

## PART I

### THE INQUIRY

# CHAPTER 1

## INTRODUCTION

### The establishment of the Senate Select committee

1.1 On 9 December 1993, on the motion of Senator Alston, the Senate resolved that a Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media be appointed to inquire into the origin and basis of decisions in 1991 and 1993 to increase the permissible percentage of foreign ownership of newspapers. The committee's terms of reference referred specifically to events in 1991 concerning the receivership of John Fairfax Ltd, and to the government's decision on 20 April 1993 to increase the permissible levels of foreign shareholding in Australian newspaper companies. A review of procedures of the Foreign Investment Review Board (FIRB) was also included in the terms of reference.

1.2 The committee was established in the wake of public concern and comment about allegations in an autobiography published in November 1993 by Mr Conrad Black in which Mr Black claimed that at a meeting in November 1992 the Prime Minister, Mr Keating, had agreed that Black's company, The Telegraph plc, would be able to raise its stake in Fairfax to 25 per cent and had also said:

... If he were re-elected and Fairfax political coverage was 'balanced' he would entertain an application to go higher ...<sup>1</sup>

1.3 In a radio interview given while at an APEC meeting in Seattle on 18 November 1993, Mr Keating admitted that he had sought from Black 'a commitment that the paper would be balanced' and:

... if there is any notion that, you know, of bias, that is you barrack for the Coalition, on the basis of your conservative proclivities in other places, then there's no way you would qualify as the kind of owner we would like ...<sup>2</sup>

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<sup>1</sup> Conrad Black, *A Life in Progress*, Random House, Sydney, 1993, p 453

<sup>2</sup> Extract from transcript of Mr Keating's interview in Seattle, USA, 18 November 1993, p 5

He then went on to say that:

So therefore, after the election, I, on behalf of the government made good a commitment to reconsider them, and took them to 25.<sup>3</sup>

1.4 The committee's terms of reference concerned the issue of whether certain decisions about the levels of foreign ownership in Australia's print media were based on considerations other than that of the national interest.<sup>4</sup> Wider issues, including the role and procedures of the Foreign Investment Review Board (FIRB) generally and, in particular, its effectiveness in advising the Treasurers in their decisions in December 1991 as to whether to allow the Independent and Tourang bids for John Fairfax Ltd to proceed, and in April 1993 to increase the allowable limit of foreign shareholding in the print media to 25 per cent, are also covered by the terms of reference. In view of the fact that in his book Mr Black claimed that Dr Hewson 'had already promised that if he were elected he would remove restraints on [Mr Black's] ownership',<sup>5</sup> the terms of reference also required the committee to report on the views expressed to Mr Conrad Black by the then Leader of the Opposition, Dr Hewson MP, on foreign ownership in the print media in Australia.

#### **The background to the 1991 bids for John Fairfax Ltd**

1.5 The decision of the banking syndicate, comprising the major creditors of John Fairfax Ltd, to appoint a receiver for the company on 10 December 1990, inaugurated the lengthy and elaborate corporate manoeuvres which culminated in the successful Tourang bid for the company in December 1991.

1.6 On 24 December 1990, the banking syndicate of creditors appointed Mr Mark Burrows, principal of Baring Brothers Burrows, as corporate adviser to the receiver to oversee the auction process and ensure the repayment of Fairfax's banking syndicate creditors. By July 1991, several bidders had emerged for John Fairfax Ltd, including the Tourang

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<sup>3</sup> Extract from transcript of Mr Keating's interview in Seattle, USA, 18 November 1993, p 5

<sup>4</sup> Appendix A

<sup>5</sup> *Life in Progress*, p 453

consortium led by Mr Conrad Black and Mr Kerry Packer, which announced its bid on 16 July 1991, and Independent Newspapers plc owned by Dr Tony O'Reilly. In August 1991, institutional investors, the AMP Society and National Mutual, announced their support for Australian Independent Newspapers' (AIN) bid for Fairfax.

### **The 1991 Parliamentary inquiry into the print media**

1.7 Intense public interest had been generated by news of the Fairfax receivership, stimulated partly by speculation on the part of the company's own journalists. They organised themselves into a group, called Friends of Fairfax, to lobby for editorial independence for a restructured Fairfax. Public interest was also generated by concerns about concentration of ownership in the print media in the wake of the News Limited takeover of *The Herald* and *Weekly Times* in 1987.

1.8 Public concern had also been given political and parliamentary expression by the establishment of a House of Representatives Select Committee on the Print Media (the 'Lee Committee') on 22 August 1991 to investigate concentration of ownership of the print media and editorial independence issues. That committee commenced its hearings on 1 October 1991 and examined many witnesses who were involved at the highest levels in the Fairfax bidding process.<sup>6</sup>

### **Political lobbying by parties to the Fairfax bidding process**

1.9 While speculation about the rival bidders in the Fairfax auction dominated the public arena throughout 1991, intense lobbying of politicians by the competing consortiums and manoeuvring within the ALP on the foreign ownership issue continued behind closed doors. On 10 October 1991, the then Treasurer, Mr John Kerin, announced the following decision of the Federal Parliamentary Caucus:

In the context of the current bidding for the Fairfax Group, Caucus supports the proposition that any outcome should not extend foreign control of Australian media. Accordingly it requests the Treasurer in considering any matters placed before him by the Foreign Investment Review Board to ensure such foreign control does not eventuate. As part

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<sup>6</sup> *News & Fair Facts*, Report of the House of Representatives Select Committee on the Print Media, March 1992, Appendix 4, List of Witnesses

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of the process Caucus opposes any level of foreign voting equity above 20 per cent.<sup>7</sup>

1.10 There are indications that there was significant dissent from this position by some members of the government. Conrad Black in his autobiography alleges that Mr Kerin had previously told him that levels of up to 35 per cent would be acceptable. With regard to the politically contentious issue of Mr Kerry Packer's involvement in Tourang, Black's lobbying of the Minister for Communications, Mr Kim Beazley, had left him confident, that provided Mr Packer's holding remained below the cross-media ownership threshold of 15 per cent set out in the Broadcasting and Television Act, the government could accept Packer as part of Tourang.<sup>8</sup>

### **The structure of the Tourang bid for Fairfax**

1.11 The original structure of Tourang reflected the confidence of all the participants that the Hawke government could be persuaded to accept foreign investment shareholdings in excess of 20 per cent provided they partly consisted of non-voting stock. In Mr Black's own words:

The Telegraph would subscribe for 20 per cent of Tourang, Hellman & Friedman for 15 per cent, and Packer's Consolidated Press for 14.99 per cent, the limit prescribed for cross-media owners.<sup>9</sup>

1.12 Mr Black claims that from the outset he was aware of potential political difficulties about both the level of foreign shareholding and the involvement of Mr Kerry Packer as a shareholder holding 14.9 per cent of the shares. His view is supported by evidence from Mr Malcolm Turnbull to the committee on 11 February 1994. Turnbull outlined the nature of his primary political concerns when putting the bid together, firstly with respect to FIRB:

The safest way to structure the deal was to have only so much foreign ownership that you did not come within the purview of the Foreign Acquisitions and Takeovers Act. That meant that you had to have no

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<sup>7</sup> John Kerin, Press Release, No 98, 10 October 1991

<sup>8</sup> *A Life in Progress*, pp 419-20

<sup>9</sup> *A Life in Progress*, p 416

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foreign shareholding having more than 15 per cent and foreign shareholders in aggregate not having more than 40 per cent.<sup>10</sup>

1.13 Secondly with respect to the involvement of Mr Kerry Packer, Turnbull's concern was:

essentially [that] a judgement on the acceptability of Tourang would be made by FIRB and/or the Treasurer by reference to the involvement of Packer. I think that clearly, certainly in the political discussions...this was an element. If you recall all the drama, the big sort of political bogey towards the end of 1991 was not so much Conrad Black and foreign ownership but Kerry Packer and the cross media issue.<sup>11</sup>

1.14 In his evidence before the Lee Committee on 4 November 1991, Packer himself was very keen to emphasise that his proposed 14.9 per cent of Tourang would not result in him having de facto control of Fairfax. In his opening statement to that committee he said:

My agreement with my co-investors is set out in a written agreement dated July 16th 1991. This agreement is on file with the ABT. Paragraph seven of that agreement provides that there are no agreements whatsoever that exist between us after Tourang buys John Fairfax. We are free to act independently in any of our actions concerning Fairfax. I will not, either alone or with others, control or try to control John Fairfax. I cannot make my position any clearer than that.<sup>12</sup>

1.15 Mr Packer's reported fears of an Australian Broadcasting Tribunal (ABT) investigation into Tourang were well founded because on 26 November 1991, the Chairman of the ABT, Mr Peter Westerway, appeared before the Lee Committee and announced that the Tribunal would be holding a public inquiry into Tourang. In the words of the Tribunal's report on the outcome of its investigations:

The Tourang consortium envisaged that after any acquisition of Fairfax, Mr Packer would hold just under 15 per cent of the paid-up value of all shares. This would be insufficient to amount to deemed control in the terms of s.89JA [of the *Broadcasting Act 1942*]. However, there was also

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<sup>10</sup> Evidence p 124

<sup>11</sup> Evidence p 128

<sup>12</sup> Mr Kerry Packer, House of Representatives Select Committee on the Print Media, Official Hansard Report, 4 November 1991, p 1149

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the issue of whether Mr Packer or Conspress would retain actual control in the terms of s.89JA after any acquisition of Fairfax. Prompted by media speculation and by indications that Mr Packer and Conspress were in control of the consortium before the transaction, the Tribunal commenced an investigation of all the circumstances surrounding the deal.<sup>13</sup>

1.16 The Tribunal was enabled to investigate all aspects of a transaction before it was completed, by widened powers under the *Broadcasting Amendment Act 1991*. These included the power to acquire information or documents relating to a transaction under section 89X of the Act. When asked by the Print Media Committee Chairman, Mr Michael Lee, how long the ABT investigation into the Tourang bid might be expected to take, Mr Westerway replied that it was 'a bit like saying how long is a piece of string'.<sup>14</sup> He told the committee that the Tribunal was already engaged in continuous surveillance of the Tourang bid:

The Tribunal has used its powers under section 89X of the Act to monitor the decision making process closely, with regular directions to both the receiver and his advisers.... Indeed, we have investigated this proposed transaction in great detail and a team of people, including senior counsel, are fully briefed on it.<sup>15</sup>

1.17 On 28 November 1991, the Tribunal was advised that Mr Packer had withdrawn from the Tourang consortium and on 13 December 1991 it announced that the ABT investigation of the Tourang bid had closed.

### **The restructuring of Tourang**

1.18 The structure of Tourang was revised following the withdrawal of Mr Packer and a revised bid was submitted to the Foreign Investment Review Board (FIRB) for consideration. The revised bid proposed a shareholding by Conrad Black's The Telegraph plc of 20 per cent and by United States investment house, Hellman & Friedman, of 14.9 per cent. On 9 December 1991, Tourang received notice from Mr George Pooley of FIRB that the

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<sup>13</sup> ABT, Report into the proposed purchase of John Fairfax Group Pty Ltd by the Tourang Consortium, No 10/91/78, para 1.7

<sup>14</sup> Peter Westerway, House of Representatives Select Committee on the Print Media, Official Hansard Report, 26 November 1991, p 1503

<sup>15</sup> Peter Westerway, House of Representatives Select Committee on the Print Media, Official Hansard Report, 26 November 1991, p 1501

Treasurer had failed to approve the bid, which was judged to be 'contrary to the national interest'. On the other hand, the bid by O'Reilly's Independent Newspapers plc, with a 20 per cent foreign shareholding component, was approved by Treasurer Kerin.

1.19 Following the FIRB advice, Tourang was restructured for the second time. This time The Telegraph's holding was reduced to 14.99 per cent of the shareholding and Hellman & Friedman's to 5 per cent non-voting debentures. The revised bid was submitted to the newly appointed Treasurer, Ralph Willis, for consideration on 11 December 1991. On 11 December 1991, Tourang's Dan Colson wrote to Mr Willis to contend that the Tourang bid had been treated inequitably by the former Treasurer in comparison to the Independent bid. He also foreshadowed Tourang's interest in increasing its shareholding in Fairfax:

We acknowledge there is a legitimate national interest debate in determining acceptable levels of foreign participation in Fairfax beyond 20 per cent. We would, as a separate matter, wish to explore with Government what percentage interest between 20% and 35% would be acceptable.<sup>16</sup>

1.20 On 13 December 1991, Mr Willis issued a press release announcing approval of the restructured Tourang bid. On 16 December, George Pooley of FIRB wrote to Stephen Chipkin of Freehill Hollingdale and Page, solicitors for Tourang, and informed him:

In regard to Tourang's wish to explore a higher level of participation by the two foreign parties - up to 35 per cent, as in the previous application which the Government rejected I have been directed to inform you that the Government continues to regard this proposition as unacceptable for the foreseeable future.<sup>17</sup>

1.21 On 23 December 1991, on the recommendation of the adviser to the banking syndicate, Tourang took Fairfax out of receivership.

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<sup>16</sup> Dan Colson to Ralph Willis, 11 December 1991, attachment to Submission No 3, (Mr Conrad Black)

<sup>17</sup> George Pooley to Stephen Chipkin, 16 December 1991, Conrad Black, Submission No 3, attachment 13

### **Criticism of the role of the Foreign Investment Review Board**

1.22 In its submission to the committee, an unsuccessful bidder for Fairfax, Australian Independent Newspapers Ltd (AIN), criticised the procedures and final decision of FIRB in relation to Tourang. In AIN's view, the merits of its bid as a viable Australian alternative to permitting foreign owners to gain effective control of Fairfax should have been fairly considered by FIRB. AIN's submission included an attachment (later acknowledged by the Treasurer, Mr Willis, to be a true copy of a FIRB Minute dated 5 December 1991) containing confidential advice to the then Treasurer, Mr Kerin, on the merits of the rival bids. FIRB's minute advised that 'only Tourang can settle with the bondholders prior to mid-January without an immediate public float'. Throughout the minute FIRB dealt with AIN's bid in dismissive terms. The minute also incorrectly stated that AIN had no newspaper experience.<sup>18</sup> AIN submitted that:

the treatment of the AIN offer in the FIRB Minute was likely to result in the recommendation made by FIRB being fundamentally flawed and the information put before the Treasurer in relation to foreign investment issues and national interest considerations being incomplete and misleading.<sup>19</sup>

### **The 1993 decision to increase The Telegraph's shareholding in Fairfax**

1.23 In his autobiography and again in his submission to the committee, Conrad Black alleges that Prime Minister Keating had promised that The Telegraph would be permitted to acquire up to 25 per cent of Fairfax:

I met with Mr Keating for the first time in February 1992 at Kiribilli House. He acknowledged that, as he had said publicly at the time, the treatment of Tourang had not been equitable, and we could understandably aspire to receive more than 15 per cent of the benefit for successfully shouldering 100 per cent of the burden of relaunching Fairfax. He indicated that he expected to address the situation within the next six months.<sup>20</sup>

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<sup>18</sup> AIN Submission No 11, attachment 4, p 10: Authenticated by Mr Kerin on 24 March 1994 and confirmed by the Treasurer, Mr Willis, in a letter to the committee of 20 April 1994

<sup>19</sup> AIN, Submission No 11, p 14

<sup>20</sup> Conrad Black, Submission No 3, p 5

1.24 At a later meeting in November 1992, Mr Black submitted:

Mr Colson and I called upon Mr Keating at his Sydney office. Mr Don Russell was also present. At this meeting, Mr Keating advised that he believed it would be appropriate for us to apply for an increase of The Telegraph's shareholding to 25 per cent.<sup>21</sup>

1.25 Conrad Black acted to increase The Telegraph's shareholding in Fairfax after his meeting with the Prime Minister by forwarding a formal request to the Treasurer dated 11 December 1992. A decision on this application was effectively postponed until after the 1993 general election.

1.26 Following the 13 March 1993 election, which saw the return of the Labor government, within the ranks of its Federal parliamentary caucus there was considerable opposition to the proposal that The Telegraph increase its stake in Fairfax. On 15 April 1993, government backbencher John Langmore wrote to the Treasurer John Dawkins to argue against any change in existing foreign investment policy, claiming that any decision to approve an increase would be against the spirit of the House of Representatives Print Media Committee report:

that requests for foreign control beyond 20 per cent 'should be approved only if the government believes that a strong case has been made that it is in the national interest or that special arguments (eg failing company) apply.' We know of no factors which would suggest that these reasons apply in this case.<sup>22</sup>

1.27 In the period between the March 1993 election and the April 1993 decision there was intense media speculation about the Black application. One columnist, Bryan Frith, wrote:

A reason purportedly being put forward to favour Mr Black's candidacy for 25 per cent of Fairfax is that it would give the Government "a point of reference".

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<sup>21</sup> Submission No 3, p 6

<sup>22</sup> Mr John Langmore MP, media release attachment, letter to Hon John Dawkins, 15 April 1993, signed by Michael Beahan, Barry Jones, John Langmore, Jim McKiernan and Daryl Melham

Just what that might mean is a matter of conjecture. It may be, for example, that Mr Keating may consider that if he or the Government has complaints about any Fairfax journalist, and the coverage the Government receives, he may have a receptive ear from a grateful Mr Black.<sup>23</sup>

1.28 On 20 April 1993, the then Treasurer John Dawkins, announced an increase in the maximum permissible level of foreign shareholdings in mass circulation newspapers to 25 per cent. He made specific reference to The Telegraph in the context of the announcement:

The Government has agreed to The Telegraph increasing its shareholding in Fairfax from just under 15 per cent to 25 per cent. With foreign interest Hellman & Friedman having an active 5 per cent involvement, the total foreign interest involvement will be at the maximum of 30 per cent... The Government will not countenance further increases in the permitted level of foreign involvement in mass circulation newspapers.<sup>24</sup>

### Structure of this report

1.29 The preceding precis of events relating to the 1991 and 1993 decisions on the foreign ownership of the Fairfax group sets the scene for the chapters which follow. The report has been divided into five parts.

1.30 Part I, 'The Inquiry', which includes chapters 1 and 2, describes and analyses the conduct of the inquiry. It refers to the difficulties the committee experienced in gathering evidence, the refusal of the government to provide relevant documents to the inquiry, the claim of 'public interest immunity' by certain public servants well placed to give evidence on the terms of reference, and legal advice obtained by the committee in an endeavour to clarify its rights to insist that witnesses give evidence.

1.31 Part II, 'The Percentage Players', which includes chapters 3 and 4, is in essence a detailed chronology of events relevant to the terms of reference. In addition, in this section of the report the committee has made findings in respect of key events which, both during the taking of evidence and in media coverage prior to the inquiry, have been the subject of different interpretations by several key witnesses.

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<sup>23</sup> *The Australian*, 23 March 1993

<sup>24</sup> John Dawkins, press release, 'Foreign Investment Policy: Mass Circulation Newspapers', 20 April 1993

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1.32 Part III, 'Balanced Coverage', includes chapters 5 and 6. It covers the balanced coverage aspect of the inquiry in relation to Mr Black's evidence and Mr Keating's Seattle remarks.

1.33 Part IV, 'Foreign Investment and The Foreign Investment Review Board', which includes chapters 7 to 10, addresses foreign investment policy and procedures in relation to the 1991 and 1993 foreign ownership decisions.

1.34 Part V, 'Views expressed by Dr Hewson', consists of chapter 11 and covers the terms of reference relevant to Dr Hewson's contact with Mr Black prior to the 1993 election.

**1.35 Following chapter 11 there is a minority, or dissenting, report comprising a number of chapters, prepared by the Government Senators on the committee, Senators Carr, Loosley, Murphy and Sherry. Senator Kernot has also added a separate reservation to the report.**

### **Citations**

Oral evidence is cited by reference to the Hansard proof transcript as follows: 'Evidence p xx'. Written submissions are referred to by registration numbers: 'Submission No xx'.