THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

# SENATE SELECT COMMITTEE ON MATTERS ARISING FROM PAY TELEVISION TENDERING PROCESSES

FIRST REPORT

TERMS OF REFERENCE PART (1) (a)

SEPTEMBER 1993

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## 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

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## 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.

Background to the inquiry

1.2 The tender process for satellite pay-TV licences which resulted in the announcement on 30 April 1993 of the highest bidders, became the subject of significant parliamentary and media criticism during May 1993. This criticism focussed mainly on the fact that tenderers were not obliged to lodge a deposit calculated as a percentage of their bid at the time of submitting it.

1.3 On 3 May 1993 the Minister for Transport and Communications, Senator the Honourable Bob Collins, sought advice from the Secretary to the Department, Mr Graham Evans, about the absence of a requirement for a deposit in the tendering process for the satellite pay TV licences.

1.4 As a result of that query and the developing parliamentary and media debate on the issue the Secretary subsequently asked Professor Dennis Pearce on 8 May 1993 to undertake an inquiry into this matter.

1.5 Whilst debate continued on the satellite tender process, difficulties relating to the validity of the MDS (Multipoint Distribution System) licence tendering process were emerging. Cabinet decided to abrogate the process on 17 May 1993. On 18 May Professor Pearce agreed to undertake a second inquiry this time into aspects of the MDS licence tender process. Included in this was a review of material prepared on the matter by two Deputy Secretaries from the Department, Mr M.J. Hutchinson and Ms C.M. Goode.

1.6 The reports by Professor Pearce on the satellite and MDS tendering processes were tabled in the Senate on 20 and 26 May 1993, respectively. These reports, together with those from Mr Hutchinson and Ms Goode, provide a detailed history of the two tendering processes.

1.7 During the May 1993 sittings of parliament the issue of pay TV remained prominent, being the subject of questions without notice on a daily basis, matters of public importance, adjournment debates and questions at a Senate Estimates Committee. A considerable volume of documents from the Department was tabled in the Senate, in response to an Order of the Senate of 19 May and following undertakings by the Minister. The bulk of the documentation on the satellite process was tabled on 24 May and on the MDS process on 26 May.

1.8 The Select Committee was established on 27 May 1993, the last day of the autumn 1993 sittings.

Conduct of the inquiry

1.9 The inquiry was advertised in the Australian and the Australian Financial Review on 2 June 1993. Those individuals and organisations who provided written submissions or material to the Committee are listed in Appendix 1. In view of the tight schedule the Committee was operating under, it decided that the most expedient method of gaining material relating to the concept of ministerial responsibility was to invite a variety of witnesses to open discussions with the Committee.

1.10 The Institute of Public Administration Australia (ACT Division) gave great assistance to the Committee. It has considerable experience in organising conferences, seminars and round tables to facilitate exploration of issues and did so on this occasion. The Committee now expresses its thanks to the Institute.

1.11 The Committee held public discussions in Melbourne on 20 July 1993 with former federal and state political leaders. In Canberra on 21 July it participated

in a round table discussion with academics and senior bureaucrats both past and present. Two further public hearings were held in Canberra on 6 and 20 August 1993 with the Minister, the Department and the General Manager of the ABC to discuss the tendering processes. A list of witnesses appearing at these hearings and discussions is at Appendix 2.

1.12 On 1 September 1993 the Senate agreed to extend the time for the presentation of the Committee's report on part (1) (a) of the terms of reference until 7 September 1993.

Request for SAVO coverage

1.13 Given the historical significance of the Melbourne meeting with the appearance of a former prime minister and state premiers, a request was made to the Parliamentary Sound and Vision Office to provide a video recording of the proceedings.

1.14 The request was rejected. Funding restraints and the fear that giving coverage in Melbourne would set a precedent for video recordings being made of committee hearings conducted outside Canberra were cited as reasons for this rejection.

Attendance of personal staff of parliamentarians

1.15 During the inquiry an issue arose of whether a member of a parliamentarian's personal staff at a time relevant to the matters under review ought to be called before a Committee. A former adviser to the Minister was in that position. The Minister objected to him being called before the Committee. He acknowledged that committees have the power to call witnesses. He said this power had always been exercised with discretion. The major concern was that the ability of ministers and other parliamentarians to rely on the confidentiality of their working relationship with their personal staff and advisers would be put at risk if the latter could too readily

be called as witnesses to testify about matters arising from that relationship. Research could not produce any precedent showing that the Senate, House of Representatives or Joint committees had ever called personal staff as witnesses.

1.16 The Chairman said there was a public interest in the community knowing what goes on in Government and in Parliament. At the same time there was a public interest in ministers and members of parliament being able to discuss matters with their personal advisers freely and frankly. Their ability to do this would be prejudiced by knowing those advisers could readily be called to give evidence about those discussions before parliamentary committees. Accordingly personal advisers should be called before parliamentary committees only in the most exceptional circumstances. These had not been demonstrated in the present instance.

1.17 Senators Alston and Tierney did not agree with the position taken by the Chairman. However it was supported by Senators Loosley and McKiernan and was accordingly adopted by the majority.

Consideration of ministerial responsibility

1.18 In this report the Committee discusses individual ministerial responsibility as part (1) (a) of the terms of reference requires it to.

1.19 The concept of ministerial responsibility has been the subject of considerable debate over many years in respect to its history, definition, operation and relevance to past, present and future activity by members of Government. A 'traditional' understanding of the concept identifies two components of the system - collective and individual ministerial responsibility.

1.20 It is the Committee's intention to produce an additional report which will consider the concept of ministerial responsibility further. It will explore the variety of approaches and attitudes reflected in the evidence at the round table discussions held during the inquiry and in the historical and contemporary literature on the subject.

1.21 Ministerial responsibility is but one component of the many elements which combine to mould the Australian system of government. Although its origin is in the British system it has developed characteristics of its own.

1.22 The Committee suggests that as the system develops with political and social circumstances constantly changing, it would be of greater benefit to consider the operation of ministerial responsibility in contemporary circumstances and whether such operation is appropriate, rather than attempting to define the concept.

1.23 The Committee has given considerable attention to the views of Sir Rupert Hamer in articulating a form of codification of ministerial responsibility. Sir Rupert's views are set out in paragraph 2.27.

## CHAPTER TWO

## MINISTERIAL RESPONSIBILITY

Considering Ministerial Responsibility

2.1 The concept of ministerial responsibility, the perception of how and in what circumstances it should operate, and the understanding of who should apply sanctions for its breach vary across a range of commentators, journalists, academics, politicians and public servants. There is a need to ensure as far as possible that the rhetoric regularly used to discuss these issues does not prejudice rational consideration of them.

How Does a Minister Err

2.2 In contemporary Australia there are three broad categories into which matters raising the issue of whether a minister has failed in his or her responsibilities and should be sanctioned can be put.

2.3 The first is where the minister has personally misbehaved such as where he or she has deliberately mislead Parliament or has conducted himself or herself morally in a way the community finds intolerable.

2.4 The second is where the minister has personally driven his or her department along some disastrous course or over time has allowed it to persist in pursuing one when he or she knew or should have known it was doing so.

2.5 The third is where the minister's department has done something or failed to do something in contravention of its duty. For example where the people charged with carrying out the work of the department do it badly or omit to do it at all and ill consequences follow. The minister has no actual involvement in the matter. Any liability he or she has for it's conduct is vicarious.

Sanctions for breach

2.6 Often the sanction for a breach of ministerial responsibility is regarded as being effective only where a minister resigns or is otherwise forced from office. Colloquially put, only where a 'scalp' is gained is the enforcement of ministerial responsibility seen to be operating effectively. If a minister does not resign and battles through a particular crisis without losing office the concept is seen as being in decline or 'dead'.

2.7 This view that the only effective sanction for a minister's failure to meet his or her responsibility is their compelled resignation or removal from office fails to recognise the operation of the concept at other levels. There are other sanctions which a minister may suffer for failing in his or her duty. For example there is demotion or lack of promotion or loss of the respect of his or her peers.

The Minister, The Leader, Parliament

2.8 The sanctions available to a leader dealing with a minister who has erred are different from those available to Parliament. A leader can have a minister dismissed. Parliament cannot. Parliament can subject him or her to questioning and to censure motions and can prevent him or her being effective in the legislative chamber. It can bring him or her to account but not to dismissal.

Resignation

2.9 Where a minister has erred in some way, the retention or otherwise of his or her ministerial office depends upon the political leader. Chapter II of the Australian Constitution is specific and provides that the Governor General alone may appoint members who are to hold office during his or her pleasure. He or she will usually act on the advice of the Prime Minister and accordingly the fate of ministers depends upon the decision of their leader. The Constitution gives neither Parliament nor the Judicature any power to appoint or dismiss ministers.

2.10 Chapter II of the Constitution reflects the position in the States and Territories of Australia. The Governor-General and the State Governors have almost invariably acted on the recommendation of the Prime Minister or the Premier in appointing and dismissing Ministers of State. There are no established criteria that Ministers must meet other than that they be Members of Parliament. Other than that they can be appointed or dismissed at will. Accordingly leaders are decisive in the outcome for a minister who has erred while holding office.

Is Dismissal Capricious?

2.11 Whether a minister who has erred is to be asked to resign or be dismissed is a political issue and is one for the leader to resolve. While some may perceive this to be a cynical approach to the operation of ministerial responsibility, it is a recognition of the reality of what in fact happens in Australia at both federal and state levels.

2.12 Although a minister's fate may rest with the leader it does not follow that he or she will be dealt with capriciously. A decision which is political is not by necessity an unprincipled one. There must be some trigger. It is likely that a minister has performed some act or omitted to perform some duty which has aroused media or parliamentary scrutiny.

2.13 Once triggered, the political leader will need to balance a range of considerations in reaching a decision on the minister's future. Initially, the Minister must have erred in some way. A perception of the gravity of the minister's failing will be an important consideration. How a minister is performing and the minister's overall competence would be considered. The leader will be aware of the importance of the minister's perceived indiscretion on party stability and the consequences for the government's electoral survival. The leader must assess the effect the failing will have on the electorate.

2.14 It is probable that having attained the position he or she has, a leader will possess very sound political antennae with a heightened sensitivity to issues affecting an electorate and the contemporary standards of behaviour acceptable to the community.

2.15 The end result is that the leader must reach a decision balancing a value judgement about the gravity of the minister's failing and a pragmatic judgement as to what is best for the government's future.

2.16 Even though the leader is often required to make these decisions it should be noted that there are some matters which almost always compel a minister to resign.

2.17 Studies of resignations (and non-resignations) in the Australian context have identified a range of actions which trigger consideration by the leader of a minister's future. Some of these actions consistently result in a minister's resignation or removal from office, whilst others have a variable result and still others have not resulted in any loss of the ministerial commission.

2.18 Serious lapses in personal behaviour and conduct, and in particular deliberately or recklessly misleading parliament usually result in resignation. Even with misleading parliament there are variations in outcome. If a minister unintentionally provides incorrect information to parliament and takes the earliest opportunity to correct the record, it would be unusual for the incident to be taken as an offence worthy of resignation.

2.19 A minister has certain collective responsibilities to the government and cabinet over policy issues. Disagreement with or inability to support government policy usually leads to resignation. Collective responsibility will be covered in greater detail in the Committee's later report on the subject.

2.20 There are two further categories of conduct which raise the issue of whether or not ministers have met their responsibility. Firstly, there are ill advised actions taken by a department in accordance with ministerial directions or with actual ministerial involvement. It would be usual for major failures arising from these actions to lead to resignation. Often these actions involve policy considerations. Secondly, there is a vicarious liability for departmental actions which the minister ought to have known about and should have acted upon. Generally, these involve issues of maladministration and have not resulted in resignations in the Australian, British or Canadian situation. However they have led to Parliament testing the minister on the issue and having him or her account for what has happened.

2.21 Given the ability a leader has to see ministers dismissed, it might appear at first impression that when they err their fate is determined with scant regard to principle. That impression may arise partly through confusing judicial and political processes for resolving issues.

2.22 The judicial process involves applying existing and specific laws to a set of facts to reach a decision in accordance with natural justice. The political one involves making an assessment of a variety of influences and pressures and acting according to what they allow.

2.23 . These political influences and pressures on leaders will usually include ethical ones, including their own sense of morality and community standards. Leaders are subject to real constraints, including peer pressure, oversighting by Parliament, scrutiny by the press, party discipline and consciousness of the next election.

2.24 Rules of natural justice do not apply to leaders' decisions to have minister's dismissed. But though their decisions are not determined by a set of legal principles and procedures as would those of a judge they are nonetheless subject to powerful influences prompting them towards proper conduct.

2.25 In deciding how to deal with a minister who has erred a leader has the following influences working on him or her:

* his or her own moral values
* political ethics
* parliamentary pressure
* peer pressure
* party sentiment
* community standards
* community reaction
* media reaction
* precedent.

Codification of ministerial responsibility

2.26 During the round table discussions there was considerable debate for and against codification of ministerial responsibilities. To make a list of actions and omissions which are to constitute breaches of ministerial responsibility would create a code too inflexible and too inefficient to meet political realities. Community standards are dynamic and ethics subject to continuing reinterpretation. Yet these are two major factors determining how a leader will deal with an erring minister.

2.27 In evidence to the Committee, Sir Rupert Hamer said:

> "I do believe that there may be some value in trying to establish some sort of codification, however general it is. You do not have to specify what is acceptable or unacceptable; you simply, as courts have always tried to do, try to assess, in the light of contemporary views, what is acceptable and what is not acceptable". (Hansard 20.7.93, pp.67-68, see also pp. 6-7, 43).

2.28 While a code of specific and binding rules would not allow enough flexibility in determining what should happen in any particular case where a minister has erred, the Committee believes that there should be a form of guidelines against

which a minister's exercise of responsibility can be assessed. Precedent has provided general criteria against which the issue of whether a minister should resign or be dismissed can be tested. These criteria operate, in effect, as de facto guidelines to assist those dealing with particular cases in assessing what is acceptable and what is not.

Departmental/Administrative Accountability

2.29 When appointed, ministers become responsible for their departments. This means they are responsible for the policy and overall administration of those departments. Parliament can call a particular minister or the ministry generally to account. Question time is the most regular and amongst the most effective ways this is done. There is considerable debate about the effectiveness of the process by which Parliament calls the Ministry or any individual member of it to account.

2.30 Propositions put in the debate range from those which advocate that a minister be held responsible for all actions of his or her department and be subject to sanctions where they fall short, to those which say he or she should never suffer any consequence no matter what its failures.

2.31 A minister's responsibility for administrative and policy actions can be discussed in three areas: the level at which it is undertaken, the processes by which it is undertaken and the effectiveness of these processes.

2.32 The consequences for a minister's breach of his or her responsibility may be resignation or dismissal, but are not confined to these. Though Parliament cannot dismiss ministers it can make them account for their stewardship, for example in question time or through a censure motion or in estimates committees.

2.33 Where grave problems have arisen from the policy decision of a minister or where his or her department implements a grossly flawed program at his or her

specific direction then the issue of whether he or she will resign or be dismissed becomes a major one.

2.34 But there are no contemporary precedents for the resignation or dismissal of a minister where the failing in issue arose within the department itself and he or she had at most a vicarious liability for it. This practice is at variance to the 'traditional' concept of ministerial responsibility. The complexities of modern public administration render it not viable for a minister to be compelled to resign for departmental actions for which he or she had at most a vicarious liability.

2.35 There are situations where the question of whether a minister should resign or be dismissed is an open one. For example if a minister was well aware or should have been well aware that his or her department was maladministered or seriously affected by systemic failure and seeks to do nothing about it, then the leader is faced with an issue of whether the minister should be allowed to continue in office.

2.36 Regular movement of ministers, either due to resignation or other reasons, produces its own problems. There is a need for stability and longevity in a ministerial office in order for a minister to master the portfolio and to be able to effectively discharge their ministerial responsibilities in relation to administration.

2.37 Whilst there are benefits for efficient administration in the stability of a ministry, this does not exonerate a minister from any of their responsibilities nor affect their need to resign or be removed from office should the circumstances warrant such action.

2.38 The level of responsibility by the minister has been challenged in recent years, at the federal level, as a result of the implementation of significant reforms to the Australian Public Service. There is recognition that the complexity and sheer scale of administrative tasks, combined with devolution of managerial responsibilities and other aspects of public service reform, means that ministers cannot be directly responsible for all the actions of their departments. It has been argued that this

process has gone further and that ministers are reluctant to accept responsibility for their departments by adopting an 'arms-length' attitude to their relationship. Associated with public service reform is the view that public servants are accountable to parliament only through their minister, although this is complemented by answering for certain actions directly to parliamentary committees.

2.39 The question of diminished responsibility and 'arms-length' relationship was raised in respect to the growth in numbers of Government Business Enterprises and the establishment of many other commercially competitive bodies. A major aspect of this trend to corporatisation is the removal of accountability and responsibility by a minister in relation to the activities of these bodies which they had before they were corporatised. The Committee notes the difficulties involved in this area but these are not relevant to its terms of reference.

Parliament and Ministerial Accountability

2.40 Parliament has numerous procedures available to it through which it can have ministers account for their stewardship. Questions without and on notice, the raising of matters of public importance and urgency motions, censure motions, grievance and adjournment debates and the work of committees all provide opportunities for relevant matters to be pursued. All these are of great importance in having a minister explain his or her own acts and omissions and those of his or her department.

2.41 The parliamentary system has been described as the greatest single element in bringing ministers to account for their actions and omissions. The strengths of a system which enable a minister to be tested rigorously cannot be underestimated. A minister whose performance is shown to be as unsatisfactory, who is the subject of constant questioning and criticism which he or she cannot satisfactorily answer and who is unwilling to accept responsibility for departmental actions for which people reasonably think he or she should, may come to be seen as

a political liability by the political leader and removed from office or may suffer the indirect penalty of demotion or non-promotion.

2.42 Traditionally ministers were regarded as responsible for policy and his or her department for general administration and policy implementation. This demarcation is not as clear cut as once it was. The complexities of government make drawing a clear line between the two difficult, with administration processes often involving policy issues. This was exemplified by what happened in the satellite tendering process. What was perceived at a critical point in time as process was later seen as policy.

2.43 The importance of Parliament in having public administrators give account of their performance can be seen in the work of its committees.

2.44 The impact of the parliamentary procedures in bringing ministers and public servants to account, relies upon the effectiveness of the operation of the procedures. Conflicting opinions exist in respect to the effectiveness of some parliamentary procedures, for example the nature of information sought and the workload imposed by parliament or its committees on sections of the public service can be counter productive to accountability and overuse of procedures such as censure motions can devalue their effectiveness.

2.45 The political make up of a particular House of Parliament will influence the way it makes a minister account for his or her acts or omissions. This is well illustrated by comparing the manner in which a house where the government party is in control deals with a minister who is alleged to have erred with that in which it is not.

Operation of the Private Office

2.46 The issue of ministerial responsibility includes the matter of a minister's responsibility for staff in his or her private office. The staff in such an office play a vital role, among other things in advising the minister in his or her conduct of affairs and

in representing his or her interests at appropriate forums. Their role is largely a political one and they do not usurp the functions of the relevant department.

2.47 Whilst a minister is directly responsible for the employment of personal staff, his or her responsibility for their activities could usefully be compared to that which he or she has for departmental officers. If an action was at the specific direction of the minister or undertaken with the minister's knowledge, the level of culpability would be greater than that applying to an action undertaken without the minister's knowledge. In any event in all cases the minister can be called on by Parliament to give an account of his or her conduct.

Concluding comments

2.48 The operation of ministerial responsibility is too often seen solely in terms of a minister's resignation or dismissal for his or her failure to adhere to it. Whilst it is accepted as a component of ministerial responsibility that a minister might be expected to lose office in certain, reasonably well-understood circumstances, attention ought to be paid to other dimensions of the concept. He or she has the responsibility for departmental policy and activity. He or she can be called on by Parliament to give an account of how he or she has met these. He or she may be tested on a range of issues, including what remedial action he or she has taken when the administration of a department has been found wanting. The parliamentary process may well expose significant ministerial deficiencies. However it is not open to parliament to determine whether the minister will be dismissed or demoted or shifted in such cases. That rests with the political leader in the short term and ultimately with the voters.

## CHAPTER THREE
## CARETAKER CONVENTIONS

3.1 The caretaker conventions apply in the period immediately before an election and are outlined in paragraphs 2.19 to 2.28 of the Cabinet Handbook. The guidelines for the handling of government business during the election period and for pre-election consultation with officials by the opposition were tabled in the Senate on 5 June 1987 (see Appendixes 3A and 3B). An article providing detail on the conventions and their background was included in the 1986-87 Annual Report of the Department of the Prime Minister and Cabinet (Parliamentary Paper No. 302 of 1987).

3.2 Successive governments have accepted that caretaker conventions operate 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, there is no caretaker period for separate half Senate elections. Conventions in similar terms to the basic conventions which now apply date from the second administration of Sir Robert Menzies in 1951. The conventions cover three general areas - the actions of government, the operation of departments and consultation with the opposition.

### Actions of government

3.3 By convention, the government ensures that decisions are not taken in the caretaker period which would bind an incoming government or 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 including those which would be politically contentious.

### Operation of departments

3.4 Further dimensions of the caretaker conventions are 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. In general, during the caretaker period the routine business of administration continues until the incoming government's wishes are known. The circumstances of an election campaign demand special attention by departments to the need to ensure impartiality of the public service and its ability to serve whatever government is to be elected. Ministers usually sign necessary correspondence only. There is correspondence normally signed by ministers which during this period is signed by departmental officers. Departmental replies should not assume the election of one party or another.

3.5 Material concerning the day to day business of government is supplied to Ministers in the usual way. It is accepted as proper practice for departments to decline requests for material or administrative assistance for purposes clearly related to the election rather than the ongoing business of government. Other matters addressed include the issue of travel by ministers and their opposition counterparts and the continuation of government advertising campaigns.

Consultation with Opposition

3.6 Finally, to ensure a smooth transition in the event of a change of government, there is provision under appropriate guidelines for pre-election consultation between the opposition and departmental officers. The subject matter of these consultations relates to the machinery of government and may include the administrative and technical practicalities and procedures involved in the implementing of policies proposed by the opposition. Officers are not authorised to discuss government policies or offer opinions on party political matters.

3.7 The Department of the Prime Minister and Cabinet has observed that, despite their general terms, the caretaker conventions and pre-election practices have been relatively free from controversy, with successive Australian governments from both sides of politics accepting the need for such conventions to apply at election time. (see Department of the Prime Minister and Cabinet, Annual Report 1986-87, p.44).

## CHAPTER FOUR

## SATELLITE AND MDS TENDERING PROCESSES

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

1. What were the processes followed by the Department in the preparation for the Minister of a draft Determination under subsection 93(1) of the *Broadcasting Services Act 1992* for a price-based allocation system for allocating subscription television broadcasting licences A and B?

2. What were the reasons for the non-inclusion in that draft Determination of deposit requirements for the tendering process?

3. What was the form of advice to the Minister for Transport and Communications in relation to the non-inclusion in the draft Determination of deposit requirements for the tendering process?

4. Was that advice sufficient to alert the Minister to the fact that he was adopting a process which did not involve deposit requirements by signing the Determination?

5. Was the non-inclusion of deposit requirements for the tendering process in the draft Determination given adequate and high level consideration by the Department given the potential implications of this course of action?

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

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

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

2. Why were the Ministerial Determinations of 1 October 1992 and 7 January 1993 inconsistent with the Government's policy intention, and what were the reasons for the discrepancies between the Ministerial Determination and the Invitation to Tender?

3. What was the extent and timing of advice to the Minister on the 'technical' deficiencies'?

4. Were the judgements made by the Secretary and his officers in relation to the handling of the 'technical deficiencies' issue in the Perth Court proceedings reasonable in the circumstances? Was it reasonable for the Department and the Minister to assume that the Court Order of 7 April enabled them to continue with the tender process?

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

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

The Satellite Tender

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

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

Non-inclusion of deposit requirement

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

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

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

> The scheme that was adopted was seen as fitting appropriately within the mechanism of a price-based tender system while providing adequate checks on abuse of that system. The scheme involved the following steps:
>
> . identification of the person making the highest bid;
>
> . that person being subjected to ABA and TPC scrutiny; and
>
> . payment of the full amount bid within 30 days of advice of approval.
>
> It was straightforward and fair.

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

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

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

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

Non-inclusion of prequalification conditions

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

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

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

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

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

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

Minister's responsibility in satellite tender

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

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

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

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

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

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

The MDS Tender

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

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

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

ABC input

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

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

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

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

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

Technical deficiencies with MDS tender

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

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

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

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

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

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

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

Discharge of ministerial responsibility in relation to tender process

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

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

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

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

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

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

These matters are discussed earlier in this report.

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

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

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

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

The Pearce Reports

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

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

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

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

Findings

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

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

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

Conclusion

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

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

Senator Barney Cooney
Chairman
September 1993

## 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]

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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 looses 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?

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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 circumstance 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 later 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.

Senator John Tierney
Deputy Chairman
Liberal Senator for New South Wales

Senator Richard Alston
Liberal Senator for Victoria

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

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

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.

ATTACHMENT

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).

APPENDIX 3D

Minute

Transport and Communication

Central Office

Our reference

Dr

March 1992

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

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.

APPENDIX 3F

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.

4. A query has been raised as to whether an applicant who was removed from the selection process because the applicant ~~did not propose~~ is unable 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

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.

ATTORNEY GENERAL'S DEPARTMENT

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

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.

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

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?

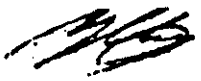
A. In my view, yes.

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



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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 5 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;

Minute

Transport and Communications

Central Office

9 December 1992 Dat

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)

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).