibility is perceived in terms of crime and punishment, with removal from office the only punishment. The opposite view is that there is an undue focus on resignation which is the ultimate, not the only sanction. The problem lies in confusing responsibility with resignation.

Acceptance of responsibility can occur without recourse to resignation. It may be the ultimate penalty but there are other intermediate punishments which can be levied on ministers. Loss of reputation, embarrassment and demotion, non-progression or relief of office at later ministerial reshuffles all have punitive effects on individual ministers. The ministry as a whole may suffer electorally if too many ministers transgress.

Former Prime Ministers Whitlam, Fraser and Hawke have variously indicated that whilst there may be too great a focus on resignation, it remains an important aspect of ministerial responsibility.

Actions leading to loss of ministry

Issues relating to whether it is possible to categorise ministerial actions which lead to resignation or dismissal and who makes the decision on a minister's fate and in what circumstances have been considered. A number of researchers including Page, Marshall and Sutherland have provided through case studies in Australia, Britain and Canada a listing of actions which have invariably resulted in a Minister's resignation and those which have not. Browning has also listed Australian examples of ministerial

resignations based on individual or collective ministerial responsibility and accountability to Parliament.

From these and other studies categories of action which have historically resulted in resignation have been described. In all cases there is personal responsibility or involvement by the minister. Broadly, these categories are:
Personal behaviour or conduct which is unacceptable to community standards such as private scandals compromising financial probity or personal morals. Unacceptable personal behaviour may range from deliberately misleading or lying to Parliament to being convicted of a criminal offence.
Secondly, the unwillingness of a minister to accept collective responsibility. This is discussed in a separate section.
Thirdly, an action performed by a department following a direct instruction given by the minister so that the minister is directly responsible.
Fourthly, when the minister knows of misconduct or maladministration within the department and fails to take action.
Whether these categories should be codified is discussed in a separate section.

Vicarious responsibility and resignation

The actions of a department for which the minister has vicarious responsibility only, fall into a category which is now widely accepted as not leading to a minister's resignation. Although the traditional concept of individual ministerial responsibility has a minister responsible for all actions of the department, it is not expected that a minister should resign for those actions of which he or she could not be aware or was not personally involved in.

The case histories for Australia, Britain and Canada show that in recent times no minister has resigned in this situation. An English case involving Sir Thomas Dugdale, known as the Crichel Down case, which was regarded at the time as an example of a minister resigning over the errors of public servants has since been reassessed. It is now suggested that whilst there were administrative shortcomings the primary failing was one of political misjudgment and personal involvement by the minister.

To say that ministers do not resign in these circumstances is not to argue that ministers should not resign but simply to observe that the effective working of the principle of individual ministerial responsibility does not depend on resignations being the only sanction.

The view that due to the growth in the size and complexity of departmental administration a minister cannot be expected to be aware of every action of their department has been expressed by politicians, public servants and academics. Nevertheless a minister should take responsibility for all actions in the form of being accountabile and answerable to the Parliament.

Sutherland has written that rather than in resignation, the democratic significance of ministerial responsibility is in its provision for political leadership of administration.

The leader and resignation

It has been argued that the question of who makes the decision on a minister's fate is a political one for the leader. Wran described the normal procedure for ministers to resign as the Prime Minister or Premier telling the minister that their conduct or misconduct, their omission or commission of some act or offence, their negligence, their misjudgment is such that the government cannot carry them any longer.

This is not to say that leaders act unilaterally or capriciously. In reaching a decision there are competing influences affecting a leader's consideration. They are sensitive to public opinion and have finely developed political antennae. There must be culpability on the minister's part. The leader will consider questions including the party or government's survival, election timing, the minister's performance and perception of the severity of the alleged offence. A balance between a value versus a pragmatic judgment needs to be made.

Codification of ministerial responsibility

Sir Rupert Hamer suggested a form of codification of ministerial responsibilities. He suggested four categories in each of which a minister has a degree of personal involvement and accordingly could be expected to resign. They are:

- personal behaviour/unacceptable personal conduct,
- inability to accept collective responsibility of cabinet,
- the department follows a direct instruction given by the minister on policy or practice so that he or she takes on that responsibility, and
- the minister knows of misconduct within the department and fails to take action.

The question of vicarious responsibility for other acts of the department or maladministration was not included in the area of direct responsibility leading to resignation.

Against this suggestion was the view that to make a list of actions and omissions which would constitute breaches of ministerial responsibility would create a code too inflexible, too inefficient and too removed from the way things actually work to meet political realities.

Whilst a code of specific rules with predetermined outcomes would not allow enough flexibility in deciding the outcome in particular cases, the categories outlined by Hamer and the precedents for ministerial resignation described in the case studies referred to earlier indicate that a defacto set of guidelines already exist against which a minister's exercise of responsibility can be assessed.

Role of Parliament

Ministers are responsible to the Prime Minister for their own and their department's actions. This responsibility is manifested in their accountability to parliament and is expressed in terms of answerability to parliamentary procedures. Ministers are expected to be accountable to parliament for administrative problems of the department. These may range from implementation of policy or departmental action directly involving the minister to vicarious responsibility for actions the minister could not be expected to know anything about. Ministers should acknowledge and give a full account of the error that has occurred and indicate the measures being undertaken to remedy the problem. Such measures should not only remedy the particular deficiency, but also the system so that the particular fault does not recur.

Parliamentary procedures provide a range of opportunities to test ministers, including question time, censure motions, grievance debates, matters of public importance, urgency motions and committee activity. The parliamentary process can expose a minister and enable the electorate, ministerial colleagues and the Prime Minister or one or more of them to make judgments about the efficiency, competence and honesty of the minister under scrutiny. This process is integral to ministerial accountability. Wran described the power of parliament as the greatest single element in bringing ministers to account.

Butler and Page have written that this accountability to parliament in the sense of being answerable to it is the great quality of ministerial responsibility. It obliges ministers to take precautions, to delve into their departments for information, to check their facts, to explain their department's actions and to find remedies in the case of demonstrated error. Not only must ministers take this obligation seriously, but parliament expects them to do so. To the extent that this obligation to account to parliament is taken seriously, the concept of ministerial responsibility provides a control over Australian executive government.

The strengths and weaknesses of parliamentary processes and the effectiveness of certain aspects of it were canvassed in evidence given to the Committee. For example Macklin and Singleton questioned whether the censure motion has been devalued through overuse. Yeend and Gleeson suggested that the public service may be becoming overburdened with accountability mechanisms thereby reducing their effectiveness.

The issues of whether the formal processes of parliament are used by an opposition to gain media attention by embarrassing a government through attacking a minister or whether they are used to raise issues, gain information and focus attention on a government's performance were raised. Reid and Forrest have suggested that an opposition call for a minister to resign is an attempt to convince the electorate that through the minister's shortcomings a government has offended against 'accepted standards' or 'conventions' of political behaviour.

The possible use of parliamentary procedures to render untenable the chamber role of a minister accused of some wrongdoing and who does not resign has been raised. Such a use of procedures could be counter-productive to the process of bringing a minister to account. Where the effectiveness of parliamentary scrutiny is regarded in terms of putting pressure on a minister in the chamber to ensure subsequent behaviour is up to the level it ought to be and the minister is divorced from that process by being unable to operate in the chamber, then that scrutiny would be greatly weakened.

The effectiveness of a parliament in scrutinising a government and bringing ministers to account is related to the political configuration of the parliament. Upper Houses with non-government majorities are regarded as much more active in their review role and in calling ministers to account. This can also be the case in lower Houses with a minority government, as has recently been seen in NSW. The effect of the unicameral system in Queensland without review mechanisms was the subject of comment in the Fitzgerald Royal Commission.

Accountability

Accountability is in itself a much discussed and written about term. There is often overlap in the usage of the terms responsibility, accountability and answerability as shown in the previous section.

Ministers are regarded as responsible to the Prime Minister and accountable to parliament. Whilst, public servants are responsible to the minister, there has been considerable debate as to whether they should be accountable either directly to parliament or through their minister to parliament. The Management Advisory Board has distinguished between ministerial and public service responsibility by reference to their different levels of parliamentary accountability, whilst acknowledging that public servants are answerable to parliament. This view has been seen as diminishing the role of parliament and downgrading the level of accountability of public servants who have been given more responsibility for their actions. They should be expected to take a greater degree of direct accountability to the parliament.

Traditionally the responsibility for policy matters rested with the minister and administrative matters with public servants. The division between policy and administrative matters is now much less relevant as they have converged in recent years.

The importance of the relationship between the minister and the departmental head in terms of the responsibility each has for policy and administration has been considered.

Weller poses as crucial questions in this partnership - what do ministers know? What can we expect them to know? What should they know? This is particularly significant in complex technical areas rather than in the political context. Ministers are after all usually appointed on grounds of general expertise and political sensitivity rather than their vocational expertise. It is the departmental head that has the responsibility for ensuring that the minister is notified or has brought to his or her attention every

significant policy issue. The minister's personal advisers provide a political perspective on policy issues. The role of the minister's private office in providing advice is discussed in a separate section.

Devolved accountability of public servants

The public service reforms of the 1980s have had a significant impact upon its accountability. The reforms, which have been underpinned by greater devolution, accompanied by increased decentralisation and delegation have shifted responsibility and authority down the line. This movement of responsibility has led to differences of interpretation as to the result. On the one hand it is argued that the devolution of authority has led to the expansion of accountability mechanisms within the public service. The receiver of devolved powers and new delegations must be prepared to accept the new responsibilities and the accountability that goes with them. On the other hand these reforms are seen as leading to uncertainty over responsibility and who should stand accountable.

Whilst there is debate over the form and extent by which they must account to the legislature, public servants remain accountable to Parliament and answer to parliamentary committees e.g. estimates committees. In addition to the parliamentary scrutiny there is a range of external review mechanisms which form a part of the accountability process. These include the courts, Administrative Appeals Tribunal, investigative bodies such as the Auditor-General and Ombudsman and freedom of information legislation. The development of these mechanisms has been seen by Parker as an alternative to the traditional idea of ministerial responsibility. They are fundamentally inconsistent. Finn suggests that if the end result is accountability to the public through different means, there is no inconsistency. The question is not which is more efficient but which is more effective - which means of accountability provides greater reassurance to the community that the system of government is working.

The Management Advisory Board contends that accountability should be measured in terms of what outcomes can be achieved. Risk management techniques are encouraged and recognise that mistakes will be made -but should not be repeatedly

made. Public servants are expected to defend the judgments involved in risk assessment before ministers and, through them, parliamentary committees.

Sanctions which can be applied against public servants relate to loss of security of tenure, reduced career prospects and performance appraisal and the loss of pay bonuses affecting all senior officers.

Responsibility for and accountability of GBE's and similar bodies

An associated issue raised with the Committee concerned the growing numbers of Government Business Enterprises and other commercially competitive bodies. Their growth has raised the question of diminished ministerial responsibility through the 'arms-length' relationship of ministers with these bodies. A major concern has been the removal of a minister's accountability and responsibility in relation to the activities of these bodies which ministers possessed before they were corporatised.

This reduction in ministerial responsibility has led to concerns over the accountability of these bodies. The Management Advisory Board has suggested that pertinent individuals are accountable through an accountability chain applying in GBE's.

This increasingly complex area of responsibility and accountability has in recent years been the subject of examination and comment by the Western Australian Royal Commission into WA Inc and the South Australian inquiry into the State Bank of South Australia.

The Victorian Economic and Budget Review Committee's report on controls over commercial authority debt levels considered the role of parliament and the notion of ministerial responsibility in relation to commercial authorities.

The Minister's Private Office

The role and staffing of a minister's private office has developed dramatically in recent years. This raises questions relating to the minister's responsibility for the actions of his or her staff.

The role of ministerial personal staff in advising the minister by giving a perspective outside the bureaucracy, representing the minister at various meetings and forums and operating as a link with the department has been considered. Their role is seen as largely a political one and they should not usurp the functions of the relevant department.

Fraser noted that ministerial staff provide an important support to the minister in carrying out those functions which cannot be delegated to departments without handing over responsibilities which should remain the minister's alone.

The effectiveness of the 'Canberra situation' where a minister operates from a private office in an executive enclave in Parliament House, physically separated from the department has been questioned. This does not occur in State administrations. Gleeson indicated that when you have a minister working alongside the department, a much better working relationship develops both between the minister and the department and between the department and the private office. On the other hand Hyslop has noted that most departmental heads preferred that the minister did not live in the department.

REFERENCES

These references to each section are the equivalent of footnotes. They indicate the sources from which the text of each section has been distilled. These sources should be consulted for an elaboration of the issues raised and arguments referred to:

History of Ministerial Responsibility -

Crossman, R.H.S. Introduction to Bagehot, W. (1993 Fontana edition)

Dicey, A.V. Ministerial Responsibility and the Rule of Law in Marshall, G. (ed.) (1989), 22-24. Also Part 1 of Marshall (1989).

Finn, P. Myths of Australian Public Administration in Power, J. (ed.) (1990), 41-56

SSCOSPR (1971), Vol. 1 - 147-149 and submission by Reid, G.S., Vol. 2 - 380-382

Hansard, 21 July 1993, Finn 75-78

Westminister system -

Reid and Forrest (1989), 337 - 339

Thompson, E. The 'Washminster' Mutation in Weller and Jaensch (1980), 32-40

Uhr, J. (1991), 9-12

SSCCLA, (1979), 34-35

Previous Parliamentary Reports -

RCAGA (Coombs 1976), 59-67 and Emy, H.V. Appendix vol. I, 15-68. Reid G.S. (AJPA 1976) for comments on the Coombs report and Emy paper.

SSCOSPR (1971), 145-152

SSCCLA (1979), 35-44

Collective ministerial responsibility -

Browning, A.R. (ed.) (1989), 86-87

Butler, D. The Canberra Model (1973), 57-62 and (PA1973), 409-414

Ellis, D.L. (1980), abridged version in Marshall, G. (ed.) (1989)

Fraser, J.M. (1978), 3-4

Griffith and Ryle (1989), 23-27

Marshall, G. (ed.) (1989), Part II

Parker, R.S. Responsible Government in Australia in Weller and Jaensch (1980), 17

Pyper, R. (1991), 243-247

Sutherland, S.L. (CJPS 1991), 95-96

SSCCLA, (1979), 35-39

Individual ministerial responsibility and ministerial resignation -

Fraser, J.M. (1978)

Hawke, R.J.L. (1989), 13

Page, B (CBPA 1991), 72; (CAB 1988), 31-32

Snedden, B.M. (1965), 8

Yeend, Canberra Times, 2 June 1993, p.12

Hansard, 20 July 1993, Whitlam 14; Nethercote 60-61

Actions leading to loss of ministry -

Browning, A.R. (ed.) (1989), 104

Marshall, G. Individual Responsibility: Some Post-war Examples in Marshall, G. (ed.) 1989, 127-133

Page, B. (JCCP 1990)

Pyper, R. (1991)

Sutherland, S.L. (CJPS 1991), 100-107

Woodhouse, D. (1993)

Hansard, 20 July 1993, Whitlam 14

Hansard, 21 July 1993, Page 88-92; Weller 117-118, 146

Vicarious responsibility and resignation -

Butler, D (PA 1989), 404

Page, B. (CBPA 1991)

Marshall, G. (ed.) (1989), 106-114

Sutherland, S.L. (CPA 1991), 579-582

The leader and resignation -

Reid and Forrest (1989), 326-327

Hansard, 20 July 1993, Cain 3-5; Hamer 6,9; Whitlam 9; Wran 45, 48, 51

Hansard, 21 July 1993, Page, Singleton 100; Yeend 138; Gleeson 133, 143

Codification of ministerial responsibility -

Page, B. (JCCP 1990)

Marshall, G. (1989), 127-133

Hansard, 20 July 1993, Hamer 6-7, 18-19, 42-44, 67-68; Nethercote 39; Wran 66

Hansard, 21 July 1993, Gleeson 134; Yeend 139; Coper 145; Finn 148

Role of Parliament -

Butler, D (PA 1973), 404-405

Browning, A.R. (ed.) (1989), 88-89 (quoting RCAGA (Coombs 1976)), 104

Page, B (JCCP 1990), 156-157 and (CAB 1988), 32

Reid and Forrest (1989), 324-325

Yeend, Canberra Times, 2 June 1993, p.12

Hansard, 20 July 1993; Macklin 20-21, 37-38; Cain 44; Whitlam 10, 46; Wran 47, 58

Hansard, 21 July 1993; Finn 78-80, 84; Yeend 83, 130, 137-139; Page 91; Singleton 100-104; Waterford, Weller 130; Gleeson 134

Accountability -

Finn, P. Canberra Times, 24 August 1993, p.9

Hawke, R.J.L (1989), 12

Hyslop, R. (1993), 60-63

Parker, R.S Submission, 2-3

Snedden, B.M. (1965), 5-8

Sutherland, S.L. (CPA 1991), 583

Uhr, J (1991), 12-15

MAB-MIAC, No. 11 (1993), 6-7

Hansard, 20 July 1993, Hamer 7; Cain 47; Nethercote/Wran 52-3, 59-61

Hansard, 21 July 1993, Yeend 81, 137-139; Finn 83; Weller 115-119; Tange 120-124; Gleeson 133-136

HORSCFAA (1990), 90-99

Devolved accountability of public servants -

MAB-MIAC, No. 11 (1993), 8-9, 14-16

Uhr, J. Submission, 2-5

Hansard, 21 July 1993, Waterford 125; Parker 127; Finn 128; Gleeson 134

Responsibility for and accountability of GBE's and similar bodies -

Economic and Budget Review Committee, Victoria (1988), 163-181

MAB-MIAC, No. 11 (1993), 17-18

Hansard, 20 July 1993, Cain 3-4, 51; Whitlam 10

Hansard, 21 July 1993, Finn 82; Yeend, Finn and Parker 111-114; Gleeson 136

Griffith and Ryle (1989), 38-40

The Minister's Private Office -

Fraser, J.M (1978) 5

Hyslop, R. (1993), 25-31

Sutherland, S.L. (CPA 1991), 584, 590-592 (Discusses the position of chief-of-staff in a Canadian minister's office)

Hansard, 20 July 1993, Cain 27-30

Hansard, 21 July 1993, Yeend 97-98; Gleeson 135-136

Hansard, 20 August 1993, Collins 323-324 and 15 November 1993, 438-439

BIBLIOGRAPHY

Books

Bagehot, W. The English Constitution, Fontana 1993

Browning, A.R. (ed.) House of Representatives Practice, 2nd edition, AGPS 1989

Butler, D. The Canberra Model, Cheshire 1973

Griffith, J.A.G. and Ryle, M. Parliament: Functions, Practice and Procedures, Sweet and Maxwell 1989

Hyslop, R. Australian Mandarins: Perceptions of the Role of Departmental Secretaries, AGPS 1993

MAB-MIAC Accountability in the Commonwealth Public Sector, No. 11, AGPS 1993

Marshall, G. (ed.) Ministerial Responsibility, OUP 1989

Morrison, H. Government and Parliament, OUP 1962

Power, J. (ed.) Public Administration in Australia: A Watershed, Hale and Iremonger 1990

Reid, G.S. and Forrest, M. Australia's Commonwealth Parliament 1901-1908, MUP, 1989

Weller, P. and Grattan, M. Can Ministers Cope?, Hutchinson 1981

Weller, P. and Jaensch, D. (eds.) Responsible Government in Australia, Drummond 1980

Journal and other articles

Butler, D. Ministerial Responsibility in Australia and Britain, Parliamentary Affairs (PA), Autumn 1973, 403-414

Doig, A. The Resignation of David Mellor, Parliamentary Affairs, Vol. 46, No. 2, April 1993, 167-178

Doig, A. The Resignation of Edwina Currie: A word too far, Parliamentary Affairs, Vol. 42, No. 3, July 1989, 317-329

Ellis, D.L. Collective Ministerial Responsibility and Collective Solidarity, Public Law, Winter 1980, 367-396

Emy, H.V. The Public Service and political control: The problem of accountability in a Westminster system with special reference to the concept of ministerial responsibility, RCAGA, 1976, Appendix, Volume One, 15-68

Fraser, Hon. J.M. Responsibility in Government, Australian Journal of Public Administration, Vol. 37, No. 1, March 1978

Hawke, Hon. R.J.L. Challenges in Public Administration, Australian Journal of Public Administration, Vol. 48, No. 1, March 1989, 7-16

Keating, Hon. P.J. Performance and Accountability in the Public Service, statement by the Prime Minister, 1 July 1993

Marshall, G. Evolving practice of parliamentary accountability: writing down the rules, Parliamentary Affairs, Vol. 44, No. 4, October 1991, 460-469

Page, B. Ministerial Resignation and Individual Ministerial Responsibility in Australia 1976-1989, Journal of Commonwealth and Comparative Politics (JCCP), Vol. 28, No. 2, July 1990, 141-161

Page, B. Ministerial Responsibility and Crichel Down Revisited, Canberra Bulletin of Public Administration (CBPA), No. 64, May 1991, 70-73

Page, B. Ministerial Responsibility: Myth or Reality?, Current Affairs Bulletin (CAB), April 1988, 31-32

Pyper, R. Ministerial Departures from British Governments, 1964-1990: A Survey, Contemporary Record, Vol. 5, No. 2, Autumn 1991, 235-256

Reid, G.S. Ministerial Responsibility, submission to Senate Select Committee on Off-Shore Petroleum Resources, Report 1971 Volume 2 - Evidence, pp. 379-396

Reid, G.S. Responsibility and Accountability and the Coombs Inquiry, Australian Journal of Public Administration (AJPA), Vol. 35, No. 4, December 1976, 320-327

Singleton, G. Political Review: April to June 1992, Australian Quarterly, Vol. 64, No. 3, Spring 1992, 309-321

Snedden, Hon. B.M. Ministerial Responsibility in Modern Parliamentary Government, Third Commonwealth and Empire Law Conference, Sydney, August 1965

Stone, J. Yes, Minister? Politicians and Bureaucrats in Canberra, Quadrant, Vol. 36, No. 290, October 1992, 14-19

Sutherland, S.L. Responsible Government and Ministerial Responsibility: Every Reform is its own problem, Canadian Journal of Political Science, Vol. 24, No. 1, March 1991, 91-120

Sutherland, S.L. The Al-Mashat affair: administrative accountability in parliamentary institutions, Canadian Public Administration, Vol. 34, No. 4, Winter 1991, 573-603

Uhr, J. Rethinking Public Accountability, Paper presented to RIPAA Conference on Fraud, Ethics and Accountability, Sydney, November 1991

Uhr, J. Public Accountabilities and Private Responsibilities: the Westminster World at the Cross Roads, Paper to American Political Science Association Conference, Chicago, September 1993

Woodhouse, D. Ministerial responsibility in the 1990s: when do ministers resign?, Parliamentary Affairs, Vol. 46, No. 3, July 1993, 277-292

Parliamentary and related reports

Australasian and Pacific Regional Parliamentary Seminar (APRPS), Seventh, October 1984, Transcript, Ministerial Responsibility, 157-180

Economic and Budget Review Committee, Controls over commercial authority debt levels, 24th Report to the Parliament, May 1988, Victorian Parliament

House of Representatives Standing Committee on Finance and Public Administration (HORSCFPA), Not Dollars Alone: Review of the Financial Management Improvement Program, September 1990 (Parliamentary Paper 175/1990)

Royal Commission on Australian Government Administration (RCAGA) - Report, H.C. Coombs - Chairman, AGPS 1976 (Parliamentary Paper 185/1976)

Senate Select Committee on Off-Shore Petroleum Resources (SSCOSPR) , Volume 1 - Report, Volumes 2 and 3 - Evidence, December 1971 (Parliamentary Papers 201, 201A and 201B/1971)

Senate Standing Committee on Constitutional and Legal Affairs (SSCCLA), Freedom of Information, November 1979 (Parliamentary Paper 272/1979)

Other bibliographies

Marshall, G. (ed.) Ministerial Responsibility, 1989, Select Bibliography, 167-168

Reid, G.S. Responsible Government and Ministerial Responsibility: A Select Bibliography, in Responsible Government in Australia, Weller and Jaensch, 1980, 264-270

APPENDIX 5

Department of Transport and Communications

Guidelines for

Price-Based

Allocation Processes

(Revised 20 October 1993)

Note: **The draft of 30 September has been revised in the light of commercial comment and views provided by the ANAO. (The ANAO's comments do not imply ANAO endorsement). Further revision may be required in the light of comment from other Commonwealth agencies and completion of current licence allocation exercises in the portfolio.**

Contents

1: INTRODUCTION

1.1 In May 1993, following its first efficiency audit of the sale of a Commonwealth business enterprise, the Australian National Audit Office (ANAO) published a "best practice guide" to assist Commonwealth agencies through the main steps involved in such sales. This followed the Department of Transport and Communications' management of the sale of AUSSAT as part of the process of licensing Optus as Australia's second telecommunications carrier.

1.2 The Department of Transport and Communications has been required in recent years to use price-based or similar processes to allocate "rights" or licences in the communications sector. These have included the right for certain metropolitan commercial radio stations to convert from AM frequencies to FM; licences to operate radiocommunications transmitters in the "MDS" bands; the right to Australia's third public mobile telecommunications licence, and the right to satellite Pay TV licences.

1.3 The *Broadcasting Services Act 1992* provides for the use of a price-based system for the allocation of all future commercial radio and television broadcasting licences (s.36), as well as providing for satellite subscription television broadcasting licences A and B to be awarded using a price-based system (s.93). The *Radiocommunications Act 1992* provides for specified transmitter licences to be allocated by using a price-based system (s.106) as well as providing that all spectrum licences for unencumbered spectrum shall be allocated by auction, tender, or by fixed or negotiated price (s.60). The *Telecommunications Act 1991* provides for AUSTEL to manage the numbering of telecommunications services in Australia (s.39) and to allocate numbers on application (s.242). This is likely to involve the use in future of price-based allocation systems for "premium" numbers.

1.4 Price-based processes can be an objective and efficient means for allocating scarce or limited resources among competing applicants or competing uses. They create economic incentives in a commercial environment for the resources to be deployed to the most efficient uses and to be used most efficiently in those applications. They allow for the "economic rent" associated with the award and use of the right or licence to be paid to (or at least shared with) the community through the allocation price paid, rather than being wholly a windfall gain to the licensee.

1.5 In his letter of 25 May 1993 to the Minister for Transport and Communications, and again in his submission of 6 August 1993 to the *Senate Select Committee on Matters Arising from Pay Television Tendering Processes*, the Secretary to the Department of Transport and Communications foreshadowed the preparation of Departmental guidelines for future price-based allocation processes.

1.6 These guidelines draw on the experience of the Department of Transport and Communications in conducting the allocation processes for telecommunications licences in 1990-92, and for the Satellite Subscription Broadcasting Service Licences and Multipoint Distribution System transmitter licences in 1993. They are intended to supplement the ANAO "best practice" guide particularly in the circumstances of price-based allocation of communications rights or licences.

1.7 The purpose of the guidelines is to assist future processes to achieve efficient and effective outcomes that are consistent with Government policy requirements and that can sustain appropriate public, Parliamentary and other valid scrutiny - including the possibility of legal challenge. The guidelines need to be applied and adapted to the specific allocation process in hand, having regard to the characteristics of what is to be allocated, the particular legislation, regulatory arrangements, market conditions and other factors. That will often require consideration beyond the scope of this general document.

1.8 The guidelines address the four stages identified by the ANAO guide - extended as appropriate;

(a) identification;

(b) planning;

(c) implementation; and

(d) review.

1.9 These guidelines depart to some extent from the ANAO structure in suggesting that rather more of the detail 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.

1.10 Attention is also drawn to the publication "Accountability in the Commonwealth Public Sector", MAB/MIAC publication No.11, AGPS, June 1993. This booklet provided a framework of accountability principles and practices in the context of the central importance of the rule of law in the conduct of public affairs, especially the need for probity and fairness at all stages.

2: IDENTIFICATION

2.1 The main purpose of the identification stage is at a policy or strategic level to:

(a) establish clearly what it is that is to be allocated by the process (eg a particular licence; one of a number of similar licences);

(b) establish the specific objectives for the process, (for example, the balance between revenue maximisation and maximum licence allocation; any subject-specific policy aims - such as encouragement of new services, technologies or the like; and other public policy objectives - such as community service obligations);

(c) define the roles and responsibilities of the various Commonwealth entities involved; and

(d) define the expected need for, and roles of external advisers in areas such as technology assessment, valuation, commercial, administrative and contract law, and commercial practice, and the criteria for their selection.

2.2 The detailed definition of the subject of the allocation process is addressed further in para 3.8 et seq.

2.3 The objectives that are identified should focus primarily on the timely and efficient achievement of the specific objectives that the Government has established for the particular allocation process. This will usually include arranging for the licence to be operable in the market as soon as possible. However, they should also explicitly include other general process, public interest and accountability objectives, including:

(a) protection of the Commonwealth's financial and other interests;

(b) compliance with Commonwealth obligations in respect of privacy, security and the like;

(c) the cost-effective and publicly defensible use of Commonwealth financial and other resources;

(d) demonstrated probity and ethical conduct;

(e) avoidance of undue risk of litigation; and

(f) transparent and equitable processes and decision making that are defensible to the Parliament and public as well as at law.

2.4 At this stage, consideration should be given to the consistency between the objectives and the proposed use of a price-based process. The need for possible pre-qualification requirements and/or licence conditions to augment the price-based process may need to be considered. Some allocation processes may need to have multiple selection criteria, rather than being solely price-based, where there are explicit public policy objectives that cannot be addressed by the use of price as the sole selection criterion, consideration will need to be given to the alternative of using multiple selection criteria, provided that is consistent with legislative provisions.

2.5 An early matter to be settled is the identification of the agency to have executive responsibility for the conduct of the process. In many cases this will be implicit in the legislation, while in others it may be necessary to consider using another agency, including the Asset Sales Task force in the Department of Finance.

2.6 An early decision is also needed on the level at which responsibility for the process and its outcomes will rest on the allocation of responsibilities to officer and teams. In a process that is solely price-based, the final allocation decision will usually be an objective administrative conclusion rather than a decision. As such, Ministerial involvement may be able to be limited to approval of the process and announcement of the outcome. (This is unlike non-price-based, or multi-criteria, allocations where decisions on trade-offs among the criteria may need to be made at Ministerial level, unless legislation provides for a statutory agency to undertake that role.)

2.7 Where the possible revenue effects of the allocation may be significant in a Budget context, the responsible Minister would need to keep the Minister for Finance advised. Where the allocation process involves wider industry issues - in particular any industry development conditions, then there may need to be consultation with the Minister for Industry, Technology and Regional Development.

2.8 Other Government agencies may be affected. In the case of communications rights, these could include Defence (in respect of their use of facilities and spectrum); law enforcement and security agencies (in respect of national security and/or interception matters); Health, Housing and Community Services in respect of some safety-of-life services and electromagnetic interference effects; Treasury and the Trade Practices Commission in respect of any competition policy and enforcement issues. A wide net should be cast to ensure all relevant Commonwealth interests are identified in good time.

3: PLANNING

3.1 The planning stage will involve both the responsible management team and appropriate advisers. It has five main elements:

(a) management planning;

(b) definition of the "right" or licence to be allocated;

(c) assessment of the likely market;

(d) design of the allocation process; and

(e) preparation of detailed information for potential applicants.

Management Planning

3.2 The pressures when an allocation process is in train may sometimes be inimical to consistently clear and controlled decision making. A detailed, well documented plan of action assists in managing these pressures.

3.3 The planning stage is concerned with the detailed planning of the process. A detailed management plan, consistent with the approved strategy, should be developed for endorsement by senior management or Government. An activity diagram, flow chart and/or critical path diagram is a useful management tool. The plan should identify the principal risks and contingencies and how they will be managed.

3.4 The plan should identify financial and staffing resource needs to ensure that the process can be completed in the planned timescale.

3.5 A management structure needs to be put in place with associated lines of authority and accountability that are clearly set out and authorised. Where the process is routine and will follow well-documented procedures it may be sufficient to execute it as a line management function. In cases where the process is new, complex, or particularly sensitive it may be preferable to establish a special project team managed through a steering committee. The use of external advisers must be planned and integrated into the management structure.

3.6 Where the plan calls for Government or Cabinet consideration or legislative action, that needs to be scheduled carefully having regard to the requirements of Cabinet business forecasts and the Parliamentary timetable.

3.7 Once developed, the plan provides an early indication of areas requiring further attention. The initial plan should be developed prior to any public involvement in the process such as seeking expressions of interest. It should be reviewed and updated as the process proceeds to accommodate new information and new developments.

Definition

3.8 The "rights" or licence(s) to be allocated must be defined as precisely as possible in order to minimise uncertainty. The output of the "definition" stage must be robust, correct, complete and unambiguous. It may be advisable to obtain external independent technical and commercial advice as part of a quality assurance process in this respect.

Legal Context

3.9 Any price based allocation process must be completely consistent with the scheme of the applicable legislation, including associated licensing and regulatory arrangements. In most cases there will be a primary Act governing the process (see para 1.3 above). In addition there may be extant subordinate legislation in place, or there may be a need to make or amend such legislation - notably Determinations under the primary Act.

3.10 All processes must be conducted having regard to the provisions of Administrative Law, specific case law, and applicable principles of common law. The Audit Act and Finance Regulations will also apply, especially in settling arrangements for the handling of money by the Commonwealth.

3.11 Any need for specific enabling or amending legislation should be identified at an early stage. Some aspects of the process - such as any payment of interest on deposits held by the Commonwealth - may need explicit appropriation by the Parliament.

3.12 In some cases it will be necessary to refer to generally applicable commercial law - in particular the *Trade Practices Act 1974* and the *Foreign Acquisitions and Takeovers Act 1975*.

3.13 Specialist legal advice, including from the Office of Commercial Law in the Attorney-General's Department, will usually be required. Any statutory instruments required should be prepared by qualified legal personnel - preferably the Office of Legislative Drafting - from explicit instructions.

Licensees' rights, obligations and limitations

3.14 All of the rights, obligations and limitations of licensees, and how they are authorised or imposed, need to be defined in detail prior to conducting the allocation process.

3.15 Where it is not possible to settle these matters substantively, the relevant legislative provisions, current policy, and expected processes should be set out, in order to minimise uncertainty. Additional formal regulatory instruments (standards, guidelines and the like) may be needed.

3.16 Without limiting the generality of this requirement, this stage must identify and address:

(a) the precise rights conveyed by the licence to be allocated;

(b) licence duration and arrangements for renewal/re-allocation;

(c) licence fee arrangements (including future revisions to fee scales);

(d) any applicable technical specifications, conditions and standards;

(e) geographic location;

(f) any related licensing issues (such as the need for some uses of *Radiocommunications Act* licenses to be licensed as services under the *Broadcasting Services Act* or the *Telecommunications Act* and to pay associated fees); and

(g) any ancillary obligations or conditions (ownership restrictions; usage restrictions, industry development obligations; timing constraints on service commencement and the like).

3.17 One issue in this context will be the rights of licensees to transfer or sell their licences or rights to third parties. Associated with this would be the possible right of licensees to authorise third parties to exercise their licence rights - or fulfil their licence obligations.

3.18 The concept of price-based allocation and market efficiency is broadly consistent with licensees having such rights and, with the role of a secondary market in licence rights - although the involvement of *arbitrageurs* in the initial allocation of licence rights may attract some public criticism in particular cases.

3.19 Consideration will need to be given to how rights and obligations associated with a licence are to be maintained effectively through any change of ownership. Appropriate registration arrangements may be needed to keep records of ownership or authorised third party use.

Regulatory framework

3.20 The full rights and duties of the Commonwealth or its agencies in respect of the post-allocation period also require to be settled prior to allocation. Mostly this will be addressed by the provisions of legislation or regulation.

3.21 Any proposal to provide contractual certainty to licensees regarding the future legislative action of the Commonwealth would need to have specific legislative authority (see for example s.70 of the *Telecommunications Act 1991*). Minsters cannot fetter the future use of their statutory powers.

Market Assessment

3.22 The nature of the market for the acquisition of the particular rights or licences will influence the choice of the allocation method and the design of the process.

3.23 It is not usually appropriate for this stage to look at the prospective commercial viability of any particular applicant for the licence or right to be allocated, or to consider the effect of the allocation on any existing licensees, unless there is some over-riding public interest that requires these matters to be addressed. This will usually have been specified in relevant Government policy or in legislation at the outset. In the case of commercial broadcasting licences, for example, the *Broadcasting Services Act 1992* leaves questions of commercial viability to the commercial judgement and skills of those involved.

Likely uses

3.24 The permitted or likely commercial and community uses for the relevant rights or licences should be identified as far as possible, in order to assist in valuation and design of appropriate processes. Consideration should be given to future uses that might become available or viable through technological change. Current regulatory restrictions on use, and any actual or foreshadowed sunset provisions (such as the ending of the duopoly restrictions on telecommunications carriers in 1997) will be relevant.

Likely applicants

3.25 The nature and extent of the likely commercial interest in obtaining the rights or the licences should be considered. This is to ensure that the process does not favour or exclude any particular class of applicants, while avoiding going to lengths where that would be unnecessary or not cost-effective.

3.26 Allocation processes may need to allow for bona fide new participants in a previously established industry sector. Therefore the nature of the allocation process and the information provided in connection with it should not assume familiarity with established administrative practice in any particular sector. At the same time the allocation process should not encourage application by parties who lack necessary skills, experience or resources to take up the opportunities.

3.27 Consideration may be given to formally seeking non-binding "expressions of interest" at this stage to assist in gauging the market where there may be inadequate information.

Valuation

3.28 Consideration should be given to the likely order of magnitude of value of the licence, insofar as that is practicable, in order to ensure that the costs of the process, and its design, are consistent with the amounts at stake. Independent external financial and commercial advice may need to be sought on possible values.

3.29 Any indicative valuations should be held in confidence to the Commonwealth in order to avoid distorting the subsequent process.

Process Design

3.30 The design of the allocation process needs to reflect the specific objectives for the particular process, as well as the rights or licence(s) being allocated and the expected nature of the market. The process should be fair and certain in achieving the established objectives and be executed promptly having regard to the circumstances. The process should avoid placing undue pre-application workload or financial burdens on applicants, especially by way of excessive requirements for specialised legal and technical advice.

Pre-qualification

3.31 Consideration needs to be given to whether any public interest aspects of the rights to be allocated warrant the field of applicants being limited by qualitative pre-qualification or short listing. Short-listing may also be a valid means of avoiding placing undue pre-application workload burdens on a large number of applicants where few licences are available. The grounds for pre-qualification should relate properly to the objective of the process and be provided for consistent with the provision of legislation. They might include industry experience, financial capacity, business or service plans and the like, but may not address matters that are provided for otherwise in the regulatory framework.

3.32 Financial pre-qualification might require intending applicants to demonstrate that they at least have reasonable prospects of firm and timely access to the necessary funds in the event that their application is successful.

3.33 Financial pre-qualification should be distinguished from any considerations of *viability* (see also para 3.23). Viability is usually concerned with whether an applicant's proposed business is likely to be profitable, or with whether the an applicant's proposed business is likely to affect the profitability of other like businesses that were previously established. Wherever possible viability is best left to the commercial judgement and competence of those directly responsible. Only where there is an over-riding public interest in the continuity of some established business, or in the commercial survival of a new business once established, should viability require to be addressed in allocation. (The public interest may include consideration of cost to the Commonwealth).

3.34 An alternative to any qualitative pre-qualification can be to impose corresponding requirements or obligations to be performed or carried by the licensee once selected. This can avoid problems associated with any post-allocation changes in the character, plans or ownership of an applicant company that may subsequently invalidate, or render obsolete, the basis of pre-qualification. Such obligations may be imposed by licence conditions, legislation or contract. (However, in some situations it may still be prudent to provide for some prequalification confirmation that applicants would be in a position to meet their continuing obligation).

3.35 In such cases, questions of financial capacity are then usually best handled by way of deposit requirements (see para 3.50 et seq).

Form of pricing process

3.36 There are a number of price-based systems that may be appropriate. These include tender, auction, fixed price, and negotiated price. The choice of process will need to be made having regard to the objectives of the process and the market assessment. The responsibility for settling, in principle, the system to be used may be specified in legislation; where it is not, it will usually need to be confirmed at a senior Departmental or Ministerial level. What follows is only an introduction to the alternatives. The specific choice may require more specialised advice and wider consideration.

3.37 In an auction choice is usually between:

(a) **an "English" auction**, in which ascending bids are called openly, with the right being awarded to the highest bidder. This is generally an efficient process where there are a number of broadly similar rights available and a large number of applicants. It ensures that the rights are allocated to applicants who value them most highly, but at the lowest price they need to pay in order to beat other bidders. The process risks allowing a "windfall" gain to the buyer where that price falls short of the amount that they may have been prepared to pay. It is theoretically superior where different applicants may have quite different valuations of the rights being allocated; and

(b) **a "sealed bid" auction**, in which applicants lodge a single sealed bid and the right is awarded to the highest bid. This approach can provide for a higher proportion of the "economic rent" to be tendered in payment. It is more appropriate where there are fewer similar rights or licences available, or where there are relatively few applicants. Where there are no benchmarks available to establish a likely price range in advance of the allocation process, it does run some risk of excessive bids being made, with consequent risk of default or subsequent business failure.

3.38 These alternatives are not necessarily exclusive. For example a "sealed bid" auction process could be operated in real time, such that bids for successive licences are informed by the allocation price paid for previously awarded licences. In addition there

may be scope to design other schemes to suit particular circumstances - although there is merit in basing these closely on known and tried arrangements where possible.

3.39 There are other available auction techniques, in particular "Dutch auctions" and "second bid price sealed tenders". These will generally not be appropriate other than in very specialised circumstances.

3.40 Where sealed bids are sought, there needs to be an objective means of settling tied bids. One way could be to allocate each bidder a reference number on a random basis so that where offers are equal the bidder with the lower reference number is deemed to be the "winner". Alternatively, the tied bidders could be given an opportunity to lodge further, higher bids.

3.41 It may sometimes be open to allocate licences on the basis of a fixed price or a negotiated price. The former may be suitable where there are a large number of licences with a significant and objectively ascertainable value but relatively few applicants. In such cases it may be appropriate to have an independent expert certification that the price is "fair and reasonable".

3.42 Care needs to be exercised to maintain demonstrable fairness and probity when engaged in negotiations. Attention is drawn to paras 4.16 - 4.22 of the ANAO's "guide" in this respect.

Multiple Allocations

3.43 Where there are a large number of similar licences or rights on offer, then consideration needs to be given to providing scope for applicants who may wish to acquire more than one such licence - perhaps to acquire multiple rights in one location, rights in a number of locations, or even multiple rights in a number of locations. There may be policy or legislative constraints to be observed, as well as allowing for the legitimate interests of potential applicants.

3.44 In addressing multiple rights questions, an overriding consideration is to maintain the certainty and integrity of the process. To this end it is desirable to avoid undue complexity. But if the process fails to provide scope for applicants to apply for the particular combinations that they seek, then it may fail to achieve its objectives fully, and will run the risk of applicants defaulting on bids when the outcome only gives them part of what they sought.

3.45 As far as possible without undue complexity and without introducing uncertainty, the process should allow combined applications for specified multiple rights. However, limited experience to date has shown that this is difficult to achieve. An alternative could be to allocate each separate right sequentially to maximise the scope for applicants to progressively build up any "packages" that they seek. While this may yield lower overall returns to Government in some cases (for example where the outcome of initial allocation deters further bidders) it may still be consistent with other process objectives, in particular certainty.

Payment arrangements

3.46 It is always preferable for prices offered and accepted to be fixed amounts. Bids that are expressed by reference to the amounts of competing offers should usually be precluded (for example a bid may be expressed as "$5 million or $1000 more than any other bid up to a maximum of $7 million, whichever is the greater" should not be acceptable). Payments made to the Commonwealth need to be cleared funds before they can be treated as "received" rather than merely "tendered".

Deferred Payments

3.47 In some cases it may be reasonable to allow prices to include some deferred payments. If deferred payments are to be permitted, this should be made clear, and the basis on which such payments will be assessed should also be established prior to bids being made, in order to maintain objective equity in assessment. Any deferred payments should be due on fixed dates, rather than by reference to some future event. Consideration needs to be given to the means of securing any future payments in terms of amount, timing and certainty of receipt.

3.48 To compare competing bids with different payment schedules, discounted cash flow analysis must be employed, so that all bids are compared on the basis of their "expected present values". The discount rates should reflect the risk that the Commonwealth bears in accepting deferred payments and so should reflect the risk profile of the applicant, the market and the cost of finance.

3.49 Consideration should be given to requiring guaranteesfrom an applicant's parent companies or shareholders and/or requiring interest payments on deferred payments.

Deposits

3.50 The purpose of a deposit is to demonstrate the bona fides of the offer and to provide some tangible insurance against the full balance not being paid when due. A deposit is more likely to be necessary when the process has not involved any financial pre-qualification (see paras 3.31 et seq) or where there is a greater risk of contrived application strategies or default. (In some cases both financial pre-qualification and deposits might be warranted - to ensure that the applicant both *can* and *does* pay a bid price.)

3.51 Deposits may be payable either on submission of an offer, or on acceptance of an offer. Deposits payable on acceptance of an offer may typically be 10% (for example on the "fall of the hammer" at an "English" auction). Deposits of 5% have been considered appropriate on application.

3.52 Deposits tendered with an offer must be refundable if that offer is not accepted. Consideration needs to be given to the payment of interest on any refundable deposits that need to be held for extended periods that are outside the applicants' control. Payment of such interest by the Commonwealth would require funds to be appropriated.

3.53 Deposits paid or retained on the acceptance of an offer should generally be non-refundable if the applicant does not then proceed. This serves to discourage frivolous applications and some form of bidding strategies that might be contrived to frustrate the process. However, if there are post-acceptance regulatory hurdles to be satisfied by an applicant, then consideration should be given to allowing for refund in the event that the applicant fails to pass these hurdles for reasons that could not be anticipated and addressed commercially in advance by the applicant.

3.54 Recognition also need to be given to the deterrent effects of excessive deposit requirements or lengthy deposit retention periods. The need to risk substantial deposits will deter some potential applicants. It may also tend to reduce the prices offered by some applicants.

3.55 There is merit in requiring offers to be binding. Later default then creates an entitlement for the Commonwealth to recover losses. This can be done by requiring offers by companies to be made under seal, or requiring selected licensees to sign an appropriate deed at the time of selection. Allowance needs to be made to avoid unfairly penalising those who may withdraw for bona

fide reasons beyond their personal or commercial control or capacity. This would not usually include failure of a speculative application.

Multiple applications

3.56 It can be valid for one entity to seek multiple rights in an allocation. This is particularly so when there are multiple rights available. The design of the process should address the need for any particular or general limits to be placed on the number or proportion of such rights that might be allocated to any one owner. Such limits would need to be properly authorised in legislation, and procedures for detecting breaches and enforcing compliance would need to be put in place.

3.57 In other cases multiple applications, with some intent to use default as a possible commercial strategy, may be part of a contrived or exploitative application strategy that risks thwarting the objectives of the process and jeopardising its timely conclusion. The application and allocation process should be designed to reduce the scope for such applications, minimise the incentive for them to be lodged, and to ensure that they can be dealt with expeditiously if they eventuate. These objectives can be supported by requiring deposits to be lodged with applications or soon after initial allocation.

Reserve Price

3.58 If there is an objective basis for doing so, provision should be made to set a confidential reserve price where an auction or tender process is to be followed. If offers received do not exceed the reserve price, then the allocation would not take place in that process. The role of a reserve price in ensuring that the Commonwealth obtains a fair and reasonable price is most useful where there are expected to be relatively few applicants.

3.59 A reserve price should only be set where there is the option of not allocating the licence for less than the reserve price.

3.60 If offers are made that fall short of the reserve price, then the process should allow for negotiation with those applicants tendering the highest amounts.

Conformity

3.61 Where written offers are to be made, or formal registration is to be required, it is important to specify clearly any requirements of form, process and/or content. There is often merit, especially where simple offers are sought, in adopting a standard application form to avoid uncertainty.

3.62 The conformity requirements that are specified as mandatory should be what is needed to verify the authenticity and authority for the application, assess applications properly and to maintain the integrity and certainty of the process.

3.63 Applicants should be told about the consequences that will arise from failure to comply with specified requirements. These may include an application not being considered on the grounds of non-conformity. The arrangements should set out any notice and review arrangements associated with findings of non-conformity, as well as addressing how any deposits or fees received in respect of such applications will be managed.

Variation and Termination

3.64 It will usually be appropriate to provide explicitly for any arrangements to vary or terminate an allocation process. Such actions may be necessary as a consequence of changes in Government policy, legal action by a third party, the discovery of errors or omissions and so on. (In many cases a change may be limited merely to a change in timetable, venue or to the provision of supplementary information.)

3.65 The arrangement should provide for adequate periods of notice to affected parties. Appropriate publicity needs to be provided for, as well as legal certainty.

3.66 Decisions to vary or terminate will therefore need to satisfy the tests of legality, fairness, and natural justice. Consideration of the effect on the market will also be appropriate.

Notices and advertising

3.67 Provision is needed for the allocation process to be brought to the attention of all potentially interested parties - including some who may have an interest, but would not themselves be applicants.

3.68 Consideration should be given to widespread public advertising, especially in the national press. In some cases international advertising may be appropriate, and there may also be a need to advertise in specialised media or journals.

3.69 The formal arrangements establishing the process should make proper provision for adequate advertising, and for any notices that may need to be provided to interested parties. Care is needed to ensure that all advertising complies with any formal requirements laid down in the authorising instruments.

3.70 Where the process calls for legal deadlines to be set for receipt of applications, notices or funds, then deadlines should be specified precisely in terms of dates and times. Due allowance needs to be made for the effects of public and bank holidays in each State and Territory. The consequences of any missed deadlines need to be made clear in advance. It will generally be undesirable to provide for deadlines, once set, to be capable of variation. Arrangements should be made for formal certification of receipt within deadlines.

3.71 Arrangements may be needed to give legal status to notices delivered by facsimile.

Information Preparation

3.72 It is in the Commonwealth's interest to inform potential applicants as fully as possible about the licences or rights, and also about the allocation process. The resultant allocation will best meet its objectives if the market is fully informed.

3.73 There is usually a need for some form of information document, catalogue, or prospectus that fully sets out the details of what is being offered for allocation. This needs to address, in particular, the matters canvassed above under "Definition" (paras 3.8 to 3.21). The information provided should be complete, accurate and not misleading. It will usually be appropriate to include a disclaimer of liability, and some encouragement to intending applicants to take their own independent legal, commercial and technical advice, and to rely on their own judgement.

3.74 It is also necessary to prepare and make available documentation that advises intending applicants of the details of the process that is to be followed, including its legal framework. This will need to address the issues covered above under "Process Design" (paras 3.30 to 3.71) and should include any forms that are proposed to be used, and provided authorised contact details.

3.75 It may be worth providing potential applicants with the opportunity to comment on proposed documentation before it is finalised. The process must avoid consulting only "established players" in an industry, or to limit access only to well resourced parties with ready access to legal and technical expertise. In acting on comment received from interested parties, care should be taken to avoid giving effect to views that may reflect vested interest rather than public interest. Consultation with industry experts with no vested interests can also be helpful.

3.76 The documentation should not be able to be represented as providing legal advice to intending applicants. At the same time, related Commonwealth agencies may need to be alerted to exercise care in discussing matters related to the process with those who may become applicants. For example, during the conduct of the current MDS licence allocation process, all Spectrum Management Agency officers have been advised to refer all MDS-related queries to the Communications Selection Team, even if those officers consider that they could deal with the query themselves.

4: IMPLEMENTATION

4.1 The implementation stage following the planning stage will usually comprise most of the following steps:

(a) execution of necessary determinations;

(b) advertising the allocation process;

(c) registration of intending applicants;

(d) circulation of information documents;

(e) call for applications;

(f) receipt and registration of applications;

(g) conformity checking of applications;

(h) ranking of bids;

(i) notification of highest bidders;

(j) receipt of payment from successful applicants;

(k) issue of licences;

(l) re-allocation of licences in the event of default(s);

(m) notification of unsuccessful applicants;

(n) refund of deposits; and

(o) publication of outcomes.

4.2 It is useful for the team to develop written operational procedures, especially for handling funds and for contact with applicants - including the handling of registrations, applications and notices. The form of notices requires legal advice.

4.3 Each step of the process should be subject to careful checking to ensure that it is consistent with legal requirements and with the intent of the process.

4.4 A careful audit trail of documents, notices and processes is required to be maintained.

4.5 Many processes will attract public and media attention. In dealing with media and other queries, the validity of public interest will need to be balanced with the Commonwealth's interest in confidentiality at some stages in the process. Applicants may also have bona fide commercial

interest in confidentiality. Media queries should be anticipated and responses planned. A single point of contact for media queries is desirable. No information should be made available that might advantage any applicant over others.

4.6 Once licences or rights have been awarded arrangements are needed to monitor licensees' conduct to ensure that their obligations are met. In many cases this will be a routine regulatory activity that is already provided for in the ongoing functions of the relevant agency. In other cases, special arrangements may need to be made, including for licensees to provide reports, as well as to respond to any market based reports of breaches or non-compliance. As far as possible, such ongoing monitoring should be assigned to a relevant functional unit and embedded in its standard operating practices and instructions, rather than remaining a residual task associated with the allocation process.

5: REVIEW

5.1 Review and evaluation is the last stage of the process. It may often be overlooked in the environment that follows the completion of an allocation. Timely review can help to improve subsequent processes by passing on lessons from each exercise.

5.2 It is important to evaluate the process in its entirety. The review should be designed to assist future processes and should analyse the extent to which:

(a) the end result met the original objectives;

(b) the process was carried out economically, efficiently and effectively; and

(c) there were no unintended consequences, and associated implications.

5.3 The evaluation should, where practicable, be scheduled within an agency's Portfolio Evaluation Program (PEP) or its Departmental Evaluation Program (DEP). It should be carried out by a team that includes staff who were not engaged in the allocation process, in order to ensure objectivity. The report should be made available to relevant departments and agencies. It should be scheduled as soon as possible after the results of the allocation process are expected to be assessable.

LEGAL AWARENESS SEMINAR

STATUTORY OBLIGATIONS AND ADMINISTRATIVE RESPONSIBILITY

DEPARTMENT OF TRANSPORT AND COMMUNICATIONS IN CONJUNCTION WITH THE PUBLIC SERVICE COMMISSION

July/August 1993

9.00am **OPENING ADDRESS**

Mr G C Evans, Secretary, Department of Transport and Communications.

9.15am **INTRODUCTION AND OVERVIEW: WHY BOTHER?**

* Why do we have legal constraints on our decision-making?;
* High public interest in litigation;
* Increasing volume of regulations and legislation;
* Personal accountability and increased scrutiny:
  . Parliament;
  . Commercial Interests;
  . Media;
  . Community;
* The APS framework and its agreed set of values and standards.
  . Effectiveness;
  . Ethical Conduct;
  . Natural Justice.

Mr Shane Carroll, Senior Lecturer in Law, Victoria University.

9.40am **THE EXTERNAL PERSPECTIVE**

* Displaying greater sensitivity to commercial needs;
* Trying to look through industry's eyes;
* Keeping industry at arm's length but being conscious of possible outcomes;
* Does Administrative culture equal Legal culture? - looking for the pragmatic approach in testing for outcomes.

Mr Shane Carroll.

10.15am **Morning Tea**

10.35am **THE CONTEXT OF DECISION-MAKING**

Cabinet and Parliamentary Processes

* Importance of understanding policy-making and implementation processes;
* Appreciating the context in which decisions are made by various stakeholders.

Mr Bill Blick, Acting Deputy Secretary, Department of Transport and Communications.

11.05am **WORKING WITHIN THE LEGAL FRAMEWORK**

* Difference between common law and legislation;
* Types of legislation and the hierarchy of powers:
  . Acts;
  . Regulations;
  . Determinations;
  . Guidelines;
  . Circulars;
  . Information Papers;
  . Policy;
* Significance of delegations and authorisations and their consequences;
* Survival skills in finding, reading and analysing legislation;
* Mandatory and directory provisions;
* Duty of Care and pitching your response with caution;
* The primacy of law and testing outcomes.

Mr Shane Carroll.

12.30pm **LUNCH**

1.15pm **SCOPE OF THE ADMINISTRATIVE LAW FRAMEWORK**

* Aims and objectives of the administrative law framework;
* Powers, scope and importance of:
  . Ombudsman;
  . AAT;
  . FOI;
  . Specialised agencies;
  . Archives requirements;
  . Privacy principles;
  . ADJR;
  . High Court;
  . Natural Justice requirements;
* Difference between judicial review and merits review;
* Requirements for giving statements of reasons for decisions;
* How to deal with a legal challenge administratively:
  . keeping on top of documents;
  . increasing your consultation;
  . implementing outcomes.

Mr Shane Carroll.

2.45pm **GETTING THE PAPERWORK RIGHT**

Records Management Staff.

3.15pm **AFTERNOON TEA**

3.35pm **INTEGRATING POLICY AND LEGAL EXPERTISE**

DTC Legal and General Branch and Attorney-General's Department.

4.35pm **WRAP UP**

* Re-iterate objectives of session;
* Summary of key action points and issues arising from group discussion;
* Re-emphasise the primacy of the law;
* The Road Ahead.

Mr Shane Carroll.

5.00pm **CLOSE**

****

AVIATION SUB-PROGRAM
LEGAL AWARENESS TRAINING

GENERAL SESSION

9.00 - 9.05	Welcome	(Vanessa Fanning)
9.05 - 9.15	Introduction	(Vanessa Fanning)

Brief outline of why we are here and proposed program.

9.15 - 10.00	Overview of Relevant Legislation	(Henry Lis)

To highlight legislation relevant to the Division's operations and discuss broad guidelines to be followed in administering this legislation.

10.00 -10.15	Morning Tea	
10.15 -10.55	Areas of Legal Risk	(FAS and Branch Heads)

Discussion to identify areas of legal risk illustrated by particular examples; identify the sub-programs' clients/customers and areas of special sensitivity.

Branch Heads to briefly discuss recent cases where legal risks have been highlighted (for detailed consideration in later modules). General discussion on how to address weaknesses in Division's awareness and handling of such cases. How can we best protect decision makers and support staff from legal risk?

10.55 -12.15	Attorney-General's Department Perspective	(A-G's Panel)

A panel presentation by lawyers from A-G's to cover areas common to the three modules (eg natural justice and administrative decision-making and litigation-Daley/Renwick) and to preview areas to be covered in individual modules:

- *international law / treaty obligations (Bill Campbell)*
- *oversight of GBE's - TAAATS example (John Butler)*
- *aviation security (Peter Ford)*

12.15 -12.45	Debriefing	

Discussion to address any questions and any need to modify proposed case study modules to cover perceived needs.

Facilitator : Anne Buttsworth
When : Wednesday 9.00 am - 12.45pm 13 October 1993.
Venue : Eagle Hawk, Federal Highway

AVIATION SUB-PROGRAM
LEGAL AWARENESS TRAINING

MODULE 1

OVERSIGHT OF GBEs

1.30 - 1.45	Introduction	(Vanessa Fanning or Hugh Milloy)
1.45 - 2.30	Industry Perspective	(John Mant - CAA) (Peter Robson - FAC)

Addresses to provide a "stakeholder" viewpoint on commercial/legal issues of concern to Government Business Enterprises involved in aviation. Aim is to ensure participants understand implications of their work and the commercial environment in which they function.

2.30 - 3.00 Attorney - General's Department Perspective (Skehill)

To highlight legislation relevant to the oversight of GBE's and areas where there may be challenges by commercial interests and/or significant accountability issues for GBE management and Boards. Discuss how staff can best manage and minimise risk.

3.00 - 3.15 Afternoon Tea

3.15 - 4.30 Case Study - CAA Assets (Mike Bird)

Mike Bird to present problem. Participants to discuss how the legal issues should be managed and risks minimised.

4.30 - 5.00 Debriefing (Hugh Milloy)

Facilitator to bring together conclusions and draw out from participants lessons learnt and how we could do better in identifying and handling problems in the future.

Complete course evaluation sheets.

Facilitator : Hugh Milloy.
When : Wednesday 1.30 pm - 5.00 pm 13 October 1993 .
Venue : Eagle Hawk, Federal Highway

AVIATION SUB-PROGRAM
LEGAL AWARENESS TRAINING

MODULE 2

INTERNATIONAL LAW AND OBLIGATIONS

9.00 - 9.15 Introduction (John Kerr)

9.15 - 10.00 Industry Perspective

- Ian Rischbieth (IASC)
- James Kimpton (Ansett)

Address to provide a user's viewpoint on commercial/legal issues of concern within the international air transport industry. Aim is to ensure participants understand implications of their work and the commercial environment in which they function.

10.00 - 10.15 Morning Tea

10.15 - 10.45 Attorney - General's Department Perspective
(Bill Campbell/ Barry Leader)

To highlight legislation / treaties relevant to the Division's operations and areas where there may be challenges by commercial interests and risks. Discuss how staff can best manage and minimise risk.

10.45 - 12.00 Case Study - China (John Kerr)

John Kerr to present problem. Participants to discuss how the legal issues could be managed and risks minimised.

12.00 - 12.30 Debriefing (Tony Wheelens)

Facilitator to bring together conclusions and draw out from participants, lessons learnt and how we could do better in identifying and handling problems in the future.

Complete course evaluation sheets.

Facilitator : Tony Wheelens
When : Thursday 9.00 am - 12.30 pm 14 October 1993.
Venue : Eagle Hawk, Federal Highway

AVIATION SUB-PROGRAM
LEGAL AWARENESS TRAINING

MODULE 3

AVIATION SECURITY

9.00 - 9.15	Introduction	(Anne Buttsworth)
9.15 -10.00	Industry Perspective	(Qantas - Ron Armstrong & John Mc Kay)

Address to provide a user's viewpoint on the importance of airport security and its impact on the industry in terms of costs, delays etc. Aim is to ensure participants understand implications of their work and the commercial environment in which they function.

10.00 -10.15 Morning Tea

10.15 -10.45 Attorney - General's Department Perspective (Peter Ford)

To highlight legislation relevant to the sub-programs responsibilities for airport security and areas where there may be challenges by commercial interests and risks. Discuss how staff can best manage and minimise risk.

10.45 -12.30 Case Study - CTFR : Cost Recovery Implementation and Interpretation of Regulations - (Lloyd Binks/Ron Walters)

Lloyd Binks and Ron Walters to present problem. Participants to discuss how the legal issues should be managed and risks minimised.

12.30 - 1.00 Debriefing (Allan Behm)

Facilitator to bring together conclusions and draw out from participants lessons learnt and how we could do better in identifying and handling problems in the future.

Complete course evaluation sheets.

Facilitator : Allan Behm
When : Friday 9.00 am to 1.00 pm 15 October 1993
Venue : Eagle Hawk, Federal Highway

GENERAL SESSION

Participants: All SES and Senior Officers or equivalents in the Division - (total = 55 including 5 from the regions)

IASC
Alexandra Wedutenko
Legal & General Branch (Henry Lis)
Attorney-General's Department
- Bill Campbell (international law)
- Simon Daley / James Renwich (administrative law)
- John Butler (legal relationships with GBE's)
- Peter Ford (avaiation security)

Qantas (Lyn Cooper as observer)

MODULE 1 OVERSIGHT OF GBEs

Participants :

FAS,PA, AS and Senior Officers or equivalents in IRB plus interested officers from other areas of the Division.
Senior Officers from GBE oversight area in Pol Coord. (Brian Brockelbank and David Green)
Alexandra Wedutenko
CAA (John Mant) }For sessions 1.30 pm
FAC (Peter Robson) } to afternoon tea
Jim Wolfe (Minister Collins' Office)
Legal and General (Henry Lis)
A-G's (Skehill, Butler)

MODULE 2 INTERNATIONAL LAW AND OBLIGATIONS

Participants :

FAS, PA, AS and Senior Officers or equivalents in IRB plus interested officers from other areas of the Division.
IASC (Ian Rischbieth)
Jim Wolfe (Minister Collins' Office)
Ansett (James Kimpton for his speaking session only)
Legal and General (Henry Lis)
A-G's (Bill Campbell / Barry Leader)

MODULE 3 AVIATION SECURITY

Participants

FAS, PA, AS and Senior Officers or equivalents in ASB, including from regions plus interested officers from other areas of the Division.
Legal and General (Henry Lis)
A-G's (Peter Ford)
Allan Behm (Federal Justice Office)
Industry (Qantas - Ron Armstrong & John Mc Kay)

DEPARTMENT OF TRANSPORT AND COMMUNICATIONS

Office of the Secretary

Graham Evans

Minute T93/926

Subject: **GUIDANCE TO STAFF ON OBTAINING LEGAL SERVICES**

Sub Program Managers

cc Deputy Secretaries
Assistant Secretary CST
Executive Officer IASC

This minute is to provide instructions to all staff in relation to arrangements for obtaining legal advice and other legal services.

The arrangements reflect recommendations in the report of the Review of Legal Services for the Department of Transport and Communications by Professor Dennis Pearce, Richard Moss and Di Mildern. A copy of the executive summary and recommendations accompany this minute. The recommendations aim to strengthen legal resources available to Departmental Managers and address the appropriate roles of the Legal & General Branch and the Attorney-General's Department (including the outposted General Counsel). The review team recommended a number of changes to existing arrangements for obtaining legal services, including:

- that all legal services be provided centrally, and that sub programs discontinue the practice of using members of their own staff as legal advisers;

- that all sub programs be required to use Legal & General Branch as the gateway in obtaining legal services from the Attorney-General's Department, except where specific agreement is reached (between L&G and the sub program) for direct access on particular matters;

- that the Executive and Legal & General Branch be able to refer issues directly to the General Counsel. (Other issues may be referred to the General Counsel through Legal & General Branch were appropriate)

- the review also recommended that Ministers be able to refer matters directly to the General Counsel. Where Ministers themselves seek

formal legal advice, it should ordinarily be sought through the Attorney-General. The General Counsel can facilitate the provision of such advice and will be available to advise on day-to-day issues in conjunction with officers of the Department;

- that sub programs consult with Legal & General with a view to greater involvement of legal advisers early in policy and operational processes.

The arrangements to be followed are set out in more detail in the attached instructions and guide for obtaining legal services. They deal with the question of who should be approached for legal advice in a particular case and set out guidance on when to seek legal advice and how to go about it.

Sub program managers should ensure that all staff are familiar with the attached instructions and guide.

The reports by Professor Pearce indicated a need for greater attention to the effective involvement of legal advisers in the policy and operational processes. While practices have varied between sub programs, it is important that staff in all sub programs examine their approach to obtaining legal advice in the light of these arrangements.

The training sessions on legal awareness have included general guidance on the practicalities of obtaining legal advice. The second round of program specific workshops will provide a further opportunity to discuss these matters.

You will be aware that Alexandra Wedutenko has now been appointed as our General Counsel for a twelve-month period. Alexandra will also perform the function of Attorney-General's Department National Client Service Manager for this Department. Telephone and fax numbers for Alexandra and her support staff will be circulated as soon as possible.

CMD is implementing the other review recommendations.

GRAHAM EVANS

25 AUG 1993

DEPARTMENT OF TRANSPORT AND COMMUNICATIONS

INSTRUCTIONS ON ARRANGEMENTS FOR PROVISION OF LEGAL SERVICES

1. Sub-programs should not use their own staff as legal advisers but should obtain legal services from Legal & General Branch (L&G) and, as appropriate, from officers of the Attorney-General's Department (A-G's).

2. Except in defined circumstances, L&G is to be the gateway to A-G's for the provision of legal services.

   - Except as set out in 3. and 4. below, requests for legal services should be referred to L&G in the first instance.

   - Should sub program staff see it as desirable that the General Counsel or other A-G's officers be involved, that should be specified.

   - L&G should also suggest the involvement of A-G's officers where that is appropriate; for example because of sensitivity of the subject matter or specialist expertise required.

3. Sub-programs may negotiate arrangements with L&G to work directly with A-G's for a defined purpose and time period where that would facilitate efficient access to legal services.

   Relevant factors would include:

   - whether specialised skills or expertise are involved that are not available in L&G

   - whether the level of resources required exceeds that available within L&G in the necessary time frame

   - whether there have been established arrangements for direct contact with A-G's that have worked efficiently.

   In each case the terms of the agreement should be set out in writing, such as an exchange of minutes.

4. Issues requiring legal advice or other input may be referred directly to the General Counsel by:

   - the Executive
   - L&G, in accordance with working arrangements established with the General Counsel.

   In any issue referred to the General Counsel, the General Counsel may involve other A-G's officers and L&G officers as considered appropriate.

   Sub-program staff may specify that L&G involve the General Counsel in responding to a particular request for legal advice referred to L&G.

5. Where formal legal advice is sought by Ministers themselves, this should ordinarily be sought through the Attorney-General, but the General Counsel will facilitate this process whenever possible. The General Counsel will be available to advise on day-to-day issues in conjunction with Departmental officers.

   - Sub-program staff may approach the General Counsel directly to arrange participation by the General Counsel at meetings with Ministers in which legal issues will need to be discussed.

6. Written arrangements are to be prepared between the General Counsel and L&G to ensure a co-ordinated and co-operative approach to the provision of legal services in the Department.

   The arrangements will cover

   - the sharing of information
   - balancing workload between the units, having regard to relative priorities, areas of expertise and available resources
   - mutual assistance, making effective use of L&G's familiarity with many departmental programs, the range of expertise available through A-G's and the professional independence, judgement and experience of the General Counsel.

7. Departmental officers should consult L&G to involve legal services early in policy or operational issues which will require legal input.

   . it is envisaged that L&G will normally be involved in the early stages of policy/operational issues, approaching the General Counsel as necessary.

8. Departmental officers should exercise careful judgment to ensure that they seek legal assistance in all appropriate cases. Specific examples of circumstances in which legal services are to be sought are set out in Part 1 of the guide attached to these instructions.

9. Sub-program officers and legal advisers should examine the implications of each issue carefully to ensure that the full range of legal aspects are explored (eg commercial, constitutional, trade practices, litigation). Further specialist advice should be obtained through A-G's as appropriate.

10 A summary of the issues in which A-G's should be involved (usually through L&G) is set out in attached guide. The summary lists a number of issues on which A-G's must be involved. Further, it identifies other circumstances where, as a matter of judgement, A-G's should normally be involved. Both sub-program staff and L&G staff should exercise careful judgment to ensure that the General Counsel and other A-G's officers are involved in appropriate cases and are fully briefed on the Department's objectives and requirements.

11. The attachment also sets out guidance about how officers should go about obtaining legal advice in order to ensure that the legal expertise available is used effectively. Officers should, as far as practicable, follow those guidelines in their dealings with legal advisers.

12. Departmental officers can consult the A-G's National Client Service Manager, the General Counsel and any other outposted A-G's officers, or L&G for information on the range of expertise available within A-G's and appropriate contacts.

ATTACHMENT

GUIDE FOR OBTAINING LEGAL ADVICE

1. When to get legal advice

- In preparing advice to ministers, government organisations or members of the public which involves real questions of interpretation of legislation or other legal issues.

- In developing policy options where constitutional issues, interpretation of international agreements, legislative interpretation or other legal issues might arise.

- In reaching any administrative decision which involves unusual or controversial aspects, or where the amount at stake suggests a prospect of legal challenge.

- In preparing statements of reasons under section 13 of the ADJR Act (or where any other issue arises under that Act).

- In development and processing of legislative proposals, including at Parliamentary debate where questions of interpretation arise and in developing responses to Parliamentary committees on legal policy issues.

- In development of legislation and statutory instruments

  - in preparing drafting instructions to reflect policy objectives and strategies, settling drafts and preparing explanatory material for legislation and legislative instruments.

  - in drafting other formal instruments under statute.

- In considering enforcement action (whether prosecution or regulatory) in other than purely routine cases.

- In any steps involved in defending litigation against the Commonwealth or Commonwealth officers (whether actual or contemplated).

- In responding to applications for merits review of a decision - internal review or review by the AAT.

- In preparing replies to the Ombudsman where an interpretation of portfolio legislation or other legal issues are involved.

- In dealing with correspondence which argues a legal position and where the resolution of that issue affects the response.

- In all stages of major acquisitions (including but not limited to IT) and other substantial commercial tasks.
- In drafting of any changes or additional clauses for standard form contracts.
- In resolving any dispute over contractual terms.
- In dealing with any claim against the Commonwealth for payment of monies or other concession where that is not routinely payable under an established scheme.
- In responding to compulsory court processes (including subpoenas).
- In responding to requests for access to sensitive information.
- In considering the use of personal or other sensitive information for a purpose other than that for which it was obtained.
- In establishing, or taking on participation as shareholder or officer (director, trustee, council member, etc) in a company or other external organisation.

2. **Issues on which the Attorney-General's Department must be involved (through L&G unless otherwise agreed)**

- Constitutional issues.
- Litigation against the Commonwealth or commonwealth officers (whether actual or contemplated).
- Drafting or clearance of government contracts on legal agreements.
- Drafting of new or amending Acts (Office of Parliamentary Counsel) and statutory rules (Office of Legislative Drafting).
- Resolution of disputes between Commonwealth agencies or of legal issues affecting several agencies.
- National security matters.
- Government-to-government agreement work, whether within Australia or internationally.

3. **Other issues where A-G's involvement is likely to be appropriate (through L&G unless otherwise agreed)**

- Where the issue calls for expertise on specialist areas covered in A-G's eg. international law, company law, copyright, major commercial issues.

- Where there are major implications attaching to legal advice, such as:

  - precedent value;

  - political risk; or

  - high risk of litigation.

- Where the advice will be used to promote a particular legal interpretation externally.

4. **What staff should do in obtaining legal advice**

- Think the issue through as far as you can yourself before seeking advice.

- Clearly set out the objectives, your understanding of the policy/operational issues and all relevant background information.

- Try to identify areas of concern and the nature of any legal issues you are concerned might arise.

- If you are aware of previous legal advice on relevant issues, identify that advice and provide a copy if practicable.

- Set out any time requirements clearly and be in a position to discuss them.

  - Allow a reasonable time in the context of the complexity of the issues and the sort of advice requested.

- Clear the proposed request for advice at an appropriate level

  - Make sure your understanding reflects that of others in your area.

  - Articulating the background and issues and exposing your account to others can help clarify the thinking or identify further issues.

- Seek advice early in the process and be prepared to obtain further advice progressively as proposals firm or other issues emerge.

- Do not expect once-and-for-all answers on complex issues.

- Think about taking it in stages.

- Advice on complex issues requires a co-operative approach to bridging the gap between policy or operational and legal perspectives.

- Consider carefully the advice you receive and its implications at each stage.

. Feel free to ask follow up questions or to query the advice, or to discuss your understanding of it with the adviser.

. If you intend to rely on oral advice, record that advice carefully and clear the record with the adviser.

5. What <u>not</u> to do in seeking legal advice

. Don't put the same question to several legal advisers in order to choose the advice you prefer.

- If the advices are different, there is clearly a level of uncertainty to be resolved.

. Don't provide unbalanced or incomplete supporting information in the hope of a particular outcome.

. Don't seek to obtain advice by asking for clearance of draft documents without explaining their intended effects, your policy objective and any relevant background information or identifying issues to be addressed.

. Don't present complex policy/operational problems as if they might be resolved by legal advice alone. Describe the objectives that are sought to be achieved.

TABLE OF CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Assessing the demand for legal services has been a major task for the review. The primary focus has been on identifying current and future demand.

Over the last twelve months, the development of legislation has been a principal area of concern in Sub-programs, consistent with the major reforms in many of the areas.

Sub-program officers identified a significant demand for legal advisings - particularly, but not exclusively, in relation to the application and implementation of new legislation.

There has also been a significant demand for assistance with litigation, including several major administrative law cases which may affect Sub-program operations.

Interviews with Sub-program officers suggested too that there was a growing realisation of the value of using legal services in their work. There is an increasing tendency to try to involve legal advisers in early stages of policy development to ensure they have a greater appreciation of the background to particular issues and to help identify potential problems.

A number of areas suggested that their real needs exceeded their expressed demand, particularly with regard to involving legal advisers in strategic approaches to policy formulation. They did not involve Legal & General (L&G) Branch because they were aware that L&G's workload was too great to enable it to provide the desired service.

The Department's demand for legal services has historically been met from a number of sources. Some areas use L&G, some rely on Attorney-General's (A-G's), and others use a mixture of approaches depending on particular requirements. Use is also made in a few areas of legally qualified Sub-program staff.

The Department has not articulated the relationship between Sub-programs, the in-house legal unit and A-G's. In its day-to-day operations L&G Branch has been guided by the principle that it exists to assist Sub-program managers achieve their targets by which ever approach they might choose.

For specific projects, the Department has made a practice of arranging for the attachment to the team of specialist legal advisers from A-G's.

The Review Group is satisfied that the demand for legal services by the Department is unlikely to diminish over the next few years although it expects some changes in the balance of activities.

The Group agrees with those senior managers who stressed the importance of early participation by legal advisers in the policy development process and in the development of regulatory mechanisms or administrative schemes. It also recognises that there are difficult judgments to be made about the best use of resources.

RECOMMENDATION 1

That the Department actively promote the greater involvement of legal advisers early in the policy development process, with the proviso that involvement should be subject to consultation between the relevant Sub-program manager and the head of L&G as to the feasibility of making an officer available.

Against the background of the nature of the demand and availability of A-G's services the Review Group considered whether the Department should continue to maintain an in-house legal unit and the form it should take.

RECOMMENDATION 2

The Department continue, for the immediate future, to use a combination of A-G's (central and outposted) and in-house legal resources for those legal functions for which use of A-G's is not obligatory.

RECOMMENDATION 3

That legal services be provided centrally and the practice of allowing Sub-programs to use members of their own staff as legal advisers be discontinued.

Although the primary focus of the review has been on the legal services provided by L&G Branch, the Group also addressed the Branch's broader corporate functions, including contracts, assets and supply functions and functions of a quasi-legal nature such as FOI, privacy, co-ordination of portfolio legislation and other matters with a broad legal content.

RECOMMENDATION 4

That L&G Branch be retained within CMD and that the Branch continue to embrace broader functions such as FOI and Privacy. Further, CASS should remain within the Branch at this stage.

The Review Group's assessment is that the L&G Branch is currently under-resourced. Not only is the Branch Head being over-used as an adviser, but other senior staff are

working excessive hours for sustained periods and most of the legal staff are carrying more complex case loads than is normal for officers at their classification level.

RECOMMENDATION 5

That the Department make every effort to reallocate from within existing resources sufficient funds to permit the creation and filling of an additional SO B position within L&G to manage the significant quasi-legal functions for which the Branch is responsible.

Given the requirements of the work in L&G, the Review Group is of the view that the legal structure is more appropriate than is the clerical or administrative structure. Not only would it resolve anomalies within the classification structure, but it would also increase the status and authority of in-house advisers and assist the Department to attract and retain legal staff. The officers would have access to a legal career structure across the APS and there would be a real possibility of effective staff interchange with A-G's.

RECOMMENDATION 6

That the Department adopt the Legal classification structure for the legal unit within L&G Branch and that its implementation occur through a transition phase involving parallel clerical and legal positions.

The Department currently uses three principal sources of legal advice: L&G, A-G's proper and outposted A-G's officers and it will shortly have a General Counsel, also outposted from A-G's. This creates particular problems for both users and providers if the roles of, and interrelationships among, the sources are neither well defined nor well understood.

The Review Group identified three problem areas: the relationship between the General Counsel and the in-house legal advisers; between Sub-programs and each of the sources of legal services; and between resources located in the Department and those in A-G's proper.

In the Group's view, the General Counsel should focus on the advising and major litigation functions. His/her role should be defined as:

- the provider of consultant legal services to the Executive of the Department (and, on occasions to the portfolio Ministers) and to L&G Branch. The primary focus will be on the more critical or sensitive issues which confront the portfolio Ministers and the Department and especially on helping them assess the strategic significance of specific advisings or specific aspects of litigation.

- facilitator of access to specialist expertise within A-G's where this is necessary to satisfy the needs of the Executive and/or the in-house legal unit. Critical in this aspect will be the ability to integrate, in a way that is useful to senior managers, advice from a variety of specialist sources and to draw out its implications.

With this role clearly in mind, the Group sees access to the General Counsel as being necessarily limited. Without a restriction on access Counsel's ability to meet the demands placed on the position will be severely constrained.

The normal operating arrangements should be for Sub-programs seeking advisings from the General Counsel to go to L&G Branch.

Where the Executive goes to General Counsel for advice, Counsel will decide whether the matter can be best handled by a direct response, by reference to the appropriate specialist area of A-G's, or by L&G.

RECOMMENDATION 7

That the Secretary issue formal instructions defining the arrangements under which the services of the General Counsel are available to officers of the Department, key elements of the arrangements being:

- **direct access rights limited to Ministers, the Executive and L&G Branch;**
- **a formal agreement between the General Counsel and L&G as to matters on which the latter may approach A-G's directly; and**
- **the accumulation within L&G of copies of all advisings, irrespective of their source.**

The relationship which emerges between the head of the Branch and Counsel will be critical to the legal services function.

The Review Group also considered the role of the A-G's National Client Service Manager (NCSM), in light of the General Counsel arrangement.

RECOMMENDATION 8

That the Department ask the Australian Government Solicitor (AGS) to redefine the role and functions of the NCSM for the Department of Transport and Communications and examine whether these could and should be performed by the General Counsel and his/her support staff.

In its examination of existing arrangements within the Department, the Group noted that there are major variations in practice when decisions are being made about where to seek legal services. It concluded that it is in the Department's interest to adopt a firm position of requiring all Sub-programs to use L&G as the gateway to other legal services.

Where L&G lacks either the specialised skills or sufficient capacity to meet the client Sub-program's needs within the required timeframe, it would enter into a formal agreement with the Sub-program manager that the latter would work directly with A-G's for a defined purpose and time period.

Because those Sub-programs which have long standing arrangements with A-G's do gain advantages from them, the Group believes that these arrangements should be brought within the framework of agreements negotiated with L&G, and the General Counsel advised of them.

RECOMMENDATION 9

That the Department require all Sub-programs to use L&G Branch as the gateway to other legal services and require Sub-program managers to enter into a formal agreement with L&G where, by mutual agreement, it is decided that direct access to A-G's on specified matters is the most desirable course of action.

The Review Group believes that it will be necessary to review the arrangements that it proposes for the provision of legal services after they have been in place for a reasonable period.

RECOMMENDATION 10

That the arrangements for the provision of legal services be reviewed within twelve months. In particular, the review should examine whether the recommended arrangements for managing the relationships among L&G, the General Counsel and A-G's have been effective; and assess progress with, and effectiveness of, the adoption of the Legal structure and the adequacy of co-ordination arrangements with A-G's. The review should also take up the question of whether it is then appropriate to move the contracts, assets and supply functions out of L&G Branch.

APPENDIX 8

Minute

Transport and Communications

Central Office

Our reference T93/926
T93/1420

18 October 1993

Date

Sub-Program Managers

c.c. Secretary
Deputy Secretary (Transport)
Deputy Secretary (Communications)
CMD Branch Heads
Dir ISS
Dir IA

ARRANGEMENTS FOR ACCESS TO LEGAL SERVICES

The Secretary's minute of 25 August 1993 set out guidance to staff on obtaining legal services. The minute covered issues of when to seek legal advice, who to approach and how to go about it.

The attached minute (A) sets out further information on the respective roles of Legal and General Branch officers, the General Counsel and her officers, and other areas of the Attorney-General's Department. It is intended to form the basis for co-operative working arrangements among the officers providing legal services to this Department.

I also attach (B) a copy of a contact list for the General Counsel and legal staff in L&G Branch.

Further copies of the Secretary's minute of 25 August 1993 and the Guide for Obtaining Legal Advice are available from L&G Branch. I encourage officers to refer to it regularly to ensure an effective approach to dealing with legal issues in the Department.

John Doherty
Assistant Secretary
Legal and General Branch

Minute

Transport and Communications
Central Office

Our reference T93-1420

Date

Secretary
Ms Mildern
Mr Ellis

c.c. Ms Wedutenko
L&G Section Heads

ARRANGEMENTS BETWEEN THE GENERAL COUNSEL AND L&G BRANCH

In its report on the Review of Legal Services, the review group identified a need for co-operative working arrangements between the General Counsel and Legal and General Branch. The review group suggested that the nature and bounds of this co-operative working relationship be spelled out clearly for there to be general understanding across the Department of the respective roles of the two sets of resources. Such understanding was seen to be a prerequisite for gaining maximum advantage from the range of legal resources available following appointment of the General Counsel.

Ms Wedutenko and I have discussed appropriate arrangements, as reflected in this minute. The arrangements cover not only the role of L&G and the General Counsel, but also the role of other officers of the Attorney-General's Department. (Clearly, the General Counsel appointment is not intended to supplant reliance on other A-G's officers in a wide range of circumstances.) The proposed arrangements have also been discussed with Dale Boucher, Australian Government Solicitor, and with our staff.

The broad division of responsibilities between L&G Branch, the General Counsel and other officers of the Attorney-General's Department is as set out in attachment A. The functions are spelt out in rather more detail than in the review report, but I believe the proposed division is entirely consistent with the arrangements suggested in the report.

We propose regular consultation about work on hand in each unit

- swapping lists of current projects
- frequent informal discussions about current tasks, and
- more formal meetings on a regular basis
  - about once per month.

Legal and General Branch and the General Counsel will copy to each other significant legal advices prepared in their work and all advices obtained from other officers in the Attorney-General's Department.

Legal and General officers will seek to discuss any proposed request for advice from the Attorney-General's Department with the General Counsel or her legal staff before despatching the request, with a view to testing whether the advice might be provided by the General Counsel. This step is not essential, particularly if it would complicate timely despatch of an urgent request for advice. In all cases, the General Counsel should be provided with copies of the request to the Attorney-General's Department.

The General Counsel will consider involving L&G officers in projects, particularly where a knowledge of portfolio legislation is involved. This serves the interests of efficiency and will also assist in the development of Legal and General officers.

When referring matters to the General Counsel, L&G will seek to put together a brief of key documents and, where practicable, initial comments on relevant legislative provisions or legal issues. This will help focus issues for the General Counsel. Again, this arrangement should not be applied rigidly and may be abridged on where urgency or other factors require a different approach.

Subject to any comments, I propose to circulate copies of the arrangements to all sub-programs.

John Doherty
Assistant Secretary
Legal and General Branch

6 October 1993

ATTACHMENT A

LEGAL SERVICES FOR DEPARTMENT OF TRANSPORT & COMMUNICATIONS
BROAD DIVISION OF FUNCTIONS

1. Role of Legal and General Branch

- Source of expertise in relation to key portfolio legislation.
- Usual provider to the Department (other than the Executive) of general legal advice in the context of the Department's operations, including
  - advice/assistance in the early stages of policy, operational processes
  - development and processing of legislative proposals.
- Facilitator in relation to day-to-day access to consultant or specialist legal services from A.G's, OPC, DPP
  - including day-to-day liaison with AGS on litigation.
- Co-ordinator in relation to legal activities in DTC - legislative program/privacy/FOI
  - and usual adviser on FOI issues.

2. General Counsel

- Provider of high level strategic advice on legal issues to the Executive and to other senior DTC managers as appropriate
  - using L&G assistance and A-G's if appropriate.
- Avenue of "review" of legal advice provided by L&G or other A-G's officers as necessary and extra assistance in its implementation.
- Provider of legal services on some critical policy/operational issues where that is appropriate in the context of resources/expertise
  - particularly on commercial matters.
- Counsel to L&G on sensitive legal issues.
- As A-G's National Client Service Manager, assist in facilitating the involvement of other A-G's officers as appropriate.

3. Role of Attorney-General's

. Specialist advice on a wide range of legal topics arising in DTC functions - Corporations Law, Trade Practices, Intellectual Property, Constitutional Law, International Law, International Business Transactions.

. Provider of legal services in specified areas reserved to A-G's:

- litigation
- legislative drafting
- treaties.

. In conjunction with the General Counsel, provider of consultant legal advice on critical, sensitive issues, issues with precedent value etc.

. Source of legal expertise on legislation affecting Commonwealth agencies generally

- Public Service Act
- Audit Act etc.

DEPARTMENT OF TRANSPORT AND COMMUNICATIONS

APPENDIX 9

Minute Ref: T93/750

Office of the Secretary
Graham Evans

DEPARTMENTAL RECORDS MANAGEMENT

SUB PROGRAM MANAGERS

cc: Deputy Secretary (Communications)
Deputy Secretary (Transport)

There are two matters requiring attention as we proceed with improvements to our records management practices.

Documenting the business of the department on files

My minute of 17 June 1993 outlined measures to upgrade the management of files and papers within the department. We have now developed guidelines that assist staff in the creation of appropriate written records and their maintenance.

The guidelines are to be distributed to all staff for immediate implementation. CMD will provide bulk copies to your sub program.

These guidelines were developed as part of the implementation of recommendations flowing from Professor Pearce's report on the Pay TV tendering processes.

In preparing the guidelines we consulted the Departments of the Prime Minister and Cabinet and Finance, Attorney-General's Department, the Australian National Audit Office, the Australian Archives, and the Public Service Commission. The guidelines have been agreed by the Minister for Transport and Communications, and the Minister for Communications.

Records management improvements

On 15 September the Planning Evaluation and Audit Committee (PEAC) considered the results of a consultant review of current practices and procedures. Over time, several improvements will be implemented, including:

- the current Records Management Manual will be redeveloped and issued as an instruction on departmental policy (including the above guidelines);

- 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;

- enhanced training will be developed at three levels and address the separate needs of new staff, action officers and records management staff.

PEAC will oversight these arrangements. In addition, PEAC will consider the results of a program of audits on records management practices within sub programs to be conducted by records management staff, under the guidance of the Director, Internal Audit.

GRAHAM EVANS

20 SEP 1993

T93/750

DOCUMENTING THE BUSINESS OF THE DEPARTMENT ON FILES

1. The purpose of these guidelines is to assist staff to keep appropriate Commonwealth records on departmental files.

2. Although there is significant guidance about the maintenance (or destruction) of Commonwealth records, once these have been created, there is very little, if any, guidance on what records officers should create in the first place in order to provide a full and proper account of the decision-making processes that are the subject of a particular file.

3. Most records in agencies are Commonwealth records and therefore fall under the *Archives Act 1983* (see Attachment A). Commonwealth records cover written or printed documents, sound recordings, coded storage devices, magnetic tapes or discs, microforms, photos, films, maps, plans, models, paintings or graphics that are the property of the Commonwealth.

4. Registered departmental files are the repository of a very important part of Commonwealth records. These guidelines focus on documenting the business of the Department through the creation and maintenance of appropriate Commonwealth records on departmental files.

FILES AND THEIR CONTENTS

5. A file is a collection of papers arranged in chronological or action order relating to a specific matter of departmental business. A file may cover:

- certain aspects of implementing a Government program eg the transfer of a particular Commonwealth aerodrome to local ownership;

- an aspect of the Department's administration eg agreed guidelines for the awarding of departmental scholarships; or

- the development of a particular policy matter eg the policy considerations leading to the establishment of the National Rail Corporation.

6. As a general rule, any document that another officer may need to refer to, or which has any ongoing value to the Department, should be placed on a registered file.

7. Some of the major benefits from proper documentation of files are that:

- a successor, through reference to the files, is able to take over responsibility for a particular matter from another officer with the least possible inconvenience thus providing for continuity and consistency in

administration and in the provision of advice to the Minister and of information more generally;

- the Department and its officers are able to account for their actions to the Minister, Parliament and the public;

- the Department can provide adequate responses under the various administrative law statutes or where legal action is taken against the Department;

- there is an enduring record of public administration.

8. A file should include all the key decision points in relation to its subject matter and who has made those decisions. It should include all the information which a decision maker has taken into account in formulating his or her decision, including any significant options that the decision maker considered but rejected. There should be sufficient documentation on the file to make quite explicit the intention of the decision maker and the basis for the decision.

9. Papers should not be placed indiscriminately on a file because they have a relevance, if only slight, to its subject matter. Paragraphs 26 and 34-36 provide some guidance on what not to put on file. Creation of files is the responsibility of the sub program administrative support units. This is because careful wording of the file title is essential to make the scope of its content as specific as possible. Proper keywords and cross-referencing are also important.

10. Many of the documents that officers should maintain on file will be obvious. These include for example:

- incoming and outgoing correspondence;

- minutes to the Minister or to the Executive;

- legal opinions;

- background material, including recommendations that decision makers take into account when making a decision or formulating a policy;

- the formal decisions of decision makers under delegated legislation (note that paragraph 36 refers to the special arrangements for storing the originals of legal documents - a copy would normally be placed on file);

- draft documents as described in paragraph 27;

- discussion papers;

- submissions to committees of inquiry;

- records of discussion detailing views expressed to, and by, parties relevant to the business at hand;

- descriptions of entitlements of beneficiaries under departmentally managed programs.

11. In addition, there are a variety of technical papers which need to be retained on file or need separate storage arrangements. Sub programs should determine their own local arrangements in relation to this category of documents.

12. Many documents that are created in the Department will have a relatively short life (up to ten years). Important documents that record major policy and decisions need to be retained indefinitely, if not forever. These latter documents should be produced on paper that will last; most recycled paper will deteriorate rapidly beyond ten years, so documents that you consider important should be printed or copied on permanent paper before they are placed on file.

13. Most of the categories of records listed in paragraph 10 come into being more or less automatically as a result of administrative action and once they are in existence there is no difficulty in deciding that they should go on a file.

14. The principal object, of course, is to ensure that important decisions and actions of the Department are documented and accountable.

15. There are cases, however, where doubt can arise, either about whether to create a record in the first place or whether a record, once created, is eligible for longer-term retention and should therefore be placed on file.

16. In the end, this is a matter in each case for judgement by individual officers and it would be unwise to attempt to lay down hard and fast rules. The following comments may, however, be helpful in dealing with the most common "difficult" categories of records or potential records.

RECORDS OF MEETINGS

17. The responsible officer should normally make a record of a meeting where the outcome represents an important part of the information gathering, decision making or policy formulation processes on a particular matter. Examples of such meetings might include those with State Government officials, industry representatives, trade unions, Government Business Enterprises, other departments or agencies, legal representatives and intradepartmental committees eg the Human Resources Committee.

18. Records of such meetings should include detail of the persons and organisations involved and the date and place of the meeting. The note should be a record of the main matters discussed rather than a verbatim report of the discussions. Notetakers should ensure that records are brief and to the point, recording only matters of significance, decisions taken and issues requiring follow-up. Participants should be given the opportunity to comment on the minutes/record before finalisation.

19. In certain instances, it may also be necessary to make file notes of relatively less formal meetings or discussions eg those with Branch or Division Heads, members of the Executive, the Minister or the Minister's staff. Cases in which a file note might be appropriate include meetings which:

- make important policy or program administration decisions;
- agree upon a strategy approach and/or significant task allocation;
- are important to the information gathering process (eg ascertaining the views of another Division).

20. In view of the informal nature of such meetings, it may not be appropriate in every case to apply all the rules set out in paragraph 18 above. Officers making a file record of such meetings should, however, ensure that participants in the meeting know that there will be a record, and, where the subject matter of the meeting so dictates, have the opportunity to comment on it before it goes on the file.

RECORDS OF CONVERSATION/CONSULTATION INVOLVING THE MINISTER

21. Officers may be invited to attend a meeting with the Minister or his/her Office to provide, if the Minister's office requires it, an official record of conversations or consultations involving the Minister or his/her Office and a third party. These records should follow the rules set out in paragraphs 18 and 25.

22. Draft records will require clearance by the Minister's Office unless that Office decides otherwise. This is not a decision for the notetaker. It is the responsibility of the notetaker to ensure that the departmental copy of the record is properly filed and, where appropriate, maintained on a restricted access file. Distribution of records placed on a restricted access file should be by name strictly on a "need to know" basis. Please note that a person may apply for access to these documents under the *Freedom of Information Act 1982* (see paragraph 37).

23. The notetaker may not place hand written notes made during the meeting on departmental files or retain them after making the official record. If the

Minister's Office decides no official record is necessary, the notetaker must destroy any handwritten notes.

TELEPHONE CONVERSATIONS

24. A file note of a telephone conversation would be appropriate in certain circumstances. Examples might include where the conversation:

- is part of the information gathering process;
- conveys a departmental response to another Government agency, a staff member, a media representative or to a client (depending on the situation, the response may need to be confirmed in writing);
- conveys to the Department a response on a particular matter;
- represents a complaint from the public on an aspect of the Department's administration;
- provides significant policy or administrative direction from a senior officer or from the Minister's Office.

25. If a file note is to be prepared the notetaker should inform the other party that he/she intends to prepare a file note of the conversation. Participants in the conversation should be given the opportunity to comment on the record before finalisation.

DRAFT DOCUMENTS

26. It is undesirable to clutter up files with a large number of draft papers, thus detracting from the clarity of the decision making processes that are documented on the file. As a general rule, you should not place draft documents on a file and may destroy them under the normal administrative practice provision of the Archives Act (see Attachment A).

27. However, there will be occasions when it is appropriate to place drafts on file. Some examples are:

- a draft discussion paper or draft record of a meeting that has been circulated to industry for comment or to other departments or agencies;
- a draft that has been circulated widely within the Department for comment;
- a draft annotated by a senior officer that indicates amplification of a significant policy point or change in policy direction;

a draft that notes agreement to a particular policy position or course of action from a senior officer or from another area of the Department.

28. Where you retain drafts because of annotations on them, it is only necessary to file the annotated pages unless the annotations will be misleading without the remainder of the document. If you receive comments of an editorial nature, it is not necessary to retain annotated drafts but a file note could indicate the originator of the comments and the fact that they have been incorporated into a revised paper.

29. All drafts should show the file reference, date of creation and the originating officer or area. The facility for automatic dating, timing and document identification is available on the Department's word processing software. Further information is included in the Australian Archives Guideline Booklet "When It's Gone, It's Gone".

ELECTRONIC MAIL

30. Increasingly, staff use electronic mail for communication within the Department. Much of the material conveyed by electronic mail is probably relatively unimportant or of short term facilitative value (eg time and place of a meeting, details of training courses) and can be disposed of in accordance with normal administrative practice (see Attachment A).

31. However, some electronic mail will be relevant to the information gathering, policy formulation or decision making processes of a particular issue and should therefore be printed out and placed on the relevant file.

32. Consideration should be given to the circumstances in which electronic mail is appropriate. Only in rare and/or exceptional circumstances would it be appropriate for important administrative decisions to be conveyed and recorded via the E-mail system.

33. Staff should also think about the style of the electronic message, particularly in circumstances where the message is likely to be retained on file. Where appropriate, it may be desirable to indicate as part of the message whether it is a record that the originator or the recipient should place on file. Further information is contained in the Australian Archives Guideline Booklet "Just for the Record".

WHAT NOT TO PUT ON FILE

34. As a general rule, unimportant records which can be destroyed as a normal administrative practice (see Attachment A) should not be placed on file. If material in a diary or personal notebook represents an important part of the decision making process, the author should translate it into a formal note for inclusion on the file.

35. Other material that should not be placed on file includes:

- reference material such as books or pamphlets - should be held in a reference section; if they relate directly to action or correspondence on file they can be placed in an envelope on the inside cover of the file;

- maps - as for reference material unless there is a specific requirement for these to be placed on file eg where they explain policy and administrative issues such as routes for roads or rail corridors;

- newspaper clippings - should be held in a reference section unless there is a specific requirement for these to be held on file eg where they form part of a brief to the Minister;

- cablegrams - master copies are held by Policy Coordination Branch; information copies should be held in a sub program reference area unless there is a specific requirement for these to be held on file eg where they form part of a brief;

- Cabinet Submissions, Memoranda and Minutes - kept with Parliamentary Liaison Section. Where these are temporarily located in action areas, adequate care needs to be taken to keep the documents separate and properly secured.

36. In addition, there are special arrangements for storing the originals of legal documents eg legislative instruments, certificates, deeds, contracts and licences in a central register in the Policy Coordination Branch and/or in some cases special arrangements within the sub program. Staff should consult their sub program administrative support unit about arrangements. (Refer to the Minute to all Sub Program Managers - Procedures for Handling Statutory Instruments dated 3 August 1993).

ACCESS TO DEPARTMENTAL RECORDS

37. A person may apply under the Freedom of Information Act for access to any document in the possession of the Department (including documents existing in electronic form, such as E-mail, or informal records such as diary notes). Exemption provisions in the Freedom of Information Act may protect sensitive documents from disclosure.

38. Similarly, the Department may be liable to disclose any document with evidentiary value to another party in a court action. There are only very limited circumstances where the Commonwealth can oppose production of documents on public interest grounds.

39. Staff should also note that under the Information Privacy Principles of the *Privacy Act 1988,* they are required to ensure that any personal information contained in files is not disclosed to another person, body or agency, unless an exception is applicable.

FILE MANAGEMENT ARRANGEMENTS

40. These guidelines form part of the Department's Records Management Manual. The Manual also contains departmental instructions about the management of files eg file creation, titling, folio numbering, security classification. Other guidance is contained in the Department's booklet entitled "Records Management", copies of which have been issued to all staff. Additional copies are available from your sub program administrative support unit or central Records Management.

41. The Department's file management check list is at Attachment B for easy reference.

DEPARTMENT OF TRANSPORT AND COMMUNICATIONS
20 SEPTEMBER 1993

ATTACHMENT A

LEGISLATIVE FRAMEWORK

The *Archives Act 1983* gives the Australian Archives control over disposal of Commonwealth records to ensure:

- efficient and economical record keeping in the Commonwealth government by the prompt destruction of records no longer needed for legal, fiscal, administrative or other reasons;

- identification and preservation of those records which for similar reasons, must be kept permanently.

2. Under the Act (s.24(1)), it is illegal to destroy or otherwise dispose of a record, to transfer the custody or ownership of a record or to damage or alter a record unless these actions are:

- required by any law;

- authorised by the Australian Archives;

- a normal administrative practice.

3. The Act permits normal administrative practices involving destruction, disposal, alteration or transfer of Commonwealth records (s.24(2)(c)). Thus daily administration may proceed so long as it does not undermine the proper preservation of Commonwealth records or endanger valuable information.

4. It is for example, a normal administrative practice to:

- destroy drafts, rough notes, spare copies (note that once these are placed on file, they cannot be removed without reference to a sub program administrative support unit. Additionally, some drafts should be retained on file - paragraph 27 of the guidelines refer);

- add comments to folios on file unless the folio is more than 25 years old;

- underline important points;

- add file movements to file covers.

5. Destruction as a 'normal administrative practice' usually occurs because the information is:

- duplicated (eg a handwritten draft or information copy);

- unimportant (eg telephone message slips);

- of short term facilitative value (eg compliments slips, or some ADP test data);

- or a combination of these.

6. Officials must not use the 'normal administrative practice' provision to destroy records which document the significant operations of an agency and may have long term value for research. In this regard, Australian Archives can issue a notice of disapproval in situations where they consider a 'normal administrative practice' of an agency is putting information at risk.

7. It is also not permissible to destroy any record once a Freedom of Information request or another legally binding request has been made of it, irrespective of whether it is eligible for destruction under the 'normal administrative practice' provision.

8. The Information Privacy Principles (IPPs) in section 14 of the *Privacy Act 1988*, require that any personal information contained in files is:

- accurate, up-to-date, complete and not misleading (IPP 7);

- used only for a purpose to which the information is relevant (IPP 9) and only for the purpose for which it was obtained, unless an exception is applicable (IPP 10); and

- not disclosed to another person, body or agency, unless an exception is applicable (IPP 11).

FILE MANAGEMENT CHECK LIST FOR ACTION OFFICERS

☑ To create a file, complete a "File Request Form" and pass to your Administrative Support Unit together with the papers which go to make up the new file. The papers are sighted to ensure that the file is titled, indexed correctly and appropriately classified.

☑ Place papers on files in date or action order. Ensure that the papers relate directly to the file title.

☑ Folio number each page.

☑ Documents which refer specifically to Cabinet Submissions, Memoranda or Minutes by title, number or date, or reveal the nature of Cabinet deliberations should be marked "Cabinet-in-Confidence" and placed on an appropriately classified departmental file.

☑ Obtain existing files by telephoning or contacting your Administrative Support Unit in person.

☑ Always endorse the action record on the file cover clearly. Never let a file leave you without a marking - this should be done by marking the file to another officer, re-submitting (R/S) it, or if all current action is completed, signing off the action record.

☑ If you pass a file by hand to another officer, notify your Administrative Support Unit of the movement or complete a file transfer advice.

☑ A file marked to more than one officer will be sent to the one whose name appears first. If you want the file to go in a different order, indicate your order by placing a number in pencil against the names on the file.

☑ Where later documents placed on a file are of a higher classification than the file cover indicates, send the file with a file request form to your Administrative Support Unit for reclassification.

☒ Do not attempt to alter or correct a file title. If a file title is no longer considered appropriate, refer the file to your Administrative Support Unit.

☒ Do not place more than 200 folios on a file. When a file is this size, ask your Administrative Support Unit to create a subsequent file (new part). The Centre will place a "file closed" sheet on the old file together with information of the new file's existence.

☒ Do not remove papers from a file. Refer incorrect filing to your Administrative Support Unit.

☒ Do not add further papers to a file that is closed.

☒ Do not place Cabinet Submissions, Memoranda or Minutes on a file.

DEPARTMENT OF TRANSPORT AND COMMUNICATIONS

APPENDIX 10

Minute

Office of the Secretary

Graham Evans

T93/751

Subject: **PROCEDURES FOR HANDLING STATUTORY INSTRUMENTS**

SUB-PROGRAM MANAGERS

cc EXECUTIVE

The concept of a central register for statutory instruments has been the subject of recent consultation with sub-programs and the following guidelines have been modified as a result of that consultation. FAS (CMD) provided initial guidance on 27 May.

A central register of the more important documents, with sub-registers in Divisions of the more routine documents, should prove to be a valuable source for the identification and location of documents which provide a large part of the legal basis for our operations and add to the corporate memory.

Documents to be contained in the central register.

- Instruments of a legislative character, ie instruments made under a legislative provision which lay down general rules or provide guidance to decision-makers of some general application. This would include an instrument which
  - establishes a process, scheme or plan under which powers are exercised;
  - sets levels of fees or charges payable, or defines other obligations;
  - fixes the level of entitlements or the range of rights applying in defined circumstances;
  - sets out a direction, policy statement or guideline to influence the making of decisions (whether binding or just advisory);
  - sets out general requirements for equipment in relation to matters such as design or performance parameters;
  - sets out procedures or a code of practice;
  - sets the terms and conditions to apply to the holding of a specified office.
- Instruments containing delegations and authorisations in relation to the exercise of statutory powers.

- Instruments of appointment to statutory offices (originals if signed by the Minister or copies endorsed by ExCo in the case of appointments by the Governor-General, instituted by the Minister).

- Instruments containing directions or notifications of Government policy to portfolio agencies.

- Secretary's Directions or other binding requirements to apply to departmental officers.

- Instruments relating to the establishment or structure of portfolio agencies (eg transferring property to the new authority, determining capital structure).

- Instruments amending, repealing, revoking or otherwise affecting the operation of any of the above.
- Non-statutory instruments which form key source documents in the operational framework, such as share certificates, promissory notes, trust deeds, agreements with Commonwealth, State or local government organisations etc.

- Any other instruments Sub-program Managers believe should be held on the central register.

It is appreciated that in some cases, the original instruments are not held as they have been forwarded to another party. In these cases, copies should be forwarded for the central register. In future, the legal need to send original documents to the other party should be assessed.

Copies of all documents for the central register should be retained by sub-programs.

Documents to be held on sub-registers

Originals of instruments of a more administrative nature, such as licences, permits, timetables etc, should be held by sub-programs.

GBEs and Statutory Authorities

Where GBEs and Statutory Authorities have traditionally held originals of statutory instruments, they should continue to do so. Where appropriate, however, they should be encouraged to keep their own registers.

Retrospectivity

The registers should contain all statutory instruments signed since the creation of the Department in 1987 which are still active or those which are inactive but which are required for continuity of an action process. Instruments

of particular significance, pre 1987, should be stored centrally at the discretion of Sub-program Managers.

Records and storage

The central register will comprise a computer based recording and tracking system. The documents will be kept on folders in secure "B" class cabinets. The records will be kept by the Parliamentary Liaison Section in the Policy Co-ordination Branch of CMD, located on level 2 of the Todd Building.

Sub-programs should institute recording and storage systems for the sub-registers. These may differ according to the nature of the documents (eg bulk documents, such as maps, would be stored differently from single page documents).

Sub-programs should advise FAS (CMD) by the end of August of the details of their systems.

Method of collection

The Parliamentary Liaison Section are already collecting, and will continue to collect, originals of statutory instruments returned, signed, from the Ministers' offices. Copies of these documents are forwarded to sub-programs with a stamp showing that the original is held.

Some sub-programs have already forwarded documents to the central register.

All sub-programs should extract relevant instruments in accordance with these guidelines and forward them to the Parliamentary Liaison Section by the end of August.

Access to central register

Sub-programs will be able to access the central register by contacting the Parliamentary Liaison Section and will be able to obtain copies of any documents contained in the register. Original documents will be released on loan only if there is a demonstrated need for the original and will be required to be returned.

GRAHAM EVANS

- 3 AUG 1993

DEPARTMENT OF TRANSPORT AND COMMUNICATIONS

APPENDIX 11

Minute T93/628

Office of the Secretary

Graham Evans

Subject: GUIDELINES: PREPARATION OF ADVICE TO MINISTERS

SUB PROGRAM MANAGERS

cc. Deputy Secretary (Communications)
Deputy Secretary (Transport)

The attached guidelines are to be used for the preparation of all future advice to Ministers from this department. They cover the content, structure, and overall style of such advice.

The guidelines will be distributed to all sub-programs for immediate implementation. CMD will provide bulk copies for each sub-program.

The guidelines were prepared in response to recommendations made by Professor Pearce, and in consultation with Ministers' offices, the Department of Prime Minister and Cabinet (Mr Blick) and all sub-programs.

They are to be read in conjunction with the separate "Guidelines for Handling of Ministerial Correspondence" (which cover specific handling procedures and style preferences agreed with Ministers' offices), and the particular requirements for Cabinet material as set out in the Cabinet Handbook. Other relevant references are the records management guidelines "Documenting the Business of the Department on Files" and the recently issued "Procedures for Handling Statutory Instruments".

The normal practice would be for the introduction to any recommendations to Ministers to be in the singular, with the signatory accepting responsibility for consultation as appropriate. Signatories to any advice are also responsible for seeing that the attached guidelines are adhered to in preparation of advice. Standards will be audited on a regular basis.

GRAHAM EVANS
29 September 1993

GUIDELINES

PREPARATION OF ADVICE TO MINISTERS

A. PRINCIPLES

1. Advice to a Minister from the Department is effective when it presents the Minister with:

- clear decisions to make or actions to be taken;
- the best available understanding of the substantive effect of those decisions or actions;
- a full understanding of the range of realistic options for decision or action;
- sufficient background information to provide a sound basis for the decisions or support for actions.

2. The background information that is needed may include any or all of:

- relevant history and current status of the issue;
- policy, technical, legal or cost factors affecting a decision, or its implementation;
- who will be affected, and in what ways;
- who may implement the decision or action, and how.

3. The authority of advice must be clear as regards:

- how comprehensive is the information presented;
- the basis of the judgements expressed;
- the basis and weighting of recommendations between possible options;
- the personal responsibility of the signing officer for the recommendations.

4. The advice must be expressed concisely and without ambiguity.

B. PRESENTATION

Ministers' offices are faced with information overload. Good written communications provide the maximum of useful information for the minimum investment of readers' time and attention. Advice therefore needs to be as short as possible, consistent with adequate coverage of the issues. It is important to use "plain English" style and avoid jargon or unnecessary technical language wherever possible. Slang should be avoided, as it undermines the integrity of a document and can be misinterpreted. Short sentences and paragraphs, minimum use of adjectives, and precise grammar all assist the reader.

The structure of advice should be such that at every stage readers can understand

- why they need to read the material before them;
- the relative priority of the material compared to other issues.
- what form of response it seeks; and

These guidelines set out a revised standard format to assist in meeting this objective. Items 1 to 6, and 11, are mandatory for all advice. Other headings are optional. A style model is included with other style models in the separate "Guidelines for Processing of Ministerial Correspondence."

1. File and Schedule numbers

Inclusion of the file number (Records Management) and the schedule number (Parliamentary Liaison) at the top of the cover page is mandatory, to ensure proper standards of record-keeping and correspondence tracking in the Department.

2. Address

Correct format of address is set out in the Guidelines on Processing of Ministerial Correspondence issued by Parliamentary Liaison Section.

3. Subject

The subject line should contain enough information to narrow the subject down to the area at issue eg, "AUSTRALIA POST - DIVIDENDS" is not as useful a guide to the subject as "AUSTRALIA POST DIVIDENDS - DEPARTMENT OF FINANCE CONSULTATIONS"

4. Action Sought

The purpose of the communication is most clearly defined in terms of ACTION SOUGHT from the recipient. For the Minister, this means "How need I respond.." This should be set out in the briefest and clearest terms immediately below the SUBJECT heading. Examples of typical actions sought might be:

ACTION SOUGHT: That you sign the attached papers for Executive Council relating to ....Board appointments

ACTION SOUGHT: That you note the suggested talking points for your meeting with ..... on .....

ACTION SOUGHT: That you indicate your preferred approach for the Department to consult with industry on .....

ACTION SOUGHT: That you obtain the agreement of the Minister for Finance to .....

5.Priority

Whenever there are factors that require the Minister to give priority attention to the ACTION SOUGHT, these should be set out clearly against a heading immediately following the ACTION SOUGHT.

There is little merit in simply saying a matter is "Urgent" - this term is a relative one, subject to abuse and devaluation.

The priority message must indicate a genuine deadline and the consequences of failing to meet that deadline. Examples might be:

PRIORITY: Clearance of the draft submission by 1 November is needed if the legislation is to meet the timetable for Autumn Session passage

PRIORITY: Agreement of the Prime Minister should be secured prior to your meeting with the Chairman on 10 October.

PRIORITY: Appointment of two additional Board members prior to the Annual General Meeting (25 August) is a requirement of the enabling legislation.

By this stage, the Minister or his office should have all the information they need to assess the priority of the material that follows and to schedule it for attention.

6.Issue(s)

The first sentence to follow this heading should establish the nature and scope of any issue that the Minister is asked to address in responding to the advice. Many issues may not require more than a few words to outline; in such cases you should not pad out the issues with insignificant considerations or unnecessary background. In more complex cases, two or three paragraphs may be needed to describe the issues properly. The more complex the issue, the more care should be taken to ensure that it is communicated as clearly and simply as possible.

This heading is not the place to canvass solutions. It should cover only such information as is germane to the reason a Minister now needs to be involved in the subject. This may include identification of conflicting interests, that may be affected by a Minister's decision or action. It should also include reference to any formal powers or obligations under which the Minister would act.

7.Current Situation

This heading covers a concise description of the state of play on the issue. Items to include are:

- reference to the most current statement of relevant Government policy;
- the substance of any current representations from parties involved;
- the state of any legal or administrative processes.

These items should be tightly summarised, with more detailed information available in attachments if necessary. The focus should be on the substance of the matter addressed, rather than just a simple chronology.

8.Technical Issues

Significant technical or legal issues may warrant noting under a separate heading. The source and authority of any views included must be made clear. Treatment in the main body of the advice should be limited to conveying such implications as the Minister must understand in order to take the relevant decisions or actions. Once these are outlined, detailed discussion should be set out in attachments. Where the Department's line of advice to the Minister differs from other opinions quoted, the reasons and authority for taking a different view must be made clear.

9.Options

Where there is a range of possible options for action, each should be presented with care to ensure that the implications are fully understood.

Options not favoured by the Department should still be presented objectively, particularly if they are being pursued by other parties to the issue. If detailed discussion of complex options is needed, this can be in attachments; the main text should present only the key aspects of each option.

If the range of possible options is very wide, judgement should be exercised in presenting a view of the options that is representative, but does not attempt to include minor variations.

If you cannot reduce the range of options to a maximum of three, this may indicate that there are threshold issues that should be resolved before final action options are proposed to the Minister. In these cases, it may be more effective to advise, and seek decisions, on individual components of the issue at different stages, rather than presenting the Minister with an inordinately complex web of considerations and options in a single paper.

This filtering process is a key element of the value added by the Department to government decision-making processes.

The treatment of each option should summarise clearly any implications concerning

- relationship to current policy and practice
- effects on interested parties
- process issues eg
    - is legislation needed?
    - is formal consultation required?
    - can parties appeal against the decision?
- budgetary effect
- precedents or constraints on future options or actions

10.Conclusion

This heading should be used in preference to "Summary" (which tends to invite repetition).

The text under CONCLUSION should briefly and clearly set out the arguments leading to the recommended course of action.

11.Recommendations

The recommendations should be consistent with the ACTION SOUGHT, as amplified by the OPTIONS and CONCLUSION sections.

A recommendation "That you note the above" is pointless and should be avoided. You should usually only send information notes when you know that the Minister or his office wants one, or to equip the office to deal with outside enquiries. In such cases suggested talking points should be attached.

If the purpose of the advice is solely to bring the Minister's attention to some significant information, then the recommendation should be that the Minister note the significance of the information in its particular context: eg

> "That you note the concerns expressed by XXX over the effects of YYY on ZZZ, and the possibility that this decision will be challenged in the AAT".

Wording of recommendations for Minister's action should clearly describe specific actions, so that there is no ambiguity as to what the Minister's signature to the advice means.

In general, if the advice has been well constructed there should be no need for recommendations to cross-refer to attachments: the Minister should be able to base his decision on the information in the main text. If the complexity of the issues does not permit this, then sparing reference should be made to attachments.

12. Contact Officer

The signatory to the advice takes full responsibility for all content, but may nominate a contact officer (below the signature to the advice) if the Minister (or office) may wish to follow up on matters of detail not held by the signatory, or when the signatory is likely to be unavailable for some reason. A nominated contact officer must be competent to advise the Minister directly on any matter covered in the advice, unless the nomination specifies a particular field of competence (eg legal or

technical issues). In most cases, contact officers for advice to Ministers should be at least SOB or equivalent.

TYPOGRAPHY

Style requirements are set out in the AGPS style manual, and for individual Ministers' offices in guidelines issued by Parliamentary Liaison Section in consultation with respective offices.

Automated word-processing offers individual drafters a wide array of type faces and styles in which to present written materials. In the context of official correspondence, the selection of type faces and styles has only two legitimate purposes:

- maximum readability for the recipient
- image and credibility of the Department.

Self-expression and personal idiosyncrasy must not be indulged in selection of type faces. The authority of documents is undermined if they are presented with a jumble of ill-assorted and confusing typography.

Ministerial office style guidelines will include preferences established with each Minister's office, and these must be adhered to in correspondence with each office.

Good layout and structure assist in rapid reading of documents by making the information they contain readily accessible. Useful devices include careful use of

- "dot-dash" points;
- headings and indentation;
- the use of vertical lists to present facts and options; and
- graphs and tables

Where a communication presents special presentation problems such as inclusion of extensive graphics or tables, specialist assistance should be sought from the Public Affairs design group.

C CLEARANCE STANDARDS

A Minister must be able to assume that, for any advice received from the Department, the information upon which it is based is authoritative, the most comprehensive available, and the judgements included are consistent with portfolio-wide priorities. It is the responsibility of the signatory to ensure that this is the case.

Where clearance responsibilities are delegated by program and sub-program managers, officers must be aware of their obligation to ensure drafts have received sufficient clearance both up the line (when senior perspective is required) and across sub-program and program lines (when there may be implications not obvious to a drafting officer).

1. Internal Clearance

Managers are at all times responsible for setting the levels of program clearance required for particular subject matter in their own area, and for establishing the basis on which it is appropriate for clearance to be sought up the line.

Drafting officers are responsible for ensuring that drafts have been appropriately checked with other programs and sub-programs to ensure all relevant considerations are brought to the attention of the clearing officer. Consideration of who else may have a valid interest in the issue should be part of the personal checklist for all drafters and clearers of ministerial papers.

Advice on whether the issue is of interest to other programs and sub-programs and/or they should be consulted, can be sought from senior staff or from Policy Coordination Branch. As regards legal advice, the recent circular Guidelines to Staff on Obtaining Legal Services should always apply.

2. External Co-ordination

Co-ordination with portfolio bodies, other portfolio departments and external bodies serves three purposes:

- the strengthening of information supporting advice to our own Minister;
- identification and reduction of implementation difficulties that might otherwise arise; and
- the opportunity to influence positively the advice being put to the Government from other sources.

Some forms of such co-ordination are formal requirements upon either the Department (eg co-ordination comment on Cabinet submissions, contributions to joint briefings) or the Minister (eg need to consult with the Minister for Finance on certain GBE matters).

Where the formal requirement to consult is of the Minister, it is the responsibility of relevant sub-programs to ensure that the Minister is provided with all advice necessary to the consultation.

As a rule, such advice should include the outcome of prior consultation between this Department and any other department or significant stakeholder in the Minister's consultation process.

When this Department is approached by another portfolio on a consultation basis, judgement must be exercised as to whether the subject matter warrants bringing to the attention of our portfolio's Minister. Criteria include:

- whether the matter is of major importance to this portfolio; and

- whether the matter has sufficient authority within the originating portfolio to claim the Minister's attention in the context of other priorities.

In addition to formal clearance mechanisms, informal clearance processes are a normal part of advising work that requires the exercise of discretion and judgement. A primary consideration is to ensure that the status of views and options exposed for discussion with other parties is clearly defined: ie that there is no scope for exploratory positions to be misconstrued as having government or ministerial authority.

In all clearance processes, there should be adherence to the records management guidelines "Documenting the Business of the Department on Files" and to "Procedures for Handling Statutory Instruments" as applicable.

Policy Coordination Branch
September 1993