APPENDIX F

FURTHER OPINION OF MR DAVID JACKSON QC

Re: SENATE SELECT COMMITTEE ON CERTAIN ASPECTS OF FOREIGN OWNERSHIP DECISIONS IN RELATION TO THE PRINT MEDIA

FURTHER OPINION

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Re: SENATE SELECT COMMITTEE ON CERTAIN ASPECTS
OF FOREIGN OWNERSHIP DECISIONS
IN RELATION TO THE PRINT MEDIA

FURTHER OPINION

1. In my Opinion of 8 March 1994 I expressed the view that:-

> " 52. If the correctness of the claim for public interest immunity were to arise for consideration in litigation, my own view would be that Category 1 of the material to which the Treasurer's letter refers, i.e. advice from FIRB or from the Treasury to the Government, would be regarded as falling within a class to which a claim for public interest immunity might successfully be made. Whether the claim would be sustained would depend on other factors, such as the time which had elapsed since the advice was given. The court might also well wish to examine the material itself. I think it probable, however, that the claim would be upheld."

2. The documents which I there described as "Category 1 of the material to which the Treasurer's letter refers" are referred in that letter as:-

> " 1. Confidential advice from the Board or the Treasury to the Government - the Government is not prepared to provide such material to the Committee, because to do so would be contrary to the public interest."

and, more fully, as:-

> " Category 1
>
> The documents the Government is not prepared to produce comprise confidential advice to the Treasurer, in relation first, to applications by Mr Conrad Black's Tourang Limited (Tourang) and Mr O'Reilly's INP Consortium Limited (INP) seeking approval to buy John Fairfax Group Pty Ltd (Fairfax) and, second, an application by The Telegraph to increase the ownership level. The documents are, variously, annotated 'Confidential - limited access only', 'Highly protected' or 'Protected - limited access only'."

3. The circumstances referred to in the letter as giving rise to the claim for immunity are:-

> " The Board plays a unique and major role in the public interest by advising the Government on foreign investment matters generally and in examining proposals by foreign interests for investment in Australia and in making recommendations to the Government on those proposals. The Board is an advisory, non-statutory body comprising currently four members. The Board assists me in the administration of the Government's foreign investment policy, principally by giving me confidential advice on proposals by foreign interests to invest in Australia. Board members are appointed by me after approval by the Cabinet,

generally for a term of three years. The Board members have extensive experience in business, Government or labour relations and are persons of undoubted integrity and impartiality.

The Board's advice and opinions and the expression of members' views are considered by the Government and the Board to be confidential to the deliberative process. The expectation of confidentiality is inherent in the conditions of appointment of Board members. That understanding of confidentiality is integral to inter departmental, inter agency and inter Governmental consultations in this area because it provides the most favourable conditions for frank and candid advice to me in the administration of the Government's foreign investment policy. The opinion and comment relate to the commercial activities of the parties to the proposal and, if released, could be used by competitors and others in a manner detrimental to the parties' commercial interests. The inter departmental, inter agency and inter Governmental consultations are conducted on the basis that views expressed in confidence will be protected.

It is implicit in the terms of appointment and understood by Board members that advice tendered to the Government on foreign investment proposals is strictly confidential. The Board has given its views to successive Treasurers on a considerable number of cases since its establishment in 1976. The views of individual Board members on a proposal have never been released.

To release the Board's views, opinions and recommendations could be embarrassing and damaging to Board members when those views were given in confidence as part of the deliberative process of Government. Making public such views would subject members to public comment and criticism when the matters under consideration and on which advice was being given were never intended or understood to be for external consumption. The potential for stigma to be attached to members' views could also have adverse consequences for members' reputations and commercial and business interests. Moreover, it is likely that senior and respected business people and other persons of distinction would be unwilling to serve on the Board if they knew that there was a risk that their confidential advice would be revealed.

Consistent with the above, in relation to the Committee's requests, I have directed my Department that officials should not provide to the Committee, whether orally or by way of provision of documents, information or advice provided in confidence by the Board and the Treasury to the Government. I have similarly directed Mr F.G.H. Pooley, a former official of my department."

4. I have now been asked to advise on the following matters:-

"For purposes of clarification the Committee has therefore instructed us to obtain from you advice on:

1. 'The other factors' mentioned in paragraph 52 and their relevance to the case in point.

2. Relevant case law on the point.

3. Any legislation and pending legislation pertaining to the matter.

4. The relevance of the time which has elapsed since the advice (ie. the FIRB Minute/s in question), was given."

and I have been supplied with some specific material, namely:-

" 1. The Submission of the Australian Independent Newspapers Pty Limited to the Senate Select Committee;

2. Copy of transcript of Nine Network Australia Limited transcript of 6 March 1994 at 9 pm being an interview with the Federal Treasurer.

3. Copy Canberra Times newspaper report of 17 March 1993."

5. The first such document includes a minute of the Foreign Investment Review Board dated 5 December 1991.

6. The point which I was seeking to make in para.52 of my earlier Opinion was that the documents fell into a "class" which, in litigation, would give rise to a "class" claim. (That is clear from **Sankey v. Whitlam** (1984) 142 C.L.R. 1, in which some of the documents in question were similar in nature to those referred to in Category 1.) As **Sankey v. Whitlam** itself shows, however, the fact that documents which fall within a class in relation to which such a claim is made is not decisive; other factors may result in the claim not being upheld. See **The Commonwealth v. Northern Land Council** (1993) 176 C.L.R. 604 at 616 per Mason C.J., Brennan, Deane, Dawson, Gaudron and McHugh JJ. I mentioned in para.52, by way of example, one such factor, namely the length of time since the advice was given. (That factor was regarded as important on the facts of **Sankey v. Whitlam.**) Finally, I expressed the view, on the material then briefed, that I thought it probable that the claim would be upheld.

7. In determining, in legal proceedings, whether a class claim should be allowed, the issue which falls to be determined was expressed by the majority in **The Commonwealth v. Northern Land Council** (at 616) as follows:-

> " . . . whatever may have been the position in the past, the immunity from disclosure of documents falling within such a class is not absolute. The claim of public interest immunity must nonetheless be weighed against the competing public interest of the proper administration of justice, which may be impaired by the denial to a Court of access to relevant and otherwise admissible evidence."

8. In relation to the question whether the issue can be further "subdivided", the authors of **Cross on Evidence**, Australian edition - correctly in my view - say at [27175]:-

> " It is difficult to add anything to the statement that it is the duty of the court, in arriving at a decision on question whether evidence should be withheld, to balance the public interest in the administration of justice against whatever public interest is likely to be injured by the disclosure of the evidence. The balancing of divergent interests means it is difficult, if not unprofitable, to attempt to extract a series of principles from the decided cases. The importance to be given to any one public policy consideration will depend not only on its own merit but also upon that against which it must be measured."

9. Notwithstanding that view it <u>is</u> possible, I think, to identify more exactly some features which may be regarded as material. They are:-

(a) The level of government at which the communication in question took place. The higher the level, the more likely that the immunity will be respected: **Sankey v. Whitlam** at, eg. 99 for Mason J.

(b) Whether the communication deals with important matters of policy or those which are not: **Sankey v. Whitlam** at 99 per Mason J.

(c) The nature of the proceedings in which the issue arises. The immunity is unlikely to prevail in criminal proceedings if its acceptance would act

adversely to the position of the accused: **The Commonwealth v. Northern Land Council** at 618. Again, it may militate against allowing the claim to immunity if to do so would prevent investigation of malefactions in the workings of the government claiming the immunity: **Sankey v. Whitlam** at 46-47 per Gibbs A.C.J., at 56-57 per Stephen J.

(d) The length of time since the documents came into being: **Sankey v. Whitlam** at 46-47 per Gibbs A.C.J.

(e) Whether the matters the subject of the documents are still "current or controversial": **The Commonwealth v. Northern Land Council** at 620.

(f) Whether the document has already been made public, including the circumstances of its publication: **Sankey v. Whitlam** at 45 per Gibbs A.C.J., at 64-65 per Stephen J. at 101 per Mason J.

10. It is, of course, a matter for the Committee to form its own view on whether it will allow the claim to immunity in respect of the documents, and information, in question, and in forming that view to give such weight to the various factors to which I have referred as it thinks apropriate.

11. If the issue were to arise in respect of the document which I have now seen, namely the minute of the Foreign Investment Review Board dated 5 December 1991, in civil proceedings in a court, I would incline to the view that the claim to immunity would not succeed. The factors which would seem to me significant in that regard are:-

(a) It has already been disclosed - perhaps by a "leak" - the disclosure taking place at some time prior to Mr Leslie's letter of 20 January 1993 to Sir Bede Callaghan.

(b) Mr Kerin, the Treasurer at the relevant time, in his evidence to the Committee on 24 March 1993 agreed that the document shown to him (which I take it was the relevant minute) was the document which had been supplied to him by FIRB, except that the last sentence was missing. The document, already "public", was thus authenticated. Mr Kerin also discussed, to some extent, the contents of the document.

(c) The contents of the document, in terms of their subject matter, are only doubtfully on "important matters of policy".

(d) The events to which the document related are all in the past, although it is true to say that it has some ongoing relevance.

12. As I have said, the issue is ultimately for the Committee. I should add two observations, however, concerning matters put to me in my Instructions. The first concerns the decision of the Administrative Appeals Tribunal (Deputy President R.K. Todd) in **Lordsvale Finance v. Department of Treasury (No. 3)** (No. A84/181, 30 June 1986). In that decision he held that documents broadly of the kind presently in question could not be the subject of a successful class claim for the purpose of deciding whether under s. 58(5) of the **Freedom of Information Act 1982**:-

> " . . . There exists reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest."

Each document had to be considered on its merits. That does not affect the views which I have earlier expressed.

13. The second matter concerns legislation. The only existing or proposed legislation which seems potentially material is the **Evidence Bill 1993** which in s. 130(1) provides that:-

> " (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public

> interest in preserving secrecy or confidentiality in relation to the information or a document, the court may direct that the information or a document not be admitted into evidence."

The succeeding provisions of the section then elaborate upon that broad proposition. The section does not, I think, affect materially the position otherwise applying in the present circumstances.

14. In relation to any questions concerning the document already published (or documents related to it) the basis for maintaining an objection to answering such questions would seem to disappear if a claim to immunity in respect of the document could no longer be sustained. As Gibbs A.C.J. said in **Sankey v. Whitlam** at 45:-

> " It was further submitted that if one document forming part of a series of Cabinet papers has been published, but others have not, it would be unfair and unjust to produce one document and withhold the rest. It may be indeed be so, and where one such document has been published it becomes necessary for the court to consider whether that circumstance strengthens the case for the disclosure of the connected document."

To similar effect was Stephen J. at 66:-

> " The other documents here in question have largely not been the subject of prior publication but all of them are in some degree affected by it. They consist of inter-Ministerial and inter- and intra-departmental documents and of documents passing between a department and outside persons.

> All are apparently concerned with the proposed borrowing of four billion dollars which was the subject of the published Executive Council Minutes. Once those minutes became public and subject to public speculation and discussion it is not easy to identify the particular quality of public interest which is said to reside in the non production of these associated documents. Certainly the Ministerial and other affidavits, involving no more than class claims and making only very general and unspecific references to the proper functioning of the Executive and of the Public Service, provide no assistance in this regard."

15. In relation to other documents falling within the claim for immunity, the Committee will need to consider each such document in the light of the principles to which I have referred. I see no reason, for example, why the Committee could not require the documents in respect of which the immunity is claimed to be more specifically identified, at least on a confidential basis, as a starting point.

With compliments,

D.F. JACKSON QC

31 March 1994.

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