

EXTRACT FROM CABINET HANDBOOK, JUNE 1991

Caretaker Conventions

- 2.19 Successive governments have accepted that special arrangements apply in the period immediately before an election for the House of Representatives, in recognition of the considerations that:
- (a) with the dissolution of the House, there is no popular Chamber to which the executive government can be responsible; and
 - (b) every general election brings with it the possibility of a change of government.
- 2.20 Over recent years, practices have developed to remind Ministers and departments of the need to observe the conventions. As soon as a general election has been announced, and sometimes shortly before, a meeting of the Ministry notes a summary of the conventions which will apply from the dissolution of the House of Representatives. Where this has not occurred, the Prime Minister has written to Ministers concerning the conventions.
- 2.21 The formal period for which the caretaker conventions operate dates from the dissolution of the House of Representatives until the election result is clear or, in the event of a change of government, until the new government is appointed. However, it is also accepted that some care should be exercised in the period between the announcement of the election and the dissolution. There is no caretaker period for separate half Senate elections.
- 2.22 By convention, the Government ensures that decisions are not taken in this period which would bind an incoming government and limit its freedom of action. The basic caretaker conventions require a government to avoid implementing major policy initiatives, making appointments of significance or entering major contracts or undertakings during the caretaker period and to avoid involving departmental officers in election activities.
- 2.23 In relation to appointments, only those which it is essential to fill are proceeded with, and preferably on an acting or short-term basis unless a minimum or fixed term is prescribed. There is often consultation with the relevant Opposition Spokesperson, particularly where longer term appointments are necessary.
- 2.24 The basic conventions are directed to the taking of decisions, and not to their announcement. Accordingly, the conventions are not infringed where decisions taken before the caretaker period are announced during the caretaker period. However, it is desirable, if the decisions concern significant initiatives, that they be announced in advance of the caretaker period in order to avoid controversy. The caretaker conventions do not apply to new policy promises which a government may announce as part of its election campaign.
- 2.25 Ministry, Cabinet or Cabinet committees may meet in the caretaker period if this is necessary for the continuance of the normal business of government, but the range of matters which may be considered is constrained by the conventions. Normally efforts are made to clear necessary business prior to the caretaker period, thus avoiding the necessity for such meetings during the caretaker period.

- 2.26 There are other established practices, usually regarded as being part of the caretaker conventions, which govern activities in the election period. These are mainly directed at ensuring that departments avoid any partisanship in the special circumstances of an election campaign and that government resources are not directed to supporting a particular political party. They address matters such as the nature of requests that Ministers may make of their departments, procedures for consultation by the Opposition with departmental officers, travel by Ministers and their Opposition counterparts and the continuation of government advertising campaigns.
- 2.27 Adherence to the conventions and practices (which of course have no legal standing) is ultimately the responsibility of the Prime Minister. Where Ministers are in doubt about a particular matter, they raise it with the Prime Minister.
- 2.28 A summary of the caretaker conventions and the guidelines for pre-election consultation by the Opposition were incorporated in the *Senate Hansard* of 5 June 1987. An article providing more detail on the conventions and their background may be found in the *Annual Report of the Department of the Prime Minister and Cabinet, 1986-87*.

TABLED BY SENATOR EVANS
5 JUNE 1987

HANDLING OF GOVERNMENT BUSINESS DURING THE ELECTION
PERIOD

In a general sense, the business of government continues during the election period, and this applies to ordinary matters of administration.

The following is a summary of the caretaker conventions which apply:

- (a) following the dissolution the Government assumes a 'caretaker' role and by convention avoids
 - (i) taking major policy decisions likely to commit an incoming Government;
 - (ii) making appointments of significance;
 - (iii) entering major undertakings or contracts.
- (b) in the case of appointments of significance due to take effect after the date of dissolution, Ministers should:
 - (i) defer appointment; or
 - (ii) if an appointment needs to be made for continuity purposes, appoint for a short term only to carry through until after the election period; or,
 - (iii) if a short term appointment is not practicable, appoint for the full term following consultation with the relevant Opposition spokesperson.
- (c) in the period between the election announcement and the dissolution there may be some major initiatives or appointments of significance which Ministers judge should not proceed.
- (d) some Government advertising campaigns may need to be suspended or curtailed depending on the nature of the campaign.
- (e) consultation by the Opposition parties with departmental officers should be consistent with the attached guidelines which are substantially the same as those tabled in the House on 9 December 1976.
- (f) particular cases where Ministers may be in doubt on the application of the caretaker conventions would be raised with the Prime Minister.

Guidelines for Pre-election Consultation with Officials
by the Opposition

(i) The pre-election period is to date from three months prior to the expiry of the House of Representatives or the date of announcement of the House of Representatives election, whichever date comes first. It does not apply in respect of Senate elections only.

(ii) Under the special arrangement, shadow Ministers may be given approval to have discussions with appropriate officials of Government Departments. Party Leaders may have other Members of Parliament or their staff members present. A Departmental Secretary may have other officials present.

(iii) The procedure will be initiated by the relevant Opposition spokesperson making a request of the Minister concerned who is to notify the Prime Minister of the request and whether it has been agreed.

(iv) The discussions will be at the initiative of the non-Government parties, not officials. Officials will inform their Ministers when the discussions are taking place.

(v) Officials will not be authorised to discuss Government policies or to give opinions on matters of a party political nature. The subject matter of the discussions would relate to the machinery of government and administration. The discussions may include the administrative and technical practicalities and procedures involved in implementation of policies proposed by the non-Government parties. If the Opposition representatives raised matters which, in the judgement of the officials, sought information on Government policies or sought expressions of opinion on alternative policies, the officials would suggest that the matter be raised with the Minister.

(vi) The detailed substance of the discussions will be confidential but Ministers will be entitled to seek from officials general information on whether the discussions kept within the agreed purposes.



AUSTRALIAN SENATE
CANBERRA, A.C.T.

SELECT COMMITTEE ON MATTERS ARISING
FROM PAY TELEVISION TENDERING PROCESSES

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600
TEL: (06) 277 3570
FAX: (06) 277 3899

**ISSUES FOR CONSIDERATION:
SATELLITE AND MDS TENDERING PROCESSES**

A. The Satellite Tender

1. Why did the Determination (BSST 1/93 dated 19 January 1993 as set in Appendix 2 of Pearce Report 1) not contain a requirement for an up-front non-refundable deposit?
2. Why were sufficient steps not taken to ensure the ultimate tender process was in accordance with the relevant Cabinet decision, which sought a threshold requirement for a financial and business plan as part of the price-based plan?

B. The MDS Tender

3. What were the inputs into the paper which the Minister took to Cabinet in relation to the capacity of MDS, which was subsequently described by the Prime Minister as "notoriously misleading"?
4. Why did the Minister abort the licence tender process and was he justified?
5. At what stage and in what circumstances did the Minister become aware of alleged technical deficiencies in the MDS tender process? (Caretaker convention aspects included).



Minute

Our reference

March 1992

D

MINISTER FOR TRANSPORT AND COMMUNICATIONS

PAY TV : SELECTION PROCESS

BACKGROUND

Cabinet decided last year that the Pay TV licence would be sold by a price-based competitive tender process

- the intention was to stipulate the regulatory requirements as conditions, prior to calling of tenders.

During our overseas visit, you expressed concern that a purely price-based process may not deliver the best outcome for Australia and that a degree of qualitative assessment may be necessary.

COMMENT

You saw overseas the difficulties presented to regulators by the conduct of a comparative merit selection process. The trend around the world is to move away from these by stipulating what the regulator expects from the service provider, providing the penalties for non-compliance and then allocating licences on the basis of price.

In Australia, there is a range of vested interests that would seek to delay the commencement of Pay services and others who may wish to contest any decisions made. If the comparative merit process is undertaken, there is also a capacity for accusations of favouritism or unfair processes. Nonetheless, we would not like to see an outcome whereby the highest price won the licence but the winner was unable to deliver the licence conditions.

In other industries, it is not unusual for tenders to be called for a project and a "due diligence" examination of the tenderers' capacity to deliver on the contract being undertaken before awarding of the contract on price. This is, in fact, common practice in the Australian Public Service and is used often by State Road Authorities when letting major construction contracts.

We therefore propose a similar process for the sale of the satellite right wherein:

- you will pre-determine the Government's requirements for Australian content; cross-media and foreign ownership; industry development; period of exclusivity; conditions of related services etc
- tenders will be called when the legislation is passed through both Houses of Parliament
 - : if it is delayed beyond the current sitting, you may choose to go out to a qualified tender pending passage of the legislation
- tenderers will be on notice that they will be subject to a pre-qualification process wherein we will examine their proposals and seek "specialist" merchant bank, etc, advice on their capacity to deliver, and
- for those that pass the pre-qualification screening, decisions will then be taken on price.

RECOMMENDATION

That you agree to the selection process outlined above.

CHRISTINE GOODE
Deputy Secretary
(Broadcasting)

PAY TV LICENCE REQUIREMENTS

Caucus asked for further work on the issue of Australian content and a description of how the proposed selection process would work. The following are prequalifications for bidders for the Pay TV licence. When the sales team is satisfied the criteria has been met, money bids would be considered and the licence awarded to the winner.

Price-Based Pay TV Selection Process

The Request for Tender (RFT) will have to set out clearly the conditions which the Government has decided on for Pay TV in Australia, and the regulatory framework within which it will operate. This framework is to be given effect in the new Broadcasting Services Act, where the sections dealing with subscription television services, both satellite and non-satellite, are likely to be of particular interest to bidders.

The RFT must also set out the information which bidders are expected to provide, and how the selection process will be conducted, ie, what are the significant hurdles/criteria. The likelihood of legal challenge on the Government's final decision can be minimised if there are some objective tests to be passed, and a clear basis on which the final decision will be made. The more subjective are the judgements involved, the more likely the process is to be challenged.

Submission of Proposals

Bidders will be asked to provide submissions covering:

- (a) details of participants in their consortium/company;
- (b) details of equity structure in relation to foreign equity, Australian commercial TV licensee equity, national broadcaster equity, telecommunications carrier equity and large newspaper equity;
- (c) arrangements proposed for manufacture of satellite reception equipment (dishes, low noise converters, receiver/decoders;
- (d) details of the services to be provided and how much may be Australian; and
- (e) business plan (including strategy for attracting subscribers and financial plan).

Shortlisting: Assessment Against Hurdles

This phase of the selection is where bidders are assessed against hurdles or key requirements. It can be described as the pre-qualification stage, before those assessed to have satisfied the hurdles go on to bid on price.

The hurdles are:

- (a) **Ownership**: Does the bidder's equity structure meet all
Cabinet-in-Confidence

the limits which the Government has set?

- (b) Capability: Is the bidder's business plan and financial plan sound?
- (c) Australian Content: Do the bidder's program proposals demonstrate that the Australian content requirement would be met?
- (d) Industry Development (see draft criteria at ATTACHMENT B)
 - (i) Does the bidder propose manufacture in Australia of reception equipment or to make it available for manufacture under licence?
 - (ii) Will the transmission and encryption system proposed allow other subscription service providers access to the same equipment?
 - (iii) Has the bidder proposed commercial relationships for the domestic manufacture of reception dishes?
- (e) Understanding of Other Conditions: Is it clear that the bidder understands the anti-siphoning rules, the ban on advertising as a source of revenue and any other conditions?

The Government will not be deciding what programs the Pay TV licensee must offer, nor what specific delivery strategy the licensee must use for attracting subscribers. It is critical to the commercial success of the venture that the licensee be able to exercise commercial judgement on these issues.

Thus the selection process should check that hurdles will be met, but not go further than that into second-guessing commercial decisions. One might thus see several consortia satisfying the hurdles, but having different program mixes, different business strategies and different manufacturing and other industry development arrangements. The several who do satisfy the hurdles would move into the final selection phase .

Final Selection

The final selection would be on the basis of the price which is bid.

Cross media limits

A commercial TV broadcasting licensee must not own more than 20% of a satellite subscription TV licence.

A national broadcaster (ABC or SBS) must not own more than 20% of a satellite subscription TV licence.

Commercial TV broadcasting licensee and national broadcasters must not own in aggregate more than 35% of a satellite subscription TV licence.

An owner of a newspaper with a daily circulation exceeding 100,000 must not own more than 20% of a satellite subscription TV licence.

All newspaper owners with a daily circulation exceeding 100,000 must not own in aggregate more than 35% of a satellite subscription TV licence.

Vertical integration

A general telecommunications carrier or a public mobile licence holder must not own more than 20% of a satellite subscription TV licence.

All telecommunications carriers and public mobile licence holders must not own in aggregate more than 35% of a satellite subscription TV licence.

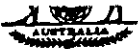
Foreign Ownership

A foreign person must not own more than 20% of a satellite subscription TV licence.

All foreign persons must not own in aggregate more than 35% of a satellite subscription TV licence.

Australian Program Content

The four transponder licence holder be required to spend at least 10% of the annual programming expenditure incurred in providing all predominantly drama channels on new Australian drama programs and that this minimum required level of expenditure be reviewed by the proposed Australian Broadcasting Authority in 1997 in conjunction with a wider review of commercial television. Further background on this approach, including a definition of 'Australian drama program', is at ATTACHMENT A.



Our Reference:

Your Reference:

Contact:

The Secretary
Attorney General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Attention: Mr Robert Orr
Deputy General Counsel
Office of General Counsel

**PRICE-BASED ALLOCATION SYSTEM FOR ALLOCATING SUBSCRIPTION
BROADCASTING TELEVISION LICENCES**

The Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992, which is currently before the Senate, contains amendments to the Broadcasting Services Act 1992 (the BSA) to insert a new Part 7 which provides for subscription television broadcasting services.

2. Proposed subsection 93(1) of the BSA will require the Minister to determine a price-based allocation system for allocating 2 licences, each for the provision of up to 4 satellite subscription television broadcasting services.

3. At Attachment A is a proposal for a price-based selection process which has previously been brought to the attention of the Government. Paragraphs 4 to 7 of Attachment A provide that as part of the selection process, there would be 5 hurdles which applicants would need to satisfy before moving into the final selection phase where selection would be on the basis of the price which is bid.

x 4. A query has ^{is viable} been raised as to whether an applicant who was removed from the selection process because the applicant ~~did not propose~~ to comply with one of the hurdles listed in paragraph 5 of Attachment A could take legal action to invalidate the process on the basis that it is not a 'price-based allocation system' within the meaning of that term as used in new subsection 93(1). Your advice is sought on the following questions:

- (1) Would a selection process based on the proposal in Attachment A be a price-based allocation system within the meaning of new subsection 93(1)?

- (2) If the selection process is a price-based allocation system, is there sufficient doubt on the matter to mean that there is a significant risk that the allocation process could be delayed by an applicant taking legal action upon being excluded from consideration for a non-price reason?
- (3) If the selection process is not a price-based allocation system, is there a way of building the hurdles into the selection process in such a way that the system remains 'price-based'?

5. In relation to the last question, note that proposed subsection 98(1) of the BSA provides that a company is a suitable applicant for a subscription television broadcasting licence if the ABA has not decided that proposed subsection 98(2) applies to the person. Subsection 98(2) enables the ABA to decide that the subsection applies to a person if it is satisfied that allocating a subscription television broadcasting licence to a particular company would lead to a significant risk of an offence against the Act or the regulations being committed or a breach of the licence conditions occurring.

6. Proposed subsection 93(6) of the BSA requires the ABA, subject to proposed section 98, to allocate a licence to a person that the Minister directs where the Minister has decided to allocate the licence to the person in accordance with the price-based allocation system. Proposed subsection 95(1) prevents a subscription television broadcasting licence being allocated to an applicant if the applicant is not an Australian company or the ABA decides that new subsection 98(2) applies to the applicant.

7. Elements of a possible alternative price-based allocation system are set out in Attachment B to this memorandum. However, we have several questions in relation to the alternative proposal.

- (4) Should the setting of non-price hurdles in the allocation system result in that system not being 'price-based', could the request for tenders still require applications from bidders to give details of the ownership and control structure of the applicant company and the applicant's proposed industry plan?

8. In relation to this question, it is envisaged that applicants' tenders will be examined by the Selection Team. Where there are potential problems with a proposal because it may not comply with requirements of the ownership and control rules in Division 3 of Part 7, the applicant will be informed of the problems and asked to address those issues. Applicants will have been carefully notified in the request for tender of the need to comply with the special condition relating to Australian content in new section 102, the condition about industry development to be imposed in accordance with a direction under subsection

100(4), anti-siphoning rules in clause 10(1)(e) of Schedule 2 and the special condition about advertising in new section 101). The allocation decision will be based on price alone. However, where the Minister is concerned about the suitability of the highest bidder (including compliance with the ownership and control limits), the Minister could direct the ABA to allocate the licence to the person, but at the same time draw the concerns to the attention of the ABA for the purpose of section 98.

9. One possibility under consideration is for the applicant who is eventually chosen for a licence, to have the industry plan put forward in the application imposed as a licence condition under subsection 100(2) in accordance with a direction under subsection 100(4). An implication of this approach, however, is that different applicants, in calculating the amount of their bids, will do so on the basis of their own industry plan, which may be more or less onerous than the proposed plan of another applicant. It is intended that applicants will discuss their proposed industry plans with DITAC and the Selection Team before they put forward their bids.

(5) Would the price-based allocation system be able to permit different industry plans for different applicants without leaving a serious opening for legal challenge?

10. Your advice is sought on the above questions as a matter of urgency. The Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992 is currently due to be debated in the Senate on 24 November and a Caucus Committee meeting which is expected to canvass some of these issues may be held on the evening of Monday, 23 November. It will be necessary to brief the Minister on these matters before that meeting is held.

11. The contact officers in relation to this matter are myself, on tel. 274 8178 and Graeme King on tel. 2746641.



Rohan Buettel
Director
Communications Legal Group
Legal and General Branch

10 November 1992

PRICE-BASED PAY TV SELECTION PROCESS

1. The Request for Tender (RFT) will have to set out clearly the conditions which the Government has decided on for Pay TV in Australia, and the regulatory framework within which it will operate. This framework is to be given effect in the new Broadcasting Services Act, where the sections dealing with subscription television services, both satellite and non-satellite, are likely to be of particular interest to bidders.
2. The RFT must also set out the information which bidders are expected to provide; and how the selection process will be conducted, ie, what are the significant hurdles/criteria. The likelihood of legal challenge on the Government's final decision can be minimised if there are some objective tests to be passed, and a clear basis on which the final decision will be made. The more subjective are the judgements involved, the more likely the process is to be challenged.

Submission of Proposals

3. Bidders will be asked to provide submissions covering:
 - (a) details of participants in their consortium/company;
 - (b) details of equity structure in relation to foreign equity, Australian commercial TV licensee equity, national broadcaster equity, telecommunications carrier equity and large newspaper equity;
 - (c) arrangements proposed for manufacture of satellite reception equipment (dishes, low noise converters, receiver/decoders;
 - (d) details of the programs to be provided; and
 - (e) business plan (including strategy for attracting subscribers and financial plan).

Shortlisting: Assessment Against Hurdles

4. This phase of the selection is where bidders are assessed against hurdles or key requirements. It can be described as the pre-qualification stage, before those assessed to have satisfied the hurdles go on to bid on price.
5. The hurdles are:
 - (a) Ownership: Does the bidder's equity structure meet all the limits which the Government has set?

- (b) Capability: Is the bidder's business plan and financial plan sound?
- (c) Australian Content: Do the bidder's program proposals demonstrate that the Australian content requirement would be met?
- (d) Industry Development (see draft criteria at ATTACHMENT I)
 - (i) Does the bidder propose manufacture in Australia of reception equipment or to make it available for manufacture under licence?
 - (ii) Will the transmission and encryption system proposed allow other subscription service providers access to the same equipment?
 - (iii) Has the bidder proposed commercial relationships for the domestic manufacture of reception dishes?
- (e) Understanding of Other Conditions: Is it clear that the bidder understands the anti-siphoning rules and the ban on advertising as a source of revenue?

6. The Government will not be deciding what programs the Pay TV licensee must offer, nor what specific delivery strategy the licensee must use for attracting subscribers. It is critical to the commercial success of the venture that the licensee be able to exercise commercial judgement on these issues.

7. Thus the selection process should check that hurdles will be met, but not go further than that into second-guessing commercial decisions. One might thus see several consortia satisfying the hurdles, but having different program mixes, different business strategies and different manufacturing and other industry development arrangements. The several who do satisfy the hurdles would move into the final selection phase
Final Selection

8. The final selection would be on the basis of the price which is bid.

Elements of an Alternative Price-Based Allocation System

- . the request for tender clearly sets out the requirements of the Act and the conditions imposed on the licence by the Act (eg. foreign ownership and cross-media ownership rules), including the proposed use of a direction under proposed subsection 100(4);
- . the request for tender will require submissions from bidders to give details of the ownership and control structure of the applicant company and the applicant's proposed industry plan;
- . the Applicants' submissions will be examined by the Selection Team;
- . where there are potential problems with a proposal because it may not comply with the requirements of the ownership and control rules in Division 3 of Part 7, the applicant will be informed of the problems, asked to address those issues and advised that if not addressed, they will be brought to the attention of the ABA if the applicant puts in the highest bid;
- . the allocation decision will be based on price alone;
- . where the Minister is concerned about the suitability of the highest bidder, the Minister will direct the ABA to allocate the licence to the person, but will draw the concerns to the attention of the ABA for the purpose of section 98;
- . the licence must be allocated by the ABA within 1 month of being directed by the Minister, unless the ABA is considering whether subsection 98(2) applies to the applicant, in which case the licence must be allocated to the person within one month of the ABA deciding that subsection 98(2) does not apply to the person;
- . the price is payable in full before the allocation of the licence;
- . where:
 - the ABA considers that subsection 98(2) applies to the applicant; or
 - the applicant does not pay the price on or before the due date;

the ABA must inform the Minister and the Minister must direct the ABA to grant the licence to the applicant who bid the next highest price;

- . the preceding 4 dot points apply to any further direction to an applicant because of the operation of the immediately preceding dot point.



Office of General Counsel

OGC92460730

23 November 1992

Mr Rohan Buettel
Director
Communications Legal Group
Legal and General Branch
Department of Transport and Communications
GPO Box 594
CANBERRA ACT 2601

Dear Mr Buettel

BROADCASTING SERVICES ACT 1992 ('THE ACT'); BROADCASTING SERVICES (SUBSCRIPTION TELEVISION BROADCASTING) AMENDMENT BILL 1992 ('THE BILL') - PRICE-BASED ALLOCATION SYSTEM FOR SUBSCRIPTION BROADCASTING TELEVISION LICENCES

I refer to your memorandum of 20 November 1992 and my telephone conversations with you on that day. You seek advice on two proposals for allocating licences A and B for subscription broadcasting services under proposed s.93(1) of the Act as proposed to be inserted by s.3 of the Bill. You say that the Bill is to be debated in the Senate on 24 November 1992 and will probably be considered at a Caucus Committee meeting on the evening of Monday, 23 November 1992.

Legislation

2. The Bill will insert a new 'Part 7 - Subscription Television Broadcasting Services' into the Act. The proposed sections which are principally relevant are s.93(1), (5), (6), 95(1) and 98(1) which are set out below.

'93. (1) The Minister is to determine in writing a price-based allocation system for allocating 2 licences ('Licence A' and 'Licence B') each of which allows the provision of up to 4 subscription television broadcasting services with the use of a subscription television satellite.

(5) The price-based allocation system may provide that the ABA is to allocate the licences, and may require an application fee.

(6) If the Minister decides, in accordance with the price-based allocation system, that a licence referred to in subsection (1) is to be allocated to a particular person, the

Central Office

Minister may direct the ABA to allocate that licence to that person and, subject to section 98, the ABA must allocate that licence to that person.

...

95. (1) A subscription television broadcasting licence is not to be allocated to an applicant if:

- (a) the applicant is not a company that is formed in Australia or in an external Territory and has a share capital; or
- (b) the ABA decides that subsection 98(2) applies to the applicant.

...

98. (1) For the purposes of this Part, a company is a suitable subscription television broadcasting licensee, or a suitable applicant for a subscription television broadcasting licence if the ABA has not decided that subsection (2) applies to the person.

The Proposals

3. Proposal A, which is the preferred option, provides that as part of the selection process there would be five 'hurdles' which applicants would need to satisfy before moving into the final selection phase where selection would be on the basis of the price which is bid. That part of the selection process is described as 'the pre-qualification stage, before those assessed to have satisfied the hurdles go on to bid on price'.

4. The five hurdles are:

- (a) *Ownership*: Does the bidder's equity structure meet all the limits which the Government has set?
- (b) *Capability*: Is the bidder's business plan and financial plan sound?
- (c) *Australian Content*: Do the bidder's program proposals demonstrate that the Australian content requirement would be met?
- (d) *Industry Development*:
 - (i) Does the bidder propose manufacture in Australia of reception equipment or to make it available for manufacture under licence?
 - (ii) Will transmission and encryption systems proposed allow other subscription service providers access to the same equipment?
 - (iii) Has the bidder proposed commercial relationships for the domestic manufacture of reception dishes?
- (e) *Understanding of Other Conditions*: Is it clear that the bidder understands the anti-siphoning rules and the ban on advertising as a source of revenue?

5. Proposal B is attached to this letter.

23 November 1992

Proposal A

6. Your questions and my short answers are:

(1) Q. Would a selection process based on the proposal be a price-based allocation system within proposed s.93(1)?

A. In my view, no.

(2) Q. If the selection process is a price-based allocation system, is there sufficient doubt on the matter to mean that there is a significant risk that the allocation process would be delayed by an applicant taking legal action upon being excluded from consideration for a non-price reason?

A. Yes.

(3) Q. If the selection process is not a price-based allocation system, is there a way of building the hurdles into the selection process in such a way that the system remains price-based?

A. I do not consider that the hurdles can be incorporated into a pre-qualification stage whereby some potential bidders are eliminated before their bids are assessed on a price basis.

Reasons

7. I do not consider that a price-based system for allocating licences necessarily implies that the decision will only be made on the basis that the highest tenderer will automatically be allocated a licence. A system of allocation could properly be described as 'price-based' if the basis of allocation were price even though other considerations were taken into account. I note that the term is undefined in the Act and that commercial television and broadcasting licences are also allocated on a price-based system - see ss.36 and 41 of the Act which are similar to proposed ss.93 and 98.

8. The major difficulty with Proposal A is that proposed s.98(1) will be an expression of legislative intention that unless the Australian Broadcasting Authority ('ABA') is satisfied pursuant to subsection (2) that there is a significant risk of an offence against the Act or the Regulations being committed or a breach of a condition of the licence occurring a company is to be regarded as a suitable applicant for a subscription licence. Under Proposal A some potential bidders might be removed from the selection process before the ABA considered their suitability in terms of proposed s.98(2). The function given by the legislature to the ABA would be given to those involved in the shortlisting process. Although proposed s.93(1) will give to the Minister considerable flexibility in determining the basis for allocation of licences the Minister could not, in my view, validly determine a system which might prevent the ABA from performing the role assigned to it by the legislature under s.98.

9. I should add that while most of the five hurdles bear some relationship to the legislative requirements for the suitability of applicants hurdle (b) does not appear to be a matter which the legislature will have indicated as a relevant factor in assessing suitability. While the past business record of an applicant and those associated with it (see proposed

23 November 1992

s.98(3)) will be relevant to the ABA's assessment of suitability I doubt whether the soundness of a bidder's business or financial plans is a relevant factor for that purpose.

Option B

10. In my view the Minister could determine a price-based allocation system under proposed s.93(1) along the lines envisaged in the attachment. Under this option none of the applicants will be eliminated from the tendering process before their tenders are evaluated on the basis of price. I see no reason why the Minister should not bring relevant factors to the attention of the ABA so that it may discharge its functions under the proposed s.98(2).

11. I consider that a requirement that the applicant pay the price in full before allocation of the licence could validly be imposed by determination under proposed s.93(1) as part of a price-based allocation system. The time at which the price is to be paid as well as the amount of the price is a relevant factor. However, I doubt whether the Minister could, under proposed s.93(1), impose on the ABA a requirement to allocate licences within a particular period and I suggest that the seventh dot point be omitted. There are no doubt other processes available to the Minister to ensure that the ABA deals promptly with applications for licences under proposed Part 7 of the Act.

12. Your specific questions on Option B and my answers thereto are:

(4) Q. Should the setting of non-price hurdles in the allocation system result in that system not being 'price-based' could the request for tenders still require applications from bidders to give details of the ownership and control structure of the applicant company and the applicant's proposed industry plan?

A. Yes. You say that it is envisaged that applicants' tenders will be examined by the selection team. Where there are potential problems with a proposal because it may not comply with requirements of the ownership and control rules in Division 3 of proposed Part 7 the applicant will be informed of the problems and asked to address these issues. Applicants will have been carefully notified in the request for tender of the need to comply with the special condition relating to Australian content in proposed s.102, the condition about industry development to be imposed in accordance with a direction under proposed s.100(4), anti-siphoning rules in clause 10(1)(e) of Schedule 2 and the special condition about advertising in proposed s.101. The allocation decision will be based on price alone but the Minister could direct the ABA to allocate the licence to the person and at the same time draw his concerns to the attention of the ABA for the purpose of s.98. I see no problems with these proposals.

(5) Q. Would the price-based allocation system be able to permit different industry plans for different applicants without leaving a serious opening for legal challenge?

A. In my view, yes.

13. You say that one possibility under consideration is that the applicant who is eventually chosen for a licence, would have the industry plan put forward in its application imposed as a licence condition under proposed s.100(2) in accordance with a direction

under proposed s.100(4). An implication of this approach, however, is that different applicants, in calculating the amount of their bids, will do so on the basis of their own industry plan, which may be more or less onerous than the proposed plan of another applicant. It is intended that applicants will discuss their proposed industry plan with the Department and the selection team before they put forward their bids.

14. Provided the industry plan can be described as a 'code of practice' the licensee could be required to comply with the plan if the ABA imposed a condition under proposed s.100(2)(a). In my view a system which allowed consideration of different industry plans from different applicants in assessing their tenders could still properly be regarded as a price-based allocation system. As indicated earlier I do not consider that a price-based allocation system necessarily involves acceptance of the highest tender irrespective of all other considerations.

Yours sincerely



Peter Clay
Consultant

Telephone: 250 6268
Facsimile: 250 5915

ATTACHMENT 3

Elements of an Alternative Price-Based Allocation System

- the request for tender clearly sets out the requirements of the Act and the conditions imposed on the licence by the Act (eg. foreign ownership and cross-media ownership rules), including the proposed use of a direction under proposed subsection 100(4);
 - the request for tender will require submissions from bidders to give details of the ownership and control structure of the applicant company and the applicant's proposed industry plan;
 - the Applicants' submissions will be examined by the Selection Team;
 - where there are potential problems with a proposal because it may not comply with the requirements of the ownership and control rules in Division 1 of Part 7, the applicant will be informed of the problems, asked to address those issues and advised that if not addressed, they will be brought to the attention of the ARA if the applicant puts in the highest bid;
 - the allocation decision will be based on price alone;
 - where the Minister is concerned about the suitability of the highest bidder, the Minister will direct the ARA to allocate the licence to the person, but will draw the concerns to the attention of the ARA for the purpose of section 98;
 - the licence must be allocated by the ARA within 1 month of being directed by the Minister, unless the ARA is considering whether subsection 98(2) applies to the applicant, in which case the licence must be allocated to the person within one month of the ARA deciding that subsection 98(2) does not apply to the person;
 - the price is payable in full before the allocation of the licence;
 - where:
 - the ARA considers that subsection 98(2) applies to the applicant; or
 - the applicant does not pay the price on or before the due date;
- the ARA must inform the Minister and the Minister must direct the ARA to grant the licence to the applicant who bid the next highest price;

9 December 1992

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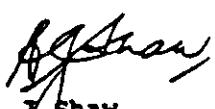
Michael Crawford
Senior Adviser

CAUCUS PAPER ON INDUSTRY OPPORTUNITIES FROM PAY TV

Attached is a revised draft of the abovementioned paper. I have simultaneously provided a copy to DITAC (Ashley Cross) for comment).

DITAC have now come back with comments on the draft Cabinet Submission and I will revise it with a view to having a copy to you later today.

PM&C (Peter Thomas) are concerned about the Cabinet list for next week and rang to discuss the implications of deferring the Submission on industry plans until 19 January. Deferral would result in release of the information paper being delayed from early January until end January, which would mean that licences would not be issued until mid April at the earliest. It is clearly highly desirable to resolve the outstanding Pay TV matters as soon as possible and get the process moving before there is any opportunity for the regime to unravel.


A J Shaw
First Assistant Secretary
Broadcasting Policy Division

Cabinet-In-Confidence

INDUSTRY OPPORTUNITIES FROM PAY TV

INTRODUCTION

The introduction of Pay TV offers opportunities for Australian industry. It is important that these opportunities are realised.

Key areas where Australian industry will benefit are in the subscriber management systems, installation and servicing, program production, retailing the manufacture of reception equipment.

The legislation for Pay TV ensures Australian industry participation in this new industry through a number of arrangements:

- . The Minister may direct the ABA to impose a condition designed to ensure that licensee A, licensee B and licensee C adequately involve Australian industry in the provision of services under those licences (s.100(4)).
- . The standard for the full digital transmission system must employ reception equipment that is capable of being manufactured in Australia, whether under licence or otherwise (s.94(5)).
- . Each subscription television broadcasting licensee is subject to the condition that, if the licence provides a service devoted predominantly to drama programs, the licensee will, for each year of operation, ensure that at least 10% of the licensee's program expenditure for that year in relation to that service is spent on new Australian drama programs (s.102)).
- . The decision to make Australia the first country to mandate the use of a digital system (s.92(3)) will give local manufacture the best chance to develop options in both the local and export markets.
- . Fragmentation of the local satellite Pay TV reception equipment market will be avoided through the establishment of a common infrastructure and the licence condition requiring that customer receivers must be accessible to other satellite broadcasters (s.100(3)(b)). The requirement that a satellite Pay TV provider must allow access to its subscriber management system at a fair price (s.100(3)(b)) is also relevant here.

The remaining issue to settle prior to the sale of licences A and B by a price based process (as provided for in s.93)

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is the form of the condition on them designed to ensure they adequately involve Australian industry.

As a matter of policy, all bidders for licences A and B should be expected to commit to involving Australian industry. This should include commercial relationships, research and development and export plans. However, all bidders will not be able to offer exactly the same commitments because of their own particular strengths given the structure of their consortium and linkages with industry. Therefore, it is necessary to provide scope for different licence conditions to be placed on bidders that build on a bidder's individual strengths. This is the most practical way of gaining the best possible advantage for Australian industry.

Licence C, which will be issued to the ABC, is not formally a party to the establishment of the full digital transmission standard. Therefore, an industry plan for this licensee can only be developed after the standard is set and prior to the commencement of the service.

The content of the industry plan for licensee C will largely depend on any commercial arrangements made between licensee C and A and/or B. For example, should C enter into an arrangement with A to provide a fully integrated 6 channel service, there would be a case for the industry plan set as a licence condition on A to be also set for C.

This paper provides information about the opportunities available for Australian industry and how the industry plan licence condition would be handled in the sale process for A and B.

SALE PROCESS FOR LICENCES A AND B

The legislation provides that the sale process will be price-based. A price-based process requires that price is the only factor that can be used to decide between bidders.

The information paper for potential bidders will make it clear that:

- the legislation sets out ownership and control rules with serious penalties possible if the limits are breached;
- there are already a number of provisions in the Act designed to ensure Australian participation in the new industry through manufacturing, production, etc in addition to ownership of the service licences;
- the licence conditions already specified in the Broadcasting Services Act and others to be imposed by the ABA must be complied with and, again, are backed by serious penalties.

The price-based process cannot involve comparative assessment of individual bidders. However, bidders will be required to provide an industry plan which covers commitment to Australian industry involvement (including proposed commercial relationships, R&D and export plans). They will be told that the intention is to impose compliance with an industry plan as a licence condition and that their submitted plan could form the basis for the condition (s.100(4)).

To ensure that the Government's intentions for Australian industry involvement are met, bidders will be asked to develop their industry plan in consultation with the Carrier Selection Team (CST) prior to lodgement of tenders. Officers from the Department of Industry, Technology and Commerce will be seconded to the CST to assist in this process. The plans will then be set as a licence condition.

As a safeguard, if bidders do not develop an industry plan prior to lodgement of tenders, or a plan is assessed as inadequate, the Minister for Transport and Communications, in consultation with the Minister for Industry, Technology and Commerce, would impose an industry plan to meet the Government's objectives as a licence condition.

As the industry plan will be set as a licence condition under the Broadcasting Services Act 1992, the Australian Broadcasting Authority will be the body legally responsible for ensuring that the conditions are met. If the conditions are not met the full force of the ABA's powers could be brought to bear. The best way to ensure that the industry plan is being adhered to is for that plan to

include a requirement that the licensee will provide annual reports to both the ABA and the Department of Industry, Technology and Commerce. The complaints mechanism in the Act can be used by the Department of Industry, Technology and Commerce (or Australian industry) to formally complain to the ABA if a licensee appears to be breaching a licence condition. Provided that the complaint is not frivolous or vexatious, the ABA must investigate it (s.149).

As discussed previously, the final nature of Australian industry involvement cannot be determined until the technology is developed and available for commercial manufacture. Nevertheless, for a bidder's industry plan to be acceptable it will have to provide a commitment to Australian industry through aspects such as: strategic plans; proposed sourcing of equipment; proposed R&D activities; promotion of exports of equipment or services which incorporate local design, development and/or production; and the linking of their Pay TV operation with activities elsewhere through joint ventures, licensing arrangements and export arrangements (including strategic alliances).