

PART II

THE PERCENTAGE PLAYERS THE 1991 AND 1993 DECISIONS

Scope

This Part addresses the factual origins of the specific decisions which gave rise to this inquiry. In doing so this Part touches upon the bases of those decisions including the procedures employed by FIRB. The procedures followed by FIRB, in this case and in general, are dealt with more fully in Part III.

The decisions

The committee focussed its investigations on four crucial decisions made by the Treasurer relating to the foreign investment bids for the Fairfax group in receivership and subsequent applications to increase the levels of foreign investment in the company after receivership.

The specific decisions examined by the committee are as follows:

- The decision by the then Treasurer, Mr J Kerin, on 5 December 1991, to approve the foreign investment application by Dr O'Reilly's Independent Newspapers Group and to reject the revised Tourang I application.
- The decision by the then Treasurer, Mr R Willis, announced on 13 December 1991, to approve a further modified application from the Tourang consortium.
- The decision by the then Treasurer, Mr J Dawkins, announced on 23 April 1992, to allow small foreign portfolio shareholdings under 5 per cent each, in cases where the foreign investor is neither related to any other Fairfax investor nor represented on the Fairfax board.
- The decision by the then Treasurer, Mr J Dawkins, on 20 April 1993, to allow Mr Conrad Black, through his company The Telegraph plc, to increase his investment in Fairfax from just under 15 per cent to 25 per cent.

CHAPTER 3

THE 1991 DECISIONS

Background to the decisions

3.1 To appreciate the context in which the decisions subject to inquiry were taken, it is necessary to examine certain aspects of the history of the Fairfax organisation prior to the appointment of the receiver and manager in December 1990. It was this action by the secured creditors that led to the conduct, during 1991, of an auction process, from which emerged several potential bidders including foreign companies.

3.2 Australia's foreign investment policy requires that all proposals for foreign investment in the print media first be submitted to the Foreign Investment Review Board (FIRB) for consideration and subsequent approval by the Treasurer.

3.3 This chapter traverses developments in foreign investment and print media policy during the period leading up to the decisions under review.

John Fairfax Group prior to receivership

3.4 Much has been written about the action by Mr Warwick Fairfax to 'buy out' the Fairfax group of companies in 1987. For the purpose of this report it is not necessary to explore those events in detail. It is sufficient to recall that, having initiated the purchase not long before the stockmarket crash in October 1987, Mr Fairfax paid a high price for his acquisition, and that, compared with the cashflows later available to the group, the purchase was too highly leveraged.

3.5 One element of the financing package put together by Mr Fairfax included the placement of subordinated debentures worth \$450 million with US investors. These subordinated debentures (known as 'junk bonds') and how they were to be treated in the bids to take the company out of receivership, are of interest in this inquiry. Mr Malcolm Turnbull gave evidence of his role as representative of the bond holders and of the existence of an exclusivity agreement between the bond holders and the

Tourang consortium.¹ Mr Kerin, in his evidence, referred to the operation of the agreement with the bond holders being a factor in his taking the decision that he did when he did.²

3.6 Mr Turnbull also spoke of the precipitate action of the secured creditors in appointing a receiver rather than adopting, as he termed it, 'a take and hold strategy'. He also spoke of the 'astonishment' of the US junk bond holders at their lack of rights under Australian bankruptcy laws. Mr Turnbull recommended the committee take note of the lack of an equivalent to the US Bankruptcy Chapter 11 provision which operate to protect the interests of all creditors, not only secured creditors.³ This could be a matter worthy of consideration by the Joint Parliamentary Committee on Corporations and Securities.

3.7 History has it that after months of speculation about its corporate future, Mr Des Nicholl of Deloitte Ross Tohmatsu, was appointed as receiver and manager of the Fairfax group on 10 December 1990. Mr Nicholl's appointment was followed by the appointment on 24 December 1990 of Mr Mark Burrows of Baring Brothers Burrows, as adviser to the receiver and manager on the sale of the Fairfax group.

The Fairfax auction process

3.8 At this stage of the report it is important to identify the key players and describe their involvement in the 1991 Fairfax decision. Chart 3.1 lists these players. Essentially this chapter adheres to that structure. No reference has been made to those persons or companies who were involved in the Fairfax auction, but who had no direct role in the information gathering and/or decision making processes which resulted in the Treasurers' decisions.

¹ Evidence pp 117-122

² Evidence p 458

³ Evidence pp 117-119

Chart 3.1**The Percentage Players: Who were they?**

The Receiver and Manager:	Mr Des Nicholl, Deloitte Ross Tohmatsu
Advisers to the Receiver:	Mr Mark Burrows, Mr Jeff White, Mr Peter Breese, of Baring Brothers Burrows
Major Bidders:	AIN Mr Jim Leslie, Mr Greg Taylor, Mr John D'Arcy, Mr Mark Johnson, Mr Robert McKay, Mr Thomas Harley
	INP Dr Tony O'Reilly, Mr Liam Healy, Mr John B Fairfax, Mr A E Harris, Mr John C Reynolds
	Tourang Mr Conrad Black, Mr Daniel Colson, Mr Brian Powers, Mr Kerry Packer (withdrew on 28 Nov 91)
For the Government:	Prime Minister Mr Bob Hawke Treasurer Mr Paul Keating (to 3 June 1991) Treasurer Mr John Kerin (4 June 1991- 9 December 1991) Treasurer Mr Ralph Willis (9 Dec 91-27 Dec 91) Treasurer Mr John Dawkins (27 Dec 91 onwards) Minister for Transport & Communications Mr Kim Beazley
For Caucus:	Mr John Langmore MP, Senator Chris Schacht
For the FIRB:	Sir Bede Callaghan, Mr George Pooley, Mr Ken Stone, Mr Des Halsted
For Treasury:	Dr Darryl Roberts

THE PLAYERS: IN DETAIL

Receiver and Manager

3.9 Mr Des Nicholl of the then Deloitte Ross Tohmatsu was appointed receiver and manager of the Fairfax group of companies on 10 December 1991 by CitiSecurities Limited on its own behalf and on behalf of other secured lenders.

3.10 In his submission to the committee, Mr Nicholl outlined the basis of his duties as receiver to Fairfax and the division of responsibilities that existed between himself and Mr Mark Burrows. Mr Nicholl's role was to manage the business of the companies in receivership, including maintenance of that business, whereas it was Mr Burrows' role to advise on the financial restructuring or sale of the business.

3.11 Mr Nicholl went on to clarify his role in respect to the conduct of the sale:

Consistently with that division of responsibilities, any enquiries which were made of me by prospective purchasers of that business were referred to Mr Burrows. Additionally, Mr Burrows had responsibility for managing the process by which that business was sold including, in particular, conducting such negotiations with the Commonwealth Government as were necessary to ensure that as many prospective purchasers as was possible could bid for it.⁴

3.12 As the appointed receiver, Mr Nicholl was an interested party in the decisions about potential foreign investors made by the Treasurers. The course of action available to Mr Nicholl was, in fact, dependent upon the Treasurers' decisions, among other things. However, the committee is satisfied that Mr Nicholl played no part in the matters encompassed by its terms of reference.

Advisers to the receiver and manager - Baring Brothers Burrows (Barings)

3.13 On 24 December 1990, Mr Mark Burrows of Baring Brothers Burrows was appointed as adviser to the receiver in respect of the restructuring or

⁴ Submission No 7, p 1

sale of the Fairfax business. He was assisted in those duties by Mr Jeff White and other staff of Barings, including Mr Peter Breese.

3.14 Before taking oral evidence from Messrs Burrows and White at its hearings on 11 April 1994, the Chairman outlined the procedures the committee would apply to any issues which might be covered by the sub-judice convention, given the existence of court proceedings instigated against Mr Burrows and others in relation to the Fairfax reconstruction.

3.15 In advising of these procedures the Chair stated the focus of the committee's investigations as follows:

The committee's terms of reference are specifically directed at the government decisions and the procedures of FIRB in respect of the Fairfax Group vis-a-vis foreign ownership application. The thrust of the committee's inquiry is not directed at the commercial decisions of the receiver in respect of the bids for Fairfax...⁵

3.16 Mr Burrows gave evidence in three specific areas of interest:

- Barings' communications with FIRB
- Barings' contacts with the Prime Minister and Treasurers
- FIRB processes generally.

Barings' communications with FIRB

3.17 Mr Burrows tendered in evidence copies of three letters (the contents of which, with specific quoted exceptions, he requested be kept confidential) from his firm to FIRB dated 13 February, 5 November and 6 December 1991.⁶ This correspondence was prepared in response to FIRB requests for information concerning the reconstruction of Fairfax and '...encapsulates our entire dialogue with the FIRB.'⁷

3.18 Mr Burrows outlined the general nature of the first two letters but quoted specific references from the letter dated 6 December 1991. This was to rebut any inference that he or his office had been the source of

⁵ Evidence p 546

⁶ Evidence p 547

⁷ Evidence p 553

comments critical of the AIN bid (referred to in detail later in this chapter) and included in the FIRB report to the Treasurer.

3.19 The language of the FIRB Minute of 5 December 1991 is significant. The words used therein, supporting the options set out, indicate direct knowledge of the receivers' thinking at that time. The level of detail is such that the possibility that the words were random thoughts, suppositions, or inventions by FIRB staff is most unlikely.

3.20 The committee sought evidence from Mr Burrows as to whether he or his firm was the source of comment critical of the AIN bid. Mr Burrows gave evidence of correspondence with FIRB to prove that neither he nor his company was the source of those comments. However, despite being given several opportunities to do so he did not unequivocally rule out the possibility of being the indirect source of such comment. The committee notes that the INP application to FIRB dated 16 November 1991 stated:

Barings has advised INP Co. that it intends to advise the Receivers to proceed only with INP Co. and Tourang and that the offers that it has received from each of these bidders are "comparable" in terms of price. AIN, according to Baring does not appear to be in the running at this stage.⁸

3.21 On 2 June 1994 the committee wrote to INP requesting that it inform the committee of how their information was conveyed to INP and whether INP could provide any documents or records of any conversations in this matter.

3.22 Subsequent correspondence between the committee and INP will require that this matter be more fully dealt with in the committee's second report.

Dr Roberts and Mr Pooley

3.23 Another matter of public concern to the committee was that despite the fact that FIRB had presumably informed itself in considerable detail as to the characteristics of each of the Fairfax bidders at the outset of the process, nonetheless, after FIRB had forwarded the initial recommendation to the Treasurer dated 5 December 1991, containing detailed criticism of the

⁸ FIRB document - File A - Doc No 1, p 3 (unpublished)

AIN bid, the following day the relevant case officer, Dr Darryl Roberts, telephoned Mr Burrows' office seeking 'basic background information' on AIN. In response to questioning about the timing of the request from Dr Roberts, Mr Burrows observed that he thought it 'interesting'.⁹

3.24 This matter has excited the interest of the committee also because the committee believes it extraordinary that both Dr Roberts and Mr Pooley claimed not to remember Dr Roberts contacting Barings to obtain background information the day after the FIRB advice had been completed. The memory lapse experienced by Dr Roberts is even more extraordinary when one considers:

- That to obtain basic background information on a bidder mentioned in a key FIRB document in a extremely unfavourable light the day after the advice has been prepared is seemingly an unforgettable event.
- That the person on the receiving end of the request, Mr Breese, remembers: that Dr Roberts left him a telephone message on or about 6 December 1991; that when he returned the call, Dr Roberts requested 'background information' on the AIN bid; and that he sent a fax dated 6 December 1991 containing this information.¹⁰
- That Mr Pooley informed the committee the day before Dr Roberts' appearance that 'we certainly discussed it [Dr Roberts' contact with Barings as revealed in evidence on 11 April 1994], as I have said. I think you will find, when you ask him the question, that he does not recall anything about it either.'¹¹

⁹ Evidence p 564

¹⁰ Submission No 33, p 2

¹¹ Evidence p 637

3.25 The committee especially believes the circumstances surrounding the need to obtain the information in this particular document more than 'interesting'.

Finding 3.1

In relation to FIRB contacting Barings after the recommendation of 5 December 1991 had been forwarded to the Treasurer, a number of questions remain:

- Why was such basic information sought after the recommendation had been made to the Treasurer?
- Why was such information sought from Barings and not from AIN?
- How was FIRB able to compile the Minute of 5 December 1991 if it was not already in possession of such basic information?
- Was the information sought to cover up a lack of substantive information on FIRB files?
- Did FIRB correct its flawed analysis of AIN's bid and bring that matter to the attention of Treasurer Willis?

These questions remain open and the committee finds this situation adversely reflects on the impartiality of FIRB advice in this case.

Barings' contacts with the Prime Minister and Treasurers

3.26 Mr Burrows gave evidence of a series of meetings which he attended between July 1991 and November 1991 with Treasurer Kerin and Prime Minister Hawke, during which issues such as expressions of interest in the purchase of Fairfax, the company's indebtedness, problems for caucus with Mr Packer's involvement and the proposed caucus restriction on foreign

investment were discussed. Mr Burrows asserts that the merits of any details of any bid were not discussed at those meetings nor was the concept of 'balanced coverage'.¹²

3.27 With respect to the meeting on 9 October 1991, about the proposed caucus restriction on the level of foreign investment, Mr Kerin referred to the representation made by Mr Burrows that the proposed restriction could result in the elimination of foreign bidders from the auction process and result in a very low price. Mr Kerin also referred generally to Mr Burrows' role in using the auction process to get greater value into the bids for Fairfax.¹³ Mr Kerin saw that process as consistent with his own responsibility as Treasurer about which he said:

...I thought I had a duty to see that as much as was possible that people to whom debt was owed gained what they could. That was just as Treasurer, because of our international reputation, and the behaviour of some of the people in the commercial sector led me to the view that it was in Australia's best interest to open this up to bids to see what it was worth.¹⁴

3.28 The need to complete the bidding process as soon as possible was a matter discussed by Mr Burrows in answering a telephone call from the new Treasurer, Mr Willis, on 13 December 1991.¹⁵ In outlining the other matters discussed, Mr Burrows stated that they also covered why the Treasurer's decision needed to be made quickly. This issue will be covered later in this chapter.

FIRB processes generally - Barings' perceptions

3.29 In responding to questions about FIRB processes, particularly in relation to the sources of information about AIN, Mr Burrows was circumspect, but did respond:

¹² Evidence p 550

¹³ Evidence p 459

¹⁴ Evidence p 457

¹⁵ Mr Willis was appointed Treasurer on 9 December 1991

...from our point of view, when the FIRB rings with an inquiry, having dealt with them on myriad matters over a period of time, one politely responds; one does not ask, 'Why do you want this information?'.¹⁶

3.30 When questioned on the 'normality' of FIRB processes in relation to FIRB seeking advice about domestic bidders there was the following exchange:

Mr Burrows: In terms of assessing a foreign takeover, everything is normal.

Senator Minchin: There are no rules.

Mr Burrows: Sorry. I am being facetious. The answer to your question is that there is no normality: it is for them to make their judgements. Coming back to Senator Kernot's point, the rules have changed. If you go back and have a look at what John Kerin said to you, of course you had in this process - surprise, surprise! - a caucus decision. As I understand it, the nub of what John Kerin said to you was that the reason that he knocked back Tourang was his perception of the caucus decision on non-voting equity. If he had had a wider perception of non-voting equity, obviously the two would have been ticked through, in terms of not being against the national interest.¹⁷

3.31 In response to a further question about his experiences in being asked to provide advice about domestic bidders, Mr Burrows gave the example of a discussion he had with then Treasurer Dawkins in relation to the receivership of Harlin, which had an interest in the Fosters brewing business. He said:

I had a conversation with the then Treasurer and got the very clear impression that, with the potential for local parties to own Fosters, the chance of a foreigner being allowed to own it would be zero...¹⁸

¹⁶ Evidence p 560

¹⁷ Evidence pp 564-565

¹⁸ Evidence p 565

3.32 Such a comment by the Treasurer, taken together with FIRB's unsubstantiated derogatory comments about the domestic bidder in the Fairfax case and evidence from Mr Hinton about the irrelevance of the existence of domestic bidders in the consideration of the merits of a foreign investment proposal and determination of the national interest, appear to demonstrate real inconsistency in the foreign investment procedures over a short period of time. This issue is progressed further in chapters 7 to 10.

THE BIDDERS IN THE AUCTION

3.33 This section will give a brief outline of the bidding companies, the principal players within each company and the structure of their bids.

3.34 There were three bidders in the final stage of the Fairfax auction, namely, AIN, Independent Newspapers and Tourang.

Australian Independent Newspapers¹⁹

3.35 Australian Independent Newspapers Ltd (AIN), a Melbourne based syndicate with a broad range of experience in business and newspapers.

The principals included:

Mr Jim Leslie, Chairman of Boral Ltd, former Chairman of Qantas;

Mr Greg Taylor, Managing Director of David Syme, former Editor of *The Age* and Editor in Chief of David Syme;

Mr John D'Arcy, Chairman and Chief Executive Officer of *The Herald & The Weekly Times* from 1985 to 1988, formerly Finance Director and Deputy Chief Executive Officer of Queensland Newspapers;

Mr Robert McKay, Chairman, Macquarie Library Ltd, formerly Executive Director of the Macmillan Company of Australia Pty Ltd;

¹⁹ Submission No 11

Mr Mark Johnson, Chairman of Macquarie Corporate Finance Ltd, Director of Macquarie Bank; and

Mr Thomas Harley, Special Projects Manager, Treasury at BHP, Treasurer and a Director of UNICEF Australia.

3.36 The AIN bid was supported by a wide range of Australia's leading institutional and other investors including:

ANZ Funds Management	Macquarie Investment Management
Australia Post Superannuation	Mercantile Mutual
Australian Eagle	Norwich Australia
BT Asset Management	Rothschild Australia
CSR Superannuation	Shell Superannuation
Colonial Mutual	Suncorp
County Natwest	UniSuper
Friends Provident	Wardley
ICI Superannuation	Westpac Investment Management

3.37 This support enabled AIN to offer a bid in excess of \$1.5 billion, which AIN contends was the highest bid.

Independent Newspapers Plc

3.38 Independent Newspapers Plc (INP), is a newspaper company based in Ireland. Through a trust company this company also had interests in Australian Provincial Newspapers Holdings Limited (APN) which is a major publisher of regional newspapers in Queensland and northern New South Wales.

3.39 The principals in the INP bid were:

Dr Tony O'Reilly, Chairman of HJ Heinz and Chairman of Independent Newspapers;

Mr Liam Healy, Chief Executive Officer of Independent Newspapers;

Mr John B Fairfax, former Deputy Chairman of the Fairfax Group;

Mr A E (Ted) Harris, Chairman of Australian Airlines, Director of British Aerospace and Chairman of the Australian Sports Commission; and

Mr John C Reynolds; proposed Chief Executive of Fairfax, Managing Director of APN.

3.40 The INP bid was underwritten by JB Were and included institutional support from:

Independent Newspapers
Cambooya Pty Limited
BT Asset Management Limited
Commonwealth Bank Group Financial Services Division
County Natwest Australia Investment Management Limited
FAI Insurances
NRMA Investments
State Authorities Superannuation Board
Suncorp Insurance and Finance Limited
Prudential Assurance Limited
JB Were Underwriting²⁰

3.41 INP claimed that its bid would have cleared the debt of secured creditors and resulted in an offer to the unsecured creditors greater than the Tourang offer.

Tourang²¹

3.42 A special purpose company brought together as a consortium for the purpose of bidding for the Fairfax Group. The consortium comprised Consolidated Press Holdings, Hellman & Friedman (of San Francisco) and The Telegraph plc (of London). Consolidated Press Holdings, representing the interests of Mr Kerry Packer, withdrew from the consortium on 28 November 1991 after the Australian Broadcasting Tribunal announced an inquiry into aspects of the proposed purchase and possible contravention of cross media ownership legislation.

²⁰ Unpublished Treasury Submission of 18 February 1994

²¹ Submission No 3, and unpublished Treasury Submission of 18 February 1994

3.43 The principals of Tourang after Mr Packer's withdrawal were:

Mr Conrad Black, Chairman, The Telegraph plc (London), publisher of newspapers in Canada, USA, and Israel;

Mr Daniel Colson, Vice-Chairman, The Telegraph plc; and

Mr Brian Powers, General Partner, Hellman & Friedman Capital Partners II, L.P., a private investment firm.

3.44 The Tourang bid was underwritten by Ord Minnett with institutional support expected when the float went to market. The Telegraph plc, Hellman & Friedman and US debenture holders were the major influences at the time of the bid. A distinguishing feature of the Tourang bid was its exclusivity agreement with the US junk bondholders.

THE BIDDERS' EVIDENCE TO THE COMMITTEE

AIN

3.45 In both its written submission and oral evidence AIN presented strongly that its bid for Fairfax was misrepresented by FIRB in the recommendations to the Treasurer dated 5 December 1991. AIN presented detailed information in a point by point rebuttal of the FIRB references to AIN which they termed erroneous and misleading.²²

3.46 AIN's evidence covered three main areas:

- Errors of fact and analysis in FIRB minute and inappropriateness of FIRB's procedures.
- Antagonism towards the AIN bid by some Labor Party politicians.
- The national interest and definition of 'control' in foreign investment proposals.

3.47 This section will address those issues under each heading.

²² Evidence pp 210-217 and Submission No 11, p 14

Errors of fact and analysis in FIRB Minute and inappropriateness of FIRB's procedures

3.48 The AIN submission incorporates copies of correspondence to FIRB and sets out details of other discussions or meetings with the Executive Member, Mr Pooley.²³ FIRB's failure to accept repeated AIN invitations to provide additional information or presentations on its bid, its failure to check the accuracy of comments made about AIN or indeed its assertions about the relative merits of the other bidders in its advice to the Treasurer (a copy of which was leaked to AIN in January 1993 but authenticated by former Treasurer Kerin in evidence to the committee on 24 March 1994 and subsequently released to the committee by Treasurer Willis in his letter of 20 April 1994)²⁴ and even its most basic failure to deal appropriately with the correspondence received from AIN in the whole of this case, are things which only Mr Pooley or FIRB can explain.

3.49 The AIN submission included specific criticisms of the FIRB Minute of 5 December 1991:

AIN's ability to close

3.10 It is asserted on page 2 of the FIRB Minute that the capacity of INP and AIN to complete a quick purchase was complicated by Tourang's exclusivity agreement with the Participating Bondholders and what FIRB describes as less certain commitments by banks, institutions and underwriters in relation to the INP and AIN bids.

3.11 AIN does not know how FIRB could have been in a position to make an informed judgement in relation to AIN's ability to close. The investors in and underwriters of the AIN offer had committed to close the purchase by the date advised by Barings. Nor does it understand why FIRB would consider that national interest considerations were affected by the timing of completion of any particular bid.²⁵

3.50 Points 3.12 to 3.16 went on to: substantiate AIN's ability to satisfy the bondholders; point out that they had made an alternative offer which did

²³ Submission No 11, Attachment 3, pp 87-94

²⁴ Submission No 11, Attachment 4, pp 95-109 - See Appendix G

²⁵ Submission No 11

not require bondholder agreement; question FIRB's untested assumptions about the bondholder agreement; argue that the total AIN offer exceeded the Tourang offer; and to argue that the AIN offer was fully underwritten and therefore there was no uncertainty attending the financing of the AIN bid.

AIN as a viable alternative to the foreign bids

3.51 The AIN submission went on to point out that:

- 3.17 There are a number of comments in the FIRB Minute that both directly and by implication undermine the credibility of the AIN offer as a viable alternative to foreign control of Fairfax. These statements contain material errors of fact and assumptions which are unfounded.

At page 10 of the FIRB Minute it is asserted that: "AIN has no newspaper experience." It is astonishing that FIRB could have made such an assertion. It is wholly erroneous. The fact is that Mr Gregory Taylor (the proposed Chief Executive Officer), Mr John D'Arcy and Mr Robert McKay, who could all have been members of the Fairfax Board of Directors if the AIN offer had been accepted, had extensive newspaper and publishing experience. AIN's proposal brought together a considerable array of newspaper and business experience, details of which were clearly stated in AIN's offer and should have been available to FIRB. Barings was aware that the leading Australian investment institutions had preferred AIN's bid to those of Tourang and INP.

- 3.19 It is also stated: "... we are not aware of any plans by the syndicate (AIN) to acquire expertise comparable to that available to Dr O'Reilly and Mr Black". AIN had offered on a number of occasions to provide FIRB with the details that would have informed it of the expertise within the AIN syndicate. Mr Pooley told AIN not to make further presentation to FIRB and FIRB declined AIN's offers to provide it with further information concerning AIN's bid. AIN's proposals contained specific details of areas where specialised assistance was required, in addition to that already available to it, and the steps it would take to obtain that assistance. Moreover, AIN's success in obtaining the support of leading Australian institutional investors suggests that the expertise offered by AIN was considered by the Australian investment community not to be inferior to that of the other bids.

- 3.20 The assertion is also made that: "we would expect Fairfax press to be more competitive were one of the two foreign bidders to get control". This statement is unsupported but it appears to be a critical finding. AIN cannot understand how FIRB could make an assessment of Fairfax's potential competitiveness under AIN in apparent total ignorance of AIN's competitive strategy, a key feature of which was AIN's detailed management plan.

The supposed benefits of foreign control of Fairfax

3.52 AIN noted under this heading FIRB's uncritical acceptance of foreign control and its benefits for Fairfax. They noted that FIRB did not include any assessment of the national interest, of existing Fairfax management, or of the strengths and weaknesses of the company at the time. In particular it criticised the lack of understanding of Fairfax's skills and technology relative to overseas companies.

Assessment of foreign investment indicators

3.53 AIN pointed out that: in its final form Tourang was totally foreign controlled; the FIRB recommendation allowed both foreign bidders effective control of Fairfax at the cost of one fifth of the share capital (at odds with Caucus' decision not to extend foreign control in Fairfax); and that the AIN bid would also have allowed foreign investment, but in an Australian controlled company and via the public listing of that company.

Barings' sale structure preferences

3.54 The AIN submission questioned FIRB's uncritical acceptance of Barings' preference to sell Fairfax as a complete entity, and further queried how the underlying assumptions by FIRB, about the commercial concerns of the banks, the receivers and their advisers, related to the national interest.

Enforceability and operation of the Exclusivity Agreement

3.55 AIN queried FIRB's ready acceptance that there was a virtually binding agreement with Tourang and the bondholders and pointed out that the agreement had been reported by the media as operative only until 16 January 1992.

The risk that AIN might reduce its bid

3.56 AIN noted in their submission that FIRB had suggested that they might reduce their offer if there were no approved foreign bidders. This was simply not possible, AIN noted, because their offer was not conditional and there was no provision in the offer under which AIN could have reduced the purchase price. 'FIRB's assertion is wholly erroneous'.

Conclusions in the AIN submission

3.57 AIN's conclusion re-stated the obvious clash between FIRB's assessment of their bid, and the assessment made by leading Australian institutional investors. They also pointed out that:

- 4.2 AIN is unaware of the source and nature of the information apparently relied upon by FIRB in forming a view of the AIN offer. AIN understands that FIRB may have obtained information from Mr Mark Burrows and other officers of Barings and from others involved in the bidding process. What is clear from the FIRB minute, however, is that:
 - (a) the financial strength of the AIN offer and its attractiveness to Fairfax creditors were not recognised by FIRB;
 - (b) the other benefits of AIN's offer are not referred to; and
 - (c) the alleged deficiencies identified by FIRB in AIN's offer are erroneous.
- 4.3 It is 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. AIN is not aware whether any other material concerning the AIN offer was put before Mr Kerin or Mr Willis.
- 4.4 Further, a reading of the FIRB Minute suggests there was no practicable alternative to foreign control of Fairfax. In fact, AIN's offer was, on any measure, a strong competitive offer, and had it been accepted, would have resulted in a strong Australian owned and controlled Fairfax.

3.58 In evidence to the committee Mr Leslie, one of AIN's principals, could only speculate on the possible sources of the information upon which FIRB relied to denigrate the AIN bid. He said:

We do not know [what influenced FIRB's advice]. We say we have seen that there is a document of seven pages from the receiver's adviser. What would motivate him I just do not know, but it would seem that someone was giving him advice. I do not think they thought this up in isolation. So I think it must have come from either our rival bidders or the receiver's advisers, but that is only speculation.²⁶

3.59 AIN also provided to the committee a copy of the confidentiality agreement they were required to sign as a prerequisite of eligibility to participate in the auction. This meant that Barings would provide any information required by FIRB in connection with the AIN bid. AIN's action indicated that they in fact operated on this basis. Even the meeting which Mr Johnson had with Mr Pooley on 31 October 1991 was arranged by Barings and held in their offices²⁷.

3.60 On the matter of the seven page minute, Mr Burrows tendered in-camera evidence that included correspondence with FIRB and the document in question, identified as the letter of 6 December 1991 which provided background information on AIN.²⁸ He gave evidence about how the document came into existence,²⁹ the time at which it came into existence and that the latter part was an extract of papers provided to Barings by AIN. Mr Burrows commented:

... None of that correspondence contains any derogatory remark about AIN. Importantly, to the contrary, our correspondence which reflects communications in terms of oral meetings and telephone conversations creates a favourable impression of AIN.³⁰

²⁶ Evidence p 222

²⁷ Evidence p 223 (and Submission No 11, p 8 para 3.4)

²⁸ FIRB Documents, File D, Doc No 72 (unpublished evidence)

²⁹ See also Mr Breese's evidence, Submission No 33

³⁰ Evidence p 223

Antagonism towards AIN

3.61 The only person to admit to negative comments about AIN was Mr Hawke. He met with members of the AIN syndicate on 23 July 1991. The Chairman asked Mr Hawke if he had strong views in relation to Mr D'Arcy. Mr Hawke responded:

Yes. He was not going to be a proprietor. I am surprised it took you so long to get to this question

... I made the point at the group with which the gentleman you are talking about-Mr D'Arcy-was concerned that I found it a bit difficult to cop the proposition of independence, the Labor Party having had the experience in 1984 with the Herald group when, without any question, the campaign run by the Herald group supporting the Liberal Party was saying that it was going to be the end of civilisation if we brought in some legislation which denied pensions to millionaires. That campaign waged by the Herald group was one of the most vicious, evil, un-Australian and un-decent campaigns in the history of this country. And being told that one of the fellows involved in this bid was from that group I made the point that I did not think you could be shouting about the capacity for independence. I said that quite openly and directly to them. But that, I can assure you, had no part-and by definition had no part-in what we are talking about because it was not before the Foreign Investment Review Board. This was an Australian bid. It had nothing to do with the government.³¹

3.62 This candid admission from the former Prime Minister that he perceived hostility towards the Labor Party as the only issue that mattered to him in assessing the quality of the AIN bid, certainly constituted a sufficient basis for vetoing the consortium.

3.63 Mr Colson was questioned by the committee whether he had told FIRB that AIN had no newspaper experience. He responded: 'Certainly not that I recall'. When asked a further question about any other comments Mr Colson responded, 'As far as I am aware absolutely not....'. In response to another question about the source of the comments about AIN, Mr Colson said:

I can only speculate. Certainly, the O'Reilly camp did not find it difficult to rubbish our bid consistently, in the press and elsewhere. So I guess on

³¹ Evidence pp 537-538

that basis it is not inconceivable that they may have taken the liberty of making comments about AIN's bid, but I do not know that.³²

3.64 In his evidence on this matter Mr Cameron O'Reilly, representing the INP group and his father Tony, in response to a question about whether his group had sought to influence opinion in relation to the AIN bid, said:

No, I don't think so. I think, though, obviously in pushing the relative merits of ourselves as newspaper operators, there is a natural consequence of that because people are comparing different bids.³³

3.65 The committee's task in investigating the source of the comments critical to AIN contained in the FIRB minute of 5 December 1991 was frustrated by the continued refusal of FIRB members and Treasury staff to respond to questions. They claimed that the direction from the Treasurer prevented them from commenting on how they sourced their information.

3.66 Assuming Mr Hawke's last assertion to be true, despite some differences of view from FIRB members as to what aspects of domestic bids should be covered by FIRB, the committee is then left with the question - Why did FIRB include any comment at all on AIN if it had nothing to do with the government?

3.67 In the absence of any evidence from the FIRB members or staff involved in preparation of the advice to the Treasurer to the contrary and noting Mr Hawke's evidence, the committee agrees with Mr Leslie's interpretation of this matter, and accordingly finds:

³² Evidence pp 692-693

³³ Evidence p 320

Finding 3.2

The treatment of the AIN offer in the FIRB Minute of 5 December 1991 and the recommendation made by FIRB were fundamentally flawed and resulted in the advice put before the Treasurer being incomplete and misleading. Further, a reading of the FIRB minute suggests that there was no practical alternative to foreign control of Fairfax.³⁴

3.68 The errors of fact and analysis in the FIRB minute may have stemmed both from taking inaccurate advice from whatever source and the repeated refusal to accept information from AIN. Knowing that its procedure was to include comment and analysis of the AIN bid, FIRB owed a duty of care as well as the requirements of natural justice to hear from AIN and to correct references before submitting the minute for consideration. Such careless treatment appears to have characterised FIRB's whole dealings with AIN, both before and after the decisions.

3.69 In respect to Mr Hawke's vehement statement about Mr D'Arcy's role in a campaign run by the Herald group in 1984 against proposed changes to pension legislation, Mr D'Arcy advised the committee that he did not join the HWT group until July 1985 and that, until then, he was employed by Queensland Newspapers. Mr D'Arcy also submitted a copy of a letter he sent to Mr Hawke on 22 August 1991, in which he endeavoured to correct the inaccuracies in Mr Hawke's perception of his role. Mr D'Arcy wrote to Mr Hawke:

I am taking the liberty of writing to you to correct a misunderstanding that both surprised and dismayed me.

It has been reported that you, and perhaps other members of Cabinet, believe an editorial campaign to influence government changes to pension asset testing in the Melbourne Herald early in 1986 was instigated and supported by me as chief executive of The Herald & Weekly Times Ltd.

This perception is completely inaccurate. The newspaper group I served for 30 odd years defended strongly the principle of editorial independence.

³⁴ Evidence pp 215-6

I cannot recall any management influence being exerted on any editor or senior journalist in my years at Queensland Press/HWT group.

This does not mean that all editorial direction was correct or balanced. It does mean that newspaper reporting and editorial content were the exclusive prerogative of the editor.³⁵

3.70 Labor Party antipathy towards the AIN bid was widely canvassed in the media at the time of the caucus debate on changes to the foreign ownership limits applying to the media in September and October 1991. In particular the allowance of non-voting equity outside the 20 per cent limit was seen as deliberately favouring the two foreign bidders over the AIN bid. 'Shifting of the goal posts' mid-game was the analogy used to describe this action.³⁶

3.71 FIRB gave the caucus resolution on this matter extensive consideration and weight in its recommendations to the Treasurer. However, in doing so FIRB reversed the weighting caucus gave to control using voting equity as a limiting factor.

3.72 The book *Corporate Cannibals* further exemplifies the extent of the antipathy. On page 252 the then Minister for Transport and Communications, Kim Beazley is reported as saying 'Why should we do any favours for the uptown Melbourne establishment mob?'³⁷

3.73 Many witnesses have stated that the test of 'not contrary to the national interest' is difficult to determine. Mr Kerin argued that the national interest is in the mind of the beholder and that the Treasurer should determine the national interest.³⁸ When questioned on whether the Treasurer should be accountable for the reasons for his decision, Mr Kerin responded:

³⁵ Attachment to Submission No 11

³⁶ Kerry O'Brien, Senator Chris Schacht, Hon Kim Beazley, *Lateline* interview, 19 September 1991

³⁷ *Corporate Cannibals*, p 252

³⁸ Evidence p 474

We do not require that, and part of the reason the government that I was part of did not require that was that it is a very difficult concept to pin down.³⁹

3.74 From this it is apparent that there were no objective criteria against which FIRB considered the merits of all the bidders. FIRB's recommendation was apparently designed to satisfy political objectives ahead of any national interest tests. Alternatively, it is possible that the comments about AIN were incorporated to be malicious and deceptive, or that, in so far as they pleaded the benefits of an infusion of overseas journalism, they represented a degree of 'cultural cringe' in some new definition of the national interest. As FIRB officers and members were prevented from giving evidence on this point it has been impossible for the committee to determine if such motives were among its considerations.

3.75 Even without being able at this stage to ascertain the ultimate source of Mr Pooley's information, the fact remains that he consciously signed off one of the most significant and controversial proposals ever to come before the FIRB under his stewardship when he knew or ought to have known that the gratuitous views expressed in respect of AIN in the 5 December 1991 recommendation were, at best, recklessly inaccurate and misleading or, at worst simply untrue. There can be no excuse for Mr Pooley not checking the accuracy of the recommendation before signing it.

3.76 Indeed, having regard to the fact that the Fairfax issue had been before the Board for many weeks before he signed the recommendation and during that time he had had a number of discussions with all interested parties as well as the advisers to the receivers, it is inconceivable that he would not have been aware that there was simply no evidence to justify the criticisms of AIN. In those circumstances, in the absence of evidence to the contrary, the committee is forced to conclude that it was probably a deliberate decision to stamp such gross inaccuracies with his imprimatur and a serious dereliction of duty reflecting adversely not only on his competence, but on his professional integrity.

³⁹ Evidence pp 473 & 481

Finding 3.3

The committee finds that the FIRB processes in the 1991 Fairfax decision were defective and that the processes by which FIRB conducts its investigations and enforces its conditions must be rectified to achieve greater transparency and fairness to interested parties. This is a matter which is taken up again at chapters 7-10. The committee believes that there needs, at least, to be some 'signposts' to which FIRB, or some similar body, can refer in making indicative decisions and recommendations on the national interest.

The 'national interest' and definition of 'control' in foreign investment proposals

3.77 On the definition of 'control' AIN argued it is possible for an adviser to structure an investment, using non-voting shares or other instruments, in such a way that the investor can enjoy the same degree of influence or control with the same economic interest as though the investment were in voting shares.

3.78 They also argued that, depending on the spread of shareholdings, effective control can be exercised by a minority shareholding. This has certainly been the case with The Telegraph Plc interest in Fairfax. That company, supported by the non-voting interests of Hellman & Friedman, has exercised control since receivership, whether its shareholding was at 15 per cent or 25 per cent.

3.79 Mr Galbraith summarised their submission thus:

I think it is a test, in a particular situation, of what constitutes control. The number of voting shares possessed by a particular person is just one factor. That is a truth which, as you point out, is realised in terms of broadcasting legislation and it is also a truth which governs the substantial shareholding and takeover provisions of the Corporations Law--sophisticated pieces of legislation. The basic proposition has to be that it is an economic truth that you will exercise at least the degree of influence or control over a company as your ownership in that company, however that is held.⁴⁰

⁴⁰ Evidence pp 243-244

3.80 The argument advanced by AIN about the exercise of control and the ways in which control can be structured around non voting shares are relevant to the manner in which caucus and, later, FIRB dealt with this issue. The issues of control and national interest are covered further in chapters 7-10.

INP

INP's FIRB experiences

3.81 The written submission to the committee from INP canvassed changes to the foreign investment guidelines particularly in relation to regional newspapers, which the O'Reilly family company, APN, publish in Queensland and northern New South Wales. The submission also touched on the foreign investment applications and processes INP experienced in 1991 and 1993, as a bidder for Fairfax and in respect of increases in investment in APN.

3.82 In evidence, Mr Cameron O'Reilly outlined the process INP used throughout 1991 of holding discussions with public servants and with politicians of all parties including, to his recollection, the Prime Minister, Mr Hawke, and Mr Beazley, then Minister for Transport and Communications. He stated that INP formed the view early on that 20 per cent would be the maximum foreign ownership allowable.⁴¹

3.83 In response to questions about the company's dealings with FIRB, Mr O'Reilly described his dealings as 'very straightforward' and 'mechanical'. He indicated that his company did not experience problems with FIRB not responding to correspondence.⁴²

3.84 On the topic of heavy concentration of media ownership in Australia, Mr O'Reilly said:

... ultimately it seems to me that the role of the press in particular within society is quite an important role and there is a responsibility attached to that. That is to provide hopefully critical information to the public about the goings-on of the smallest thing and the biggest thing within the country,

⁴¹ Evidence pp 317-318

⁴² Evidence p 321

but without being influenced by any one particular hand. The more different points, the more diversity that one has in the media, the more likely that I think the public are going to benefit from a wide range of views. I, certainly as a consumer, as a reader, would like to feel that I am getting a diversity of opinion and have access to that if I wish.⁴³

3.85 Mr O'Reilly went on to argue that allowing foreign buyers into the market should, theoretically at least, contribute to greater diversity and so lessen media concentration.

3.86 The committee also questioned Mr O'Reilly on his attitude to transparency in decision making in relation to foreign investment. He said:

I believe it should be absolutely transparent, that the rules should be set and there should be no exceptions and people should abide by those rules.⁴⁴

3.87 Speaking further on this issue as it relates to the national interest and the rights of the parties to access information provided about both themselves and the rationale for decisions, Mr O'Reilly said:

... What is defined as in the national interest needs perhaps to be set out, the issues that should be considered and those that should not be considered.⁴⁵

3.88 In discussions with the committee on this point, Mr O'Reilly asserted that all bidders would want to know the rationale for decisions and to have the opportunity to respond to information being considered about them and their bid.

3.89 Issues of transparency in decision making and the national interest are covered further in chapters 6 to 10.

⁴³ Evidence p 322

⁴⁴ Evidence p 324

⁴⁵ Evidence p 325

INP's bid for an increased share in APN

3.90 The committee notes the INP submission seeks to achieve a change in foreign investment policy with respect to regional newspapers. In oral evidence INP's representative in Australia, Mr Cameron O'Reilly, submitted that the committee should consider recommending that the 25 per cent limit on foreign investment in Australia's print media be lifted for provincial newspapers (those which have a circulation of less than 50,000 per day in a restricted geographical area).⁴⁶ Whilst the committee agrees that Mr O'Reilly made a number of persuasive points in support of his submission, the terms of reference do not allow the committee to make conclusions in respect of his request. An examination of ownership levels, per se would entail the taking of substantial additional written and oral evidence under additional and clearly delineated terms of reference.

Recommendation 3.1

The committee recommends that, in the context of the APN submission to the Senate Print Media Committee, the Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure inquire into and report on the merits of distinguishing between provincial newspapers and major capital city daily newspapers in deciding levels of foreign ownership.

3.91 In terms of the matters under inquiry, the committee notes that INP enjoyed a comparatively straightforward experience with its application to FIRB and the Treasurer in the Fairfax bidding process - lobbying, application, approval - and no problems in exchanging correspondence with FIRB.

TOURANG

3.92 The Tourang consortium was developed out of a meeting between the principals and other interested parties held in London in June 1991. The operating basis of the consortium was subsequently expressed in a

⁴⁶ Evidence pp 314-316