ABA REFERS ONE PAY TV LICENCE TO TPC

The ABA has asked the Trade Practices Commission (TPC) to provide a report into the allocation of satellite pay TV licence A to UCOM Australia Pty Ltd (UCOM).

The request follows the ABA's commencement of an investigation into the common ownership of UCOM and New World Telecommunications Pty Ltd (New World), the companies which have paid 5 per cent deposits for the A and B licences.

The Minister for Communications announced on 30 August that UCOM Australia Pty Ltd had paid a deposit of $4.85m for satellite pay TV licence A while New World Telecommunications Pty Ltd had paid a deposit of $5.85m for licence B. The applications were referred to the ABA, which must investigate their suitability.

The ABA referred only one application to the TPC because of the common ownership of the companies with the bidding rights for licences A and B. The TPC has 45 days within which to provide its report to the ABA.

'The ABA has taken this course keeping in view that the Chairman of UCOM has stated a preference for ultimately retaining some control over licence A rather than B,' said Mr Brian Johns, ABA Chairman.

'UCOM and New World have not yet satisfied the ABA that they have made progress with resolving the suitability problems caused by the common ownership,' Mr Johns said.

'The ABA has sought substantive evidence from UCOM and New World that the common ownership problems have been, or will definitely be resolved. The ABA has asked for corroborative evidence concerning any offers of equity participation in either licence,' he said.

'The ABA is seeking agreements reached by the companies and not simply assurances,' Mr Johns said.

This request, along with a deadline, followed the receipt of submissions from UCOM and New World which failed to allay the ABA's concerns about the suitability of the applicants.

The Role of the Trade Practices Commission

The issue by the ABA of satellite pay TV licences A or B is subject to a report by the TPC stating that the issuing of the licence would not contravene section 50 of the *Trade Practices Act 1974* and that the allocation would be authorised under that Act if the applicant had applied for such an authorisation. Authorisation may be granted on public benefit grounds.

Section 50 of the Trade Practices Act prohibits mergers or other acquisitions which substantially lessen competition.

Referral of one application

The reference to the TPC of the application for licence A does not preempt the applicant's choices as to which of the licences it retains some equity in or which licence is onsold.

Effect of common ownership on suitability

Section 110 of the *Broadcasting Services Act 1992* provides that a person who is in a position to exercise control of licence A must not, before 1 July 1997, have company interests exceeding 2 per cent in, or be in a position to exercise control of, licence B and vice versa.

Because of the common ownership of licences A and B, the ABA is considering the suitability provisions set out in subsection 98(2) of the Broadcasting Services Act.

A pay TV applicant is unsuitable if the ABA decides that allocation of a licence would lead to a significant risk of an offence against the Broadcasting Services Act or a breach of the conditions of the licence occuring.

Summary of process

1. Department of Transport and Communications notified ABA of names of depositors and referred tender documents to ABA (31 August 1993).
2. Licence allocation process begins immediately (no maximum timeframe).
3. ABA will examine foreign ownership, cross-media ownership and other matters impacting on applicants' suitability.
4. ABA decides whether company is suitable.
5. If ABA decides applicant is suitable and TPC reports within 45 days there is no contravention of the Trade Practices Act, ABA makes final decision to allocate licence and applicant has 30 days to pay price bid, otherwise process will recommence with the next highest bidder.

Apart from differing ownership and control restrictions, licences A and B are identical. Each entitles the licensee to provide up to four subscription television broadcasting services through leased transponder capacity on an Optus satellite. The same foreign ownership limits apply to licences A and B (20 per cent individual and 35 per cent aggregate) but licence A is subject to more rigorous cross-media ownership and control restrictions.

Persons in control of a large circulation newspaper, a commercial television licence or a telecommunications carrier must not have company interests exceeding 2 per cent or be in a position to exercise control of licence A.

Role of the ABA

The ABA has the responsibility of formally allocating satellite licences A and B. Satellite pay TV licensees and applicants for such licences are required to be suitable persons. An applicant for a licence is taken to be suitable unless the ABA is satisfied there would be a significant risk of a breach of the Act or the conditions of the licence if the ABA were to allocate the licence.

Once allocated, the licence is subject to a condition that the licensee remain a suitable person. The ownership structure of an applicant will be treated by the ABA as relevant to the applicant's suitability because of the possibility of a breach of the ownership provisions of the Act.

Where the ownership structure of an applicant is subject to change, the ABA will require evidence that the applicant's ownership conforms to the relevant ownership or control provisions of the Act before notifying the applicant that a licence will be allocated.