

DISSENTING REPORT BY SENATORS RICHARD ALSTON AND JOHN TIERNEY

MINISTERIAL RESPONSIBILITY

"I did not know. I was not told. I should have asked." Winston Churchill

1. The doctrine of individual ministerial responsibility is unquestionably essential and vital to the workings of a democratic system. Its cornerstone is that ministers must be individually responsible to Parliament for their own actions as well as those of their departments.

2. Ministerial responsibility is a convention which is still very much alive. Resignation of a Minister, indisputably the ultimate penalty for a failure of ministerial responsibility, still occurs along with the practice of extensive Opposition scrutiny of Ministers in the Parliament for alleged misconduct, misjudgment and departmental blunders. Such scrutiny can be carried out either through Question Time, parliamentary committees or other instruments available to the Parliament. In the particular case of the bungling of the introduction of the pay television the Senate has heard questions or speeches relating to the issues on 131 occasions since 4 May 1993.

3. This Committee has canvassed many aspects of direct and indirect ministerial responsibility including the responsibilities of departments, Ministerial advisers, the Minister and their inter relationships.

4. It is unreasonable to assume that a Minister should or could fully monitor the entire administrative processes of his or her department. However this cannot in any way absolve a Minister from responsibility for administrative or other errors at a high level within his Department. As Sir Rupert Hamer suggested to the inquiry in

Melbourne on 20 July 1993 "Every Minister is responsible for what goes on in his department or in the statutory authorities under his control." ¹

5. Former Prime Ministers, Mr Hawke and Mr Fraser have rightly supported the maximum penalty of ministerial resignation, in situations where a bungle occurs in the department of real importance to Australia or a significant act or omission was theirs... or was a matter about which they obviously should have known and done something.²

6. Ministerial staff, an extension of the Minister, should also be seen as within the realm of the Minister's responsibility given that their role is to assist and support the Minister in overseeing the Department and ensuring that it implements government policy . A staffer is essentially a conduit between the Departmental Head and the Minister. If a staffer fails to inform or advise the Minister of certain information made available by the Department then the Minister is and must be responsible for the consequences.

7. Criticism of the Department of Transport and Communications is not a recent phenomenon when one looks at its history.

8. Former Prime Minister, Mr Gough Whitlam, told the inquiry that "the department concerned is the inheritor and the amalgamation of the two greatest disaster areas in federal administration in the 1980s. The Department, in both of its characters, the electronic media and transport, has clearly been staffed at crucial levels by incompetent persons." ³

1 Hamer: Senate Select Committee on matters arising from pay TV tendering process, 20 July 1993, p54

2 Page W: Ministerial Resignation and Individual Ministerial Responsibility in Australia 1976-1989, The Journal of Commonwealth and comparative Politics, July 1990, p143

3 Whitlam: Senate Select Committee on matters arising from pay TV tendering process, 20 July 1993, p22

9. In addition to this historical perspective on the Department there are more recent events which point to the need for caution. These include the rapid turnover of Ministers over the last two years, ever faster changes in technology, industry restructuring with the move from monopoly to competition and the previous record of the Department's administrative failures.

10. Given these problems the pay TV development was a minefield waiting for a disaster to happen. Senator Collins, therefore, should have exercised due care in the administration of his Department. Winston Churchill's quote "I did not know, I was not told, I should have asked" is very appropriate to these circumstances.

11. Bungles by Ministers in the past have been handled in different ways. History clearly shows that a Minister will rarely resign without first being pushed by the Prime Minister. A number of witnesses firmly held the belief that even though ministers are individually responsible for their actions, in practice these wrong doings are generally judged by the Prime Minister who will then determine what action should be taken against the Minister.

12. During the Committee hearings in Melbourne on 20 July 1993 a comparison was drawn between the resignation of Dr Jim Cairns from the ministry in 1975 and the events of the pay TV tendering process.

13. Dr Cairns had signed a document without understanding all of the implications of the measures in that document. The same can be said of Senator Collins in relation to the pay TV tendering processes. At least in 1975 the Prime Minister of the day understood that the Minister had failed in his responsibilities and the Prime Minister demanded a resignation.

14. Mr Wran and Mr Cain said that in practice Prime Ministers do not make such judgements based on the severity of the misconduct, or negligence of the minister but on how such actions are judged by the public and media. In other words if the government can no longer protect the Minister, or the public cannot condone the

Minister's actions to such an extent that the government itself loses credibility then the Prime Minister will no doubt be forced to ask for the Minister's resignation.

15. This view of ministerial resignation is succinctly summed up by Mr Wran when he said at the Committee

"The normal procedure for Ministers to resign is that the Prime Minister or the Premier tells them 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 and they either go, or as Sir Rupert says, they will be pushed."⁴

16. The view of Mr Wran and Mr Cain is supported by Prime Minister Keating:

"On both sides of politics, the question of ministerial resignation will be a matter of hard nosed judgement by the PM, taking into account whether or not the Minister was directly involved and, if not, whether the Minister should have been involved"⁵

17. Given the Government took so much pain in the Autumn sitting, to the extent that the Government's standing dropped in the polls, one would have thought that even by the Wran standard Senator Collins should have been dismissed.

18. It is curious that this didn't happen here as Senator Collins' handling of the pay TV issue dominated the May sittings of Parliament. Outside the Parliament an enormous amount of media attention was devoted to this issue. If the majority report is correct why has there been such an outcry from across the community at the handling of the satellite pay TV tendering process?

4 Wran: Senate Select Committee on matters arising from pay TV tendering process, 20 July 1993, p45

5 Dr Singleton: Senate Select Committee on matters arising from pay TV tendering processes, 21 July 1993, p100

19. Although history supports the fact that the dismissal or resignation of a Minister has been and still is primarily the responsibility of the Prime Minister it does not follow that such a decision should be made for purely political reasons.

20. The doctrine of ministerial responsibility is far too important to be treated just as a political exercise. A moral judgement, not just a political judgement should be fundamental to the Prime Minister in deciding on the punishment of the Minister. Responsibility to the Parliament and the people, and not just to the party, should be reflected in the Prime Minister's judgement and subsequent punishment of a Minister's misdemeanours. This means that the Prime Minister needs to assess the seriousness of a Minister's actions rather than what affect these actions will have on the Government's popularity.

21. Ministerial resignation should not be seen merely as a means to remove pressure from the government but as a measure dealt to the responsible Minister for failing the Prime Minister, Parliament and public.

REPORT ON SATELLITE PAY TV TENDERING PROCESS

22. In March 1992 the then Minister for Communications, Senator Richardson, travelled overseas for the purpose of informing himself as to the most appropriate method of conducting licence selection processes. Subsequently a memorandum from Ms Christine Goode, Deputy Secretary (Broadcasting) made it clear to the Minister that the trend around the world was to move away from comparative merit selection processes and to stipulate what the regulator expects from the service provider.

23. The recommendation was that a similar process for the sale of the satellite rights should involve tenderers being on notice that they would be subject to a pre-qualification process which would take into account the capacity of the tenderer and only those who passed the preselection screening would then be judged on price.

24. As the tender process for satellite pay television was a very important new initiative it is understandable that Senator Richardson appreciated the need to be fully informed on world's best practice. It also appears that officers of the department visited various regulators in other countries, including the UK Independent Television Commission where the requirement of a minimum deposit was canvassed.

25. In these circumstances it would be extraordinary that the March memorandum from Ms Goode to the Minister was not brought to the attention of Senator Collins shortly after he assumed portfolio responsibility in May 1992. It would also be very surprising if Senator Collins was not made fully aware of the importance of the possibilities. However no evidence has emerged to indicate that Senator Collins showed any more than a passing interest in the procedures to be followed.

26. In June 1992 the Federal Cabinet decided that pre-qualification criteria should be insisted upon and in the light of subsequent events this was clearly a very important political and policy decision and one which should have been the responsibility of the Minister and his ministerial advisers to follow through closely.

27. However it would seem that the matter was thereafter left entirely to Departmental Officers who then proceeded to seek advice from the Department of the Attorney-General as to the legality of a pre-selection process, particularly one which involved a series of five hurdles, one of which was: "capability: is the bidders business plan and financial plan sound?"

28. In due course, by letter dated 23 November 1992, advice was received by DOTAC from Peter Clay, consultant to the Office of General Counsel in the Attorney-General's Department that the hurdles could not be incorporated into a pre-qualification stage whereby some potential bidders are eliminated before their bids are assessed on a price basis.

29. This advice was indeed extraordinary having regard to the fact that such an approach had been adopted quite successfully in other countries and clearly is now recognised as one which would have made eminent good sense.

30. However it would seem that the Department did not advise the Minister of the advice which specifically rejected the request of the Cabinet and that neither the Minister nor his advisers took any interest in the matters or acquainted themselves with developments.

31. As a result the Ministerial determination which was ultimately forwarded to the Minister for signature did not contain any requirement for a pre-qualification stage.

32. Having regard to the fact that Senator Collins was by early 1993 a Senior Cabinet Minister with extensive Ministerial experience, and one who conceded an awareness of previous tender processes, particularly those in relation to the AM/FM conversion and the MDS licence approach, it is extraordinary that at no stage did he apparently turn his mind to how Cabinet's request could be facilitated. Indeed he seems to have been blissfully unaware, not only of any legal difficulties but of the absence of the critical requirement. Moreover he does not at any stage appear to have turned his mind to the requirement for a substantial deposit to be paid or to the appropriate means by which multiple bids lodged by speculators with no serious intent could have been avoided. It is clear that the requirement for a substantial up front deposit in respect of each application would have avoided most, if not all of the problems which have subsequently arisen.

33. Professor Pearce made no attempt to inquire why it was that the department did not bring the consequences of the Attorney-General's advice of 23 November to the attention of the Minister, particularly as the results that flowed meant that the Minister was being asked to sign a determination which was in clear breach of the express wishes of the Cabinet.

34. It is also extraordinary that there appear to be no minutes of the meetings attended by senior officers on 17 and 24 December 1992 when the draft determination was discussed and that Pearce has not even commented on such absence.

35. It seems clear that a meeting of senior officers was crucial in determining the price based allocation process yet no record was made of the meeting. In these circumstances it beggars belief that Professor Pearce is able to say in paragraph 20 of his report: "it is significant that this meeting did not discuss the possibility of a payment of deposit being an obligation on a tenderer". If this was in fact so then presumably such a decision was made at an earlier meeting. Departmental officers must have at some stage decided that the deposit requirement applicable to the MDS tender process should not apply in this instance yet Pearce does not even appear to have pursued this matter.

36. It is also verging on the unbelievable that Pearce was unable to identify the origin and status of a crucial document which included the statement that tenderers for a pay television licence "are not required to pay a deposit to enter the process". Evidence to the Committee that the document was prepared by a junior officer who has been overseas for more than six months and is not able to be presently located is also highly convenient given the fact that such absence has deprived the Committee of pursuing this vital issue.

37. Professor Pearce makes no criticism of the fact that despite the minute of 4 January being hand delivered to the Minister's office on the same day, it was not logged in the normal fashion and no record exists of it having been sent to the Minister's Darwin office. Nor is there any comment on why the final version of the determination was not forwarded to the Darwin office.

38. If these events are true then they suggest that the Minister's office was indeed a shambles for which he must accept clear responsibility.

39. Professor Pearce finds it surprising that senior officers asserted that the possibility of requiring a deposit was not discussed but says he has no basis for disbelieving them. He could certainly have made a judgement on balance of probabilities that such a contention was unlikely in the extreme, particularly given the existence of the vital document referred to in paragraph 21.

40. Pearce regards the failure to require a deposit as not constituting a change in departmental practice because there are only two instances where such practices had been followed. However this overlooks the fact that the most recent and relevant precedent was the MDS process where such a deposit had been required and Pearce ought to have at least explored why it was thought necessary or desirable to diverge from this approach.

41. Pearce simply notes that there were no discussions with the Minister or his advisers relating to the tender process to be included in the determination. He makes no adverse comment on what is obviously a deficiency in the chain of reporting and accepts the Minister's specious proposition that he wished to distance himself from any involvement in determining the tender process lest he be accused of favouring an existing party or existing media interest. Pearce seems oblivious to the fact that intervention to require a deposit could not in any circumstances be construed as favouritism.

42. The findings by Professor Pearce in relation to Term of Reference number 4 are a complete whitewash and heavily reflect the tenor of remarks made publicly by Senator Collins and presumably repeated in private to Professor Pearce. The statement that "the Minister signs a large number of documents of different kinds. He cannot be expected to peruse each of these closely" is pure Collins. This was not just another document but one which was setting off a new era in communications and broadcasting policy and was confidently expected to result in at least several hundred million dollars worth of revenue to the Commonwealth. Senator Collins cannot possibly be excused for treating this as just another document. To the extent that he was unaware of its significance he was guilty of a gross failure to exercise reasonable

care in not seeking advice from the Department or his ministerial advisers. The fact that it may have been during the Christmas vacation or that a Federal election was imminent is certainly no excuse given that he was prepared to sign the document without reading it thoroughly let alone comprehending its significance.

43. To suggest that a Minister is entitled to sign any document placed in front of him unless he is specifically advised not to do so is to treat the Minister as a mere servant of others and to completely ignore the fact that he has been appointed to high office specifically to accept responsibility and to bring to bear both political and policy judgements on important issues before signing what was clearly a non-routine document.

44. Professor Pearce said that in a perfect world the Minister's advisers would have brought the absence of deposit requirements to the Minister's attention. Why this should not also be expected in an imperfect world is quite unclear. This is clearly not a matter of process as Pearce contends but one of policy particularly having regard for the fact that Cabinet had specifically addressed the requirements of a price based allocation system and resolved to attach hurdles and these matters were ought, or to have been, known to both the Minister and his advisers.

45. Pearce implies that the Minister's advisers deserve criticism if the minute of January 4 was not placed before the Minister but then proceeds to excuse them on the basis that it is unlikely to have made any difference because the minute of 4 January was silent on the question of deposits. This totally ignores the fact that the recommendation contained in the minute was for the Minister to "note the processes involved" and was quite clearly requesting the Minister to turn his mind to the Cabinet decision and subsequent implementation.

46. Pearce notes that the Minister is strongly of the view that he has been ill served by his Department in its failure to advise him on the deposit aspect. This makes it clear that the Minister regards the matter as a policy rather than a process issue but Pearce seems oblivious to this fact, as well as to the clearly self serving nature of the

assertion designed as it is to divert attention from the obligation on any Minister to keep himself fully informed.

47. Pearce suggests that it is the role of departmental officers rather than ministerial advisers to bring matters of significance to the attention of the Minister. Gratuitous references to "the comparatively recent phenomenon of Ministers having advisers on their staff" suggests that advisers should bear no responsibility for a matter which Cabinet clearly regarded as a political/policy issue. This statement verges on the disingenuous as ministerial staffers have been around for number of years and are clearly well paid for the purpose of ensuring that the Minister is kept fully informed of the implications of all decisions taken by the Government and the Minister and particularly to ensure that all documents are put in context. The failure by the staff to advise the Minister of the significance of the Ministerial determination is apparent. The greater culpability must attach to the Minister for not seeking advice or having a reporting system in place which would have ensured that documents for signature were accompanied by adequate explanatory memoranda.

48. The end result of the Minister "being out to lunch" during the month of January and being pre-occupied by imminent electoral disaster clearly resulted in him having his eye off the ball for an extended period of time and indeed he has subsequently conceded as much to the committee. In these circumstances it is clear that the blame for the ongoing fiasco which has enveloped the satellite processes must be squarely attributable to the Minister and his priorities.

REPORT ON THE MDS TENDERING PROCESS

49. Professor Pearce's report finds that there were a number of significant shortcomings in the preparation of the Ministerial Determination and the invitation to tender but that the Minister received "adequate and timely" advice of the technical deficiencies.

50. Once again the picture is of a Minister operating in blissful ignorance of what is happening in the real world. The Department seems to have proceeded on a need to know basis which certainly did not include the Minister.

51. It is simply extraordinary that a ministerial adviser could be aware of technical deficiencies but not see the need to communicate the detail to the Minister in order to ensure that he is fully aware of potential difficulties which might arise. The apparent failure by Mr Bruce Meagher, senior ministerial adviser, to keep the Minister informed simply underlines the importance of Mr Meagher's evidence and the refusal by the Minister and the Government Members of this Committee to allow him to do so, simply heightens the concerns which must attach to the Minister's ignorance.

52. Had the Minister been made aware in early February of the very significant legal defects which by that stage had been identified, and then been prepared to take decisive action, the whole turn of events, and the approach taken by the Commonwealth in relation to the Perth Court proceedings, would have been different.

53. Early ministerial attention to the issue could have obviated the need for the court proceedings and avoided many of the difficulties which ultimately led to the announcement on 17 May that the Government proposed to abrogate the tender process and commence the procedures afresh.

54. Professor Pearce's report makes clear that the policy relating to the calling of tenders and more particularly the allocation of licences, was not committed to writing despite the fact that it had to be authorised by a ministerial determination.

55. Professor Pearce's report concentrates exclusively on departmental responsibility for this extraordinary state of affairs and pays no attention to the obvious vicarious responsibility of the Minister. If there was an administrative culture as identified by Professor Pearce whereby some officers held the view that where a contradiction existed between policy and the law the former should prevail, then it seems extraordinary that the Minister should have been oblivious to such an

approach. Indeed its continuing existence some nine months after the Minister had assumed responsibility for the portfolio could well give rise to the inference that he was at least a tacit supporter of such a view.

56. The failure of Bruce Meagher to bring to the attention of the Minister the departmental view of 2 February that the invitation to tender could be defective would again seem to suggest that the Minister's approach to such matters was such that he did not expect to be briefed on such matters. Once again this shows an extraordinarily cavalier approach toward obligations attaching to Ministerial office.

57. The calling of a Federal election on 7 February undoubtedly gave rise to certain conventions in relation to ministerial decision making but there would seem to be no good reason why the Minister should not have continued to take a direct interest in litigation involving the Commonwealth. It follows that the meeting held on 24 February involving the Secretary of DOTAC, Mr Graham Evans, the Deputy Secretary, Ms Christine Goode, and Assistant Secretary Legal and General Branch, Mr John Doherty, was of particular significance given that it had already been indicated that Senior Counsel retained for the Commonwealth Mr Dyson Heydon QC, was reluctant to argue on behalf of the Commonwealth that its own instrument was deficient.

58. The crucial question of the tactics to be adopted in the legal proceedings brought by Australian Capital Equity Pty Ltd was clearly one that involved obtaining instructions from the ultimate client in whose ample shoes the Minister squarely stood.

59. Yet the decision by the most senior officers of the department not to involve the Minister can only lead to the conclusion that they had formed the view that the practice of the Minister was such that he would not wish to be disturbed on this account. Either there was a serious dereliction of duty on the part of senior officers or they were simply acting in accordance with an approach already established by the Minister. The latter seems more likely and accordingly it is difficult to escape the conclusion that the Minister wished to concentrate on retaining his seat in the Parliament and neglected his ministerial responsibilities during this vital period.

FAILURE TO CALL WITNESS

60. At all material times Bruce Meagher was a senior policy adviser in the office of the Minister. His principal task was to keep the Minister informed of matters of relevance and to provide appropriate advice.

61. On 2 February he attended a meeting with officers from the Department of Transport and Communications and the Department of the Attorney-General to consider legal issues in anticipation of litigation. It was at this meeting that the matter of "technical deficiencies" was first raised and according to the finding of Professor Pearce from that date the Department was aware that the invitation to tender could be defective.

62. This knowledge was a critical factor in the approach to be taken in relation to litigation, particularly the action initiated by Australian Capital Equity Pty Ltd on 3 February when Mr Meagher attended a further meeting with DOTAC officers to discuss the Minister's general policy notification and direction to the Australian Broadcasting Authority on the use of MDS for pay television. There was brief discussion of the decision to revoke the MDS tender process.

63. It is therefore clear from Professor Pearce's report that Mr Meagher was possessed of critical information in relation to the conduct of the MDS process. Yet inexplicably, there is no indication that Mr Meagher, who appeared before Professor Pearce, was questioned about any information he conveyed to his Minister on this subject and indeed if he did not communicate any such information, why not?

64. Failure on the part of Mr Meagher to bring these critical legal and policy deficiencies to the attention of the Minister was a very serious matter which calls into question both Mr Meagher's professionalism and the nature and extent of his relationship to the Minister.

65. Clearly it would have been very important for Mr Meagher to attend the hearing of the Senate Select Committee and to give evidence as to why he did not communicate such matters to the Minister and indeed what instructions he was working to from the Minister.

66. The refusal of the Government members of the Committee to allow Mr Meagher to give evidence and the vigorous opposition to such a course from the Minister are matters which go to the heart of the powers of Senate Committees.

67. It was conceded by the Minister that there was no legal impediment to Mr Meagher giving evidence. The assertion by the Chairman that ministerial advisers should do so only in exceptional circumstances was not in accordance with any legal principle or rule of practice and was clearly designed to frustrate the calling of Mr Meagher and to provide a veneer of respectability to what can only be regarded as a blatant attempt to withhold critical evidence from the Committee and possibly to the heart of the matter under consideration.

68. It was not within the competence of the Minister to make judgements that Mr Meagher's involvement in the issues was "marginal". Nor was it appropriate for him to express subjective judgements that he or other departmental officers could respond on Mr Meagher's behalf. The fact that Mr Meagher had given evidence before Professor Pearce albeit in private, clearly indicates the weakness of the Minister's position and his dogged determination to ensure that direct evidence from Mr Meagher did not see the light of day is very disturbing and can only provide further confirmation of the importance of Mr Meagher's evidence.

CONCLUSION

69. The fundamental issues covered by this Select Committee came into sharp focus during the hearings of the Committee in Canberra when the Minister admitted his involvement and indeed his culpability when he said in the hearings "It is like an airline disaster... ..The reason you rarely have an airline disaster is that it is a collection

of a whole series of failures... ..The bureaucracy narrows down very quickly to a couple of people in the cockpit of the aircraft - if you like, my senior adviser, sitting in the seat next to me, and me as the captain of the aircraft, as the Minister, finally. When errors occur that combine failures on the ground, in the control tower, in the systems management and finally compounded in the cockpit, you get a disaster. I think the analogy is exact and I am part of that disaster." ⁶

70. The Minister is the vital link between the Cabinet and his Department and therefore has a duty of care to ensure that Cabinet decisions are carried out properly. This particularly applies at the interface between the Cabinet and the Department. If the Minister fails to understand what he is implementing through his and the Department's actions then, one wonders, what is the point of having a Minister? An automatic letter signing machine could do the job!

71. We have Ministers and we pay them large salaries because in a democracy they are expected to exercise critical judgements as part of a complex decision making process.

72. Prime Minister Keating should heed his own words and put moral and ethical judgement above politics. Senator Collins has made Australia an international laughing stock. Industries which should now be taking off are being forced to wait on the sidelines for the next monumental crisis. Moreover Senator Collins has not only proven incompetent in his dealings over the pay TV tendering but has tried to avoid ministerial responsibility by shifting the blame for this aspect of the process onto others.

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Deputy Chairman
Liberal Senator for New South Wales

Senator Richard Alston
Liberal Senator for Victoria

6 Collins: Senate Select Committee on matters arising from pay TV tendering process,
6 August 1993, p290