Parliament of the Commonwealth of Australia

The Report of the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media

PERCENTAGE PLAYERS

The 1991 and 1993 Fairfax Ownership Decisions

June 1994

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PREFACE

On 9 December 1993 the Senate appointed a Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media, with terms of reference requiring it to inquire into and report on:

(a) the origin and basis of decisions in 1991 and 1993 to increase the permissible percentage of foreign ownership of newspapers, and, in particular:

  (i) whether those decisions were influenced by considerations relating to the content of newspapers including any requirement for balanced coverage;

  (ii) whether the contents of newspapers were influenced by those decisions or the prospect of those decisions;

  (iii) the procedures followed by the Foreign Investment Review Board and the extent to which any of its deliberations or recommendations were taken into account in the making of those decisions; and

  (iv) whether the Prime Minister influenced or sought to influence those decisions, and, if so, the basis on which and the extent to which he did so.

(b) the significance and effectiveness of the guidelines of the Foreign Investment Review Board; and

(c) 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.

These terms of reference have been modified to extend the term of the committee, which is now due to conclude on 22 September 1994 upon the presentation of the Committee's final report.

Percentage Players is the first report of the committee, an initiative made necessary by the lack of cooperation from the Prime Minister and the Treasurer, and by the directions from the Treasurer to certain witnesses which significantly limited their evidence.

The final report is proposed for September 1994 by which time the Senate Committee of Privileges and the Parliament will have had the opportunity to resolve the issues surrounding the government's claim for public interest immunity in relation to certain matters. The key to this resolution may be the Bill introduced by Senator Kernot, which attempts to provide a mechanism for referring disputed claims of public interest immunity to the courts. Accordingly, the final report will address any relevant matters arising from evidence which becomes available in the intervening period.

The title of this report, *Percentage Players*, reflects the uncertainty under which media decisions have been made in this country in recent years, and the element of risk and gamble present in media ownership decisions. The rules are frequently changing, and the public is faced with the spectacle of constantly manoeuvering players who are watching for every possible opening and taking advantage of it. When the Prime Minister chose to enter the field as a rule maker and umpire with a vested interest in the outcomes, then the game lacked propriety as well as order. This report is a salutary reminder of the need for integrity and predictability in the regulation of the media.

The committee acknowledges and records its thanks to all those individuals and organisations who assisted the inquiry by making written and/or oral submissions. The committee also thanks the staff listed overleaf and all of those mentioned in the Acknowledgements.

Senator Richard Alston
Chair

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

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KEY POINTS

Evidence gathering

This inquiry was established in response to community concern about:

- allegations in the autobiography of Mr Conrad Black, which described a deal with Prime Minister Keating to allow Mr Black to increase his investment in Fairfax if its political coverage of the 1993 election was 'balanced';

- comments by Mr Keating in a subsequent media interview which supported the notion of a deal with Mr Black; and

- concern about Foreign Investment Review Board (FIRB) processes leading up to the 1991 and 1993 Fairfax decisions.

From the outset, the inquiry was frustrated in its endeavours by the non-cooperation of the government, including Prime Minister Keating, Treasurer Willis, public servants and paid advisers. The committee was required to use its powers of compulsion to ensure the attendance at hearings by former Prime Minister Mr Hawke, and a former Treasurer, Mr Kerin.

Treasurer Willis issued a series of instructions to public servants and paid advisers from FIRB directing them not to cooperate with the committee in certain key lines of inquiry. The Treasurer claimed public interest immunity, but produced no legal opinion in support of his position. The committee obtained opinions from the Clerk of the Senate and two senior legal counsel. These support the committee's contention that it has the power to deal with the issues of public interest and accountability, and to require that public servants and other potential witnesses give evidence.

To break the impasse which developed, Senator Kernot, in March 1994, introduced legislation to provide for enforcement by the

Federal Court of the lawful orders of the Senate and its committees to obtain evidence for which the government has claimed public interest immunity.

The committee acknowledges that, as a consequence of Mr Keating's and Mr Willis' non-cooperation, the evidence it has taken is incomplete. Notwithstanding this, the committee has made findings and recommendations based on the available evidence.

The task of inquiring into the foreign investment decisions, particularly those made in 1991, was complex and difficult due to the number of parties involved. In addition to regulators, government officials, foreign investment and media experts, the committee took evidence from six teams comprising more than thirty players, including the bidders for Fairfax. Some witnesses gave evidence with great conviction and certainty but later professed imperfect memory. Still others, seemingly well placed to shed light on the 1991 Fairfax decision, professed defective memory on what was described by one expert witness as being 'the most contentious foreign investment decision probably since the war'.[1]

Findings and recommendations

The committee's key findings include:

- in relation to the 1993 decision, the Prime Minister, Mr Paul Keating, did attempt to improperly influence the political coverage of Fairfax newspapers by holding out to Mr Black the prospect of increased investment in Fairfax in return for balanced coverage;

- contrary to his claim in Parliament, Mr Keating did not take into account national interest considerations when making the decision to allow Mr Black to increase his investment in Fairfax;

- Treasurers Kerin and Willis were not apprised of the true merits of the Australian bidder for

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[1] Evidence of Mark Burrows, p 560

Fairfax, Australian Independent Newspapers. The information provided by FIRB, at least to Treasurer Kerin, was false and misleading;

- the foreign investment rules and procedures applied in the 1991 and 1993 Fairfax decisions were ill-defined and uncertain;

- hasty and ill-considered decisions were made which were based on political imperatives rather than the national interest;

- the government has assiduously opposed the committee's endeavours to obtain information and documents on the decisions. This is contrary to the public interest;

- FIRB is excessively secretive, employed defective processes in this case and is not accountable for its actions or recommendations. FIRB's processes must be more open and transparent to meet modern standards of accountability in public administration;

- the Foreign Acquisitions and Takeovers Act and the other foreign investment policy statements should be replaced with a single statute covering all foreign investment policies and regulations;

- FIRB should be replaced by a new statutory authority responsible for administering foreign investment policies, making decisions on applications in non-key industry sectors and referring applications in key industry sectors to the Treasurer accompanied by recommendations which would be made public;

- applications in key industry sectors, such as the media, should be determined by the Treasurer who would be required to make decisions based

on national interest considerations and publish reasons;

- the interests of domestic bidders should be taken into account in any consideration of the national interest;

- all applications and accompanying documentation to FIRB or its replacement body should be accessible to the public after twelve months, unless the affected party is able to demonstrate that the public interest requires such material should be kept confidential; and

- limits on foreign ownership should cover both economic (non voting) and voting interests.

FINDINGS AND RECOMMENDATIONS

This table lists all findings and recommendations in the Report. Not all chapters contain findings or recommendations. Numbers denote chapters.

FINDINGS

Finding 3.1 **Page 44**

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.

Finding 3.2 **Page 58**

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.

Finding 3.3 **Page 61**

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.

Finding 3.4 **Page 69**

The committee has considered the conflict of evidence between the aforementioned players (Messrs Hawke, Black, Kerin and Kennedy) regarding government commitments on foreign ownership levels. The committee has noted the following points:

- The reports of the Caucus debate and decision on foreign ownership and media concentration that took place between the meeting in July 1991 and the Treasurer's decision on 5 December 1991;
- The independent recollection of Mr Kennedy; and
- The date and the contents of the press quotation above.

In view of the fact that Tourang structured its initial bid to accord with a 35 per cent limit, and the independent evidence of Mr Kennedy, the committee accepts that Mr Black was given a positive indication that up to 35 per cent foreign ownership could be countenanced.

Finding 3.5 **Page 73**

Re Tourang II

Taking into account:

i) the criteria Mr Kerin advised that he would use in considering foreign investment applications for Fairfax;

ii) his evidence of what he actually did take into account;

iii) the arguments and recommendations put before him by FIRB (particularly the comments adverse to AIN);

iv) the decision that he took, particularly its timing, to approve O'Reilly and reject Tourang (purportedly so as not to disadvantage Tourang by delay); and

v) that in doing so he acted contrary to the Caucus decision in regard to both the treatment of foreign non-voting equity and the extension of foreign control of the Fairfax company;

The committee rejects Mr Kerin's assertion that in approving O'Reilly and rejecting Tourang he was not effectively bequeathing Fairfax to the O'Reilly group. The committee finds that the decision was discriminatory, based on incorrect and misleading advice and was deliberately intended to obtain an outcome in the interests of the government and not the national interest as required by the FATA.

Finding 3.6 **Page 74**

From the foregoing, the committee concludes that the current procedures for consideration of foreign investment applications are defective and may be, in fact, a deterrent to investment.

Finding 3.7 **Page 80**

Despite numerous invitations to do so, Mr Willis chose not to attempt to justify his actions or to advance any legal advice to support his repeated non-cooperation with the committee.

The committee condemns the action of Mr Willis in directing his officials not to cooperate with the inquiry in providing certain critical evidence. The committee finds that Mr Willis has acted contrary to the public interest in not assisting this parliamentary inquiry.

Finding 5.1 **Page 120**

Given the totality of Mr Black's and Mr Keating's explanations the committee finds that Mr Keating did complain to Mr Black of unfavourable and, as he regarded them, gratuitous, comments by Fairfax reporters and that Mr Black's public response was to characterise these complaints as concerns about the separation of reporting from editorial comment.

The committee does not accept Mr Keating's explanation to the media that he was trying to protect the rights of Fairfax employees 'to write and have printed that which they believe and not have proprietorial intervention'. On the contrary, all his actions suggest he was more interested in using the unique leverage of his position to influence the political coverage of the Fairfax press in his favour in the lead-up to the 1993 election.

Finding 5.2 **Page 125**

Despite ample opportunities in the Parliament and elsewhere to do so, Mr Keating has never resiled from his remarks made in Seattle, where he said he had told Mr Black:

> '... we want a commitment from you that the paper will be balanced. And if there is any notion that, you know, of bias, that is that 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.'

In the light of those remarks and the other evidence mentioned here, the committee finds that Mr Keating attempted to influence Mr Black regarding the political coverage of the Fairfax newspapers for the 1993 general election.

Finding 5.3 **Page 130**

Since his acquisition of the Fairfax group, Mr Black has made executive appointments of persons who were sympathetic to his political and commercial concerns. By warning Fairfax senior management that the proprietor was on probation Mr Keating did his best to ensure that he would receive a more sympathetic hearing at Fairfax than had previously been the case.

The committee finds that Mr Keating attempted to exert pressure at Fairfax for favourable election coverage by making a linkage between 'balance' in election coverage and an increased ownership limit for Mr Black.

Finding 5.4 **Page 136**

The committee rejects Mr Keating's claim to the Parliament that he took into account national interest considerations when deciding on the ownership of Fairfax.

Finding 6.1 **Page 143**

The committee finds that Mr Keating's request of a **single** newspaper proprietor to provide 'balanced coverage' is at odds with the whole history of media regulation and with the overwhelming trend of democratic governments throughout the years, which has been to protect the diversity and plurality of the print media as a whole.

Finding 6.2 **Page 167**

For Mr Keating to have set himself up personally as the judge of bias and the arbiter of the kind and extent of freedom which Mr Black should give to his employees is plainly not at all the same as a government enforcing an open and well understood charter of independence. The committee finds that it was improper for Mr

Keating to set himself up in this role, holding power as he did over Mr Black's increased ownership.

Finding 11.1 **Page 243**

The committee finds that Dr Hewson's account of his conversations with Mr Black is, on the balance of probabilities, true. Dr Hewson's account is consistent with his public stance on the issues and is supported by the corroborating evidence given by Mr Warwick Smith. Mr Black's version of the conversations is unsubstantiated, despite the fact that it was taken up so enthusiastically by the Prime Minister, who was not present at any of the meetings attended by Dr Hewson and Mr Black.

RECOMMENDATIONS

Recommendation 3.1 **Page 64**

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.

Recommendation 6.1 **Page 166**

The committee recommends that the Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure, as part of its reference on telecommunications developments (24 March 1994) should consider the regulatory issues of convergence of media technologies, especially as they relate to the preservation of diversity.

Recommendation 6.2 **Page 166**

The committee recommends that the Senate Standing Committee on Legal and Constitutional Affairs, which is examining codes of conduct for journalists, examine the issue of the enforceability of guarantees of independence as part of government regulation of the media.

Recommendation 7.1 **Page 188**

That the government prepare amendments to the Foreign Acquisitions and Takeovers Act and the Broadcasting Services Act which will ensure that limits on foreign ownership cover both economic (non-voting) and voting interests.

Recommendation 10.1 **Page 226**

That the government introduce legislation in the Parliament to amend Australia's foreign investment laws in accordance with the recommendations of this report.

Recommendation 10.2 **Page 227**

That the government incorporate all components of its foreign investment policy into a single statute.

Recommendation 10.3 **Page 227**

That the legislation include a comprehensive statement of the goals of foreign investment policy and identify those sectors of the economy which should be subject to foreign investment regulations.

Recommendation 10.4 **Page 228**

That the legislation contain the criteria which should be used to determine applications by foreign investors and that it should also provide, where appropriate, that the interests of domestic bidders be taken into account.

Recommendation 10.5 **Page 230**

That the legislation to reform foreign investment rules reflect a realistic and appropriate range of sanctions to remedy possible breaches, and that there be a duty on the part of the administering body to monitor and enforce compliance.

Recommendation 10.6 **Page 230**

That the legislation include procedures that the regulatory body should adopt to consult with applicants and other interested parties preparatory to it exercising any administrative discretions conferred by the statute.

Recommendation 10.7 **Page 231**

That the legislation provide that all applications and accompanying documentation would be accessible to the public after 12 months unless the affected party was able to demonstrate that the public interest required such material to be kept confidential.

Recommendation 10.8 **Page 232**

That the new statute contain provisions establishing an independent statutory authority to be known as the Foreign Investment Commission (FIC) which will replace the non-statutory FIRB.

Recommendation 10.9 **Page 234**

That the legislation establish the FIC as a regulator, as opposed to an 'application processor'.

Recommendation 10.10 **Page 235**

That FIC be empowered to make binding decisions in respect of certain categories of applications, applying the tests established under the Act and that the Treasurer, on FIC's recommendation, make decisions in respect of more significant applications, for example, those in key sectors. These decisions would be made according to the national interest and would be accompanied by a statement of reasons.

Recommendation 10.11 **Page 235**

That for those categories of decisions to be made by the Treasurer, FIC prepare briefing material and recommendations and that this material be published prior to its dispatch to the Treasurer.

Recommendation 10.12 **Page 235**

That FIC maintain a public register of all foreign investment proposals and decisions and that the register of proposals and decisions for each financial year be included in the FIC report which would be tabled annually in Parliament. The register would be limited to providing details of the receipt and status of applications.

Recommendation 10.13 **Page 236**

It is essential that in protecting the interests of all parties, any review process be both speedy and effective. It is therefore recommended that the legislation provide that decisions of FIC be subject to the processes of administrative law review.

Recommendation 10.14 **Page 236**

That the legislation require FIC to prepare an ongoing communications strategy. This would be included in its annual report to Parliament and comprehensively address the information needs of both potential foreign investors and the Australian community.

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 ...[1]

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 ... .[2]

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[1] Conrad Black, *A Life in Progress*, Random House, Sydney, 1993, p 453

[2] 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.[3]

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.[4] 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.[5], 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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[3] Extract from transcript of Mr Keating's interview in Seattle, USA, 18 November 1993, p 5

[4] Appendix A

[5] *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.[6]

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

[6] *News & Fair Facts*, Report of the House of Representatives Select Committee on the Print Media, March 1992, Appendix 4, List of Witnesses

> of the process Caucus opposes any level of foreign voting equity above 20 per cent.[7]

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.[8]

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.[9]

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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7 John Kerin, Press Release, No 98, 10 October 1991

8 *A Life in Progress*, pp 419-20

9 *A Life in Progress*, p 416

> foreign shareholding having more than 15 per cent and foreign shareholders in aggregate not having more than 40 per cent.[10]

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.[11]

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.[12]

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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[10] Evidence p 124

[11] Evidence p 128

[12] Mr Kerry Packer, House of Representatives Select Committee on the Print Media, Official Hansard Report, 4 November 1991, p 1149

> 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.[13]

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.'[14] 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.[15]

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

[14] Peter Westerway, House of Representatives Select Committee on the Print Media, Official Hansard Report, 26 November 1991, p 1503

[15] 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.[16]

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.[17]

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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[16] Dan Colson to Ralph Willis, 11 December 1991, attachment to Submission No 3, (Mr Conrad Black)

[17] 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.[18] 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.[19]

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.[20]

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[18] 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

[19] AIN, Submission No 11, p 14

[20] 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.[21]

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.[22]

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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[21] Submission No 3, p 6

[22] 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.[23]

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.[24]

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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[23] *The Australian*, 23 March 1993

[24] John Dawkins, press release, 'Foreign Investment Policy: Mass Circulation Newspapers', 20 April 1993

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'.

CHAPTER 2

CONDUCT OF THE INQUIRY

Significance and appropriateness of the inquiry

2.1 The conduct of this inquiry has given rise to a number of complex and politically sensitive procedural issues which, at times, have overshadowed the subject matter of the terms of reference. This high level of procedural and political sensitivity emanates from the very nature of the terms of reference. Traditionally, parliamentary inquiries have been seen to have a threefold purpose, viz, assist in developing legislation, monitoring and influencing the executive arm of government, and informing public opinion.[1] This inquiry had an intense focus on each of these goals. Its terms of reference focussed on the decisions of the executive government, encompassing the role of two Prime Ministers and three Treasurers, in two key foreign ownership decisions which resulted in foreign control of newspapers published in Sydney and Melbourne reputed to be amongst the top twenty newspapers in the world.[2]

2.2 One of the expert witnesses giving evidence on the foreign investment procedures assessed the 1991 decision as being '... the most contentious foreign investment decision probably since the war ....'.[3] Moreover, the decisions of 1991 and 1993 concerned the corporate future of an organisation with assets valued at, depending on time and share value, between $1.25 billion and $2.75 billion engaged in publishing newspapers which included *The Sydney Morning Herald, The Age* and the *Australian Financial Review.*

2.3 The inquiry incorporated a review of print media policy specifically, and foreign investment legislation and procedures generally. Each of these policy areas arouses particular community sensitivities. The inquiry took evidence from probably the most crucial agent in public opinion formation,

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[1] Galloway GB 1927 "Investigative Functions of Congress", *American Political Science Review*, 27: 47-70

[2] Mr Nic Richardson, "Loose Lips and Lost Chances", *The Bulletin*, 10 May 1994, p 27

[3] Mr Mark Burrows, Evidence p 560

the print media. It was therefore not surprising that the committee experienced spirited opposition to the gathering of certain evidence relevant to its terms of reference.

2.4 The committee noted the concern of Mr Conrad Black and Mr Stephen Mulholland regarding the nature and thrust of the inquiry. In oral evidence Mr Mulholland, the chief executive officer of John Fairfax Holdings, submitted:

> ... I feel I must say to you that as a newspaper man of almost 40 years standing I, the chief executive officer of a newspaper company, am extremely disturbed and concerned that our editors and our editorial directions are being brought before this panel of politicians to be questioned on the inner workings and editorial decisions of our company.[4]

2.5 Mr Black said of the inquiry:

> ... that normally this is not a suitable subject for a political questioning of editors to find out how newspapers function internally. But in this case I was not opposed to it, because I accepted that we had to remove any doubt that may have arisen about the probity of our behaviour in this regard.[5]
>
> ..., what more can I do to bury the putrid corpse of this myth, short of driving a silver stake through a copy of the committee's terms of reference, and I do not propose to do that. [6]

2.6 It is unfortunate that some witnesses laboured under the misapprehension that the inquiry had a licence to probe the general editorial and commercial operations of the Fairfax press.[7] The committee is at a loss to explain such a comprehensive misunderstanding, as even a cursory reading of the terms of reference would have made it clear that the committee was not at liberty to conduct a broad-ranging inquiry into the commercial and editorial entrails of the Fairfax group, but was confined to

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[4] Evidence p 249

[5] Evidence p 647

[6] Evidence p 652

[7] See para 2.4

examining the extent to which any promise of an increase in foreign ownership affected the political coverage of the Fairfax group of newspapers, particularly *The Sydney Morning Herald*, during a very narrow timeframe - November 1992 to March 1993.

2.7 As stated in Part III of this report, there are ample precedents which uphold the legal and moral right of a parliamentary committee to inquire into terms of reference of the type agreed by the Senate for this inquiry. The thrust of these terms of reference was to determine whether there had been any improper understanding or arrangement between the Prime Minister and Mr Black whereby 'balanced' political coverage would be exchanged for a government decision to grant increased ownership. If any such arrangement were even entertained, let alone entered into it would have been contrary to the principle of a free and unfettered press. In these circumstances the committee's terms of reference went to the heart of the issue.

Procedural considerations

2.8 A critical procedural issue concerned the giving of evidence by serving and former government ministers. Also at issue were the committee's powers to compel certain public servants and paid advisers to cooperate with the committee by providing information and documents in the face of a ministerial directive requiring non-cooperation. Another key issue concerned the rights of a witness involved in litigation arising out of the sale of Fairfax interests relating to the 1991 government decision. In this regard the committee was called upon to make decisions about whether insisting on obtaining certain evidence might have breached the Senate's sub-judice convention.

2.9 Consequently, in a series of private meetings and to a lesser extent in public session, the committee devoted considerable time to these types of procedural concerns. However, the procedural focus of the inquiry should not be viewed in its own spotlight for each procedural decision had a bearing on whether the committee would gain access to evidence which might prove to be highly relevant to its terms of reference and of critical significance to the development of public policy.

2.10 The committee observes that its procedural focus may have been even more intense but for the fact that, in an unusual if not unprecedented move, the Senate, in establishing the committee pursuant to its terms of reference,

determined a number of procedural matters which are usually resolved by a committee itself at an early stage of most inquiries. The terms of reference provided that:

- subject to any contrary order, submissions be published on receipt;
- subject to any contrary order, evidence which adversely reflected on a person should be forwarded to that person inviting a response;
- the chair be authorised to make public statements to the media concerning the committee's activities; and
- the broadcasting and re-broadcasting of public proceedings be authorised in accordance with the order of the Senate of 23 August 1990.

Written submissions

2.11 At its first meeting, the committee resolved that it should seek written submissions from a range of persons and organisations that might have an interest in the inquiry, and that the secretariat should prepare a list of potential witnesses which would be circulated to committee members to facilitate their nomination of additional potential witnesses. It was further agreed that advertisements be placed in the *Australian Financial Review* on 17 December 1993 and *The Weekend Australian* on 18 December 1993 calling for written submissions to be made to the committee by 20 January 1994. Ultimately, the committee invited more than 50 persons and organisations to make written submissions and/or give oral evidence at a public hearing. The committee received 34 written submissions (see Appendix B) and took oral evidence from 51 persons (see Appendix C).

The list of witnesses

2.12 The potential witness list included the Prime Minister, the then Treasurer Mr John Dawkins, a former Prime Minister, two former Treasurers, the previous and present Ministers for Communications, the heads of the consortiums bidding for the Fairfax group in 1991, the secretaries of the Treasury and the Department of Communications, and the heads of relevant government authorities including the Trade Practices

Commission and the Australian Broadcasting Authority. The Leader of the Opposition and the shadow Minister for Communications during the period 1991-1993 were also invited to participate in the inquiry. The list also included members of the Foreign Investment Review Board (FIRB), a cross-section of media proprietors and editorial staff in the Fairfax group and other print media organisations, The Australian Press Council, and academic institutions with an interest in media matters.

2.13 During January 1994, an informal sub-committee comprising Senators Alston, Kernot and Sherry agreed on a draft witness list comprising 51 names which was considered by the committee on 1 February 1994. The committee adopted this list but in a number of instances majority decisions were recorded, one of which concerned the attendance of former Treasurers, the Hon John Dawkins and the Hon John Kerin.

Use of the committee's power to summons witnesses

Clerk's advice

2.14 The secretariat received a significant number of requests for advice regarding the rights of witnesses to decline committee requests for their attendance. In addition, the committee received correspondence from several key witnesses declining the committee's invitation and subsequently refusing the committee's requests for their attendance. Accordingly, the committee sought the advice of the Clerk of the Senate on its powers to require the appearance of public servants, statutory office holders and advisers to the government to give evidence. The Clerk advised the committee as follows:

- each House of Parliament has the power to require persons to attend to give oral evidence and to produce documents but only the House may punish any default;

- ultimately the power to compel witnesses depends on the power of each House to punish any default as a contempt - see *R v Richards; ex parte Fitzpatrick and Browne* 1955 92 CLR 157 - and the *Parliamentary Privileges Act 1987* which has both limited and codified this power;

- all persons in the Commonwealth are subject to the power to compel witnesses with the exception that a House or its committees may not compel a member of another House of the Commonwealth Parliament or a state parliament; and

- on a number of occasions the executive government has claimed a right to instruct its officers to refuse to appear to give evidence or to produce documents in relation to a parliamentary inquiry. This right is known as 'crown', or 'executive privilege' or 'public interest immunity' but has not been adjudicated upon by the courts, nor has the Senate conceded its existence but has asserted that it is for the Senate to determine such a claim.[8]

2.15 In view of the high level of public and media interest in the attendance of witnesses, the committee resolved to publish letters of invitation to potential witnesses and any responses to this correspondence.

Decision to summons two witnesses

2.16 In two cases of a refusal of the committee's request for the attendance of certain witnesses, by a majority decision, it was resolved to use the power to summons. The Hon John Kerin and the Hon Bob Hawke AC were summonsed under Senate Standing Order 34 which provides that the Senate may give a committee the power to summons witnesses and require the production of documents.

2.17 The committee notes that, following its request, a former Treasurer, the Hon John Dawkins, agreed to give evidence in public session. The committee commends Mr Dawkins for agreeing to appear before the inquiry but notes its regret that Messrs Hawke and Kerin were not prepared to attend on a voluntary basis and only attended following the issuing of a summons. The evidence of these former members of the Ministry was seen as critical to the conduct of the inquiry. It is ironic that following Mr Black's evidence, Mr Hawke successfully sought the committee's consent for him to appear before the inquiry on a second occasion to respond to evidence which he perceived to have reflected adversely on his interests.

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[8] Evidence p 3-5. See also Appendix D

2.18 The direction by Mr Willis to certain current and former FIRB officers, not to give information to the committee relating to the 1991 and 1993 Fairfax ownership decisions, also heightened the need for the committee to take evidence from Messrs Hawke, Kerin and Dawkins, as well as other private individuals involved in the bidding process to acquire a share of the Fairfax group.

Claim of public interest immunity by the Treasurer

In relation to public servants

2.19 During the committee's first hearing on 4 February, a member of the committee sought from the Executive Member of the FIRB, Mr Tony Hinton, copies of four FIRB reports relating to the 1991 and 1993 Fairfax decisions. Mr Hinton indicated that he had no power to release the advice and that any such requests would need to be referred to the Treasurer.[9]

2.20 The committee adjourned the hearing and met in private session resolving that Mr Hinton should be required to produce any documentation on the 1991 and 1993 decisions relating to either correspondence received, discussions held with, or information and advice received from interested parties or persons.

2.21 Upon its resumption the chair advised Mr Hinton of the committee's decision and pointed out that, unless there are express words in a statute or there is by implication a clear intention that documents are exempt from examination by a parliamentary committee, they should be produced. The Chair also informed Mr Hinton of the advice from the Clerk of the Senate, which had been circulated to all members, and advice from the Solicitor-General previously tabled in the Senate, which indicated that the committee has absolute power to require witnesses to attend and produce documents, except perhaps in respect of members of other houses of parliament.[10]

Treasurer's response

2.22 During its second day of hearings on 11 February 1994, the committee received a letter from the Treasurer dated 10 February 1994 in response to

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[9] Evidence p 18

[10] ibid p 19

the request for the production of the FIRB documents. The Treasurer referred to three categories of documents and advised the committee of his claim for 'public interest immunity' in respect of Category 1 and 2 documents, but indicated a preparedness to release Category 3 documents:

Category 1	Confidential advice from the Board [FIRB] 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.
Category 2	Documents revealing information provided to the Government in confidence, to the release of which originators or affected parties object - the Government is not prepared to release these because to do so would be contrary to the public interest.
Category 3	Information or documents given to the Government in confidence, to the release of which the originators or affected parties do not object - the Government is prepared to release these.

2.23 In relation to Category 1 documents, the Treasurer further advised that he had directed his department that officials should not provide the committee with information, whether orally or by way of provision of documents, information or advice provided in confidence by the Treasury or FIRB to the government. He further advised that a similar direction had been given to the previous FIRB executive member, Mr George Pooley. In relation to Category 2 documents, the Treasurer issued a similar directive. In relation to Category 3 documents the Treasurer informed the committee that he had set in train arrangements to release certain documents to the committee as quickly as possible, but that some of the material, because of its confidential nature, should not be published by the committee. The letters from the Treasurer to Mr Pooley and Mr Hinton directing them not to give evidence in respect of Category 1 and 2 documents were subsequently received by the committee.

Inquiry options

2.24 Having been advised of the likely non-cooperation of the previously mentioned key witnesses, the committee resolved that the secretariat prepare an options paper canvassing its possible courses of action to address this potential impasse. The paper identified four options, namely:

(i) The committee could agree to continue the inquiry and, when it is in a position to identify the classes of non-cooperating witnesses, seek specific legal advice on each class (for example, public servants, paid government advisers, statutory office holders, serving ministers and former ministers). Notwithstanding the need to obtain this advice, the committee could table a report on its terms of reference based on available evidence. This report could include references to any instances of witness non-cooperation. The Senate could then decide what action it might take under its powers relating to parliamentary privilege.

(ii) The committee could immediately report to the Senate instances of witness non-cooperation and recommend that action be taken against the witness under the provisions of the *Parliamentary Privileges Act 1987*. This course of action may result in the witness being punished by a resolution of the Senate.

(iii) The committee could immediately report the non-cooperation of the Government witnesses to the Senate and seek a 'return to order' resolution under Standing Order 164 of the Senate for the Leader of the Government in the Senate to table the documents requested by the committee.

(iv) The committee could seek a private meeting with the Treasurer to explore agreed ways and means of obtaining the information required by the committee.[11]

2.25 At a private meeting on 16 February, the committee discussed the options paper and resolved to adopt Option 1 as its preferred course of action.

Legal advice from Mr David Jackson QC

2.26 Accordingly, the committee continued with its schedule of hearings and sought legal advice on the compulsion of witnesses from Mr David Jackson QC based on the following questions:

[11] Evidence pp 201-202

1. Does the committee have the power to compel witnesses from each of the following **categories** to give evidence and produce documents? If so, by what means?

Category 1

Mr Tony Hinton, employed under the *Public Service Act 1922* and Executive Member of the Foreign Investment Review Board, a non-statutory body which advises the Treasurer in relation to foreign ownership decisions.

Category 2

Mr George Pooley, formerly employed under the Public Service Act and the immediate past Executive Member of FIRB. Mr Pooley is now the Commissioner, Insurance and Superannuation Commission and is employed under the provisions of the *Insurance and Superannuation Commissioner Act 1987.*

Category 3

Mr Des Halsted and Mr Ken Stone are members of FIRB. To the Committee's knowledge these witnesses are paid advisers to government. They are neither public servants nor statutory office holders.

Category 4

Messrs Kerin, Hawke and Dawkins. These witnesses were Ministers when one or both of the 1991 and 1993 decisions were made.

2. In so far as Treasurer Willis seeks to assert a conclusive claim that certain documents are not to be disclosed to the committee, is it for the government to determine the nature and extent of public interest immunity and that certain witnesses curtail their evidence to the committee and/or not disclose certain documents?

3. Are decisions of the Senate and/or the committee justiciable and in what circumstances and to what extent is a court able to go behind a decision of the committee of the Senate?

4. What steps are open to the committee to take in respect of non-cooperation with its orders?

5. Is the Treasurer in contempt of the Senate in instructing various witnesses to refrain from providing evidence to the committee and producing documents, or in other ways limiting their co-operation with the committee and other orders of the Senate? [See Standing Orders and other Orders of the Senate documents (attachment 2), especially:

- Parliamentary Privilege Resolution of 25 February 1988 Resolution 6(1), 6(10) and 6(13) (pp 97-99).

- Procedural Orders and Resolutions of the Senate of Continuing Effect. Resolution 24 and 27 (pp 122-123).]

2.27 A copy of both Mr Jackson's first opinion of 8 March 1994 and his further opinion of 31 March 1994 have been included in Appendices E and F. An opinion on questions of public interest immunity prepared by Mr Tony Morris QC, at the request of one of the committee members, Senator Kernot, is included in Appendix H.

2.28 Mr Jackson advised the committee that it does have the power to compel witnesses from each of categories 1 to 4 to give evidence and produce documents. In the event of a witness from these categories failing to provide a document or refusing to give an answer, according to Mr Jackson, the committee's power is to refer the matter to the Senate for its adjudication under section 7(3) of the *Parliamentary Privileges Act 1987* which provides that the Senate may impose a penalty of imprisonment not exceeding 6 months or a fine not exceeding $5,000.

2.29 In giving an opinion on Question 2 (whether it is for the government to determine the nature and extent of public interest immunity and to direct that certain witnesses not fully cooperate with the committee) Mr Jackson said:

> ... I do not think it is the province of the executive government to decide conclusively whether questions should not be answered, or documents produced, by reason of public interest immunity.[12]

[12] Appendix E, para 54

2.30 He also expresses an 'in the abstract view' that the Houses of Parliament did have the power to compel an answer but that that power would not 'ordinarily be exercised where there was a significant contention that the national interest would not be served by compelling the answer'. In a gratuitous remark not accompanied by any process of reasoning, detail, context or judicial precedent, he also suggested that it might be of some persuasive value to examine how a court might consider a similar claim for public interest immunity.[13] In respect of the Category 1, 2 and 3 documents, he advised that for the Category 1 documents (advice from FIRB to the Treasurer), the court would need to consider a number of factors, for example, the time that has elapsed since the advice was given. In addition, he pointed out that the court might wish to see the material itself. Having identified these considerations he concluded that it is probable that such a claim would be upheld.

2.31 Having considered Mr Jackson's opinion, the committee by majority resolved that he be requested to clarify his remarks relating to the consideration by a court of claims of public interest immunity in relation to the Category 1 documents. The further instructions sought clarification on:

- the other factors referred to in paragraph 52;
- relevant case law;
- any legislation and pending legislation pertaining to the matter; and
- the significance of the elapsed time since the FIRB advice was given.

2.32 In due course a further opinion was received which listed six factors which might be relevant to a court's determination of a claim of public interest immunity:

- the level of government at which the communication took place, that is, the higher the level the more likely that the immunity will be respected;

[13] Appendix E, para 52

- whether the communication deals with important matters of policy;
- the nature of the proceedings before the court, for example, the court would be more likely to admit a document in evidence if its exclusion would be prejudicial to the case for the accused;
- the length of time since the documents came into being; and
- whether the document had already entered the public domain.[14]

2.33 Having been given a copy of one of the documents sought by the committee, the FIRB Minute of 5 December 1991,[15] he was inclined to the view in respect of that document that the **claim for public interest immunity would not succeed.** The relevant factors in reaching such a conclusion are: that it was disclosed as a leaked document in early 1993 and confirmed by former Treasurer Kerin, the recipient of the document, before the committee on 24 March 1994; that its contents are 'only doubtfully on important matters of policy' and that the information in the documents is about events that have passed. These last two factors would seem to be of equal force in relation to the outstanding documents.

Legal Advice from Mr Tony Morris QC

2.34 The opinion of Mr Morris is somewhat more cautious as regards whether a court would uphold a claim for public interest immunity in respect of Category 1 documents as a class of document. In the summary to his opinion he states that one would not be able to predict with any certainty the way a court would resolve the question. Inherent in any such proceedings would be the need to examine the documents individually to ascertain the potential prejudice to public interest arising from disclosure and the need to balance this against the detriment which might be caused if the documents were excluded from consideration. The reasons for Mr Jackson volunteering a reference to a court are unclear in the view of

[14] Appendix F

[15] Appendix G

Mr Morris. It is not helpful to any consideration of the committee's powers to speculate as to what a court might do.

2.35 Mr Morris said of the 5 December 1991 Minute:

> **Having carefully perused that document, I must say that I am entirely at a loss to understand how it can be argued that production of the document might be inimical to the public interest.** The document does not appear to contain any information which could be regarded as having any degree of continuing commercial sensitivity. One cannot seriously imagine that the members of the Foreign Investment Review Board would be less candid in providing advice to the Treasurer or the Government, were documents of this character to be available for public scrutiny: to echo the words of Lord Radcliffe in the Glasgow Corporation Case as adopted by Stephen J in Sankey v Whitlam, one would imagine that members of the FIRB are "made of sterner stuff". It is, of course, conceivable that commercial organisations might feel more reluctant in disclosing their commercial secrets to bodies like the FIRB if they were aware that such documents could ultimately become open to public scrutiny; but it does not appear to me that this particular document discloses any commercial secrets. It may be said that the workings of the FIRB, and of the Treasury, may to some extent be prejudiced if the manner in which they operate becomes public information; **but I cannot see anything in this particular document which might be thought to disclose some highly-sensitive *modus operandi* which justifies concealment of its contents. [emphasis added].**

2.36 The concluding remarks of both members of the senior bar provide the committee with confirmation of the appropriateness of its actions in insisting on the production of the documents in question. Mr Jackson advised that he sees no reason why the committee could not require that the documents be more 'specifically identified', at least on a confidential basis as a starting point.[16] Mr Morris is of the view that the committee is balancing one public interest against another and that in pursuing its investigation it is entirely inappropriate for a committee to constrain itself by an analogy with the courts' interpretation of public interest immunity.[17]

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[16] Further Opinion of Mr D Jackson QC, p 11, see Appendix F

[17] Opinion of Mr A Morris QC, p 45, see Appendix H

In relation to FIRB Members

2.37 On 18 February 1994, the Treasurer wrote to the committee informing it that in view of the government's claim of public interest immunity in respect of certain FIRB matters he had advised two FIRB members, who were in effect paid advisers, that their duty of confidence precluded them from providing information to the committee relating to advice, views and recommendations they may have provided to him or past Treasurers. Notwithstanding this, these FIRB members attended the inquiry and gave evidence constrained by the Treasurer's direction.

Justified or unwarranted secrecy

2.38 Whether the Treasurer's claim of public interest immunity is justified was the subject of much discussion both within the committee and amongst observers of the inquiry. The committee examined this issue from a number of perspectives. The first involved weighing up the public interest in not releasing the information in the FIRB documents, including the interests of parties who made confidential submissions to FIRB, against the public benefit of knowing how that process works, including its obvious flaws, in relation to government decisions on the ownership of print media. The chapters in the report on the FIRB processes show clearly that the committee believes that future decisions should be made following a more open and transparent information gathering process, and that the parties to these decisions should enter any such process in the full knowledge that the Parliament and, thereby, the community have a right to know how the process works in relation to any particular decision.

2.39 The major shortcoming in current FIRB procedures is that, provided applicants submit material with an accompanying assertion that it is commercial-in-confidence, the information has an 'in perpetuity' secret status. It would appear that the fact that a decision has been made and the commercial transaction has been completed, has no bearing whatsoever in striking down the secret status of FIRB information. This unrealistic and over-secretive approach, which FIRB and successive governments have elected to take, is to a large extent, the reason for the committee being confronted by an inability to obtain a complete set of evidence on the 1991 and 1993 decisions.

Sub-judice matters

2.40 As foreshadowed in an earlier paragraph, the committee received a submission dated 4 February 1994 from solicitors representing Mr M Burrows and Mr J White requesting that the committee not take evidence or, alternatively, defer taking evidence from their clients until litigation had been completed. The submission informed the committee that Messrs Burrows and White are respondents to legal proceedings in which the applicants are claiming damages in the sum of $140-215 million. The submission argued that it would be prejudicial if either Mr Burrows or Mr White were required to give evidence.

Clerk's advice

2.41 The committee referred this item of correspondence to the Clerk of the Senate who advised that in making a decision on whether there is any such danger of prejudice to court proceedings, the committee needed to have knowledge of:

- whether the matters before the court will be tried by a jury;
- whether there are witnesses or potential witnesses who may be influenced by a hearing of evidence by the committee; and
- whether the particular questions in some of the legal proceedings are likely to be canvassed in any hearing of the committee.[18]

2.42 The Clerk further advised that if the committee were to come to a conclusion that there is a danger of prejudice to the court proceedings, it could avoid that danger by resolving to take evidence in private session.[19]

2.43 The committee considered the Clerk's advice and decided that it should insist on the witnesses giving oral evidence, but that they should be advised of their right to have their evidence heard in-camera. The committee

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[18] Evidence p 208, see also Appendix I

[19] Evidence p 209

further agreed to organise its line of questioning in such a way as to minimise frequent requests to move into private session. During the taking of public evidence from these witnesses, four matters were deemed to be appropriate for consideration as in-camera evidence and were subsequently examined by the committee during a very brief private hearing.

Conclusion

Incomplete evidence

2.44 As a consequence of the repeated directions by the Treasurer that public servants and advisers appearing before the committee claim public interest immunity, the committee has been unable to make definitive and conclusive findings in respect of a number of matters germane to its terms of reference. In an attempt to identify these issues the committee published in its Hansard two charts which illustrate the extent of the procedural and evidentiary impasse which it faced.[20] During the giving of a Notice seeking a resolution of the Senate to extend its date of reporting to complete the committee's report, the chair, Senator Alston tabled and incorporated these documents in Hansard.[21] These two documents appear as charts 2.1 and 2.2 in this chapter.

2.45 At this stage of the inquiry the committee resolved that letters be written to the witnesses listed in this document seeking their response to questions based on the unresolved issues. The text of the questions to these witnesses has been included in chapters 3, 4 and 5.

Private Senator's Bill

2.46 On 12 May 1994, following an extended debate involving eight of the nine committee members, on the motion of Senator Kernot, the Senate resolved that the committee should present two reports. The resolution provided that this report, to be known as the first report of the committee, would be presented by 9 June 1994. It further provided that the final report of the committee be presented by 22 September 1994.

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[20] Evidence p 739-740

[21] Senate Hansard of 3 May 1994, pp 31-32

2.47 In speaking to her motion Senator Kernot informed the Senate that the extension of the committee's date of reporting was intended to give the Senate an opportunity to resolve the impasse in relation to repeated claims of public interest immunity. This would allow the committee to make conclusive findings on all of the available evidence, including that which the Treasurer has claimed to be of a public interest immunity character.

2.48 Senator Kernot had previously introduced The Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 to amend the Parliamentary Privileges Act by providing that the Federal Court enforce lawful orders made by Parliament and empower that court to determine claims that disclosure of information to Parliament would contravene the public interest. It was Senator Kernot's contention that the Senate Privileges committee should examine her Bill and present a report by 23 August 1994. Her resolution further provided that during the period 9 June 1994 to the day the committee presents its final report, the committee should be provided with the minimum resources required to give effect to the resolution.

Chart 2.1

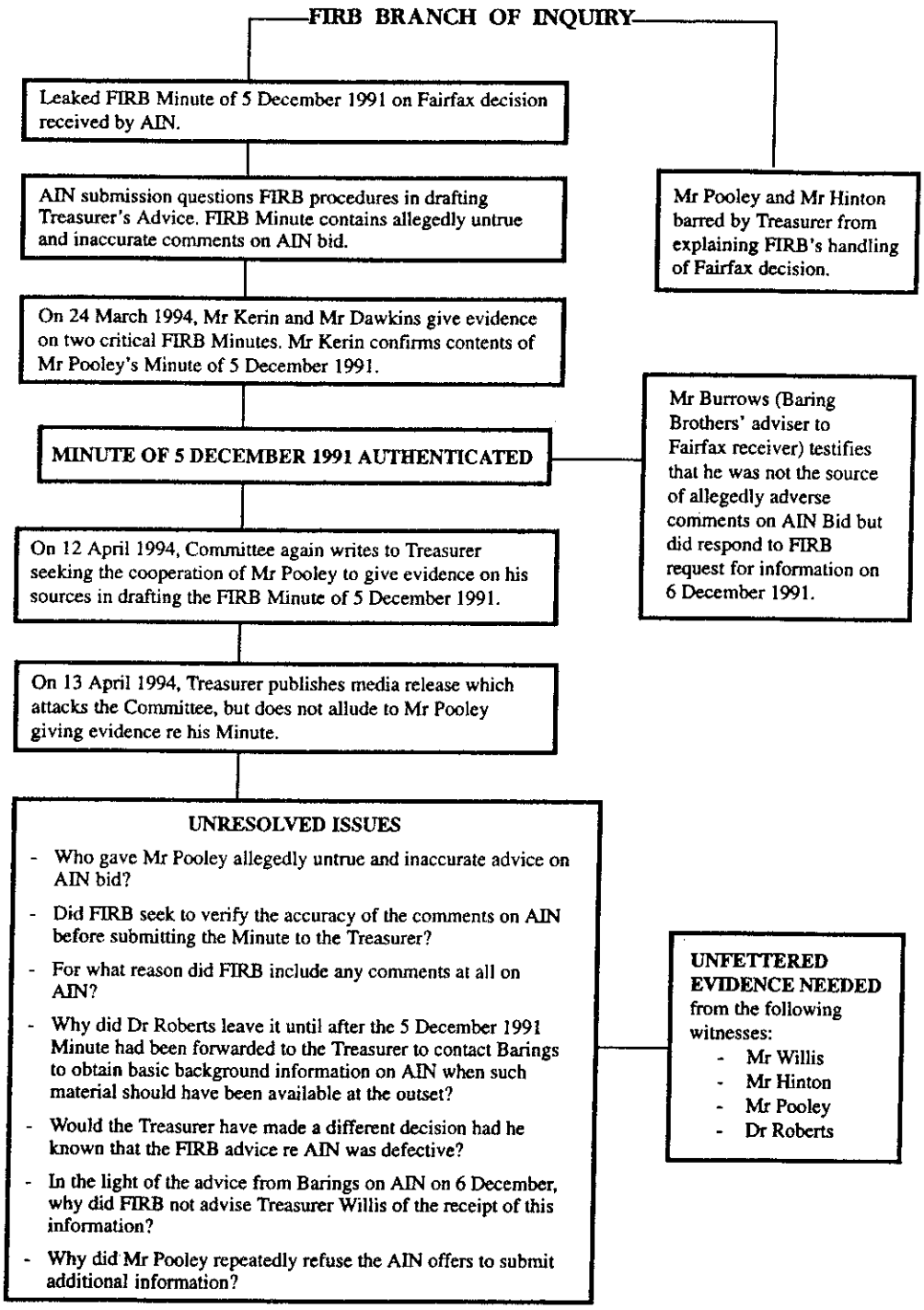
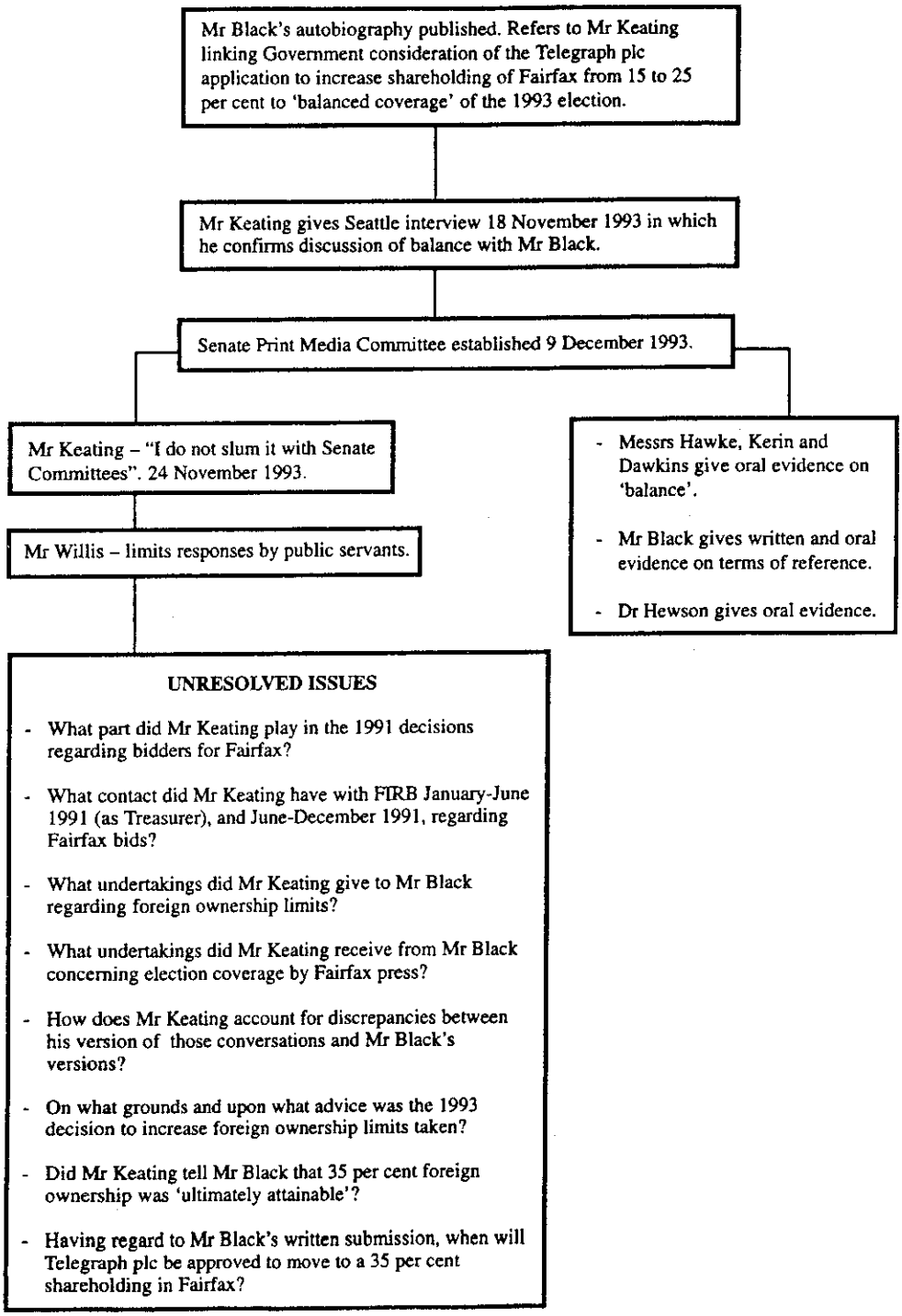

FIRB BRANCH OF INQUIRY
Leaked FIRB Minute of 5 December 1991 on Fairfax decision received by AIN.
AIN submission questions FIRB procedures in drafting Treasurer's Advice. FIRB Minute contains allegedly untrue and inaccurate comments on AIN bid.
Mr Pooley and Mr Hinton barred by Treasurer from explaining FIRB's handling of Fairfax decision.
On 24 March 1994, Mr Kerin and Mr Dawkins give evidence on two critical FIRB Minutes. Mr Kerin confirms contents of Mr Pooley's Minute of 5 December 1991.
MINUTE OF 5 DECEMBER 1991 AUTHENTICATED
Mr Burrows (Baring Brothers' adviser to Fairfax receiver) testifies that he was not the source of allegedly adverse comments on AIN Bid but did respond to FIRB request for information on 6 December 1991.
On 12 April 1994, Committee again writes to Treasurer seeking the cooperation of Mr Pooley to give evidence on his sources in drafting the FIRB Minute of 5 December 1991.
On 13 April 1994, Treasurer publishes media release which attacks the Committee, but does not allude to Mr Pooley giving evidence re his Minute.
UNRESOLVED ISSUES
- Who gave Mr Pooley allegedly untrue and inaccurate advice on AIN bid?
- Did FIRB seek to verify the accuracy of the comments on AIN before submitting the Minute to the Treasurer?
- For what reason did FIRB include any comments at all on AIN?
- Why did Dr Roberts leave it until after the 5 December 1991 Minute had been forwarded to the Treasurer to contact Barings to obtain basic background information on AIN when such material should have been available at the outset?
- Would the Treasurer have made a different decision had he known that the FIRB advice re AIN was defective?
- In the light of the advice from Barings on AIN on 6 December, why did FIRB not advise Treasurer Willis of the receipt of this information?
- Why did Mr Pooley repeatedly refuse the AIN offers to submit additional information?
UNFETTERED EVIDENCE NEEDED from the following witnesses:
- Mr Willis
- Mr Hinton
- Mr Pooley
- Dr Roberts

Chart 2.2

'BALANCED COVERAGE' BRANCH OF INQUIRY



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.

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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

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[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

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[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]

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[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:

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[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]

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[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 Newspapers[19]

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 Underwriting[20]

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.

Tourang[21]

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.

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[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

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[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 offices[27].

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]

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[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:

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[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:

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[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.

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[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,

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[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.

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[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

[Subscription] Agreement between the shareholders made on 16 July 1991. The consortium also entered into an exclusivity agreement with the US junk bond holders in July 1991, which was reported to bind the bondholders to the consortium until 16 January 1992.

Who said what at the meeting of 18 July 1991?

3.93 Consortium members commenced active lobbying of politicians in July 1991. A meeting was held between Messrs Black and Kennedy (then Fairfax CEO-designate) with Prime Minister Hawke and Treasurer Kerin on the morning of 18 July 1991. All four persons gave evidence to the committee on their recollections of the meeting and the contention as to whether they had discussed a level of 35 per cent foreign ownership for the Fairfax group.

3.94 This issue arose out of Mr Black's reference in his book to that meeting and his subsequent discussions over lunch with Mr Kim Beazley, then Minister for Transport and Communications. Mr Black wrote:

> I expressed a fervent desire to accommodate any reasonable political concerns the government had and asked the Prime Minister and Treasurer to indicate what they could wear in foreign and cross-media ownership, so I didn't inadvertently 'hand them a political grenade with the pin pulled.' It was at this point that Kerin uttered his remark that 'up to 35%, concerns for foreign ownership are piffle.' He subsequently disputed employing the word 'piffle,' but that is precisely what he said and I obviously took careful note of it and repeated it... .
>
> ... I considered this the most important point in the exchange.[47]

3.95 In submissions to and evidence before the committee, two views of this discussion emerged from the debate, which was sometimes hostile, seemingly vitriolic and which included public attacks by each on the other's credibility, particularly by Mr Hawke and Mr Black.

The importance of the conversation

3.96 The committee believes that the evidence of these players in the 1991 Fairfax saga is of vital importance to the findings in this report. First, the conversations occurred at the highest level of government and were about the most sensitive and important aspects of foreign investment policy. The

[47] Conrad Black, *A Life in Progress*, p 419

meeting between the four key players involved commitments to foreigners about the sale of the nation's major print media outlets and had the potential to create in the collective mind of the Tourang consortium an impression that policy was about to change. Any misleading or incorrect advice may have resulted in commercial detriment to the Tourang consortium and thereby could have given a signal to foreign investors at large that Australian investment policy was uncertain and not to be entertained under any circumstances.

3.97 This line of inquiry, therefore, is an appropriate matter for a committee scrutinising the performance of executive government.

3.98 Also at issue in this regard is the credibility of these witnesses in relation to other aspects of their testimony. This matter was highlighted when, after giving their evidence with a high degree of personal conviction, Messrs Hawke and Black released a statement to the media saying that they had agreed that their recollections of events may not have been perfect and that, therefore, it was of little consequence to continue their public disagreement. The text of this settlement is included later in this chapter.

Messrs Hawke and Kerin

3.99 Mr Kerin gave evidence categorically denying that he had used the words, ascribed to him by Mr Black, that up to 35 per cent foreign ownership would be 'piffle'. He also rejected any suggestion that the figure of 35 per cent was raised. His version of the meeting was that he and Mr Hawke stressed that there were no prescribed limits to foreign newspaper ownership.[48] It is noteworthy that Mr Kerin informed the committee that it was his view that Mr Hawke had in his mind that the final decision would depend on advice from FIRB. This is at odds with Mr Dawkins' view of FIRB expressed in his evidence on the 1993 decision. Mr Dawkins perceived FIRB to be but one of a number of sources of advice in making foreign investment decisions. This difference of opinion about the perceived and actual status of FIRB recommendations is a matter taken up in chapters 7 to 10.

3.100 During his evidence Mr Kerin referred to notes which he took at that meeting. These notes mention 20 per cent for Black and 14.9 per cent for

[48] Evidence p 462

Mr Packer but omit the other principal foreign player, Hellman and Friedman, who sought a 15 per cent share in Fairfax.[49] The FIRB Minute of 5 December 1991 includes details of the principal economic interests in Tourang. The committee is uncertain as to the reason for this omission. It could be that the notes are a defective record or Mr Kerin may have misinterpreted them in giving evidence. Whatever the reason there is some doubt about the accuracy of Mr Kerin's evidence.

3.101 However, in referring to the alleged 'piffle' statement, Mr Hawke supported Mr Kerin's recollection saying that 'Mr Kerin is telling the truth and Mr Black is not.[50]

The Tourang recollection of events

3.102 The Tourang version of the meeting was given by Mr Black in his written submission to the committee. Mr Black declared that he was given an assurance at the meeting that up to a total of 35 per cent would be welcomed by the government. Other than cross-media issues related to Mr Packer's involvement, the foreign ownership discussion was the most significant development at the meeting. Mr Black asserts that he reported this to his consortium colleagues. The consortium then acted accordingly on that information by structuring its bid at 35 per cent.[51]

3.103 Mr Kennedy's evidence on the matter was crucial, given his independence from the Tourang bid and the less than harmonious circumstances in which he departed from the consortium. He said:

> It is my recollection-- someone asked me this the other day--that Kerin used a word that, if not 'piffle', sort of essentially characterised that notion in his mind.
>
> **Senator Kernot:** What does he mean? What impression did you get?
>
> **Mr Kennedy:** Given that ownership of the asset was in diverse hands, and that was the notion we were selling at that

[49] FIRB Minute of 5 December 1991 - see Appendix G

[50] Evidence pp 523-524

[51] Submission No 3

> time--that while there could be up to 35 per cent there was a passive institutional investor on one hand, an international media investor who would bring a lot to the party in terms of expertise and all those other things on the other, there was a 15 per cent shareholder in Consolidated Press, and then the remainder of it was distributed amongst Australian institutions--my impression was that Kerin accepted the notion that it was nonsense to believe that 35 per cent foreign ownership was a threat to this institution [presumably the Fairfax group].[52]

3.104 Mr Black's oral testimony also emphasised his recollection that Mr Hawke and Mr Kerin led him to understand that up to 35 per cent foreign ownership would not be an issue. He urged the committee that Trevor Kennedy's corroborating evidence should assume special significance because, in the light of the acrimonious circumstances of his departure from the Tourang group, Mr Kennedy owed him no favours.[53]

3.105 As corroboration of Mr Black's evidence the committee gave weight to a press report in *The Sydney Morning Herald* dated 12 December 1991, which included the following:

> Mr Black recalled a July meeting in Mr Kerin's office, which Mr Hawke attended, when his eligibility as a foreign bidder had been discussed and, he said, it had been essentially agreed that FIRB would not be an obstacle for Tourang.
>
> They said - and I use the word again - they said it was piffle. Piffle, they said.[54]

3.106 This was the same article to which Mr Hawke referred in attempting to discredit Mr Black's credibility over the detail of the location of the meeting.[55]

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[52] Evidence p 167

[53] Evidence pp 653-4

[54] *The Sydney Morning Herald*, 12 December 1991, p 1

[55] Evidence p 524 and pp 654-5

The committee's view

Finding 3.4

The committee has considered the conflict of evidence between the aforementioned players (Messrs Hawke, Black, Kerin and Kennedy) regarding government commitments on foreign ownership levels. The committee has noted the following points:

- The reports of the Caucus debate and decision on foreign ownership and media concentration that took place between the meeting in July 1991 and the Treasurer's decision on 5 December 1991;
- The independent recollection of Mr Kennedy; and
- The date and the contents of the press quotation above.

In view of the fact that Tourang structured its initial bid to accord with a 35 per cent limit, and the independent evidence of Mr Kennedy, the committee accepts that Mr Black was given a positive indication that up to 35 per cent foreign ownership could be countenanced.

Mr Packer's withdrawal

3.107 The other matter discussed at the meeting with Prime Minister Hawke and Treasurer Kerin and over lunch with the then Transport and Communications Minister Beazley, was concern over the role within the consortium of Mr Kerry Packer and his former associate Mr Trevor Kennedy. In his book Mr Black reveals that Messrs Hawke and Kerin took the issue of Mr Packer's 15 per cent involvement more seriously than Messrs Packer, Kennedy, Turnbull and Powers.[56]

3.108 Mr Kerin confirmed the accuracy of Mr Black's observations when he gave evidence that with the cross-media rules at 14.9 per cent: 'I think there

[56] *A Life in Progress*, p 420

was a general view that Mr Murdoch and Mr Packer had enough and I think there was some antipathy towards Mr Packer.[57] Mr Hawke also confirmed the anti-Packer sentiment. It is now history that Mr Packer withdrew from the consortium on 28 November 1991.

Tourang II's application to FIRB

Restructured bid

3.109 With Mr Packer's withdrawal from the consortium on 28 November 1991, a revised application was submitted to FIRB for consideration. This revised structure, which provided for the following share distribution on completion, was the subject of the Treasurer's consideration on 5 December 1991:

The Telegraph plc	20%
Hellman & Friedman	15%
US Bondholders	4%
Australian investors	61%

3.110 The holding by Hellman & Friedman was to be in non-voting shares or debentures so that the voting interests of The Telegraph plc complied with the consortium's interpretation of legislative, policy and Caucus guidelines.

Mr Kerin's rejection of Tourang II

3.111 In what Mr Hawke recalled was Mr Kerin's last decision as Treasurer, Mr Kerin rejected the Tourang application despite the fact that it complied with the Caucus resolution on foreign voting equity.[58] Mr Kerin gave no explanation at the time for his decision to approve the INP application and reject the Tourang bid, nor did he issue a press release. His decision did, however, precisely reflect Mr Hawke's well-known attitude to the two foreign bids and the decision prompted a headline response from the euphuistic Mr Black, who described what had happened as 'sleazy, venal and despicable'. In an interview published in *The Sydney Morning Herald* on 12 December 1991 he went on to say:

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[57] Evidence p 483

[58] Evidence p 528

> that he understood that the Foreign Investment Review Board had cleared the Tourang offer but that 'something rather sinister happened between FIRB and (the former Treasurer) Kerin's office.
>
> Someone during that time has muscled in on us,' he said.
>
> Mr Black said he would not name names but added that 'when this game is up and it gets out into the open there's a few people in Canberra that aren't going to look very statesmanlike'.

3.112 It is uncertain what, if any, impact Mr Black's outburst had on Treasurer Willis who, the next day, was considering the further revised application from Tourang.

3.113 What is also uncertain from Mr Black's statement is how he gained his knowledge, in London two days after Mr Kerin's decision was announced, that FIRB had cleared the offer but that it failed in the Treasurer's office. Given that he was making such a strong outburst and not naming names, it is significant that Mr Black chose, in the same otherwise emotional article, to say that Mr George Pooley, the head of FIRB, had 'acted with total integrity and probity in this matter'. This strongly suggests that he had by that time been made aware of Mr Pooley's attitude to the Tourang bid.

3.114 As Mr Pooley merely advised the consortium of the Treasurer's decision on 9 December 1991 and Messrs Black and Colson in evidence to the committee stated that the reasons for the decision were not explained, the following questions arise. Did Mr Pooley break confidence and provide information to Mr Black about FIRB's recommendation? Or did he only assist in the 'massaging' process described by Mr Stone, the acting chair of FIRB, to ensure successful passage of the amended application?[59]

3.115 Mr Kerin advised the committee that, in rejecting the Tourang application, he took into account the caucus resolution and the views which were held in his party. He stressed that it was his view that the government had powers in respect of foreign applications only and that it was the responsibility of the receivers to take into account the merits of domestic bidders. He informed the committee that he treated the application expeditiously because of the expiry time for the joint bondholders.[60]

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[59] Evidence p 689

[60] Evidence p 458

3.116 Also at issue was the fact that the Tourang bid had 39 per cent foreign economic interest, that the bid was not as accommodating regarding editorial independence and that there was the prospect of the syndicate retrenching 400-500 staff.[61]

3.117 The committee questions Mr Kerin's perception that he needed to act expeditiously in respect of the decision. It is the committee's understanding that for the INP bid, under the FATA legislation, the deadline date was 20 December 1991 and that in the case of the exclusivity agreement which Tourang had with the junk bondholders, the first expiry date was 16 January 1992.

3.118 Mr Kerin's account of the factors he had in mind when he took the decision contrasts with the criteria he publicly nominated some months before taking the 1991 decision. *The Australian* of 19 October 1991 reported:

> The Treasurer, Mr Kerin nominated industry competition, quality, editorial freedom and the open "retention of the empire" last night as the national interest criteria he would use in assessing any foreign bid for John Fairfax Group Pty Ltd.

3.119 Mr Kerin also 'signalled he was hoping to be able to provide details in the future about broad principles of national interest and specific principles in some sectors and industries to give business a clearer idea of the basis of government decision making in foreign investment matters.'[62]

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[61] Evidence p 460

[62] *The Australian*, 19 October 1991

Finding 3.5

Re Tourang II

Taking into account:

i) the criteria Mr Kerin advised that he would use in considering foreign investment applications for Fairfax;

ii) his evidence of what he actually did take into account;

iii) the arguments and recommendations put before him by FIRB (particularly the comments adverse to AIN);

iv) the decision that he took, particularly its timing, to approve O'Reilly and reject Tourang (purportedly so as not to disadvantage Tourang by delay); and

v) that in doing so he acted contrary to the Caucus decision in regard to both the treatment of foreign non-voting equity and the extension of foreign control of the Fairfax company;

The committee rejects Mr Kerin's assertion that in approving O'Reilly and rejecting Tourang he was not effectively bequeathing Fairfax to the O'Reilly group. The committee finds that the decision was discriminatory, based on incorrect and misleading advice and was deliberately intended to obtain an outcome in the interests of the government and not the national interest as required by the FATA.

3.120 On the evidence before him, and given the criteria disclosed publicly and via the Caucus decision, the only equitable decision available to Mr Kerin was to approve both applications. To have not done so, and in the light of the derogatory commercial comments about AIN, and his clear understanding of how at least the Prime Minister felt about AIN, was indeed to anoint the O'Reilly bid. For, in his own words 'It was very clear that,

given the strong views of the Federal Parliamentary Labor Party about the Tourang bid, even with Mr Packer out, the party would be happier with the O'Reilly bid than the Black-Tourang bid.'[63]

3.121 Despite the comments by Mr Kerin and Mr Hawke about the distinction between the Treasurer's role and that of the receiver, this was a decision more about picking winners than the result of an objective comparison of the merits of each bidder and a determination of what was or was not contrary to the national interest. It is not surprising then that Mr Kerin commented that 'the national interest is in the mind of the beholder'.[64] He reiterated this sentiment in stating that the reason for not publishing reasons for decision was that the national interest was a 'very difficult concept to pin down'.[65]

3.122 It is hard to escape the conclusion that this was little more than a blatant exercise in giving the nod to the politically preferred bidder rather than any genuine attempt to reach an objective conclusion based on national interest considerations.

3.123 In the end there were no winners with this decision, for what Mr Kerin did not take into account was that both Tourang and AIN would submit amended bids, on the final day, and change the outcome he was expecting. O'Reilly won the political race but lost the 'Receiver's stakes', AIN lost politically and commercially, whilst Tourang, having lost that round, hastily regrouped with a further amended application to comply with a more stringent equity requirement, and was approved by both the new Treasurer and the receiver.

Finding 3.6

From the foregoing, the committee concludes that the current procedures for consideration of foreign investment applications are defective and may be, in fact, a deterrent to investment.

[63] Evidence p 460

[64] Evidence p 473

[65] Evidence p 481

3.124 The committee also notes the irony of the October 1991 press report of Mr Kerin's proposed actions to make foreign investment procedures clearer for business. A similar report was attributed to the current Treasurer, Mr Willis on 9 May 1994.[66]

3.125 The committee cannot help but agree with a number of witnesses, notably Cameron O'Reilly, that uncertainty about the rules of the game must inevitably lead to a lack of foreign investor confidence and diminution in Australia's international reputation. Indeed, a system which allows for very important foreign investment decisions to be at the mercy of unfettered discretion exercised at the highest political level, is a recipe for encouraging improper political influence and even political corruption. Such concerns are heightened by Mr Keating's unguarded admission that the 1993 decision had virtually nothing to do with genuine national interest criteria and everything to do with balanced coverage. As discussed elsewhere the latter concept was a not very subtle euphemism for advancing the electoral interests of the government and in the process made a mockery of the national interest.

PRIME MINISTER HAWKE

Ministerial freedom

3.126 In evidence to the committee Mr Hawke outlined his practice, whilst Prime Minister, of allowing Ministers to conduct their portfolio responsibilities without undue interference and gave his version of the meetings with bidders in July and August of 1991.

3.127 Mr Hawke was emphatic and colourful in his endeavours to prove his credibility before the committee, given the less than flattering comments made about Mr Hawke by Mr Black in his book. In his opening statement Mr Hawke said 'the simple fact is that Conrad Black does not tell the truth. He has the habit of distorting events through the prism of his own self interest.'[67] Mr Hawke took several other opportunities throughout the hearing to attack Mr Black's integrity and veracity.

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[66] *The Sydney Morning Herald*, 9 May 1994

[67] Evidence p 523

3.128 To the extent that Mr Hawke's endeavours to undermine the credibility of Mr Black's evidence were relevant, the issues in question have been dealt with in the section on the Tourang bid.

3.129 On his relationship with the AIN bidders, particularly Mr John D'Arcy, Mr Hawke gave evidence which is covered in the section on the AIN bid.

3.130 With respect to the Treasurers' decisions of 5 and 13 December 1991, Mr Hawke gave evidence that he had no discussions with FIRB members or Treasury officials, that there was no Cabinet consideration of either decision and that he had no direct input to Mr Kerin's decision.[68]

Mr Hawke and Mr Black

3.131 Mr Hawke's input to Mr Willis' decision to approve the restructured Tourang bid, was limited to a short discussion in which Mr Hawke said 'You do whatever you think is right.'[69] Mr Hawke's apparent lack of interest at this point was due to his concern with the mounting challenge to his leadership, which saw him toppled as Prime Minister one week later.

3.132 The most notable aspect of Mr Hawke's and Mr Black's recollections of events in 1991 is the certainty and extraordinary feeling both men displayed in giving their evidence. Both witnesses were dogmatic and even pedantic in arguing that their's was the more accurate recollection of what happened, particularly at the July meeting. Both witnesses endeavoured to damage the credibility of the other by reference to matters of fine, but irrelevant, detail. If the committee was left only with the evidence of these witnesses and Mr Kerin, it would have found it difficult to form any conclusive judgement about the discussion of 35 per cent foreign interest in Fairfax.

3.133 However, the committee also considered the testimony of an apparently independent witness, Mr Trevor Kennedy. It also took account of the fact that Mr Black's view was on the record as early as 12 December 1991. The committee is persuaded that Mr Black was given an indication that 35 per cent foreign ownership of Fairfax could be countenanced.

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[68] Evidence pp 527-8

[69] Evidence p 523

3.134 As is often the case, the media coverage of the evidence highlighted what were essentially peripheral issues - whether Mr Hawke had offered to be Mr Black's 'eyes and ears in Canberra' to spy on his successor for a fee of US$50,000 (Mr Black's version) or whether Mr Hawke had merely evinced an interest in providing general political intelligence to the Fairfax organisation for a fee to be negotiated (Mr Hawke's version).

3.135 There was also substantial media coverage of a lesser sub-theme - whether Mr Black had, for no apparent reason, when discussing Israeli politics and his ownership of the *Jerusalem Post*, gratuitously observed that he was not Jewish (Mr Hawke's version) or whether Mr Black had simply been at pains to point out that not being Jewish had not been an impediment to his acquisition of a sensitive vehicle of public influence (Mr Black's version).

3.136 Neither of these issues bore any direct relevance to the committee's terms of reference and both were clearly raised by the respective parties in an attempt to diminish the credibility of the other's evidence and to cast a doubt on their recollection of those events which were central to the committee's inquiry.

3.137 Both men, as seasoned media performers, clearly appreciated the impact of sensational allegations in influencing public debate but nonetheless their respective attacks on each other did not assist the committee in its task.

3.138 As to the public bitter disagreement between Messrs Hawke and Black, which extended beyond the committee room and into the lounge rooms of the nation, the committee is now aware of a brokered rapprochement between the two men. The text of their joint statement issued 26 April 1994 is included here:

> The recent public disagreement between Conrad Black and Bob Hawke has been concluded with the acceptance by both of them of the principle that people can sincerely have differing recollections of past meetings. This principle applies to their only conversation in July, 1991, and to Mr Hawke's discussion with Mr Black's associate, Mr Colson, in 1993, about a possible corporate relationship between them. All reciprocal allegations of untruthfulness are withdrawn. All disparaging reflections over the venue of the 1991 meeting, over Mr Hawke's professional activities subsequent to his retirement as prime minister, and over Mr Black's motives in raising

> Israeli matters with Mr Hawke in the 1991 meeting, are also reciprocally withdrawn.
>
> Mr Hawke intended no suggestion or implication that Mr Black had any anti-Semitic attitudes and Mr Hawke repeats his assertion to the Senate committee that he had no reason to believe this to be the case. As mentioned above it is agreed that it is possible for people to have different recollections of conversations and with regard to the discussion between Mr Colson and Mr Hawke, Mr Black accepts Mr Hawke's integrity and the sincerity of Mr Hawke's statement of his recollection. For his part, Mr Hawke also accepts Mr Black's integrity.
>
> Mr Black withdraws the statement in Sunday's *Sun-Herald* concerning the term 'official greeter' and Mr Hawke having retainers with foreign companies to spy on his successor.
>
> With these misunderstandings removed, both men profess a reasonable regard and absence of ill-will for the other.[70]

3.139 Those who had the opportunity to observe both men give evidence to the committee will form their own judgements of the joint statement. Certainly, the change in attitude, from complete discrediting of each other to 'absence of ill-will for the other', in such a short time verges on the incredible. The Hansard record will have to serve as the permanent record of the remarkable evidence of these two men. Mr Black's credibility is not assisted by the fact that he had to issue a media release to clarify the fact that, contrary to his earlier assertion, it was his office, not Mr Hawke's, which had initiated negotiations whereby a planned television debate was not proceeded with.[71]

3.140 Certainly this extraordinary volte-face by Messrs Black and Hawke and the apparent repudiation of earlier passionately asserted personal attacks must leave ordinary citizens bemused. It can only be concluded that these recantations were simply an exercise in media damage control rather than a genuine change of heart. In these circumstances such repudiations can not be taken seriously in assessing the truth of matters central to the committee's inquiry.

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[70] *The Canberra Times*, 27 April 1994

[71] *The Canberra Times*, 2 May 1994

TREASURERS

Mr Keating

3.141 No evidence was adduced as to the involvement of Mr Keating as Treasurer in the early part of the receivership prior to his replacement by Mr Kerin on 4 June 1991.

Mr Kerin

3.142 Mr Kerin's role in the meetings with bidders, in participating in Caucus consideration of print media policy and the application of that decision, and in making the decision to approve O'Reilly and reject Tourang has been covered already in the relevant paragraphs.

3.143 Mr Kerin's interpretation of national interest and the way in which that is applied to foreign investment proposals is covered in more detail later in this chapter, as well as chapters 7-10.

Mr Willis

3.144 On 9 December 1991 Mr Willis was appointed to the position of Treasurer in place of Mr Kerin. Mr Willis then took responsibility for considering the revised Tourang bid. He approved that bid shortly after taking office and Tourang's bid went on to be accepted by the receiver.

3.145 However, in light of Mr Willis' refusal to cooperate with this inquiry, and particularly his direction to past and present FIRB and Treasury officials to not discuss aspects of the case with the committee, there are a number of outstanding questions to Mr Willis that remain unresolved. In the absence of FIRB documentation the committee does not know what the basis for Mr Willis' decision was or why it was taken at the time it was and cannot at this stage make findings in relation to this aspect of the inquiry.

Mr Willis - outstanding questions

3.146 The questions requiring response from Mr Willis are:

1. Did you consider the material in the FIRB Minute of 5 December 1991, on which your predecessor, Mr Kerin, based his decision to

reject the Tourang proposal, in deciding to approve the Tourang II proposal?

2. Did the FIRB submission to you of 12 December 1991, re Tourang II, acknowledge and rectify the defective information re AIN contained in the Minute of 5 December 1991?

3. What weight did you give to FIRB comments about AIN in consideration of the revised Tourang bid?

4. What weight did you give to Prime Minister Hawke's expressed hostility to the AIN group which included Mr D'Arcy?

5. What decision would you have made had you known the FIRB Minute of 5 December 1991 contained defective information?

3.147 Mr Willis' letter of response to these questions did not provide any answers.[72]

Finding 3.7

Despite numerous invitations to do so, Mr Willis chose not to attempt to justify his actions or to advance any legal advice to support his repeated non-cooperation with the committee.

The committee condemns the action of Mr Willis in directing his officials not to cooperate with the inquiry in providing certain critical evidence. The committee finds that Mr Willis has acted contrary to the public interest in not assisting this parliamentary inquiry.

Mr Dawkins

3.148 Mr Willis was replaced as Treasurer on 27 December 1991 by Mr Dawkins, who made the decision early in 1992 to allow passive foreign institutional shareholders to take up to a 5 per cent shareholding in Fairfax when it was floated on the market, so long as they were unrelated to existing foreign shareholders and had no representation on the board.

[72] Treasurer's letter of 25 May 1994

3.149 Documents released by FIRB relating to this decision reveal that it arose from an inquiry from an independent stockbroker. However, the documents provided by FIRB do not allow an analysis of the basis for that decision. As no evidence was adduced from witnesses on this particular decision, the committee is unable to make a finding on it. Should the Treasurer reverse his rule that public servants not give evidence on individual FIRB cases there would then be an opportunity to make findings in relation to this matter.

FIRB

3.150 FIRB's role in the Treasurer's 1991 decision has been covered in detail in earlier paragraphs. However, the significance of some of the findings and the differing treatment afforded different bidders and inconsistencies in FIRB's procedures require a consolidation of the major issues at this point.

3.151 The major issues are:

- FIRB's treatment of AIN;
- FIRB's request to Barings on 6 December 1991 for information about AIN;
- National Interest - Does FIRB know what it is that it's advising on? and
- Release of confidential information - How did Mr Black know what FIRB's recommendation to the Treasurer was?

FIRB's treatment of AIN

3.152 AIN was caught in a 'Catch 22' situation. It was not a foreign bidder so it did not need to come before the government. According to some witnesses, they were not a foreign bidder so their offers to present information to Mr Pooley on the status, structure and quality of their bid were not accepted. Yet AIN's bid was put before government by FIRB in a most damaging and inaccurate light so that the recipient of such advice would conclude there was no sensible alternative but to allow foreign control of Fairfax.

3.153 Mr Pooley and Dr Roberts, the FIRB officers involved in preparing the Minute of 5 December 1991, relied on the direction from the Treasurer not to discuss FIRB advice to the government to cover their inability or unwillingness to answer general questions about how they obtained the source information about AIN.

3.154 Despite repeated invitations to do so they did not put any legal advice before the committee or attempt to justify their refusal to cooperate other than to read the text of the Treasurer's directives.

3.155 Indeed, Mr Pooley's prediction, that the committee would discover that Dr Roberts could not recall vital matters, strongly suggests that the two men, who currently work together at the Insurance and Superannuation Commission, had agreed to seek refuge in memory loss rather than seeking to publicly justify their actions.

3.156 Mr Burrows, Mr Black, Mr Colson, and Mr Cameron O'Reilly all gave evidence that they did not give or could not recall giving to FIRB information adverse to the AIN bid, although Mr O'Reilly did admit to making comparative comments. In the absence of direct evidence from the FIRB staff responsible for preparation of the minute, the committee has no other alternative than to conclude that FIRB procedures for information gathering and analysis were defective. The committee can form no conclusion as to what sources FIRB used to obtain the relevant information.

3.157 A number of questions about the treatment of AIN remain outstanding, requiring responses from Mr Pooley, Mr Hinton and Dr Roberts:

Questions for Mr George Pooley

1. Upon what information did you base your conclusions on the qualities of the AIN bid for Fairfax? Given the adverse nature of some of your conclusions, did you seek to verify the accuracy thereof?

2. Did the Treasurer, any Minister or former Minister contact you and comment on the AIN bid? If yes, what were the comments?

3. Were you aware of Mr Hawke's open hostility to the AIN bid? If yes, what influence did this have on your conclusions?

4. Did Baring Bros tender any oral advice on the qualities of the AIN bid? If yes, what was this advice?

5. Did you instruct Dr Roberts to obtain written advice on AIN? If yes, why and why after you had signed the Minute?

6. In the light of the written advice from Barings, did you consider sending supplementary advice to the Treasurers Kerin/Willis? If yes, what was this advice?

7. Why did you repeatedly refuse AIN offers to submit additional information?

8. Having regard to FIRB guidelines, why did you include any reference at all to AIN in your Minute of 5 December 1991?

Questions for Mr Tony Hinton

1. Did you play any role in the 1991 decision? If yes, what was this role?

2. From your knowledge of FIRB files and the organisation's corporate memory, answer the following questions which have been forwarded to Mr Pooley:

    a. Upon what information did FIRB base its conclusions on the qualities of the AIN bid for Fairfax? Given the adverse nature of its conclusions, did FIRB seek to verify the accuracy thereof?

    b. Did the Treasurer, any Minister or former Minister contact FIRB to comment on the AIN bid? If yes, what were the comments?

    c. Was FIRB aware of Mr Hawke's open hostility to the AIN bid? If yes, what influence did this have on FIRB's conclusions?

    d. Did Baring Bros tender any oral advice on the qualities of the AIN? If yes, what was this advice?

    e. Did any FIRB officer instruct Dr Roberts to obtain written advice on the AIN bid? If yes, why and why after the Minute of 5 December 1991 had been signed by the Executive Member?

f. In the light of the written advice from Barings, did FIRB consider sending supplementary advice to the Treasurers Kerin/Willis? If yes, what was this advice?

g. Why did FIRB repeatedly refuse AIN offers to submit additional information?

h. Having regard to FIRB guidelines, why did FIRB include any reference at all to the AIN bid in its Minute of 5 December 1991?

3. Does FIRB now have in place appropriate procedures to check the accuracy of advice prepared for the Treasurer?

Questions for Dr Darryl Roberts

1. Dr Roberts, could you outline for the committee the role that you played in FIRB at the time of the 1991 Fairfax ownership decision.

2. Could you outline the methodology that you would have used in preparing advice for the Board.

3. What contact did you have with Baring Bros - who did you contact, when and what was the subject matter?

4. Why did you ring Barings seeking written advice on AIN after the Minute of 5 December 1991 had been submitted to the Treasurer?

5. Was the written advice on AIN from Barings consistent with earlier telephone/oral advice?

6. I understand you have been given a copy of Mr Burrows evidence which makes a reference to your involvement in the Minute of 5 December 1991. Is this evidence correct in every respect?

7. Did you receive any adverse advice re the quality of the AIN bid? If so, what was this advice and who proffered it?

8. Was it your practice to make notes to file of telephone conversations/informal meetings re AIN? Did this happen in the case of your AIN dealings?

9. You would have known that the Minute of 5 December 1991 had been signed and sent to Mr Kerin, why did you contact Mr Burrows the day after, requesting a seemingly innocuous description of AIN's

qualities? Why did you contact Barings and not AIN? Were you under orders not to contact AIN?

10. Did it surprise you that the FIRB Minute of 5 December 1991 breached FIRB guidelines (page 1 of Guide for Investors, Sept 1992) and made comments on an Australian bidder?

3.158 On 25 May 1994, under the cover of a letter from the Treasurer, the committee received blanket responses to these questions which continue to invoke public interest immunity as directed by the Treasurer.

FIRB's request to Barings on 6 December 1991 for information about AIN

3.159 The committee took evidence from Mr Leslie and Mr Burrows about the possible implications and content of the letter from Barings to FIRB dated 6 December 1991.[73] The committee also attempted to question Mr Pooley and Dr Roberts on the reasons for requesting such apparently basic information about a domestic bidder, the day after a minute containing information highly critical of the bidder was forwarded to the Treasurer and processed.

3.160 Mr Pooley and Dr Roberts avoided the questions using a combination of the Treasurer's direction and poor memory as an excuse.

Dr D Roberts

3.161 The committee cannot accept Dr Roberts' excuse that a memory lapse prevents him from recalling the circumstances of his contacting Barings for this seemingly innocuous background briefing material the day after the casework had been completed. It may well be that Dr Roberts handled tens or hundreds of Fairfax type decisions during his time in FIRB. However, the committee reiterates that as this FIRB case was almost without precedent and his actions so unusual, it is beyond any reasonable expectation that an officer of Dr Robert's intellectual capacity and status in the public service would have forgotten this occurrence.

Mr G Pooley

3.162 Mr Pooley's memory lapses are also highly questionable.

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[73] Evidence pp 222-3 and 548

3.163 Mr Pooley was the Executive Member of FIRB for 'about ten years'[74] until his statutory appointment as the Insurance and Superannuation Commissioner in August 1992. During this period the Australian economy was the subject of a raft of changes to make it more open to international competitive forces. One of the key changes entailed a substantial relaxation of foreign investment rules. FIRB was the body responsible for the implementation of these changes. It is extraordinary, therefore, that Mr Pooley, the officer who provided the bureaucratic oversight for these changes, when asked what role FIRB might have in the future, responded:

> I have got a job that does take up my time very fully and since I have been there I have not spent any time at all thinking about my previous job and what ought to be done about it, if anything.[75]

3.164 The committee is concerned that Mr Pooley's attitude to the inquiry was a negative one bordering, in this case, on non-cooperation.

3.165 His lapses in memory in giving evidence on other matters, for which he may have been in a position to shield behind the Treasurer's claim of public interest immunity, intensified the committee's concern about the genuineness of his testimony. On several occasions Mr Pooley claimed that he could not remember what can only be described as significant and eminently unforgettable occurrences. For example: he could not remember whether or not he had requested Dr Roberts to obtain basic background information on AIN after the Minute of 5 December 1991 had been drafted and signed[76], whether or not he had advised AIN that, as it did not have FIRB implications, there would be no need for them to make a submission[77]; and whether or not FIRB obtained any expert technical or financial opinion to assess whether Fairfax required foreign expertise[78].

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[74] Evidence p 383

[75] Evidence p 414

[76] Evidence p 636

[77] Evidence p 397

[78] Evidence p 408

3.166 But on the other hand, he could remember: acting as the executive member of FIRB in 1980 whilst the 'occupant' was overseas[79]; giving evidence on how FIRB monitors overseas investment projects to a Senate committee on 8 March 1991[80]; and the changes to policy in 1986[81].

3.167 Mr Pooley was an unsatisfactory witness. He clearly came to the inquiry with a mind to deny the committee information which it needed to report on its terms of reference. The reasons for his attitude and performance as a witness require explanation. Was he voluntarily protecting the government? Was he under duress not to cooperate with the inquiry? Did he misinterpret the Treasurer's instructions in respect of public interest immunity and, when pressed, became confused, thereby claiming the most effective defence to incisive questions, namely, loss of memory? Did he use a combination of the Treasurer's letter and his failing memory as a defence to any less than competent advice which he may have prepared during his time as executive member of FIRB?

3.168 In the light of Mr Pooley's refusal to proffer any explanation he cannot complain about the suggestion that he might have been seeking to cater to the perceived prejudices of his political masters.

3.169 It should be emphasised that the Treasurer's directive did not purport to prohibit comment on the substance of discussions with third parties who were the source of such information and, therefore, did not preclude Mr Pooley from indicating the source of his information.

Obligations of public servants

3.170 The committee would be remiss if it did not state that public servants need to consider carefully their positions when directed by a minister to act in a way which might be contrary to the public interest. In this inquiry the committee was legitimately inquiring into a public interest matter concerning economic decisions based on the national interest. The Treasurer, Mr Willis, repeatedly directed his officials, one of whom was an independent statutory officer, not to cooperate with a parliamentary inquiry. During the taking of

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[79] Evidence p 390

[80] Evidence p 395

[81] Evidence p 405

evidence from certain public servants, the committee often asked itself to whom does a public servant owe allegiance? The NSW ICAC made some noteworthy observations on the duties of public servants vis-a-vis their following 'to the letter' the directions of a minister:

> But public servants are there to serve the public, not to please their Minister. Accordingly they must be prepared to press their views if the public's interest as they perceive it so requires.
>
> No public servant should be heard to say that something was done because it is what the Minister wanted, and that is that.[82]

3.171 Unfortunately the evidence of certain public servants and advisers was well below this ethical standard.

'National interest'- does FIRB know what it is that it's advising on?

3.172 On numerous occasions during the taking of oral evidence the committee sought to explore the meaning of the terms national interest and not contrary to the national interest as applied in foreign investment policy. In doing so the committee endeavoured to establish against what criteria foreign investment proposals are considered by delegates within Treasury, by FIRB, and by Treasurers. The committee was also trying to establish what understanding foreign investment applicants had of the processes by which their proposals would proceed.

3.173 The responses in evidence were enlightening and at times disconcerting. A selection of responses follow:

Mr Kerin: The national interest is in the mind of the beholder.[83]

Mr Stone: I was hoping you would not ask that... .
... It is one of those dreadful things that can change.[84]

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[82] Independent Commission Against Corruption (ICAC) *Report on Investigation into the Silverwater Filling Operation*, February 1990, p 16

[83] Evidence p 473

[84] Evidence p 614

Mr Leslie: I think it is a difficult question to answer because it is defined, obviously by whoever is in office as Treasurer at the time.[85]

Dr Roberts: The national interest is what the Treasurer and the Government decide it is at the time and in the circumstances.[86]

3.174 The committee interprets from these and other comments that the concept of national interest in relation to foreign investment is in effect a 'movable feast' depending upon who occupies the Treasurer's chair.

3.175 Such flexibility may well suit the discretion of a particular Treasurer to pick a winner in an individual case. However, the difficulty such a regime presents, both to investors and to a body such as FIRB in trying to frame its recommendation so as to second guess what is in the Treasurer's mind on a particular day, is obvious.

3.176 The need to improve foreign investment procedures to allow greater transparency for all participants is beyond question. The committee notes and welcomes the reference to such a need for change as reported in *The Sydney Morning Herald* following an interview with the Treasurer, Mr Willis.[87]

3.177 FIRB's analysis of all bidders as contained in the Minute of 5 December 1991, demonstrates the need to improve the system. That document contains references to AIN, despite the fact that, according to Mr Hinton's evidence, AIN's bid 'did not involve foreign interests and therefore did not involve FIRB processes'. (The Catch 22 debate with Mr Hinton over whether or not AIN had been a casualty of FIRB processes is reported in eight pages of evidence).[88] This matter is further addressed in a recommendation in chapter 10.

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[85] Evidence p 234

[86] Evidence p 708

[87] *The Sydney Morning Herald*, Monday 9 May 1994

[88] Evidence pp 40-48

FIRB guidelines

3.178 FIRB's Minute of 5 December 1991 also included background on Conspress, despite Mr Packer's earlier withdrawal, and stated that any subsequent re-entry by Mr Packer would again trigger an ABT inquiry in respect of cross-media rules. An ABT/ABA inquiry has not occurred following Mr Packer's return to Fairfax as a minority shareholder.

3.179 These comments in the FIRB minute regarding Conspress and Mr Packer may well reflect the anti-Packer feeling evident at that time as opposed to a genuine attempt to assess the cross media policy vis-a-vis the complexities of the Tourang bid.

3.180 FIRB's assertions about the benefits of foreign ownership were largely untested and unsubstantiated and indicate that there were no established criteria against which FIRB was supposed to conduct its analysis. Such a shallow and superficial approach is an indictment of the government's long-standing foreign investment policy and procedures.

Release of confidential information - how did Mr Black know what the FIRB recommendation to the Treasurer was?

3.181 Mr Black's outburst in reaction to Treasurer Kerin's decision and his reference to Mr Pooley are detailed earlier in this chapter. To enable a judgement to be formed on this matter the committee requires that Mr Pooley answer the following additional questions:

- What advice did he pass to Mr Black or his associates about the content of the FIRB minute to the Treasurer?
- Can he explain how Mr Black became aware of the FIRB recommendation so as to enable him to comment as he did on 11 December 1991?

CONCLUSION

3.182 In this chapter the committee has reported on the evidence and canvassed a number of critically important issues which are relevant to the three 1991 decisions identified in the introduction to Part II.

3.183 In relation to Mr Kerin's decision to approve the foreign investment application by the O'Reilly group and to reject the Tourang application, the committee finds that the decision was discriminatory, based on incorrect and misleading advice and was deliberately intended to obtain an outcome in the interests of the Government, and not the national interest as required by the FATA.

3.184 In relation to Mr Willis' decision to approve the amended application by the Tourang consortium, the committee finds that the decision itself appears to have been equitable and corrected the discrimination resulting from Mr Kerin's decision. However, as the committee was unable to obtain evidence from the Treasurer or unfettered evidence from FIRB members it is unable to make any conclusive findings as to the origins and basis of this decision. The committee notes that the process by which the Tourang consortium submitted its revised application required the applicant to restructure, so as to reduce the foreign equity component to less than that required by the caucus criterion.

3.185 FIRB's inability to come to a decisive judgement on whether domestic bidders should be comprehensively and thoroughly reported on in assessing the national interest worked to the detriment of AIN. Clearly, in assessing the national interest in relation to a newspaper sale of the magnitude of the 1991 Fairfax case, the interests of Australian nationals should have been taken into account, otherwise why have the term 'national interest' in the legislation? FIRB's failure in this matter meant that Treasurer Kerin, and probably Treasurer Willis (the committee has not been provided with a copy of the FIRB Minute to Treasurer Willis) did not have before them an accurate assessment of AIN's bid for Fairfax in the context of an analysis of the national interest.

3.186 In relation to the decision by Mr Dawkins to allow a small level of passive institutional foreign investment in Fairfax, subject to certain restrictions, when it was floated in 1992, the committee received no submissions and has taken no evidence from witnesses on this decision. The committee is, therefore, unable to reach any conclusions on this matter. However, should a way be found to allow the committee to have access to the relevant documents conclusive findings could then be reported.

3.187 Unfortunately, the taking of evidence in relation to this chapter has been marred by the inability and unwillingness of certain witnesses to give open, frank and reliable evidence. The text of this chapter contains a

number of references to unsatisfactory evidence which the committee will endeavour to address in its second and final report.

CHAPTER 4

THE 1993 DECISION

Introduction

4.1 This chapter will examine the origins and basis of the decision by former 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 to 25 per cent. This decision is the one that gave effect to the alleged arrangement between Mr Black and Mr Keating as reported in Mr Black's book *A Life in Progress* and confirmed during Mr Keating's Seattle interview.

4.2 The committee took evidence from Mr Black in amplification of statements in his book and submission about the series of meetings and discussions he had with Prime Minister Keating during 1992 and 1993 leading up to the Treasurer's decision to allow an increase in his investment in the Fairfax group. Mr Dawkins gave evidence as to his role as Treasurer in considering the application that was submitted for approval under foreign investment policy. FIRB staff cited an instruction from the Treasurer for their inability to discuss the case or the advice given to the Treasurer on this proposal.

4.3 Prime Minister Keating has not responded to any of the committee's requests to provide evidence or information which would allow the committee to clarify its interpretation of his remarks about the alleged deal with Mr Black. The Prime Minister's attitude to this committee was expressed in his response to Dr Hewson's question to him in the House on 24 November 1993. He said: 'Listen, brother, I know my place in the world. I do not slum it before Senate committees.'[1]

Background

4.4 Mr Black advised the committee of a total of 6 meetings or discussions he had with Mr Keating, identified and described in following paragraphs and referred to as contact 1, 2, etc. Those events and a summary of the relevant discussion according to Mr Black are:

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[1] House of Representatives Hansard, 24 November 1993, p 3545

- **Contact 1** - February 1992, meeting at Kirribilli House - discussed burden shouldered by Mr Black in restoring Fairfax. Mr Keating would consider an increase in about six months.

- **Contact 2** - August 1992, telephone call - Mr Keating had not got around to it, but his support for the proposition remained - deferred to November.

4.5 An independent version of events to this point is contained in an article by Tom Burton in *The Sydney Morning Herald* of 24 October 1992. The article reports a discussion between Mr Keating and the new chief executive of Fairfax Mr Stephen Mulholland and subsequent comments by Mr Keating at a lunch with senior editors and executives.

4.6 In response to a question about Mr Black's prospects for gaining approval to lift his investment in Fairfax from the previously approved 15 per cent, Mr Keating referred to the company as being on 'probation'. Mr Keating is reported to have then referred to Mr Black's advice to him of an opposition promise to allow him to own 100 per cent. The report goes on to say that Mr Keating 'embarked on a long rendition why his government should be supported.'

4.7 Burton went on to draw his own conclusion from these statements:

> the real issue of Keating trying to suggest the company was on probation, as far as allowing Black to increase his shareholding was missed. Black this week was reported as admitting he would have a better chance under the Liberals, which no doubt will lead to a conspiracy theory about the direction of Fairfax's political coverage whenever an anti-Keating story gets a big run in the lead up to the election.[2]

4.8 The existence of such comments, a year before the question of a 'deal' between Messrs Black and Keating became a matter of inquiry, is of interest to the committee. Fairfax executives, including Mr Black, were on notice, before the election, that any request for approval of increased foreign investment was subject to a satisfactory 'probationer's' report from the Prime Minister. Fairfax executives were left to draw their own conclusion that the test for a satisfactory report included support for the government.

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[2] *The Sydney Morning Herald*, 24 October 1992

4.9 Mr Black's evidence of conversations subsequent to October 1992 continued:

- **Contact 3** - November 1992, meeting in Mr Keating's Sydney office-Messrs Colson and Black. According to Mr Black, Mr Keating 'urged us to send an application at once to the Foreign Investment Review Board to raise our share to 25 per cent and he would champion it'.[3]

4.10 This was the meeting at which 'balance' was discussed. In his book Mr Black states that any further increase was conditional on Mr Keating's re-election and Fairfax political coverage being 'balanced'.[4] In his submission on this matter Mr Black is more specific in saying that Mr Keating indicated in-principle support that 35 per cent was attainable after the election. Mr Black acted on Mr Keating's urging and duly lodged his application for an increase in December 1992. The issue of 'balance' and the concept of a deal is discussed in chapters 5 and 6.

4.11 The other discussions between the Prime Minister and Mr Black were:

- **Contact 4** - April 1993, telephone discussion - Mr Black inquired as to the status of the application to go to 25 per cent. Mr Keating indicated it would be considered in two cabinet sessions from then and that he was hopeful it would be approved;

- **Contact 5** - May 1993, meeting in Canberra - Messrs Colson, Black and Mulholland - the application to go to 25 per cent had recently been approved. There was passing reference to going higher than 25 per cent; and

- **Contact 6** - November 1993, meeting in Canberra - Messrs Black and Colson met Mr Keating, who advised them the issue of going higher could be raised when appropriate, but gave no commitment.

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[3] *A Life in Progress*, p 453

[4] *A Life in Progress*, p 453

FIRB procedures

4.12 Consistent with the above sequence of meetings and discussions and Mr Keating's invitation in November 1992, an application for foreign investment approval to increase its shareholding from 15 to 25 per cent under the Foreign Acquisitions and Takeovers Act was lodged with FIRB on behalf of The Telegraph plc on 11 December 1992.

4.13 On 11 January 1993, Treasurer Dawkins issued an order under the Act prohibiting the proposed acquisition for a period of ninety days. The effect of this order was to defer the decision until after the then imminent election which was held on 13 March 1993.

4.14 The committee has been prevented by the Treasurer, Mr Willis, from gaining access to the FIRB advice to the then Treasurer Mr Dawkins, when he was considering the matter after the election.

4.15 On 20 April 1993, the Treasurer issued a press release advising of a change in foreign investment policy in relation to mass circulation newspapers. This change in policy, resulting from the Telegraph's application and discussion with Mr Keating, allowed approval for the Telegraph to increase its stake in Fairfax to 25 per cent.

4.16 The press release also advises that a single foreign investor can have a shareholding of up to 25 per cent, with unrelated foreign interests allowed to have non-portfolio shareholdings of up to 5 per cent.

4.17 Subject to FIRB guidelines requiring all proposals for foreign investment in newspapers to be subjected to case-by-case examination, it is, therefore, at least theoretically possible for four foreign investors to each acquire 25 per cent in Fairfax. While other permutations on shareholding can be calculated, it is important to understand that under the existing foreign investment policy 100 per cent foreign ownership of Fairfax is a possibility.

4.18 Ironically, another beneficiary of this policy change was Dr Tony O'Reilly. His company INP was thereby able to increase to 25 per cent in its investment in APN, the publisher of regional papers in Queensland and New South Wales.

Treasurer Dawkins

4.19 Mr Dawkins gave evidence of his role and the actions he initiated in his consideration of Mr Black's application to raise his shareholding in Fairfax to 25 per cent.

4.20 With respect to FIRB's advice on this matter Mr Dawkins stated that the advice was that the proposal 'was inconsistent with policy'.[5] That left the government with the option to reject the application as inconsistent with policy, or to change the policy. In this case the government decided to change the policy.

4.21 Mr Dawkins outlined the discussions he had with Mr Black in which he advised of FIRB and government processes for consideration of the application. The government's approach to the issue was discussed by Mr Dawkins with Mr Keating, and Mr Dawkin's later took a submission to cabinet to determine the matter in view of the change in policy required.[6]

4.22 Media reports at the time indicated opposition to the proposal from within the Labor Party and the ACTU. A number of Labor members including Party President, Mr Barry Jones, signed a letter to Treasurer Dawkins expressing opposition on a number of grounds. ACTU President Martin Ferguson is reported to have forwarded a letter on behalf of the ACTU in which he questioned 'What is so magic about his desire to own 25 per cent when he has shown that he has a dominating influence over the company with a 15 per cent holding?'[7]

4.23 Adequacy of control at 15 per cent was obviously an issue in cabinet's consideration of Mr Black's application, particularly given that caucus policy set in 1991 included a requirement that foreign control not be extended.

4.24 Mr Dawkins' stated reasons for approving the application were to allow Mr Black to secure his management control of the company so as to safeguard his financial and managerial commitments. Mr Black at that time was proposing to increase the company's investment in plant and equipment.

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[5] Evidence p 519

[6] Evidence pp 506-7

[7] *The Age*, 19 April 1993

The press release advising the change in policy concluded that further increases in the level of foreign ownership would not be countenanced.

4.25 Regardless of this apparent restriction on future increases, which is similar to the restriction announced with the original decision to approve the Tourang II bid in December 1991, Mr Black remains of the view that he should be allowed to increase his holding to 35 per cent. In concluding his opening statement to the committee on 21 April 1994 Mr Black said:

> Finally, on the issue of foreign ownership, our contention is that, since neither the Prime Minister nor the Leader of the Opposition - I will leave the former Prime Minister out of it - objects in principle to the idea of us going to 35 per cent, and since no-one that I am aware of has claimed that our stewardship at Fairfax has been anything other than adequately competent and conscientious, consideration should be given to our going to 35 per cent and, in the unlikely event of a takeover bid being made that we would consider hostile, to our being able to protect our position at 35 per cent.[8]

4.26 Under the current policy Mr Black's request to go to 35 per cent requires consideration by caucus. The committee notes Mr Black's evidence of Mr Keating's in-principle support for him to gain that increase at the appropriate time.

4.27 The committee has had no evidence from Mr Keating and, therefore, refers the question to the Prime Minister. Did he tell Mr Black that 35 per cent is 'ultimately attainable'?[9] If so, when will Mr Black be advised to lodge his application for approval under the foreign investment policy, as he was advised in November 1992? The committee understands that there is no such application before the FIRB, at the present time.

4.28 What is particularly perplexing about the 1993 decision is that it 'flew in the face' of recommendations contained in the House of Representatives Select Committee on Print Media Report. That committee recommended:

- the Foreign Investment Review Board continue to examine all foreign investment proposals in the print media;

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[8] Evidence p 662

[9] Submission No 3

- Government guidelines for foreign investment in the print media be amended to show that, subject to the normal national interest requirements, proposals with up to 20 per cent foreign control be approved;

- for all proposals above 20 per cent a case would have to be made that the proposal is in the national interest or that special arguments (eg failing company) apply; and

- the Treasurer publish reasons for accepting or rejecting foreign investment proposals in the print media. (Paragraph 9.93).[10]

Conclusion

4.29 With respect to the origins and basis of Mr Dawkins' decision to approve the increase in Mr Black's shareholding from 15 to 25 per cent, the committee has been hampered in its investigation by the unwillingness of certain officials, under instruction from the Treasurer, to provide evidence and by the Prime Minister's repeated failure to respond to requests for information.

4.30 The committee has considered Mr Black's evidence about his communications with Mr Keating. As with any two party situation it is difficult to conclude a view if only one party's views are taken into account. Nevertheless, the committee has explored the issue of 'balance' in chapter 5 based on Mr Keating's statements to the media. A number of questions await response from the Prime Minister. These include:

> What part did you play in the 1991 decisions regarding bids for Fairfax?
>
> What contact did you have with Mr Pooley or any other FIRB member during Jan-June 1991 (as Treasurer), and June-December 1991, regarding Fairfax bids?
>
> What undertaking did you give to Mr Black regarding foreign ownership limits?
>
> What undertaking did you receive from Mr Black concerning election coverage by Fairfax press?

[10] *News & Fair Facts*, pp xxxiv-xxxv

How do you account for discrepancies between your version of those conversations and Mr Black's version?

You have indicated that you and the Cabinet were sufficiently satisfied with the performance of the Fairfax press in the 1993 election to approve increased ownership for Mr Black. Can you inform the committee of the criteria which you and the Cabinet used to assess this performance?

On what grounds and with what advice was the 1993 decision to increase foreign ownership limits taken?

Did you ever tell Mr Black that 35 percent foreign ownership was ultimately attainable?

Having regard to Mr Black's written submission, when will 35 percent be attained?

4.31 Mr Keating has not responded to the committee's correspondence on this question. Accordingly, the committee has had to refer to Mr Keating's remarks in the Parliament and in the media. The committee's findings in respect of balanced coverage and the 1993 decisions can be found in chapters 5 and 6.

PART III

BALANCED COVERAGE

In this part the committee addresses the issue of whether the Prime Minister influenced or sought to influence the 1991 and 1993 decisions to increase the permissible percentage of foreign ownership of newspapers.

Chapter 5 explores the issue of whether those decisions were influenced by considerations relating to the content of newspapers including any requirement for 'balanced' coverage. The chapter examines statements made by Mr Black and by the Prime Minister regarding their conversations leading up to the 1993 ownership decision and unravels the threads of their explanations. In doing so, it reflects on the undertakings which were made and the extent to which they were carried out.

Chapter 6 is a summary of government experience in this and similar countries, relating to media regulation and 'balance'. It traces the notions of diversity of opinion versus 'balanced' opinion and draws conclusions as to the appropriate mechanisms for protecting the rights of the public and of newspaper proprietors vis-a-vis 'balance'. It makes recommendations regarding further inquiries by other committees and makes a finding on the propriety of Mr Keating's actions.

CHAPTER 5

CONSIDERATIONS RELATING TO THE CONTENT OF NEWSPAPERS

Conversations between Mr Keating and Mr Black

5.1 As identified in chapter 1, the events giving rise to the committee's terms of reference were the *Lateline* interview with Mr Conrad Black on 18 November 1993, and the remarks made at that time by Mr Keating in Seattle. It was alleged that Mr Keating's interview included the statement that the increase in foreign ownership for Mr Black had been contingent upon the Fairfax group delivering balanced coverage, especially in the lead-up to the 1993 Federal election.[1]

5.2 The above comments by Mr Black and Mr Keating were made with regard to the 1993 decision to increase the allowable shareholding of Mr Black from 15 per cent to 25 per cent. They did not specifically refer to the 1991 decision to allow the original purchase of Fairfax with a 14.99 per cent holding by Mr Black's *The Telegraph*. That decision had been taken when Mr Hawke was Prime Minister and Mr Willis the Treasurer.

5.3 This chapter therefore canvasses the concept of 'balance' with regard to the 1993 decision only.

The term 'balance' in the discussions

5.4 The first controversial airing of the term 'balanced political coverage' in this context was in Mr Black's autobiography, *A Life in Progress*, where he said of a meeting with Mr Keating in November 1992 that the Prime Minister had:

> acknowledged that he had been delinquent in not acting earlier on the promise of January. He urged us to send an application at once to the Foreign Investment Review Board to raise our share to 25 per cent and he would champion it.

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[1] Senator Alston, Senate Hansard, 9 December 1993, p 4280

> If he were re-elected and Fairfax political coverage was 'balanced' he would entertain an application to go higher.[2]

Later on the same page, he adds:

> In March 1993, he was comfortably re-elected and in April he approved our ownership increase application.[3]

5.5 The Australian media were quick to pick up Mr Black's comments and he was interviewed on *Lateline* on ABC television on 18 November 1993 regarding his statements. Mr Black attempted to explain his understanding of 'balance':

Kerry O'Brien: Paul Keating also said according to the book that if he was re-elected - that was in the election this year - and Fairfax political coverage was balanced, he would entertain an application for higher ownership of Fairfax again beyond the 25 per cent. Has he since indicated to you that the Fairfax coverage was balanced?

Conrad Black: No. I want to be clear here. He was not endeavouring to influence the editorial position that might possibly be a matter in which I would have some say. He was more concerned with the performance of journalists. He has the view that Fairfax journalists, some of them, have historically been gratuitously hostile to him, and what he was hoping was - and I think he said this to his Caucus at the time that he championed our move from a 15 to 25 per cent allowable ceiling - that we would assert a discipline in favour of fairness - not partisanship, and he was never asking for that.[4]

And elsewhere:

Conrad Black: He was concerned, as I've said to you before, Walter, that he thought he'd not been fairly treated by certain

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[2] Conrad Black, *A Life in Progress*, Random House Australia, Sydney 1993, p 453

[3] ibid

[4] *Lateline*, Thursday 18 November 1993, MICAH transcript p 22

> Fairfax reporters. But he, in so far as he referred to my alleged Thatcherite tendencies, one, he was respectful of them and two, he only raised them in what I took to be a jocular context.[5]
>
> All he was seeking was professionalism, fairness and balance in the Fairfax titles and all I was pledging to do was my best to ensure that occurred, but that contained no implications of partisanship in one direction or another, and indeed I had somewhat similar discussions with Dr Hewson. The only interest either man ever expressed was that the paper's quality be maintained and that professionalism be maintained, and where one or other of them perceived it had been lacking before, to be shored up. There was no discussion of deals and no discussion of partisanship.[6]
>
> And the Government's view was, since they had that xenophobic faction in their own Caucus that the Prime Minister had to contend with, that it would be easier to justify such an increase if the fact of balance - and he was very careful to say he did not mean that as a euphemism for partisanship or favours for his party - just balance and avoidance of unprofessional practices during the election campaign and the run-up to the election, if that balance was demonstrably something that we were going to try to encourage, that's all.[7]

5.6 The disturbing elements of these first statements from Mr Black are as follows:

- in stressing that Mr Keating was not endeavouring to influence his editorial opinion, Mr Black was clearly conceding that the Prime Minister was seeking to influence journalistic coverage. He was also making it plain that he saw nothing improper in Mr Keating seeking to do so.

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5 *PM*, 19 November 1993, MICAH transcript

6 *PM*, 19 November 1993, MICAH transcript

7 *Business Sunday*, 21 November 1993, MICAH transcript

- Mr Black saw 'balanced coverage' as something which he could bring about with a 'discipline in favour of fairness'.

- Mr Black was happy to concede that Mr Keating had not always received fair treatment at the hands of Fairfax reporters without presumably having any more than the vaguest awareness of any evidence to that effect. He was also happy to concede that Mr Keating was entitled to have the 'balance' redressed.

- Mr Black was therefore more than willing to intervene to promote 'balance' as 'something that we were going to try to encourage'.

5.7 The long history of antipathy between the Labor Party and the Fairfax press was described in the book *Corporate Cannibals* as 'the stuff legends are made of'.[8]

5.8 On the relationship between Mr Keating and Fairfax, *Corporate Cannibals* quotes from a board minute by editorial executive Mr Max Suich in early 1987, reporting on an extended meeting with Mr Keating, then Treasurer:

> ... Keating says his motives for getting involved in the *Herald* and *Weekly Times* takeover were a desire to see the [Melbourne] *Herald* broken up and a desire to hurt Fairfax ... The Treasurer is a product of the New South Wales right wing of the ALP and his conversation is littered with threats, references to getting even, doing deals and assisting 'our crowd' in business, the press and within the ALP.
>
> He is very blunt about the fact that the New South Wales right are 'deal makers' and that they provide favours to 'our crowd' in return for favours given.
>
> He also has very strong feelings about old money or establishment money, which he describes as dead money stultifying the economy, and he sees great advantages in new money - in which he includes Murdoch and Packer - being given opportunities to knock off old money. This I guess is the last glimmer of the class warrior ... .[9]

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[8] *Corporate Cannibals* p 172

[9] *Corporate Cannibals* p 173

5.9 Against this background it is hard to imagine Mr Keating, of all people, having any altruistic or academic interest in questions of journalistic 'balance' - his motives were much more transparent. Having regard to his long-standing reputation for ringing up journalists and berating those whose writings to which he took exception, an observer could reasonably conclude that Mr Keating was of a mind to right past wrongs and tilt the balance as much as possible in his favour.

5.10 Given the history of the relationship between the Labor Party and Fairfax, there is a thread in Mr Black's early statements that whatever the term 'balance' implied, it was something which had not always prevailed, and that it was something other than the status quo. Whatever Mr Black understood by the term, he took it to mean that it would require some action on his part to bring it about. Mr Black's writings and his interviews, however much he subsequently sought to disguise the nakedness of the arrangement, made it clear that he was willing to trade at least a promise of proprietorial intervention to enhance his prospects of increased foreign ownership in the Fairfax empire.

5.11 Mr Keating's comments in Seattle did nothing to dispel the notion of a causal link between coverage and ownership limits:

> I said, "Well, we'll think about it, but we want a commitment from you that the paper will be balanced. And if there is any notion that, you know, of bias, that is that 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."
>
> **J:** But Mr Keating, should a commercial dealing of that sort rest on your judgement about whether a media organisation is fair to Labor?
>
> **PM:** No, not whether it's fair to Labor, but whether reporting is fair.
>
> **J:** But you're the judge, are you?
>
> **PM:** Well, I'm the Prime Minister. That's how I become the judge.[10]

[10] Transcript of interview with the Prime Minister, the Hon P J Keating MP, Seattle USA, 18 November 1993, pp 5 and 6

5.12 These admissions and explanations raise fundamental questions about the manner in which such decisions were made and whether the 'national interest' was a mere cloak to disguise more mundane considerations.

5.13 In addition to Mr Black's own explanations of the meaning of 'balance', the committee has heard from a number of witnesses within the newspaper world regarding the use of such terms by politicians. They have testified that whenever a politician asked them for 'balance', they took them in fact to mean 'bias'. For example:

> **Mr Kohler:** We get lots of calls. Balance is generally in the eye of the beholder. So one person's balance is another person's bias, I guess.
>
> **Senator Kernot:** You do not develop an immunity of sorts?
>
> **Mr Kohler:** Sure, I am immune to politicians.
>
> **Chairman:** I take it that you have not had any of them ringing up recently asking for balance.
>
> **Mr Kohler:** I have never had politicians asking me for balance. What I have had is politicians asking for bias.
>
> **Chairman:** Imbalance.
>
> **Mr Kohler:** Precisely.[11]

5.14 Given the above, there was every reason for the media and the public to suspect that if Mr Keating had used the word 'balance' in this context, that a reasonable person would have taken him to mean bias, or at least a less unfavourable treatment for his party.

5.15 Mr Black has commented to the committee that:

> I had - and I suppose I have myself to blame for this - absolutely no idea that using the words I initially did, and in particular putting the word 'balance' in quotes, would lead to the supposition that what I really meant was the reverse of what I wrote![12]

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[11] Evidence p 306. See also Mr Kennedy on p 164

[12] Evidence p 687

5.16 The committee is not attempting to use semantics to twist the word 'balance' in any way. Despite Mr Black's assertions, the committee has not assumed that it was Mr Keating who first used the word. What concerns the committee, as it did the public and the media at the time, is the context in which the reported conversation occurred and the subsequent rationalisation of it by Mr Black and Mr Keating. This section of the report attempts to unravel the main threads of those rationalisations and to evaluate each of them. It begins by looking at the term 'balance'.

The meaning of 'balance'

5.17 Mr Black, as a media owner dependant on the government for his ownership percentage, must have been well aware from the time when he first began to negotiate with the government, of the need to please them. He would also no doubt have been aware that there was compelling good sense in accommodating the government and specifically the Prime Minister on an issue of such political sensitivity, particularly when the fate of any such application was entirely dependent upon the discretion or whim of one powerful individual. When addressing Mr Hawke at the Hearing of 22 April 1993, Senator Kernot commented that:

> I asked Mr Black yesterday why we should believe him. I thought it was interesting that Mr Black reflected favourably on Dr Hewson and Mr Keating who are current decision-makers, but less favourably on you and Mr Kerin and Malcolm Turnbull. I think this is a real difficulty for people who are watching the proceedings here.[13]

5.18 There are clear signs of such a disposition on Mr Black's part long before the publication of his book. As early as the day on which Mr Keating became Prime Minister in 1991, Mr Black appeared in the media to state his willingness to please the new leader:

> **Peter Martin:** Will any anti-Labor bias continue under you?
>
> **Conrad Black:** Balance and professionalism and reasonableness and high quality standards of fair reporting and comment will be observed and I will do whatever I can as an influential shareholder. I wouldn't put it more strongly than that, and I think it would be inaccurate to put it more strongly than that. Anything I can do to ensure

[13] Evidence p 757

> that it happens. Therefore if Mr Keating's comments on the former performance of those papers were well-founded then I think perhaps we can set his mind at ease a bit and I'll try to do that. I'm talking about the elimination of bias if there was such a bias, I'm not talking about partisanship or the institutionalisation of partisanship.[14]

5.19 Mr Black used similar terms when discussing the draft charter of editorial independence at Fairfax:

> As I understand and as I've seen these versions, the journalists are free to write what they want independent of any influence from outside and if the editor does not or can not require of them a standard of balance, quality and fairness required by the AJA code of Ethics, then there's nothing anyone can do about it. Not the shareholders, not the directors, not the general manager not anybody. Well at some point there has to be some recourse to ensure that, but that's what I mean. I'm talking about the ensuring of quality, balance and fairness. I'm not talking about euphemisms for the intervention of a proprietor... .[15]

5.20 These quotes demonstrate Mr Black's already frequent use of the word 'balance', and his willingness to reassure the government and the public by using that term. In using that particular word he also seems to have been drawing more from his own vocabulary and familiar environment than from the local context. The AJA Code of Ethics simply says journalists 'shall report and interpret the news with scrupulous honesty by striving to disclose all essential facts and by not suppressing relevant, available facts or distorting by wrong or improper emphasis.' By contrast, the Statement of Principles for Canadian Daily Newspapers contains an entire section on 'Accuracy and Fairness' which defines fairness as 'a balanced presentation of the relevant facts in a news report, and of all substantial opinions in a matter of controversy'.[16]

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[14] *AM*, 20 December 1991, transcribed by committee secretariat.

[15] *PM*, Wednesday 18 December 1991

[16] See Paul Chadwick, *Charters of Editorial Independence: An Information Paper*, Communications Law Centre, Melbourne 1991. The AJA model charter which was appended to *News & Fair Facts* (Appendix 11), did include the following: 'The Chief responsibility is to provide news that is as accurate, fair and complete as possible and comment that reflects the diversity of opinion within the community'

5.21 In April 1993, looking back on the November 1992 meetings, Mr Black again used similar key words:

> I promised both party leaders that I would assert all the influence I could in favour of **fairness and coverage**, and that I would not endeavour to influence the editorial recommendations in any way other than to ensure that they were where they belong and clearly labelled opinion pieces rather than news stories. And I made it absolutely clear, personally and via the Managing Director, Mr Mulholland, that I was not seeking and actively sought not to achieve any influence at all on the recommendations the editors would make to their readers.[17] [emphasis added].

5.22 When his book was published in November 1993, Mr Black attributed the word 'balanced' to Mr Keating, and put it in quotes. Mr Black repeated that attribution at first in his opening statement to the committee on 22 April 1994 by saying:

> the word 'balanced' was in quotes by me because that is the word that was used and that is what he meant.[18]

5.23 Later in the same discourse, however, Mr Black claimed that the term was his own:

> The word 'balance' was used by me, but it was a fair summary--that he accepted and has used since - of what he said.[19]

5.24 Similarly, although Mr Keating at first responded in public to the quote as his own, he did argue on one occasion that the word was Mr Black's:

> **Kerry O'Brien:** ... Conrad Black said, that you had promised him that you would entertain going higher if the Fairfax reporting of this last election was balanced.
>
> **Paul Keating:** No, look, in fact Mr Black raised the question of balance. The only matter I raised was the question of accuracy and reporting. He said to me in the first conversation he wanted to move the Herald and the

[17] *PM*, Wednesday 21 April 1993

[18] Evidence p 646

[19] Evidence p 646

> Age more towards the British broadsheet standard of accuracy. And I said to him this is a good thing, this needs to happen, there should be more presentation of news and less of views - comment that as news copy should be news copy, where the reader has a chance to read. That was the matter I raised with him, not in fact about the balance. But someone asked me on what basis do you get a right to consider the balance.[20]

5.25 Whether the precise word 'balance' originated with Mr Black or with Mr Keating is irrelevant. Mr Keating, then and since, chose to adopt the term to sum up his various demands regarding Fairfax's coverage.

5.26 It is unfortunate that the failure of the Prime Minister to speak to the committee renders it necessary to judge his use of words and to weigh the evidence of Mr Black without the benefit of another version. Contrary to Mr Black's apprehensions, we do not intend to misinterpret this single word, and to build conclusions upon it. Indeed, given all of the above, it seems likely that the term 'balance' did not originate with the Prime Minister, but was a part of the standard vocabulary used by Mr Black to reassure government. It is quite clear that regardless of its origin, however, the Prime Minister did adopt the word.

5.27 What is disturbing here is the circumstance in which the word was used: that of a foreign newspaper proprietor meeting with the leader of the government to seek a vital commercial concession. In that conversation, assurances are sought and given on both sides. The fact that communication between the two was less than perfect is not at all reassuring and it is not comforting for the public that each came away with differing recollections of what was said by the other. On the contrary, it contributes to the overall cloud of poor communication, inadequate documentation, and imperfect recollection which has shrouded the history of these significant foreign investment decisions.

5.28 Mr Keating declined to appear before the committee or answer written questions. Whether he chose to do so to demonstrate his contempt for the Senate or because he did not want to expose himself to questioning on this issue, the fact remains that he has not chosen to resile from his

[20] *Lateline*, 29 November 1993

Seattle remarks. The committee had to rely upon his public statements in order to make any judgement of his stand on this issue. At the end of chapter 4 there appears a list of the questions which were sent to the Prime Minister.

5.29 The Prime Minister made a deliberate and calculated decision to refuse to appear before the committee and instead to publicly denigrate it. As well, he did not respond to letters seeking his cooperation. He cannot therefore complain if conclusions are drawn about his words and actions based on the material available to the committee.

Key points of agreement regarding the conversations

5.30 In searching for the key points of agreement between the recollections of Mr Black and those of Mr Keating, and using the inadequate information provided by Mr Keating's statements to the Parliament and to the media on the subject, the committee has carefully considered the various explanations and interpretations which have been put forward. In doing so, certain consistent themes do emerge.

5.31 The first of these themes is 'balance' in the sense of editorial control and the line taken by Fairfax journalists. The second is 'balance' in the sense of general bias or partisanship in political coverage. The third relates very little to 'balance' and could be described as 'national interest and cultural identity'.

'Balance' as editorial control over journalists

5.32 The nature of Mr Keating's deep sense of grievance over Fairfax reportage has been well documented. It was plainly understood and acknowledged publicly by Mr Black and by media commentators that Mr Keating believed that Fairfax journalists had consistently treated Labor unfairly. The following examples illustrate the depth and breadth of Mr Keating's long held views on this matter:

> Rupert Murdoch had advised me we would find the Fairfax journalists 'a snake pit', but Keating's reflections on them are often less charitable than that. In fact, most seem to me acceptable, but as a group they required a

serious debriefing from their long bout of disenthralled liberty to be as tendentious or even defamatory as they pleased.[21]

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He was concerned, as I've said to you before, Walter, that he thought he'd not been fairly treated by certain Fairfax reporters.[22]

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He was more concerned with the performance of journalists. He has the view that Fairfax journalists, some of them, have historically been gratuitously hostile to him, and what he was hoping was - and I think he said this to his Caucus at the time that he championed our move from a 15 to 25 per cent allowable ceiling - that we would assert a discipline in favour of fairness - not partisanship, and he was never asking for that.[23]

ooo

...he was speaking of reporting. He made it clear that it was one of his proper concern what the legitimate commentators or editorialists said in what was clearly marked as opinion.[24]

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he did refer to a practice in some sections of the press, according to him, of allowing too much editorialising to creep into what purported to be reporting.[25]

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He was talking about, as he perceives it, the penchant of some journalists - whom he did not name, but he did not lead me to believe that he confined them to Fairfax: he just meant journalists in general--if the editors were not requiring a high professional performance from them, to pursue their own taste in what was represented as reporting. He said this in a

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[21] *A Life in Progress*, p 454

[22] Conrad Black, *PM*, 19 November 1993

[23] Conrad Black, *Lateline*, 18 November 1993, MICAH transcript p 22

[24] Conrad Black, Evidence p 646

[25] Conrad Black, Evidence p 665

good-natured way. He did not say it in a spiteful or vindictive way. He did not confine it to Fairfax.

His view, I think, would be - as he has expressed it to me - that, if the editors do not do their jobs, some journalists (naturally, I suppose; as an employer of many journalists, I think there is some truth to this) will tend to allow their own biases to creep into their reporting. But his view was that the whole process of augmenting our shareholding would be easier if, in the abstract, in a non-partisan, non political way, we were perceived as champions of professionalism and balance in precisely that sense: that we had editors who required the separation - as much as is possible, since you can never be perfect about this - of reporting from comment.[26]

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Paul Keating: The only matter I raised was the question of accuracy and reporting. He said to me in the first conversation he wanted to move the Herald and the Age more towards the British broadsheet standard of accuracy. And I said to him this is a good thing, this needs to happen, there should be more presentation of news and less of views - comment that as news copy should be news copy, where the reader has a chance to read.[27]

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Paul Keating: So let's be clear about media bias. There was a lot of media bias by journalists at John Fairfax and Sons in not publicising the diversity of the media change under this Labor Government. And the Government's taking stick over what has been a milestone piece of legislation. [Extract archive tape, August 1988]

Deborah Snow: Keating had helped secure party support for the changes by playing on Labor hostility towards the Fairfax and Herald and Weekly Times groups.

[26] Conrad Black, Evidence p 674

[27] *Lateline*, 29 November 1993

John D'Arcy: I think it was an obsession with the ALP about those two independent newspaper groups - I don't know.

Deborah Snow: Fairfax and Herald and Weekly Times?

John D'Arcy: I don't know why. I think it started in antiquity and just kept going on.

Deborah Snow: Keating's animosity towards the Fairfax group over articles run in its Sydney papers was well known to company executives at the time.

Ted Thomas: Oh, I think it's been inferred, if not stated, that the Treasurer didn't particularly like the Fairfax press. He may have felt that there was a vendetta, a conspiracy, or something of that sort. It seemed to be a word that was floating around at the time, both in respect to Paul and to Neville Wran.[28]

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Ken Davidson: The reason why this government has always disliked the Fairfax Group and why, incidentally, its also disliked the ABC, is because you can't do deals with the management. You can't ring up one person in either organisation and say 'get that journalist off my back'. Both organisations don't work that way.[29]

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In the second half of 1986, when Cabinet was finalising its media plans, Fairfax was changing the *National Times*. Relaunched as the *Times on Sunday*, the paper infuriated Keating by investigating his friend, property developer Warren Anderson, reporting that Keating had obtained planning permission to renovate his Sydney home and discussing valuations for the antique French clocks Keating collected. Keating later told friends: 'Don't they realise it's a jungle out there and I'm a tiger? The only way to get a tiger is to shoot it here

[28] *Four Corners*, 5 November 1990

[29] *Lateline*, 19 September 1991

> (tapping the middle of his forehead). Those fools hardly hit me.'[30]

> Look, there's no group more self-interested than the Fairfax journalists in the affairs of Fairfax. The only rivals are the ABC and the affairs of the ABC. Outside of these two very articulate and self-interested groupings, the rest of us are bystanders to the general media debate.[31]

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5.33 This government dissatisfaction with Fairfax journalism and, particularly *The Sydney Morning Herald*, was apparently so well known that it had even been taken on board by FIRB. It is interesting to note that in the controversial leaked FIRB Minute of 5 December 1991, the first and presumably the major benefit of foreign ownership of Fairfax which the Chairman and the Executive Member assumed would be persuasive to the then Treasurer was 'higher quality journalism'. This was mentioned ahead of 'more modern technology' and was the conclusive argument for allowing bids which the minute acknowledged could give control to the foreign owners. This is despite the fact that no plan for improving journalism at Fairfax has at any stage in the proceedings been drawn to the attention of this committee. The wording in the minute was:

> The Chairman, Sir Bede Callaghan, and the Executive Member consider the prospect of foreign control to be outweighed by the benefits of foreign newspaper expertise, such as higher quality journalism and more modern technology. They therefore recommend in each case that you authorise advice to the parties that there are no objections to the proposal under the government's foreign investment policy.[32]

5.34 Mr Black's response to his understanding of the Prime Minister's views about journalists may have derived from his standard stock of phrases. It was in terms of exerting editorial control:

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[30] Chadwick, Paul, *Media Mates: Carving Up Australia's Media*, Macmillan, Melbourne 1989, p 35. Quotes Carew, Edna, *Keating - a biography*, Allen & Unwin Australia, 1988, p 181

[31] Transcript of interview with the Prime Minister, The Hon P J Keating MP, Seattle, USA, 19 November 1993

[32] See Appendix G (final page)

> I promised both party leaders that I would assert all the influence I could in favour of fairness and coverage, and that I would not endeavour to influence the editorial recommendations in any way other than to ensure that they were where they belong and clearly labelled opinion pieces rather than news stories.[33]
>
> ooo
>
> It is the job of good editors to remind journalists, from time to time, of their professional obligation to play it straight in reporting, whatever their opinions - and they are entitled to their opinions - and however ferocious their comment would be in what is labelled as comment.[34]

5.35 What is emerging here is that Mr Keating complained about journalists and their tendency, as he saw it, to comment unfavourably upon himself, his party or his government. Mr Black, as he would have us believe his reply, gave a standard response about the need for newspapers to separate comment from straight reporting and his willingness to ensure that this would happen. In retrospect, both he and Mr Keating have dressed this up as a concern solely over the clear labelling of opinion:

> ... he was speaking here of reporting. He made it clear that is was none of his proper concern what the legitimate commentators or editorialists said in what was clearly labelled as opinion.[35]

5.36 Much of the subsequent media discussion as to what the parties meant by 'balance' and Mr Keating's repeated efforts to play down the significance of his original remarks and Mr Keating's role, have centred on the official line of the Fairfax newspapers as reflected in their editorials. However, Mr Black as a seasoned newspaper proprietor with a close, active and long-standing interest and involvement in politics on several continents, well knew that it is not the editorials which get under the skin of politicians, it is the slant of the stories, their absolute and relative prominence and the headlines which most concern politicians.

5.37 Mr Keating's own accounts of what he had in mind at the time are quite inconsistent. On *Lateline* on 29 November 1993, he stated that he had

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[33] *PM*, 21 April 1993

[34] Evidence p 665

[35] Evidence p 646

been simply agreeing with Mr Black that there should be 'more presentation of news and less of views', whereas on 19 November 1993, in his second Seattle interview, he was trying to portray himself as the defender of the Fairfax journalists against their proprietor:

> I don't think that anyone in Australia should welcome heavy handed proprietorship. I remember the whole of the Fairfax employees talking about the rights to write and have printed that which they believe and not have proprietorial intervention. And it was that same point that I was making.[36]

5.38 The latter view is not reflected in any statement by Mr Black at any time. At no stage did Mr Black mention Mr Keating having advocated 'hands off' the Fairfax journalists. The tenor of Mr Black's recollections was more consistently like the following:

> And his view, as recently as early this week, was that while he accepts there's been considerable progress, strictly in professional standards he's not purporting to judge or require the friendliness towards him or to his party, but his professional standards of fairness in reporting - not comment - he feels that there's still a way to go. And I don't think he's all wrong. But he does acknowledge that in terms of assuring a discipline in favour of fairness and professionalism we've made some progress.[37]

5.39 Clearly either Mr Keating is being untruthful when he claims that he was defending the rights of Fairfax staff, or his remarks to Mr Black were so slight and so forgettable, that Mr Black could not even recall them. In either case, the effect is the same, and it highlights the folly of putting such a valuable asset as journalistic freedom at the mercy of a private conversation. Had Mr Keating any serious view about the rights of journalists at Fairfax and the need to protect them beyond the charter of independence which Tourang had already signed, he could have ensured that FIRB incorporated guarantees of independence as conditions on the approval of increased ownership. There are ample precedents for such guarantees. The Labor Party Platform itself includes at Article 42, that it should 'promote the public's right to a full variety of views in printed media by ensuring diversity of ownership through:

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[36] Transcript of interview, Seattle, 19 November 1993

[37] Conrad Black, *Lateline*, 18 November 1993

> ... e) supporting the development of enforceable codes of editorial independence by ensuring that the articles of association of newspaper companies guarantee editors a proper degree of independence from the proprietor.[38]

Finding 5.1

Given the totality of Mr Black's and Mr Keating's explanations the committee finds that Mr Keating did complain to Mr Black of unfavourable and, as he regarded them, gratuitous, comments by Fairfax reporters and that Mr Black's public response was to characterise these complaints as concerns about the separation of reporting from editorial comment.

The committee does not accept Mr Keating's explanation to the media that he was trying to protect the rights of Fairfax employees 'to write and have printed that which they believe and not have proprietorial intervention'. On the contrary, all his actions suggest he was more interested in using the unique leverage of his position to influence the political coverage of the Fairfax press in his favour in the lead-up to the 1993 election.

The first element - the exercise of editorial control at Fairfax

5.40 There is little evidence of active intervention by Mr Black during the period leading up to the election.

5.41 With regard to direct intervention over journalists Mr Black seems to have been content to assuage Mr Keating's concerns without doing very much. The committee has heard evidence from a number of current or former Fairfax editors and from Mr Claude Forell, the Vice-Chairman of the Age Independence Committee, whose words probably sum up the general view:

> Although I believe many members of staff are unhappy with the editorial restructuring and the cost-cutting measures that have been instituted by the

[38] *ALP Party Platform, Resolutions and Rules* as approved 39th National Conference, Hobart 1991

> new management, there appears to be no evidence that Mr Kohler or the editor of the *Sunday Age*, Mr Bruce Guthrie, have been directed or pressured to modify editorial policy contrary to the principles of editorial independence.[39]

5.42 This lack of apparent follow-through is not new amongst newspaper owners making deals with government. Paul Chadwick commented in 1989:

> Politicians commonly go over the heads of journalists and editorial executives to make direct contact with owners or senior management to complain about criticism or request favours. Good mates will want to try to help. Whether media patronage always works is debatable but irrelevant; the point is politicians think it does and owners have a vested interest in encouraging that belief. A senior Hawke Cabinet minister reflected this classic politician's view when asked why the government had done so much for a couple of media owners. He replied: 'I guess we hoped they'd throw us a bone'.[40]

5.43 Despite Mr Black's comments the committee has seen no evidence of concern from any quarter, other than the Prime Minister, about the lack of separation of editorial comment and reporting at Fairfax.

The second element - balance as general bias/partisanship in political coverage

Discussion on balance

5.44 In this section we examine the theme in Mr Black's and Mr Keating's discussions of 'balance' as referring to support for one party in political coverage during the election campaign.

5.45 There can be no doubt that Mr Black believed that he needed to accommodate the wishes of the ALP and particularly Mr Keating if he was to have any realistic prospect of an increase in his level of permitted ownership under a Labor government. Even his own flagship newspaper *The Sydney Morning Herald* had told the world about Mr Keating's uncompromising approach to the matter. In the 24 October 1992 edition

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[39] Evidence p 360. See also Mr Hickie's evidence on p 301

[40] *Media Mates: Carving Up Australia's Media*, Paul Chadwick, Macmillan, Melbourne, 1989, page i of *Chronology*

there was a report concerning a meeting between Mr Keating and the newly arrived chief executive of Fairfax, Mr Mulholland, 'barely off the plane from South Africa'. According to the report, after advising Mr Mulholland of the inexpediency of changes to the Canberra bureaus for *The Age* and *The Herald*, Mr Keating went on to a luncheon meeting with him and senior *Herald* editors:

> At one stage someone, in what was described as a light-hearted comment, asked what were the prospects of Canadian Conrad Black increasing his company's shareholding in Fairfax from 15 to 20 per cent.
>
> Describing Black as a 'truant proprietor', Keating declared the company was 'on probation'... .[41]

5.46 These reported comments leave little doubt that the Prime Minister was making it clear to senior Fairfax executives that if their owner was to get his way, senior management and journalists would need to be on their best behaviour - they should not offend the ALP in the run up to the election, even if it deserved to be criticised.

5.47 The article went on to point out that there was bound to be speculation about Fairfax coverage of the upcoming election including bias towards either party. It was common knowledge at the time that the issue of Fairfax coverage would be a sensitive one in the light of Mr Black's ambitions for increased ownership. It is simply not credible for Mr Black to have said to this committee that:

> Fairness to Labor is, in itself, an admirable thing, but as far as I know, it has not been a contentious issue in respect to Fairfax, and it is not the only criterion in judging an application to raise our shareholding.[42]

5.48 The committee observes that fairness to Labor has been a contentious issue with respect to Fairfax and it should never have been a criterion in judging an application to raise a shareholding.

5.49 Mr Black's writings make it clear that he knew of Mr Keating's long and strongly held views concerning lack of fairness towards himself and his

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[41] Tom Burton, Canberra Insider: Pressing Issues in the Capital, *The Sydney Morning Herald*, 24 October 1992

[42] Evidence p 665

party by the Fairfax press. Mr Black's remarks imply that fairness to Labor was a legitimate concern to be taken into account when considering the merits of an application for an increase in foreign ownership.

5.50 Unfortunately, despite Mr Black's protestations that fairness to Labor was not the only criterion to Mr Keating, there is no evidence that any other criteria were in fact taken into account. On 24 and 25 November 1993, when called on to answer questions in the House of Representatives on the motives for his decision, rather than answering the questions Mr Keating chose to allege that Dr Hewson had promised even higher levels of ownership. These allegations are examined in chapter 11.

5.51 The next issue to canvass is whether Mr Keating had, as Mr Black belatedly suggested to the committee, sought only to ensure even-handedness and political neutrality. In his written statement to the committee dated January 20 1994, Mr Black said:

> Finally, Mr Keating made the point that, regardless of who won the election, he felt it would be easier for our application to be approved if no political party could reasonably accuse Fairfax of unbalanced political coverage.[43]

5.52 This contains a new element: the suggestion that 'if no political party could reasonably accuse Fairfax of unbalanced political coverage', then it would be easier to approve the application. This bilateral view had not been mentioned in any previous statement.

Chairman: I think what I was putting to you was that your submission was the first place in which you adverted to the fact that you say that Mr Keating was professing concern about balance on behalf of the opposition as well as the government.

Mr Black: If I were to say, hand over heart, that Mr Keating professed a really exaggerated state of solicitude for the welfare of the opposition ...

Chairman: Or any degree at all.

Mr Black: I think you would be right to wonder if I was telling you the whole truth. But he was perfectly clear in saying that in this case he meant that any such application had to be regarded

[43] Submission No 3

> as not a politically sensitive issue because of any partisan position of the newspapers. You are quite right. This is the first time I have pointed it out, because I had - and I suppose I have myself to blame for this - absolutely no idea that using the words I initially did, and in particular putting the word 'balanced' in quotes, would lead to the supposition that what I really meant was the reverse of what I wrote. I accept that I must have somehow been deficient in intimate knowledge of the Australian political context to have made such a misjudgment but, in my experience, normally, if you quite clearly state something, you can be assumed to be stating it accurately and not meaning the reverse of what you have just written.[44]

5.53 Mr Black's long history of political activity and involvement would certainly have made him alert to the possible electoral outcomes. Furthermore, having met Mr Keating on several occasions, he would have been well aware that no-one else would believe that Mr Keating was seriously interested in protecting the opposition. Mr Keating at the time of the book release, showed that his own approach had been far narrower:

> ... I said, 'Well, we'll think about it, but we want a commitment from you that the paper will be balanced. And if there is any notion that, you know, of bias, that is that 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.'[45]

5.54 Nor at the time did Mr Black deny that this had been raised:

> **Conrad Black:** ... in so far as he referred to my alleged Thatcherite tendencies, one, he was respectful of them and two, he only raised them in what I took to be a jocular context.[46]

5.55 The difficult questions for the committee here are:

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[44] Evidence p 687

[45] Transcript of interview with the Prime Minister, The Hon P J Keating MP, Seattle, USA, 18 November 1993

[46] *PM*, 19 November 1993

- Whether Mr Keating attempted to influence the 'bias' and level or direction of political coverage in Mr Black's Australian newspapers.

- If so, whether Mr Black felt constrained by Mr Keating's attempt and did act upon it.

Finding 5.2

Despite ample opportunities in the Parliament and elsewhere to do so, Mr Keating has never resiled from his remarks made in Seattle, where he said he had told Mr Black:

> '... we want a commitment from you that the paper will be balanced. And if there is any notion that, you know, of bias, that is that 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.'

In the light of those remarks and the other evidence mentioned here, the committee finds that Mr Keating attempted to influence Mr Black regarding the political coverage of the Fairfax newspapers for the 1993 general election.

5.56 The issue of whether Mr Black felt constrained by Mr Keating's attempt to influence him, and whether he acted upon it is discussed in the next section.

Delivery of general bias or partisanship in political coverage

5.57 Mr Black has claimed that Mr Keating's remarks in regard to bias were to ensure that he did not offend either side. However, whether or not such advice came to him from Mr Keating, it was a natural apprehension for a media owner who had already decided that it was unwise to offend when concessions hung in the balance. With an election in the offing and the opposition widely tipped to win, it would not have been surprising if Mr Black had a mind to both possibilities. Indeed, if one assumes that any bias by Fairfax was to be motivated by self-interest then it would be logical to expect the newspaper owner's bias to reflect the polls at the time. These

polls predicted a victory by the opposition. Although he had no indication from Dr Hewson of any relationship between bias and his increased ownership, Mr Black may well have chosen to 'hedge his bets' for that possibility by at least running dead in response to Mr Keating's blandishments.

5.58 Thus, rather than going in to bat for the ALP against the odds, Mr Black's game plan would have been sufficiently advanced by achieving an absence of criticism of the ALP even if such criticisms were objectively justified by its political performance at that time.

5.59 Attempting to pass judgement on whether the Fairfax papers did favour one side or the other is an almost impossible and subjective task. The issue for the committee here is a difficult one, since it is impossible to compare the election coverage at the time with what might have been under other circumstances. It is claimed in some quarters that the coverage was less favourable to Labor than it was to the Opposition although this was strongly contested by Dr Hewson, the opposition leader at the time of the 1993 decision:

Senator Carr: The evidence is that all the Fairfax mastheads in the last election supported you. Do you see that as tilt?

Dr Hewson: I am happy to answer that. I must have been in a different place during the last election. I saw an editorial or two but I saw a fairly consistent run of front page stories that did not do us a lot of good.

Senator Carr: Like the 'Pork-barrel republic'. Do you regard that as a fair presentation?

Dr Hewson: I thought the headlines in the last week that focused on Medicare and impacting on the seat of Lowe are pretty damaging.

Senator Carr: So you regard the Fairfax press as being biased towards Labor, do you? Is that the proposition you are putting?

Dr Hewson: You made a statement that they had been universally in our favour and I was -

Senator Carr: No, four of the five were.

Dr Hewson: I was simply pointing out to you that on my recollection, and I have not gone back over it, it is true that in editorials, in the end, they sort of on balance came down in favour of us. But I can remember a number of other stories during the election campaign that featured more prominently than an editorial, namely on the front page, which I did not think were all that supportive. So you draw your own conclusions about what I am saying. I think that you could hardly say they were uniformly in our favour through the election campaign.[47]

5.60 Mr Black has already referred to Mr Keating's references to 'my alleged Thatcherite tendencies' and in his book has described his involvement in the making and breaking of governments overseas.

5.61 The consistent thread of Mr Black's involvement elsewhere has been conservative and his tendency has been to push his publications further to the right. This was referred to by Mr Keating in the Parliament when he cited Mr Black's changes at the *Jerusalem Post*.[48] On the other hand, it has been argued, indeed by those who had least reason to apologise for him, that Mr Black is on a scale of interventionist proprietors, quite moderate.[49]

5.62 In the case of the 1993 elections in Australia, Mr Black, at least according to his editors, exerted no direct personal influence. The committee had heard Mr Black's evidence that he made some attempt to tell his editors that they had freedom to endorse whomever they wanted:

Mr Black: What I would say is, as I have remarked elsewhere, I did ask Mr Mulholland, and so lacking in heavy-handedness was my request that he professes not to remember it, to invite the editorial director, Mr Hoy - and I think I did mention it to Mr Hoy directly, and he does dimly remember - to ask the editors to endorse whoever they wanted ... .[50]

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[47] Evidence p 726

[48] House of Representatives Hansard, 24 November 1993, p 3540

[49] For example see *Citizen Black: A Field Manual*, Christopher Dornan, in *Media Information Australia*, No 68 May 1993, pp 12-20

[50] Evidence p 685

5.63 Although there was clear confusion amongst the editors as to who had transmitted this message and how[51], and Mr Mulholland had forgotten it altogether, the committee finds substantial agreement that there was no direct pressure on editors to endorse either party. Indeed, given Mr Black's self-professed 'Thatcherite tendencies' elsewhere, it seems most likely that the net effect of Mr Keating's demands was that Mr Black avoided direct personal intervention.

5.64 The committee did take evidence however on the tendency for owners to create corporate cultures in which their interests are easily transmitted to the staff without direct coercion, and of Mr Black's own efforts to do so:

> ... I think as far as the editors were concerned, and perhaps this goes to at least one part of your inquiry, the incoming ownership was dominated unambiguously by Black. Even though he technically did not own more than 15 per cent, or now 25 per cent, he always intended from very early days to exert very strong management control over the company ... .
>
> But he was always going to exert management control by a tried and trusted method, and that was change everybody who ran everything. There are five major newspapers within the group. That is all it does and so he did, over the first year, change every editor. No editor that was editing that particular paper prior to Black coming in is now the editor of that paper. In that sense, each of the editors owes their position, I suppose, in that kind of crude managerial sense, to the incoming management. I was simply one of those editors removed. In any case, I was removed entirely, but all of the other editors were moved.[52]

5.65 Paul Chadwick, in *Media Mates*, described the phenomenon in this way:

> Owners usually appoint executives whom they believe know the owner's general views well enough to ensure the paper or station will reflect the owner's interests and certainly will not harm them. When necessary, the executive consults with the owner and then passes orders on. Lower down the ladder it can be difficult to confirm which directives come from the proprietor via executives, which are an executive's guess at what the owner would like, and which are simply an executive exercising a bit of power himself or herself and perhaps leaving the false impression that it is the

[51] See Evidence p 268 ff, p 301 ff and p 307 ff

[52] Mr Gerard Noonan, Evidence p 341

> owner's wish. Fear of offending the owner, or zealous pursuit of the owner's favours, can lead some executives to excesses that may appal the proprietor.[53]

5.66 It was into such a climate at Fairfax that Mr Keating launched himself in his new role as 'judge' of Mr Black's 'balance', lunching with the Chief Executive officer newly arrived from South Africa, and announcing, according to Fairfax's own papers, that Mr Black was a 'truant proprietor' and 'on probation'.[54]

5.67 The committee cannot say with any certainty that the Fairfax coverage of the election was less conservative than it might have been. However, the climate had been created in which there was an awareness of the need to placate Mr Keating and of the commercial consequences of failing to do so.

5.68 Mr Black's behaviour before the committee, in particular his determination to avoid offending current party leaders, his consistent public comments designed to reassure the media and the Parliament, and his hastily reconciled disagreement with Mr Hawke, all point to a man more interested in safeguarding his commercial operations than in the right to free speech. The Mayor of New York commented recently in the US debate on proposed legislation to enforce balanced coverage:

> I get the sense that a lot of the people who make profits in this business will sell freedom for fees. They will make deals with Congress, they will accept regulation that they shouldn't be accepting .. all in exchange for an opportunity to make more money.[55]

5.69 It would be disappointing if anyone aspiring to be a media proprietor in this country felt that the surrender of freedom was the price of ownership. Whether or not Mr Black subsequently sought to influence the slant of the Fairfax newspapers either in favour of the ALP or at least not against it, the committee is concerned that he saw nothing improper in having been asked to act in such a way. Newspapers are expected to be the

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[53] Chadwick, *Media Mates*, p 214

[54] Tom Burton, Canberra Insider, *The Sydney Morning Herald*, 24 October 1992

[55] *Washington Post*, Editorial, 6 November 1993, final edition. Commenting on the Bill for a Fairness in Broadcasting Act 1993, based on the Fairness Doctrine of the 1934 Communications Act. See chapter 6 for a discussion of this Doctrine.

champions of free speech, and the proprietor, whether foreign or not, should be prepared to champion the cause of democracy and encourage debate on issues of substance.

Finding 5.3

Since his acquisition of the Fairfax group, Mr Black has made executive appointments of persons who were sympathetic to his political and commercial concerns. By warning Fairfax senior management that the proprietor was on probation Mr Keating did his best to ensure that he would receive a more sympathetic hearing at Fairfax than had previously been the case.

The committee finds that Mr Keating attempted to exert pressure at Fairfax for favourable election coverage by making a linkage between 'balance' in election coverage and an increased ownership limit for Mr Black.

The third element - balance, national interest and cultural identity

5.70 On 24 November 1993, Mr Keating had the opportunity to explain his Seattle remarks and his original conversations with Mr Black, to the Parliament. He chose to do so in terms which did not mention the issue of 'balance' but focused instead on 'national interest'. Mr Keating maintained to the Parliament that the conversation had concerned issues of cultural identity and chose to argue discursively that he had been intent to ensure that the Fairfax newspapers continued to reflect Australia's unique cultural identity and heritage, irrespective of a change in the level of foreign ownership. He conspicuously failed to grapple with the central allegation - that he had been prepared to trade the national interest for any political advantage:

> When I spoke to Mr Black I made these points to him: I said to him that in Canada there is a limit of 25 per cent on foreign ownership of mass circulation print media. That is to protect the interests of Canada in terms of its cultural and national interests. But I made the point to him that whatever Canada's cultural and national interests are, its plurality as a society is protected by the media of the United States, the television of the United States, and by the fact that Canada is landlocked by Alaska and

> continental USA. So Canada's strategic interests are protected by the presence of the United States, with its vast community of 230 million Americans, and the fact that it is landlocked on both sides. I said that that was not true of Australia, and Australia's newspapers, particularly its broadsheet newspapers, should reflect unambiguously those things which are in Australia's best national interests.
>
> I said that my view was that a financial arrangement by a foreigner, in this case a Canadian who is not often resident in Canada, coming from the acquisition of Mr Warwick Fairfax and the aborted takeover of the Sydney Morning Herald, the Age and the Australian Financial Review, cannot lead simply to a thoughtless shift of ownership and control to a foreigner of Australia's principal broadsheet newspapers which have an authority to at least speak about the country's national interests.[56]

He also referred to Mr Black's intervention at the *Jerusalem Post*, and stated that:

> I said to him that I accepted his arguments about not being able to have any executive control of the papers at 14.9 per cent, but the government wanted the papers to be a serious reflection of the state of Australian national life ...
>
> Opposition members interjecting ...
>
> **Mr Keating:** I did - and that that should be reflected in these newspapers.[57]

5.71 Mr Keating did not retract his earlier admission of the commitments he had sought from Mr Black in return for favourable consideration. Whilst his parliamentary answer is in higher moral terms, no evidence by any party has mentioned that the discussions included such a component.

5.72 This interest in preserving national identity is not mentioned anywhere else by either Mr Black or Mr Keating as having formed part of their conversations. During the entire hearing, Mr Black made no reference to such concerns having been expressed to him by Mr Keating at the time. When he did address them, it was in response to Dr Hewson's reported remarks about foreign ownership.

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[56] House of Representatives Hansard p 3540

[57] House of Representatives Hansard p 3540

5.73 Mr Black's comments to the committee on the subject of foreign ownership were indignant and condescending:

> We need to know - and I think a great many other people interested in investing in this country would wish to know - who really speaks for Australia. Mr Hawke spoke very eloquently in his appearance here of not constructing a wall around Australia, a country of 17.5 million, he said, in a world with 5.5 billion people in it. Do those people in both major parties, including the Prime Minister, who embrace, at least commercially, the whole vast Pacific from Bangkok to Vancouver, really speak for Australia? Or is it this element that is still audible and has not been completely absent from the proceedings of this committee that, in effect, implies that any Australian is preferable to any foreigner and that foreigners tend to be ravening predators from another hemisphere coming here to deprive the women and children of Australia of their birthright? We need to know this because we have to plan our business.
>
> I think we have been - and I do not want to be self-righteous about it - pretty good corporate citizens in this country. We have invested $273 million in Australia in Fairfax - and, by the nature of our shareholdings, a large share of that is my own money - and we have received one 7c per share dividend, which in an annualised rate gives us a return of under two per cent. Is not the least irony in this situation that precisely those people who accuse us of wishing to skim the assets here or flip them at a great quick gain to ourselves are those who are the most vocal in opposing those measures that would enable us to do what we ardently wish, which is to stay here and invest more? [58]

5.74 There are a number of points which need to be made here. The first is that the concern expressed by Mr Keating, so belatedly in the Parliament, and by Dr Hewson at the time, are sentiments shared by many Australians. More than that, they reflect a realistic assessment of the economic as well as the cultural implications of foreign investment in communications. As the world moves closer and closer to a global village the issues of media control become more and more significant.

5.75 'Cultural imperialism' has a real meaning when one considers the significance, firstly of the ownership and control of information, and secondly, the implications of that information for shaping culture and commerce. In any discussion of media ownership the concept of diversity of

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[58] Evidence p 659

ownership is a core value because it relates to the need for a diversity of views in public debate. Related to this diversity is the need for a local view.

5.76 Mr Black also said to the committee:

> But there are also special circumstances that I hope I can raise without giving offence to anyone. It has never in the history of Canada occurred that the media industry was largely in an insolvent condition. You will recall that in this country, the leading newspaper publisher, News Corporation - though controlled by a man who is now a citizen of the United States - was on the verge of insolvency, Fairfax and several other newspaper companies were in receivership and most of the private sector television industry was in the tank too. A very large swathe of the media industry was in a financially embarrassed condition. We never had that in Canada. It was in those circumstances, as you know, that we came to this country, bringing our money with us.[59]

5.77 The suggestion that a major portion of the Australian print media industry was crying out to be rescued from insolvency by a foreign white knight is a misleading and romantic attempt to disguise the purely commercial nature of the deal. This is a dangerous and inaccurate view of the situation. There can be no doubt in the mind of any well informed observer that Mr Black, in buying into Fairfax, as in so much else, was following the patterns he had laid down much earlier. His business success, as his own autobiography boasts, was built upon buying sound investments when they were cheap. His own boast of Fairfax was that it was 'the best large newspaper deal done in the Western world since the purchase of *The Daily Telegraph...*'.[60]

5.78 His remark that the Australian scene was in some way uniquely impoverished and in need of his cash is also unrealistic. Mr Black worked long and hard to fend off a bid by Australian investors and well knew the bargain that he had achieved when he succeeded in making a purchase. The irony of his claims is that his same autobiography boasts of buying control of Southam in 1992. Southam is the Canadian equivalent of Fairfax and by a twist of irony, it was the subject of a Canadian Royal Commission (the Kent Report) in 1981. That Commission reported that 'Newspaper

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[59] Evidence p 658

[60] *A Life in Progress*, p 437

competition, of the kind there used to be, is virtually dead in Canada'.[61] It went on to say that:

> We are concerned only about the special case of newspapers, the particular consequences of conglomeration on the way newspapers discharge their responsibility to the public. The effect is to undermine their legitimacy; it is to create a power structure of which the best defence, on the evidence of their principal corporate proprietors themselves, is that they do not exercise their power. In their evidence to the Commission they uniformly argued that the reason why there is nothing wrong is that they give free rein to the employees who are defined as publishers of particular papers. Many absolute monarchs in history might have made the same defence, but did not survive by it. Delegation does not change the absolute locus of power.
>
> It is in any event, a power that is wanted. The process of concentration has, if existing law and policy are unchanged, momentum. The major next extension is apparent. Southam spends millions of dollars a year employing more journalists and providing better newspapers than any hard-nosed business calculation requires. Clearly it is ripe for a conglomerate such as Thomson which will pay what the shares would be worth with the unnecessary costs eliminated and the bottom line improved accordingly...[62]

5.79 In 1992 Mr Black achieved control of Southam and wrote:

> At David Radler's and my first board meeting in February, the dividend was cut in half. I proposed a further $80 million allocation for demanding to remove 1000 superfluous employees, all in the year-end figures for 1992, and a special committee was struck to consider methods of further collaboration between Southam and Hollinger. Southam's newspaper division employed 7,500 people, clearly a third of whom shouldn't have been there.[63]

He went on to say that:

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[61] Royal Commission on Newspapers Conclusions and Suggestions (Kent Report), Canada 1981, p 215

[62] Royal Commission on Newspapers Conclusions and Suggestions, Canada 1981, p 219

[63] *A Life in Progress*, p 479

> We had bought half a loaf for the price of a quarter of a loaf. A very substantial capital gain was virtually inevitable, whether we should choose to realise the gain or not, and the Southam transaction was a worthy successor to the Telegraph and Fairfax.[64]

Of buying into Southam he said:

> It was a profound metamorphosis from the shambles left behind by McDougald in 1978, and even from the beleaguered Hollinger that propelled itself into the newspaper industry in London from the proceeds of liquidations in other industries.[65]

5.80 The point here is not to belittle Mr Black, but to refute any myth-making as to his role in Fairfax. It was not an heroic rescue operation but a fiercely contested corporate struggle for a glittering prize, a struggle which Mr Black himself portrayed in more accurate terms when he said:

> ... this is one of the great institutions of Australia and one of the great newspaper companies of the English-speaking world, and for its fate to be settled in a spectacle of political influence peddling like that is nothing that anybody involved in it should be proud of in my opinion. I don't think anybody is proud of it... [66]

and admitted that:

> The Melbourne group had lots of money but they weren't as focussed, they weren't as politically adept and they didn't have the newspaper background.[67]

5.81 Australia is not unique in valuing its quality newspapers or its cultural heritage. A succession of commissions in Canada and the United Kingdom have been set up in the face of the very process of conglomeratisation of which Mr Black boasts and in which he has participated to his profit. All three countries have prized an independent press and in particular their quality broadsheets. It is not surprising or unusual that Australians should

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[64] *A Life in Progress*, p 484

[65] *A Life in Progress* p 485

[66] *Four Corners*, 16 March 1992

[67] *Four Corners*, 16 March 1992

be concerned to maintain the quality and standards of Fairfax, and Mr Black was well aware of this factor from the outset.

Finding 5.4

The committee rejects Mr Keating's claim to the Parliament that he took into account national interest considerations when deciding on the ownership of Fairfax.

5.82 Mr Keating's own words are an apt criticism for his role and that of his government:

> ...a financial arrangement by a foreigner, in this case a Canadian who is not often resident in Canada, coming from the acquisition of Mr Warwick Fairfax and the aborted takeover of *The Sydney Morning Herald*, *The Age* and *The Australian Financial Review*, cannot lead simply to a thoughtless shift of ownership and control to a foreigner of Australia's principal broadsheet newspapers which have an authority to at least speak about the country's national interests.[68]

5.83 This intention of protecting the national interest, if indeed it was an intention, should have been carried out via transparent FIRB processes. The committee recommends elsewhere in this Report, the kinds of mechanisms which should be set in place to ensure that in such cases there are proper conditions attached to any acquisition and that these are enforced. The increased share of Fairfax which Mr Black obtained was a valuable concession and could fairly have been limited with conditions which would have protected the identity and integrity of the papers.

5.84 The committee has heard evidence on the way in which the earlier undertaking to FIRB, by Tourang, to appoint an Australian senior executive was simply abandoned with the consent of the government.[69] We can find no reason to accept Mr Keating's version that by a simple blandishment to Mr Black he had somehow protected the cultural and national interests of this country or the plurality of its society. Moreover, as the nation moves

[68] House of Representatives Hansard, 24 November 1993, p 3540

[69] Mr Dawkins, Evidence p 503

with the rest of the world into new forms of media and greater convergence of technology and ownership the committee has grave concerns about any government which seeks to protect its citizens' interests with nothing more binding than a private conversation.

CHAPTER 6

PROPRIETY

Interactions between governments and the media - previous experience

6.1 In this chapter the committee has examined the mainstream of thought in similar countries on the matter of balance in the media in particular, and on the relationship between the media and the government in general. The analysis is based particularly on parliamentary and judicial inquiries and the trends in rulings by courts. *News & Fair Facts*, the 1992 report from the *House of Representatives Select Committee on the Print Media* also devoted some time to summarising other media inquiries. This committee has only examined those aspects of such inquiries as are relevant to the issue of balance.

6.2 Any comparison of the Australian press with other countries is bound to be qualified by the relative circumstances of the different countries. Australia's press still ranks as 'most free' in the Freedom House survey of press liberty. On the basis of an international survey this puts it, with only Belgium, Denmark, New Zealand and Norway, ahead of all other countries including the US, UK and Canada in terms of freedom from restraint by laws and administrative rules, economic influence, political pressure and overt repressive actions against reporters.[1] As the Hon Justice Michael Kirby pointed out in his speech to mark International Press Freedom Day, Australians enjoy a very high standard of media freedom and have a responsibility to protect and extend it, rather than to allow it to be diluted to the standard of our sometimes critical neighbours.[2] Given the above, comparisons have been made with like countries, and in an awareness that questions of degree are relative.

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[1] Leonard Sussman, *Good News and Bad, Press Freedom Worldwide*: 1994, Freedom House, New York, p 10

[2] Transcript of address in Sydney to mark the first International Press Freedom Day, 3 May 1994

Summary of overseas practices

6.3 Although the concept of freedom of speech is as old as that of democracy and that of the freedom of the press is probably as old as the history of writing, it is possible to trace the main concepts which influence our understanding of these notions in modern Western democracies. The notion of the freedom of the press as we currently know it has been strong at least since the English Revolution and the rash of tracts and treatises which spread across all of Europe in that age. As related philosophies of government and economics were refined during the eighteenth and nineteenth centuries, there was a tendency for them to share concepts and to provide metaphors for each other. Jeremy Bentham's 'On the Liberty of the Press and Public Discussion' (1820) had argued that a free press helps to control the 'habitual self-preference' of those who govern.[3] John Stuart Mill's 'On Liberty' (1859), was another influential essay which advanced the argument that since we cannot be sure where truth resides we must always tolerate the greatest possible diversity of views in the interests of all:

> When there are persons to be found, who form an exception to the apparent unanimity of the world on any subject, even if the world is in the right, it is always probable that dissentients have something to say for themselves, and that truth would lose something by their silence.[4]

6.4 The metaphor which has come to us from this age is that of free speech and the press itself as a kind of 'marketplace of ideas'. The difficulty for democratic Western governments has always been that the reality of press regulation is not as simple as the metaphors for its functioning. The ideal view of a democracy might be that there is an effective marketplace of ideas in which free expression is possible and that the natural functioning of this market is such that it is self-regulating. Thus, if there are a large number of people in the community with ideas of a certain type, then the market forces will be such that a corresponding number of newspapers will reflect those views, thereby creating a balance.

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[3] John Keane, *The Media and Democracy*, Polity Press, Cambridge, 1991, p 16

[4] John Stuart Mill, 'On Liberty', in J M Robson, Essays on Politics and Society, toronto & Buffalo 1977, p 254. Cited in John Keane, *The Media and Democracy*, Polity Press, Cambridge, 1991

6.5 A more pessimistic but still rationalist view is that such a free marketplace cannot function in modern industrialised societies. Bentham and Mill had envisaged a society in which ideas flowed freely and could easily be disseminated. In complex modern societies the needs, interests and aspirations of widely different groups must be represented, but ownership of the means of publication is in the hands of a very few. Under this view, government intervention is necessary to ensure that voices are heard other than from those who control capital.

6.6 This pessimistic view has been widely accepted with regard to broadcast media with very little opposition, largely because when such new technologies as radio and television appeared, it was manifestly obvious that ownership of them would be limited. Hence cross-media ownership rules and government subsidised public broadcasting have been established in many countries. In the United States the 'Fairness Doctrine' was specifically introduced to bring about balanced coverage in the broadcast media. The view has been widely resisted with regard to print media, however, although public newspapers have at times been proposed as a balance upon sectoral interests.

6.7 The second imperfection in the simple models of press freedom is that they ignore layers of involvement by many individuals, including owners, advertisers and journalists. If the press is to be free, who is to be most free? Should society support the right of the owner to say what he or she likes in his or her newspaper, or do they have obligations to respect the freedom of their readers to hear a variety of views, and of their journalists to express an opinion? Should advertisers be free to influence what is printed with the money which they provide, or should they be forced to fund the expression of views contrary to their own interests in the sake of democracy?

6.8 A third problem with the market model is that it ignores values and ethics. Those who introduce values to the argument have at times, for instance, advocated censorship or restrictions on the right to publish in the belief that the values of some take precedence over the values of others. On the other hand, those arguing for an ethical model have proposed the argument that the right to publish is not an individual freedom, but a right granted collectively by society and one which imposes reciprocal ethical obligations on the publisher, editor or journalist to be mindful of the society's plurality.

6.9 The next issue which arises and it has been a particular issue for this committee, is the question of national interest. In an age of rapid internationalisation of the media, is it appropriate to treat news as just another commodity, capable of being imported from wherever it can be produced most cheaply, or is the surrender of local voices and local control of the media also a surrender of national values, the national interest and culture? This issue has been little examined overseas, and some of the witnesses before the committee have commented adversely on it as in some way xenophobic. The committee rejects this view and signals that it is an issue of increasing significance for this and other nations in the face of convergence in communications technologies.

6.10 Most of the commissions into the press which have been set up in Australia, the United Kingdom and Canada, have been directly as the result of increasing concentration of newspaper ownership, often triggered by a specific takeover or merger. They have arisen out of concern for the lack of diversity in ownership and hence opinion, and concern for the way in which media power will be used.

6.11 There is a general acknowledgment by commissions of inquiry that the trend in newspaper ownership is towards concentration. Despite this, in the print media it has been very rare that any concept of forcing 'balance' of an individual owner or publication has arisen. Invariably the resolution, whether explicit, or implicit by virtue of ignored recommendations, has been that governments should not intervene to obtain balance, other than by supporting press councils and endorsing the notion of charters of editorial independence. The recognised risk is that politicians, who often live or die by their treatment at the hands of the media, are the last persons who should be entrusted with the responsibility for determining balance.

6.12 To allow politicians to make significant media ownership decisions contingent upon their highly subjective judgements of such a notoriously controversial issue as balance would be even less proper.

6.13 The notion of 'balance', where it arises, is as a consequence of freedom of speech for journalists and editors (ie freedom to express the variety of views within the community without constraint by owners) or of diversity of ownership (ie giving rise to diversity of views). Neither has seen determined action by government, except in the areas of broadcast media and, by extension, cross-media ownership.

Finding 6.1

The committee finds that Mr Keating's request of a **single** newspaper proprietor to provide 'balanced coverage' is at odds with the whole history of media regulation and with the overwhelming trend of democratic governments throughout the years, which has been to protect the diversity and plurality of the print media as a whole.

6.14 The following sections trace the recent history of print media regulation in countries similar to Australia.

The United Kingdom

1947

6.15 In the United Kingdom there have been a number of inquiries into the press. A Royal Commission was established in 1947 with the object of furthering the free expression of opinion through the Press and the greatest practicable accuracy in the presentation of news to inquire into the control, management and ownership of the newspaper and periodical press and the news agencies, including the financial structure and the monopolistic tendencies in control, and to make recommendations thereon. The Commission's conclusions were focussed on whether the particular concentration of ownership that did exist was 'so great as to prejudice the free expression of opinion or the accurate presentation of the news or to be contrary to the best interests of the public'.[5]

1961

6.16 These concepts of 'free expression of opinion' and 'accurate presentation of news' recur verbatim in the terms of a similar Royal Commission established in 1961.[6] In its Report the Commission commented on 'variety of opinion in the press' and stated that 'there is still a

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[5] Cmnd 7700 pp 4-5 and p 176

[6] Cmnd 1811

considerable range of choice ...but...it would be better if there were more'[7], and referred to 'the potential danger that variety of opinion may be stifled'.[8] The Commission recommended that a General Council of the press be established to, among other things, 'act as a tribunal to hear complaints from editors and journalists of undue influence by advertisers or advertising agents and of pressure by their superiors to distort the truth or otherwise engage in unprofessional conduct'.[9] Again, key concepts were the freedom to express opinions, and the need for accuracy. The concept of balance, so far as it arose, was as a product of variety of opinion rather than as the result of moderating any individual opinion or of forcing a equal space to the statement of contrary positions. The recommended role of government was to provide mechanisms which would support the individual freedom of editors and journalists.

1977

6.17 A Royal Commission on the Press reported in 1977 after having been established in 1974 'to inquire into the factors affecting the maintenance of the independence, diversity and editorial standards of newspapers and periodicals, and the public's freedom of choice of newspapers and periodicals, nationally, regionally and locally'.[10]

6.18 Amongst features which the report considered desirable were 'editorial variety' and 'editorial independence from proprietors'.[11] It recommended a charter of press freedom which would include amongst others, the following 'essential safeguards':

(a) Freedom of a journalist to act, write, and speak in accordance with conscience without being inhibited by the threat of expulsion or other disciplinary action by his union or his employer;

(b) Freedom for an editor of a newspaper, news agency or periodical to accept or reject any contribution whether or not the contributor

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[7] Cmnd 1811 p 116

[8] ibid

[9] Cmnd 1811 p 117

[10] Cmnd 6810

[11] Cmnd 6810 p 135

is a professional journalist or a member of a union, so long as this freedom is not abused;

(d) Protection of an editor's right to accept or reject any contribution notwithstanding the views of his proprietor, the management of his company, union chapel or any advertiser or potential advertiser;[12]

6.19 In the terms of reference and the recommendations of the Royal Commission, the concept of diversity had been strengthened alongside those of freedom of expression and accuracy. That Commission in fact spent considerable time over the difficult issue of freedom of the press and whether the combination of a free market and lack of restraint on comment would result in true diversity:

> We define freedom of the press as that degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing the facts and opinions without which a democratic electorate cannot make responsible judgements. However, some parts of the press are more subject to economic than to other forms of restraint. Anyone is free to start a national daily newspaper, but few can afford even to contemplate the prospect. Among the questions that we have to consider are whether the public can obtain the information and opinions that it needs in this democracy without a range of diverse newspapers ... .[13]

6.20 The Commission analysed newspaper coverage of elections and tabulated the circulation of newspapers supporting Labour, Conservative or Liberal views in a given election against the votes for those parties at that election. The study found that a consistently higher number of papers had given editorial support to the Conservative Party than any other and that the circulation of Conservative newspapers tended to be increasingly higher than the Conservative vote.[14] This correlates with the view described in the report, that newspapers requiring capital as they do for their production, are inherently likely to support a capitalist and conservative perspective.

6.21 The Commission also analysed suggestions which had been advanced in the UK for a 'balancing' of the press by the state subsidisation of newer,

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[12] Paragraphs c, e and f not quoted to save space

[13] Cmnd 6810 p 9

[14] Cmnd 6810 p 98

less conservative newspapers. They concluded that 'we cannot accept either that the creation of more newspapers whether partisan or not, would be likely to lessen the irresponsible conduct which is engaged in by some existing partisan newspapers, or that it would quieten the political dissatisfaction with the contents and behaviour of the press'.[15]

6.22 Finally, the Commission stated that 'Our firm belief is that the press should be left free to be partisan and restrained as at present only by the law and by the voluntary system of a Press Council... There is no escape from the truth that a free society which expects reasonable conduct must be prepared to tolerate some irresponsibility as part of the price of liberty'.[16]

Canadian reports

6.23 As in the United Kingdom, inquiries into the media in Canada were generated by concern over the concentration of ownership. Their tendency was towards a view of freedom of the press which was based on an ethical rather than a rationalist view. In 1961 the O'Leary Commission on Publications stated that:

> There is need to remember that freedom of the press is not an end in itself, but only a function of general intellectual freedom; to remember that no right includes a privilege to injure the society granting it; to understand that a great constitutional doctrine cannot be reduced to a mere business convenience.[17]

6.24 Plainly for the O'Leary Commission, the right to publish was not absolute, but given collectively by the society. The individuals who were entrusted with this right had a reciprocal duty.

6.25 In 1970, a Canadian Senate committee on the mass media, chaired by Senator Keith Davey, recommended strategies to reduce further concentration of media ownership.[18]

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[15] Cmnd 6810 p 107

[16] Cmnd 6810 p 107

[17] Quoted in Kent, Royal Commission on Newspapers Conclusions and Suggestions, 1981, p 235

[18] Davey 1971

6.26 In 1980 a Royal Commission (the Kent Commission) was established because of further concentration which had occurred. The Kent Report traced a link between the freedom of the press and the right of the public to information. The Report was built on a strongly ethical view of the media. It described a link between the freedom of the media proprietor who owns the medium of communication to express his or her views, and the right of the public to full information:

> Freedom of the press is a double-edged sword for the owner or publisher. The one edge serves as a defence against the outside, but the other is turned inward. It is the difference between enterprise and the duty to inform. Business is private, but information is public.[19]

6.27 If one accepts the notion of media ownership as imposing ethical obligations, one can come more readily to a concept of an individual duty of 'fairness' or 'balance'. The Kent report argued for the existence of such an ethical duty. The difficulty which the Commission faced was that such an ethical duty did not exist in law. They pointed out that:

> In fact, British jurisprudence does not recognise any special freedom of the press. Anything that is printed goes - as an extension of freedom of opinion - as long as one does not break the law of libel or other laws. In other words, such freedom is absolute as long as it is not used to damage someone's reputation, act immorally, or betray the nation.[20]

6.28 The Report went on to describe a situation in which owners have the discretion as to whether or not to be ethical:

> In the minds of newspaper owners and publishers, freedom of the press flows from freedom of opinion. It is a private right, one that is inseparable from the freedom to do business. They are loath to admit duties that prevail over economic responsibilities... . There are still many publishers who are not ashamed to admit their bias or to lead fierce political opposition, but the vast majority strive to present a wide range of opinion; only they want it to be of their own free choice. This is a very sensitive question with newspaper publishers: they consider any social responsibility

[19] Kent Report p 26

[20] Kent Report p 25

> imposed from outside, and especially by the government, as an intolerable blow to free enterprise in the press.[21]

6.29 The dilemma which the Kent Report could not resolve was that although the Commission perceived an ethical duty, they also recognised that it was not present in the minds of some proprietors and was not embodied in law. They also dismissed the notion that economic forces would in some way deliver a balance:

> In history, and still in current mythology, 'freedom of the press' has been supposed to ensure the fulfilment of the newspaper's public responsibility. John Stuart Mill, and others before and since, in effect applied to information and opinion the same concepts that Adam Smith articulated for the production of physical goods: the competition of free markets creates an invisible hand to ensure that what is produced is what people will pay for, priced at the lowest possible cost. Freedom of the press would likewise ensure diverse expression and, by the discipline of competition, completeness and accuracy of public information.
>
> In many sectors, the economic theory has been made unreal by the technologies and institutions that have created rigidities and power positions which Adam Smith could not envisage. It retains, nevertheless, vestigial elements of validity in some economic processes.
>
> As much cannot be said for the concept of press freedom as the guarantee of responsibility. In a one-newspaper town it means nothing except the right of the proprietor to do what he will with his own. In a country that has allowed so many newspapers to be owned by so few conglomerates, freedom of the press means, in itself, only that enormous influence without responsibility is conferred on a handful of people. For the heads of such organisations to justify their position by appealing to the principle of freedom of the press is offensive to intellectual honesty.[22]

6.30 Unable to find a natural champion of fairness in the newspaper owners, the Kent Report then turned to the journalists:

> The Commission emphasises what it regards as the essentially professional nature of the journalist's work. The professional - the doctor or the lawyer, for example places his special skills at the service of the patient or client, to deal with problems which the layman does not himself know what to do

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[21] Kent Report p 28

[22] Kent Report p 217

> about. The professional is in honour bound to use his judgement to do what is best for the health or welfare of his client. The layman has a closely analogous need for the journalist's services: to select from the mass of available facts the information which is significant to most of the newspaper's readers and to present that information in a way that is accurate, understanding, comprehensible, interesting and balanced.[23]

6.31 Here at last, we find a reference to 'balance'. Unfortunately it is in a context which, for Kent at least, fails to function. The Report goes on to describe an inadequate level of training and professionalism amongst journalists and to comment bitterly that:

> The Davey Report said 11 years ago that the newsrooms of most Canadian newspapers were boneyards of broken dreams. Our investigations lead us to think that there are now fewer dreams to break. ... This malaise is, in the Commission's view, part of the price we pay for conglomerate ownership.[24]

6.32 This depressed view of journalism echoes the reports from the United Kingdom. Like the market theories, idealised views of journalism as noble, unbiased, inherently altruistic and discerning of the public good, often run into difficulties when compared with the actual circumstances of a society. Variables such as the limitations of journalists' training, the constraints imposed by owners and editors and the corporate cultures which exist within newspapers can all combine to make the reality differ from the ideal. In Kent's case, the greatest impediment was seen as conglomerate ownership.

6.33 In the end, the Kent Report could only advocate intervention in the market in order to create diversity of ownership. The Commission might have had a moral conviction that balance should be the duty of owners or journalists, but they recognised that there was no objective mechanism to enforce or to measure balance. The only significant remedy which they could recommend was to break up the conglomerates. They did not feel that they could ever keep the owners out of the newsrooms and they therefore urged that there be a broader range of owners.

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[23] Kent Report p 218

[24] Kent Report p 218

6.34 The recommendations of the Commission were not implemented by the government.[25]

US approaches

6.35 In the United States, the First Amendment to the Constitution is the cornerstone of media regulation:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.[26]

6.36 By and large, interpretations of this amendment have defined the whole debate in the US over regulation of the media. In the context of the interpretation of this amendment two main traditions have been identified.[27] The first is a literal tradition based on the liberal theories already referred to. That is the tradition of a 'marketplace of ideas' which should be allowed to function unhindered.

> A free press, in liberal theory, provides a decisive check on government both through objective reporting and by reconstituting a public through the press' complex mediation of public opinion. Any governmental intervention undermines this editorial independence and tramples on the autonomy of individual speakers. The classical marketplace metaphor is telling for its reliance on economic assumptions about supply and demand, and Enlightenment philosophic assumptions about rationality. The theory, again, is that absent government interference, the autonomous sanctions of diverse individual speech entrepreneurs will lead to a multiplicity of viewpoints whose rationality will be discerned through public discussion to the benefit of the social order as a whole.[28]

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[25] *News & Fair Facts*, p 26

[26] United States Code Service Lawyers Edition - *Constitution*, 1986, p 163

[27] Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, common carriers and free speech in the 1990s', in *Theory and Society*, Kluwer Academic, Netherlands, 1991

[28] Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, common carriers and free speech in the 1990s', in *Theory and Society*, Kluwer Academic, Netherlands, 1991, p 35

6.37 An example of a court decision upholding this literal tradition was Miami Herald v Tornillo, a 1973 case which struck down a Florida statute requiring newspapers to provide reply space to political candidates attacked by the newspaper. Although the court agreed that there was a concentration of ownership in daily newspapers and that there were extreme financial barriers to anyone starting a new paper, the court unanimously refused to allow government intrusion in the print media. They held that there must be no intrusion by government into the editorial function and no reduction in the freedom of the owner.[29] Chief Justice Warren Burger stated that 'A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated'. Similarly, in disallowing a Congressional Act to limit campaign finance, the court held that 'government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others'.[30]

6.38 The second tradition loosely rests on an assumption of market failure. Under this viewpoint, the original metaphor of a marketplace could only function in a traditional society where freedom of assembly and verbal communication meant that the value of one person's speech was equivalent to another's. Once communication is mediated, this view has it that control of the media distorts the market. Generally speaking, worldwide, governments and courts have tended to accept that the broadcast media are an example of an imperfect market, given that they require access to a scarce spectrum and specific capital intensive technologies. Access to broadcast licences has in many countries been held as a privilege not a right, and one which imposes a reciprocal obligation on the licence holder.

6.39 As early as 1947, the view had been advanced in the United States that modern technology was leading to media monopolies which were an obstacle to democracy:

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[29] See Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, common carriers and free speech in the 1990s', in *Theory and Society*, Kluwer Academic, Netherlands, 1991, p 36

[30] Buckley v Valeo, 424 US 1 (1976), at 48-49. Cited in Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, common carriers and free speech in the 1990s', in *Theory and Society*, Kluwer Academic, Netherlands, 1991

> If modern society requires great agencies of mass communication, if these concentrations become so powerful that they are a threat to democracy, if democracy cannot solve the problem simply by breaking them up - then those agencies must control themselves or be controlled by government.[31]

6.40 The Hutchins Commission was a philanthropic exercise, financed by Henry R Luce of Time Inc. Its findings were deeply philosophical and moralistic and its authors attempted to balance between advising media proprietors of a moral duty and warning them of government's obligation to intervene if they ignored that duty. It referred to the 'responsibilities of the owners and managers of the press to their consciences and the common good for the formation of public opinion',[32] and said that 'the tremendous influence of the modern press makes it imperative that the great agencies of mass communication show hospitality to ideas which their owners do not share'.[33] The report toyed with the notion of publicly funded media in order to increase diversity and went so far as to say that:

> The need of the consumer to have adequate and uncontaminated mental food is such that he is under a duty to get it; and, because of this duty, his interest acquires the stature of a right. It becomes legitimate to speak of the moral right of men to the news they can use.
>
> Since the consumer is no longer free not to consume, and can get what he wants only through existing press organs, protection of the freedom of the issuer is no longer sufficient to protect automatically either the consumer or the community. The general policy of laissez faire in this field must be reconsidered.
>
> The press today, as the Supreme Court has recently recognised in the case of news services, has responsibilities to the general spread of information which present analogies to those of a common carrier or of a trustee... .[34]

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[31] *A Free and Responsible Press: A general report on Mass Communication: newspapers, radio, motion pictures, magazines and books*, the Commission on Freedom of the Press, Robert M Hutchins Chair, University of Chicago Press, Chicago, 1947, p 5

[32] Hutchins p vi

[33] Hutchins p viii

[34] Hutchins Commission, op cit, p 125

6.41 In sympathy with such views there were attempts to gain support for government intervention in broadcast media. The *US Federal Communications Act, 1934* included a 'public interest' standard. This Act established the Federal Communications Commission (FCC) as a force for balance. The Fairness Doctrine, created by the FCC, required that broadcasters 'cover contrasting viewpoints on controversial issues of public importance'. This was based on the premise that the radio frequency spectrum and access to it are limited and that access had to be regulated to ensure fairness.

6.42 In 1978 the Supreme Court upheld the FCC power in the face of a challenge based on the First Amendment by ruling that the Amendment's goal was to achieve the widest possible dissemination of information from diverse and antagonistic sources.[35] It upheld intervention by the government by ruling that rather than being a prior restraint, it was an attempt to facilitate a free marketplace of ideas and a diversity of viewpoints.

6.43 The Fairness Doctrine of the FCC Act was also held to be compatible with the First Amendment when it required that discussion of public issues be presented on radio stations, that each side of an issue be fairly presented, and that individuals personally attacked during broadcasts and opponents of political candidates endorsed in the broadcaster's editorials should be given equal opportunity to respond over the broadcaster's facilities.[36]

6.44 This was in effect, support for the extension of the free speech right on the basis that it implicitly includes the right to hear a wide range of views, as well as the right to express views. In FCC practice, however, and in successive court rulings, the concept of balance became limited to specific right of reply in certain cases, and the broadcast licensee was given 'wide discretion to decide what issues are of public importance, and what kind of programming constitutes balanced programming'.[37]

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[35] FCC v National Citizens Committee for Broadcasting (1978) in *United States Code Service Lawyers Edition - Constitution*, 1986, p 239

[36] Red Lion Broadcasting Co v FCC in *United States Code Service Lawyers Edition - Constitution*, 1986, p 300

[37] Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, common carriers and free speech in the 1990s', in *Theory and Society*, Kluwer Academic, Netherlands, 1991, p 44

6.45 Public interest groups had also attempted to use FCC laws to gain access rights to broadcast media in order to air issues of public concern. The aim here was to protect the collective First Amendment rights of those with dissenting, non-establishment views by guaranteeing them some access to the broadcast medium. The Supreme Court ruled, however, that this treated broadcast licensees as if they were common carriers. Unlike the Hutchins Commission, they did not accept this as a valid role for the media. They ruled that it risked unacceptable governmental intrusion into the journalistic process.[38] In the late eighties the FCC itself abandoned the Fairness Doctrine, apparently on the basis that advances in telecommunications had overcome the scarcity basis for regulation.[39]

6.46 Nor did the US media necessarily perceive the doctrine as leading to balance. It has been alleged in the media that some former US administrations used the doctrine to challenge and harass broadcasters of dissenting views and it has also been commented that:

> The doctrine had the exact opposite effect that the FCC sought. After lengthy hearings in 1985, the FCC said the doctrine did not serve the public interest because it did in fact "chill" speech.[40]

6.47 There is currently strong opposition by many journalists to moves by the US government to reintroduce the Fairness Doctrine through legislation before the Congress at present.[41] Their perception is that any requirement for balance is likely to be effectively a restraint on dissent, and they have

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[38] Columbia Broadcasting System v Democratic National Committee in Horwitz, p 42

[39] Emord, Jonathan W 'The First Amendment Invalidity of FCC Content Regulations', in *Notre Dame Journal of Law, Ethics and Public Policy*, Vol 6 1992

[40] Steinfort, Roy Freedom of information: Fairness demands that TV and print work together: Fairness Doctrine threatens First Amendment for all, in *Quill*, November/December 1993. See also Hentoff, Nat, Editorial, *The Washington Post*, 6 November 1993, Final Edition

[41] Bill number HR 1985 by Hefner (D-NC) - Fairness in Broadcasting Act of 1993. 'A bill to clarify the congressional intent concerning, and to codify, certain requirements of the Communications Act of 1934 that ensure that broadcasters afford reasonable opportunity for the discussion of conflicting views on issues of public importance. Senate Bill S.333, of the same title, by Hollings (D-SC), 4 February 1993

characterised the move as reflecting the current government's discomfort with conservative criticism from within the media. Opponents of the doctrine, including the Governor of New York, have said:

> ... the drive by Democratic members of Congress to command broadcasters to present opposing views on controversial issues is related to the rising popularity of conservative talk-show hosts on the radio. If the Fairness Doctrine returns, these programs - and the few with hosts on the left - will become safely bland.
>
> New York's governor also noted that broadcasters, by and large, have been rather subdued in protesting the renewed gutting of their First Amendment rights. "I get the sense", he says, "that a lot of people who make profits in this business will sell freedom for fees. They will make deals with Congress, they will accept regulation they shouldn't be accepting ... all in exchange for an opportunity to make more money.[42]

6.48 The US then, like Canada and the UK, has experienced a trend over time where government intervention to promote diversity of ideas, when it does occur, has been generally conservative and limited to broadcast media. The effect of attempts to promote balance via the Fairness Doctrine has been largely regarded as cumbersome and as suppressing free speech rather than promoting it. In effect, the freedom of speech right most strongly upheld in the US has been the power of the owner to publish, rather than the right of the public to have access to a diversity of views.

6.49 It can therefore be seen that even legislative attempts to allow aggrieved citizens a right of reply are fraught with difficulty. None of the countries surveyed has ever legislated to allow an outside body to sit in judgement on the overall balanced coverage of newspapers let alone the tying of foreign investment decisions to subjective decisions by politicians on what constitutes balanced coverage. To effectively intimidate a leading national newspaper or so muzzle its political comments during an election campaign is to use Mr Black's colourful phrase to "put a silver stake through the heart of the democratic process".

Australian inquiries

6.50 In Australia as elsewhere the major inquiries into the media have resulted from concern over concentration of ownership and its effects on

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[42] Hentoff, Nat, Editorial (*The Washington Post*), 6 November 1993, Final Edition

diversity. The *Norris Report* in Victoria in 1981 found a very high and increasing control of newspapers and warned both of a loss of diversity and of a growing power of a few proprietors to influence the opinions of society.[43]

6.51 The report described:

> ... the power to influence the very functioning of our whole society by control over the nature and extent of the information presented to it and by the analysis and interpretation of that information. It is this latter aspect of power, affecting social and political affairs, that distinguishes the media industry from other industries.[44]

6.52 It concluded that neither the Australian Press Council nor market forces could prevent further concentration of media ownership, and recommended the establishment of a statutory Press Amalgamations Authority to scrutinise acquisitions by newspaper publishers already owning more than 10 per cent of shareholdings in other newspapers in Victoria. Consent depended on the acquirer proving that the acquisition was not contrary to public interest.[45] Its recommendations were not implemented.

6.53 The Working Party into Print Media Ownership was also set up in Victoria, following concern over the takeover by News Corporation of the *Herald* and *Weekly Times* group. It reported in 1990, and found that since Norris, the concentration of media ownership had further increased. The report distilled from the literature the following list of the potential adverse consequences of concentration:

(a) concentration of power unacceptable in a democracy, whether or not that power is used;

(b) insufficient channels for the expression of opinion;

(c) economic forces creating barriers to entry for others who might dilute that power and open new channels;

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[43] *The Norris Report* 1981, pp 85-86. See also *News & Fair Facts*, p xv

[44] *The Norris Report* 1981, pp 85-86

[45] *The Norris Report* 1981, pp 193 and 219

(d) diminished localism of content and accountability caused by a group's size and pursuit of economies of scale;

(e) debilitated journalistic culture caused by reduced competition, self-censorship, lack of alternative employment;

(f) conflicts of interest for owners with non-media interests. Although not caused by concentration, such conflicts grow in their potential adverse effects in proportion to concentration.[46]

6.54 The Working Party concluded that it would be in the public interest to dilute the existing concentration and to prevent its extension.[47]

6.55 The Report stated that:

> We underpin our recommendation with the principles Sir John Norris urged:
>
> (a) the means to be employed to allow the press to function as it should must not themselves threaten its freedom;
>
> (b) any legislation to regulate ownership and control must be so drawn as not to interfere with the content of the press, or with the liberty of persons to publish. Any concept of licensing the press or regulating its content must be eschewed;
>
> (c) if the relevant legislation is to satisfy (such conditions) ... it must not constitute the executive government the repository of the authority to grant or withhold favours.[48]

6.56 The 1991 House of Representatives Print Media Inquiry (or the 'Lee Committee') had the following terms of reference:

> To inquire into and report on:
>
> (a) structural factors in the print media industry inhibiting competition between publications,

[46] Quoted in CLC Submission No 19

[47] *Report of the Working Party into Print Media Ownership*, 1990, pp 3 & 4

[48] *Report of the Working Party into Print Media Ownership*, 1990, p 3

including ownership, production (including paper supply) and distribution arrangements;

(b) the print media's distribution and information gathering arrangements:

(c) the extent to which the ownership or control of various sectors of the print media industry provides a barrier to entry by competitive alternatives;

(d) the adequacy of current Commonwealth legislation and practices to foster competition and diversity of ownership in the print media; and

(e) the practicability of editorial independence between proprietors and journalists.

6.57 The Lee Committee was making its inquiries in the midst of the Fairfax takeover controversy, and some of the issues involved in our deliberations were also canvassed at that time in its hearings. Many people at the time looked to the Lee Committee for direction in the uncertainty which surrounded media regulation. Although it made some findings, however, its report, *News & Fair Facts* was not taken up enthusiastically. It had been set up amidst the furore surrounding the involvement of Mr Packer with the Tourang syndicate. Concern on ownership concentration was at its highest when he was a member of that group, and to a certain extent public interest and the sense of urgency about concentration declined when he withdrew.

6.58 Amongst the issues which that committee canvassed was the nature of competition in and between the various forms of media. It found, for instance, that there was a trend towards monopoly or small group ownership of newspapers. It also found that there was little competition in terms of advertising between media forms (such as TV and newspapers) in the same area. The significance of this conclusion is that in narrow commercial terms, the 'Queens of Screen and Princes of Print' approach to cross-media regulation introduced by the government in the late eighties is not a significant factor in increasing competition. That is, the cross media rules which prevent ownership of print and broadcast in the one area by the one proprietor may contribute to diversity of opinion but do little to increase commercial competition for advertisers. However, the committee advocated

their retention because entry to the electronic media is restricted, and the cross-media rules do prevent:

> undue influence of public opinion by the few by enhancing public access to a diversity of viewpoints, sources of news, information and commentary.[49]

6.59 The Lee Committee found that the print media market is not highly contestable. That is, it found that there were considerable capital costs and commercial risks for new entrants to the market. It also found that the marginal costs for established papers are small, and that they have a significant edge in attracting advertisers, thus further discouraging new entrants. The ownership of chains of newspapers confers additional economies of scale and opportunities for sharing of resources between mastheads.

6.60 When examining the relationship between the concentration of ownership and the lack of diversity of information and ideas in the Australian Press, the Lee Committee was divided:

> Some members of the committee concluded that there was a connection between the unprecedentedly high concentration of media ownership and the lack of diversity of information and ideas in the Australian press, and that the former is likely to be a significant cause of the latter. However, a majority of the committee considered that there was insufficient evidence to conclude that the current high level of concentration in the Australian print media has resulted in biased reporting, news suppression or lack of diversity. All members agreed that concentration of ownership is potentially harmful to plurality of opinion and increases the potential risk that news may be distorted.[50]

6.61 A voluminous submission to the Lee Committee from News Limited included a study prepared by Professor Peter Swan, the Freehill, Hollingdale and Page Professor of Management at the University of NSW, which set out an argument that newspapers in a monopoly position can still offer a diversity of views. This argument essentially maintains the 'marketplace of ideas' metaphor but says that a single monopoly newspaper will still reflect the diversity of its audience because of the commercial motive of wishing to

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[49] *News & Fair Facts*, p 309

[50] *News & Fair Facts, p xxii*

keep that audience as broad as possible. This argument was effectively rejected by the committee when it said:

> The relevant issue ... is not whether the range of stories or categories of information presented is affected by concentration, but whether the interpretation of the stories is more likely to vary when newspapers are independently owned.[51]

6.62 Having found high levels of concentration in the Australian print media industry which are potentially harmful to the plurality of views, and having found formidable barriers to entry, the major question the Lee Committee report addressed was how can competition be promoted that will increase the diversity of views which is so important to Australian society?

6.63 The committee considered and rejected calls for some form of divestiture or numerical limits on the number of newspapers and magazines any one proprietor can own. It also concluded that current dominance tests for mergers in the Trade Practices legislation had failed to preserve a desirable level of competition in some sections of the print media.

6.64 The option selected was a move from the dominance test to 'a substantial lessening of competition' test, combined with special requirements for print media. This required an amendment to the Trade Practices Act so that authorisations on print media mergers would look at the impact on:

- free expression of opinions;
- fair and accurate presentation of views; and
- the economic viability of the publication if the merger does not proceed.[52]

Their report stated that:

> Diversity of opinion and truth and accuracy in reporting are of fundamental importance to the public interest. While no law will be able to totally guarantee these ideals, steps can be taken to ensure that any potential threat to them which may arise from a merger or acquisition, is

[51] *News & Fair Facts*, p 195

[52] *News & Fair Facts, p xxiv*

> fully evaluated in a forum which allows all interested parties the opportunity to air their concerns.[53]

6.65 Having expressed reservations about the extent of economic competition across the media in any given area, the committee recommended the retention of cross-media rules, preferably based on a test of controlling interest rather than a fixed percentage, on the basis that:

> The intention behind the cross-media ownership limits is to prevent undue influence of public opinion by the few enhancing public access to a diversity of viewpoints, sources of news, information and commentary. It may be that sometime in the future there could be such a proliferation of players and such limited chances of high concentration because of pure or 'atomistic' competition, that the cross-media rules would be irrelevant. Until that time the committee considers that the rules should continue.[54]

6.66 As in other countries, the Report advocated a strengthening of the Press Council. It made only tentative recommendations on ethics, however, by recommending that the Government 'convey to the print media industry the committee's preference' for proprietors, editors and journalists to be 'encouraged to subscribe to the principles' of the Code of Ethics of the AJA. It further said that 'contracts for editors, whilst supported in principle, are a matter for individual proprietors and editors', and that the committee 'rejects calls for legislative requirements for mechanisms to support editorial independence'[55].

6.67 In summary, the Lee Committee placed the Australian regulatory framework firmly in the tradition of the other countries surveyed here. It subscribed to the 'marketplace of ideas' concept; it mildly advocated an ethical approach by individual players on a voluntary basis, but in the end could only strongly endorse intervention at the point which establishes the number of players. Any attempt to referee the 'balance' of the views reflected by any one player (beyond the well-intentioned but mild umpiring of the Press Council) was not contemplated.

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[53] *News & Fair Facts*, p xxiv

[54] *News and Fair Facts*, p 309

[55] *News & Fair Facts*, p xxxiii

6.68 The most recent government report on the media in this country is the *Review of Government Media and Information Services* by the Queensland Parliamentary Committee for Electoral and Administrative Review. That report takes a strong line on the need for a diversity of press ownership, arguing that 'increased concentration also increases the potential political power of the media companies, making politicians cautious in their dealings with the media' and stating:

> This committee acknowledges the concentration of print media ownership in Queensland and recognises that this has the potential to reduce the diversity of news and information available to Queenslanders and lead to possible abuses of influence.[56]

6.69 The Report went on to recommend that the Attorney-General urge the nation's Attorneys-General to consider uniform defamation and shield laws. It then stated that:

> At times it is likely that a vigorous and energetic media will be in conflict with the government. It is however in the interests of the electorate to have media which recognises and accepts the responsibilities the Fourth Estate imposes, rather than a docile media which fails to expand the scope of public knowledge, or media which abuses power for its own advantage. To ensure that this is done in a way which recognises the primacy of the public interest the committee encourages media organisations and journalists in Queensland to develop effective and meaningful methods of self-regulation and public accountability, so that the democratic potential of the media may be realised.[57]

6.70 In Australia then, the experience has been broadly the same as in the UK and Canada. While Royal Commissions and Parliamentary Committees have uniformly expressed regret regarding the loss of diversity of views in the media resulting from the trend to concentration of media ownership, governments themselves have tended to confine media regulation to the control of ownership at the point of acquisition, merger or takeover. Although they often advocate a stronger role for Press Councils, they draw back from the manifest risks of allowing executive government to decide on what constitutes 'balance'.

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[56] *Review of Government Media and Information Services*, Parliamentary Committee for Electoral and Administrative Review, Queensland, 1994, p 72

[57] *Review of Government Media and Information Services*, Parliamentary Committee for Electoral and Administrative Review, Queensland, 1994, p 87

6.71 Sir John Norris' comments in 1981 were taken up again by the Hon Race Mathews in his 1981 report, and quoted again by the Queensland Committee this year. They bear repetition once more in this context:

> (a) the means to be employed to allow the press to function as it should must not themselves threaten its freedom;
>
> (b) any legislation to regulate ownership and control must be so drawn as not to interfere with the content of the press, or with the liberty of persons to publish. Any concept of licensing the press or regulating its content must be eschewed;
>
> (c) if the relevant legislation is to satisfy (such conditions) ... it must not constitute the executive government the repository of the authority to grant or withhold favours.[58]

Balance and the propriety of Mr Keating's actions

6.72 As already noted, in this country the notion that diversity should be encouraged at the point of ownership and independence fostered at all levels of the media, has held sway, and the trend is reflected in the Labor Party's own platform which includes the following:

> Print
>
> 41 Maintain and enhance freedom of the press, which is a cornerstone of democracy
>
> 42 Promote the public's right to a full variety of views in printed media by ensuring diversity of ownership through:
>
> a) strong cross-media ownership limitations;
>
> b) limitations on the capacity of dominance in particular markets by utilising all arms of federal government authority including the Foreign Takeovers Act, the Corporations Act and the Trade Practices Act to ensure proper restrictions on further print media concentrations;

[58] Quoted in *Review of Government Media and Information Services*, Parliamentary committee for Electoral and Administrative Review, Legislative Assembly of Queensland, 1994, pp 71-72

c) encouraging the establishment of independent newspapers serving particular constituencies, including the broad labour movement;

d) encouraging and supporting staff ownership of newspapers; and

e) supporting the development of enforceable codes of editorial independence by ensuring that the articles of association of newspaper companies guarantee editors a proper degree of independence from the proprietor.

43 Establish, in consultation with the media industry, a press council with a majority of public members appointed by an independent panel, responsible for advising and making recommendations to government and the media industry on ways of improving the quality and diversity of print media in Australia.[59]

6.73 The present government has clearly endorsed the need for diversity of opinion and its willingness to legislate for it through the changes to the Broadcasting Services Act and other regulatory mechanisms which it has made over the years. The Prime Minister, as the then Treasurer, played a key part in the 1988 changes to broadcasting rules and spent considerable effort in justifying them under the banner of diversity:

> So lets be clear about media bias. There was a lot of media bias by journalists at John Fairfax and Sons in not publicising the diversity of the media change under this Labor government.[60]
>
> Is this not clear social improvement? Is this not more diversity?[61]

6.74 Similarly, in the Second Reading Speech for the Broadcasting Services Bill 1992, Senator Collins made the following remarks under the heading of 'Regulatory Philosophy':

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[59] Source: *Australian Labor Party Platform, Resolutions and Rules* as approved by the 39th National Conference, Hobart, 1991

[60] Archive tape, August 1988, in *Four Corners*, Monday 5 November 1990, MICAH transcript

[61] Paul Keating, letter to *Media Information Australia*, No 48, May 1988, p 41

> The Bill ... continues to recognise that broadcasting is integral to developing an Australian identity and cultural diversity. It is vital to the operation of a democratic society ... .
>
> Underpinning the whole framework is the intention that different levels of regulatory control apply across the range of broadcasting services according to the degree of influence that such services are able to exert.[62]

6.75 The entire net of media regulation in this country clearly embodies this implicit acceptance of the marketplace of ideas, of the value of diversity, and of the existence of an imperfect market in need of government regulation. The one 'straw man' in all of this has been the reluctance of governments here and overseas to accept that newspapers are an imperfect market in the same way that radio and TV were long ago accepted to be.

6.76 *News & Fair Facts* clearly indicated that the newspaper market is far from perfect. Moreover, any rational analysis of the cross-media rules in this country and the way in which they have worked since the 1980s, can only lead to the observation that the government has been having a major impact in the newspaper market at least since that time, and that if the newspaper market was not imperfect then cross-media rules certainly made it that way.

6.77 The 1991 and 1993 decisions in relation to foreign ownership and Fairfax were also hugely significant in affecting that market. Governments must now squarely face the reality that all sectors of the media are interdependent in their economics and regulation, and that as technology convergence continues so they will become more and more related and less distinguishable as markets. They must also accept that for better or worse, governments are an integral part of media regulation.

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[62] Senate Hansard, 4 June 1992, p 3599

Recommendation 6.1

The committee recommends that the Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure, as part of its reference on telecommunications developments (24 March 1994) should consider the regulatory issues of convergence of media technologies, especially as they relate to the preservation of diversity.

6.78 If we accept then that government has an actual and a legitimate role in regulating for diversity of opinion in the print media, what are the other elements of this diversity apart from variety of ownership? We have seen that the next common element in this and other countries has been the protection of editorial and journalistic freedom. We have also seen that in other countries the tendency has been to leave this largely to the discretion of owners.

6.79 The implicit assumption has been that the rights conferred by ownership of a newspaper are absolute except where constrained by laws such as those for defamation, and that there is no enforceable reciprocal obligation on the owner. This assumption is worth re-examining. Simply put, the regulatory framework which government has already put around media ownership implicitly assumes that ownership is not an absolute right but one granted by society. The committee believes that there may be a role for enforceable codes of editorial and journalistic freedom, binding upon the owners.

Recommendation 6.2

The committee recommends that the Senate Standing Committee on Legal and Constitutional Affairs, which is examining codes of conduct for journalists, examine the issue of the enforceability of guarantees of independence as part of government regulation of the media.

6.80 However, it is essential to stress that such codes are not currently part of the regulatory framework and were at no time formally put to Mr Black by the government as a requirement of ownership or increased ownership.

The committee therefore finds that Mr Keating's claim to have informally championed editorial independence in his November 1992 meeting with Mr Black to be incongruous:

> But, obviously, I don't think anyone in Australia should welcome heavy handed proprietorship. I remember the whole of the Fairfax employees talking about the rights to write and have printed that which they believe and not have proprietorial intervention. And it was that same point that I was making.[63]

Finding 6.2

For Mr Keating to have set himself up personally as the judge of bias and the arbiter of the kind and extent of freedom which Mr Black should give to his employees is plainly not at all the same as a government enforcing an open and well understood charter of independence. The committee finds that it was improper for Mr Keating to set himself up in this role, holding power as he did over Mr Black's increased ownership.

6.81 Mr Keating's mistaken perception of his role is exemplified in the following transcript:

David Margan: I'm still interested though, in the Prime Minister's notion of balance. Should you be the one who decides that, though?

Paul Keating: Well, when prime ministers have got to decide, I mean I notice a bit of comment about this saying: Well, isn't it unusual, the Prime Minister's had to make a decision about the acceptability or otherwise of a particular set of proprietors. That's one of the things, I'm afraid, prime ministers have to do, I mean, because we're the ones that have got to take the decisions about who gets what in terms of equity. So it may be an uncomfortable lot and a burden, but that's part of the job.

[63] Transcript of interview, the Hon P J Keating, Seattle, Friday 19 November 1993

David Margan: Do you think the next media baron, though, should come to you about questions of balance and objectivity for your decision?

Paul Keating: If they are foreigners, if they want to buy a large chunk of Australia, yes.[64]

ooo

J: But Mr Keating, should a commercial dealing of that sort rest on your judgement about whether a media organisation is fair to Labor?

PM: No, not whether it' fair to Labor, but whether reporting is fair.

J: But you're the judge, are you?

PM: Well, I'm the Prime Minister. That's how I become the judge.[65]

6.82 Certainly Mr Black's long-standing objection to journalistic codes of conduct and his strident assertion of a media proprietor's prerogative to influence the political tone of his newspapers are well known and were referred to by Mr Keating above.

6.83 Mr Black's autobiography proudly boasted of his use of *The Daily Telegraph* in a last ditch attempt to save the Prime Ministership of Margaret Thatcher. It is therefore inconceivable that Mr Black would seriously agree to surrender such powers. Indeed he has always been at pains to defend them as being an integral part of the democratic tradition. It is therefore very difficult to accept that he would meekly bow to the imposition of a 'balance' requirement on one part of his newspaper empire when he would find it abhorrent anywhere else, unless there were some other advantages to be gained.

6.84 The remaining element of government regulation which is relevant to Mr Keating's conversations with Mr Black and with the whole issue of the Fairfax decisions, is the element of cultural diversity. We have already seen

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[64] *7.30 Report*, Monday 22 November 1993, MICAH transcript

[65] Transcript of Seattle interview, 18 November 1993, pp 5 and 6

that democratic governments world-over prize the diversity of sources as an element of democracy itself. However, in an age of increasing globalisation, there is also concern over national identity and the representation of national interests. As mentioned at the end of chapter 5 of this report, Mr Keating has also attempted to portray his discussions as having been an attempt to safeguard cultural sovereignty. This issue is more complex in terms of precedents.

6.85 The FIRB booklet plainly states that:

> Foreign investment in mass circulation newspapers is restricted. All proposals by foreign interests to establish a newspaper or acquire an interest in an existing newspaper business in Australia are subject to a case-by-case examination irrespective of the size of the proposed investment.[66]

6.86 Similarly, foreign ownership limits apply for radio and television:

> Foreign investment in television licences is governed by the *Broadcasting Services Act 1992*, which provides (i) that a 'foreign person' may not be in a position to exercise control of a television licence, or have company interests in such a licence exceeding 15 per cent; and (ii) that two or more foreign persons must not have company interests in such a licence exceeding 20 per cent in aggregate. proposals for foreign investment in radio which fall within the scope of the *Foreign Acquisitions and takeovers Act* are considered on a case by case basis.[67]

6.87 Mr Black has attempted to portray such concerns and the questions of the committee, as implying: 'that any Australian is preferable to any foreigner and that foreigners tend to be ravening predators from another hemisphere coming here to deprive the women and children of Australia of their birthright.'[68]

6.88 This is plainly ridiculous, but it highlights the risk which governments fear, of being portrayed as xenophobic. The committee has not had the

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[66] *Australia's Foreign Investment Policy: A Guide for Investors*, September 1992, p 7

[67] *Australia's Foreign Investment Policy: A Guide for Investors*, September 1992, p 7

[68] Evidence p 659

resources to make a thorough study of foreign ownership controls on the media in other countries, but believes that such a study is likely to reveal a healthy and well-founded concern for the preservation of national identity and an awareness that national interests must be preserved via a local voice in the media. Chapter 7 includes information on controls over overseas investment.

6.89 Without canvassing the complex issues involved in foreign ownership and cultural sovereignty, the committee notes the clear incongruity of the government stance on the matter. The FIRB booklet plainly shows the government's public stance to protect cultural identity and a voice for Australians in their own media. Despite this, and in the case of a stated policy which, for television at least, expressly aims to prevent control by a foreign owner, Mr Keating entered into an arrangement with a foreign owner which was designed precisely to deliver control:

> Mr Black said to me, 'I have now, for better or worse, charge of this company, an important industrial company in Australia, the primary print media company, and I cannot manage it on 14.9 per cent of the stock'.
>
> ...
>
> So the fact was that, at 25 per cent, such an interest meant that there was at least a degree of managerial control in the hands of the Black interests.[69]

6.90 Mr Keating gave this control with no assurances having been sought or received in public or in writing, much less in any binding arrangement, that the owner would respect Australian cultural sovereignty. His remarks to the Parliament on 24 November 1993 give us no confidence that he has ensured that the Fairfax newspapers will 'reflect unambiguously those things which are in Australia's best interests'.

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[69] House of Representatives Hansard, 24 November 1993, p 3540

PART IV

FOREIGN INVESTMENT AND THE FOREIGN INVESTMENT REVIEW BOARD

The committee is charged by the Senate in its terms of reference *inter alia* to examine the activities, guidelines and procedures of FIRB. The role of this advisory body and the secrecy that shrouds its advice to the Treasurer, has become a major concern of the committee, media and the public during the course of the inquiry.

The chapters that constitute this part of the report address issues and committee findings on:

- Foreign Investment Policies in Australia
- Foreign Investment Administration in Australia
- The FIRB Dilemma
- A Revamped FIRB

FIRB has existed for almost 18 years but information about its operations has been constrained by the confidentiality of commercial and government operations imposed on or applied by FIRB. The Treasury submission states that:

> by providing information about FIRB and FIRB processes, Treasury also hopes to counter a degree of misunderstanding that appears to exist in some areas about the Board and its functions within the Government's handling of foreign investment applications.[1]

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[1] Treasury Submission p 4

Whether misunderstood or not, FIRB has been examined by several Parliamentary committees.[2] Their reports reflect concerns about its operations which the government has chosen to ignore, avoid or refuse to change. The reason for this reticence may have been that FIRB was not the subject, but an adjunct to the scope, of those committee's enquiries. This committee, however, is specifically directed to examine FIRB. The results of its inquiries are detailed in this part of the report.

The committee sought information about FIRB in the context of the Treasurer's decisions in 1991 and 1993 to permit the increase of foreign ownership in newspapers and, more generally, FIRB's effectiveness and significance in the field of regulating foreign investment inflows into Australia. The process of attempting to obtain information from government representatives (the Treasurer as well as FIRB members and ex-members) about the former topic has been described elsewhere in this report.

The committee obtained information about FIRB generally from a number of sources. In this regard the Treasury provided a submission and agreed to give the committee access to earlier submissions to parliamentary inquiries to obtain factual data about FIRB and its operations. The committee also commissioned the Parliamentary Research Service to prepare several papers which were of assistance in the preparation of this part of the report. The committee also was assisted by the written and oral evidence of a number of expert witnesses in foreign investment issues and the print media.

Based on this body of material the committee believes it has a sound base to analyse FIRB's appropriateness and effectiveness as:

- a model for public policy decision making in foreign investment matters; and

- as a body well-placed to make foreign investment policy recommendations in respect of the print media.

The committee's conclusions on these subjects and others are contained in this part of the report.

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[2] The House of Representatives Select Committee on the Print Media, *The News & Fair Facts*, AGPS, Canberra, March 1992 and the Senate Standing Committee on Environment, Recreation and Arts, *The Australian Environment and Tourism Report*, AGPS, Canberra, September 1992

CHAPTER 7

FOREIGN INVESTMENT POLICIES IN AUSTRALIA

Overview of foreign investment policy

7.1 A pithy and authoritative statement about Australia's foreign investment policy was made by the then Treasurer Dawkins in 1992:

> The Australian government welcomes foreign investment. The government recognises the substantial contribution foreign investment has made, and can continue to make, to the development of Australia's industries and resources.
>
> Capital from other countries supplements Australia's domestic savings and adds to the funds available for investment. It provides scope for rates of growth in economic activity and employment to be higher than otherwise. Foreign capital also provides access to new technology, management skills and overseas markets.
>
> The government's policy is, therefore, to encourage foreign direct investment consistent with the needs of the Australian community, including the expansion of private investment, the development of internationally competitive and export-oriented industries and the creation of employment opportunities. This attitude to foreign investment is reflected in the substantial liberalisation of foreign investment policy announced in the government's One Nation Statement in February 1992.[3]

7.2 The structure of Australia's external accounts and balance of payments is such that Australia has traditionally been a large net importer of capital. Foreign investment has been and will continue to be a major supplement to Australia's domestic savings. Views differ on the benefits of this form of private sector investment, though proponents like the then Treasurer point to access to new markets, and the technical product and managerial expertise new owners can bring to ventures as demonstrating the benefit of foreign investment to our economy.

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[3] The Hon J S Dawkins as reported in Department of the Treasury, *Australia's Foreign Investment Policy*, AGPS, Canberra, September 1992, page v

The need for a foreign investment regime

7.3 The arguments for and against foreign investment in the Australian context, at least, have been softened in recent years during the period of internationalisation and globalisation of world trade and currency flows. The committee believes that the debate is a useful one and cannot be discouraged.

7.4 During the inquiry the committee took evidence from several foreign investment experts. Dr Robertson, a member of the FIRB division during its early years, suggested that the problems re the Fairfax decision would not have arisen had the market been left to 'sort out who was going to buy the shares'. He questioned the need for any interventionist model of FIRB and canvassed a case for there being no 'national interest' test ... . 'as long as the economy is being well run ...'.[4]

7.5 Frank Stilwell, professor of economics at Sydney University, on the other hand, advocated the need for a 'strong foreign investment' policy alerting the committee to six specific problems which are extant in the 'internationalised world':

- The reliance upon overseas investment, together with corporate borrowing, is responsible for many of Australia's economic difficulties. In this regard the massive capital inflows of the 1980s have led to substantial interest and dividends. Payment commitments are one of the largest items in the current account deficit;

- There are dependency problems whereby the fortunes of the local economy have become reliant on decisions taken overseas;

- Foreign capital inflows have the potential to accumulate boom and bust cycles;

- The reliance on foreign capital is not conducive in many respects to the development of local business;

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[4] Evidence pp 75 and 77

- Some overseas companies may not be appropriately discharging their obligation to pay taxes to the Australian government; and

- Cultural imperialism, for example, in the media may also be a problem.[5]

7.6 The adverse consequences of too great a reliance on foreign capital inflows was taken up by Dr Vince Fitzgerald in his report on National Savings. That report indicated that overall debt is 'very high', that 'premiums' are now part of debt financing costs and that the risk of exposure to international stocks is unacceptably high.[6]

7.7 But against these considerations it is prudent to weigh up the benefits of foreign capital inflow, especially in targetted sectors. The print media sector is one in which the government has encouraged foreign capital inflows. In the following chapters a number of references have been made to the costs and benefits which have accrued to print media firms consequent to foreign capital inflows. For example, Dr Craik, an expert in foreign investment policy, advised that, from her observations, the internationalisation of the print media industry had not resulted in any noticeable improvement in journalism, competition between and within the media, or newspaper technology or know-how.[7]

Community expectations

7.8 It would be an understatement to say that, in general, Australians are somewhat cautious in expressing unreserved support for increased foreign investment. Consistently, opinion polls reveal that a substantial section of the population has reservations about the benefits of foreign capital inflows. For example, in relation to the **quantum** of foreign investment in Australia, 57 per cent of a sample said that there was 'too much', 22 per cent said 'about right' and 11 per cent 'too little'.[8] As to whether we should '**welcome** foreign

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[5] Evidence pp 98-99

[6] V W Fitzgerald, *National Savings - A Report to the Treasurer*, AGPS, Canberra, 1993

[7] Evidence p 367

[8] *The Bulletin*, 'Foreign Investment is cause for concern', 7 May 1991

investment' 24 per cent said 'no' in respect of European investment, 40 per cent said 'no' in respect of Asian investment and 23 per cent said 'no' in respect of American investment.[9]

7.9 The contentious Campbell's takeover of one of Australia's industrial icons, Arnotts, is but one example of significant community opposition to foreign investment. The numerous radio stations that conducted a poll on the Arnott's buy-out reported overwhelming opposition to the loss of Australian control. A radio 2GB spokesman reported a record 'volume of calls'.[10] The Fairfax takeover itself was, and still is, a matter of public concern and controversy. These expressions of apprehension should not go unnoticed. It is the duty of any responsible government to take account of community expression in this sensitive area of public policy and to develop a decision-making process which is open, transparent, consistent and reflects community expectations.

Australia's obligations to the international community

7.10 Australia was a signatory to the Organisation for Economic Co-operation and Development (OECD) Declaration on International Investment and Multinational Enterprises of 1976. The OECD declaration, inter alia, requires member nations to strengthen co-operation in the field of international direct investment. It also exhorts members 'to endeavour to make local regulations and administrative practices as transparent as possible so that their importance and purpose can be ascertained and that information on them can be readily available'.[11]

7.11 Notwithstanding the OECD declaration, amongst member countries there are widespread foreign investment restrictions. Table 7.1 provides a most useful snapshot of these restrictions across the 24 member nations. Australia's regulatory net relative to other nations appears to be neither too restrictive nor too open.

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[9] *The Age*, 'Asian rejected poll finds', 21 April 1992

[10] *The Canberra Times*, 6 February 1993

[11] The Department of the Treasury, *Australia's Foreign Investment Policy*, AGPS, Canberra, September 1992

Chart 7.1

OECD MEMBERS RESTRICTIONS ON FOREIGN INVESTMENT

Table 2. **Restrictions on main sectors***

Country	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Australia	LR		L	L		C	L	L	L		L*	L			L	C	L*
Austria	R	R	C	C	C	C	C	L	L	L	L	L*	LR	L		L	C
Belgium	R	R		L	C	C	L	L		C	L		R			C	
Canada	LR*	LR*	L	L	C	C	L	L	L*	L*	L*	L*		L*	L*	L*	
Denmark	R	R	L	L	C	C	L	L			L					C	
Finland	LR*	R	C	L	R	C	L	L	L		L					C	C
France	LR	LR	L	L	R	C	L	L	L	R	L*		R	R	LR	L	L
Germany	LR		L	L	C	C	LR	L*									C
Greece	LR	LR	C	C	C	C	C	L	L	C	L	L	R	C		C	C
Iceland	L	L	L	C		C	L			C	C	L	L			C*	
Ireland	LR	LR		C		C	C	LR			C					C	
Italy	LR	LR	C	C	C	C	LR	L	R		L		R			C	C
Japan	LR	L	L	L		L	L	L	C	C	L					L	
Luxembourg			C	C	L	L	L									C	
Netherlands	LR	L	L	L	C	C	L	L			L					C	
New Zealand			L	L		C	L	L			L						
Norway	LR	LR	C	L	C	C	L	L			L		L			C	C
Portugal	LR	L	L	C		C	C	R						L		C	
Spain	R	R	L	L		C	L	L				L				C	L
Sweden	L	L	L	L		C	L	L									C
Switzerland	R	L	L	C		C	L	L				L		C		L	
Turkey	LR	LR	C	C		C	L	L			L		L			C	C
United Kingdom	R	R	L	L		C	L	L	L		L		L			C	
United States	R	R*	L	L		C*	L	L	L		L	R*				L*	

L = Limited.
R = Reciprocity.
C = Closed.
* Measures at a subnational level.

1. Banking (including financial services).
2. Insurance.
3. Radio broadcasting and television.
4. Post and telecommunications.
5. Road transport.
6. Rail transport.
7. Air transport.
8. Maritime transport.
9. Mining.
10. Oil and/or gas.
11. Fishing and Fish-Processing.
12. Real estate.
13. Tourism.
14. Audiovisual works (including film distribution).
15. Publishing.
16. Public utilities (including energy, water, gas and electricity distribution).
17. Gaming, casino, lottos and lotteries, etc.

Notes: This table covers mainly measures upon establishment that are regarded as restrictions in the sense of the Code of Liberalisation of Capital Movements and not covered by the general authorisation procedures in Table 1.

"C" refers to activities in a given sector that are closed to foreign competition, including monopolies and/or concessions shown in Table 3.

Source: International direct investment policies and trends in the 1980s (OECD Paris 1992) p 38

7.12 The committee sought information from the Treasury on the legislative and prescriptive arrangements of other OECD countries in relation to foreign investment in the media. In an additional submission dated 9 February 1994, the Treasury supplied information which suggests 'most other OECD countries, except Belgium and Ireland, have restrictions on foreign participation in radio, broadcasting and the television sector'. The type and extent of those restrictions are not disclosed by the Treasury information.

7.13 The House of Representatives Select Committee on the Print Media reported its understanding that, 'with the exception of Australia, Canada and France, there are no limits on foreign ownership in the print media in OECD countries.' That committee also noted the statement by the same source:

> In Canada, foreign investment is permitted only if it takes the form of a joint venture controlled by Canadian interests.[12]

7.14 The committee points to the differing outcomes achieved by these two ostensibly similar systems. The Australian government's published reasons for justifying the increase of foreign shareholding in Fairfax in 1993 were:

> This case has been assessed against the objective of limiting foreign involvement in mass circulation newspapers. It also reflects the valid need of foreign investors to safeguard their financial and managerial commitment to their newspapers.[13]

7.15 While the Canadian system seeks to maintain Canadian equity and control, it could be argued that the Australian system, at least in this case, worked expressly to maintain and enhance foreign control.

History of foreign investment in Australia

7.16 Australia has always welcomed foreign investment and prior to the early 1970s had no mechanism for regulating its flows.

7.17 During the 1960s and early 1970s, some sections of the community expressed concern at rising levels of foreign ownership and control of

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[12] *News & Fair Facts*, op cit, p 37

[13] Treasurer, Press Release, *Foreign Investment Policy: Mass Circulation Newspapers*, 20 April 1993

Australian industries and resources. Governments of both persuasions reacted by introducing measures designed to screen foreign investments in certain sensitive sectors of the economy while maintaining an 'open door' approach to foreign investment generally.

7.18 The Foreign Acquisitions and Takeovers Act (FATA) was a Labor government initiative. It established a regime for screening takeovers and authorising proposals to establish new businesses, investments by foreign governments and real estate purchases. To succeed under the initial FATA regime foreign investment proposals had to be of demonstrable benefit to Australia. There was also a provision that Australian interests had had an adequate opportunity to purchase the business or property in question.[14]

7.19 In April 1976, the then Coalition government announced a package of measures addressing foreign investment controls. The centrepiece was the establishment of FIRB. Replacing the existing committee of public servants, FIRB was to consist of three members, two with business sector experience and a senior Treasury official. The explanation for the change focused on the government's perceived need to obtain independent expert advice from persons who reflect community and business sector interests.[15]

7.20 Since that time, the Hawke and Keating governments have announced a number of significant changes to Australia's foreign investment policy.

7.21 In 1986, the test requiring applicants to demonstrate net economic benefits, and that Australians had had the opportunity to purchase the target businesses, was dropped.

7.22 The new test assessed whether a proposal for foreign investment was contrary to the national interest. Treasury said: 'In effect, this shift in emphasis was implicit endorsement that foreign direct investment was typically of benefit to the recipient economy'.[16] The committee notes, however, that the then Finance Minister Senator Walsh, in the second

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[14] Treasury Submission No 16, p 5

[15] The then Treasurer, the Hon P Lynch explained the purpose of the amendments in Foreign Investment in Australia, an attachment to the *Foreign Investment Review Board Report 1977*, AGPS, Canberra, pp 26-38

[16] Treasury Submission No 16, p 5

reading speech for the Foreign Takeovers Amendment Bill 1986 incorporating these amendments, stated:

> The proposed amendments to ... the *Foreign Takeovers Act 1975* represent only one part of the overall package of foreign investment policy modifications announced ... last year. The changes announced at that time that did not require statutory implementation have already been implemented by administrative action. Under those changes, the 'opportunities test' was abolished, certain thresholds under foreign investment policy were increased significantly and the policy in respect of merchant banks, other non-bank financial institutions, insurance companies and real estate was liberalised. ... Based on past experience, the changes will either exempt from examination or simplify and streamline the examination process for around one-third of proposals that have been subject to foreign investment screening. The government has demonstrated its commitment to the removal of those parts of regulations which are burdensome and contribute little benefit to Australia.[17]

7.23 The amendments appear to have facilitated the application process more than embraced the benefits of totally unfettered direct foreign investment. Moreover, Australian policy has not wavered from a regime that identifies particular economic sectors like the media for special consideration and specific rules. In the event, the committee notes that these changes to foreign investment policy were made by administrative fiat rather than legislation.

7.24 The Treasury reports a number of other subsequent 'major liberalisations' to Australian's foreign investment policy:

- Minimum Australian equity and control requirements for takeovers, new businesses and projects in most industry sectors in which they were imposed (mining, oil and gas, primary industries, forestry and fishing, real estate, finance and insurance) were progressively abolished;

- Higher thresholds (below which proposals do not require approval) were progressively introduced, such that most takeovers and new businesses in most sectors did not require prior approval;

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[17] Second Reading, Foreign Takeovers Amendment Bill 1986, Senate Hansard 1986, p 1203

- In 1984, sixteen foreign banks were invited to apply for a banking authority. In 1992, the government decided that other foreign banks could apply for banking licences, subject to their being of sufficient standing and where the bank agrees to comply with Reserve Bank prudential supervision and arrangements; and

- There also occurred a progressive deregulation of Australia's non-bank financial sector, with easier access to merchant banking, stockbroking and insurance.[18]

FIRB's jurisdiction

7.25 The scope of FATA provides that the following proposals be submitted to FIRB:

(i) acquisitions of interests in urban real estate regardless of value ...;

(ii) acquisitions of shareholdings of 15 per cent or more in Australian companies that have total assets valued at more than $5 million (more than $3 million if greater than 50 per cent of the assets of the company are in the form of rural land);

(iii) takeovers of Australian companies and businesses by means other than the acquisition of shares, viz:

(a) by the purchase of assets or interests in assets;

(b) by agreements in relation to board representation or by alteration of the articles of association or other constituent documents of a company; or

(c) by arrangements for leasing, hiring, managing or otherwise participating in the profits of a business -

where the total assets of the target company or business are valued at more than $5 million (more than $3 million if greater than 50 per cent of the assets are in the form of rural land); and

(iv) takeovers of off-shore companies that have Australian subsidiaries or assets valued at $20 million or more, or where the value of the

[18] Treasury Submission No 16, p 6

Australian subsidiaries or assets is more than half of the value of the global assets of the target company.[19]

7.26 In addition, FIRB examines proposals not subject to FATA but which fall into the following categories:

(i) any proposals in the media sector irrespective of size;

(ii) proposals to establish new businesses in other sectors of the economy where the total amount of the investment is $10 million or more (total investment means the total expenditure expected to be associated with the proposal, including the value of any assets leased); and

(iii) direct investments by foreign governments or their agencies, regardless of size, (excluding investments related to their diplomatic representation).[20]

7.27 Government policy also provides that once registered, the following proposal will normally not be examined or required to comply with the 'national interest' criteria:

- the acquisition of 15 per cent or more of a company or business valued by total assets and consideration below $50 million;
- the establishment of a new project or business with a total investment below $50 million; and
- the takeover of an off-shore company with Australian subsidiaries or assets valued below $50 million and not exceeding half the global asset value.[21]

Foreign investment policy for the media

7.28 Foreign investment in television licences also is regulated under the provisions of the *Broadcasting Services Act 1992* which provides that a foreign person may not be in a position to exercise control over television licences or have interests in a licence exceeding 15 per cent and that two or

[19] *Australia's Foreign Investment Policy*, p 2

[20] *Australia's Foreign Investment Policy*, p 3

[21] *Australia's Foreign Investment Policy*, p 4

more such persons shall not have such interests exceeding 20 per cent in total.[22]

Cross-media rules

7.29 In addition, there are rules which straddle both the electronic and print media to promote diversity of control over media in the same area. Charts 7.2, 7.3 and 7.4 are a succinct survey of these provisions.[23]

7.30 In effect, persons are prohibited from exercising control of a commercial radio or television station (free-to-air or pay) and a mass circulation newspaper in the same 'market'. The penalties in the Act, however, are directed to the broadcast or television interests of the owner, not their newspaper operations.

7.31 However, it is worth noting that if the cross-media rules were meant to achieve a strict ownership separation between major information mediums such as print and television they have obviously failed to do so.

7.32 The largest shareholder in Channel 7 is Rupert Murdoch, easily the most dominant player in the Australian print media. Ownership of the most successful commercial television station Channel 9 has not stopped Kerry Packer from acquiring a 14.9 per cent stake in the Fairfax group.

7.33 Indeed by allowing cross holdings of up to 15 per cent the rules have simply encouraged major stakeholders to press for more. Rupert Murdoch recently made it clear that he would like to acquire at least a major holding in Channel 7 and there is little doubt that Kerry Packer would be very interested in being able to hold a controlling interest in both Channel 9 and the Fairfax organisation.

7.34 The 15 per cent rule is just as ineffective in relation to foreign ownership. Conrad Black continues to press the government to be allowed to increase his holding to at least 35 per cent and, if given a chance,

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[22] *Broadcasting Services Act 1992*, Section 57

[23] The Australian Broadcasting Authority (ABA) provided this summary of the operation of the cross-media rules to the committee at the public hearing on 11 February 1994, Evidence pp 109-110

majority ownership. As he told *ABC PM's* Peter Martin 'you cannot get enough of a good thing'.[24]

7.35 Similarly Canwest's nominal limit of 15 per cent direct voting interest in the third commercial television station has not stopped it from being widely regarded as being in effective control of Channel 10. This matter is taken up in the ensuing section.

[24] *PM*, 21 April 1993

Chart 7.2 - CROSS-MEDIA RULES

Free-To-Air Television

A person is prohibited from being in a position to exercise control of:

- a commercial **television** broadcasting licence and a commercial **radio** broadcasting licence that have the same licence area; or
- a commercial **television** broadcasting licence and a **newspaper** that is associated with the licence area of the licence; or
- a commercial **radio** broadcasting licence and a **newspaper** that is associated with the licence area of the licence.

Free-to Air Television - Directorships

- A person is prohibited from being a director of a company that controls, or companies that between them control, a prohibited combination of media outlets (TV/radio, TV/newspaper, radio/newspaper).
- A person who controls one or more commercial broadcasting licences or newspapers is prohibited from being a director of a company with media holdings, if, between them, the person and the company control a prohibited combination of media outlets (TV/radio, TV/newspaper, radio/newspaper).

Pay Television (Primarily Satellite Licence A)

- Controllers of large circulation newspapers may not control, or have more than a 2 per cent company interest in licence A.
- Controllers of commercial television broadcasting licences may not control, or have more than a 2 per cent company interest in licence A.
- Controllers of telecommunications carriers may not control, or have more than a 2 per cent company interest in licence A.
- The ABA, in consultation with the Trade Practices Commission, must monitor the cross-media ownership of the holders of non-satellite pay TV broadcasting licences in the context of the objects of the Act.

Chart 7.3

Newspaper

A newspaper is defined in the Act as a newspaper in English published on at least 4 days a week.

Associated Newspaper Register

Section 59 of the Act requires the ABA to maintain a register of newspapers which are associated with the licence area of a licence, ie where at least 50 per cent of the circulation of a newspaper is within the licence area of a commercial television broadcasting licence or a commercial radio broadcasting licence.

Large Circulation Newspaper Register

Section 105 of the Act requires the ABA to maintain a register of newspapers with an average daily circulation in Australia over 100,000.

Chart 7.4

Company Interests

These are a percentage of:

- a shareholding interest, or
- a voting interest, or
- a dividend interest, or
- a winding-up interest

held by a person in a company.

If the person has two or more such interests, the relevant company interest is whichever of those interests has the greater or greatest percentage.

Canwest - control and influence

7.36 The committee took a particular interest in the Canwest acquisition from Westpac of its interests in Channel 10. Under that arrangement, Canwest, an overseas company, acquired a 57.5 per cent interest in Channel 10 in the form of subordinated debentures, some of which are debentures convertible to shares. The Australian Broadcasting Authority (ABA) stressed that such an interest could be classified as a 'financial interest' but was not a 'company interest', because they have no voting rights. The committee was advised that the ABA was of a view that the arrangement fell within its Act, but that it was concerned about the 'actual control' of the channel, which it believed depended on one or a number of the following considerations:

- the composition of the board;
- right of veto by persons over board decisions;
- programming arrangements; and
- management arrangements.[25]

7.37 The committee found that Canwest was represented on the board of Channel 10 by two of its representatives both of whom have a media background.[26] Under the Broadcasting Services Act (Section 58) not more than 20 per cent of each commercial television licence may be owned by foreign persons, unless the ABA has approved a higher percentage, and that may be once only and shall not exceed 28 days. On the basis of the evidence given by the ABA, it would appear that Canwest, whilst it is not in a position to exercise control via a formal shareholding, has a significant influence over the corporate direction of Channel 10 as a consequence of the arrangement for it to have two board positions.

7.38 The committee's understanding of Canwest's interest in Channel 10 vis-a-vis FATA is that the debenture holders do have a financial interest in the company, but such an interest does not come under section 18 (acquisition of shares), section 19 (acquisition of assets) or section 20 (directorate of corporation) for the reason that a debenture is a loan not an interest which

[25] Evidence pp 111-115

[26] Evidence p 114

gives immediate and actual control. The committee was advised, however, that FIRB could rely on section 8 of FATA to examine those debentures which have an option for conversion to shares.[27] But the evidence points to the fact that the decision by Canwest to hold debentures in Channel 10 has ultimately given it a form of control. The committee believes that these sections of FATA require amendment to remove any doubt about whether loan arrangements, which result in control over print or electronic media organisations, should be the subject of normal FIRB procedures.

Recommendation 7.1

That the government prepare amendments to the Foreign Acquisitions and Takeovers Act and the Broadcasting Services Act which will ensure that limits on foreign ownership cover both economic (non-voting) and voting interests.

7.39 The committee endeavoured to confirm whether FIRB had considered the Canwest interest but, consistent with FIRB policy, was unable to gain information on this matter. Yet the chair of the ABA indicated that ABA had 'dealings' with FIRB in respect of Canwest.[28] The committee reiterates its view that it is extraordinary that such ex post advice cannot be given. Yet again, this highlights the need for FIRB to maintain a public register of all proposals which come under its regulatory net. This information, along with a list of rejections/approvals for all proposals, should be incorporated in FIRB's annual report which is tabled in the Parliament.

Foreign investment policy for newspapers

7.40 Newspapers have been identified specifically as a sensitive area since 1976 when the government policy was announced in the then Treasurer's statement:

> **We will restrict foreign investment in** certain basic sectors of the economy. These areas, some of which are already covered by legislation, are banking

[27] Mr B Bailey, Parliamentary Research Service Paper on 'Subordinated Debentures' prepared for the committee on 23 May 1994

[28] Evidence p 108

> (both savings and trading), radio, television, **daily newspapers** and certain aspects of the civil aviation industry.[29] [emphasis added].

7.41 This statement continues to reflect government policy though the level of acceptable foreign involvement in print media has been adjusted over time.

7.42 In the first edition of *Australia's Foreign Investment Policy*, newspaper policy was recorded as:

> All proposals for foreign investment in newspapers in Australia, irrespective of size of the proposed investment, are subject to a case-by-case examination. **Foreign investment in mass circulation papers is restricted.** Further, approval is not normally given to proposals by foreign interests to invest in ethnic newspapers in Australia, unless there is substantial involvement by the local ethnic community and effective control of editorial policy;[30] [emphasis added]

and the most recent edition in 1992 contains a similar statement:

> **Foreign investment in mass circulation newspapers is restricted.** All proposals by foreign interests to establish a newspaper or acquire an interest in an existing newspaper business in Australia are subject to a case-by-case examination irrespective of the size of the proposed investment. Approval is not normally given to proposals by foreign interests to establish ethnic newspapers in Australia, unless there is substantial involvement by the local ethnic community and effective local control of editorial policy.[31] [emphasis added].

Sources to ascertain government policies relating to newspapers

7.43 Australian government rules for foreign investment can be found in Acts of Parliament, media releases and Treasury publications. Market concepts about company control, ownership of shareholdings and voting rights are intermingled with social or public interest concepts of national interest and, more recently, of what is contrary to the national interest. For instance, with respect to foreign investment in daily newspapers, the regime

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[29] Treasury Submission No 16, p 6

[30] The Treasury, *Australia's Foreign Investment Policy*, AGPS, 1978

[31] *Australia's Foreign Investment Policy*, p 7

is contained in not only one Act but also in several media releases and the latest edition of the *Guide to Investors*. The FATA stipulates the Treasurer must approve individual foreign persons acquiring an interest in excess of 15 per cent of shares of an Australian company valued at $5 million or more. In the absence of other legislative provisions, the reader could be forgiven for believing an application for a smaller percentage is not required, but this is not the case according to the *Guide for Investors*. This misunderstanding did however occur in the 1991 Fairfax decision. Under the Act, the Treasurer may reject the acquisition if satisfied that the share acquisition would result in control passing to the foreign owner.

7.44 Obviously, the lay person's interpretation of the FATA and the government's stated policies contained in the *Guide to Investors* requiring notification of all applications (and not just applications for more than 15 per cent) in the print media sector, are at odds.[32] The committee observes that the use of both legislation and media release to communicate government policy has been criticised by authorities in the past. There are obvious grounds for avoiding a system that requires the community to search for its laws in other than the statutes. This point was taken up by the Australian Press Council whose chair, Professor Flint, submitted:

> If there were to be a level of foreign investment in the press, that should be determined by legislation, by the Parliament.[33]

Newspaper policy in the 1990s

7.45 Notwithstanding the lack of apparent legislative authority underpinning statements requiring notification of all applications, the

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[32] For example, *Australia's Foreign Investment Policy*, p 2 & 3:

a) The Government requires the following categories of proposals by foreign interests to be notified to the Foreign Investment Review Board.

b) Investment proposals not coming under the Foreign Acquisitions and Takeovers Act, but falling within the following category:

any proposals in the media sector irrespective of size

[33] Evidence p 426

government has announced through media releases, a number of decisions that appear to reflect a policy or, at least, a developed position on foreign ownership of newspapers. There remains the conundrum of whether newspaper foreign investment decisions to date establish a clear policy that future applicants can rely upon to guide their investment decisions.

7.46 The statements of the government which assert a case-by-case approach and the changes in the Fairfax shareholding thresholds accepted by successive Treasurers add weight to a conclusion that the merits of each application will be judged according to the circumstances of the day. The two announcements of approval in 1991 and 1993 for the Tourang consortium advised that the government would not permit higher share holdings than what was approved at that time.[34]

7.47 However, Australian Provincial Newspapers (APN) gave evidence which suggested that this system develops policy which binds the government to make a like decision for future similar applications. Speaking about the revised Tourang bid that mirrored the foreign ownership levels of the already approved Independent consortium, Mr Cameron O'Reilly said:

> But at the end of the day, again it was a mechanical process. As soon as they [Tourang] adjusted and revised their bid to the 20 per cent limit, they were approved as well.[35]

7.48 Similarly, when APN became aware of the then Treasurer's decision to increase The Telegraph plc stake to 25 per cent of Fairfax, Mr O'Reilly's family trust applied and obtained approval to increase its shareholding to that same level in APN. Mr O'Reilly and his family have a significant investment in Australia and are very familiar with the foreign investment processes.

7.49 The point is that as an experienced player, APN, believes that the principles of the 'rule of law' apply in foreign investment decisions; like decisions for like cases. Indeed, the media release from the then Treasurer Dawkins, on 20 April 1993, records an industry wide policy:

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[34] Media release by Treasurer Willis, 13 December 1991 and media release by Treasurer Dawkins , 20 April 1993

[35] Evidence p 320

> The government has decided to increase the maximum permitted foreign interest involvement in mass circulation newspapers by a single shareholder to 25 per cent.
>
> In considering this change in policy, the government has also made a decision on the foreign investment application for The Telegraph plc (Telegraph) to increase its interest in John Fairfax Holdings Limited (Fairfax) to 25 per cent.

7.50 The published position of the government, however, permits expedient decision-making and within this position, precedent is only one of a number of factors to be considered. The current policy provides scope for the government to decide differently for like applicants.

Conclusion

7.51 The committee believes the state of affairs described in this chapter is untenable and advocates a number of measures, which are recorded in chapter 10, to address this deficiency in foreign investment policy and procedures. It could be argued that the policy is untenable because it places in the hands of government a discretion to use its executive power to alter foreign investment percentages at its whim. This discretion may give, or be seen to give, a government power over the editorial content of newspapers. Essentially, this is what is alleged to have occurred in the 1993 decision. An unfettered and seemingly unaccountable discretion of this type over the ownership of the print media, a sector of the mass media highly regarded for its ability to shape political opinion, cuts across the long-cherished democratic ideal of a free and independent press.

7.52 The committee believes that in relation to print media ownership rules there is no place for a 'halfway house' policy. Either there should be no intervention whatsoever or there should be clearly established legislative rules which are administered openly and transparently.

CHAPTER 8

FOREIGN INVESTMENT ADMINISTRATION IN AUSTRALIA

8.1 The terms of reference for the committee include an examination of the guidelines of the Foreign Investment Review Board (FIRB). The committee's task is to examine the operations and procedures of FIRB and to determine whether that body satisfactorily administers Australia's foreign investment policies. This chapter examines the structures and procedures of FIRB.

8.2 It could be argued that, where it sees fit, government promotes FIRB as the formal administrator of its foreign investment policies. Though policy and administration are often intertwined in a bureaucracy (and that is especially so in respect of FIRB and foreign investment policy), the division of administration from policy is important in demonstrating that FIRB is an administrative structure chosen by government to advise it on the implementation of its policy. FIRB should be seen as more akin to a regulator implementing established policy, than a 'think tank' created to decide on policy options for problem sectors of the economy.

FIRB's functions are advisory

8.3 FIRB's functions are:

- to examine proposals by foreign interests for investment in Australia and to make recommendations to the government on those proposals;
- to advise the government on foreign investment matters generally;
- to foster an awareness and understanding of the government's policy in the community at large and in the business sector, both in Australia and abroad; and

- to provide guidance, where necessary, to foreign investors so that their proposals may be in conformity with policy.[1]

8.4 The Treasury and its staff emphasised the advisory function of FIRB which they contended established the master/servant relationship between the Treasurer and FIRB:

> The Board has no authority to take decisions either to approve or reject foreign investment applications.[2]

8.5 In evidence, Mr Hinton emphasised this point:

> ... FIRB is an advisory body. It provides advice to the government on the consistency of individual foreign investment applications with government policy. The board has no authority to take decisions either to approve or to reject foreign investment applications. It is for the Treasurer, or the Assistant Treasurer, and the government to make decisions on cases and policy.[3]

and again:

> ... FIRB is an advisory body only and does not make decisions on any foreign investment proposal, either for approval or rejection. It is for the Treasurer, Assistant Treasurer or cabinet - the government - to make decisions on proposals. At the end of the day it is not for any official or advisory body to make a decision about what is contrary to the national interest. It is open to the board - in fact it is incumbent upon it - to give advice to the Treasurer, Assistant-Treasurer and the government on the sorts of issues that are flagged by a particular proposal. It is the government's policy to assess it against the view, 'Is it contrary to the national interest?'. At the end of the day it is the Treasurer, the Assistant-Treasurer or the government who makes that fundamental decision as to whether or not it should be allowed to proceed under foreign investment

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1 Department of the Treasury, *Foreign Investment Review Board Report*, AGPS, Canberra, 1992-93, p 1

2 Treasury Submission, p 8 and supplementary submission of 20 April 1994. FIRB officers have the delegation to approve applications in certain sectors provided these applications comply with existing Government policy.

3 Evidence p 7

> policy. That is a very important part of foreign investment policy administration.[4]

8.6 The previous Treasurer, John Dawkins, emphasised FIRB's advisory role:

> So FIRB is not some mysterious body; it is merely a process by which the Treasurer, instead of being advised by, say, officials in the department, is advised by a [non-] statutory board about the particular application in respect of either the provisions of the Act or the provisions of the government's policy as announced.[5]

8.7 A former Treasurer, John Kerin, said of FIRB:

> They put the situation before me. That is the advice; the Treasurer does not have to take the advice of FIRB; the Treasurer does not have to give reasons for taking decisions.[6]

8.8 The committee accepts that the executive government should have, and has, responsibility for initiation and administration of policies relating to foreign investment, and that FIRB is an advisory body created to facilitate that process. However, the committee does not accept any implication that FIRB is in practice only an advisory body with limited impact on foreign investment policy.

8.9 FIRB assists the Treasurer to consider foreign investment applications that deal with both new and existing foreign investment policies. FIRB is involved in multi-million dollar recommendations that have the potential to, and have actually, changed the corporate landscape of Australia. The print media decisions alone saw the transfer of a totally owned Australian enterprise with a price tag of $1.5 billion to the control of foreign nationals. Few advisory bodies preside over systems that affect so dramatically the Australian economy.

8.10 FIRB is referred to as a 'Board'; it has prominent Australians as its members and it reports annually to Parliament. If the government was of a

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[4] Evidence of Mr Tony Hinton, p 36

[5] Evidence p 495

[6] Evidence p 460

mind to reduce FIRB's standing, it could have employed one or more FIRB members as private consultants and abolished the board. Instead, FIRB has been given a prominence and standing that has created a community perception that FIRB is both authoritative and an authority on foreign investment matters.

FIRB as an non-statutory body

8.11 FIRB is a non-statutory body (NSB). This means FIRB is not constituted under an Act or regulation. No reference to FIRB is found in the FATA or any broadcasting legislation. No reference to FIRB is found in any regulations associated with media-related legislation. FIRB was created following the then Treasurer's announcements in 1976, though 'the possibility of embodying policy in a comprehensive way in legislation' was identified as an important role for FIRB.[7] Similarly, establishing FIRB as a NSB was seen as an expedient though not long term option:

> Initially we will establish the Board by administrative action. It is proposed that it be given a statutory basis as soon as possible.[8]

8.12 FIRB operates on the same basis as other non-statutory bodies that report to their portfolio minister. FIRB sits at the same hierarchical level as all other less well known non-statutory bodies. Examples of bodies with the same non-statutory status include the Advisory Committee on Commemorative Reunions, the Agreement on Standards, Accreditation and Quality Monitoring Committee and the Innovative Agricultural Marketing Program Executive Committee.[9]

8.13 The informality of a non-statutory FIRB, however, is seen by its present members as a boon:

> **Chairman:** ... Are there any rules of procedure for the operation of the meetings of FIRB? Is there a constitution or any other governing document?

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[7] *FIRB Report 1977*, p 32

[8] *FIRB Report 1977*, p 31

[9] Senate Standing Committee on Finance and Public Administration, *List of Commonwealth Bodies*, Commonwealth of Australia, June 1993, p xii

Mr Hinton: The FIRB is a non-statutory advisory body and, therefore, does not operate under legislative guidelines, structures or strictures. The more informal nature of that body means that the operational processes for meetings of the FIRB depend significantly on the wishes of the chairman or acting chairman. Experience over the years has been that effective exchange of views and discussion of the issues at hand is facilitated more by an open, free-flowing discussion than a formalised board meeting. Being a small group it does not need very strict control over the operation of meetings.

Chairman: I take it from that that there are no written rules of procedure or constitutions.[10]

The FIRB and the Foreign Investment Branch of Treasury

8.14 FIRB has existed since 1976 and has developed a unique relationship with Treasurers. Since that time, membership of FIRB has remained remarkably stable. The late Sir Bede Callaghan, CBE, was Chairman of the Board from 1976 until 30 September 1992. Messrs Ken Stone and Des Halsted were first appointed in 1984 and continue to serve today. Mr George Pooley was the executive member for many years until replaced in 1992 by Mr Tony Hinton, also a career Treasury officer. Mr Graham Maguire, a former ALP Senator, was appointed in 1993 (and has not been involved in this inquiry). Mr Stone has been acting Chair since the resignation of the late Sir Bede Callaghan.

8.15 FIRB is the advisory body consisting of four members but the actual day-to-day administration associated with foreign investment applications is undertaken by 18 permanent public servants within the FIRB branch of the Treasury. In his evidence before the Senate Standing Committee on Environment, Recreation and the Arts, Mr Pooley, the then Executive Member and head of that part of the Treasury, explained the working relationship as:

> What we [the public servants employed in the Division] really do, I think is to prepare a draft minute to the Treasurer which we send to the [other members of the] Board and, to the extent that the Board wants to change it, then it changes it. That minute goes to the Treasurer. It is just sent to the Treasurer by us along with all other minutes that are going to him, but

[10] Evidence p 15

> it is on separate paper, headed 'Foreign Investment Review Board', and it contains all the views of everybody, including the views of the FIRB.[11]

8.16 In other words, the Treasury prepares a report after its own contact with the applicant and interested parties. 'The report is shown to FIRB which looks at the recommendation, reads the report and decides whether it wants to change the recommendation or to go along with the one that is made.'[12]

8.17 Over time, the staff within Treasury servicing FIRB have developed substantial expertise and have been granted considerable authority to administer the foreign investment regime. Treasury staff, for example, are used by applicants to sound out potential applications, to give advice on matters likely or unlikely to obtain approval. They also exercise the Treasurer's delegation to approve applications in some fields which comply with existing policy. FIRB and the Treasury staff assisting FIRB have separate and distinct roles that complement each other. The Treasury staff cannot be dismissed as a mere secretariat to FIRB itself. Rather it could be argued that Treasury staff are public servants employed to administer existing government foreign policy and facilitate the development of new or revised policy, where necessary, using FIRB as a mechanism to those ends.

Past FIRB experience in assessing newspaper applications

8.18 The first FIRB examination of the newspaper sector was of the proposal by News Limited to takeover the Herald and Weekly Times group in 1987. The Treasury submission records the government decision 'not to raise any objections to the News Limited's proposal after having considered carefully all the issues, having taken into account the views of state governments and the various representations received.'[13]

8.19 It would be accurate to say that commentators and sections of the community were greatly concerned about this outcome. When the John

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[11] Senate Standing Committee on Environment, Recreation and the Arts, Senate Printing Unit, Canberra, September 1992, *The Australian Environment and Tourism Report*, para 10.5

[12] Evidence to the Senate Standing Committee on Environment, Recreation and the Arts, op cit, p 168

[13] Submission No 16, p 7

Fairfax group went into receivership in 1990, many people believed this event offered an opportunity to revisit the issue of foreign investment levels in the print media. Instead, newspaper policy has been revised to reflect the outcomes of the applications by various foreign interests for shares in that newspaper group. That is, policy has been developed in a reactive manner. From a position of absolute restriction in the early 1980s, the policy flirted with total liberalisation in the late 1980s before moving to the compromise positions of foreign shareholdings of 20 percent in 1991 and 30 percent in 1993.

Change in the culture of FIRB over time

8.20 Anyone examining FIRB publications over time may be forgiven for concluding that the foreign investment regime has remained static since 1975. With the exception of different colours for each annual report and edition of the *Australia's Foreign Investment Policy*, the reports use the same language year in and year out. This was drawn to the attention of FIRB:

> Senator Kernot: I was very interested to notice that the three paragraphs on consultation arrangements in your annual reports have been the same for about five years[14]

8.21 The use of other almost standard passages gives an impression of continuity of policy. Indeed, the very similar quotes from the 1978 and 1992 *Guide to Investors* about newspaper application procedures can be interpreted as reflecting a continuity of policy when the opposite is the reality.

8.22 The rhetoric of both the government in media statements and the Treasury in its annual FIRB reports leaves the impression that the present watchdog regime monitors all foreign investment applications and moves against any undesirable applications. The reality is that the system has, with few exceptions, always retained the 'open slather' approach of the 1960s.

[14] Evidence p 12

Features of the FIRB regulatory system

Statistics

8.23 While the regime was never intended to block desirable investment, FIRB now administers a system that considered 3,825 applications, with the Treasurer or Assistant Treasurer rejecting a total of 58 in the financial year, 1992-1993. It is important to note that only a small proportion of applications is actually examined by FIRB members. During 1992-93 the Board considered and made recommendations in respect of 43 applications. It was given four 'post examination' copies of advice prepared by Treasury officers in respect of 971 cases, but did not sight material relating to 2,646 cases. During 1992-93 the Treasurer or Assistant Treasurer approved 172 applications and rejected 58.[15] The numbers of rejections for the last five financial years are comparable to the 1992-93 figure of 58. In other words, the approval rate is in the order of 98 to 99 per cent each year. Furthermore, 'most of the rejections were in the real estate sector and related to applicants failing to qualify for approval to acquire established residential real estate.'[16]

8.24 The dollar value costs and benefits could be expressed as FIRB having an operating cost of around $1 million each year applied to the approximately $100 million of undesirable foreign investment (mainly in the real estate sector) rejected by FIRB in 1992-93.

Methods of communicating policies

8.25 As explained in chapter 7, Australia's foreign investment policy is set out in the Broadcasting Services Act, the Foreign Acquisitions and Takeovers Act, and Ministerial statements and Departmental publications. The role of the legislation as the repository of foreign ownership rules has waned because new policy and revisions of old policy have been announced via irregular media releases by the Treasurer.

8.26 *The Foreign Acquisitions and Takeovers Act 1975* has been amended to reflect changes on only four occasions, while the *Trade Practices Act 1974,* economic legislation of a similar vintage, has been amended 43 times.

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[15] Treasury Supplementary Submission of 20 April 1994

[16] The Treasury, *FIRB Report 1992,* AGPS, Canberra, p 7

This comparison points to a general conclusion that foreign investment rules are neither recorded in one or even a series of Acts nor updated regularly following parliamentary scrutiny. Rather, foreign investment rules have been the exclusive province of the executive government.

8.27 Legislation by press release is a practice that has been the subject of adverse comment by Senate committees because the use of this mechanism has the potential to undermine the position of the Parliament in the legislative process. Unfortunately, a number of key foreign ownership policy decisions have been made in this way.

Application guidelines under FIRB

The process

8.28 Chart 8.1 depicts FIRB process. A number of points can be drawn from this depiction which are relevant to the committee's deliberations about FIRB.

8.29 The Treasury claims that much of the information required by FIRB to assess a particular proposal will be of sensitive commercial-in-confidence nature:

> All information provided to the Board and the Executive by foreign investors is treated in strict confidence and the Board and the Executive do not disclose details of proposals other than to the parties involved, except in special circumstances where the information provider's consent is first obtained.[17]

Domestic bids

8.30 The Treasury claims that a 'normal' report to the Treasurer on a foreign investment proposal includes:

> **views of** other Commonwealth and State government departments and authorities and information presented by the parties who may be opposing or otherwise affected by

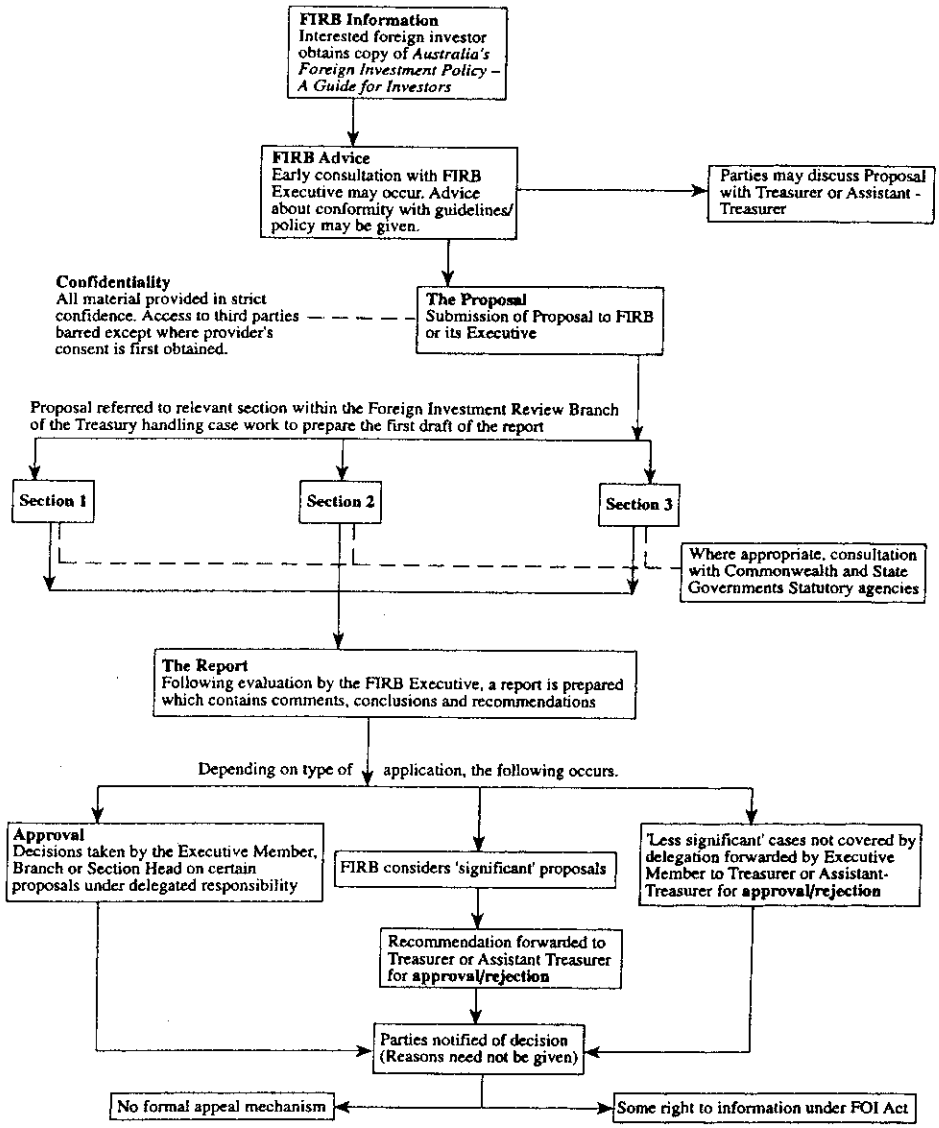
[17] Treasury Submission p 12

the proposal (e.g. the target company or **a competing Australia bidder**).[18] [emphasis added].

[18] Treasury Submission p 11

Chart 8.1

The FIRB Process*



* Source: Treasury Submission 2 February 1994

8.31 Whilst this might be the general policy, it is unclear whether FIRB has in place a communications strategy to inform Australian bidders on this matter. Also unclear are the procedures which FIRB uses to process Australian applications or submissions about a foreign investment proposal.

8.32 The Treasury publication *Australia's Foreign Investment Policy* lists the objectives of FIRB, defines what a foreign interest is, sets out the types of proposals which should be notified, describes how proposals are processed and states the government's policy in respect of overseas participation in key sectors of the economy. However, it is difficult in that publication to find any specific reference to the procedures that FIRB follows in considering domestic bids. It is not surprising that this matter has not been addressed in FIRB's official publication. The committee is of the view that within FIRB there is confusion about what FIRB's role should be in considering domestic bids alongside overseas bids.

8.33 FIRB's evidence on this matter is inconsistent in a number of respects. For example, FIRB stated that the AIN bid 'did not involve foreign interests and therefore, did not involve FIRB processes'[19] but Mr Breese from Barings stated that Dr Roberts, a FIRB case officer, contacted him seeking information on the AIN bid[20]. Similarly, the FIRB Minute of 5 December 1991 contained information, much of it erroneous, about AIN. To say that AIN had not become involved in the FIRB process borders on the unbelievable.

8.34 If FIRB has a view that officially it does not treat Australian bidders as part of a process to assess foreign investment, then any unofficial treatment, as appears to have happened in the case of AIN, could be seen as being contrary to national interest in that it encouraged foreign bids over domestic bids. Surely, in considering the national interest FIRB is obliged to assess properly the qualities of any domestic bidder.

Notification of reasons for decision

8.35 The Treasury stated that FIRB provides advice of the outcome of the Treasurer's decision to the parties, but that advice:

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[19] Evidence p 40

[20] Submission No 33

> is confined to whether or not there are objections to the proposal ... and to noting any conditions that may be attached to an approval. **Formal notification of the reasons for a decision by the Treasurer is not normally made,** although it is open for the parties to a proposal to request the reasons for a proposal being regarded as inconsistent with policy in cases where the proposal to rejected, or to request an explanation for any conditions imposed. Although **there are no formal or legal avenues for appeal** of a decision by the Treasurer or Assistant-Treasurer, it is open for the parties to a proposal that is rejected to seek its reconsideration as a new proposal on the basis of additional information bearing on the proposal or the modification of its features.[21] [emphasis added].

Excessive secrecy

8.36 The lengths to which FIRB/Treasury will go to protect the confidentiality of information provided in foreign investment applications was manifested during the public hearings. Mr Chadwick, representing the Communications Law Centre, said of his dealings with FIRB:

> What troubled us at times was that we would get answers like 'This is awkward and confidential and no, I cannot confirm or deny the existence of an application in this matter, notwithstanding that it is notorious in the press'.[22]

8.37 Mr Mark Ryan, of the Media Entertainment & Arts Alliance, commented that since 1986 he had found FIRB to be 'consistently secretive, inconsistent and probably irrelevant to the actual decisions that have been made. It has been secretive to the point of stupidity'. He cited an instance where the Board wrote to seek his consent for the release of an Australian Journalists' Association (AJA) submission made on The Herald Weekly Times takeover by News Ltd company. The AJA consented to the release, but according to Mr Ryan, the Board declined to release the papers, including those submitted by the AJA.[23]

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[21] Treasury Submission p 12

[22] Evidence p 440

[23] Evidence p 171

Freedom of information (FOI) data

8.38 FIRB's record in handling FOI requests, confirms its apparent obsession with secrecy and confidentiality. An examination of successive FIRB reports[24] reveals that its handling of FOI requests is at variance with its stated policy, and well below the norms for other Australian government agencies. FIRB's 1989-90 report states:

> Wherever practicable, requests for information are answered without applicants needing to have recourse to the provisions of the FOI Act.[25]

8.39 The 1989-90 report reveals that 50 per cent of FOI applications resulted in a full release and 50 per cent in partial release. The overall figures for years 1988 to 1993 are even less impressive with, on average, only 27 per cent fully released, 38 per cent partially released, 16 per cent withdrawn and 19 per cent rejected.

8.40 Public service-wide FOI release data for 1989-90 published by the Royal Australian Institute of Public Administration (RAIPA) reveals that 75 per cent of all requests were fully granted, 96.7 per cent fully or partially released and 3.3 per cent rejected.[26]

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[24] See Table 8.1

[25] *FIRB Report 1989-90*, p 9

[26] S Zifcak, Paper delivered to the Royal Australian Institute of Public Administration (RAIPA) (ACT Division) and Australian Institute of Administrative Law, at the *Fair and Open Decision Making: 1991 Administrative Law Forum.*

FOREIGN INVESTMENT REVIEW BOARD

FREEDOM OF INFORMATION REQUESTS

1985 - 1993

Table 8.1

Year	No of Applications Processed	Full Release	Partial Release	Withdrawn	Rejected*
1985-86	9			5	
1986-87	4				
1987-88	6				
1988-89	6	2	2		2
1989-90	4	2	2		0
1990-91	7	2	3	1	1
1991-92	6	1	1	3	1
1992-93	14	3	6	2	3
Total (1988-93)	37	10	14	6	7
Percentage (1988-93)	100	27	38	16	19

* Assumed rejected as Annual Reports for FIRB do not state that applications for documents were rejected. Instead it is claimed that applications for documents under FOI are outstanding as they are still before the Administrative Appeals Tribunal or time has lapsed.

Leaks

8.41 Paradoxically, when FIRB discovered that one of its most crucial and controversial minutes had leaked it elected **not** to take measures to establish the source of the leak. The Treasury submission indicates that a failure to maintain complete confidentiality would 'irreparably harm the basis of the Board's existence and curtail its usefulness'[27]. It is of interest to the committee that in being questioned about the leak, FIRB's Executive Member indicated that the broader considerations in taking a decision not to investigate the leak included the fact that the receiver's decision had been made and that, subsequently, the document had a 'shelf life' that had passed.[28] This revelation undermines considerably the Treasurer's insistence that each of the four FIRB minutes sought by the committee were of a 'public interest immunity' character. This evidence also suggests that FIRB's policy of blanket secrecy may not be justified.

Comparison of FIRB with other regulatory or review agencies

Handling sensitive and confidential material

8.42 To assist its understanding and appreciation of FIRB and its processes, the committee wrote to a number of other regulatory and review agencies, that operate in similar environments, to obtain statements of their *modus operandi*. The committee chose to limit inquiries to three such agencies: the Trade Practices Commission (TPC); the Industry Commission (IC); and the Australian Broadcasting Authority (ABA).

8.43 The rationale for selecting these agencies was straightforward. The TPC and IC are statutory agencies reporting to the Treasurer within the Treasury portfolio as does FIRB. The ABA administers the television and broadcasting regime and addresses print media matters insofar as 'restrictions are placed on participation in the Australian broadcasting media if certain interests are held in the Australian print media'[29]. The committee sought to canvass agencies with knowledge of:

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[27] Submission No 14 p 12

[28] Evidence p 590

[29] Evidence p 107

- the foreign investment review process;
- the specifics of print media;
- the culture of the Treasury bureaucracy; and
- the difficulties of conducting investigations testing what may be commercially sensitive material in the marketplace.

Trade Practices Commission (TPC)

8.44 Under the Trade Practices Act, the scheme of the confidentiality provisions entails putting all material submitted during the authorisation process on the Public Register, but confidentiality can be claimed by those providing the information for commercial concerns such as trade secrets etc. If the confidentiality is not granted, the client firm can withdraw its application.

8.45 In cases of non-statutory claims for confidentiality the TPC will examine whether the claim is genuine. The material from the TPC indicates that in examining these claims, often these claims are 'over cautious'.

8.46 Much of the TPC information becomes dated and some years later may not be confidential. As a consequence, the TPC will often give the public access to this material.

Industry Commission (IC)

8.47 Submissions to the Industry Commission (IC) may contain confidential information and the IC Act provides for the protection of such information. The IC explains to client firms the benefits of public information and sometimes such material is narrowed down and separated into an annex which is treated as commercial-in-confidence material.

8.48 Submissions to the IC are generally available to the public.

8.49 Public hearings of the IC are held and transcripts are made available to interested parties.

8.50 Commission reports are submitted to government and tabled in Parliament.

Australian Broadcasting Authority (ABA)

8.51 A significant amount of information collected by the ABA is of a commercial-in-confidence nature, presumably the balance of such information is not so protected.

8.52 On occasions the ABA publishes reports dealing with confidential information but every effort is made to ensure that the confidentiality is not breached.

Testing the validity and accuracy of information

8.53 The receipt of information which is then made available to the public provides any government agency with a useful and potentially rigorous checking mechanism. Should the information be provided on a less than fully public basis, the work of verification falls squarely on the shoulders of the agency making the report and/or preparing a recommendation for government. The three agencies responded to the verification question in the following way:

Trade Practices Commission

8.54 The TPC tendency is to make marketplace inquiries to verify material. Another layer of accountability in information processing and gathering is provided in the form of annual reports and other relevant publications, some of which are published in draft form to allow the public to verify and test certain data and conclusions.

The Australian Broadcasting Authority

8.55 The ABA tests data by seeking information from other parties who have access to the same data, by obtaining authorised copies of certain documents and by seeking additional information to substantiate claims.

The Industry Commission

8.56 The IC contends that it verifies data by discussing it with the participant and by entering into a process of public analysis which draws on the data in such a way as not to disclose it to the public.

Applications to FIRB

8.57 The procedures used by the TPC, ABA and the IC to verify and validate raw data could be successfully adopted by FIRB. This matter is developed further in the following chapters.

FIRB record keeping and internal processes

8.58 On a number of occasions during the inquiry the committee sought details of the listings of files and folios in relation to the 1991 and 1993 decisions. Following the receipt of the first list of files and folio documents the committee resolved that a further letter be written to the Treasurer to obtain his assurance that it had been given a complete list of the relevant documents. On the basis of the first list it seemed that the information provided only included the correspondence received by FIRB, the internal correspondence from FIRB to the Treasurer and a list of other publicly available documents such as press releases.

8.59 The Treasurer responded in such a way as to indicate that the committee had been given all relevant correspondence. What concerns the committee is the fact that there appears to be no notes to file relating to meetings between FIRB officers, no minutes of meetings/telephone conversations between FIRB officers and players in the Fairfax decision and no notes to file following telephone conversations between FIRB officers and the Treasurer's office. The committee is particularly concerned that there appears to be no support documentation of an internal nature to justify the conclusion reached by Mr Pooley in his Minute of 5 December 1991 about the qualities of the AIN bid. Another concern of the committee is that, in respect of a decision of enormous consequence to the control of the print media in Australia, there appeared to be no evidence of an exchange of ideas either amongst FIRB officers or between FIRB officers and FIRB members on the merits of a decision, other than the final Minute of 5 December 1991.

8.60 In short, there appears to be no documents or analysis on file to support the extraordinary comments made. This paucity of written information does little to assist FIRB's corporate memory, particularly as several of its former key senior officers have experienced difficulty in recollecting significant events.

The Committee's view of FIRB guidelines

8.61 The FIRB process can be characterised as 'one of administrative advice and executive discretion.'[30] FIRB is not subject to the *Administrative Decisions (Judicial Review) Act 1977* (ADJR) which means that a person aggrieved over a decision made under the *Foreign Acquisitions and Takeovers Act 1975* is unable to use ADJR provisions which include obtaining a statement of reasons for a particular decision. Although FIRB is subject to the *Freedom of Information Act 1982,* there is a range of grounds that the Treasury can and has used to claim exemption from disclosure of documents. The safeguards of Australia's administrative law have only limited application to FIRB and its processes.

8.62 As the Communications Law Centre (CLC) submitted:

> The Treasurer is not required to give reasons for a decision on how the national interest is affected by any proposal and has protected advice given by FIRB from public scrutiny under the Freedom of Information Act, by issuing a conclusive certificate. ... Neither the public nor an applicant has a right to make submissions on the question of the national interest, and the FIRB does not disclose details of proposals to anyone other than the parties directly involved.[31]

8.63 FIRB guidelines permit the system to be characterised as being politically rather than administratively driven with decisions that appear to be, at best, political pragmatism at its most blatant. The absence of reasons for a decision, the absence of independent appeal, the absence of transparent accountability and the absence of a body of decisions from which policies can be discerned make any other conclusion difficult to justify.

8.64 The interrelated issues of best administrative practice, natural justice and the absence of review of FIRB decisions and procedures are matters that are developed in chapters 9 and 10.

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[30] CLC Submission, p 9

[31] CLC Submission, p 9

CHAPTER 9

THE FIRB DILEMMA

9.1 The previous chapters of Part IV record the history and development of current policies and administrative practices dealing with foreign investment in Australia. Those chapters identify and discuss a number of features of the current system. This chapter identifies the flaws in that system and foreshadows the means for its enhancement. Chapter 10 contains a series of recommendations aimed at codifying policy and transferring certain responsibilities from the administrative arm of government to a properly constituted, autonomous body responsible to the Parliament for foreign investment administration.

Introduction

9.2 Changes are long overdue given that the Foreign Investment Review Board (FIRB) has not been the subject of a focussed external review in its 18 years:

> Senator Kernot: Has FIRB ever been the subject of an external review by, for example, the Auditor-General's department?
>
> Mr Hinton: Not to my knowledge[1].

9.3 However, the committee notes that FIRB has been the subject of a degree of parliamentary scrutiny by a Senate inquiry into tourism and a House of Representatives Select Committee on the Print Media. In neither case was FIRB the central focus.

9.4 The failure to review FIRB is contrary to government policies. In its response to another Senate committee, the government agreed that its future policy would be that:

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[1] Evidence p 56

> Reviews should be conducted every 3-5 years; they should address the need for the NSB's [non-statutory body - in this case, FIRB's] existence, and, if there is a continuing need for the NSB, its functions and organisation.[2]

9.5 This parliamentary committee is the first body to examine FIRB, reporting as it is, on the 1991 and 1993 Fairfax decisions. In the absence of any previous formal review it may not surprise that the committee did not discover an accountable, open body which consults widely on foreign investment matters. Instead, it found an informally constituted group with an excessive preoccupation with secrecy in its dealing with applicants and parliamentary committees.

9.6 The ability of the committee to identify and address the issues in its terms of reference was limited by the obfuscation of the Treasurer, Treasury and FIRB in this regard.

The government's right to govern ...

9.7 Underlying the Treasurer's instruction to members and ex-members of FIRB is the contention of the executive government, given voice in the repeated claims of public interest immunity in respect of matters for which incorrect advice may have been prepared, that this inquiry is a threat to the government's right to govern.

9.8 The committee recognises that there are those who consider elected governments should simply be allowed to get on and govern. This view asserts that governments should proceed to implement their election platforms without the need for consultation, presumably because they have all the answers to complex problems or, if that is not the case, then public involvement will only delay the government implementing whatever becomes a desired solution. This view further asserts that members of the community have their voice in government at election time only, and any subsequent parliamentary review is seen as unnecessary or politically motivated.

9.9 The unquestioned acceptance of such a notion is based on a simplistic and unfortunate view of the democratic process. Democratic participation in Australia is not limited to a vote once every three years from a limited list of candidates. Democracy is not just about one party winning an election

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[2] Senate Standing Committee on Finance and Public Administration, *Non-Statutory Bodies - Further Report*, AGPS, May 1988, p 33

with the unfettered right to govern and the electors enjoying the fruits or suffering the consequences of their choice. The committee believes consultation and accountability processes are very important factors in designing accountable public policy decision-making systems. The foreign investment regime in Australia is one such key decision-making system.

... versus the public's right to know ...

9.10 The committee is not questioning the right of elected governments to make certain decisions without having first consulted the community. Often, there is no practical alternative. The committee believes, however, that the right of the government to implement its policies must be subject to parliamentary review and public accountability. However, in the case of the Fairfax decisions, the government used a national interest criterion with no formal mechanism for assessing such interest.

What is wrong with the FIRB model

9.11 The previous chapters in Part IV describe a foreign investment system that was created by Commonwealth enactment. It was designed to address legitimate concerns of the Australian community about unrestricted foreign investment. The system can be described as placing some restrictions on sensitive sectors of the economy while encouraging investment in the remainder. In that sense, the system endeavoured to balance two, sometimes competing, imperatives; encouraging foreign investment generally; but at the same time flagging areas where investment should be discouraged so as to give preference to Australian ownership.

9.12 The committee believes that this system is fundamentally flawed. The problem is not that wrong decisions are made, but that the system detached itself from scrutiny, both direct public scrutiny and the vicarious scrutiny on behalf of Australian citizens performed by the Parliament. A viable decision-making system must be able to withstand the rigorous critique of players. It should not hide behind the artifice of secrecy to escape scrutiny. The possibility of corruption, deal-making or political favouritism will always exist in such an environment. A general election is an inadequate redress for parties adversely affected by apparently unsound foreign investment decisions.

Problems in the design and operation of FIRB

9.13 The foreign investment system has two serious flaws; one related to the system design and the other to its administration.

Parliamentary scrutiny

9.14 The essence of our parliamentary democracy is a system of checks and balances that operates to mitigate the exercise of excessive arbitrary power by any one arm or level of government. The scrutiny processes of the Houses of Parliament place a brake on the power of any executive that exceeds its powers. It could be argued that the foreign investment system was established by legislation, but that the system, in effect, permitted the executive government to make unilateral changes to the rules. While this mechanism may be expedient, it would appear that the government has used this power to avoid the original intention of the system as embodied in legislation.

9.15 Often, amendments to foreign investment rules are made by the executive via media release, and thereby avoid the processes of Parliament.

Public scrutiny

9.16 The other serious flaw is that FIRB has embraced a culture of secrecy that has become the by-word for its foreign investment administration. Proponents of the system contend that frank and candid disclosure by applicants to FIRB requires that a cloak of secrecy surround disclosure of that information to third parties in perpetuity. The flaw in this argument is that both for FIRB and for outside players, the verification of information becomes difficult, if not impossible.

9.17 The committee has cited the example of other regulatory agencies that operate effectively without the self-imposition of secrecy on their investigations. In the face of these examples of agencies operating even within the Treasury portfolio, FIRB and the government continue to argue for the retention of the present secret system.

9.18 The secrecy provisions permit FIRB to avoid being scrutinised by interested third parties who may well be able to provide different information. In embracing the purported fiduciary duty to preserve the secrecy of information supplied by applicants, FIRB exempts itself from the

best form of accountability, namely public oversight of its operations. It appeared in evidence that no-one was supposed to know what applications were before FIRB so the opportunity for critical third party comment was avoided or severely limited. Only the most interested person would lodge views with FIRB when that body neither confirms nor denies the existence of a particular application. In reality, FIRB only has to satisfy itself that the application meets the criteria and this process is administratively so much easier if consultation is excised from the system except in the extraordinary cases.

FIRB as a processor of applications

9.19 In successive annual reports FIRB attests to the speed at which it is able to process the thousands of applications received each year. The success rate of applications demonstrates the considerable ability of staff assisting FIRB to advise applicants to ensure compliance with the established criteria. It would appear that as a processor of applications, FIRB has few peers. Eighteen staff took 40,000 telephone calls and processed 3,800 applications in the financial year 1992-93.

9.20 However, this high volume of activity may have taken its toll in other areas, for example record taking, briefings, procedural reviews and reporting:

> **Chairman:** I take it from what you have said that there are no written rules of procedure or written constitutions. Has anyone sought to bring together the institutional memory of the process?
>
> **Mr Hinton:** Exercises like making our submission to this committee are useful, in that they provide opportunities to put down on paper the operations of FIRB. .... Therefore, this process - that is, this committee hearing and our submission to it - provides ... the history.
>
> **Chairman:** But no-one has sought to formalise that?
>
> **Mr Hinton:** The nature of the consultative process and the advice to government has not really generated a strong demand for that to be set in any sort of formalised system.[3]

[3] Evidence pp 15-16

9.21 The point is that FIRB and its support staff apparently do not recognise that recording its operations is a necessary function of sound administrative practice. The absence of even an outdated description of the activities of FIRB makes any review difficult, especially when confronted with an attitude that such recording is a distraction from the proper function of FIRB.

FIRB and print media policy

9.22 It appears that FIRB has significant difficulty when an application is lodged that does not comply with existing policy. This difficulty is not a reflection on the policy formulation skills of FIRB or staff assisting the FIRB, but rather it is an observation based on the processes undertaken by this body when dealing with the extraordinary application. How does a body, whose focus is processing proforma applications, deal with politically charged applications about the ownership of a media icon involving considerations not covered by established policy parameters? The John Fairfax decisions were prime examples of this dilemma.

9.23 FIRB knew that newspaper ownership was restricted as it had been written in every FIRB publication since 1975. The difficulty was in the interpretation of 'restricted'. For Rupert Murdoch, restricted had one meaning, for Robert Maxwell another. What did it mean for Conrad Black and Tony O'Reilly and what impact, if any, did the interests of the Australian consortium, AIN, have on the thinking of FIRB about the foreign consortiums?

9.24 FIRB did not have an accepted process set out in its statute to address the challenge of change. FIRB had to develop its own procedures to identify and discuss the issues arising from each of the Fairfax applications against the backdrop of the secrecy undertakings that have become part of its *raison d'être*. The difficulties for FIRB became apparent as it realised that newspaper ownership policy was a movable feast. The policy depends as much on the personal views of the Treasurer of the day as on the previously established policy. Each instance was resolved after months of negotiations, but made redundant upon the lodgement of a new application.

Accountability

9.25 Public consultation is a natural expression of the democratic process. That process legitimises final decisions. The challenge created by urgent, individual matters not contemplated at election time or included in party platforms is to decide them in an open and accountable manner. The urgent case still needs to be decided according to the principles of established policy or, at least, policy developed through public consultation to deal with the problem when identified.

9.26 The absence of consultation has the potential to create suspicion of the type which has been attached to FIRB in respect of the Fairfax decisions.

9.27 The committee's reservations on FIRB's accountability are highlighted by the FIRB document of 5 December 1991 from Mr Pooley to the Treasurer. This document demonstrates that a lack of accountability has resulted in FIRB producing a report containing grossly inaccurate information.

9.28 The committee emphasises that, in the first instance, this document was not released by FIRB or the government. Indeed, the government went to extraordinary lengths to avoid confirming its existence despite the fact it had been public for over a year.

9.29 The Minute dated 5 December 1991 which was leaked to the AIN consortium in January 1993 contains factual errors about AIN, and unsubstantiated assertions that were not tested with AIN.

9.30 Several witnesses, including the Acting Chair of FIRB Mr Stone and his fellow board member Mr Halsted, spoke highly of the work produced by the Treasury support staff. Mr Stone described it as the 'best reporting I have ever come across in my life', 'superb' and 'very deep'.[4] Mr Halsted supported those comments and added 'absolutely first class'.[5]

9.31 As the Minute of 5 December 1991 is the only document of FIRB recommendations to a Treasurer known to have leaked into the public

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[4] Evidence p 607

[5] Evidence p 607

domain in FIRB's history, the committee is able to comment only on this one document as an example of FIRB's quality of analysis and recommendations. The committee finds that it falls well short of the standards suggested by the current board members.

9.32 The government has defended the FIRB minute on two grounds:

- that the FIRB minute was not reporting to the Treasurer about AIN; it was about the two competitive foreign consortiums, Tourang and INP; and
- that FIRB comments had no bearing on the receiver's ultimate decision to determine the successful bid.[6]

9.33 The committee believes that the FIRB report raises the following questions:

What other unsubstantiated statements or factual errors exist in this or other FIRB material?

Why was the AIN bid not assessed in the context of the "contrary to the national interest" test which could have seen the only Australian bidder given preference over the foreign bidders by rejecting Tourang and INP?

What value can future Treasurers place on an advisory body that produces work so patently inaccurate?

If the Treasurer does not rely on FIRB for foreign investment advice, who does he rely upon for such critical advice?

9.34 These questions only give greater force to the demand that FIRB disclose all relevant materials, at least on an 'in camera basis' and answer its critics in the open forum of this committee. They also point to what is the ultimate question, the credibility of FIRB in future foreign investment decisions.

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[6] Attachment 5 of the AIN Submission contains a complete set of the lopsided correspondence between the Government and that disgruntled bidder

9.35 No other FIRB documents conveying advice to the Treasurer have been released by the government. Therefore, the committee has no evidence supporting the capacity of that body to arrive at cogent and defensible conclusions.

The way forward is to start again

9.36 The ultimate check on any administration is public opinion and scrutiny. This is only effective if there are structures and systems to ensure the public is properly informed. Secrecy is an impediment to accountability which can divert and even corrupt decision-making processes. The safety net of a review by the Parliament has also been avoided by the present system for foreign investment. The withholding of material evidence only demonstrates the absence of accountability and heightens concern as to the effectiveness of the process and procedures observed in this case.

9.37 The committee believes that the entire foreign investment process in Australia requires dramatic structural and procedural changes to be undertaken as soon as practicable.

CHAPTER 10

A REVAMPED FIRB

Overview

10.1 The terms of reference direct the committee to review the procedures followed by the Foreign Investment Review Board (FIRB). The committee obtained evidence about the operation of the current foreign investment policy and some valuable criticisms of present practices. However, the committee has only obtained limited evidence on desirable changes to the system. The views contained in this chapter reflect the collective experience of committee members, who in the course of their parliamentary duties examine the administration of public sector structures, and the insights of witnesses. The scope of this inquiry, the limited timeframe in which it has been conducted and the reluctance of the government to canvass before the committee options for reform, have combined to restrict the capacity of the committee to present as detailed a plan as would have been desirable.

Basic aims of foreign investment policy

10.2 The initial focus of any review of any of FIRB's procedures should be on the basic aims of foreign investment policy. This is a precondition for any rational discussion of plans to restructure the present system. There is a clear consensus in the community for the retention of some form of foreign investment control in Australia. Any changes to foreign investment systems should focus on the nature of the controls.

10.3 Views of witnesses and members of the committee on the desirable features of the controls vary substantially, but there is a common desire for a system that provides for the reasonable access of foreign investors, while upholding Australia's right, based on 'national interest' concerns to preserve certain industry sectors. This is consistent with OECD practices referred to in chapter 7.

10.4 The committee also discerns the world trend since the 1970s towards an even more open system. FIRB reports record increasing liberalisation of foreign investment policy in Australia.

10.5 For some people, the objective in a perfect world would be that the system be open. In the 1990s, however, there is strong public support for the

maintenance of regulatory 'checks and balances' on foreign equity investment. This was alluded to in chapter 7.

10.6 The policy statements of the four political parties represented by member Senators on this committee recognise the desire for sensible and realistic controls on foreign investment, and all believe the continuance of a regulatory body is warranted. Similarly, the players in the John Fairfax saga accepted the existence of a set of rules and endorsed that framework.

10.7 Even within the divergent views of the foreign investment experts who gave evidence, the common thread is a call for a more open and accountable process:

> **Prof Stilwell:** I would like to see restructuring so as to permit a wider array of community interests to be represented in that process rather than allowing the decisions to be retained effectively by the Treasurer.
>
> **Chairman:** What about the Treasurer publishing reasons for a decision?
>
> **Prof Stilwell:** I would welcome that.[1]
>
> ooo
>
> **Dr Craik:** ... we do need a transparent policy process that is accountable. I understand the problem with confidential business information ... but I would have thought there are ways around that kind of matter as there are in courts of law.[2]

10.8 Dr Robertson, a champion of deregulation of foreign investment controls, argued the advantage of permitting the market mechanism to determine matters; 'if a firm makes a mistake the market will tell them'[3]. The market mechanism requires accurate and timely information for all participants to make their judgements. In that sense, the market mechanism is open and transparent and is the antithesis of a closed system where only selected parties are informed of decisions and benefit from that information.

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[1] Evidence p 101-2

[2] Evidence p 376

[3] Evidence p 75

10.9 Media industry experts like the Australian Press Council and the Communications Law Centre (CLC) hold similar views:

> We [the Australian Press Council] proposed that if - I stress the if - there were to be a level of foreign investment in the press that should be determined by legislation, by the parliament. Any decisions taken in relation to the refusal or acceptance of a proposal concerning foreign investment should be subject to review by the courts.[4]

> In our [the CLC] view the ideal structure for these matters [FIRB process] would have the following characteristics: that notice be given; that consultation occur; that there be more transparency - in particular disclosure of decisions and reasons for them - and that there be opportunity for challenging decisions.[5]

10.10 The committee believes that a system of control continues to be warranted in the 1990s and beyond. The aims of the system should remain the same; they must encourage desirable foreign investment while preserving declared areas of our economy from undesirable foreign interest and/or loss of strategic control. The question becomes the method of giving effect to these aims.

Restructure of the system

The features of the revised regulatory system

10.11 The major thrust of this part of the report is a call for greater accountability and consultation in the foreign investment regime. The committee believes that an appropriate mechanism to bring about changes to the present system should involve public consultation and a commitment by the government to that process. The following recommendations are aimed at setting an agenda for this process of consultative change. Ensuring that this debate encompasses a wide audience through an open process will go a long way toward addressing the problems identified in this report. The process should be initiated via the introduction of legislation in the Parliament to facilitate critical and representative debate by all political parties.

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[4] Evidence of Prof Flint p 426

[5] Evidence p 439

Recommendation 10.1

That the government introduce legislation in the Parliament to amend Australia's foreign investment laws in accordance with the recommendations of this report.

Setting the legislative scene

Need for a single statute for foreign investment policy

10.12 In its 1988-89 report, FIRB reports on 'Changes to Foreign Investment Legislation':

> In keeping with the long-standing foreign investment practice, and to maintain flexibility and avoid excessive legalism, the criteria for examining proposals notified pursuant to the legislation continue to be set down by way of Ministerial statement and published in guideline form.[6]

10.13 There are numerous reasons for consolidating foreign investment policies in a single statute rather than the present combination of aging legislation, Treasurer's media releases and FIRB publications. Traditionally, the community looks to the statutes for its laws rather than relying on media reports of changes to policy and guidelines issued irregularly and infrequently. The Tourang experience, in structuring its original bid for Fairfax around its interpretation of the existing legislation, demonstrates this point. The cost of preparation of foreign investment applications requires greater certainty and clarity in defining policy and procedures. The existing uncertainty and red tape adds to business overhead costs, which ultimately are borne by the community at large. The difficulty for the community in complying with rules not freely available has been the subject of numerous parliamentary committee reports.

[6] *FIRB Report 1988-89*, p 1

Recommendation 10.2

That the government incorporate all components of its foreign investment policy into a single statute.

Identify key sectors

10.14 The present system identifies specific requirements for certain industries and types of foreign investment. The committee accepts that the current structure of the legislation remains an appropriate model for the new statute:

> The process of notification, examination and recommendation seems to me perfectly sound ...[7].

10.15 The statute should specify exemptions or limitations and the statutory tests and sanctions that apply to each sector.

Recommendation 10.3

That the legislation include a comprehensive statement of the goals of foreign investment policy and identify those sectors of the economy which should be subject to foreign investment regulations.

Signposts for the 'national interest'

10.16 The committee acknowledges that the present test of 'contrary to the national interest' has not been defined previously because of the perceived difficulty in anticipating all possible permutations and scenarios[8].

10.17 In the words of one witness, Mr Cameron O'Reilly of AIN:

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[7] Evidence of Prof Stilwell, p 100

[8] Evidence of Mr Hinton, p 29-30 and p 57 explains the difficulties and indicates that a set of criteria is not available

> It seems to me it is not a job I would particularly like, to be trying to define what is and is not in the national interest. So I think there will always be a certain amount of mystery...[9]

10.18 In chapter 3, other witnesses gave evidence of where this definition resides, namely, in the mind of the Treasurer. Whatever the proposed review process identifies as the appropriate test or tests in the new legislation, the clients will be better served by clear and unequivocal statements of legislative intent. The thousands of applications considered since the change of the test in 1986 should assist the legislative drafters and instructing officers to distil those precedents and draft new sections of the Act that could help to define or exemplify the revised tests. The task may be a difficult one, but the many precedents suggest it is possible.

10.19 Should the matter prove too difficult to incorporate in legislation, the committee believes that the administering body should, at the very least, publish its views on the matters relating to the 'national interest'. Other government agencies facing similar tasks have assisted their clients by providing written information and interpreting legislation; thereby identifying what applicants can do safely and what conduct is at risk. For example, the Australian Taxation Office and the Trade Practices Commission have produced useful interpretative material on the application of their respective statutes.

Recommendation 10.4

That the legislation contain the criteria which should be used to determine applications by foreign investors and that it should also provide, where appropriate, that the interests of domestic bidders be taken into account.

Review sanctions and remedies

10.20 *The Foreign Acquisitions and Takeovers Act 1975* includes criminal sanctions of fines of $50,000 or 2 years jail for breaches by individuals and fines of $250,000 by corporations. The legislation also contains administrative

[9] Evidence p 325

mechanisms permitting the Treasurer to issue wide-ranging orders to remedy problems in specified circumstances.

10.21 While these sanctions appear to 'cover the field', the committee observes that the Treasurer has not exercised his powers under the Act except on three occasions. On two of these occasions, the Treasurer issued divestiture orders under the Act requiring foreign persons to dispose of their interests in residential real estate within six months from the issuance of the orders.[10]

10.22 The committee believes that any regulatory system is only as effective as the appropriateness of the remedies to redress breaches and the capacity of the regulator to conduct compliance activities. The absence of resolve or capacity to use the sanctions is a matter addressed in a later recommendation. It may be that the current sanctions are appropriate, but their lack of use suggests that this matter should be examined by the government in preparing its legislation.

10.23 In preparing the legislation, it is possible that the government might find that the sanctions are adequate but that the fact that compliance enforcement is restricted to the office of Treasurer, limits overall compliance resolve. In Australian competition law, some civil remedies are available to parties other than the Minister and the regulator. Australian competition law has generated a strong incentive to avoid breaches because those affected by anti-competitive conduct can take legal action. Injunctions and damages actions by aggrieved parties offer an opportunity for industry regulation not envisaged under the present regime. The changes to foreign investment policy should encompass the appropriate sanctions together with the classes of litigants permitted to apply for redress.

[10] Treasurer's Press Release No 150 of 24 November 1993

Recommendation 10.5

That the legislation to reform foreign investment rules reflect a realistic and appropriate range of sanctions to remedy possible breaches, and that there be a duty on the part of the administering body to monitor and enforce compliance.

Need for clear consultation processes

10.24 Based on its experiences during this inquiry, the committee believes the legislation should clearly state the procedures necessary to guarantee consultation.

Recommendation 10.6

That the legislation include procedures that the regulatory body should adopt to consult with applicants and other interested parties preparatory to it exercising any administrative discretions conferred by the statute.

Balancing publication and confidentiality

10.25 An integral feature of the present system is the requirement to maintain the confidentiality of information supplied by applicants. To do otherwise would breach the duty created when accepting the 'commercial-in-confidence' information. The committee does not accept that the system should be predicated on such 'in perpetuity' secrecy undertakings.

10.26 To gain a better understanding of the problems that other government organisations encounter in receiving, handling and making decisions on information which might be of a confidential nature, the committee surveyed the Trade Practices Commission[11], the Australian Broadcasting Authority[12] and the Industry Commission[13]. Each of these organisations

[11] Submission No 31

[12] Supplementary Submission of 18 April 1994

has a legislative charter which requires that they gather information that might be classed as confidential. These agencies come into contact with commercial material which has the same general features as that which is encountered by FIRB. Some of the material pertains to the corporate strategy of the client firm, other material is of a pre-contractual nature and other material might include costing and pricing data. In many instances the corollary of the receipt of 'in-confidence' material is that decisions based on that material should also be made in a veil of secrecy. The committee upholds the view expressed in the TPC submission that confidentiality should be an emergency process to protect commercial interests and should not be invoked to protect the deliberations of a government agency.[14]

10.27 Each of these agencies is able to operate in a way which strikes a balance between the rights of the three parties: the client firm, and the government agency are able to preserve a degree of confidentiality, and at the same time allow the community an acceptable degree of access. From the material submitted by these three agencies, the following 'best practices' are particularly worthy of serious consideration. What is important in respect of these agencies is that, unlike FIRB's procedures, there is no automatic prior assumption that the mere labelling of material as 'confidential' will ensure that it will never be released.

Recommendation 10.7

That the legislation provide that all applications and accompanying documentation would be accessible to the public after 12 months unless the affected party was able to demonstrate that the public interest required such material to be kept confidential.

Getting the administering agency right

10.28 The preceding recommendations are relevant to the legislative reform and address broad policy concerns. The next series of recommendations may also require incorporation into the statute, but focus on the role and functions of the body administering foreign investment regulations. These

[13] Submission No 30

[14] See also AIN supplementary Submission of 19 April 1994

recommendations address the means by which the regulatory body will implement the rules embodied in the legislation.

A Foreign Investment Commission (FIC)

10.29 FIRB was originally envisaged as eventually becoming a statutory body.[15] It is now time for that event to occur. FIRB should be replaced by a new independent statutory authority to be known as the Foreign Investment Commission (FIC). FIC would assume responsibility for administering foreign investment policies; making decisions on applications in non-key sectors; and referring proposals involving key sectors to the Treasurer accompanied by recommendations which would be made public. The print media industry would be one of these key sectors.

10.30 Parliamentary scrutiny, good administrative practice and the recommended public interest litigation functions of FIC require that this body be created by statute.[16]

Recommendation 10.8

That the new statute contain provisions establishing an independent statutory authority to be known as the Foreign Investment Commission (FIC) which will replace the non-statutory FIRB.

The role of the Foreign Investment Commission

10.31 As stated in chapter 8, FIRB is assisted by an executive which is part of Treasury. In 1992-93, this Branch of Treasury employed 18 staff who handled 3,825 proposals and something like 40,000 phone inquiries.

10.32 The picture created by these measures of the work of FIRB and their staff is that of an organisation processing increasing numbers of applications.

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[15] Statement by Treasurer, Hon P Lynch, to House of Representatives, 1 April 1976

[16] The committee notes that on 17 December 1992 the Australian Democrats tabled a draft Bill which inter alia provided for the establishment of a statutory Foreign Investment Review Commission intended to replace FIRB - Senate Hansard, 17 December 1992, p 5322

FIRB annual reports refer to a reduction in the average time taken to process an application and the increase in the average number of applications dealt with by staff each year. These productivity improvements in processing applications, however, have been achieved at the cost of other functions of FIRB.

Senator Kernot: Some of the approvals are made with conditions. Is that right?

Mr Hinton: That is correct ... .

Senator Kernot: Who follows them up? How do you do it?

Mr Hinton: With difficulty. ... We do not have the resources to examine in detail real estate acquired for construction of a house within, say, 12 months time if there are several thousand a year ... .

Senator Kernot: With the best will in the world, how can you really find the time to investigate compliance and follow through properly? ... You do not have the capacity to **initiate** the follow through properly, do you? [emphasis added]

Mr Hinton: ... We do not have a so-called foreign investment police force out there ... . The important consideration is that if they are found to have not complied with that condition, the powers of penalty and divestiture are very substantial.[17]

10.33 A later exchange established that sampling is not undertaken to establish levels of applicant compliance with imposed conditions.

10.34 FIRB and its support staff exhibit a culture somewhat removed from that of a regulator. The committee observes that:

- Senior staff deplore the notion of active policing of the conditions imposed on approved applicants.

[17] Evidence pp 52-55

- Litigation for a breach of the Foreign Acquisitions and Takeovers Act (FATA) has never been instituted.

- Legal doubts about the administrative powers of the Treasurer in the FATA were not redressed until amendments in the late 1980s with the result that only three divestiture actions have been undertaken in almost 20 years of operation.

10.35 Laws creating an administrative system to benefit the community are only as good as the will to see those laws enforced. Without adequate resources and enforcement skills, the regulator charged with administering the laws cannot operate effectively and compliance with the laws will be diminished. FIC will need to address the appropriate balance between regulator and processor.

Recommendation 10.9

That the legislation establish the FIC as a regulator, as opposed to an 'application processor'.

Joint role of FIC and the Treasurer

10.36 There will need to be a clear delineation between the powers of decision-making vested in FIC and those which would remain with the Treasurer. The legislation will need to identify those classes of decisions which will be made by FIC. Those decisions to be made by the Treasurer would be first considered by FIC with a view to formulating a recommendation to the Treasurer.

Recommendation 10.10

That FIC be empowered to make binding decisions in respect of certain categories of applications, applying the tests established under the Act and that the Treasurer, on FIC's recommendation, make decisions in respect of more significant applications, for example, those in key sectors. These decisions would be made according to the national interest and would be accompanied by a statement of reasons.

Recommendation 10.11

That for those categories of decisions to be made by the Treasurer, FIC prepare briefing material and recommendations and that this material be published prior to its dispatch to the Treasurer.

Recommendation 10.12

That FIC maintain a public register of all foreign investment proposals and decisions and that the register of proposals and decisions for each financial year be included in the FIC report which would be tabled annually in Parliament. The register would be limited to providing details of the receipt and status of applications.

Review of FIC decisions

10.37 It is in the national interest that FIC decisions be subject to administrative law and/or judicial review.

Recommendation 10.13

It is essential that in protecting the interests of all parties, any review process be both speedy and effective. It is therefore recommended that the legislation provide that decisions of FIC be subject to the processes of administrative law review.

FIC's communications strategy

10.38 Foreign investment is a subject which continues to stimulate public interest and debate. It is essential that this debate be well-informed and mature. Any new regulatory body will need to prepare written material which reports on policy developments, outlines topics of national concern, communicates key FIC and government decisions, and reports sectoral trends in foreign investment.

10.39 FIRB's annual report attempts to do this, but its effectiveness is limited by its timing (publication once yearly), and style, which is overly bureaucratic. Likewise, FIRB's *Guide for Investors* also has a strong bureaucratic/procedural focus. It is worth noting that Investment Canada, Canada's equivalent to FIRB, publishes a twice-yearly newsletter entitled *Investors in Canada.* This document reports on topical foreign investment cases, industry forums and statistical developments.

Recommendation 10.14

That the legislation require FIC to prepare an ongoing communications strategy. This would be included in its annual report to Parliament and comprehensively address the information needs of both potential foreign investors and the Australian community.

PART V

VIEWS EXPRESSED BY DR HEWSON

This part deals with the final substantive reference of the committee which was 'the views expressed to Mr Conrad Black by the then Leader of the Opposition, Dr Hewson MP, on foreign ownership in the print media of Australia'.

CHAPTER 11

THE VIEWS EXPRESSED TO MR CONRAD BLACK BY DR HEWSON

11.1 In his autobiography, Mr Black made the comment that:

> The Leader of the Opposition, the rather Thatcherite and intelligent Dr John Hewson, had already promised that if he were elected he would remove restraints on our ownership.[1]

11.2 The government commented on this allusion by Mr Black, comparing it to the 'balanced coverage' statement and insisting that Dr Hewson be called to account for the views which he may have expressed to Mr Black. However, Mr Black's version of those conversations had already been aired long before the publication of his book. It was through the Prime Minister that Mr Black's version of the meetings with Dr Hewson was first transmitted. As early as October 1992, Mr Black apparently had conversations with the Prime Minister regarding his meetings with Dr Hewson. In October 1992, Mr Keating was using the hearsay of Mr Black in order to criticise the then Leader of the Opposition:

> ... Keating ... declared the Opposition had given a promise that Black could own 100 per cent. Pressed by Mulholland how Keating knew this, Keating responded that Black had told him.[2]

11.3 Mr Keating has continued to use Mr Black's conversations with him as a premise for frequent allegations that Dr Hewson promised Mr Black varying percentages of ownership:

> Now, Conrad Black told me expressly on a number of occasions, he said: 'John Hewson has made it very clear to me that he is completely relaxed about how much of the stock we own. They don't regard foreign investment as an issue at all.' And I said: 'What, he will let you go to 100 per cent?' And he said: 'Yes, but I don't need 100 per cent, I just need a majority of the stock.' Now, I repeated that to a lunch of Fairfax editors late last year where there was Mike Steketee, and Ross Gittins and Max

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[1] *A Life in Progress*, p 453

[2] Tom Burton, 'Canberra Insider', *The Sydney Morning Herald*, 24 October 1992

Walsh, and hosted by Mr Mulholland. So, I mean I am not just wise after the event. I said it at the time, when it wasn't, in a sense, newsworthy.[3]

ooo

Oh no, I had a conversation with him late last year when John Hewson had offered him 50 per cent equity in John Fairfax & Sons, and I said to him, "Oh, I wouldn't consider that."[4]

ooo

He said to me in the course of conversation that the leader of the Opposition had offered him an unlimited amount of stock in the company. He said, `He's offered me the right to buy the company'. I said, `What, 100 per cent?' He said, `Well, he put no limit on it, but I only need 50 plus'.[5]

ooo

... he told me that he could buy up to 100 per cent on the say-so, with the agreement of John Hewson, but he didn't need 100 per cent, something over 50 per cent would be enough for him.[6]

ooo

He is the man who promised Black 100 per cent stock in John Fairfax.[7]

11.4 Mr Keating has repeatedly alleged that the version of the conversations reported to him by Mr Black is accurate and that Dr Hewson would not appear before this committee:

He's offered 50 up to 100, unlimited, and now he is backsliding on a Senate committee because he knows if he goes he will need to perjure

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3 *Lateline*, 29 November 1993

4 Transcript of interview with the Prime Minister, the Hon P J Keating MP, Seattle, USA - Thursday 18 November 1993

5 House of Representatives Hansard, 24 November 1993, p 3540

6 *AM*, 26 November 1993

7 House of Representatives Hansard, 24 November 1993, p 3545

himself when questioned under oath about whether he offered control of John Fairfax and Sons to Conrad Black.[8]

11.5 On the matter of attendance before this committee, the two leaders had this exchange in Parliament:

> **Dr Hewson:** Are you appearing?
>
> **Mr Keating:** Listen, brother, I know my place in the world. I do not slum it before Senate committees.[9]

11.6 Contrary to the Prime Minister's predictions, Dr Hewson did appear before the committee. Moreover, his version of events was corroborated by another witness, Mr Warwick Smith. Mr Smith gave evidence about the meeting in July 1991 with Messrs Black and Kennedy which he attended with Dr Hewson. He said:

> ... the position of the Liberal Party was made clear to him with the concentration being, at that stage, on cross-media ownership rules.
>
> As the matter unfolded, there was an article in *The Sydney Morning Herald* on 24 October 1992 in which it was suggested by the Prime Minister - Mr Keating - that the opposition had promised Mr Conrad Black that he could have 100 per cent ownership in Fairfax. When he was challenged by Mr Mulholland, he said that Mr Black had told him this. I responded in the Parliament on 3 November 1992 to this allegation in the following terms:
>
> 'I do not know anything about that. I think it is an outrageous allegation and I would totally reject it.'

Mr Smith went on to say:

> A year later, on 24 November, Dr Hewson, in the parliament arguing these matters following the publication of Mr Black's book, stated:
>
> 'I have never given that commitment.' This was concerning the increase.
>
> 'If he had the decency to go back to the Hansard when those allegations were first made at the end of last year he would read that the then shadow

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[8] *AM*, Friday 26 November 1993

[9] House of Representatives Hansard, 24 November 1993, p 3545

minister, Warwick Smith, denied in this place that there was ever a commitment to go to 100 per cent.'

Throughout this period the decisions, as far as I am aware, were consistent with the original policy and were consistently restated by me on every occasion.[10]

11.7 When he appeared before the committee Dr Hewson restated the policy as he had put it to Mr Black:

We have no specific limits, because they do not work. We will assess all proposals on their merits. We will assess those proposals against their impact on the national interest. The onus is really on those who are making the application, or would be if we were in government, to argue their case as to why it would be beneficial to Australia's national interest to have a higher level of foreign ownership in some area of the media. That is why, when this government increased the Black shareholding from 15 to 25, I put out the statement: 'Please explain how it is that you justify the extra 10 per cent on the basis of the national interest. What do we gain, how is it explained?' One of the reasons for this inquiry is that it has never been explained.[11]

11.8 Mr Black gave the following account of the meetings:

I have had three meetings with Dr Hewson. The first one was in July 1991, a couple of days after my famous meeting with Mr Hawke which I will comment on in a minute. Also present were Warwick Smith and Trevor Kennedy. The great concern of the Leader of the Opposition about the Tourang consortium was cross-media ownership. He was concerned about Mr Packer's presence and how much influence he would have. He was quite clear that foreign ownership was not a leading issue with him at that time.

The second meeting I had with Dr Hewson was in February 1992. There were a number of witnesses present including the former Chief Justice of this state, Sir Laurence Street, a Fairfax director. Dr Hewson volunteered that he had no objection, and his party had no objection, and that in the event that they formed a government they would have no objection, to our taking 50 per cent or more of Fairfax. He made it absolutely clear that it was not a sensitive issue with him - just as you, Senator Alston, made it clear when you telephoned me here in Sydney on 19 November that you

[10] Evidence of Mr Warwick Smith, p 714

[11] Evidence pp 732-733

were, in your words, 'relaxed about the issue', as were your party and its leader.

The last meeting I had with Dr Hewson was on 24 August 1992, and again Sir Laurence Street and a number of others were present. We touched lightly upon the subject. He reiterated his and his party's position that they had no objection whatever to our going to 50 per cent or higher, as shareholders in Fairfax. I wish to emphasise that there was absolutely no question of a quid pro quo. There was no discussion of the contents of the newspaper; it was articulated as a straight matter of policy in an absolutely declarative fashion.[12]

Finding 11.1

The committee finds that Dr Hewson's account of his conversations with Mr Black is, on the balance of probabilities, true. Dr Hewson's account is consistent with his public stance on the issues and is supported by the corroborating evidence given by Mr Warwick Smith. Mr Black's version of the conversations is unsubstantiated, despite the fact that it was taken up so enthusiastically by the Prime Minister, who was not present at any of the meetings attended by Dr Hewson and Mr Black.

11.9 It is important to note the vital differences in propriety between Dr Hewson's meetings with Mr Black and those between the Prime Minister and Mr Black:

1. Dr Hewson stated a policy position. There is no suggestion, even from Mr Keating, that this involved any kind of deal.

2. Unlike Mr Keating, Dr Hewson did not indicate that the policy was liable to change or that such a change depended on whether Mr Black had provided 'balanced coverage'.

3. Contrary to Mr Keating's assertions Dr Hewson has cooperated with the committee, and his version of events has been substantiated by another witness.

[12] Evidence p 649

THE FAIRFAX INQUIRY
A PARLIAMENTARY BLACK HOLE

INTRODUCTION

1. **The Australian people and the Australian Parliament have received very little value for the $150,000 spent funding the Senate Select Committee on Certain Aspects of Foreign Ownership in the Print Media.**

2. **This committee has been flawed from its inception.** This is the inevitable result of the committee having been founded on a number of erroneous presumptions. These politically motivated presumptions include:

a. **That the bankrupt Fairfax Company was disposed of by the Australian government, not the receivers.**

This is clearly wrong.

b. **That there existed a deal between the government and Conrad Black over the disposal of the Fairfax Company.**

Since Fairfax was not the government's to sell, this too is clearly wrong and no evidence has been produced to support this presumption. If anything, the so-called 'cultural change' within Fairfax that has accompanied the change in ownership has in fact produced newspapers with more conservative values, and thus more sympathetic to the Coalition. This 'cultural change' has been followed by a decline in readership of newspapers such as *The Age*, which on the latest figures has had a decline in weekday sales of 4.9 per cent, or over 10,000 copies a day.[1] However mistaken these changes may or may not have been they are based on the commercial decisions of the management and not on any political influence brought to bear by the government.

c. **That the Coalition opposed the sale of Fairfax to Black's company and the extension of Mr. Black's control of that company.**

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[1] *The Australian*, 27 May 1994

Senator Alston, speaking as Opposition spokesperson on media matters, in a press release of 20 April 1993 said,

> The Coalition is not opposed to an increase in the level of foreign direct ownership investment in Fairfax.

d. **That the Coalition has not had an open slather approach to foreign investment.**

At the time of the Fairfax sale, Coalition policy was for the abolition of the Foreign Investment Review Board (FIRB). The report by the non-government members of this committee, which includes sections dealing with the operations of FIRB, has been released at a time which coincides with a Coalition campaign against foreign investment.

Mr Downer and Mr Costello have sought to shift Coalition rhetoric on the question of foreign investment policy. The Liberal leadership group, including Senator Alston, have complained that foreigners own too many Australian assets and companies. It is indeed ironic that former Liberal leader, Dr Hewson, also complained about the level of foreign ownership when he appeared before the committee, despite the fact that in the mid-1980's, he himself was an agent for the foreign banking interests who undertook purchase of Australian assets.

It seems this born-again Australian economic nationalist decided to make a stand as a prelude to the current Coalition campaign. The Liberals' anti foreign investment campaign contrasts with their stated policy position of unlimited foreign investment in the Australian economy.

3. **This inquiry has been conducted by the chair in an absurd and sinister manner.** Given the lack of evidence to support the predetermined positions taken by the majority on this committee, it is little wonder that the non-government Senators' majority report resorts so readily to the peddling of ridiculous conspiracy theories. The committee's operations have been widely criticised by individuals from both the public and private sectors, including cabinet ministers, former cabinet ministers, public servants, business executives, editors and journalists.

4. **The report of the non-government members of this committee brings no great credit to them as it reflects the political manoeuverings of a**

discredited Opposition. The committee's work has been marred by the persistent party-political abuse of Senate procedures through disrespectful and often contemptuous treatment of witnesses, threats against and grotesque attempts at intimidation of public servants, preconceived presumptions of guilt against political opponents, prejudgement and misrepresentation of events under investigation, and attempted interference in the free press.

5. **Above all, this is and has always been a political inquiry.** It is not a bona fide legal process of investigation and ultimately its purpose has been to try to assert and extend the powers of the Senate which can only be finally tested in an appropriate court of law. Whatever legalistic trappings have been called upon to give this inquisition the aura of legitimacy, there can be no disguise for what is little more than a grubby political exercise.

6. **The unseemly harassment of witnesses and threats directed at the Treasurer by the Chair has not shaken the established principle of public interest immunity which is a basic principle of government.** It is widely accepted that if all advice and communications were to be full public knowledge, there were would be less frankness and candour in the governmental process and that the quality of decisions would suffer. Ministers would lose their publicly endorsed responsibility to make decisions. Advisers would lose their ability to be anonymous and honest. Independent counsel, former Cabinet ministers and the Clerk of the Senate have all provided advice which indicates the existence of the convention of public interest immunity.

7. **In the specific case of the Foreign Investment Review Board (FIRB), it has been a long-standing practice for it to treat sensitive information as commercial-in-confidence material.** This protects potential foreign investors from information being divulged to their competitors.

8. **Despite the assertions of the Chair to the contrary, the vast majority of the evidence to the inquiry has demonstrated that the government has a consistent and reasoned policy on foreign ownership and investment.** However, this dissenting report does make several recommendations in order to refine the effectiveness of FIRB as one of the components of this policy:

- **a more open and consultative process, accessing a range of expertise and seeking the public's input;**

- **comprehensive system of notification, involving the publication of significant decisions, reasons for them and any special conditions;**

- **comprehensive community and client investment reporting strategy; and**

- **monitoring progress of projects, their compliance with any special conditions previously set and appropriate sanction for breaches under current legislative provision.**

9. This dissenting report also finds that there is a need to re-examine foreign ownership limits and cross-media regulations for the print media as they relate to impact on regional newspapers, where it may be desirable to allow some liberalisation. This may assist in increasing diversity in the face of a tendency to ownership concentration by a handful of owners.

10. This dissenting report finds that any rational reading of the evidence shows that meetings between the Prime Minister and Mr Black were within the bounds of propriety and that allegations of any understanding or agreement between the two are completely unsubstantiated. Any references to balanced coverage were in relation to fair and independent reporting. Further, evidence before the committee suggests that Mr Black did not interfere with the political coverage of Fairfax newspapers in favour of Labor during the 1993 election. In fact, the 1993 election coverage by Fairfax was unquestionably inclined to favour the coalition parties over Labor.

11. In the main, the Chair's report consists of a series of unsubstantiated assertions which have been given the status of 'findings' and are not based on any evidence presented to the committee.

12. The only definitive conclusion that can be drawn from this inquiry is that it is possible for the opposition parties to divert and distort the powers of the Senate, by conducting a committee as a pointless and expensive exercise in deliberately pursuing the trivia of political speculation at the taxpayers' expense.

CHAPTER 1

CONDUCT OF THE INQUIRY

Public condemnation of the inquiry

1.1 Senate committees should have a reputation as well-intentioned, impartial and professional agents of Parliament seeking to advance the principles of good government and sound public administration. This inquiry has been described in evidence, in editorials and in Senate debate in terms which do it little credit. As can be observed from this chapter, the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media will go down in the history of Parliament as one of those events which did the institution no credit at all.

Editorial comment

1.2 The following is a sample of the adverse editorial criticism which has been made during the course of the inquiry:

> ***The Age* (editorial)**
>
> The chief defect of the inquiry lies in the insipid generality of its charter. Their summoning [sic] of editors and newspaper executives, in an apparent attempt to prop-up various widely held but laughably inaccurate theories about proprietors' influence over journalists, was another. The constant bickering between Committee members is yet another.
>
> That it should come to jail threats and the badgering of witnesses to divulge details of irrelevant private conversations and inter-personal dealings is absurd. It is high time for the Committee to pause and reflect that it is, after all, merely inquiring into print media, not Australia's vulnerability to nuclear attack.[1]
>
> **Kerry O'Brien, *Time***
>
> The inquiry will not go down as one of the committee system's finest hours... . Liberal committee chairman, Richard Alston helped them move focus from Keating when he made a goose of himself by ringing the editor of Fairfax's Melbourne flagship, *The Age*, to complain about its coverage of the Liberal leadership... . At the direction of her party room Kernot

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[1] *The Age* (editorial), 23 April 1994

later warned Alston that if there were any further 'silliness' he would lose their support. Then there was another spat over Kernot's threat to jail public servants for refusing, on ministerial instruction, to hand over FIRB documents and over some legal advice on that issue that the coalition, and Kernot, did not want to make public.[2]

***The Age* (editorial)**

The inquiry, however laudable its initial ambitions might have been (although that in itself is doubtful), has now become little more than a political exercise.[3]

P McGuinness, *The Australian*

The Senate inquiry into print media ownership was inspired by party politics and the events of this week have only exposed its lack of substance. This also means that the inquiry is scarcely likely to resolve the fundamental problem of government media policies being driven by the politics at the expense of principle.[4]

***The Canberra Times* (editorial)**

Fairfax's chief executive, Stephen Mulholland, predictably, has angered members of the Senate inquiry into the media by his provocative description of its probe of the Fairfax buy-out as a 'star chamber'. ... Mr Mulholland is right in suggesting that attempts by politicians to poke about in the entrails of newspapers - as distinct from the government decision-making process should be resisted.[5]

The Age

The previous owners of Fairfax had a long-standing practice of determining the line that would be taken in pre-election editorials in some of their newspapers. It is traditional in England, America and Canada for owners to have a say... . But they do not, of course, have the right to demand that news be distorted to fit their world view. In Fairfax, directors, shareholders or management do not influence the news judgments or editorial policies...

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2 Kerry O'Brien, 'Bunfight of the Vanities', *Time,* 11 April 1994, p 13

3 *The Age* (editorial), 23 April 1994

4 PP McGuinnes, 'MPs Must Abandon Media Protectionism,' *The Australian,* 23 April 1994

5 *The Canberra Times* (editorial), 18 February 1994

> In light of that, the **inquisitorial tone of some of the Senate Committee's questioning** seems rather puzzling. [emphasis added][6]

Comments by witnesses

1.3 A number of witnesses also made comments critical of the conduct of the inquiry. The comments by former ministers Messrs Dawkins and Kerin are particularly insightful:

> I [Mr Dawkins] am not sure what I say tonight is going to help the inquiry but the Committee has reiterated that it wanted me to turn up so I have turned up without the necessity of you summonsing me. But you should not read into that I think this a very sensible inquiry or one that is going to lead very far because I think that most of the relevant issues are already on the public record and much of what you will discover here will be more in the way of being a circus rather than anything else.[7]

> I [Mr Kerin] believe this inquiry is a witch hunt directed at the Prime Minister. ... The reason I say it is a witch-hunt is because this inquiry was inspired by an allegation in a book by Mr Conrad Black about his recall of a private conversation with the Prime Minister - since disputed. The Prime Minister and the Treasurer have declined to appear in the witch-hunt, so I see little point in the Committee requiring an ex-Treasurer and, for that matter, an ex-Prime Minister to appear to give evidence on history when they are not associated in any way with the central allegation and no longer part of ongoing government decisions or political activity.[8]

Reasons for adverse comment

1.4 The reasons for the inquiry being the subject of such intense and prolonged public ridicule and condemnation are numerous. The terms of reference themselves were a portent of the problems which the inquiry would experience.

Inappropriate terms of reference and pre-judgement

1.5 In the terms of reference, it is quite apparent that the inquiry would be seeking to make adverse findings against the Prime Minister. It was

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[6] *The Age* (editorial), 18 February 1994

[7] Evidence p 494

[8] Evidence pp 455-456

therefore inevitable that the Prime Minister, or for that matter any prime minister, would have declined invitations to become involved with a committee which, by majority, was a hostile body.

1.6 If there were any doubts about this matter they were confirmed when the taking of evidence commenced. In putting questions to witnesses, opposition members on the committee continually demonstrated that they had a preconceived idea about the circumstances of the 1991 and 1993 Fairfax decisions. As is evidenced in the following pages of this dissenting report, again and again witnesses faced hostile questions designed to pre-judge possible responses and the findings of this report.

Interference with the free press

1.7 Another matter which seriously undermined public confidence in the inquiry concerned the way in which the committee sought to interfere with the internal workings of the Fairfax press. The terms of reference directed the committee to examine whether any agreements had been entered into between the government and Conrad Black, which exchanged foreign ownership percentages in return for 'balanced coverage' leading up to the 1993 election. The conduct of the inquiry should not have required the attendance of a panel of Fairfax editors to answer questions about the way they performed their day-to-day business. The committee had no right to ask the Fairfax executives to give evidence about the relationship between management and editorial staff, and editorial staff and reporting staff. This aspect of the inquiry did much to undermine the long cherished democratic ideal of a free and unfettered press. The government members of the committee endorse the words of the Fairfax chief executive, Mr Stephen Mulholland, when he gave evidence that:

> [As] a newspaper man of almost 40 years standing I am extremely disturbed and concerned that I, the chief executive officer of a newspaper company, our editors and our editorial director are being brought before this panel of politicians to be questioned on the inner workings and editorial decisions of our company.... One cannot conceive, for example the editors and managers of the *New York Times* being brought before a political body such as this to be subjected to an inquisition on how they conduct the affairs of the *New York Times*.[9]

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[9] Evidence pp 249-250

US precedent

1.8 The government members of the committee note that in 1971 the US Congress determined that it was inappropriate for the House to examine the inner workings of a media organisation.[10] In February 1971, the Columbia Broadcasting System (CBS) aired a highly controversial television documentary entitled, 'The Selling of the Pentagon'. Several military spokesmen criticised the program and one Congressional member proceeded to file a complaint with the Federal Communication Commission charging CBS with 'misleadingly editing film in order to disparage the Pentagon's publicity effort'. Shortly thereafter, the chairman of the Special Subcommittee on Investigations of the House Interstate and Foreign Commerce Committee issued a subpoena to the CBS president ordering that he deliver all recordings and materials used in the preparation of the program. CBS provided tapes of the aired program. However, it refused to submit other materials, offering these words as an explanation:

> We recognise that journalists can make mistakes.... But I respectfully submit that where journalistic judgments are investigated in a Congressional hearing, especially by the Committee with jurisdiction to legislate about broadcast licenses, the official effort to compel evidence about our editing processes has an unconstitutionally chilling effect.

1.9 CBS submitted that the First Amendment's guarantee of the freedom of the press was the basis for its refusal to comply with the request by Congress. It was CBS's belief that its journalistic independence, as intended by the Constitution, was under serious threat.[11]

1.10 The subcommittee cited CBS for contempt and referred the matter to the House. In July 1971, a vote on recommittal of the motion to committee passed 226 to 181, effectively killing the move to find CBS in contempt of

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[10] In the instance of CBS and the Pentagon Papers. See Congressional Quarterly Inc, *Congressional Quarterly's Guide to Congress*, 4th edition, Congressional Quarterly Inc, Washington DC, 1991, p 225

[11] In the instance of CBS and the Pentagon Papers. See Congressional Quarterly Inc, *Congressional Quarterly's Guide to Congress*, 4th edition, Congressional Quarterly Inc, Washington DC, 1991, p 225

Congress.[12] The voluntary concession by the Congress, that it should not meddle in the affairs of a free press, has not been contested since the 1971 vote.

The Chair

1.11 Notwithstanding the risks to free speech created by the inquiry, there was an opportunity for the committee to conduct its affairs with both exemplary dignity and due adherence to proper and appropriate procedures. The role of the Chair is critical to the success of a committee inquiry. The words of Thomas Jefferson provide some guidance in this matter:

> When a man assumes a public trust, he should consider himself as public property.[13]

1.12 Unfortunately, the actions of the Chair and non-government members of the committee effectively shattered any hopes that these ideals could be preserved. The Chair, with the support of the non-government members, embarked on a course of reckless actions which was contrary to responsible leadership and management of a Senate committee. Shortly after the appearance of Fairfax editorial staff, he contacted the editor of *The Age* requesting that his paper give a balanced coverage of the leadership difficulties experienced by his then party leader, Dr John Hewson. When questioned in the media about this matter, the Chair compounded his error by prejudging the outcome of the inquiry through his reference to 'deals' between the Prime Minister and Conrad Black. These two injudicious and irresponsible media interventions by the Chair dealt a savage blow to the committee's reputation specifically, and the Senate committee system in general.

1.13 The government senators on the committee felt so strongly about this behaviour that at a deliberative meeting of the committee, in what is believed to be an unprecedented development, they moved a motion of no-

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[12] Maurice Van Gerpen, *Privileged Communication and the Press: The Citizen's Right to Know Versus the Law's Right to Confidential News Source Evidence*, Greenwood Press, Westport, Connecticut, 1979, pp 9-10

[13] Thomas Jefferson, in a conversation with Baron Humboldt, as quoted in *The Home Book of American Quotations*, Gramercy Publishing Company, New York, 1986

confidence in the Chair based on this evident political intervention in editorial affairs of *The Age*, and his stated predetermination of the committee's findings relating to the Fairfax takeover. Unfortunately, this motion was lost on the casting vote of the Chair.

1.14 It is noteworthy that the Chairman's report makes no reference whatsoever to his numerous indiscretions. This serious omission is but one example of the selective nature of the presentation of evidence in the majority report.

Matter of sub-judice

1.15 Another reason for the inquiry being brought into public dispute was its approach in a matter of sub-judice. Shortly after it commenced taking oral evidence, the committee was apprised of the fact that one of the witnesses before the inquiry, Mr Mark Burrows, who was the adviser to the Fairfax receiver, had become a subject of a claim for damages to the sum of between $140 million and $200 million in the Federal Court. Solicitors for Mr Burrows advised the committee that his attendance as a witness had the potential to place at risk the defence to his case and would thereby be prejudicial to the proceedings in the Federal Court.

1.16 The government senators again place on record their opposition to the committee resolution which required the attendance of Mr Burrows and his colleague, Mr White. The government members of the committee also place on record the fact that, when Messrs Burrows and White attended to give evidence, they refrained from asking questions of these witnesses. These witnesses attended the hearing in the company of their instructing solicitors and a senior member of the bar, Mr Stephen Charles QC. Having regard to the fact that Mr Burrows will incur substantial expenses in defending the claims which have been lodged in the court, it was indeed unfair that he had to incur further expense in obtaining the services of legal assistance to attend the committee hearing.

1.17 In pursuing Mr Burrows, the non-government members of the committee appeared to be embarking on a deliberate attempt to build a foundation from which other parties, opposing Mr Burrows in the Federal Court action, could build a successful line of questioning. The government members of the committee understand and appreciate the need for Parliament to be a sovereign body which has a right to pursue lines of inquiry independent of the courts. We also appreciate and uphold the

principle that as soon as the proceedings of Parliament impinge in a detrimental way on the deliberations of the court, restraint becomes an imperative. Prima facie, as these proceedings will, ultimately, be brought to trial before a single judge, it would appear that the committee inquiry may not prejudice fair and equitable court proceedings. However, during public hearings, it appeared from the line of questions that certain non-government senators had determined that they would assist the plaintiffs in the court action by discovering matters germane to the litigation, but irrelevant to the terms of reference. To use a committee inquiry to advance the case of litigants involved in civil proceedings is a dangerous precedent which should not be repeated.

Summonsing former ministers

1.18 In relation to the extraordinary initiative of summonsing former cabinet ministers it would have been prudent for coalition members to take heed of the position taken by the conservative elder statesperson, Lady Thatcher. In refusing to appear before a House of Commons select committee she asserted the constitutional convention going back to 1945 that:

> ... prime ministers and former prime ministers do not give evidence to select committees on specific issues.
>
> ooo
>
> ... to have accepted the invitation would have compromised the convention for future prime ministers.[14]

Unfair attacks on public servants

1.19 The other issue, which has seriously undermined the inquiry's credibility as a fair and impartial quest to make findings on media ownership decisions, has been the pursuit of defenceless public servants acting under the lawful directions of their Minister, the Treasurer.

1.20 From the outset the Treasurer has correctly insisted his right to decide that the evidence of a public servant in relation to certain matters before the inquiry should be the subject of public interest immunity. The government

[14] *The Guardian* 20 May 1994

members agree with the claim of the Treasurer for public interest immunity as expressed in his letter of 10 February 1994. Having been informed of this clear and unequivocal stand, the committee was legally, morally and politically obligated not to pursue public servants, attacking their integrity as competent and professional custodians of public policy and administration in Australia. As will be argued in chapter 2, the government has a long standing legitimate legal right to claim public interest immunity in respect of matters integral to the national importance and interest. In the case of the 1991 and 1993 decisions the government has justifiably and correctly claimed that right and it is not for the committee to challenge that decision.

1.21 In pursuing their ill judged causes, non-government members of the committee have intimidated public servants by subjecting them to court room style adversarial lines of questioning without their having access to legal counsel and rights of appeal. These public servants have been the subject of repeated and unrelenting questions, attacks in the media on their integrity as professional servants of the executive and personal abuse contrary to the Australian ethos of a 'fair go for all'.

1.22 On several occasions these public servants have been reminded of the provisions of the Parliamentary Privileges Act, including on one occasion a reminder via a program on a national television current affairs program, that the committee may consider the penal provisions of the Act in the event of public service witnesses not cooperating with the inquiry. It is a credit to their professionalism that these public servants have not reacted adversely to the badgering and taunting tactics of the non-government members of the inquiry.

1.23 One of the public servants indicated the difficulty which he faced in responding to a threat from the Chair that the committee might draw adverse inferences which 'may reflect on [his] competence or integrity' but in responding in the way that he did he demonstrated clearly that certain members of the committee had abandoned the principles of natural justice which should underpin any parliamentary inquiry:

> In circumstances where there is an allegation about something and the person concerned is not in a position to respond, for one proper reason or another, I would have thought that it was proper for the Committee to

> conclude that person was not in a position to say anything about that matter.[15]

1.24 When threats failed, certain members of the committee resorted to infantile questions intended to ridicule, for example:

> **Dr Roberts:** ... My position was that when I left FIRB I moved into a totally different kind of job.
>
> **Chairman:** And we leave everything behind. We turn the memory off, do we?[16]

1.25 Their treatment extended to interviews reported in the press and was defamatory in the following excerpt from *The Canberra Times* of 14 April 1994:

> Senator Alston told Mr Willis on Tuesday that unless Mr Pooley answered questions, adverse findings could put his reputation as a competent public servant responsible for the prudential control of superannuation assets amounting to many millions in question.[17]

1.26 The majority report contains numerous asides and implied reflections on the integrity of the public servants who were following the legal instruction from the Treasurer. For instance, the report says, in chapter 3, under 'FIRB's treatment of AIN':

> ... the FIRB officers involved in preparing the Minute of 5 December 1991, relied on the direction from the Treasurer not to discuss FIRB advice to the government to cover their inability or unwillingness to answer general questions about how they obtained the source information about AIN.
>
> Despite repeated invitations to do so they did not put any legal advice before the committee or attempt to justify their refusal to cooperate other than to read the text of the Treasurer's directives.
>
> Indeed, Mr Pooley's prediction, that the committee would discover that Dr Roberts could not recall vital matters, strongly suggests that the two men, who currently work together at the Insurance and Superannuation

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[15] Evidence of Mr G Pooley p 642

[16] Evidence p 700

[17] *The Canberra Times* 14 April 1994

> Commission, had agreed to seek refuge in memory loss rather than seeking to publicly justify their actions.

1.27 These references and many others attempt to gratuitously attack the character and probity of the public servants involved by building a sense of mystery around their behaviour. The report uses terms attacking their memories, 'intellectual capacity' and 'status in the public service' and uses expressions such as 'highly questionable', 'negative attitude', 'non-cooperation', 'shield behind the Treasurer's claim', 'unsatisfactory witness', a 'mind to deny the committee information', and makes the threat that 'public servants need to consider their positions'.

1.28 It is an abuse of Parliamentary privilege and of due process for the committee majority to make judgements such as the following in chapter 3:

> In the light of Mr Pooley's refusal to proffer any explanation he cannot complain about the suggestion that he might have been seeking to cater to the perceived prejudices of his political masters.

1.29 Such comments are an unwarranted slur on a public servant who has followed the directions of his minister. The Westminster system has a non-political public service, but the committee has attempted to link the actions of a public servant to a political line which it takes against the motives of the government. This is unparliamentary and should be withdrawn.

Flawed treatment of evidence

1.30 The majority report is a flawed document in that it is not a true and accurate reflection of all the evidence taken during the inquiry. Its selectivity severely undermines its credibility as a reputable parliamentary report. The treatment of Mr Black's evidence is but one glaring example of this selective approach to the analysis and synthesis of evidence. In chapter 4 of the report, the committee is inclined to believe Mr Black's version of a meeting he had with Messrs Hawke and Kerin about levels of foreign ownership, in spite of the fact that both parties strongly contest each other's recollection of events. Having decided in favour of Mr Black in this instance, the majority members of the committee came down against him in respect of recollections of meeting between Mr Black and Dr Hewson. Whilst for the coalition members on the committee this is a most convenient political finding, it has no evidentiary basis.

1.31 Yet another example of the selective and less that honest use of evidence can be found in chapter 2 where it is noted that the inquiry was examining one of the 'most contentious foreign investment decisions probably since the war'. This opinion, the view of a single witness (Mr Mark Burrows), was strongly contested by Mr Pooley, the executive member of FIRB for ten years, whose evidence on this matter has not been included in the report. Having cited the views of Mr Burrows, it would also have been proper to refer to other significant government decisions on foreign investment that were mentioned in evidence. For example, The Herald and The Weekly Times case, and the Arnotts biscuits takeover come to mind as foreign investment decisions rivalling the Fairfax cases. Giving the evidence of Mr Burrows such singular prominence was a feeble attempt to ascribe to the inquiry an importance which it did not deserve.

1.32 In chapter 3 of the majority report headed "'National Interest" - does FIRB know what it is advising on?' there appears a selection of quotations from a number of witnesses. This highly selective use of evidence does not recognise that the national interest is a complex term which only assumes a meaning in the context of decisions on actual foreign investment proposals. The snide use of the quotations is in effect a smokescreen to obscure the inability of the non-government members to reach a conclusion on their definition of the term national interest. Nowhere in the report is there a majority committee view on what the national interest should embody.

1.33 The status of AIN's bid vis-a-vis foreign investment rules is yet another issue which has been the subject of selective treatment in the majority report. The report ignores important evidence from former Treasurers Dawkins and Kerin, previous Prime Minister Hawke and members of FIRB which repeatedly stressed that FIRB had no obligation to examine the AIN bid. The AIN proposal was a domestic bid and it did not come under the provisions of the Foreign Acquisitions and Takeovers Act. **These expert witnesses again and again informed the committee that the decision on AIN was in the hands of the receiver to the Fairfax group of companies, not the government.**

CHAPTER 2

PUBLIC INTEREST IMMUNITY

The basis for the government's public interest immunity claim

2.1 Public interest immunity is a long-standing defence which duly elected governments have claimed in not giving certain information to the courts or the Parliament. It is not a new defence which has latterly been invented to thwart the Senate Print Media inquiry. As the Clerk of the Senate points out 'from time to time the executive government has claimed a right to instruct its officers to refuse to appear, to give evidence, or to produce documents in response to a demand of a House or a parliamentary committee' and this right 'has not been adjudicated by the courts.'[1]

2.2 The fact of the matter is that the government has claimed its public interest immunity on the strongest of grounds. Its behaviour in this case is entirely consistent with its stance in respect of FOI cases involving the release of FIRB documents. The long-standing FIRB practice has been to accept documents which contain commercial-in-confidence material and to maintain that confidence. These confidential documents are considered by a non-statutory board of advisers which prepares confidential advice for the Treasurer. The Treasurer correctly points out that the advisers have been appointed on the condition that the advice that they prepare will be treated confidentially.

The reasons for confidentiality

2.3 The Treasurer further correctly points out that the advice tendered by the Board, if released, could come into the hands of competitors and cause commercial harm to the firm providing information to the Board. The Treasurer's view is that the release of the advice could damage the reputation of Board members and might harm their business or commercial interests. Moreover, the Treasurer is of a view that the release of the information could reduce the capacity of the Board to provide frank and candid advice in the administration of foreign investment policy.[2]

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[1] Evidence p 4

[2] Treasurer (the Hon R Willis), Treasurer's letters re public interest immunity, 10 February 1994, Appendix K p 161

2.4 The government members of the committee believe, therefore, that the government has a consistent and well founded policy for maintaining confidentiality in relation to foreign investment decision and has made a strong case in favour of its claim for public interest immunity.

2.5 The evidence of former Ministers Hawke, Kerin and Dawkins confirms the weighty arguments against the breaching of confidentiality. It is widely recognised that if confidentiality is removed in governmental proceedings, inevitably there would be less frankness and candour in debate and advice.

2.6 The United States' experience is also persuasive in this matter. As early as 1787, during the framing of the Constitution, one of first rules to be adopted required that all deliberations remain private. Madison, in particular, held the view that certain aspects of government required confidentiality because in private discussion 'no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument'.[3]

2.7 Similarly, were advisers' opinions, like those given by public servants, to be placed in the public light, it is reasonable to assume that their input would become less frank. The former Hawke/Keating government ministers, in their testimony before the committee, all agreed that this undoubtedly would be the case, with one going as far to say that the advice would become 'vapid and useless.'[4] Government officials aim to make as well informed decisions as possible. In order to do so they seek counsel from a wide range of sources. If the advice is limited in any way, so is the government's capacity to make the decisions which benefit the entire nation.

2.8 It is acknowledged that it is the responsibility of elected ministers, who are responsible to the Parliament, to make decisions. They do so after careful consideration of all the information and advice given to them, and are thereby accountable for their decisions. It is, therefore, the prerogative of ministers to choose whether or not they should disclose their advice. If they were to take a more public role, advisers would not only jeopardise the

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[3] Cass R Sunstein, 'Government Control of Information', *California Law Review*, vol 74, no 3, May 1986, p 895

[4] Evidence of the Hon J Kerin p 462

credibility of ministers' decisions, but would also obstruct their role as 'essentially anonymous, professional, fearless advisers.[5]

Views of Mr David Jackson QC

2.9 The senior legal counsel to the committee, Mr David Jackson, QC, acknowledges the right of governments in determining the release of important information to a parliamentary committee:

> In deciding whether to press a question or require the production of a document, the committee should take into account the views of executive government. They are to be respected and in many instances, one would expect them to be accepted as a matter of course. They are not, however, decisive.
>
> There seems to be also no reason why such views might not be expressed strongly by the executive government, and no reason why that government should not tell its employees, former employees, advisers and former advisers, and its own former members, that it intends to claim that the questions should not be answered or the documents not produced.[6]
>
> ooo
>
> One view is that the committee is entitled to have all such questions answered, but has a discretion not to insist upon that course where it would be inappropriate to do so, as for example, where it would not be in the public interest that disclosure should occur. The other view is that the Houses of Parliament are not entitled to compel answers to all questions which they might ask, but obliged to respect certain privileges and immunities including a 'public interest immunity', somewhat analogous to that applicable in courts of law.[7]

2.10 According to Mr Jackson, even the Senate Privileges Resolution recognises that there may be legitimate grounds on which witnesses can object to answering certain questions. Resolutions 1(10), 6(12)(b) and 6(13)(c) also contain some qualification to the non-government members' view that all questions to witnesses must be answered. The latter two

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[5] Evidence of the Hon J Kerin p 500

[6] Appendix E p 28

[7] Appendix E p 44

provisions contain the words 'without reasonable excuse'.[8] Commenting in the abstract on this matter, Mr Jackson suggests that whilst a parliamentary committee has the power to ask certain questions, that power would not 'ordinarily be exercised where there was a significant contention that the "national interest" would not be served by compelling the answer'.[9] Mr Jackson expresses these views in the abstract because it is his view that the resolution of public interest disputes is ultimately a matter for the Senate itself.[10] This point was also made by the Clerk of the Senate in his advice on the compulsion of witnesses which indicates that, all things being equal, public interest immunity will 'continue to be dealt with case by case as a matter of political dispute and contest between the Senate and a government.[11]

2.11 Mr Jackson's advice employs the analogy of how the courts would treat the class of documents which the non-government members of the committee have sought from the Treasurer. This type of analysis was used by the landmark Senate 1975 Report on Privileges.[12] Having noted the Treasurer's classification and description of FIRB documents, Mr Jackson concludes:

> 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. **I think it probable, however, that the claim would be upheld.**[13] [emphasis added]

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[8] Appendix E p 45

[9] Appendix E p 46

[10] Appendix E p 46-47

[11] Evidence p 4

[12] Senate Standing Committee of Privileges, *Report on Matters referred by the Senate Resolution of 17 July 1975,* Senate, Canberra, 1977

[13] Appendix E p 53

2.12 This opinion by Mr Jackson plainly frustrated the non-government members of the committee. They expressed this frustration by suppressing the advice for some time, and calling on Mr Jackson for supplementary advice. Their objection to Mr Jackson's analogy with the courts was based on their dissatisfaction with the conclusion which it yielded, not with its logic. Mr Jackson had used the same analogy as the 1975 committee report. The majority report refers to Mr Jackson's use of the analogy as 'gratuitous'. We do not believe that this part of his advice was gratuitous. His analysis was pertinent, and no attempt to denigrate Mr Jackson on this matter can change the impact of his advice.

CHAPTER 3

FOREIGN INVESTMENT POLICY AND PROCEDURES

Introduction

3.1 The government members of the committee acknowledge and appreciate the significant contribution which foreign investment has made to the Australian economy during the past decade. Labor government policy on foreign investment, which has been designed to ensure that Australians reap the benefits of the new global economy, has brought new technologies, opened new overseas markets, created employment opportunities and made the domestic economy more competitive. To a large extent these considerable achievements are a by-product of the sound domestic and external economic management of the Hawke and Keating governments.

3.2 We recognise that these advances occurred within policy constraints to limit the extent of foreign control over Australian economic interests. We also recognise that, in part, these limits were based on a responsible approach to ensuring that the Australian culture is allowed to coexist with overseas cultures. Of equal importance is the fact that Australia's economy is small in world terms. If there were unlimited foreign investment, there would be a real risk that local firms would be taken over or, in the short term, priced out of the market by more powerful overseas interests. This would result in less competition in the longer term. Another consideration is that there are industries which are part of the national infrastructure, for example, defence industries, which should remain in Australian hands. It is with these sorts of considerations in mind that we support a mature policy stance to foreign investment and the concomitant development of procedures which will achieve the policy goals.

3.3 The print and broadcast media are key areas of economic and cultural activity which will need effective and on-going regulation. To this end, we support the need for overseas ownership limits on print media and other key industry sectors as enunciated in the government's current policy.

3.4 However, given the highly political nature of this Senate Print Media inquiry and its rather narrow terms of reference based on two particular decisions of FIRB with a focus on media ownership, it is extremely difficult

for us to make findings on foreign investment policy generally. Notwithstanding this, we believe that before the commencement of the next cyclical surge of capital inflow the government should implement changes to our foreign investment procedures. We also believe that there is widespread community support for these changes.

3.5 Accordingly, we have made recommendations which focus on increased consultation, the introduction of public notification of proposals, enhanced reporting requirements and, finally, improvements in policy compliance procedures.

Increased consultation

3.6 In assessing the merits of applications under the government's foreign investment rules, it is of critical importance that the FIRB have access to the widest possible sources of expertise and advice. In the more significant foreign investment proposals this will mean that advertisements will need to be placed in the national press inviting public comment. In developing procedures to reflect this imperative, a balance between commercial-in-confidence and privacy considerations will need to be struck with the need to assess properly the national interest. However, these processes have time and cost implications which will need to be factored into any changes. The current time limits imposed on the FIRB process may need to be extended beyond the 30 day examination period and the 90 day period for the issue of an interim order (sections 22 and 25(3) of the Foreign Acquisitions and Takeovers Act (FATA).

3.7 Provided overseas investors are alerted to these new rules and the process is conducted in a fair and consistent manner, there should not be an adverse impact on foreign investment flows.

Recommendation

Recommendation No 1

That FIRB processes be restructured to permit a more open and consultative process which will ensure that FIRB has access to a range of expertise and community input on the merits of projects relative to the national interest.

Enhanced notification

3.8 Notification of proposals, decisions and, where appropriate, reasons for decisions, is another important feature of any changes designed to make FIRB a more open and consultative organisation. The government members of the committee believe that FIRB should be obliged to issue press releases on all major approved proposals, all rejections and all proposals for which orders have been issued under the FATA. The system of notification should be applicable to investments which exceed a certain threshold value, say $50 million. Reasons for decisions should be published for those investments which exceed the threshold value and any caveats or conditions attached to decisions should be specified and published.

Recommendation

Recommendation No 2

That FIRB develop a comprehensive system of notification which involves the publication of significant decisions, the publication of reasons for these decisions and the publication of conditions applicable to approved proposals.

Reporting strategy

3.9 We believe that FIRB should develop a comprehensive reporting strategy which meets the information needs of both the Australian community and potential overseas investors. The strategy should include provisions for publication of FIRB Quarterly Monitors which will contain

statistics relating to applications, FIRB decisions, the aggregate dollar value of foreign investments, and a description and analysis of emerging foreign investment trends.

3.10 The Monitors could include case study material on recent applications and information about the success or otherwise of previous decisions. Where applicable, reference could be made to 'follow up' on compliance matters and other regulatory activities.

Recommendation

Recommendation No 3

That FIRB develop a comprehensive community and investment client reporting strategy designed to engender certainty and confidence in Australia's foreign investment policy.

Compliance activities

3.11 As foreshadowed in the previous section, the government members on the committee believe that FIRB needs to develop a more pro-active compliance strategy. It is important that investors adhere to the conditions of any FIRB decisions and comply with Commonwealth and State law. In the event that an investor breaches the terms of a FIRB decision, FIRB has an obligation to detect such breaches and formulate an appropriate response.

Recommendation

Recommendation No 4

That FIRB develop a plan of action to ensure that it monitors progress on those projects for which have been given approval subject to special conditions. Breaches of FIRB decisions should be the subject of appropriate FIRB action as provided for in FATA.

Independent Newspapers Pls (INP) and Australian Provincial Newspapers (APN)

3.12 INP, an overseas consortium informed the committee of its interest in acquiring an even greater shareholding in APN, 'to the maximum allowable'. Currently, in accordance with ownership limits imposed by policy, it holds a 25 per cent share. INP expressed satisfaction with the ownership guidelines, but submitted that a special case could be made for the government permitting a relaxation of these limits, particularly as applied to regional newspapers. INP believes that, as concentration of ownership occurs, foreign ownership limits may result in an even greater concentration of the print media in the hands of a few domestic firms. Should the cross-media rules be relaxed, there would be an even greater likelihood of concentration.

3.13 In making this recommendation, INP pointed out that the policy should distinguish between the capital city and provincial newspapers, citing its belief that the coverage and editorial policy of the major national dailies has a far greater potential to impact on 'national life and thought'[1].

3.14 The government members of the committee are of a view that INP's arguments do have a number of persuasive qualities which should be further examined. As the terms of reference did not require the committee to report on the matter and as competing evidence was not taken, we are not in a position to come to a conclusive view. But the matters raised by INP should be the subject of government examination in the context of the enhanced procedures which have been identified in the recommendations in this chapter. Those procedures would allow the Australian community and INP an opportunity to participate in an open and informed process which would allow the government to make a fair and well-reasoned decision on the INP application.

Policy backflip on part of coalition members

3.15 In an attempt to salvage something from the ashes of the 'balanced coverage' component of the inquiry, the coalition members of the committee have decided to recommend changes to the nature and shape of FIRB. This decision is both cynical and hypocritical. The Coalition Policy in 1990 stated:

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[1] Evidence p 313

> We will ensure that there is a more effective review and monitoring of foreign investment in Australian enterprises. This will be done through the Federal Treasury, rather than by a costly Foreign Investment Review Board.[2]

3.16 Likewise, the 1989 coalition policy statement called for the abolition of both FIRB and general controls on foreign investment.[3] These two statements confirm the sheer hypocrisy of the policy U turn of the coalition parties. It is therefore difficult to give any credence to the recommendations in chapter 10 which call for changes to foreign investment policy and procedures.

Press release by Senator Alston

3.17 The other 'backflip' worthy of note is the change in attitude by the Coalition members to the Tourang consortium. The majority report both explicitly and by inference is hostile to Tourang. Yet, when the 1993 decision was made, the chair prepared a media release in support of the decision to permit Tourang to have a greater stake in Fairfax:

> The coalition is not opposed to an increase in the level of foreign direct ownership investment in Fairfax...[4]

3.18 Senator Alston's statement also acknowledged:

> Any increase in foreign ownership, particularly in the area of the media is a vitally important and sensitive issue which sends signals to both domestic and overseas investors and must take full account of all the relevant factors.
>
> Australians are entitled to expect that a government will only approve an increase in direct foreign investment where there is a compelling case to do so.[5]

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2 Liberals and Nationals, *Northern Queensland Policy,* 1990

3 Liberal and National Party Economic Action Plan, 'Economic and Tax Policy', October 1989

4 Media release dated 20 April 1993

5 Media release 20 April 1993

3.19 The very words in this release acknowledge the correctness of the government's 1993 decision. The coalition was not opposed unless there were compelling reasons. In the case of the 1993 decision - there were compelling reasons. These reasons were given in the Treasurer's statement at the time, and in the Prime Minister's statements since. They related to the large investment in new equipment required at Fairfax and to Mr Black's need for a measure of control in order to implement these improvements.

Conclusion

3.20 Throughout the inquiry it has been quite apparent that the government has an effective overall foreign investment policy. That policy is superior to the 'no policy' of the opposition, which in the case of Fairfax, for example, would have permitted up to 100 per cent foreign ownership in the major Sydney and Melbourne broadsheets. The government has manifested a consistent policy in respect of the maintenance of a FIRB, whereas the opposition policy has been an 'on/off' arrangement based on political opportunism. Had the Liberals won the 1993 election it is likely that their economic rationalist tendencies would have resulted in the abolition of FIRB and the commencement of an 'open slather' foreign investment policy. We therefore find the position on foreign investment which they have taken during the inquiry to be gross hypocrisy.

3.21 The preceding recommendations have been predicated on FIRB continuing to be a viable and effective organisation responsible for providing government with sound foreign investment advice. The significant difference, however, is that under our recommendations, in keeping with the trend for a more open government, which is a hallmark of the Keating government, FIRB's processes will be more open and transparent.

CHAPTER 4

BALANCED COVERAGE

The 1992 conversation

4.1 The trigger for the establishment of this committee were the remarks made by Mr Conrad Black in his autobiography *A Life in Progress* regarding a meeting with Mr Keating. Those remarks have been taken out of context, exaggerated in importance and turned into the basis for a futile inquisition into possible 'deals' between Mr Black and the Prime Minister.

4.2 This sensational beginning to the process set the theme for the workings of the committee under the Chair's leadership. The evidence upon which the findings against the Prime Minister have been built, consists mostly of material which should never have been used by a parliamentary committee at all. The key texts used by the Chair have been *Corporate Cannibals* and *A Life in Progress*. *Corporate Cannibals* is a dramatised and highly-coloured account of the 1991 Fairfax takeover. It was written by two Fairfax journalists whose views were coloured by their perspective as employees of a once grand enterprise which had been dragged through the unpleasantness of receivership, takeover and re-adjustment. Their view of events was flavoured with the conspiracy theories which commercial competition generates and with some resentment of the new owners. This book was referred to by the Chairman as a key document in his analysis of events, despite the journalistic licence taken by the authors, who did not appear before the committee to substantiate their numerous assertions.

4.3 *A Life in Progress*, Mr Black's autobiography, was equally inadmissible as evidence but was nevertheless frequently given the status of evidence in the majority report.

4.4 In the process of turning his business dealings and his meetings with world leaders into narrative prose, Mr Black had unfortunately chosen at times to link related conversations and events so as to give his tale continuity. In doing so, he established a false sense of causality to events. While it suited Mr Black's view of his own importance to portray all of his meetings with the notable and the successful as somehow a meeting of like

minds, witnesses have commented that in doing so, his narrative made all other public figures subordinate players to his own interests.[1]

4.5 This extraordinary approach to what constitutes admissible evidence was to continue throughout the workings of the committee and into the majority report.

4.6 The Chair's report includes countless references to newspaper articles which were nothing more than speculation and rumour, even at the time. By selectively including them in his report the Chair has given these reports a status which is undeserved and he has continued to build a clumsy and fantastic version of events which is held together by newsroom gossip.

4.7 The government members of the committee have been shocked by the extent to which wild conspiracy theories and extraordinary suppositions have been given credibility by the committee simply because they were printed in the press or broadcasted by the media.

4.8 Unfortunately, those in public life are often the target of the unstable or the malicious comment and there are many people who enjoy speculating on what may have happened in any major event when the orthodox accounts are not sufficiently exciting for them.

4.9 This committee, for instance, like many others, has had its share of submissions from extremists from the left and the right. We have received letters claiming that the Fairfax takeover is part of an international conspiracy to plunge the world into a new 'dark age' and that it is linked to global attempts to destroy the monetary system and the world as we know it.[2] What has been more disturbing, however, is that in the case of this particular inquiry, with an opposition majority hostile to the government, the Chair has seized on the conspiracy theories which he felt had most credibility and has endorsed them.

4.10 The purpose of this committee, from its very establishment by the Senate on the motion of Senator Alston, has not been to find the truth but

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[1] See for instance, Malcolm Turnball's comments on Mr Black's version of events in Evidence p 137

[2] Craig Isherwood, National Secretary, Citizens Electoral Councils of Australia Group, Submission, 27 April 1994

to find the most plausible version of the conspiracy theories in the media and to endorse it by whatever means.

4.11 This process began with the terms of reference and that initial willingness to seize on a trivial piece of self-aggrandisement in an autobiography. It has continued through to a report cobbled together from hearsay reports and from anecdotal evidence by media speculation feeding off itself.

4.12 At the time of the publication of *A Life in Progress*, in November 1993, Mr Keating was attending a major APEC meeting in Seattle. When Mr Black's comments from the book were raised with the Prime Minister by journalists, it was during interviews concerning other far more serious matters. Mr Keating's first replies were light-hearted and jocular. Aware that there was no substance to the speculations raised with him, he accurately referred to Mr Black's comments as 'dust in the cracks of history'.[3]

4.13 Mr Keating's comments during a number of interviews at the time reflected the same tongue-in-cheek attitude to the attempts by the media to 'beat up' a controversy. He was aware that the relationship between the government and the media is continually under scrutiny, since as he put it,

> ... there's no group more self-interested that the Fairfax journalists in the affairs of Fairfax. The only rivals are the ABC and the affairs of the ABC. Outside of these two very articulate and self-interested groupings, the rest of us are bystanders to the general media debate.[4]

4.14 Allegations of a relationship between politicians and Fairfax had always been likely to be beaten up sooner or later, but right up until the release of the book, it could have gone either way. As Mr Keating has many times pointed out, it was actually Dr Hewson who had offered Mr Black the most generous concessions on ownership and had the Liberals won the election, the innuendo would certainly have been laid at their door instead. As early as 24 October 1992, the 'Canberra Insider' column of *The Sydney Morning Herald* carried the comment by Tom Burton that:

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[3] Conrad Black, 7.30 Report, 22 November 1993

[4] The Hon P J Keating PM, Transcript of interview with the Prime Minister, Seattle, USA, 19 November 1993

> Black this week was reported as admitting that he would have a better chance under the Liberals, which no doubt will lead to a conspiracy theory about the direction of Fairfax's political coverage whenever an anti-Keating story gets a big run in the lead-up to the election.[5]

4.15 Mr Keating, responded firmly to the 'deal' allegations when they were put to him in 1993. He repeated his response in the Parliament and in the media.[6] Unfortunately, as they did not fit comfortably with the conspiracy theories favoured by the Chair, the major parts of Mr Keating's remarks have been omitted from the report.

4.16 From the time of its inception, Mr Keating was well aware of the likely composition of the committee and of its predisposition to misjudge even the most straightforward evidence. He chose to respond to its concerns in the Parliament, but not as a witness because he was well aware that the members were likely to do as they have: namely to bring the Senate and the Parliament into disrepute by the abuse of committee powers. There is no precedent for the Prime Minister to appear before a Senate committee, particularly a hostile one which sets out to denigrate the executive. To have appeared would have been to allow the office of the Prime Minister to be brought into the same disrepute. Messrs Black and Hawke were ample evidence that an injudicious control of the privilege of parliamentary committees by a weak Chairman seeking sensational press coverage can lead to an exploitation of insignificant disagreements between public figures. In its eagerness to uncover anything sensational, the committee encouraged witnesses into pointless accusations and counter-accusations over details with little significance.

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[5] Tom Burton, 'Canberra Insider', *The Sydney Morning Herald,* 24 October 1992

[6] The Hon P J Keating, *Four Corners*, 5 November 1990
The Hon P J Keating, *PM*, 14 November 1990
The Hon P J Keating, *Lateline*, 19 September 1991
Tom Burton, 'Canberra Insider', *The Sydney Morning Herald,* 24 October 1992
The Hon P J Keating, Transcript of interview with the Prime Minister, Seattle, USA, 18 & 19 November 1993
The Hon P J Keating, *7.30 Report*, 22 November 1993
House of Representatives, Hansard, 24 November 1993, p 3548
House of Representatives, Hansard, 25 November 1993, pp 3697 & 3740

'BALANCE'

Mr Black and 'balance'

4.17 As a prospective foreign owner of Australian newspapers and later as a current owner seeking to increase his share, Mr Conrad Black was understandably sensitive to his image. Through his own research he had no doubt established that there was anxiety in the community about his interventionist tendencies elsewhere and his proclivity to right wing views. It is not surprising then that he should be interested in dispelling such views among the government and the public.

4.18 As the committee's report does show, the term 'balance' was one frequently used by Mr Black whenever in the country to emphasise his belief in fairness.

4.19 In its dealings with government, business naturally tends to seek an advantage by trying to understand and anticipate government policy. Mr Black's initial reference to 'balanced coverage' was, therefore, not in response to any specific request by the government for undertakings. It was rather an attempt to anticipate government's views and run ahead of them.

4.20 The majority report has very selectively used instances of Mr Black's statements on balance and attempted to link them to the government. They have not, for instance, used his interview with the PM program of 25 November 1992, when Mr Black publicly slated Fairfax journalists for their handling of a story of a poll which had disadvantaged Dr Hewson, nor the coverage of the disciplining of the journalist responsible, which was referred to in the Daybreak program of 9 November 1992.

Mr Keating and 'balance'

4.21 Mr Keating has already stated that for him the concept of 'balanced coverage' was one of non-interference by the owner in the freedom of expression of the journalists and editors.

4.22 Mr Black chose to summarise one element of those discussions by using the expression 'balanced coverage'. He later admitted to the committee that the term was his own and that Mr Keating had simply responded to it. This was confirmed by Mr Keating in his own remarks. Mr Keating's only

concern was that there be accurate reporting of news. Mr Keating made no request for favourable treatment.

4.23 As already stated, Mr Black is known for his strongly partisan support of Mrs Thatcher and of Mr John Major in elections and leadership struggles in the UK and for his interference in those issues via his newspaper. He is a conservative newspaper owner and any attempt to link his views of 'balance' with those of the Prime Minister is patently absurd.

The federal government and 'balance'

4.24 The principles of freedom of speech and accuracy of reporting are well expressed in the Report *News & Fair Facts*, prepared by the House of Representatives Select Committee on the Print Media in 1992. This report and the deliberations of the government, as revealed by this inquiry, clearly show that the government values freedom of speech and accuracy of reporting very highly.

The public and 'balance'

4.25 In Australia we have as a community come to expect that newspapers will exert their independence and comment in a forthright way on issues. We are not accustomed to having balance within reports so much as balance between the sum of all reports. But Australia does expect accurate and fair reporting of all issues.

4.26 The Australian public is also aware of and accustomed to the editorial culture of certain newspapers and is able to discount that element by balancing between sources.

4.27 For instance, Fairfax's *The Age* newspaper has an ongoing tradition of small 'l' liberalism, a tradition which has been made more conservative by its new management. Mr Forell, of *The Age* Independence Committee stated that:

> Politically, I guess that we have become more conservative, harder line in economic policy. I do not mean that we have become realigned in a partisan sense. I do not think that is true at all. But there is a different feeling about *The Age*. *The Age* has always embraced what you might call

small - l iberal principles such as concern for the underdog. There is a much harder line these days.[7]

4.28 Mr Kohler agreed that, under his editorship, *The Age* had been conservative:

Senator Carr: Have you ever supported a trade union in an industrial dispute, in the time that you have edited *The Age*?

Senator Kernot: You mean editorially?

Senator Carr: Yes.

Mr Kohler: Probably not.[8]

4.29 Mr Hoy, Deputy Chief Executive and Editorial Director at Fairfax, went so far as to say:

> Mr Hoy--Not a single Fairfax newspaper supported Labor in the final analysis which is a source of irritation to me because that final decision is not an easy one for editors to make. It is made after substantial consultation with their senior staff. I feel that I would be in a very difficult position now if any one of our newspapers had actually supported the ALP. This is why I tried to explain to Senator Alston, when this inquiry was first mooted, that I felt this was a dangerous inquiry to be forming. As far as any question of balance in our newspapers is concerned, it was a claim that could be completely thrown out with even a cursory examination of the coverage of the election by our newspapers. Certainly the fact that not one supported the Prime Minister at the election must have erased any doubt anybody would have.
>
> Senator LOOSLEY--Why did you use the word dangerous to describe the committee?
>
> Mr Hoy--Because it is a free society and a free media and it should be kept at arm's length from politics.[9]

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[7] Evidence p 361

[8] Evidence p 304

[9] Evidence, p 195

4.30 In the light of such a conservative stance from Fairfax editors and executives, it is absurd that the committee majority has taken the line that it did. In seeking to establish a conspiracy theory, they have attempted to link the most conservative newspapers in the country with a Labor government. This is in spite of the obvious and glaring difficulty in the theory: that Dr Hewson, the leader of the Liberal Party at the time, had offered a far greater ownership share to their proprietor. Had the editors and executives any strong loyalties to Mr Black's commercial interests, and had they intended to assist him in any way, support for a Labor government would have been the last place to start. Similarly, for Mr Keating to have attempted to change the journalistic, editorial and managerial culture at Fairfax would have been like asking the leopard to change his spots.

4.31 To the extent that the committee did uncover evidence of change at Fairfax, it was of the commercial kind, engendered by a new management focussed on efficiency and return for investment. Whether this change has been for the better will be judged by consumers, and demonstrated in circulation figures for the papers.

The Labor party and 'balance'

4.32 The position of the Labor party on media issues has been strong and consistent. Mr Keating's actions have been in keeping with that platform and directed towards confirming the diversity and independence of the Australian media. Labor's platform includes the following:

Print

Rule 41 Maintain and enhance freedom of the press, which is a cornerstone of democracy

Rule 42 Promote the public's right to a full variety of views in printed media by ensuring diversity of ownership through:

a) strong cross-media ownership limitations;

b) limitations on the capacity of dominance in particular markets by utilising all arms of federal government authority including the Foreign Takeovers Act, the Corporations Act and the Trade Practices Act to ensure proper

restrictions on further print media concentrations;

Rule 45 Provide assistance to those publishers who provide a unique contribution to Australian literature.[10]

MEETINGS AND DISCUSSIONS

The propriety of discussions between government and business

4.33 As Prime Minister, Mr Keating is expected to hold conversations with a broad range of persons, including newspaper owners. This committee and the House of Representatives Select Committee on the Print Media have had considerable evidence and comment regarding conversations by politicians with the media and its owners. It is well accepted that such conversations do occur and are part of the free flow of comment and opinion necessary for democracy. At various times most of the editors who appeared before the committee made it clear that they had meetings and/or telephone conversations with politicians from both sides of the Parliament. The most striking instance of this was, of course, the Chairman's own widely publicised telephone conversation with Mr Kohler in which he requested 'balance' in coverage of Liberal policies.

4.34 This behaviour by the Chair led to a rash of newspaper headlines as the media responded to this double-standard:

FAIRFAX CHIEF SAYS SEN ALSTON'S ACTIONS IMPROPER
– *The Australian Financial Review*, 10 March 1994

PRINT INQUIRY CHIEF SHOULD STEP DOWN
– *Courier Mail*, 10 March 1994

MEDIA BOSS ATTACKS INQUIRY
– *The Australian*, 10 March 1994

FAIRFAX CHIEF TAKES ATTACK TO SENATOR
– *Sydney Morning Herald*, 10 March 1994

FAIRFAX BOSS CALLS ON ALSTON TO STEP DOWN
– *Canberra Times*, 10 March 1994

[10] Australian Labor Party, *Australian Labor Party Platform, Resolutions and Rules as approved by the 39th National Conference, Hobart, 1991*

> FAIRFAX EXECUTIVE CALLS FOR MEDIA INQUIRY CHAIRMAN TO STAND DOWN
>
> – *Canberra Times*, 10 March 1994

4.35 *Time* magazine summarised opinion by commenting that the Chair 'made a goose of himself'.[11]

Dr Hewson and Mr Black

4.36 At the time of the 1991 ownership decisions and routinely since, Mr Black and other media proprietors have made a practice of meeting with politicians from government and opposition in order to discuss issues of mutual concern. Dr Hewson had such a discussion with Mr Black and it was one in which he indicated total removal of limits to Mr Black's ownership:

> The Leader of the Opposition, the rather Thatcherite and intelligent Dr John Hewson, had already promised that if he were elected he would remove restraints on our ownership.[12]

> I met Mr Conrad Black on three occasions - July 1991, February 1992 and August 1992. The last two meetings were essentially informal social occasions. At these meetings I said to Mr Black nothing more and nothing less than what I have said publicly many times concerning the coalition's approach to the issue of foreign ownership of the Australian media. In relation to that issue, I have said that the coalition parties do not believe in specific foreign ownership limits simply because they do not work.[13]

4.37 Whereas Dr Hewson made it plain that he set no limits on foreign ownership, Mr Keating made a non-committal comment that the Government would re-examine Mr Black's position if it were still in office.

4.38 This aspect of liberal party policy was elaborated upon by Alexander Downer, the then Hon Shadow Treasurer when in a letter to the committee he stated:

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[11] Kerry O'Brien, 'Bunfight of the Vanities', *Time*, 11 April 1994, p 13

[12] Conrad Black, *A Life in Progress*, Random House, Sydney, p 453

[13] Evidence p 719

> The Coalition believes that each foreign proposal ought to be assessed on its merits, on a case by case approach, rather than through the application of specific percentage limits on foreign ownership.[14]

4.39 The lack of detailed policy on foreign ownership provides a totally inadequate framework for international investors to work within and allows for maximum discretion at a political level.

4.40 It provides no security to the Australian people as to what level of foreign ownership will be allowed under Liberal policy and does not refute the open slather policy that Mr John Howard introduced in the 1980's.

4.41 It is easy to understand how Mr Conrad Black, after discussion with the Liberal leadership, was assured that in his case, the Liberal party was quite relaxed by foreign ownership levels without limit. In this context, government senators on the committee can only be cynical about new found and politically opportune Liberal concern about the operation of FIRB.

Whether there was an attempt to strike a deal

4.42 Several hundred pages of oral testimony and 35 written submissions later, there is no evidence of Mr Keating striking a deal with Mr Black.

4.43 The Chairman has repeatedly attempted to pre-empt the findings of this committee by publicly referring to a 'deal', so much so, that Mr Black was forced to respond directly to his behaviour:

> I would be remiss if I did not say, Senator Alston, that I looked at what purported to be a transcript of a radio interview you gave approximately a month ago in which you referred routinely to a deal between Mr Keating and myself. There was no such deal. There has been no such deal. I do not raise these points in any spirit other than to say that this issue has, to some degree, been prejudged and it has been unfairly judged. To imply or to assert that there has been any deal, much less that I confessed to or proclaimed the existence of, such a deal or that the Prime Minister confirmed it in his remarks in Seattle or elsewhere - any such implication, assertion or inference is mistaken and, indeed, wrongs the individuals involved.[15]

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[14] Submission 22 , 10 February 1994

[15] Evidence p 646

Mr Keating's actions

4.44 Mr Keating's statement on 18 November 1993 referred to a commitment to reconsider Mr Black's application. That remark has been widely misconstrued, as that commitment was no more than an undertaking that the government would do its job. Mr Black, as a part owner of an Australian enterprise, had asked about increasing his ownership. Mr Keating, as the Prime Minister, had given an assurance that the government would look at an application from Mr Black if it were forwarded through the correct procedures. His undertaking was to do so without being tardy, not an undertaking to deliver a specific outcome.

4.45 Regarding ownership it is obvious that the caucus allowed an ownership level much less than Mr Black either then or since would have liked. As Mr Keating put it on 26 November 1993:

> ... let me just put the hypothetical. If you were right, I broke the promise, didn't I? Because when the statement came out in April, on 20 April, it was 25 per cent, after a full Cabinet discussion. The fact is I never told Conrad Black that I would consider his 35 per cent. He wanted 35 per cent, he wanted 50 per cent, he wants 50-plus, he wants whatever number gives him complete certainty, and he particularly wanted them because he thought John Fairfax and Sons shares were cheap.[16]

Mr Black's actions

4.46 Mr Black's references to 'exercising discipline' have been construed as providing evidence of action to carry out a deal. In fact, however, while he may have had some personal view that his was a strong line on propriety and subsequent conversations with staff could have had some other meaning, actual events and the evidence of his own editors and managing editors, Messrs Hoy and Mulholland, indicate that no pressure was exerted and no control exercised on the matter of editorial freedom. Mr Black's only communication to the staff had been that they had the freedom to take whatever line they chose.

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[16] The Hon P J Keating, AM, 26 November 1993

FAIRFAX NEWSPAPERS

Non-interference and the role of the ownership

4.47 The allegations of a deal regarding balance and election coverage are refuted by events as they transpired. Regarding balance, it is plainly evident that the newspapers were in fact left free by Mr Black to indulge the views of their editors and did do so.

4.48 The committee has had clear and well-corroborated evidence from a number of witnesses that the newspapers' stance in the election was solely the responsibility of the individual editors.

> **Mr Hickie:** I will say one thing on the record: I have been in an executive position on several of the Fairfax newspapers now for the last decade, and I would say that since Conrad Black became the principal shareholder in the Fairfax group there has been, as a matter of fact, the least interference, as in none, in editorial matters that there has been - I have been at Fairfax for 18 years in total, and Conrad Black's period of involvement in the share register of Fairfax has coincided with absolutely no interference editorially with what the papers are doing. That is in significant contrast perhaps with the past under the old Fairfax regime.[17]

Similarly:

> **Chairman:** Could I perhaps for the record, seeing you are all representatives of journals of record, ask you what your comment is on Mr Black's submission where he says:
>
> > As Fairfax's ultimate principal shareholder, my only initiative in respect of political coverage in the Fairfax press was to ask the managing director to ask the editorial director to request to the editors of all the papers that they endorse whichever party they wished but that they ensure fair, professional and impartial coverage in the best Fairfax tradition.

[17] Evidence p 301

Were any of you asked to speak to anyone in those terms?

Mr Hickie: It was never conveyed to me.

Mr Cockburn: Nor to me.

Mr Kohler: I think I was told once to support whichever party I felt like supporting. I think I was probably told that.

Chairman: Was that gratuitous?

Mr Kohler: Totally gratuitous. But it was worth hearing. It was great, it was good to hear.

Chairman: Positive reinforcement.

Mr Kohler: It is not something that would have been conveyed to editors in the past at Fairfax. Editors in the past at Fairfax would have been told who to support in their editorials. Before the election during perhaps the last couple of weeks of the campaign, the board would have met and would have decided and would have handed down the tablet to the editors and told them who to support. Not only does that not occur, but we were specifically told that it was not going to occur and that we did not even have to tell them who we were supporting if we did not want to.

Senator Carr: And you all supported the conservative parties.

Mr Kohler: As it happens, that is true, yes.[18]

And again:

Senator Carr: Mr Hickie, you indicated that there is less interference now in the editorial decisions than there has been in the past. What was the nature of the interference in the past?

Mr Hickie: I indicated, to be specific, that there is no interference now, as opposed to there were regular discussions under previous managements about why certain stories had appeared in certain places, how

[18] Evidence p 307

> editors had justified them, general discussions about placement of stories, the relative importance of them et cetera. These were things that took place in hindsight, where my line always was, if you have a problem with how the editor has done something, then get another editor. The current management obviously believes that you put the editor in place and you get the editor to edit. This is something that indeed allows editors to do that. And there is, among all the people who are in these sorts of positions, common agreement that there is a significant change in what might have been the case half-a-dozen years ago.[19]

4.49 This freedom to comment was also verified by Mr Matthew Moore, President of the Fairfax House Committee, on behalf of Fairfax journalists:

> I guess one thing we would say at the outset is on one of the principal issues before this inquiry, as to whether journalists were instructed to cover the election in any particular way. We agree precisely with what Mr Mulholland and the editors have said, that there was no such instruction to any journalists as far as either of us are aware.[20]

Written evidence

4.50 In addition, in the evidence submitted by the executive directors of the Fairfax companies prior to the hearings, each categorically denied ever attempting to interfere with or influence the coverage of federal politics or the election. Similarly, the editors of the Fairfax newspapers stated that none of the directors had ever approached them concerning their coverage of election or political events:

> Since 1988, successive editors of *The Age* have been bound by a charter of editorial independence - signed by editors, staff members, management and board members - that requires the affairs of the city, nation and state and the world to be reported fully, fairly and regardless of any commercial, political or personal interests, including those of any proprietors, shareholders or board members.
>
> Michael Smith

[19] Evidence p 303

[20] Evidence p 345

Group Executive Editor
John Fairfax Group Pty Limited[21]

> In response to yours [letter] of January 27, 1994, I wish to state that I have at no stage asked any editor to take any particular political line and have left this to their individual judgements. At no stage has Mr Conrad Black or anyone else associated with him asked me to try to influence our editors in their approach to political issues.

Stephen Mulholland
Chief Executive
John Fairfax Holdings Limited[22]

> In particular, I had no conversation or communication whatsoever with Conrad Black about either federal politics, or the *Sydney Morning Herald*'s coverage of it, at any point. That remains the case to this day.

David Hickie
Editor-in-Chief
The Sydney Morning Herald[23]

Independent study

4.51 The role of the owner was not so much apparent in this by his presence as by his absence. Conspiracy theories regarding Australian newspapers do not sit well with the facts. Australian journalists are well known for their independence. The proprietor of the newspaper is one of the influences least likely to shape their views. An independent study by the Australian Centre for Independent Journalism in January 1992 surveyed one hundred and five Australian journalists who cover economic, business or policy issues across a range of publications. The study found that their proprietors rated only tenth in importance of sources in providing guidance of what to cover. This rated proprietors lower than academics, public relations firms or think tanks in their ability to influence the journalist. Plainly it is mischievous and misleading to build a conspiracy theory around proprietorial intervention under the current regime at Fairfax or indeed most Australian newspapers.

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[21] Submission No 20, 8 February 1994

[22] Submission No 14, 31 January 1994

[23] Submission No 9, 20 January 1994

Election coverage

4.52 Beyond the understanding that there was no interference on the part of the ownership, it has been well recognised in the evidence to the committee that Fairfax newspapers largely supported the Opposition in the last Federal election. This anti-Labor stance clearly does not constitute what any person seeking a deal for bias would regard as satisfactory.

> **Mr Hickie:** Well, all the Fairfax papers, except for the *Sun-Herald* in Sydney, advocated a vote for the federal opposition. The *Sun-Herald* in Sydney advocated no vote for either party; nobody advocated a vote for the Labor party.[24]

4.53 So strong was the bias in some cases that the editors themselves had misgivings. On 25 February 1993, the morning after Mr Keating's official campaign launch, the headline 'Pork Barrel Republic' was printed across the early edition of *The Sydney Morning Herald.* The anti-Labor slant in this was so blatant that the editor changed it outright. The later edition hit the streets announcing 'Keating's $1bn Gamble'. This was actually just as loaded, but less openly so.[25]

Headlines and political momentum

4.54 Mr Hickie, editor-in-chief of *The Sydney Morning Herald* agreed in evidence to the committee that the momentum of the last days of an election campaign is strongly influenced by newspaper headlines and editorials. The effect of the Fairfax coverage can only have been negative for the government and could not in any way have been construed as supportive.

4.55 In the days leading up to the election all three of the Fairfax newspapers featured articles with strong anti-Labor and pro-Liberal sentiment. On the 12 March 1993, the day before the election, there was a

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[24] Evidence p 294

[25] Evidence of Mr M Cockburn, p 288, 'When I saw the page proof at about 11 o'clock that evening, in discussion with various other people such as the night editor, various page 1 editors, we made judgement that the headline which we had thought earlier in the evening was a very clever headline was perhaps a little bit too clever by half, a bit too "commenty"'.

clear bias towards the Liberals in the editorials. The headlines of the editorials of the three papers read as follows:

> IT IS TIME FOR A CHANGE
>
> *The Sydney Morning Herald*
>
> WHY HEWSON SHOULD WIN
>
> *The Australian Financial Review*
>
> WHY THE COALITION SHOULD WIN TOMORROW
>
> *The Age*

4.56 Mr Hickie agreed that a growing number of Australians make up their minds just before polling day.[26]

Editorials

4.57 Beyond the headlines, in the weeks approaching the election, Dr Hewson and his party were either favourably mentioned or directly supported numerous times in the editorial pages of the Fairfax Press:

> Dr Hewson, for his part, has united a party which had been debilitated for most of the past decade by the rivalry between the former leaders, Mr Howard and Mr Peacock. No-one can now argue, as was the case in the last few elections, that the Liberals stand for nothing. *Fightback*, an unmistakably Hewson program, has unified the party and has also cemented relations within the Coalition.[27]

> In this election, we are recommending a vote for the coalition, precisely because Dr Hewson is more prepared than Mr Keating to press vigorously with that crucial reform process.[28]

4.58 In contrast, the editorials were critical of both Mr Keating and the government for a perceived lack of national progress:

> Since he became Prime Minister, Mr Keating has been much less committed to the program of reform than he was during the years when he

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[26] Evidence p 297

[27] *The Sydney Morning Herald* (editorial), 12 March 1993

[28] *The Australian Financial Review* (editorial), 12 March 1993

> was federal Treasurer and the intellectual driving force of the Government. The recession brought about a loss of nerve, an uncertainty about the direction in which Australia should be headed.[29]
>
> In his economic statement in the first week of the campaign, Mr Keating proclaimed the Government's commitment to continue micro-economic reform. However, the Prime Minister's 'forward agenda' was just a restatement of the very modest initiatives of the preceding 12 months.[30]
>
> Although he [Keating] has tried hard to rejuvenate the Government, it is showing signs of fatigue. It is time for a change.[31]

4.59 *The Australian Financial Review* even went as far as to run a series of editorials featuring Dr Hewson's positions on several key issues:

> HEWSON'S PRUDENTIAL INQUIRY
>
> John Hewson is considering holding a Campbell-style inquiry into prudential supervision if the coalition wins the elections ... another inquiry, carefully focused on the difficult issues of prudential supervision is a good idea - and not just because it would re-examine the painful failures of the 1980's.[32]
>
> HEWSON'S STRONG POLICY LAUNCH
>
> The real strengths of Dr Hewson's campaign launch was its strong emphasis on building the economy's productive capacity and the absence of any new spending promises.[33]
>
> ... Dr Hewson has been much more disciplined than Mr Keating in his spending and taxing promises, and has mainly confined himself to 'one-off' measures that would boost spending in the short term, but make little or no addition to the structural deficit in the medium term.[34]

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[29] *The Age* (editorial), 12 March 1993

[30] *The Australian Financial Review* (editorial), 12 March 1993

[31] *The Sydney Morning Herald* (editorial), 12 March 1993

[32] *The Australian Financial Review* (editorial), 23 February 1993

[33] *The Australian Financial Review* (editorial), 2 March 1993

[34] *The Australian Financial Review* (editorial), 2 March 1993

DR HEWSON AND THE STATES

The financial markets will be relieved to hear Dr Hewson's assurance that there will [sic] no new spending promises in today's campaign speech.[35]

HEWSON VERSUS THE ECONOMISTS

... there is little doubt that Dr Hewson's tax reform would encourage saving and help growth in the longer run.[36]

Written evidence

4.60 In their written evidence, the editors of the Fairfax papers also openly acknowledged their support for the Liberal party in the elections:

> On the day before the March, 1993 Federal election, the *Age* recommended that its readers vote for the Opposition ... Editorials during the campaign generally favoured the Opposition.
>
> Alan Kohler, Editor, *The Age*[37]

> On Thursday, 11 March 1993 I rang Michael Hoy to inform him that, as a matter of courtesy, he should be aware that the Herald was printing an 'Election eve' editorial on the Friday morning which, while avoiding any strong support for either partly, concluded that 'on balance' we were mildly advocating a vote for the Federal Opposition.
>
> David Hickie, Editor in Chief, *The Sydney Morning Herald*[38]

SUMMARY

4.61 From the strong statements made by Mr Black, Mr Keating and numerous witnesses, it is clear that the informal conversations between the two men were unnecessarily blown out of proportion by the media and the Opposition.

4.62 The 'evidence' used by the committee to judge what was said and intended by both men has been largely hearsay and media speculation,

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[35] *The Australian Financial Review* (editorial), 3 March 1993

[36] *The Australian Financial Review* (editorial), 4 March 1993

[37] Submission No 9, 20 January 1994

[38] Submission No 10, 21 January 1994

which was not taken in hearings by the committee, but gathered from news reports. It is unsound and untested material which does not bear close scrutiny and which has been selectively chosen by the Chair on the basis of its attractiveness for conspiracy theorists.

4.63 Both Mr Keating's and Mr Black's understandings and use of the term 'balanced coverage' were in reference to fair and independent news journalism. Their definition of the term is in direct accordance with both the public's and government's understanding as well.

4.64 Mr Keating and Mr Black have firmly denied that any sort of a 'deal' was made between them. Mr Keating responded firmly and unequivocally to the Parliament and to the media at the time. The committee has deliberately selected from his responses on the basis of the majority predisposition to find fault regardless of the evidence. Evidence given by executives and editors of the Fairfax newspapers supports this claim. Mr Black was described many times as an owner not given to interfering in his newspapers' inner workings. The 1993 Federal election coverage, which was overwhelmingly in favour of the opposition in the Fairfax newspapers only supports this claim further.

4.65 This inquiry has been a pointless and expensive exercise in deliberately misunderstanding the trivia of public life at the taxpayers' expense.

RESERVATION BY SENATOR KERNOT

RESERVATION BY SENATOR KERNOT

While I am in agreement with the majority report, I would seek to add the following two comments by way of reservation:

The Foreign Investment Review Board

(1) The Australian Democrats principal motivation for being involved in this inquiry was the opportunity it presented to examine the operation of the Foreign Investment Review Board (FIRB).

This has been acknowledged by the other members of the Committee, for example:

> ... I understand Senator Kernot's principal concern (has) rested with the workings of the Foreign Investment Review Board and foreign investment policy generally.
>
> **Senator Stephen Loosley, Senate Hansard, March 16, 1994**

The term of reference referring to FIRB's operation was included at the Democrats' insistence. Our concern, and my concern, about the FIRB's processes has been long-standing. It is demonstrated by this extract from my first speech to Parliament:

> ... The other factor in this equation is the role played by the Foreign Investment Review Board (FIRB). Currently, part time directors virtually rubber-stamp foreign investment proposals, which are very rarely blocked. Although there is a power of forfeiture of an asset, there is no investigation into acquisitions by foreign buyers to ensure compliance with the law.
>
> I do not think that is good enough.
>
> The 1986 change in FIRB criteria for approval of acquisitions from 'economic benefit' to 'not contrary to the national interest' is an attempt to defraud the people of Australia. 'Not contrary to the national interest' to the Treasurer simply means anything which will attract currency to Australia in the short term.
>
> Mr Deputy President, the long term effects of such a policy are already being seen in the vertical integration of both the tourist and beef cattle

> industries in Queensland. It is not in the national interest for around 85 per cent of profits from these industries to flow from Australia.
>
> Senator Cheryl Kernot, First speech, Senate Hansard, August 22, 1990

It is also demonstrated by a **Private Senator's Bill** which I introduced into the Senate 18 months ago, on December 17, 1992. It sought to replace the Foreign Investment Review Board with an independent statutory body, a Foreign Investment Review Commission.

The text of my comments at that time and the Bill itself are attached to this reservation.

Public accountability

(2) Special attention needs to be drawn to another matter which affected the operation of the Committee and which goes to the heart of public accountability.

The Treasurer directed certain officials not to answer certain questions or produce certain documents. He did this by **asserting** that the information the Committee was requesting attracted a **public interest immunity.**

Currently where such a conflict between the Executive and the Senate occurs over the public interest of information, only penal remedies aimed at the officials concerned exist to resolve the conflict (these were last updated in the 1987 rewrite of the Parliamentary Privileges Act), or 'indirect' punitive measures such as disruption of the Government's legislative program.

Such assertions have previously adversely affected, amongst other things, parliamentary examination of the Loans (Khemlani) Affair in 1974/5; bottom-of-the-harbour tax schemes in 1981/2; and the Loans Council Inquiry of 1992/3.

The ability of a Minister to prevent information being publicly scrutinised by asserting - and not having to prove - that the release of the information is against the public interest runs counter to all tenets of proper public accountability.

On March 23, 1994, I introduced into the Senate a **Private Senator's Bill** [the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994] to remedy the "public interest impasse".

The Bill empowers the Federal Court to enforce lawful orders of a House of the Parliament or a committee for the production of documents. Failure to comply would be a punishable criminal offence.

Where an officer of the Commonwealth failed to produce documents because of a direction by a Minister, the bill would empower the Federal Court to make such orders as were necessary to obtain the documents, unless it were proved that disclosure of those documents would be substantially prejudicial to the public interest and that such prejudice was not outweighed by the public interest in ensuring that a House of Parliament or its committee could conduct inquiries freely.

The Bill would empower the Federal Court to find an offence proved against the officer but not to convict the officer or impose any penalty.

The Bill of course does not apply to information explicitly protected by current statute. The text of my bill is attached to this reservation.

I believe enactment of the Bill by Parliament would restore the proper balance between Parliament and government in relation to the Parliament's right to important information produced or held by government.

It would deal properly with the use of ministerial directions to intimidate officials who are ultimately accountable to Parliament. It would deal effectively with improper attempts by Ministers to conceal from Parliament documents for which there can be no justification that they be kept secret.

The Senate's Privileges' Committee is due to report back on the Bill in August this year. How it is then dealt with by the Parliament will be a test for all political parties' attitudes to long-term public accountability.

Extract from the WEEKLY SENATE HANSARD Database
Date: 17 December 1992 (13:05) Page: 5322

MATTERS OF PUBLIC INTEREST
Foreign Investment in Australia

Senator KERNOT (Queensland) (1.08 p.m.)--The issue I want to raise is that of **foreign** investment in Australia. In particular, I wish to raise the question of the level of **foreign** ownership which is allowed in our print media. There is no legislative limit on the amount of **foreign** ownership allowed in Australian print media assets. There is a reserve power vested in the Treasurer to reject any proposal concerning **foreign** investment which is judged to be contrary to the national interest, but this national interest test is so nebulous as to be virtually meaningless. There is basically a total discretion with the Executive and no parliamentary or other control on the decisions.

Recent media reports indicate that the **Foreign** Investment Review Board is currently or will soon be considering an application to allow an increase in **foreign** ownership of the Fairfax group. Mr Conrad Black is apparently attempting to increase his holdings above 15 per cent and the United States investors are also apparently seeking approval to raise their 5 per cent non-voting interest. The Australian public is completely shut out of the decision making process in this matter. As we have argued here many times, the media is a special industry. It is intrinsic to modern life in so many ways and the impact of the media on our culture and on the nature of our country is immense. Not only are our views on so many subjects and especially the rest of the world influenced by the media, but the image of Australia and Australians which is projected to the world is inexorably linked to our media, especially print media.

It is for these reasons that the Democrats support legislation which limits the level of **foreign** ownership of print media. We have such legislative control over radio and television that we may ask why newspapers and magazines should be treated differently? Mr Bryan Frith, writing in yesterday's *Australian* newspaper, made an interesting point when he said:

It must be presumed that Canadian publisher Mr Conrad Black would not seek formal approval to lift his stake in press group John Fairfax Holdings to 25 per cent unless he believed it would be forthcoming.

The office of the Prime Minister (Mr Keating) is reported as saying that no guarantees have been given. I say to him that sure, we all know about the policy making processes in the Labor Party. Prime Minister Keating decides all policy at the moment, often as a result of a bet with Senator Schacht. Who in the Labor Party is left to care that Caucus set the current limit only one year ago.

It is important to remember that it is Mr Dawkins, and only he, as Treasurer, who has the power to refuse the application. Legally Mr Keating has no status whatsoever. Mr Dawkins is on record as opposing any increase above the current arrangements. I think it begs the question what exactly has changed which would justify any alteration. Why have investors decided that now, of all times, is the appropriate time to apply for an increased holding?

Normally this period is not good for investment; there is a lot of uncertainty on the outcome of the election and hence on the commercial environment.

Surely it is inappropriate that media ownership policy is influenced by the stage of the electoral cycle. If the Treasurer wishes to stop the increase he simply has to say so publicly. I would contend that silence demonstrates a new flexibility on this issue which cannot be justified by recent events. What is needed is a whole new regime of regulation of foreign investment in Australia and to that end I seek leave to table for discussion purposes a draft Bill and an explanatory statement proposing to reform the current foreign investment review regime.

Leave granted.

Senator KERNOT--I thank the Senate and I seek leave to have the explanatory statement incorporated in *Hansard.*

Leave granted.

The document read as follows--

This Bill concerns a matter of great importance for the longterm development and security of this country. It concerns the economic sovereignty of this nation and it concerns the standards which Australia imposes on the international investment community. This Bill is not anti-foreign investment, it is unashamedly pro good foreign investment.

The Bill proposes to fulfil a promise made by the former Treasurer, Mr Phillip Lynch, on 1 April 1976 in the House of Representatives when the Foreign Investment Review Board was established. He stated:

> "Initially we will establish the Board by administrative action. It is proposed that it be given a statutory basis as soon as possible."

Mr President, more than 16 years later, that proposal has been ignored by all of the 5 subsequent Commonwealth Treasurers. This legislation proposes to remedy that inaction by establishing an independent statutory Foreign Investment Review Commission.

The Commission will take over the existing responsibilities of the Board and it will obtain enhanced powers and responsibilities. I will detail those later, however it is important to consider how an independent Commission will differ from the current arrangements.

The FIRB has close administrative arrangements with the Commonwealth Treasury. There is a branch of the Treasury, the Foreign Investment Branch, which provides services to the FIRB.

The Board's primary function is to assist the Government in administering foreign investment policy. The Board examines proposals by foreign interests to undertake direct investment in Australia and advises the Government on whether they satisfy the existing guidelines and hence should be approved. So, in essence, the FIRB is simply an advisory

body--the Treasurer has the final say on foreign investment matters.

There has been criticism that the Board is captive to the Treasury, which is under the control of the Minister. Thus even though the Board may act independently, there is always the appearance of the Board being captive to Government and hence being subject to political interference in its deliberations.

This cloud could be lifted by granting the Board statutory independence and that is one of the effects of this Bill.

A criticism which is levelled at the Board is that it is a "toothless tiger". Even in the relatively rare circumstance where the Board advises the Treasurer to impose some conditions on a foreign investment proposal, and the Treasurer agrees to such conditions, then there is absolutely no follow up to ensure that the conditions have actually been honoured. That is, there is no compliance function routinely undertaken by the Board.

Clearly this will weaken the value of any conditions imposed on foreign investment and should be remedied. A broad example concerns the development of land. There is a general condition in foreign investment policy that foreign investors cannot speculate on urban land holdings. Accordingly, acquisition of vacant real estate for development is generally allowed where the development occurs within 12 months. There are many examples in Queensland where this requirement has been breached yet no action has been taken against the investors concerned.

Clause 6 of the Bill specifically provides that one of the functions of the Commission is to ensure compliance by foreign investors with decisions made with respect to foreign investment matters. This will ensure that voluntary compliance by investors improves, and that the proper auditing of the conditions applied to investments will ensure that involuntary compliance will also be improved.

The Bill proposes to grant to the Commission both the statutory duty to consider all reviewable submissions on foreign investment and more importantly to make decisions in respect of those submissions.

Currently it is a matter of administrative practice that reviewable investment proposals are submitted to the FIRB. There is no statutory obligation that this occur. The Bill mandates that the investor must submit his or her proposal to the Commission.

The Bill also proposes to depoliticise the process of approval by granting deliberative powers to the Commission. The current advisory role of the Board will be replaced by a Commission with a deliberative power.

There are numerous reasons for granting a deliberative role for the Commission. Firstly, in practice the Board's advice is generally relied on and is the de facto decision maker. I believe that this reality should be reflected in the legislation.

Secondly, under the current arrangements it is impossible to find out whether the Treasurer acts on the advice of the FIRB or completely ignores that advice. This lack of transparency

means that it is impossible to discern whether decisions are made on economic grounds or on political grounds.

To overcome this problem, it is proposed that, although the Commission will be granted a deliberative power, a reserve power to override any decision of the Commission will be left with the Treasurer. That is, the final say will remain with the Minister. The Treasurer may reverse or alter any decision and attach any condition to any decision, however any such reversal or alteration of a decision must be in writing and must be published in the Gazette and tabled in both Houses of Parliament, with an explanatory statement, within 15 sitting days.

This system will enable the public to be aware of the original advice on any proposal and the changes imposed by the Treasurer and the reasons for those changes.

Schedule 1 of the Bill proposes to codify the principles which must be used by the Commission in determining applications for **foreign** investment into Australia. The first of these is the net economic benefit to Australia of the proposed investment.

This should not be a contentious matter. Surely it is reasonable that Australia says to the world--we welcome investment from outside this country as long as there is a clear economic benefit to Australia, and the investment is not against the national interest.

The Government amended the **Foreign** Acquisitions and Takeovers Act 1975 during the 1980's to remove the "net economic benefit" test and replaced it with the deliberately nebulous criterion of "not contrary to the public interest".

Clearly this is ludicrous. Why shouldn't the Treasurer have the power to reject a project because it doesn't provide any economic benefits?

The Commission will also have an important power concerning public enquiries into any aspect of **foreign** investment in Australia. The Treasurer, or either House of Parliament will have the power to refer any **foreign** investment matter to the Commission for enquiry and report.

This could involve a particular investment proposal, such as the Multi-Function Polis or a general reference such as an enquiry into the level of **foreign** ownership in a particular industry. Members of the public would be entitled to make submissions and to appear before these enquiries, thereby strengthening public participation.

The Commission will also have to establish and maintain a comprehensive register of **foreign** investment in Australia. There is considerable public unease over the growing level of **foreign** ownership in the Australian economy. This unease is fostered, in part, by the refusal of successive Governments to establish a comprehensive register showing the level of **foreign** ownership in Australia. Obsession with secrecy and with impugning the motives of those who speak out about our future if we "sell the farm", are the usual responses of Government--however these concerns about our longterm economic sovereignty continue to represent legitimate community concerns.

There is now a trend at the State level to establish registers of **foreign** investment in land. Queensland led the way in this matter, Western Australia has recently followed suit and there are Bills before the Parliaments of South Australia and Tasmania on this issue.

The Commission will register all **foreign** investment, not just land, with appropriate exemptions applying so as to minimise the administrative task. This register will enable the community to know the extent of **foreign** ownership of Australian assets.

Currently the **foreign** investment policy of the Government is simply policy. There are no legislative provisions for most sectors of the economy; broadcasting is an obvious exception. This means that the control of **foreign** investment is dominated by the Executive.

This situation is defended as appropriate by some on the basis that great flexibility is needed in this area. That approach is rejected by the Democrats.

The Parliament should decide upon the appropriate regime for **foreign** investment. Parliamentary scrutiny should be needed before the rules are liberalised.

For example, in the One Nation Statement, the Government unilaterally increased the thresholds below which **foreign** investment proposals are not examined, and abolished the requirement for Australian equity participation in mining ventures.

With the stroke of a pen the Government decided that it will cease to examine proposals by **foreign** interests to purchase or establish businesses with a value of less than $50 million in almost all sectors of the economy. This quite literally means that virtually every rural property in Australia could be acquired by **foreign** interests, without the FIRB even examining the acquisitions. Few, but this Labor Government, desperate for any **foreign** capital, would argue that such a scenario is in the national interest.

This Bill is still in draft form. I am tabling it to encourage community debate on the issue and I welcome feedback and suggestions for refinement and improvement.

THIS IS A DRAFT OF A BILL PROPOSED FOR INTRODUCTION IN THE SENATE, CIRCULATED TO STIMULATE DISCUSSION ON THE SUBJECT.

COMMENTS ARE WELCOME AND SHOULD BE ADDRESSED TO:

SENATOR CHERYL KERNOT, THE SENATE, PARLIAMENT HOUSE, CANBERRA ACT 2600

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DRAFT

Foreign Investment Review Commission Bill 1992

9300820 1,230/23.2.1993 (8/93) Cat. No. 93 3508 1

1990-91-92

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

(SENATOR KERNOT)

A BILL

FOR

An Act to establish a Foreign Investment Review Commission, and for related purposes

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

PART 1–PRELIMINARY

Short title

1. This Act may be cited as the *Foreign Investment Review Commission Act 1992*.

Commencement

2. This Act commences on the day on which it receives the Royal Assent.

Interpretation

3. In this Act, unless the contrary intention appears:

"Chairperson" means the Chairperson of the Commission;

"Commission" means the Foreign Investment Review Commission established by section 5;

"Commissioner" means the Chairperson, a Commissioner or a special Commissioner;

"Commonwealth authority" means:

(a) a body or an authority established for a public purpose by or under a law of the Commonwealth; or

(b) a body corporate:

(i) incorporated under a law of the Commonwealth or a State; and

(ii) in which the Commonwealth has a controlling interest;

"conservation" means the management of the human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations, and includes the preservation, maintenance, sustainable utilisation, restoration and enhancement of the environment;

"development" means the modification of the biosphere to satisfy human needs and improve the quality of life;

"Division", in relation to an inquiry, means the Chairperson, Commissioners or the special Commissioners (if any) for the inquiry;

"environment" includes all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings;

"evidence", in relation to an inquiry, includes a submission to an inquiry, whether oral or written;

"foreign interest" means a natural person not ordinarily resident in Australia, or any corporation, business or trust in which there is a substantial foreign interest, regardless of whether the corporation, business or trust is foreign controlled;

"foreign investment matter" means a proposal by a foreign interest, for investment in Australia;

"inhabited external Territory" means:

(a) Norfolk Island;

(b) the Territory of Christmas Island; or

(c) the Territory of Cocos (Keeling) Islands;

"inquiry" means an inquiry initiated under section 18;

"Judge" means:
(a) a Judge of a court created by the Parliament; or
(b) a person who has the same designation and status as such a Judge; or
(c) a Judge of a court of a State;

"losses" includes costs;

"referral" means a referral under section 18 of a matter to the Commission for inquiry and report;

"resource" means a biological, mineral or other material component, whether natural or not, of the environment (other than a human being) and includes a permanent or temporary combination or association of such components;

"special Commissioner" means a person appointed under paragraph 10(c) and, in relation to an inquiry, means a special Commissioner appointed for the purposes of the inquiry;

"State" includes the Australian Capital Territory and the Northern Territory;

"use" includes proposed use and, in relation to a resource, includes:
(a) use for, or by way of, conservation or development; and
(b) use of the resource before, during or after any processing.

Application

4. This Act extends to all external Territories.

PART 2–FOREIGN INVESTMENT REVIEW COMMISSION

Division 1–Establishment, Functions and Powers of Commission

Establishment

5. The Foreign Investment Review Commission is established.

Functions

6. The functions of the Commission are:
(a) to hold inquiries and make reports to the Minister in respect of such matters as are referred to it;
(b) to make decisions in respect of foreign investment matters in accordance with this Act;
(c) to ensure compliance by foreign investors with decisions made with respect to foreign investment matters; and
(d) to establish and maintain a foreign investment register.

Commission to be guided by policy principles

7. In the performance of its functions the Commission must be guided by the policy principles set out in Schedule 1.

Matters to be addressed in performance of Commission's functions

8. In the performance of its functions in relation to a foreign investment matter, the Commission must as far as practicable:

(a) identify the subject of the investment proposal; and

(b) identify:

(i) the environmental, cultural, social, industrial, economic and other effects of the investment proposal; and

(ii) the implications for those effects, including implications that are uncertain or long-term; and

(c) assess the losses and benefits involved in the investment proposal including:

(i) losses and benefits of an unquantifiable nature; and

(ii) losses and benefits that are uncertain or long-term; and

(d) give consideration to any other aspect of the matter that it considers relevant.

Powers of Commission

9. In addition to any other power conferred on it by this Act, the Commission has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.

Division 2—Constitution of Commission

Constitution of Commission

10. The Commission consists of:

(a) a Chairperson; and

(b) any Commissioners appointed from time to time under this Act; and

(c) any special Commissioners appointed from time to time under this Act for the purpose of inquiries.

Appointment of Commissioners

11.(1) The Commissioners, special Commissioners and the Chairperson are to be appointed by the Governor-General on the nomination of the Minister.

(2) Appointments under subsection (1) are to be made on a full-time basis or on a part-time basis.

Period of appointment of Chairperson

12. The Chairperson is to be appointed for such period not exceeding 5 years as is specified in the instrument of appointment and is eligible for reappointment.

Period of appointment of special Commissioners

13.(1) A special Commissioner is to be appointed for the inquiry or inquiries specified in the instrument of appointment.

(2) The Governor-General may by written notice to a special Commissioner appoint the Commissioner for an additional inquiry.

Selection of special Commissioners

14. Before the appointment of a special Commissioner the Minister must consult:

(a) the Chairperson; and

(b) the presiding member (however described) of the Industries Commission;

about suitable appointees.

Terms and conditions of appointment

15. The Commissioners hold office on such terms and conditions in respect of matters not provided for by this Part or Part 5 as are determined by the Minister in writing.

PART 3–REFERENCE OF INVESTMENT PROPOSALS TO COMMISSION

Submission of investment proposals to Commission

16.(1) Where a foreign investor seeks to make a prescribed investment, he or she must submit an investment proposal in the prescribed form for the consideration of the Commission.

(2) The Commission must determine within the prescribed time whether the investment as proposed may proceed.

(3) The Commission may attach any conditions for the investment that it thinks fit, consistent with the principles set out in Schedule 1.

(4) The relevant foreign investor must be advised of the decision of the Commission in writing as soon as a decision has been made under this section.

(5) Each submission of an investment proposal must be accompanied by the prescribed fee.

Submission of decisions to Minister

17.(1) The Commission must submit in writing to the Minister all decisions made by it pursuant to section 16.

(2) The Minister may by notice in writing together with an explanatory statement, reverse, alter or attach any condition to any decision, as he or she sees fit. Such notice must be issued within the prescribed time.

(3) Any notice and explanatory statement under subsection (2) must be published in the *Gazette* and laid before each House of the Parliament within 15 sitting days of that House after the Minister issues the notice.

PART 4–INQUIRIES

Division 1–Preliminary

Initiation of inquiry

18.(1) The Minister may refer any matter relating to foreign investment to the Commission for inquiry and report.

(2) Either House of the Parliament may by resolution refer any matter relating to foreign investment to the Commission for inquiry and report.

(3) All referrals to the Commission for inquiry and report must be in writing, must include a reporting date and must be included in the Annual Report of the Commission.

Notice of inquiries

19. The Commission must as soon as practicable after receiving a referral of an inquiry matter, give reasonable notice in each State and inhabited external Territory, by advertisement in a newspaper circulating generally in each State or Territory, of:

(a) the inquiry into the matter;
(b) the subject of the inquiry;
(c) when the inquiry is to begin; and
(d) the address to which, and the date by which, written submissions to the inquiry may be sent.

Constitution of Commission for purposes of inquiry

20.(1) An inquiry must be conducted by a Division of the Commission constituted by the Chairperson and the Commissioners or special Commissioners (if any) for the inquiry.

(2) A Division must include at least two Commissioners unless the Minister otherwise directs.

Inquiries may be held at the same time

21. The Commission may hold more than one inquiry at the same time.

Delegation of Chairperson's powers

22. The Chairperson may by signed instrument delegate to a Commissioner for the purposes of an inquiry all or any of the Chairperson's powers under this Act in relation to the conduct of meetings and hearings of the Division conducting the inquiry, but those powers may only be exercised at meetings and hearings at which the Chairperson is not present.

Protection of Commissioners and witnesses

23.(1) A Commissioner has, in the performance of his or her duties as a Commissioner, the same protection and immunity as a Justice of the High Court.

(2) A person giving evidence to an inquiry has the same protection and is, in addition to the penalties provided by this Act, subject to the same liabilities as a witness in proceedings in the High Court.

Division 2–Conduct of Inquiries

General conduct of inquiries

24. Subject to this Division, in the conduct of an inquiry:

(a) the procedure is to be decided upon by the Chairperson; and

(b) the Commission:

(i) may inform itself about any matter in any way the Chairperson thinks fit;

(ii) may receive oral or written evidence;

(iii) may consult with such persons as the Chairperson thinks fit;

(iv) is not bound to act in a formal manner; and

(v) is not bound by the rules of evidence.

Meetings of Commissioners

25.(1) Where there is at least one special Commissioner for an inquiry, the Chairperson may convene such meetings of the Division conducting the inquiry as the Chairperson thinks necessary for the efficient conduct of the inquiry.

(2) The Chairperson may determine the places at which the meetings are to be held.

Hearings by Commission

26.(1) The Commission may hold such hearing or hearings as the Chairperson thinks necessary for the purposes of an inquiry.

(2) Before the Commission begins hearings for the purposes of an inquiry, the Commission must give reasonable notice in each State and inhabited external Territory, by advertisement in a newspaper circulating generally in each State or Territory, of:

(a) the hearings;

(b) the subject of the hearings; and

(c) the times and places at which the hearings are to be held.

Quorum for meetings and hearings

27.(1) Subject to subsection (2), where there is at least one special Commissioner for an inquiry, the majority of the Commissioners constituting the Division for the inquiry constitute a quorum at a meeting or hearing of the Division.

(2) A quorum of a Division for an inquiry must not be taken to be present unless the Chairperson or his or her delegate for the purposes of the inquiry is present.

Presiding at meetings and hearings

28.(1) The Chairperson is to preside at all meetings and hearings at which he or she is present.

(2) Where the Chairperson is not present at a meeting or hearing for the purposes of an inquiry, his or her delegate for the purposes of the inquiry is to preside at the meeting or hearing.

Procedure at hearings

29.(1) Subject to this section, a hearing is to be held in public.

(2) Where:

(a) a person who appears to give evidence at a hearing objects to giving evidence in public; and

(b) the Commission considers that:

(i) the evidence is of a confidential nature; and

(ii) the interest in maintaining confidentiality is greater than the interest in having the evidence taken in public;

the Commission may take the evidence in private.

(3) Where the Commission considers that:

(a) that evidence to be given at a hearing is of a confidential nature, even though the person who appears to give the evidence has not objected to doing so in public; and

(b) the interest in maintaining confidentiality is greater than the interest in having the evidence taken in public;

the Commission may take the evidence in private.

(4) The Commission may if it thinks fit permit or require a person who is to give evidence to the Commission to do so in writing.

(5) The Commission may take evidence on oath or affirmation at a hearing.

Written evidence and documents to be made public

30. Where a person:

(a) gives written evidence to an inquiry; or

(b) gives or produces a document to the Commission in connection with an inquiry;

the Commission must as soon as practicable make available to the public, in any way it thinks fit, the particulars of the evidence or the contents of the document, other than any matter where:

(c) the person objects to the matter being made public and the Commission considers that evidence of the matter would have been taken in private if it had been given orally at a hearing; or

(d) the Commission considers that, even though the person does not object to the matter being made public, evidence of the matter would have been taken in private if it had been given orally at a hearing.

Commission may prepare background papers etc.

31.(1) In the course of an inquiry, the Commission may prepare for public consideration a background paper or issues paper in relation to the inquiry.

(2) The Commission must as soon as practicable make copies of any background paper or issues paper available to the public.

Draft reports

32.(1) In the course of an inquiry the Commission must, unless the Minister otherwise directs, prepare for public consideration a draft report of the inquiry.

(2) The Commission must as soon as practicable make copies of the draft report available to the public and must provide opportunities for public comment on the draft report.

Conduct of meetings

33.(1) The Commission may, subject to this Division, regulate proceedings at its meetings as it considers appropriate.

(2) Without limiting subsection (1), the Chairperson may permit participation in a meeting or hearing by telephone, closed circuit television or any other means of communication.

(3) A Commissioner or other person who is permitted to participate in a meeting or hearing under subsection (2) is to be regarded as being present at that meeting.

Powers of Chairperson

34.(1) A power of the Chairperson under section 24, 25, 26 or 33 in relation to an inquiry is to be exercised as far as practicable only after consultation with the Commissioners for the inquiry.

(2) The Chairperson is to direct and control travel arrangements by Commissioners for the purpose of the performance of their duties.

Division 3—Reports

Report to be tabled

35.(1) Where the Commission receives a reference under section 18, the Commission must report on the reference within a reasonable time having regard to the size and complexity of the reference.

(2) The Minister must cause a copy of a report relating to an inquiry that is given to him or her to be laid before each House of the Parliament within 10 sitting days of that House after the day on which the Minister receives the report.

Division 4–Evidence

Power to obtain information and documents

36.(1) Where the Commission:

(a) is conducting an inquiry or considering an investment proposal; and

(b) has reason to believe that a person is capable of giving information or producing documents relevant to the inquiry or investment proposal;

the Chairperson may give written notice to the person:

(c) requiring him or her to appear at a hearing to give evidence or to produce the documents specified in the notice; or

(d) requiring him or her to give to the Commission on or before a day specified in the notice:

(i) a statement signed by the person or, in the case of a body corporate, on behalf of the body corporate, setting out the information specified in the notice; or

(ii) the documents specified in the notice.

(2) Where documents are produced or given to the Commission under subsection (1), the Commission:

(a) may take possession of and may make copies of or take extracts from the documents;

(b) may retain possession of the documents for such period as is necessary for the purposes of the inquiry or consideration of the investment proposal to which the documents relate; and

(c) during that period must permit them to be inspected at all reasonable times by persons who would be entitled to inspect them if they were not in the possession of the Commission.

Allowances to persons giving evidence

37.(1) A person who appears at a hearing because of a notice under subsection 36(1) is entitled to be paid such allowances for the person's travelling and other expenses as are prescribed.

(2) If the Chairperson considers it appropriate, a person who appears at a hearing to give evidence or produce documents (otherwise than because of a notice under subsection 36(1)) may be paid such allowances for the person's travelling and other expenses as are prescribed.

(3) If the Chairperson considers it appropriate, a person who gives evidence to or produces documents at an inquiry may be:

(a) paid such remuneration as is prescribed for the performance of work involved in collecting and preparing the evidence or documents; or

(b) reimbursed such expenses or compensated for such losses as were reasonably incurred in collecting and preparing the evidence or documents;

or both.

(4) Money payable under this section is to be paid by the Commonwealth.

PART 5—ADMINISTRATION

Division 1—Office of Commissioner

Acting Chairperson

38.(1) The Minister may appoint a person to act as the Chairperson:

(a) during a vacancy in the office of the Chairperson (whether or not an appointment has previously been made to the office); or

(b) during any period, or during all periods, when the Chairperson is absent from Australia or is, for any other reason, unable to perform the functions of the office of the Chairperson;

but a person appointed to act during a vacancy must not continue to act for more than 12 months.

(2) Anything done by or in relation to a person purporting to act as the Chairperson is not invalid on the ground that:

(a) the occasion for the person's appointment had not arisen; or

(b) there was a defect or irregularity in connection with the person's appointment; or

(c) the person's appointment had ceased to have effect; or

(d) the occasion for the person to act had not arisen or had ceased.

Acting special Commissioners

39.(1) The Minister may appoint a person to act as a special Commissioner for an inquiry:

(a) in the place of a person who has ceased to be a special Commissioner for the inquiry; or

(b) during any period, or during all periods, when a special Commissioner for the inquiry:

(i) is absent from Australia; or

(ii) is unable to take part in the inquiry because of a direction under subsection 41(4); or

(iii) is for any other reason unable to perform the function of a special Commissioner for the inquiry;

but a person appointed to act under paragraph (a) must not continue to act for more than 6 months.

(2) In considering the persons suitable for appointment for an inquiry under subsection (1), the Minister must take into account the consultations under section 14 in relation to the inquiry.

(3) Anything done by or in relation to a person purporting to act as a special Commissioner is not invalid on the ground that:

(a) the occasion for the person's appointment had not arisen; or

(b) there was a defect or irregularity in connection with the person's appointment; or

(c) the person's appointment had ceased to have effect; or

(d) the occasion for the person to act had not arisen or had ceased.

Outside employment

40.(1) A Commissioner must not:

(a) if appointed on a full-time basis—engage in paid employment outside the duties of the office of Commissioner except with the consent of the Minister; or

(b) if appointed on a part-time basis—engage in paid employment that conflicts with the proper performance of the Commissioner's functions.

(2) A reference in this section to paid employment includes a reference to the performance by a person of a service for which it could reasonably be expected that the person would receive payment.

Disclosure of interests

41.(1) The Chairperson must give written notice to the Minister of all direct and indirect pecuniary interests that the Chairperson has or acquires in a business carried on in Australia or in a body corporate carrying on any such business.

(2) Where the Chairperson has or acquires an interest, pecuniary or otherwise, that could conflict with the proper performance of his or her functions during an inquiry:

(a) he or she must, as soon as possible after the relevant facts have come to his or her knowledge, disclose the interest to the Minister;

(b) the Minister must take such action as the Minister considers appropriate; and

(c) the interest must be disclosed in the report of the inquiry.

(3) Where a Commissioner has or acquires an interest, pecuniary or otherwise, that could conflict with the proper performance of his or her functions during an inquiry he or she must, as soon as practicable after the relevant facts have come to his or her knowledge, disclose the interest to the Minister.

(4) Where the Chairperson becomes aware that a Commissioner has, in relation to an inquiry, an interest of the kind referred to in subsection (3), the Chairperson must direct the Commissioner not to take any further part in the inquiry.

Suspension and removal from office

42.(1) The Governor-General may suspend a Commissioner from office on the ground of misbehaviour or physical or mental incapacity.

(2) Where the Governor-General suspends a Commissioner from office, the Minister must cause a statement of the ground of the suspension to be laid before each House of the Parliament within 7 sitting days of the House after the suspension.

(3) Where such a statement has been laid before a House of the Parliament, that House may by resolution within 15 sitting days of that House after the day on which the statement has been laid before it, declare that the Commissioner should be restored to office. If each House so passes a resolution, the Governor-General must revoke the suspension.

(4) If at the expiration of 15 sitting days of a House of the Parliament after the day on which the statement has been laid before that House, that House has not passed such a resolution, the Governor-General must remove the Commissioner from office.

(5) If a Commissioner:

(a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit; or

(b) being a person holding office on a full-time basis:

(i) engages, except with the consent of the Minister, in paid employment outside the duties of his or her office; or

(ii) is absent from duty except on leave granted by the Minister in accordance with section 46, for 14 consecutive days or for 28 days in any period of 12 months; or

(c) fails without reasonable excuse to comply with subsection 41(1), (2) or (3) or with a direction under subsection 41(4);

the Governor-General must terminate the appointment of the Commissioner.

(6) A Commissioner must not be removed from office except as provided by this section.

(7) Where a Commissioner who is an eligible employee for the purposes of the *Superannuation Act 1976* is removed from office under subsection (4) on the ground of physical or mental incapacity, he or she is to be taken for the purposes of that Act to have been retired on the ground of invalidity on the day on which he or she was suspended from office.

(8) A Commissioner who is suspended from office under this section is not entitled to be paid any remuneration or allowances in respect of the period of suspension unless he or she is restored to office.

Division 2—Conditions of Commissioners

Part-time Chairperson taken to be full-time

43. Where:

(a) the Chairperson has been appointed on a part-time basis; and

(b) the Minister becomes satisfied that the Chairperson will not be able to perform the functions of Chairperson during a period otherwise than on a full-time basis;

the Minister must, in writing specifying the period, direct that for the purposes of paragraph 42(5)(b) and sections 45 and 46, the Chairperson is to be taken to have been appointed on a full-time basis for that period.

Part-time special Commissioner taken to be full-time

44. Where:

(a) a special Commissioner has been appointed on a part-time basis; and

(b) the Chairperson becomes satisfied that the special Commissioner will not be able to perform the functions of special Commissioner during a period otherwise than on a full-time basis;

the Chairperson must, in writing specifying the period, direct that for the purposes of paragraph 42(5)(b) and sections 45 and 46, the special Commissioner is to be taken to have been appointed on a full-time basis for that period.

Remuneration and allowances

45.(1) Subject to this section, a Commissioner is to be paid such remuneration as is determined by the Remuneration Tribunal.

(2) A Commissioner is to be paid such allowances as are prescribed.

(3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

(4) If a person who is a Judge is appointed as a Commissioner, the person is not entitled to remuneration under this Act while receiving salary or annual allowance as a Judge.

Leave of absence

46.(1) Subject to arrangements under section 43 and to section 44, where a Commissioner is appointed on a full-time basis, the Minister may grant the Commissioner leave of absence on such terms and conditions as to remuneration and otherwise as the Minister determines.

(2) The Minister may in writing delegate to the Chairperson the powers under subsection (1) in relation to special Commissioners.

Resignation of Commissioners

47.(1) The Chairperson or a Commissioner may resign by signed instrument delivered to the Governor-General.

(2) A special Commissioner may resign as a special Commissioner for an inquiry by signed instrument delivered to the Governor-General.

Division 3—Staff and Consultants

Staff

48.(1) Subject to section 50, the staff of the Commission are to be persons appointed or employed under the *Public Service Act 1922*.

(2) The Chairperson has all the powers of or exercisable by a Secretary of a Department of the Australian Public Service under the *Public Service Act 1922*, so far as those powers relate to the branch of the Australian Public Service comprising the staff referred to in subsection (1), as if that branch were a separate Department of the Australian Public Service.

Arrangements relating to staff

49.(1) The Chairperson may, on behalf of the Commission, arrange with the Secretary of a Department of the Australian Public Service or with a body established for a public purpose by or under a law of the Commonwealth, for the services of officers or employees of the Department or body to be made available to the Commission.

(2) The Chairperson may, on behalf of the Commission, enter into an arrangement with the appropriate authority of a State or Territory for the services of officers or employees of the Public Service of the State or Territory, or of a body established for a public purpose by or under a law of the State or Territory, to be made available to the Commission.

Engagement of consultants

50.(1) The Chairperson may, on behalf of the Commission, engage persons having suitable qualifications and experience as consultants to the Commission.

(2) The terms and conditions of the engagement of a person under subsection (1) are such as are determined by the Chairperson.

PART 6—OFFENCES

Offences relating to administration of Act

51.(1) A person must not hinder, obstruct, molest or interfere with:

(a) a Commissioner participating in an inquiry; or

(b) a person acting on behalf of the Commission for the purposes of an inquiry.

Penalty: $3,000.

(2) A person who:

(a) refuses to employ another person;

(b) dismisses, or threatens to dismiss, another person from the other person's employment;

(c) prejudices, or threatens to prejudice, another person in the other person's employment; or

(d) intimidates or coerces, imposes any pecuniary or other penalty upon, or takes any other disciplinary action in relation to, another person;

because the other person:

(e) has given or proposes to give information or documents to the Commission or to a person acting on behalf of the Commission; or

(f) has given or proposes to give evidence before the Commission or to a person acting on behalf of the Commission;

is guilty of an offence.

Penalty: Imprisonment for 6 months.

Failure to comply with requirement

52.(1) A person who, after having been given notice under subsection 36 (1), without reasonable excuse:

(a) refuses or fails to comply with the notice; or

(b) when appearing at a hearing because of the notice refuses or fails:

(i) to take an oath or make an affirmation; or

(ii) to answer a question that is required by the Commissioner presiding at the hearing to be answered;

is guilty of an offence.

Penalty: $3,000.

(2) A person who, after having been given notice under subsection 36(1) requiring the person to appear at a hearing, without reasonable excuse refuses or fails to attend from day to day, unless excused or released from further attendance by the Commissioner presiding at the hearing, is guilty of an offence.

Penalty: $3,000.

(3) It is a reasonable excuse for the purposes of subsection (1) for a person to refuse or fail to answer a question, give information or produce a document, that the answer, the information or the production of the document might tend to incriminate the person or make the person liable to forfeiture or a penalty.

False or misleading evidence or information

53.(1) A person must not:

(a) give to the Commission information or documents that the person knows to be false or misleading in a material particular; or

(b) at a hearing, give evidence or produce a document that the person knows to be false or misleading in a material particular.

Penalty: Imprisonment for 6 months.

(2) Subsection (1) does not apply to a document if, at the time when the person gives it to the Commission, produces it at a hearing or gives it to the Commission, the person informs the Commission that it is false or misleading in a material particular and specifies in what respect it is to the person's knowledge false or misleading in a material particular.

Conduct of directors, servants and agents

54.(1) Where it is necessary to establish for the purposes of this Act or the regulations, the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:

(a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and

(b) that the director, servant or agent had the state of mind.

(2) Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority shall be deemed, for the purposes of this Act and the regulations, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

(3) Where it is necessary to establish for the purposes of this Act or the regulations, the state of mind of a person other than a body corporate in relation to particular conduct, it is sufficient to show:

(a) that the conduct was engaged in by a servant or agent of the person within the scope of his or her actual or apparent authority; and

(b) that the servant or agent had the state of mind.

(4) Any conduct engaged in on behalf of a person other than a body corporate by a servant or agent of the person within the scope of his or her apparent authority shall be deemed, for the purposes of this Act and the regulations, to have been engaged in also by the first-mentioned person unless the first-mentioned person establishes that the first-mentioned person took reasonable precautions and exercised due diligence to avoid the conduct.

(5) Where:

(a) a person other than a body corporate is convicted of an offence; and

(b) the person would not have been convicted of the offence if subsections (3) and (4) had not been enacted;

the person is not liable to be punished by imprisonment for that offence.

(6) A reference in subsection (1) or (3) to the state of mind of a person includes a reference to:

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person's reasons for the intention, opinion, belief or purpose.

(7) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory.

(8) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.

PART 7—MISCELLANEOUS

Relationship of this Act to other laws

55. The provisions of this Act are in addition to, and not in derogation of nor in substitution for, the requirements of the *Environment Protection (Impact of Proposals) Act 1974* or any other law of the Commonwealth.

Annual report

56.(1) The Chairperson must not, later than 31 December in each year, prepare and give to the Minister a report on the Commission's activities including the financial statements of the Commission, during the period of 12 months that ended on the preceding 30 June.

(2) A report is to contain comments on issues arising from inquiries conducted by the Commission and must contain information concerning the foreign investment register.

(3) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the Minister received the report.

Regulations

57.(1) The Governor-General may make regulations not inconsistent with this Act prescribing all matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) In prescribing a fee in accordance with subsection 16(5), the regulations must not prescribe a fee that exceeds the reasonable expenses of the Commission in dealing with the investment proposal.

SCHEDULE 1

Section 7

Policy principles for determining applications for reviewable foreign investment proposals.

In determining whether an investment proposal should proceed, the Commission must have regard to:

- the net economic benefits to Australia of the proposed investment;
- the sustainable development and growth of Australian industries that are efficient in their use of resources, self-reliant, enterprising, innovative and internationally competitive;
- the maximisation of Australian participation in the development and exploitation of Australian natural resources and in Australian industries generally;
- the maximisation of employment and harmonious industrial relations in Australia;
- national and local environmental and cultural policies;
- the concentration of foreign ownership within an industry;
- the interests of consumers and the community in general; and
- the national interest.

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1994

SENATE

PARLIAMENTARY PRIVILEGES AMENDMENT (ENFORCEMENT OF LAWFUL ORDERS) BILL 1994

EXPLANATORY MEMORANDUM

The purpose of this bill is to provide for the enforcement by the courts through normal legal processes of the lawful orders of the Houses of the Parliament and their committees.

The refusal of certain witnesses to provide documents in accordance with the requirements of the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media has drawn attention to the situation that there is no way of enforcing such requirements of the Houses or their committees except through the power of each House to punish contempts, and that the courts probably cannot and would not review an exercise of that power until a penalty is imposed.

Those incidents also drew attention to the absence of any ready means whereby a claim of executive privilege, or public interest immunity, that is, a claim that disclosure of certain information would not be in the public interest, can be adjudicated by the courts.

The bill would amend the *Parliamentary Privileges Act 1987* by inserting a new section 11A to provide:

- it would be an offence, prosecuted in the Federal Court, to fail to comply with a lawful order of a House or a committee (such as an order that a witness attend a hearing, that evidence be given or documents be produced) (proposed subsections 11A(1) to (4))
- when an offence is proved the Court would make orders to prevent the continuation or recurrence of the offence and to ensure compliance with the parliamentary order (for example, orders that evidence be given or that a document be produced to a House or a committee) (proposed subsection (5))
- if an offence is committed by a public servant because of a direction by a minister, the offence would be found proved but the conviction not recorded against the public servant nor a penalty imposed (proposed subsection (6))
- if in a prosecution a claim of executive privilege or public interest immunity is made, that is, that evidence should not be given or a document produced because this would be contrary to the public

interest, the Court would determine for itself whether that claim is sustained, and for that purpose would hear the evidence or examine the document in camera; this conforms with the law relating to claims of public interest immunity in court proceedings (proposed subsections (7) and (8)).

Proposed subsections (9) and (10) would ensure that evidence given and documents examined by the Court in camera would not be disclosed except by order of the Court, unless they are given or presented to a House or committee.

Proposed subsection (11) would prevent a House imposing a penalty for an offence which is the subject of proceedings before a court.

Proposed subsection (12) would ensure that a prosecution could not be commenced or carried on except at the direction of the relevant House.

The Parliamentary Privileges Act already provides that certain actions which are also contempts of Parliament, namely interference with witnesses and unauthorised disclosure of in camera evidence, may be prosecuted in the courts as criminal offences (sections 12 and 13 of the Act).

As with those provisions, the proposed provisions of the bill would not affect the existing power of the Houses to deal with contempts of Parliament (section 5 of the Act).

The bill would, however, provide a means whereby an impartial court could enforce lawful orders of the Houses and their committees and determine any claim of executive privilege or public interest immunity.

Only *lawful* orders would be so enforced, and the Court would determine their lawfulness in accordance with the existing law.

The bill would place the Australian Parliament in much the same position as the Congress of the United States of America, which retains its inherent right to punish contempts but which has legislated to allow the courts to impose penalties for non–cooperation with congressional inquiries and to enforce subpoenas.

1993-94

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

Presented and read a first time

(SENATOR KERNOT)

A BILL

FOR

An Act to amend the *Parliamentary Privileges Act 1987* to provide for enforcement through legal process, as an alternative to the penal powers of the Houses of the Parliament, of lawful orders of the Houses and their committees

The Parliament of Australia enacts:

Short title etc.

1.(1) This Act may be cited as the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Act 1994*.

(2) In this Act, **"Principal Act"** means the *Parliamentary Privileges Act 1987*[1].

2. After section 11 of the Principal Act of the following section is inserted:

9405121—1,350/8.4.1994—(51/94) Cat. No. 94 4343 4

Orders of Houses and committees

"11A.(1) In this section, 'the Court' means the Federal Court of Australia.

"(2) The Court has jurisdiction, exclusive of the jurisdiction of all other courts except the High Court, with respect to matters arising under this section.

"(3) The jurisdiction of the Court under this section may be exercised by a single Judge, who may refer a question of law for the opinion of a Full Court, and may, on the Judge's own initiative or on the application of a party, refer a matter to a Full Court to be heard and determined.

"(4) A person shall not, without reasonable excuse, fail to comply with a lawful order of a House or a committee.

Penalty: (a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

"(5) When an offence against subsection (4) is proved the Court shall make such orders as are necessary to prevent a continuation or recurrence of the offence and to ensure compliance with the lawful order of the House or committee in respect of which the offence was committed.

"(6) If an offence against subsection (4) is committed by an officer or employee of the Commonwealth because of a direction by a minister, on proof of the offence the Court shall find the offence proved and make orders in accordance with subsection (5), but shall not convict the officer or employee of the offence, and shall not impose any penalty for the offence.

"(7) It is a defence to a prosecution for an offence against subsection (4) in relation to an order of a House or a committee that requires the giving of evidence or the disclosure of a document if the defendant proves that:

(a) the giving of the evidence or the disclosure of the document would be substantially prejudicial to the public interest; and

(b) the prejudice to the public interest would not be outweighed by the public interest in ensuring that a House and its committees can conduct inquiries freely.

"(8) In deciding whether a defence under subsection (7) has been established, the Court shall hear the evidence or examine the document in camera.

"(9) A person shall not disclose evidence heard or a document examined under subsection (8) except in accordance with an order of the Court.

Penalty: (a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

"(10) Subsection (9) does not prevent the giving of evidence or the presentation of a document to a House or a committee.

"(11) A penalty shall not be imposed under section 7 for an offence in respect of which a prosecution under subsection (4) has been commenced.

"(12) A prosecution for an offence against subsection (4) shall be commenced and conducted only by a person so authorised by resolution of:

(a) the Senate, for an offence in respect of an order of the Senate or of a committee of the Senate; or

(b) the House of Representatives, for an offence in respect of an order of that House or of a committee of that House; or

(c) each House, for an offence in respect of an order of each House or of a committee of both Houses.".

NOTE

1. Act No. 21, 1987, as amended. For previous amendments, see No. 9, 1988.

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Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994

Second reading

Senator Kernot

23 March 1994

This Bill provides for the Federal Court to enforce lawful orders made by Parliament, and to allow the Court to determine claims that disclosure of information to Parliament would contravene the public interest.

The catalyst for the Bill is the conflict between the Senate print media committee and the Treasurer over the committee's request for Foreign Investment Review Board documents.

But I have not put this legislation forward just to solve an immediate problem. That Parliament lacks a satisfactory mechanism to enforce its own orders has been obvious for years, particularly where it is the government which refuses to comply. There has been no satisfactory way of resolving Government claims that disclosure of information is not in the public interest.

When the Coalition tried to obtain evidence about the Whitlam Government's attempt to raise loans through Tirath Khemlani and others, it failed. When Labor tried to obtain documents revealing the Fraser Government's failure to tackle bottom-of-the-harbour tax avoidance, it also failed.

The Bill is drafted to allow Parliament to ask the courts to enforce any lawful order made against any person or organisation. But the principal aim is to deal with disputes which arise when Parliament orders a government to disclose information, and the government refuses.

This is not to suggest that Parliament is powerless in the face of non-compliance of this kind. It is just that its powers, while extensive, are widely seen as inappropriate for use in such a situation.

As we know, section 7 of the *Parliamentary Privileges Act 1987* gives each House the power to impose a fine or prison sentence for an offence against it. This is Parliament's sanction of last resort, but it is clearly undesirable when a public servant is caught between two orders -- Parliament's order to divulge information, and a minister's instruction not to.

In the case now before the Senate print media committee, the House of Representatives would no doubt protect the Treasurer from any action taken against him by the Senate. This would leave the Senate with the option of taking action against the public servant at the helm of the Foreign Investment Review Board, who is

acting on the Treasurer's instructions. That is clearly unsatisfactory.

In fact, I believe there is a general view in the community that it is the role of the courts, and not the Parliament, to impose prison sentences or fines. Although there is a school of thought that the courts have no role in determining disputes of a political nature, to leave matters as they are would continue the decades-long uncertainty over the relative powers of Parliament. It is time this matter was resolved, and the only realistic way of doing so is by resort to the courts.

The Senate also has the option of taking political action to get its way. That could include filibustering, or even blocking key bills in protest. But again, I do not believe it is appropriate for Parliament to engage in obstruction to enforce accountability. This is a more civilised alternative which will avoid further erosion of Parliament's standing, and we should use it.

The Bill inserts a new section 11A into the *Parliamentary Privileges Act*.

The new section makes it an offence not to comply with a lawful order of a House or committee and requires the courts to make orders to remedy the offence.

For example, failure to comply with a lawful order to produce documents would be an offence, and the courts would order that the documents be produced.

If an offence is proved, the standard penalties in the Act apply unless the offence has been committed by a public servant acting under a minister's instructions. In that case, the public servant is not convicted of an offence, and no penalty is imposed.

There may be cases where someone other than a minister (perhaps a departmental secretary or company executive) instructs an employee not to comply with an order of Parliament. It could be argued that the employee should be protected from prosecution in those cases.

However in such a case, the secretary or executive would lack the protection of parliamentary privilege – unlike the minister – and would then be open to enforcement action instead of the employee. I have therefore decided to limit the protection of this provision to public servants acting under a minister's instructions.

It has been suggested to me that there should be no penalty for non-compliance with an order of Parliament, and that penalties should only be imposed for contempt of court, in the event that a court orders compliance but the defendant still refuses.

My concern about this proposal is that it makes non-compliance with an order of Parliament cost-free. Anyone could refuse a committee's request for information in the secure knowledge that the relevant House would have to take them to court to get it, and that they would be immune from any penalty.

Furthermore, the courts' power to order compliance provides scope for leniency in imposing penalties, for example by suspending a fine or prison term.

The Bill explicitly recognises that a defence against Parliament's order to produce

documents or give evidence is that disclosure would be contrary to the public interest. In considering such a claim, the court must hear the evidence or view the document *in camera*. Disclosure of those proceedings would be an offence unless subsequently ordered by the court, but Parliament would be free to hear the same evidence or receive the documents.

The effect of this provision is to require executive claims of public interest immunity to be determined by the courts. The Bill makes it clear that determining such a claim is a balancing act, which requires any prejudice to the public interest which disclosure might cause to be weighed against the public interest in the free conduct of inquiries by Parliament.

In recognition of the significance of the matters at stake, a case under this legislation would be heard in the Federal Court, with any appeal going to the High Court.

And the Bill prevents Parliament from having a bet each way. Once a prosecution has been commenced, Parliament would be prevented from imposing its own penalties using section 7 of the Act.

Finally, a prosecution under this Bill can only be made by a person authorised by a resolution of the House whose order -- or whose committee's order -- has not been complied with.

This Bill is a constructive attempt to break a deadlock which has existed for far too long. It is a step towards more open government, but one which allows government claims of public interest immunity to be heard and determined impartially.

The Government has given no clear indication of its position on this Bill. I would point out to them that failure to support it would look distinctly hypocritical, given the vehement attacks on me for leaving open the use of the penalty provisions of the Act to obtain Foreign Investment Review Board documents from the Board's Executive Member.

The Bill provides an alternative process which would allow the Federal Court to resolve the dispute without any threat of a penalty against any public servant. It depoliticises the competing claims of the committee and the Treasurer as to whether disclosure is in the public interest. If it doesn't become law, then we will be thrown back on the inappropriate provisions of the *Parliamentary Privileges Act*.

This Bill is a fair and reasonable alternative, and I commend it to the Senate.

APPENDIX A

TERMS OF REFERENCE

TERMS OF REFERENCE

(1) That a select committee, to be known as the Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media, be appointed to inquire into and report, on or before 28 February 1994, on the following matters:

(a) the origin and basis of decisions in 1991 and 1993 to increase the permissible percentage of foreign ownership of newspapers, and, in particular:

(i) whether those decisions were influenced by considerations relating to the content of newspapers including any requirement for "balanced" coverage; and

(ii) whether the contents of newspapers were influenced by those decisions or the prospect of those decisions; and

(iii) the procedures followed by the Foreign Investment Review Board and the extent to which any of its deliberations or recommendations were taken into account in the making of those decisions; and

(iv) whether the Prime Minister influenced or sought to influence those decisions, and, if so, the basis on which and the extent to which he did so; and

(b) the significance and effectiveness of the guidelines of the Foreign Investment Review Board; and

(c) the views expressed to Mr Conrad Black by the Leader of the Opposition, Dr Hewson MP, on foreign ownership in the print media in Australia.

(2) That the committee consist of nine senators, as follows:

(a) four nominated by the Leader of the Government in the Senate; and

(b) four nominated by the Leader of the Opposition in the Senate; and

(c) one nominated by the Leader of the Australian Democrats.

(3) That the committee may proceed to the dispatch of business notwithstanding that all members have not been duly nominated and appointed and notwithstanding any vacancy.

(4) That:

(a) the chair of the committee be elected by the members of the committee from the members nominated by the Leader of the Opposition;

(b) in the absence of agreement on the selection of a chair, duly notified to the President, the allocation of the chair shall be determined by the Senate;

(c) the deputy-chair of the committee be appointed by the chair from the members of the committee immediately after the election of the chair;

(d) the deputy-chair act as chair when there is no chair or the chair is not present at a meeting; and

(e) in the event of the votes on any question before the committee being equally divided, the chair, or the deputy-chair when acting as chair, have a casting vote.

(5) That the quorum of the committee be five members.

(6) That the committee and any subcommittee have power to send for and examine persons and documents, to move from place to place and

to sit in public or in private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives.

(7) That the committee have power to appoint subcommittees consisting of three or more of its members, and to refer to any such subcommittee any of the matters which the committee is empowered to consider, and that the quorum of a subcommittee be a majority of the Senators appointed to the subcommittee.

(8) That, without limiting its power to pass procedural or other resolutions that are not inconsistent with this paragraph or these terms of reference, the committee observe the following procedures, namely, that:

Submissions and calling of witnesses

(a) as a general principle, evidence be invited in the first instance in the form of written submissions and following examination of submissions, the committee decide which witnesses are to be called for examination; and

(b) subject to any contrary order in relation to a particular submission, the submission to the committee by a person of a statement relating to the inquiry be deemed to be the giving of evidence before the committee by that person in accordance with that statement; and

Evidence

(c) evidence be heard in public session except in instances where the committee or a sub-committee resolves to hear evidence in camera; and

Statements to the media

(d) the chair be authorised to make statements to the media on behalf of the committee concerning its activities; and

Broadcasts and re-broadcasts of public proceedings

(e) the recording, broadcasting and re-broadcasting of public proceedings is authorised in accordance with the rules contained in the order of the Senate of 23 August 1990 concerning the broadcasting of committee proceedings; and

Release of evidence and documents

(f) the secretary is authorised to supply for correction, copies of proof reports of both public and in camera proceedings to the witnesses whose evidence appears in those reports; and

(g) subject to any contrary order in relation to a particular submission, each document submitted to the committee be published; and

Adverse Evidence

(h) subject to any contrary order, evidence which adversely reflects on a person, be forwarded to that person inviting their response.

(9) That:

(a) the terms of reference of the inquiry be appropriately advertised in the media; and

(b) written submissions be sought and examined by the committee and oral evidence be heard, including oral evidence from the authors of the most important submissions.

(10) That the committee be provided with all necessary staff, facilities and resources and be empowered to appoint persons with specialist knowledge for the purposes of the committee, with the approval of the President.

(11) That the committee be empowered to print from day to day such documents and evidence as may be ordered by it, and a daily *Hansard* be published of such proceedings as take place in public.

(12) That the committee may report from time to time its proceedings and evidence taken or any interim conclusions or recommendations arising from its inquiry, and may make regular reports on the progress of its proceedings.

APPENDIX B

LIST OF WRITTEN SUBMISSIONS

LIST OF WRITTEN SUBMISSIONS

No 1	Hellman & Friedman
No 2	Baring Brothers Burrows & Co Ltd
No 3	*The Telegraph plc* - Mr Conrad Black
No 4	Australian Provincial Newspapers
No 5	Turnbull & Partners
No 6	Bankers Trust Australia Limited
No 7	Deloitte Touche Tohmatsu
No 8	Independent Newspapers plc
No 9	*The Sydney Morning Herald*
No 10	*The Age*
No 11	Australian Independent Newspapers Pty Ltd
No 12	Australian Press Council
No 13	Beerworth & Partners Limited
No 14	John Fairfax Holdings Ltd - Mr Stephen Mulholland
No 15	Australian Broadcasting Authority
No 16	Foreign Investment Review Board - Department of the Treasury
No 17	Dr David Robertson
No 18	John Fairfax Holdings Ltd - Mr Michael Hoy

No 19	Communications Law Centre
No 20	John Fairfax Group Pty Ltd - Mr Michael Smith
No 21	Mr Tony Paynter
No 22	Shadow Treasurer, Mr Alexander Downer, MP
No 23	Mr David McMurray
No 24	Dr Denis Cryle
No 25	Mr Claude Forell
No 26	Dr Jennifer Craik
No 27	Mr Tim Malseed
No 28	Ms Belinda Stinson
No 29	Department of Communications & The Arts
No 30	Industry Commission
No 31	Trade Practices Commission
No 32	*The Australian* - Paul Kelly
No 33	Baring Brothers Burrows & Co Ltd - Mr Peter Breese
No 34	Mr Starkey More
No 35	In camera
No 36	Department of the Parliamentary Library
No 37	In camera

APPENDIX C

LIST OF WITNESSES

LIST OF WITNESSES

CANBERRA, 4 February 1994

- **FELS**, Professor Alan, Chairman, Trade Practices Commission
- **HINTON**, Mr Tony, First Assistant Secretary, Investment and Debt Division and Executive Member, Foreign Investment Review Board
- **HUTCHINSON**, Mr Michael James, Deputy Secretary, Communications, Department of Communications and the Arts
- **NORTH**, Mr Christopher Mark, Acting First Assistant Secretary, Broadcasting Policy, Department of Communications and the Arts
- **ROBERTSTON**, Dr David Henry, Senior Research Fellow, National Centre for Development Studies, ANU
- **SPIER**, Mr Hank, General Manager, Trade Practices Commission
- **STEVENS**, Mr Neville Robert, Secretary, Department of Communications and the Arts

SYDNEY, 11 February 1994

- **GRAINGER**, Mr Gareth, General Manager, Policy and Programs, Australian Broadcasting Authority
- **HINTON**, Mr Tony (as per 4 February 1994)
- **HOY**, Mr Michael John, Deputy Chief Executive and Editorial Director, John Fairfax Holdings Limited
- **JOHNS**, Mr Brian, Chairman, Australian Broadcasting Authority
- **KENNEDY**, Mr Trevor John

. **MANSER**, Ms Patricia Joan, Director, Policy and Communications, Australian Broadcasting Authority

. **O'CONNOR**, Ms Cass, Director, Turnbull & Partners Ltd

. **PARK**, Ms Jacqueline Patricia, Federal Industrial Officer, Media, Entertainment and Arts Alliance

. **RYAN**, Mr Mark Anthony Patrick, Assistant Federal Secretary, Media Entertainment and Arts Alliance

. **STILWELL**, Professor Frank, Associate Professor, Faculty of Economics, University of Sydney

. **TURNBULL**, Mr Malcolm Bligh, Managing Director, Turnbull & Partners Ltd

SYDNEY, 16 February 1994

. **COCKBURN**, Mr Milton Roy, Editor, *The Sydney Morning Herald*

. **D'ARCY**, Mr John Joseph, Director, Australian Independent Newspapers Pty Ltd

. **ELLICOTT**, Mr Robert James

. **FORELL**, Mr Claude Rainer, Vice-Chairman, *The Age* Independence Committee

. **GALBRAITH**, Mr Colin Robert, Consultant, Australian Independent Newspapers Pty Ltd

. **HAMBLY**, Ms Gail, Company Secretary and Legal Counsel, John Fairfax Holdings Ltd

. **HICKIE**, Mr David John, Editor in Chief, *The Sydney Morning Herald*

. **JOHNSON**, Mr Mark, Adviser, Australian Independent Newspapers Pty Ltd

. **KENNEDY**, Mr Alan Richard, Spokesman, Friends of Fairfax

. **KOHLER**, Mr Alan Robert, Editor, *The Age*

. **LESLIE**, Mr James Bolton, Chairman, Australian Independent Newspapers Pty Ltd

. **MOORE**, Mr Matthew, President, Fairfax House Committee, Media, Entertainment and Arts Alliance

. **MULHOLLAND**, Mr Stephen, Chief Executive Officer, John Fairfax Holdings Ltd

. **NOONAN**, Mr Gerard

. **O'REILLY**, Mr Anthony Cameron, Director, Australian Provincial Newspapers Holdings Ltd and Independent Newspapers Plc

SYDNEY, 17 February 1994

. **CHADWICK**, Mr Paul Anthony, Victorian Coordinator, Communications Law Centre

. **CRAIK**, Dr Jennifer Anne Steele, Deputy Dean (Research), Faculty of Humanities, Griffith University

. **FLINT**, Professor David Edward, Chairman, Australian Press Council

. **MILLS**, Ms Helen Margaret, Director, Communications Law Centre

. **POOLEY**, Mr Frederick George Herbert, Commissioner, Insurance and Superannuation Commission

CANBERRA, 24 March 1994

. **KERIN**, The Hon John Charles

. **DAWKINS**, The Hon John

SYDNEY, 11 April 1994

. **HAWKE**, The Hon Robert James Lee, AC

. **BURROWS**, Mr Mark Douglas, Executive Chairman, Baring Brothers Burrows & Co Ltd

. **WHITE**, Mr Jeffrey Stephen, Director, Baring Brothers Burrows and Co Ltd

SYDNEY, 21 April 1994

. **BLACK**, Mr Conrad, Chairman, *The Telegraph plc*

. **COLSON**, Mr Daniel, Vice-Chairman, *The Telegraph plc*

. **HALSTED**, Mr Desmond Elliott, Member, Foreign Investment Review Board, Department of the Treasury

. **HINTON**, Mr Tony (as per 4 February 1994)

. **POOLEY**, Mr Frederick George Herbert (as per 17 February 1994)

. **POWERS**, Mr Brian Mark, Managing Director, Consolidated Press Holdings Ltd

. **STONE**, Mr Kenneth Charles, Member, Acting Chairman, Foreign Investment Review Board, Department of the Treasury

SYDNEY, 22 April 1994

. **HAWKE**, The Hon Robert James Lee, AC

. **HEWSON**, Dr John, MP, Leader of the Opposition

. **ROBERTS**, Dr Darryl Milburn, Assistant Commissioner, Policy, Insurance and Superannuation Commission

. **SMITH**, Mr Warwick Leslie

APPENDIX D

CLERK'S ADVICE ON THE COMPULSION OF WITNESSES

AUSTRALIAN SENATE

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600
TEL. (06) 277 3350
FAX (06) 277 3199

OFFICE OF THE CLERK OF THE SENATE

hm/2252

2 February 1994

Mr R Gilbert
Secretary
Select Committee on Certain Aspects of
Foreign Ownership Decisions in Relation
to the Print Media
Parliament House
CANBERRA ACT 2600

Dear Mr Gilbert

COMPULSION OF WITNESSES

Your letter of today's date seeks advice on the power of the Committee to compel the attendance of witnesses and the giving of evidence.

I hope that the following outline will be of some assistance to the Committee.

Each House of the Parliament possesses the power to require persons to attend, to give oral evidence and to produce documents in their custody or control. Each House may delegate that power to its committees, but only the House may punish any default. This Committee has such a delegation.

Ultimately the power to compel witnesses depends on the power of each House to punish any default as a contempt. That power to punish contempts was upheld by the High Court in *R. v Richards; ex parte Fitzpatrick and Browne* 1955 92 CLR 157. The power has since been limited and codified by the *Parliamentary Privileges Act 1987*, but not so as to affect the tenor of this advice.

All persons in the jurisdiction of the Commonwealth are subject to the power to compel witnesses. The only exception to this, I believe, is that a House or its committees may not compel a member of another House of the Commonwealth Parliament, or of a state parliament. There is no court judgment which supports this conclusion; indeed, there has been no adjudication of the extent of the power, but I believe that the limitation is an implied one arising from the Constitution. This matter was the subject of an advice to the Select Committee on the Australian Loan

Council, which advice was published in the interim report of that committee in March 1993.

There is also a question of whether the powers of inquiry of the Commonwealth Houses are limited by the limitations on the Commonwealth's legislative power, but that question also has not been adjudicated.

From time to time the executive government has claimed a right to instruct its officers to refuse to appear, to give evidence, or to produce documents in response to a demand of a House or a parliamentary committee. This claimed right is subsumed in the expressions "Crown privilege", or "executive privilege", or "public interest immunity", in their claimed application to parliamentary inquiries (as distinct from the proceedings of courts). The existence of the claimed right has not been adjudicated by the courts. The Senate has not conceded the existence of the claimed right, but, on the contrary, has asserted that it is for the Senate itself to determine whether any claim of privilege (ie., a claim of immunity from a parliamentary demand) should be allowed (see the resolution of the Senate of 16 July 1975, no. 24 at page 122 of the standing orders volume).

The question of the existence of executive privilege in relation to parliamentary inquiries has not been settled. Unless it is adjudicated by the courts, which is unlikely, it will continue to be dealt with case by case as a matter of political dispute and contest between the Senate and a government.

Your letter asks whether members and former members of the Foreign Investment Review Board may be compelled to give evidence before the committee. Undoubtedly such persons, if in the jurisdiction, are subject to the parliamentary power to compel witnesses. The question implicitly raised by your letter and the correspondence attached to it is whether persons who are not officers of the executive government, but who are statutory office-holders or advisers to the executive government, are subject to direction by the executive government in relation to their response to a parliamentary demand, or may be covered, as it were, by a claim of executive privilege in relation to parliamentary inquiries.

During the "overseas loans case", which was the occasion of the passage of the resolution of the Senate to which I have referred, the then Solicitor-General, who is a statutory office-holder and legal adviser to the executive government, in effect informed the Senate that, while he was not subject to direction by the executive government and not bound by a claim of executive privilege, he had a duty, in his view, to have regard to such a claim and not to act in such a way as to undermine it. On that basis he declined to answer questions. The Senate took no action against

him, nor against the public service officers who were directed by the Prime Minister not to answer questions, but passed the resolution to which I have referred and pursued the matter as a political contest with the ministry of the day.

This question is therefore also not settled, and also has not been adjudicated by the courts.

In the first instance it is for a person who is the subject of a parliamentary demand to determine whether he or she will have regard to or conform with an executive government direction to refuse a parliamentary demand. There is at least one case of an officer disobeying such a direction on the ground of a perceived duty to cooperate with a Senate inquiry. If such a person decides to have regard to or conform with such a direction, it is for the committee or the House concerned to determine whether action should be taken against the person by way of proceedings for contempt or against the individual minister concerned or the ministry collectively as a political matter.

A committee met with a refusal by a person to comply with an order to attend, give evidence or produce documents cannot take any action against the person, but can only report the matter to the relevant House, which may then proceed against the person for contempt.

It is for a committee to which the power has been delegated to determine whether it should in a particular case make a formal demand (ie., issue a summons) for a witness to attend, give evidence or produce documents. In my view a Senate committee should not make a formal demand unless the committee intends, in case of refusal, to ask the Senate to enforce the demand, and has some grounds to believe that the Senate will support the demand.

Your letter refers to the possibility of legal advice on these matters. As there are virtually no relevant court judgments, it is not a matter on which legal advice as such can be given. (There are several court judgments on these subjects in the United States, but because of the different constitutional arrangements in that country, those judgments are not readily applicable to Australia.)

Please let me know if the Committee wishes to have any elaboration or clarification of this advice.

Yours sincerely

(Harry Evans)

APPENDIX E

OPINION OF MR DAVID JACKSON QC

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

O P I N I O N

SHEDDEN HALL & GALLOP
SOLICITORS
LEVEL 4
11 LONDON CIRCUIT
CANBERRA CITY ACT 2601
DX: 5630 CANBERRA
TEL: 06 201 8900
FAX: 06 201 8988
REF: MR CHADWICK

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

O P I N I O N

A. INTRODUCTION

1. On 9 December 1993 the Senate resolved to establish a select committee:-

> " . . . to be known as the Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media . . . to inquire into and report, on or before 28 February 1994, on the following matters:
>
> (a) the origin and basis of decisions in 1991 and 1993 to increase the permissible percentage of foreign ownership of newspapers, and, in particular:

(i) whether those decisions were influenced by considerations relating to the content of newspapers including any requirement for 'balanced' coverage; and

(ii) whether the contents of newspapers were influenced by those decisions or the prospect of those decisions; and

(iii) the procedures followed by the Foreign Investment Review Board and the extent to which any of its deliberations or recommendations were taken into account in the making of those decisions; and

(iv) whether the Prime Minister influenced or sought to influence those decisions, and, if so, the basis on which and the extent to which he did so; and

(b) the significance and effectiveness of the guidelines of the Foreign Investment Review Board; and

(c) the views expressed to Mr Conrad Black by the Leader of the Opposition, Dr Hewson MP, on foreign ownership in the print media in Australia."

2. The resolution provided for a Committee of nine senators, with the quorum being five. Subcommittees might be appointed (Term of Reference (7)) and the Committee, and any subcommittee so appointed, were to have power:-

> " . . . to send for and examine persons and documents, to move from place to place and to sit in public or in private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives."

See Term of Reference (6).

3. Some provisions were also made by the resolution for the conduct of the business of the Committee, including (Terms of Reference (8)(a), (b) and (c)):-

> " That, without limiting its power to pass procedural or other resolutions that are not inconsistent with this paragraph or these terms of reference, the Committee observe the following procedures, namely that:
>
> **Submissions and calling of witnesses**
>
> (a) as a general principle, evidence be invited in the first instance in the form of written submissions and following examination of submissions, the Committee decide which witnesses are to be called for examination; and
>
> (b) subject to any contrary order in relation to a particular submission, the submission to the Committee by a person of a statement relating to the inquiry be deemed to be the giving of evidence before the Committee by that person in accordance with that statement; and
>
> **Evidence**
>
> (c) evidence be heard in public session except in instances where the committee or a sub-committee resolves to hear evidence in camera."

4. As I understand the position some persons called before the Committee as witnesses have declined to give evidence as to advice and views which they may have given the Commonwealth Government leading to the making of the two decisions referred to in Term of Reference (1)(a). Further, the Committee has been advised that the Treasurer has directed that officers of the Treasury and members of the Foreign Investment Review Board

are not to provide the Committee, either orally or by providing documents, certain information in relation to those decisions. (The terms of the Treasurer's direction are set out below.)

5. The officers fall into three categories, namely:-

Category 1

Mr Tony Hinton, employed under the Public Service Act 1922 and Executive Member of the Foreign Investment Review Board ("FIRB"), a non-statutory body which advises the Treasurer in relation to foreign ownership decisions.

Category 2

Mr George Pooley, formerly employed under the Public Service Act and the immediate past Executive Member of FIRB. Mr Pooley is now the Commissioner, Insurance and Superannuation Commission and is employed under the provisions of the Insurance and Superannuation Commissioner Act 1987.

Category 3

Mr Des Halsted and Mr Ken Stone are members of FIRB. To the Committee's knowledge these witnesses are paid advisers to government. They are neither public servants nor statutory office holders.

6. In addition the Committee intends to obtain evidence from Mr Hawke, the former Prime Minister, and Messrs Kerin and Dawkins, former Treasurers, whom I shall describe as Category 4. It may be that those gentlemen will also be "directed" or "requested" by the Treasurer not to give evidence as to advice which they received and/or decisions which they made relevant to the Select Committee's Terms of Reference. It may also be that they simply decline to give such evidence.

B. ISSUES

7. The issues upon which I am asked to advise are set out in the Instructions to me as follows:-

1. Does the Committee have the power to compel witnesses from each of the above categories to give evidence and produce documents? If so, by what means?

2. In so far, as Treasurer Willis seeks to assert a conclusive claim that certain documents are not to be disclosed to the Committee, is it for the Government to determine the nature and extent of public interest immunity and that certain witnesses curtail their evidence to the Committee and/or not disclose certain documents?

3. Are decisions of the Senate and/or the Committee justiciable and in what circumstances and to what extent is a court able to go behind a decision of the Committee or the Senate?

4. What steps are open to the Committee to take in respect of non-co-operation with its orders?

5. Is the Treasurer in contempt of the Senate in instructing various witnesses to refrain from providing evidence to the Committee and

producing documents, or in other ways limiting their co-operation with the Committee and other orders of the Senate?

[See Standing Orders and other Orders of the Senate document (attachment 2), especially:

. Parliamentary Privilege Resolution of 25 February 1988 Resolution 6(1), 6(10) and 6(13) (pp.97-99).

. Procedural Orders and Resolutions of the Senate of Continuing Effect. Resolution 24 and 27 (pp.122-123).]"

8. An additional issue was raised by a letter of 2 March 1994 from the Committee's Secretary to the instructing solicitors. It is as follows:-

" At a meeting on 1 March 1994, the Committee resolved that it seek . . . advice on the rights of witnesses for each of the four categories referred to in my earlier instructions. This further advice should include reference to the advice to be given by the Chair to witnesses before giving oral evidence to the Committee. In this regard, I again refer you to the Parliamentary Privileges Resolution of 25 February 1988 . . .".

C. VIEWS

9. The powers of the Senate derive relevantly from ss. 49 and 50 of the Constitution, which are as follows:-

" 49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

> 50. Each House of the Parliament may make rules and orders with respect to -
>
> (i) The mode in which its powers, privileges, and immunities may be exercised and upheld;
>
> (ii) The order and conduct of its business and proceedings either separately or jointly with the other House."

10. The Parliament, in the exercise of the powers conferred by s.49, has enacted the Parliamentary Privileges Act 1987. Further, the Senate, in the exercise of its powers, under s.50, has made Standing Orders, and other Orders, from time to time.

11. I have referred earlier to the fact that Term of Reference (7) conferred on the Committee a power to send for and examine witnesses, a power reflecting the terms of Senate Standing Order 34(1). Standing Order 34(2) goes on to provide that the chairman of a committee:-

> " . . . shall direct the secretary attending the committee to invite or summons witnesses and request or require the production of documents in accordance with the orders of the committee."

12. Question 1. It will thus be seen, in relation to Question 1, that there is no reason why any of the persons in Categories 1 to 4 might not, by the procedure of Standing Order 34, be required to attend to give oral evidence, and to produce documents at the Select Committee's hearing. Mr Hawke, Mr Kerin and Mr Dawkins each formerly held high political office, but that does not mean that they may not be required to

appear before a committee of a House. (None of those persons, of course, is now a member of the House of Representatives, and accordingly Senate Standing Order 178 is not applicable.)

13. I would therefore answer Question 1 by saying that the Committee does have power to compel witnesses from Categories 1 to 4 to give evidence and produce documents. The means is by the procedure of Standing Order 34(2). The procedures set out in Resolution 1 of the Parliamentary Privilege Resolutions agreed to by the Senate on 25 February 1988 ("the Privilege Resolutions") should also be followed, as should the Committee's own Terms of Reference.

14. I should add one observation in relation to documents, namely that it is unlikely that some of the persons in the several categories would themselves have relevant documents.

15. Question 4. It is convenient next to discuss Question 4, an issue which may first be considered by examining the courses which are open if a witness simply refuses to answer a question properly put at a meeting of a Committee of the Senate.

16. It is clear, in such a case, that the witness would be in breach of Resolution 6(12)(b) of the Privilege Resolutions, which provides that:-

> " (12) A witness before the Senate or a committee shall not:
>
> (b) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so."

Similarly, Resolution 6(13)(b) of the same Privilege Resolutions provides in relation to documents that:-

> " A person shall not, without reasonable excuse:
>
> (b) refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Senate or of a Committee."

17. If a witness does not answer a question to which the Committee has required an answer, the Committee may not itself deal with the witness for contempt; it must report the matter to the Senate: Resolution 1(10) of the Privilege Resolutions. [If the ground of refusal is a claim of "privilege", Procedural Order 24(4) is also relevant.] In determining whether the witness's conduct amounted to a contempt of the Senate, or a breach of its privileges, the Senate might deal with the matter itself in the first instance, or alternatively might first refer the matter to its Committee of Privileges for its report. See Standing Order 18. See too Resolution 27 of the Privilege Resolutions.

18. The ambit of Senate's power to impose sanctions in such circumstances is now regulated by the Parliamentary Privileges Act, s.7(1) of which provides that a House of the Parliament:-

> " . . . may impose on a person a penalty of imprisonment for a period of six months for an offence against that House determined by that House to have been committed by that person."

The Senate has no other power to order imprisonment for an "offence against the House" (s.7(3)), the term "offence against a House" being a reference to:-

> " a breach of the privileges or immunities, or a contempt, of a House or of the members or Committees."

See s.3(3). The Senate is also empowered to impose a fine for an offence against the House (s.7(5)) but a fine may not be imposed in addition to a penalty of imprisonment for the same offence: s.7(7).

19. In summary, in answer to Question 4, the Committee's power, in the end, is to refer a failure or refusal to answer questions or produce documents to the Senate as a whole. The Committee itself has no power to impose a sanction. The Senate, if satisfied that an "offence against the House" in terms of s.7(3) of the Parliamentary Privileges Act has been committed, may impose a penalty of imprisonment not exceeding six months or a fine not exceeding $5,000.00 in the case of an individual.

20. Two questions would arise before the Senate in such a case, namely:-

(a) whether an offence against the Senate had been committed;

(b) if so, whether any and what penalty should be imposed.

21. I turn next to Question 3.

22. Question 3. It is obvious, of course, that there are some aspects of decisions of the Senate or of the Committee which could be the subject of decisions by the courts. For example, if a committee, rather than the Senate, purported to impose a penalty for an offence against the House, albeit an offence constituted by refusal to answer a question before a committee, the court could declare that the penalty had not been validly imposed, because the body purporting to impose it had no power to do so. Only "a House" may impose a penalty of imprisonment or a fine: **Parliamentary Privileges Act**, ss. 7(1) and 7(5). A similar situation would obtain if the House imposed a penalty in excess of that provided for by the Act.

23. Further, s.9 of the Act requires that where a penalty of imprisonment is imposed the relevant resolution and warrant of commitment:-

> " . . . shall set out particulars of the matters determined by the House to constitute that offence."

Section 9 alters the previous law that the breach of privilege need only be stated in general terms: see **The Queen v. Richards, Ex parte Fitzpatrick and Browne** (1955) 92 C.L.R. 157 at 162. To my mind, a resolution or warrant not complying with s.9 could be held invalid by a court, as not providing the necessary authority for imprisonment.

24. The matters to which I have referred in paragraphs 22 and 23 are, I think, relevantly peripheral. The principal issue is the extent to which the substance of the determination:-

(a) by the Committee that the question should be answered, or document produced;

(b) by the Senate that an offence against the House had been committed;

might be reviewed by a court.

25. As to the position of the committee, I do not consider that a court would "intervene" in the affairs of a committee of the Senate. Nor do I consider that a court would take any action in relation to the deliberations of the Senate at a time prior to the final determination by the Senate that an offence against the Senate had been committed. Whether the basis of refusal to do so would be a absence of jurisdiction so to do, or that it would be premature or officious to do so, need not be now resolved. I think it is quite clear that it would be

wrong for a court to consider the propriety of the actions of the Senate or its committee before the making of a determination by the Senate that there had been an offence against that House.

26. A different situation, however, would obtain once the Senate had resolved that there had been an offence against it, at least if a penalty was imposed. [A difficult question, presently academic, is whether there might be curial consideration if a finding of an offence against the Senate were made by the Senate, but no penalty was imposed.]

27. Prior to the enactment of the Parliamentary Privileges Act the functions of a court in relation to a finding of contempt of Parliament were as discussed by the High Court in The Queen v. Richards, Ex parte Fitzpatrick and Browne where Dixon C.J., speaking for the Court, said at 162:-

> " It is unnecessary to discuss at length the situation in England; it has been made clear by judicial authority. Stated shortly, it is this: it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise."

At 166, Dixon C.J. also said, in dealing with the English position:-

> " . . . it was for the courts to judge of the existence of privileges. But - consistently as they believed with that view - they also took the

> view that in the practical application of the privilege both upon all questions of fact and upon questions as to whether the facts fell within the scope of the privilege, the resolution of the House and the warrant of the Speaker were conclusive."

28. The position in relation to the Houses of the Commonwealth Parliament has changed somewhat by reason of the enactment of the Parliamentary Privileges Act. As I have said earlier, s.9 now requires that the "particulars of the matters determined by the House to constitute that offence" must be included in the resolution imposing the penalty and in the warrant committing the person to custody. Secondly, s.4 of the Act provides that:-

> " Conduct . . . does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions . . ."

29. The terms of s.4, which operate as a limitation on the powers of the Houses in relevant respects, mean that conduct in refusing to answer a question or produce a document cannot be an offence against a House (i.e. cannot constitute a breach of that House's privileges or immunities, or contempt of it) unless such conduct:-

(a) amounts to; or

(b) is intended to amount to; or

(c) is likely to amount to;

an interference with the free exercise of the committee's authority or functions, and an interference which is "improper".

30. It is then necessary to consider whether courts may examine whether the requirements of s.4 are satisfied and, if so, the function which the courts perform in so doing.

31. To my mind the first of those matters should be answered in the affirmative. Section 4 is part of a law of the Commonwealth made under the Constitution. Section 5 of the Commonwealth of Australia Constitution Act requires it to be applied by all courts throughout the Commonwealth.

32. The second question, however, is more difficult and there are (broadly speaking) two possible views open. One is that the court may determine whether, on the material before the relevant House, the conduct in fact satisfied the test provided for in s.4. The other is that the curial function is limited to determining whether it was open to the House so to find, whether or not the court itself would arrive at a similar view.

33. The resolution of this issue, as I have said, is difficult. I incline to the view that the court's function is the more limited, and I incline to that view for two reasons. The first is that s.5 provides that:-

> " Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force."

Whilst s.4 clearly does "expressly provide" for a qualification to the earlier broad power of the Houses under s.49 of the Constitution, it does not (and the Act otherwise does not) detract from the broad principle referred to in the passage quoted earlier (para.27) of **The Queen v. Richards, Ex parte Fitzpatrick and Browne**, namely that a court was entitled to decide whether the conduct in question was capable of amounting to contempt, but it was for the relevant House to decide whether it did so in fact.

34. The second reason is that s.16 of the Act, which applies Article 9 of the **Bill of Rights, 1688** to the Houses of Parliament, together with the extensive meaning given to "proceedings in Parliament" in s.16(2) and the provisions of s.16(3)(c) may well create significant difficulties in proving in a court some of the matters which it would ordinarily be necessary to prove if the larger view of the powers of a court were taken.

35. Once again, however, it is unnecessary to express a concluded view on these issues.

36. **Question 2.** In the light of the foregoing, I turn now to Question 2.

37. The question whether a committee of a House is entitled to have answered by a witness any relevant question which it insists on putting to the witness is really unresolved. One

view is that the committee is entitled to have all such questions answered, but has a discretion not to insist upon that course where it would be inappropriate to do so, as for example, where it would not be in the public interest that disclosure should occur. The other view is that the Houses of Parliament are not entitled to compel answers to all questions which they might ask, but are obliged to respect certain privileges and immunities including a "public interest immunity", somewhat analogous to that applicable in courts of law.

38. One sees the conflicts of view reflected in, for example, the Senate's own rules. Thus Resolution 6 of the Privilege Resolutions sets out in its opening words that the following parts of Resolution 6 are not to derogate from the Senate's "power to determine that particular acts constitute contempt". On the other hand, and no doubt subject to the broad qualification to which I have just referred, the Privilege Resolutions contemplate that there are circumstances where the witness's refusal to answer questions is unlikely to amount to an offence against the Senate. Thus Resolution 1(10) of the Privilege Resolutions provides that:-

> " (10) Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee

> shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer to the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate." [Emphasis added]

39. The terms of Resolution 1(10) do not <u>themselves</u> suggest that the ground of objection raised before the committee <u>must</u> prevail. Indeed they suggest the opposite. Equally, however, they recognise that the objection <u>may</u> prevail if either the committee decides not to require an answer to the question, or the Senate declines to take action on the committee's report to it.

40. Secondly, Resolutions 6(12)(b) and 6(13)(c) of the Privilege Resolutions - set out above in para.16 - contain within themselves the qualification "without reasonable excuse".

41. Prior to the enactment of the Parliamentary Privileges Act the issue to which I have adverted in paragraph 37 presented itself in relatively stark form. It was an issue on which strongly divergent views might be taken, as demonstrated by the opposing views (along party lines) expressed by the

majority and minority in the Senate Standing Committee on Privileges Report on Matters Referred by Senate Resolution of 17 July 1975. The resolution of the issue, however, necessarily by the Senate itself rather than by the committee whose requirement that the question be answered gave rise to the issue, was always likely to be along party lines. The issue would arise with the government of the day, which might have a majority in both Houses (in which case the Senate would not be likely to take action to vindicate the committee) or which might have a majority in the House of Representatives only, but have "in its pocket" a number of bills rejected by the Senate and which would entitle it to obtain a double dissolution under s.57 of the Constitution (thus making it politically unlikely that the hostile majority in the Senate would be prepared to pay the price of a double dissolution - on a different political ground - in order to enforce the privilege of the Senate's committees). In short, the issue was for political resolution.

42. As I have said the issue, in the abstract, of the Senate's power to compel answers to questions put to witnesses by its committees was unresolved, and a matter on which strong, opposing, views were held. My own view on that abstract issue is that a House of the Parliament did have power to compel an answer to any relevant (and of course properly-framed) question but that the power would not ordinarily be exercised where there was a significant contention that the national interest would not be served by compelling the answer. I agree with the

views expressed in this regard in Campbell, **Parliamentary Privilege in Australia** (1966) at 171:-

> " Generally speaking, parliamentary committees do not regard themselves as obliged to observe the rules of evidence applied in courts of law. This means that when executive, or as it is better known, Crown privilege is claimed, a parliamentary committee may, if it chooses, reject the claim and insist that the witness testify or that the relevent documents be produced."

with the qualification which she expresses at 173:-

> " Even though in law parliamentary committees may not be bound to accept claims of Crown privilege, there may be occasions on which they ought to. Admittedly, in theory, the executive branch by convention is accountable to parliament, but, in accounting for its actions, is the administration obliged to divulge information which if disclosed might be prejudicial to national security? There is a considerable body of opinion to the effect that where parliamentary enquiry into executive action might be inimical to public safety, the House should not press for enquiry at all."

43. I have expressed the views in the preceding paragraph "in the abstract" because the issue was always inherently likely to remain academic because of the considerations to which I have adverted in paragraph 41.

44. The enactment of s.4 of the Parliamentary Privileges Act means that some modification of the views referred to above is required. As I have said earlier, an offence against the Senate will not be committed by refusal to answer questions or produce documents unless the conduct amounts, is intended to

amount or is likely to amount to an "improper interference" with the free exercise by the House or committee of its functions.

45. It may be taken, I think, that failure to answer questions or produce documents when required by a Senate committee would amount to an interference with the performance by the committee of its authority or functions. The term "improper", however, is not defined and to my mind allows a wider range of conduct, delimited only by the concept of "improper" (in the context of s.4) to be engaged in without amounting to an offence against the relevant House.

46. I shall return to the concept of impropriety in s.4, but it is first convenient to discuss in more detail the nature of the claim to confidentiality which has been made by the Treasurer.

47. That appears from the Treasurer's letter of 10 February 1994, a copy of which is Annexure "A" to this Opinion. [I exclude the Annexure to that letter.] As is apparent from its terms, the claim made is for confidentiality of the material in Categories 1 and 2 "in the public interest". The issue to which the advice and information is directed is, in the particular case, whether an order should be made by the Treasurer prohibiting the acquisition of shares in an Australian company, the power so to prohibit being found in

ss. 18(2) and 18(4) of the Foreign Acquisitions and Takeovers Act 1975. In making any such order the Treasurer must be satisifed that the acquisition or proposed acquisition would be "contrary to the national interest": ss. 18(2)(c), 18(4)(b) and 18(5). The Treasurer's letter does not suggest that the advice or information in the particular case is itself of such a nature that in the public interest its disclosure should not occur but rather that the processes of supply of information to government, and the candour of advice given to government would suffer in the class of cases in question, if the confidentiality of the supply of information and advice were not respected.

48. It is inevitable, when considering the merits of claims of this kind, to refer to the somewhat analogous situation obtaining when claims to public interest immunity are made in litigation. By way of example, the majority and minority views in the Senate Standing Committee on Privileges Report of 7 October 1975, to which I have referred earlier (paragraph 41) both draw heavily on the position of public interest immunity in relation to litigation. One of the aspects of that concept is the "class claim", and it is convenient to discuss now whether the claims by the Treasurer would, in litigation, satisfy the tests there applicable in respect of such an immunity.

49. The leading Australian case on the nature of the immunity and the manner in which it operates is **Sankey v. Whitlam**

(1978) 142 C.L.R. 1, where the principle is discussed relevantly at 38-46, 56-64, 95-99. See too generally Cross on Evidence, Australian Edition, paras. [27001] - [27195].

50. A summary of the main aspects of the operation of the principle, insofar as it applies to courts, is contained in the judgment of Gibbs A.C.J. in that case at 38-40, where he said:-

> " The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in Conway v. Rimmer, as follows:
>
> > ' There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.'
>
> It is in all the cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in Conway v. Rimmer, 'the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it'. In such cases once the court has decided that 'to order production of the document in evidence would put the interest of the state in jeopardy', it must decline to order production.

An objection may be made to the production of a document because it would be against the public interest to disclose its contents, or because it belongs to a class of documents which in the public interest ought not to be produced, whether or not it would be harmful to disclose the contents of the particular document. In the present case no suggestion has been made that the contents of any particular documents are such that their disclosure would harm the national interest. The claim is to withhold the documents because of the class to which they belong. Speaking generally, such a claim will be upheld only if it is really necessary for the proper functioning of the public service to withhold documents of that class from production. However it has been repeatedly asserted that there are certain documents which by their nature fall in a class which ought not to be disclosed no matter what the documents individually contain: in other words that the law recognizes that there is a class of documents which in the public interest should be immune from disclosure. The class includes cabinet minutes and minutes of discussions between heads of departments (**Conway v. Rimmer; Reg. v. Lewes Justices; Ex Parte Home Secretary; Australian National Airlines Commission v. The Commonwealth**, papers brought into existence for the purpose of preparing a submission to cabinet (**Lanyon Pty Ltd v. The Commonwealth**), and indeed any documents which relate to the framing of government policy at a high level (cf. **In re Grosvenor Hotel, London [No. 2]**). According to Lord Reid, the class would extend to 'all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies': **Conway v. Rimmer**.

One reason that is traditionally given for the protection of documents of this class is that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions, and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. Some judges now regard this reason as unconvincing, but I do not think it altogether unreal to suppose that in some matters at least communications between Ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure. For instance, not all Crown

servants can be expected to be made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned. However this consideration does not justify the grant of a complete immunity from disclosure to documents of this kind. Another reason was suggested by Lord Reid in Conway v. Rimmer:

> ' To my mind the most important reason is that such disclosure would create or fan ill-formed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind.'

Of course, the object of the protection is to ensure the proper workings of government, and not to protect Ministers and other servants of the Crown from criticism, however intemperate and unfairly based. Nevertheless, it is inherent in the nature of things that government at a high level cannot function without some degree of secrecy. No Minister, or senior public servant, could effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public. The public interest therefore requires that some protection be afforded by the law to documents of that kind. It does not follow that all such documents should be absolutely protected from disclosure, irrespective of the subject matter with which they deal."

51. Some further features which emerge from the passages in Sankey v. Whitlam to which I have referred, and which are also potentially germane for present purposes, are:-

(a) the protection from disclosure is not absolute, and does not endure for ever;

(b) it is the court, not the executive, which in the end decides whether the privilege is made out, although due weight, of course, is given to the view of the executive government;

(c) the immunity applies to the giving of oral evidence, as well as to the production of documents;

(d) because the immunity is for the public interest, it may be taken by a witness, or by the court itself;

(e) if necessary, the court will examine the documents in question with a view to determining whether the claim is made out.

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. The position is more

doubtful in respect of Category 2. "Confidentiality", as Lord Cross said in Alfred Crompton Amusement Machines Ltd v. Commissioners of Customs and Excise (No.2) [1974] A.C. 405 at 433:-

> " . . . is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest."

My own view, however, is whilst some of the information in the Treasurer's Category 2 would be regarded as material attracting the immunity, the "class" comprising Category 2 is in reality a number of different "classes", and that the claim would not succeed as to all documents, the subject of it.

53. There are, of course, some obvious analogies between the concepts underlying these principles and those which would be applicable by the Senate or a committee in deciding whether to require a question to be answered or a document produced notwithstanding the making of a claim to public interest immunity.

54. In the first place, I do not think that it is the province of the executive government to decide conclusively whether questions should not be answered, or documents produced, by reason of public interest immunity. I am conscious, of course, of the fact that a House of Parliament is a political, not judicial, institution and indeed a party political body. So too, however, is the executive government. In my view the

relationship between legislature and executive in Australia merits the conclusion that the executive government's view on such an issue must bend to that of the relevant House. Of course, in deciding whether to press a question or require the production of a document, the committee should take into account the views of the executive government. They are to be respected and in many instances, one would expect them to be accepted as a matter of course. They are not, however, decisive.

55. There seems to be also no reason why such views might not be expressed strongly by the executive government, and no reason why that government should not tell its employees, former employees, advisers and former advisers, and its own former members, that it intends to claim that the questions should not be answered or the documents not produced.

56. The particular form of communication adopted by the Treasurer to the committee, to potential witnesses, or by witnesses in declining to answer questions or producing documents does not, I think, much matter. The ultimate question is whether the contentions underlying the claim should be accepted.

57. In determining whether such claims should be accepted there may well be circumstances where a sub-committee of a Senate committee, by agreement with the executive, could be made aware of the nature of the evidence or documents, with a view to determining whether the executive government's claim should be

acceded to, but this is only likely to occur where there are political considerations leading to that result.

58. In short, in answer to Question 2, I consider that an executive government does not have the right to determine conclusively whether questions should or should not be answered before a Senate Committee, or documents produced to it.

59. **Question 5.** The **Parliamentary Privileges Act**, by s.12 provides that:-

> " (1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence."

Penalties are provided for by s.12(1). Section 12(3) recognises that a House may itself impose a penalty for such conduct. The terms of s.12(1) are the same as those of Resolution 6(10) of the **Privilege Resolutions**.

60. As is apparent from the terms of s.12(1), the provision contemplates that the means adopted must be "improper". I do not think that the conduct of an appropriate Minister, in taking the steps necessary to ensure that a claim to public interest immunity in respect of the disclosure of particular matters to a committee of the Senate - such conduct including "requiring" or "directing" all persons who might give evidence or produce

documents upon the subject matter not to do so at that point - can be regarded as, of itself, "improper". I am assuming, of course, that the claim is honestly made. (That does not necessarily exclude political purposes also being involved.) In particular, if it has been the policy of the Ministry to make claims of this kind over a long period of time, as the discussion in the Administrative Appeals Tribunal in **re Lordsvale Finance Ltd and Department of Treasury (No.2)** (1986) 12 A.L.D. 32 seems to suggest, it would be difficult to support the notion that the making of the claim and the taking of the steps necessary to ensure its efficacy was itself "improper" in terms of s.12(1). Those steps would appear to be necessary to bring the issue before the only parliamentary body which could resolve it, namely the Senate as a whole.

61. A different situation might well arise if the Senate as a whole resolved that the claim to immunity should be rejected. In such a case the giving of directions not to answer the question or not to produce the documents in my view would then be "improper". That involves, of course, the assumption that the Senate does have the power to require any relevant question to be answered or relevant document to produced to it. That would be an issue to be resolved in the end by a court and I do not think that the relevant Minister at that point could say that the conduct was not improper because all the Minister had been seeking to do was to obtain a ruling of the court on the issue.

62. In relation to the terms of s.4 of the Act, similar considerations, in my view, would arise. I do not think that it is an "improper" interference with the free exercise by a committee of its function for a witness to claim public immunity privilege in relation to answering questions or producing documents, provided that the witness indicates a preparedness to answer the question if the Senate determines that it should be answered or the documents produced. (It is possible that there are circumstances where that conduct would be regarded as "improper", but they would be circumstances of rarity, and probably urgency.)

63. It may be noted that the views expressed above reflect a notion referred to earlier, namely that the enactment of ss. 4 and 12 of the **Parliamentary Privileges Act** has effected some reduction in the powers of the Houses.

64. **Additional Question.** This question has been largely dealt with in answers to earlier questions. Broadly speaking, I think witnesses are "entitled" to seek to rely on public interest immunity and to take steps in reliance upon that which will lead to the issue being resolved by the Senate. A different situation, as I have noted earlier, would obtain if a witness refused to answer a question or produce documents once the Senate as a whole had determined that the witness should do so.

65. In relation to the general conduct of the matter, and in particular in relation to the advice to be given by the Chair to witnesses before they give oral evidence, the terms of Resolution 1 of the Privilege Resolutions appear a satisfactory and fair way of dealing with the matter.

66. If it is intended to pursue the answers to particular questions or the production of particular documents with any witness, it is essential that the question or requirement be put directly and clearly to the witness.

With Compliments

D.F. JACKSON Q.C.

8 March 1994

1048G

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.

1064G

APPENDIX G

FIRB MINUTE OF 5 DECEMBER 1991

TREASURER
PARLIAMENT HOUSE
CANBERRA ACT 2600

Senator Richard Alston
Chair
Senate Select Committee on Certain Aspects
of Foreign Ownership Decisions in relation
to the Print Media
Parliament House
CANBERRA ACT 2600

20 APR 1994

Dear Senator Alston

I refer to your letter of 12 April 1994 raising a number of additional matters in relation to your Committee's work.

In view of developments, I now attach a copy of the FIRB's minute of 5 December 1991 to the then Treasurer. The decision to release this document reflects the special factors surrounding its status. Its release in no way erodes the reasons for it to be protected previously. Moreover, its release in no way affects the points underpinning the approach taken by the Government in relation to other FIRB documentation and information.

I advise that my direction to Mr Pooley in relation to his appearances before the Committee continues to apply. As you know, I have directed Mr Pooley not to provide to the Committee, whether orally or by way of provision of documents, information or advice provided in confidence by the Foreign Investment Review Board and the Treasury to the government on matters associated with 1991 and 1993 decisions on the Fairfax Group under the government's foreign investment policy, or information provided in confidence to the Foreign Investment Review Board and the Treasury on matters associated with the 1991 and 1993 decisions on the Fairfax Group under the government's foreign investment policy.

Similarly, my similar directions to some other witnesses before the Committee also continue to apply. I therefore reaffirm that I have, in effect, directed officials not to discuss the FIRB cases with the Committee.

I am puzzled by your request for a schedule of all internal working documents in relation to the 1991 and 1993 decisions. As advised in my letter of 9 March 1994, the list attached to my 9 March letter, the schedule attached to my letter of 10 February 1994 and the documents covered by Attachment A of Treasury's submission to the Committee, together comprise a full list of documents held by Treasury in relation to the 1991 and 1993 decisions. It follows that the Committee already has been advised of "a list of all notes to file following telephone conversations, a list of minutes of meetings of FIRB officers and a list of minutes of meetings between FIRB officers and clients relevant to the terms of reference".

Yours sincerely

Ralph Willis

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FOREIGN INVESTMENT REVIEW BOARD MINUTE

The Treasurer

FOREIGN INVESTMENT POLICY
O'REILLY AND TOURANG PROPOSALS TO BUY FAIRFAX

FOR ACTION BY: In regard to O'Reilly, the deadline is 20 December. In regard to Tourang, there is no statutory deadline, but the parties are pressing for an early decision for commercial reasons.

PURPOSE

- On 28 November it was announced that Mr Kerry Packer was withdrawing from the Tourang bid, and that his proposed shareholding would instead be placed with Australian institutions.

- The Board is split on the two foreign investment proposals to buy Fairfax: two members recommend approval of both, and two recommend rejection of both.

BACKGROUND

Fairfax receivership

- In December 1990, the banking syndicate (ANZ, Citibank et al) to the John Fairfax Group Pty Ltd (Fairfax) appointed Mr Des Nicholl (of Deloitte Ross Tohmatsu) as Receiver/Manager. As a consequence, there is now a management vacuum and much staff uncertainty at Fairfax.

- The banks and Receiver are advised by Baring Brothers Burrows & Partners (Barings), who prefer for commercial reasons to sell Fairfax as a complete entity, rather than dispose of its individual assets (the latter would involve forgoing tax benefits and incurring additional stamp duty).

- Fairfax owes amounts totalling around $1.85 billion to:

- banks (senior lenders)	$1.27 billion
- junk bondholders	$0.55 billion
- other unsecured creditors	$0.03 billion
	$1.85 billion

- While banks rank ahead of bondholders, the Fairfax group structure can only be sold as a complete entity with the bondholders' agreement. The bondholders - advised by Mr Malcolm Turnbull of the Sydney investment bank Turnbull & Partners - are suing Fairfax and the banks for some $500m in principal and damages.

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. Barings has received proposals to buy Fairfax from:

- INP Consortium Limited (INP), controlled via Independent Newspapers PLC by the O'Reilly family of Ireland;
- Tourang Limited (Tourang), originally owned one third each by interests associated with the Australian Mr Kerry Packer's Consolidated Press group (Conspress, which is withdrawing), the Canadian Mr Conrad Black's Daily Telegraph, and the US based Hellman & Friedman investment house.
- Australian Independent Newspapers Limited (AIN), a Melbourne based syndicate, backed by AMP, National Mutual and other local institutions, which has now got back into the running by lifting its bid.

. The bids have climbed to the outer limit that Barings thinks is attainable, in the region of $1.5 billion. The capacity of the O'Reilly and AIN bids to complete a quick purchase is complicated by an exclusive agreement between Tourang and the bondholders, and less certain commitments by banks, institutions and underwriters (only Tourang can settle with the bondholders prior to mid-January, and without an immediate public float).

Fairfax group

. The issued shares in Fairfax are held in the name of interests associated with Mr Warwick Fairfax and Lady Mary Fairfax, but are available as security against debt owed to the banking syndicate.

. Fairfax is one of Australia's two major newspaper groups, the other being Mr Rupert Murdoch's News Corporation Limited (Newscorp). Within the Australian national and metropolitan newspaper market, Newscorp accounts for 62 percent of all papers published, and Fairfax for a further 20 per cent.

. In metropolitan daily classified advertising, Fairfax accounts for 76 per cent of the market in Sydney and 73 per cent in Melbourne. In national daily display advertising, Fairfax accounts for 54 per cent of the market. National and metropolitan newspapers account for about 36 per cent - or $2.3 billion annually - of total media revenue from advertising and cover prices.

. Fairfax publishes:

- The Sydney Morning Herald (SMH) and The Sun Herald
- The Age and The Sunday Age
- The Australian Financial Review (AFR)
- the Business Review Weekly and related magazines
- the Newcastle Herald, and the Illawarra Mercury
- community newspapers in suburban Sydney and Melbourne
- various other magazines and newspapers.

- The main Fairfax titles - SMH, Age and AFR - are market leaders in the high income, well educated segments of the Sydney and Melbourne markets. The SMH and Age dominate the Sydney and Melbourne print advertising markets, in both classified and display segments, and are regarded by many as among the top 20 newspapers worldwide. The AFR has the largest national newspaper display advertising market share of any newspaper.

- Fairfax employs more than 5000 people (including some part-timers and casuals). It purchases newsprint - a major newspaper input - from Australian Newsprint Mills (ANM) and from overseas sources. ANM is owned by Newscorp and Fletcher Challenge, and has a contract to supply Fairfax until 1998.

- Although the main Fairfax titles generate sufficiently strong earnings for Fairfax to remain profitable at the operational level, the group has - since Warwick Fairfax's takeover in 1987 - incurred over $600 million of losses as a result of having to service a large amount of acquisition related debt.

- As at 30 June 1991, Fairfax had total assets of $1.7 billion and total liabilities of $2.1 billion (the deficiency being covered by the goodwill value of the main mastheads). In the three years to 30 June 1991, Fairfax made total profits <u>before</u> interest and tax of $507 million, and total losses <u>after</u> interest and tax of $607 million. Around 78 per cent of Fairfax revenue comes from advertising.

<u>Bondholders</u>

- The junk bondholders are mostly US based institutions, many themselves financially troubled, which together hold Fairfax subordinated debentures totalling $450m at face value (about $550m with interest etc), and which are almost all represented by Malcolm Turnbull (who has now resigned from his other role as a Tourang director).

- Some of the bondholders have commenced legal action in the USA and Australia against Fairfax and the banking syndicate in relation to the circumstances surrounding the sale of the debentures.

- The bondholders have an exclusive, mutually binding agreement with Tourang which requires them to drop litigation against Fairfax and the banks if the Tourang bid succeeds, but which will expire in mid-January (subject to an option to renew, and a pre-emptive right to match any offers from the other bidders).

O'Reilly Proposal

Independent Newspapers - controlled by the family interests of Dr Tony O'Reilly - is incorporated and listed in Ireland, where it is the largest media group, publishing about 60 per cent of newspapers and leading the morning, evening and Sunday segments of the national market. It also publishes 'free' newspapers in England, and has non-core activities in outdoor advertising and the electronic media.

In Australia, the O'Reilly family - through Independent Newspapers and the O'Reilly Trust - operates an outdoor advertising business Buspak Advertising, Australia's largest transit advertising company, and a provincial newspaper group Australian Provincial Newspapers (APN) Australia's fourth largest print media group.

APN, acquired by O'Reilly family interests in 1988, has a print run of 250,000 copies through 13 regional dailies - and also publishes some non-dailies - along the northeastern seaboard from Coffs Harbour to Mackay. It is intended to float about half the stock in APN on the Australian Stock Exchange in 1992.

INP - incorporated in Australia solely to bid for Fairfax - is currently wholly owned by Independent Newspapers, which had total assets around $A399 million and shareholders funds around $A171 million as at 31 December 1991, and whose earnings before interest and tax in 1990 were about $A37.5 million.

BT Corporate Finance for the O'Reilly bid has submitted a foreign investment proposal which provides for:

- the current senior lenders to Fairfax (the banks) to be repaid in full, and the junk bondholders to receive debentures with a face value of $125m (convertible on sale to Australians);

- assuming most bondholders redeem their debentures, the approximate economic interests in Fairfax after a public share offer (underwritten by JB Were & Son) to be 20 per cent by Independent Newspapers, 6 per cent (non-voting debentures) by bondholders and 74 per cent by Australian portfolio investors (including 2 per cent by the family interests of Sir Vincent Fairfax);

- board members to be: Dr Tony O'Reilly (chairman of HJ Heinz and Independent Newspapers), Mr Liam Healy (CEO of Independent Newspapers), and 8 to 10 Australians, including Mr John Reynolds (CEO of APN, and former managing director of West Australian Newspapers), Mr John B. Fairfax (former deputy chairman of Fairfax), Mr Ted Harris (chairman of Australian Airlines), and Mr Greg Taylor (senior Fairfax executive);

- editorial policy - if the bid succeeds, the Charter of Editorial Independence proposed by Fairfax journalists to be signed and complied with - the Independent Newspapers philosophy is said to be consistent with the Fairfax culture and style;

- business plans - John Reynolds to be CEO, and Fairfax senior management to be restructured, drawing on the managerial expertise of the O'Reilly flagship 'The Irish Independent' - all the main Fairfax businesses to be retained (Newcastle Newspapers to be sold to Mr John B. Fairfax's Rural Press for $34.4 million), and geographic coverage to be expanded - printing technology in Sydney to be upgraded at a cost around $250 million by 1995/96;

- staff matters - subject to a review of the contractual terms of the senior Fairfax executives, all staff to continue to be employed on current terms and conditions, with all accrued employee benefits preserved - industrial relations to be managed so as to effect change (eg new technology) with minimum unrest and disruption;

- public benefits - the major Fairfax titles to be retained and professionally managed as a third force (to Conspress and Newscorp) in the Australian print media - the management philosophy and experience of Independent Newspapers to be drawn on - editorial independence to be assured - the community links of the SMH and Age to be recognised in separate management structures based in Sydney and Melbourne respectively.

Tourang Proposal

Tourang Limited, incorporated in Australia solely to bid for Fairfax, was established by interests associated with Conspress (Mr Packer, who is now withdrawing), the Daily Telegraph PLC (Mr Black, of Canada), and Hellman & Friedman Capital Partners (Hellman & Friedman, of the USA). Prior to purchase, Tourang would be restructured to limit the voting foreign voting component to 20 per cent; in particular, the Hellman & Friedman interest would be converted to non-voting debentures.

Conspress, one of Australia's largest privately owned business groups, conducts the family business affairs of Mr Kerry Packer. While its core businesses are magazines and television, Conspress also has major interests in chemicals, ski-resorts, pastoral stations and real estate. The Nine network - which Mr Packer controls through a 38 per cent shareholding - inter alia operates TV stations in Sydney and Melbourne.

Hellman & Friedman is a US based limited partnership and investment house which, together with its sister partnerships, has in excess of $US480 million in committed capital. A general partner (Mr Brian Powers) represents Hellman & Friedman on the Tourang board.

The Daily Telegraph, a British newspaper business controlled by Mr Black, publishes The Daily Telegraph (a major quality daily) and The Sunday Telegraph in the UK. Mr Black's worldwide newspaper interests include some 85 daily newspapers and 150 weekly publications.

While Tourang proposes to fully pay out bank creditors, a key element of its bid is the exclusive accommodation whereby bondholders would receive debentures worth $125 million or 28¢ in the dollar at face value (long-term value unknown). It is expected bondholders would exchange about $100 million of these debentures for cash, through sales to Australian institutions.

On completion, the approximate economic interests in Tourang via shares and convertible debentures would be:

- interests associated with Black 20%
- Hellman & Friedman (non-voting) 15%
- bondholders 4%
- Australian investors 61%

(the O'Reilly bid assumes the bondholders will hold 6%)

The 61 per cent of long-term capital to be held by Australian institutions would be underwritten by Ord Minnett Securities. Debentures held by Hellman & Friedman could be converted to shares only on sale to Australians. Shortly after completion, it is intended to partially float Tourang on the ASX (resulting in some reallocation of the Australian 61 per cent).

If the Tourang bid were to succeed, the board would comprise: Sir Zelman Cowen (chairman), Mr Conrad Black (deputy chairman), Mr Daniel Colson (Daily Telegraph), Mr Brian Powers (Hellman & Friedman), Sir Laurence Street, and up to five others yet to be announced.

The new CEO is as yet unknown (but preference will be given to Australian candidates), and the parties have indicated that high quality managers and journalists would be recruited from overseas. Overall staffing levels would be cut by 7 to 8 per cent over a 2 year period. Existing awards and redundancy agreements would be maintained.

Tourang would retain all the Fairfax titles, and says it is committed to restoring and enhancing the quality of the mastheads. The Fairfax papers would be able to draw on the expertise in printing technology and other areas of the Daily Telegraph in the UK. The Fairfax presses in Sydney would be upgraded in the medium-term. The Tourang position on editorial policy is set out at Attachment A.

ISSUES

Foreign investment policy

- Under the Government's foreign investment policy guidelines, foreign investment in mass circulation newspapers is restricted: each application is examined on a case-by-case basis.

- On 10 October 1991, Caucus resolved that:

  Caucus supports Australian ownership and control of Australian media outlets. In regard to print media, Caucus notes that a House of Representatives Committee will consider these issues among others. Accordingly, Caucus would have the opportunity to consider any recommendation in this area after the Committee reports to Parliament.

  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 of the process, Caucus opposes any level of foreign voting equity above 20 per cent. It further requests the Treasurer to keep Caucus briefed on developments in this matter.

- This Caucus resolution, as with many others, is capable of several interpretations - we have taken the 20 per cent limit on foreign voting equity as the basic proposition, and the comment on not extending foreign control as a desirable objective.

- Both bids are examinable under the Act, and could be blocked under the Act were you to decide that control of Fairfax would pass to foreign hands (essentially, Dr O'Reilly or Mr Black), and that this would be contrary to the national interest. If you were predisposed to reject either bid, the question of 'foreign control' assumes crucial importance.

- Foreign voting equity in Fairfax would be 20 per cent in either case. Aggregate foreign economic interests (shares and convertible debentures) in Fairfax would be about 25 per cent under O'Reilly (ie, O'Reilly 20, bondholders 5) and about 40 per cent under Tourang (ie, Black 20, Hellman & Friedman 15, bondholders 5). On this basis, we cannot rule out the possibility that control of Fairfax would be shared Australian-foreign.

- The argument for assuming control of Fairfax would not pass to foreign hands rests on a literal reading of the figures: foreign voting equity would be 20 per cent in each case; foreign board representation would be at most 30 per cent (O'Reilly/Healy possibly supported by Reynolds, or Black/Colson possibly supported by Powers). Both syndicates have asserted that the prominent participants (O'Reilly and Black) would be in no position to dominate the respective boards.

- The argument for assuming control of Fairfax would pass to foreign hands rests on the commercial reality that the bids were ultimately put together largely by Dr O'Reilly and Mr Black respectively, each of whom expects to significantly influence Fairfax strategic and senior management policy, at least initially.

- In our view, the fact that the new Fairfax board would have majority Australian membership may not settle the issue, as we presume the directors and policies would be chosen on the advice of the foreign bidders with the requisite newspaper expertise. The benefits promised by the bids depend on them bringing foreign management, technology and journalism skills to Fairfax, which in itself might indicate effective foreign control. On balance, we would incline to the view that effective control of Fairfax would more likely be foreign.

Consultations

- Mr Packer's withdrawal has effectively removed any national interest implications flowing from concentration and cross-media issues. The TPC said it does not oppose the O'Reilly bid, and now has no basis for opposing the Tourang bid (see Attachment B). The ABT said it had information which a priori would have raised cross-media concerns were Mr Packer still involved in the Tourang bid. We also consulted Attorney-General's on various aspects, but the withdrawal of Mr Packer made their advice unnecessary.

Media concentration

- The major players in the Australian print media (newspapers and magazines) are Fairfax, Newscorp and Conspress. In terms of circulation, Newscorp and Fairfax together control over 80 per cent of metropolitan and national daily newspapers, while Conspress and Newscorp together control 85 per cent of the 30 largest magazine titles.

- In newspapers, Newscorp and Fairfax operate in slightly different market segments: Newscorp is stronger Australia-wide and among the lower to middle socioeconomic groups, while Fairfax is stronger in Sydney and Melbourne and among the upper socioeconomic groups. Conspress has no major newspaper interests.

- Conspress is prevented by the cross-media rules from owning TV stations and newspapers in the same city, but controls about half the circulation of the top 30 magazines. In practice, since Mr Packer controls television stations in Sydney and Melbourne, he cannot under the cross-media rules also hold 15 per cent or more of a mass circulation newspaper in either city.

- The O'Reilly bid would marginally raise concentration in daily newspapers, because APN owns 13 newspapers along the northeastern seaboard (accounting for 30 per cent of the regional market, but only one per cent of the national market). The Tourang bid would not increase concentration, because the Black group does not currently have newspaper interests in Australia.

- Mr Packer will not now be a complicating factor in terms of media concentration for the Tourang bid. Further, were Mr Packer to subsequently acquire an interest in Fairfax on the stockmarket when the business is partially floated under any one of the three proposals, this would once again trigger investigation by the ABT in respect of the cross-media rules and any association between Mr Packer and the new Fairfax owners.

Editorial independence and management style

- The O'Reilly team says its management philosophy is consistent with the Fairfax culture and style, and it will comply with the proposed editorial charters. Tourang does not believe in editorial charters; its editorial policy is outlined at Attachment A. In our view, both bids would bring valuable international expertise to Australia and result in higher quality journalism in the Fairfax newspapers.

Maintaining the Fairfax group

- If the main Fairfax assets (SMH, Age and AFR) were sold to several different bidders - either now or down the track - the Australian mass circulation newspaper industry would lose the one countervailing force to Newscorp: this would clearly not be in the public interest. In the event, both foreign bidders are committed to retaining the major Fairfax titles.

OPTIONS

- You could: (a) approve both bids,
  (b) reject both bids, or
  (c) reject one and approve the other.

- As to (a), both bids appear to comply with the basic Caucus proposition that not more than 20 per cent of the voting equity in Fairfax be foreign. Both bids would bring management and technology skills to Fairfax, and a willingness to invest in, and to upgrade, the standards of the papers.

- As to (b), were you to conclude that control would become foreign contrary to the national interest, you could reject both. You could take the view that, while you had no objection to 20 per cent foreign voting equity, foreign control was per se undesirable and against the national interest.

You could also argue in support of option (b) that the Australian AIN bid was potentially sufficient to pay out the senior creditors in full (and the junk bondholders in part), so that rejecting the two foreign bids would not disadvantage the creditors.

The arguments against option (b) are that:

- after all the Caucus debate etc, rejecting the foreign bids on the basis of a tighter policy than Caucus required would signal to foreign investors that the Government was inconsistent in the sense of not sticking to its stated policies;

- Fairfax would likely benefit from the injection of management and skills that both foreign investors have demonstrated they could and would bring to Australia. AIN has no newspaper experience, and we are not aware of any plans by the syndicate to acquire expertise comparable to that available to Dr O'Reilly and Mr Black. We would expect the Fairfax press to be more competitive were one of the two foreign bidders to get control;

- rejecting the foreign bids would leave Fairfax in receivership unless and until the AIN bid proved satisfactory to the Receiver (AIN is not presently in a position to quickly close a purchase). Also, blocking the foreign bids might encourage AIN to reduce its bid to the substantial detriment of the Fairfax creditors; and

- should a foreign controlled Fairfax press publish editorials unacceptable to the nation, this would doubtless be ignored or result in a loss of sales.

As to option (c), it would be possible to reject Tourang and approve O'Reilly, or vice versa. There may seem to be a stronger case for rejecting Tourang than for rejecting O'Reilly, given the difference in foreign economic interest (40 per cent versus 25 per cent respectively), and since the probability of Fairfax being foreign controlled would be greater with Tourang than with O'Reilly.

However, it would be harsh to discriminate between them when both bids appear to comply with the basic Caucus proposition, and when their respective economic benefits are similar. Also, at this stage, only Tourang can deal with the junk bondholders, and rejecting Tourang could leave Fairfax in receivership, its creditors unpaid and its staff demoralised for many months to come (the logistics for putting new arrangements with the bondholders in place are apparently not simple, and substantial delays would make all the bids more vulnerable to a stockmarket downturn).

CONCLUSION AND RECOMMENDATION

- Both bids would bring a new major player (replacing the Fairfax family) and valuable newspaper expertise to the Australian media. While there is some community concern about foreign ownership of local newspapers per se, each bid is consistent with the key proposition of the Caucus resolution, and would at least maintain the existing degree of competition and diversity.

- The Tourang bid has the advantage from the Receiver's point of view of its exclusive agreement with the US bondholders and its firm institutional and underwriting backing. However, this is ultimately a commercial (rather than national interest) consideration.

- Two members of the Board - Mr Ken Stone and Mr Des Halsted - consider that foreign control of the Fairfax press should not be allowed. They believe it likely that both bids would result in foreign control. Accordingly, they recommend you reject both proposals.

- The Chairman, Sir Bede Callaghan, and the Executive Member consider the prospect of foreign control to be outweighed by the benefits of foreign newspaper expertise, such as higher quality journalism and more modern technology. They therefore recommend in each case that you authorise advice to the parties that there are no objections to the proposal under the Government's foreign investment policy.

- A decision to approve both bids could be easier to justify, providing of course that you are satisfied that they are consistent with the Caucus proposition.

- If you reject both bids, we would need to discuss with you whether this should be done under the Act or the policy guidelines (we cannot predict whether the parties would challenge a rejection under the Act in court: they could claim you were mistaken in concluding control would be foreign, and your decision was thus wrongly based; you would need to show control would be foreign and against the national interest).

- Whatever decision you take will be criticised, and a press release would be desirable (we will send a draft for consideration when you come to a conclusion).

- I have not given this minute wider Ministerial circulation.

F.G.H Pooley
Executive Member
5 December 1991

O'Reilly proposal: approved/rejected

Tourang proposal : approved/rejected

signed: / /91

ATTACHMENT A

EDITORIAL POLICY

1. Support for the AJA Code of Ethics

Tourang fully endorses the AJA Code of Ethics. Moreover, Tourang proposes that this Code of Ethics should be treated as part of the terms of employment of all journalists employed by Fairfax and the Board will expect the editors to ensure the Code is rigorously complied with in every particular.

2. Support for the Australian Press Council – Statement of Principles

Tourang endorses the Australian Press Council Statement of Principles and expects that all editors and journalists will comply with them.

3. Objectivity and Integrity

Tourang believes that the Fairfax publications should be free from any party political bias or attachment to any sectional interest.

Fairness

Tourang believes that the Australian press (including Fairfax) regularly accords insufficient respect to the rights of persons who are written about or who hold views contrary to those expressed in the newspapers concerned.

Tourang believes that where the newspaper misrepresents a person or misstates the facts, a person affected should be entitled to adequate and appropriate correction. In particular, where a person is defamed, his or her vindication should not have to await exhausting and expensive legal proceedings. Where newspapers have gone wrong in such cases, they should promptly admit error and correct it.

To date, Tourang is not aware of any developed system of practices by Australian newspapers covering these matters and at this stage it is appropriate only to express our support for the general principles. We expect that the board of Tourang, when fully constituted will be able to develop these principles into a workable set of procedures that will make the Fairfax newspapers fairer and more accessible both to their readers and to those about whom they write.

5. Directors' Responsibility

Tourang does not subscribe comprehensively to the "Fairfax Newspapers" Charter of Editorial Independence. In particular, the Charter denies the board of directors any right or entitlement to express an opinion in the editorial pages of a newspaper. This is a long established proprietorial right which has been widely acknowledged and exercised. In exercising it, the board must observe a meticulous respect for the truth and honest statement. Tourang claims that entitlement.

Further, Tourang is completely committed to the continued improvement and editorial excellence of the Fairfax newspapers, to the assurance of accuracy, fairness, objectivity and comprehensiveness in their coverage of Australia and the world, and firmly believes the board must maintain an ultimate responsibility for this.

TRADE PRACTICES COMMISSION ATTACHMENT B

Proposed Acquisition of John Fairfax Group

As you may be aware the Commission has undertaken investigations in the market place to ascertain if any of the proposed acquirers may contravene the Trade Practice Act.

As the bids are currently structured, the Commission's investigations to date indicate that acquisitions by the present bidders is unlikely to contravene the Act.

The Commission's enquiries have been concentrated in Sydney and Melbourne. On the basis of those inquiries the Commission sought to establish –

- whether there is a market for classified advertising in the Sydney and Melbourne metropolitan markets;
- whether the Sydney Morning Herald and The Age dominated those markets; and,
- whether any of the bidders for Fairfax would be in a stronger position as a consequence of the acquisition.

In relation to both geographic markets the Commission is of the view that there is a market for classified advertising in both Sydney and Melbourne. In relation to the question of dominance, however, the Commission found the position to be different in Melbourne and Sydney. In Sydney the Sydney Morning Herald appears to be constrained by other publications such as the Telegraph Mirror, suburban newspapers, various specialised magazines and the Trading Post. The Age does not seem to be under the same intensity of competition and the Commission is inclined to the view that The Age may dominate the market for classified advertising in Melbourne, or at least some segments of it.

The Commission is aware that Australian Consolidated Press issues a number of specialised publications (for example, for the sale of cars, commercial vehicles and property) in both Sydney and Melbourne. If Mr Kerry Packer had remained a shareholder in Tourang the Commission would have needed to explore further whether such publications would have resulted in an enhancement of the position of The Age. However, with Mr Packer's withdrawal from the consortium the Commission does not propose to pursue this line of enquiry.

Market enquiries to date do not indicate that the position of other bidders will be strengthened.

On that basis the Commission raises no objection to the proposals.

If, however, the structure of the bids were to change or other relevant factors were to come to light, the Commission may need to look again at the matter.

In addition, I note that if the INP Consortium is successful there is a proposal to on sell the Newcastle newspapers, currently part of the John Fairfax Group, to Rural Press. If that were to eventuate we would need to investigate that proposal as it may have trade practices implications.

APPENDIX H

OPINION OF MR TONY MORRIS QC

EX PARTE: SENATOR CHERRY KERNOT

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

OPINION

of

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EX PARTE: SENATOR CHERYL KERNOT

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

O P I N I O N

My advice has been sought by Senator Cheryl Kernot, the Leader of the Australian Democrats in the Commonwealth Parliament. The instructions which I have received from Senator Kernot by letter of 18 March 1994 are in the following terms:

> "I am writing to seek your advice on a matter before the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media.
>
> "As you are aware, the Committee has requested Mr. Tony Hinton, a senior Treasury official who is Executive Member of the Foreign Investment Review Board, to produce documents containing advice from the Board to the Treasurer on the proposed purchase by foreign companies of an interest in the Fairfax newspaper chain.
>
> "The Treasurer, Mr. Ralph Willis, has instructed Mr. Hinton not to produce the documents, and has written to the Committee arguing that disclosure of the documents would be contrary to the public interest. The Committee has not accepted the Treasurer's view, and is considering further steps it might take to obtain the documents. There is some chance that the conclusive decision as to which view should prevail will be made by a court.
>
> "That being so, I seek your advice as to the likelihood that a court would find:
>
> - that the documents sought by the Committee belong to a class of documents which should not be disclosed on public interest grounds; and
> - if not, that disclosure of the specific documents being sought by the Committee would nevertheless be contrary to the public interest, given the facts of the matter."

I should say, at the outset, that it is not immediately apparent to me that, as the law presently stands, there is any basis upon which a court could assume jurisdiction to reach a "conclusive decision as to which view should prevail". There is, of course, the possibility that the law will be changed, by Act of Parliament, so as to confer jurisdiction on a court to reach a conclusive decision in relation to this issue. Leaving aside that possibility, I can only conceive of one way in which the matter under dispute might imaginably arise as a justiciable issue before a court.

As the law presently stands, there is no alternative but for the Committee, at least in the first instance, to make its own decision in relation to the Treasurer's contention that disclosure of the documents would be contrary to the public interest. If the Committee were to reject the Treasurer's contention, and to direct Mr. Hinton to produce the documents at a private session of the Committee as contemplated by Rule 1(10) of the *Parliamentary Privilege Resolutions* of 25 February 1988 - and assuming that the Treasurer wee, in that event, to persist with his direction to Mr. Hinton not to produce the documents - Mr. Hinton would then be placed in the invidious position of having to choose between compliance with the Committee's direction and compliance with the direction of the Treasurer. Were Mr. Hinton to adopt the latter course, it would be open for the Committee to make a report to the Senate as a whole; and on the basis of that report, the Senate might resolve to impose a penal sanction (either a fine of up to $5,000.00, or imprisonment for not more than six months) in respect of Mr. Hinton.

If that were to happen, it is arguable that Mr. Hinton would be entitled to bring proceedings in a court of law, with a view to litigating the question whether or not the

Senate's resolution was lawful. It is open to argument that, in the scenario which I have mentioned, a justiciable issue would arise as to whether or not Mr. Hinton's failure or refusal to comply with the Committee's direction constitutes "an improper interference with the free exercise by [the Committee] of its authority or functions" within the meaning of Section 4 of the *Parliamentary Privileges Act 1987*; and in such proceedings it may be open to Mr. Hinton to contend that, whether or not his failure or refusal to comply with the Committee's direction constitutes an "interference with the free exercise of [the Committee's] authority or functions", it is not an improper interference, as the Treasurer's direction justified Mr. Hinton in failing or refusing to comply with the Committee's direction. Thus, in that way, it is theoretically possible that a court may ultimately be called upon to reach a "conclusive decision" as to whether or not the Treasurer is entitled to resist disclosure of the documents on the ground that such disclosure would be contrary to the public interest.

I do not, however, wish to be taken as accepting or endorsing the view that, even in the scenario which I have mentioned, the present issue could be the subject of a "conclusive decision" by a court of law. The decision of the High Court of Australia in The Queen v. Richards, ex parte Fitzpatrick and Browne, (1955) 92 C.L.R. 157, supports the view that, in relation to issues of this nature, courts of law will regard as conclusive the determination of the relevant House of the Parliament, so that, if the Senate were to determine that Mr. Hinton's failure or refusal to comply with a direction by the Committee to produce the documents constituted a contempt or a breach of privilege, the courts would not entertain any question as to the correctness of the Senate's determination. There is a view that the enactment of Section 4 of the

Parliamentary Privileges Act 1987 may have resulted in an alteration of the principles applied in Richards' Case, so that the courts might no longer treat as conclusive the determination of a House of the Parliament in relation to an issue of privilege. That is not a view to which I personally subscribe; but even on that view, it seems probable that the function of a court would be limited to deciding whether or not it was open to the House to find that a contempt or breach of privilege had occurred; it would be very difficult to contend that the court has the jurisdiction or power to substitute its own view for that reached by the Senate.

Nonetheless, I have been asked to consider this question on the hypothetical basis that "There is some chance that the conclusive decision as to which view should prevail will be made by a court"; and I shall therefore proceed on that assumption.

PUBLIC INTEREST IMMUNITY

The courts have long recognised that the interests of parties to a particular piece of litigation must, where necessary, be subordinated to the interests of the nation as a whole. One of the earliest reported cases of this nature was Anderson v. Hamilton, (1816) 2 Starkie N.P.C. 183; 2 Brod. & B. 157; 129 E.R. 917. In the course of that action, the Plaintiff sought to compel the production by a witness, the Earl of Liverpool, of correspondence which had passed between him (in his capacity as Secretary of State for the Colonial Department) and the defendant (in his capacity as Governor of Heligoland). Lord Ellenborough C.J. observed:

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> "... if the objection had been made by the noble Earl to the production of this correspondence as a matter of state, I should have given the fullest effect to that objection. I remember, upon some of the state trials, Lord Grenville was called to produce some letter which was supposed to have come to his hand, having been intercepted in the course of the post, or something of that kind. I speak from recollection: I do not know whether I am correct; but, upon the objection, it was thought that secrets of state were not to be take out of the hand of His Majesty's confidential servants. Now, I am very unwilling to have the evidence of what Lord Liverpool has written by way of observation on the Plaintiff's complaint ... . I do not like breaking in upon this correspondence; it might be pregnant with a thousand facts of the utmost consequence respecting the state of the government, the connection of parties, the state of politics, and the suspicion of foreign powers with whom we may be in alliance."

For many years, it was understood - at least in England - that a claim of "Crown privilege" by the responsible government minister was conclusive (see, for example, Duncan v. Cammell, Laird & Co., [1942] A.C. 624); although there were cases in which Australian Judges exercised the power to require the production of the documents in question, to examine them, and to determine whether a claim for "Crown privilege" was well-founded (see, for example, Queensland Pine Co. Ltd. v. The Commonwealth, [1920] St.R.Qd. 121).

So far as Australia is concerned, the matter has now been authoritatively resolved by the decision of the High Court in Sankey v. Whitlam, (1978) 142 C.L.R. 1. By that case, it was finally concluded that, in respect of oral or documentary evidence sought to be adduced in a court of law, the decision as to whether or not a claim for "Crown privilege" (or, as it is now more commonly called, "public interest immunity") should be upheld is to be made by the court; the views of the responsible minister, whilst accorded appropriate weight, are no longer taken as being decisive.

In Sankey v. Whitlam, the defendants (the Hon. E.G. Whitlam, the Hon. R.F.X. Connor, the Hon. Dr. J.F. Cairns, and the Hon. Mr. Justice Murphy) were charged with a conspiracy to effect a purpose that was unlawful under a law of the Commonwealth, namely the borrowing of money in contravention of the *Financial Agreement 1927*. The charges arose out of the so-called "Loans Affair", and concerned allegations that a breach of Commonwealth law had occurred when the defendants (a former Prime Minister and certain Ministers in his Government) had entered into negotiations with a person named Khemlani to arrange loans otherwise than in accordance with the *Financial Agreement 1927*. The Commonwealth was served with a *subpoena duces tecum* to produce documents, including Cabinet and Loan Council documents, in relation to those charges.

In dealing with the Commonwealth's claim for "Crown privilege", Gibbs A.C.J. said at pp.38-39:

> "It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence."

Likewise, at pp.58-59, Stephen J. said:

> "What are now equally well established are the respective roles of the court and those, usually the Crown, who assert Crown privilege. A claim to Crown privilege has no automatic operation; it always remains the function of the court to determine upon that claim. The claim, supported by whatever material may

> be thought appropriate to the occasion, does no more than draw to the court's attention what is said to be the entitlement to the privilege and provide the court with material which may assist it in determining whether or not Crown privilege should be accorded. A claim to the privilege is not essential to the invoking of Crown privilege. In cases of defence secrets, matters of diplomacy or affairs of government at the highest level, it will often appear readily enough that the balance of public interest is against disclosure. ... Just as a claim is not essential, neither it is ever conclusive, although, in the areas which I have instanced, the court's acceptance of the claim may often be no more than a matter of form. It is not conclusive because the function of the court, once it becomes aware of the existence of material to which Crown privilege may apply, is always to determine what shall be done in the light of how best the public interest may be served, how least it will be injured."

The present Chief Justice of Australia, Sir Anthony Mason, said at pp.95-6:

> "It is now recognized that in considering an objection to production on the ground of Crown privilege the court must evaluate the respective public interests and determine whether on balance the public interest which calls for non-disclosure outweighs the public interest in the administration of justice that requires the parties be given a fair trial on all the relevant and material evidence ... . In determining this question the court, though it will give weight to the Minister's opinion that the documents should not be produced, is entitled to inspect the documents and form its own conclusion upon the question whether the public interest will be better served by production or non-production."

Jacobs J. and Aickin J. adopted a similar approach.

Issues of a similar nature arose, more recently, in another case which attracted a certain degree of public notoriety: Alister v. The Queen, (1984) 154 C.L.R. 404. That was also a criminal case, involving charges of conspiracy to murder and attempted murder, in relation to the "Hilton Hotel bombing"; and one of the issues which arose at the trial related to the membership of each accused of an organization known as the "Ananda Marga", and their respective roles within that organisation. A *subpoena*

duces tecum was issued on behalf of the accused directed to the officer in charge of the Australian Security Intelligence Organization ("ASIO"). The trial Judge set aside the *subpoena*; but the High Court held (by majority) that it was an error not to require the production of any documents which may have answered the description in the *subpoena* to enable the court to discover whether any such documents existed and then to inspect them for the purpose of deciding whether they should have been disclosed to the accused. Of particular relevance are the following remarks of Brennan J. at p.455:

> "If there were an ASIO file of documents answering the description in the subpoena and if it contained a document showing the Crown case to be a fabrication and a frame-up, it is impossible to suppose that every consideration - of national security and justice to the accused alike - would not demand its inspection by the accused and, if admissible, its production in evidence."

From those cases, the following general principles may be distilled as applying where a claim for "Crown privilege" or "public interest immunity" arises in the course of litigation:

(1) A claim of "privilege" by or on behalf of the Crown, through the responsible Minister, is neither necessary nor conclusive. On the one hand, a court may exclude evidence in the public interest, even if no claim of privilege is made on behalf of the Crown. And on the other hand, even if such a claim is made on behalf of the Crown, the court must determine for itself whether or not the claim is sustainable. (It is for this reason that the expression "public interest immunity" has now largely superseded the expression "Crown privilege".)

(2) The court will, nonetheless, accord appropriate weight to the views of the responsible Minister, or those of the permanent head (or other representative) of the relevant government department.

(3) There are some categories of documents and information in respect of which such a claim is very likely to be upheld, save in the most extreme circumstances. They include (in the words of Sir Ninian Stephen) "defence secrets, matters of diplomacy or affairs of government at the highest level". Still, even in such cases, the court retains the ultimate power to determine whether or not the oral or documentary evidence in question should be admitted.

(4) A matter which, at one point in time, might have been the subject of a successful claim for exclusion in the public interest may cease to attract that protection, either because the matter has already ceased to be confidential (whether as a consequence of the documents being tabled in Parliament, or as the result of other forms of publicity), or simply because the effluxion of time means that information is no longer sensitive.[1]

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[1] Similar issues arose in the famous "Spycatcher" case, in which the British Government sought to restrain the publication of a book based upon information which Mr. Peter Wright had acquired in the course of his employment as a member of the British Secret Service (MI5). Powell J. refused to grant an injunction, as most of the information was either no longer confidential (in the sense that it had passed into the "public domain"), or was such that, as a result of the effluxion of time, its publication would not cause any detriment to the British Government. See Attorney-General for the United Kingdom v. Heinemann Publishers Australia Pty. Ltd., (1987) 8 N.S.W.L.R. 341. An appeal to the New South Wales Court of Appeal was dismissed ((1987) 10 N.S.W.L.R. 86), as was a subsequent appeal to the High Court of Australia ((1988) 165 C.L.R. 30).

(5) Ultimately, the function of a court of law, where a claim for "Crown privilege" or "public interest immunity" is advanced, involves a balancing exercise. The court must weigh up, on the one hand, the potential prejudice to the nation as a whole, if the evidence becomes public; on the other hand, the court must take into account the potential prejudice to the parties involved in the litigation if relevant evidence is excluded.

(6) The classes or categories of information which may be the subject of a successful claim for "public interest immunity" have never been - and probably are not capable of being - identified exhaustively. But it is possible, from the case-law, to identify a number of categories in respect of which claims for "Crown privilege" or "public interest immunity" have been upheld on previous occasions:

- Documents and information the disclosure of which may be prejudicial to national security;

- Documents and information the disclosure of which may be prejudicial to foreign relations;

- Documents and information the disclosure of which may prejudice the investigation or trial of a criminal offence;

- Documents and information relating to advice given to the Crown by the Government[2];

- Documents and information obtained by the Government, or by officers of the Government, in circumstances where the public disclosure of such documents or information might prejudice the Government obtaining such information on a confidential basis on future occasions[3];

- Documents and information, the disclosure of which may prejudicially affect Crown revenue or the national economy[4]; and

- Documents and information, the disclosure of which may prejudice the safety of a police informant or under-cover police investigation.

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2 The case of Sankey v. Whitlam demonstrates that, whilst "public interest immunity" is ordinarily accorded to Cabinet documents and papers concerned with policy decisions at a high level, the protection is neither absolute nor permanent. Even in respect of such documents, the court must balance the need for secrecy against the need to produce the documents in the interests of justice; and production will usually be ordered where a document has previously been published, or where the need to maintain confidentiality has ceased by effluxion of time. Moreover, the public interest which ordinarily requires the protection of Cabinet documents and similar papers may yield to a greater public interest, such as where disclosure is essential to a prosecution for misfeasance in public office.

3 Such protection may also be available, in some cases, to non-governmental organisations. Thus, in D. v. National Society for the Prevention of Cruelty to Children, [1978] A.C. 171, the House of Lords accorded immunity from disclosure in respect of the identities of persons who had provided confidential information to the Respondent - described in the judgment of Lord Denning M.R. as a "society of high repute" - concerning the neglect or ill-treatment of children.

4 This category is perhaps the most ephemeral. There are very compelling arguments to maintain the confidentiality of budget papers, and other documents dealing with (for example) proposals to impose new forms of taxation, to re-structure existing forms of taxation, or to bring about a change in interest rates or foreign currency exchange rates. However, the confidentiality of such documents largely disappears, once the proposal is put into effect: c.f. Sankey v. Whitlam, per Gibbs A.C.J. at p.42.

It is to be emphasised that those categories are not exhaustive, but merely illustrate some of the circumstances in which a claim for "public interest immunity" may be available. The mere fact that a document or information falls within one of those categories does not mean that a claim for "public interest immunity" will necessarily be upheld; it is still a matter for the court to balance the prejudice likely to arise from disclosure against the consequences which non-disclosure will have in the context of particular litigation.

(7) In almost every case, for the purpose of determining a claim for "public interest immunity", the appropriate course is for the relevant document to be produced to the court, or the substance of the relevant information to be communicated to the court, so that the court may carry out the "balancing exercise" required to determine the claim.

PARLIAMENTARY INQUIRIES

The principles discussed above are those which apply where objection is taken to the production of a document, or the disclosure of information, in the course of proceedings in a court of law. It is, however, a most fundamental mistake to imagine that the same principles necessarily apply where the production of documents is sought for the purposes of a Parliamentary inquiry. There are essentially three reasons for that, which I will deal with separately.

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1. Does "Public Interest Immunity" Apply ?

There is no doubt that each House of the Australian Parliament has the power to conduct, either directly or through committees, inquiries in relation to matters of public importance. Such a power is granted to each House of the Parliament by Section 49 of *The Constitution*, which provides:

> "49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth."

The following points are to be noted in relation to Section 49:

(1) It is apparent, from the words of the Section, that the "powers, privileges, and immunities" referred to are vested severally in the two Houses of the Commonwealth Parliament - that is to say, in each of the Senate and the House of Representatives - rather than in both Houses jointly. All of the "powers, privileges, and immunities" referred to in that Section are conferred on the Senate, to precisely the same extent as they are conferred on the House of Representatives.

(2) Section 49 contemplates that the Parliament as a whole may "declare" the scope of the "powers, privileges, and immunities" of each House. In this context, the expression "Parliament" plainly means the Federal Parliament,

which is defined in Section 1 of *The Constitution* as consisting of "the Queen, a Senate, and a House of Representatives". It follows that any "declaration" as to the scope of the "powers, privileges, and immunities" of either House for the purposes of Section 49 requires the concurrence of both Houses, as well as royal assent. Such a declaration may be made by an Act of Parliament in the ordinary way. There are, no doubt, some Acts of Parliament which enlarge or modify the "powers, privileges, and immunities" of the two Houses, and of the Parliament as a whole. But, as the Full Court of the High Court of Australia unanimously observed in the leading case of The Queen v. Richards; ex parte Fitzpatrick and Browne, (1954) 92 C.L.R. 157 [hereinafter referred to as "Richards' Case"] at p.168:

> "What the earlier part of s.49 says is that the powers, privileges and immunities of the Senate and of the House of Representatives shall be such as are declared by Parliament. It is dealing with the whole content of their powers, privileges and immunities, and is saying that Parliament may declare what they are to be. It contemplates not a single enactment dealing with some very minor and subsidiary matter as an addition to the powers or privileges; it is concerned with the totality of what the legislature thinks fit to provide for both Houses as powers, privileges and immunities. When it says that 'until declared' they shall be those of the Commons House of Parliament it means that until the legislature undertakes the task of providing what shall be the powers, privileges and immunities they shall be those of the Commons House of Parliament. We think, therefore, that in the absence of [a] general provision ... the latter part of the section continues to operate."

(3) In fact, the Parliament has to some extent defined the "powers, privileges, and immunities" of each House, by a "general" Act of the kind foreshadowed by the High Court in Richards' Case. That was done by the *Parliamentary Privileges Act 1987*. However, Section 5 of that Act is highly relevant; it provides -

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"5. Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force."

(4) It follows that, subject to the express provisions of the *Parliamentary Privileges Act 1987* (and of any other specific Act dealing with a particular aspect of the "powers, privileges, and immunities" of the Houses of Parliament), each House of the Parliament continues to enjoy all such "powers, privileges, and immunities" as were vested in the House of Commons in 1901.

In Quick and Garran's *Annotated Constitution of the Australian Commonwealth* (1901), it is observed at p.502 that:

> "The privileges of Parliament are enforced, and breaches thereof punished, by the power vested in each House to order the arrest and imprisonment of offenders. The power of commitment, with all the authority which can be given by law, is said to be the Keystone of Parliamentary privilege."

That is followed by a number of excerpts from the 10th edition of *May's Parliamentary Practice*, which include the following:

> "Either House may adjudge that any act is a breach of privilege and contempt; and if the warrant recites that the person to be arrested has been guilty of a breach of privilege, the courts of law cannot inquire into the grounds of the judgment, but must leave him to suffer the punishment awarded by the High Court of Parliament, by which he stands committed."
>
> "It may be considered ... as established, beyond all question, that the causes of commitment by either house of Parliament, for breaches of privilege and contempt, cannot be inquired into by courts of law; but that their 'adjudication

> is a conviction, and their commitment, in consequence, an execution.' No other rule could be adopted consistently with the independence of either house of Parliament; nor is the power thus claimed by Parliament greater than the power conceded by the courts to one another."

The seminal authority dealing with the powers of the English Houses of Parliament to commit for contempt is the Case of the Sheriff of Middlesex, (1840) 11 Ad. & E. 273 [113 E.R. 419]. That case was a sequel to the equally famous cases of Stockdale v. Hansard, (1839) 9 Ad. & E. 1 [112 E.R. 1112] and 11 Ad. & E. 253 [113 E.R. 411]. The defendants in those proceedings, members of the Hansard family, were the proprietors of a publishing firm, who were authorised by the House of Commons to print and publish reports of proceedings in that House - their name lives on as the name given to the official printed reports of debates and proceedings, not only of the United Kingdom Parliament, but also of other parliaments within the Commonwealth of Nations. The members of the Hansard family were sued for libel, in respect of defamatory statements made in Parliament, and republished in their reports of parliamentary proceedings. The case came on for argument before the Court of Queen's Bench, which determined that it was no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by order of the House, printed and published by the defendants. At a subsequent trial, damages were awarded in the sum of £600.00.

The defendants - the members of the Hansard family - refused to pay over the sum of damages which was awarded against them. The plaintiff thereupon took out a Writ

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of *Fieri Facias* - that is to say, a Writ of Execution directing the Sheriff of Middlesex to levy from the goods and chattels of the Hansards a sum equal to the amount of the judgment debt, interest and costs. In compliance with that Writ, the Sheriff did levy execution; but a further resolution was then passed by the House of Commons, declaring the levy a contempt of Parliamentary privilege, and ordering that the Sheriff repay the money to the Hansards. This placed the Sheriff in a most invidious situation: on the one hand, if he obeyed the Court and paid the money to the plaintiff (Stockdale), he was liable to imprisonment for contempt of the House of Commons; but on the other hand, if he obeyed the House of Commons, he would find himself in contempt of the Court, and liable for committal by the Court's order. In fact, the Sheriff was committed to prison pursuant to a resolution of the House of Commons, and that is the circumstance which gave rise to the seminal case to which I have referred.

Having been committed for contempt of the House of Commons, the Sheriff applied for a Writ of *Habeas Corpus ad Subjiciendum*. In all of the circumstances, one might have imagined that the Court of Queen's Bench would have been at great pains to find some basis to protect the Sheriff, whose imprisonment by the House of Commons was a direct consequence of his having complied with an order of that Court. But the Court found itself unable to assist the Sheriff, pronouncing the following propositions which have since attained general acceptance:

- That a warrant issued by the Speaker of the House of Commons is a good and sufficient answer to a Writ of *Habeas Corpus*.

- That the warrant need not set out the grounds upon which the House concluded that there had been a breach of its privilege, it being within the sole and exclusive jurisdiction of the House to determine the scope of its privileges, and whether or not a breach of those privileges had occurred in the circumstances of a particular case.

- That the Court could not enquire into the merits of the case, so as to review the determination of the House of Commons that a breach of its privileged had been committed.

There are many other cases in which similar principles have been applied; but it is unnecessary for present purposes to go beyond the decision of the High Court of Australia in Richards' Case, in which the members of the Court (Dixon C.J. and McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.) said at p.162 that:

> "... [T]he situation in England ... has been made clear by judicial authority. Stated shortly, it is this: it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms. This statement of law appears to be in accordance with the cases by which it was finally established, namely, the Case of the Sheriff of Middlesex."

Their Honours also adopted the remarks of the Privy Council in Speaker of the Legislative of Assembly of Victoria v. Glass, (1871) L.R. 3 P.C.App. 560, in which Lord

Cairns (speaking on behalf of the Judicial Committee) recognised that "the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that contempt by a warrant, stating that the commitment is for contempt of the House generally, without specifying what the character of the contempt is".

It follows that, subject only to the provisions of the *Parliamentary Privileges Act 1987*, each House of the Australian Parliament - including, of course, the Senate - may require that any person attend before it to give evidence and to produce documents; and that it is competent for the Senate, if it concludes that a person has committed a contempt or breach of privilege by failing or refusing to answer a question or to produce a document, to issue a warrant for the committal of the person adjudged to be guilty of that offence.

The *Parliamentary Privileges Act 1987* altered the position which previously subsisted in respect of the privileges of both Houses of the Parliament, in the following respects:

- Section 4 contains a general definition of what conduct may be held to constitute a breach of privilege or a contempt of either House. It provides that:

> "4. Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member."

- Section 7 limits the penalties which may be imposed by either House for contempt or breach of privilege. Generally speaking, either House may impose a penalty of imprisonment for a period not exceeding six months, or a fine which is not to exceed $5,000.00 in the case of a natural person and $25,000.00 in the case of a corporation.

- Section 9 of the Act requires that either House, in imposing a penalty of imprisonment (but not, apparently, a fine) must, by the terms of the resolution imposing the penalty and by the terms of the warrant committing the person to custody, "set out particulars of the matters determined by the House to constitute that offence".

At first sight, it may not seem that those provisions substantially impact upon the traditional scope of Parliamentary privilege. But it would appear that those provisions were intended to take up the observation of the High Court in Richards' Case that "If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege": see also the authorities mentioned in Quick and Garran (*op.cit.*) at p.502, in support of the conclusion that "... if the causes of commitment were stated on the warrant, and appeared to be beyond the jurisdiction of the house, it is probable ... that their sufficiency would be examined".

In that light, Sections 4 and 9 take on added significance. Section 9 compels the House, in issuing a warrant for committal of a person for "an offence against that

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House", to "set out particulars of the matters determined by the House to constitute that offence". Section 4 limits and defines the matters which may constitute an offence; and it is therefore open for a court to determine whether or not the matters particularised in the Warrant (pursuant to Section 9) constitute a contempt or breach of privilege, as defined by Section 4.

It does not necessarily follow that a court is therefore entitled to re-examine at large the question whether or not a contempt or breach of privilege has occurred. Although views may differ, it seems to me quite arguable that the "particulars of the matters determined by the House" cannot be challenged, and that the court's function is limited to determining whether the matters so particularised amount to conduct of a kind which, in accordance with the definition in Section 4, is deemed to constitute an "offence against a House". Arguably, it may also be competent for a court to consider whether or not, on the evidence before the House, it was open to the House to determine the matters particularised in the resolution and Warrant; although, in my view, there is no compelling argument that the passing of the *Parliamentary Privileges Act* was intended to abrogate the long-settled rule that the determination of such matters by a House of the Parliament is conclusive. On no view, however, could it be argued that the *Parliamentary Privileges Act* confers upon the courts of law a general jurisdiction by way of appeal from determinations made by a House of the Parliament, or to exercise a general power of judicial review in respect of such determinations.

In simple terms, if a Warrant is issued which commits a person to a term of imprisonment not exceeding six months, or to a fine (in the case of a natural person)

not exceeding $5,000.00, and the Warrant sets out particulars of the matters determined by resolution of the House to constitute the offence, it seems to me that the only question for the court to consider is whether the matters so particularised are capable of amounting to, or of being intended or likely to amount to, an "improper interference with the free exercise by [the] House or committee of its authority or functions". Even on the widest view, the only additional jurisdiction which the courts may exercise is to decide whether the matters determined by the House to constitute the offence represent findings which were open to the House having regard to the evidence before it.

Thus, in the ordinary case, a Warrant might recite or set out the facts upon which it is based: on the wider view, a court may consider whether or not those findings were open to the House; and on the narrower view, the courts' role would be limited to determining, one way or the other, whether the facts recited in the Warrant amount to an "offence" as defined by Section 4.

Neither in Section 49 of *The Constitution*, nor in the provisions of the *Parliamentary Privileges Act*, is there to be found any provision expressly limiting the powers of the Houses of the Australian Parliament, by reference to the doctrine of "Crown privilege" or "public interest immunity". Of course, if an Act of the Parliament were to declare, pursuant to Section 49 of *The Constitution*, that the privileges of the Houses of the Parliament are limited in accordance with such a doctrine, then the provisions of that Act would prevail. But there is no such Act. Thus, if there is any valid limitation in respect of the privilege of either House of the Parliament, based on principles of

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"Crown privilege" or "public interest immunity", it must be found in the terms of Section 49 itself. The only possible basis for such a limitation is that the "powers, privileges and immunities ... of the Commons House of Parliament of the United Kingdom ... at the establishment of the Commonwealth" were subject to such a limitation.

So far as I have been able to ascertain, there is no case - either before or since the establishment of the Commonwealth - in which it has even been suggested that there is such a limitation on the privileges of Parliament. On the contrary, the relevant authorities speak only of a general power, to compel attendance before the House and the furnishing of such information (oral or documentary) as the House may require. Lord Chief Justice Sir Edward Coke, in volume 4 of his *Institutes* (published in 1641), acknowledged the authority of the House of Commons, as "the general inquisitors of the realm", to conduct public examinations. In Burdett v. Abbot, (14 East 1 at 138), Lord Ellenborough, speaking of the House of Commons, said that, "independently ... of any precedents or recognized practice on the subject, such a body must *a priori* be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be". In Stockdale v. Hansard (*supra*, 9 Ad. & E. 115), Lord Chief Justice Denman said that "The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt". Littledale J., in the same case at p.168, added that "There is no doubt about the right as exercised by the two Houses of Parliament with regard to ... their right to summon witnesses to require

the production of papers and records ...; and as to any other thing which may appear to be necessary to carry on and conduct the great and important functions of their charge." Again, Patteson J. observed in the same case at p.213 that "The House is armed with ample powers to send for all persons who can give them information either before a committee, or at the Bar of the House." And in the case of Gosset v. Howard, (1845) 10 Q.B. 411 [116 E.R. 158], the Court of Exchequer Chamber (comprising Parke B. and Alderson, Coltman, Maule, Rolfe and Cresswell JJ.) observed at pp.450-51 [E.R., p.172]:

> "For it cannot be disputed that the House of Commons has by law the particular powers to take into custody which ... it is expressly averred to have exercised; and we have nothing to do with any other. First, that House, which forms the Great Inquest of the Nation (4 Inst. p.11), has a power to institute enquiries and to order the attendance of witnesses, and, in case of disobedience (whether it has not even without disobedience, we need not enquire), bring them into custody to the Bar for the purpose of examination. And, secondly, if there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody and to be brought to the Bar to answer the charge: and, further, the House, and that alone, is the proper judge whether these powers or either of them are to be exercised."

The fact that courts of law apply a principle of "Crown privilege" or "public interest immunity" does not mean that either House of Parliament is governed by the same principles. There is not the slightest authority for the proposition that either House of the Parliament is obliged, in the conduct of a Parliamentary inquiry, to apply the rules and principles applied by courts of law. Indeed, there is strong authority to the contrary.

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Take, again, the Case of the Sheriff of Middlesex. It is perfectly plain that the Sheriff was acting in accordance with the order of a superior court; and, generally speaking, any person who does an act in accordance with the order of a superior court is entitled to an absolute privilege or immunity in respect of acts done in accordance with such an order. If the Sheriff had been sued in civil proceedings (such as for trespass, detinue, trover and conversion, or the like), or if he had been charged with a criminal offence (such as larceny or breaking and entering), it would be a complete defence to say that he was acting in accordance with an order of the Court. Plainly, if the Court had considered that the House of Commons was governed by the same substantive and procedural rules as a court of law, it would have held that the Sheriff was entitled to a privilege or immunity from suit, to the extent that he acted in accordance with the order of a superior court; and it seems to follow that the principles which govern courts of law in the exercise of their jurisdiction are not to be taken as any guide to the principles which govern Houses of Parliament in exercising their powers and privileges in accordance with the *lex et consuetudo Parliamenti* ("law and customs of Parliament"). As was observed by Gould J. in Brass Crosby's Case, (1771) 3 Wils.K.B. 188 at p.204 [95 E.R. 1005 at p.1013], "This Court cannot know the nature and power of the proceedings of the House of Commons; it is founded on a different law; the *lex et consuetudo Parliamenti*, is known to Parliament-men only."

My point, very simply, is this. Even if a document, or an item of information, were such that a court of law would not compel its disclosure in the course of ordinary litigation, it does not follow for a moment that either House of the Parliament is subject to a similar constraint. The powers of each House of the Parliament are very

extensive, and members of each House must, of course, exercise those powers with a proper sense of public duty. But if, within their own consciences, the members of either House are satisfied that the proper discharge of their Parliamentary functions requires the production of documents notwithstanding the Government's objection that production may be inimical to the public interest, there is no authority in this Country which can over-ride such a decision.

2. Proceedings in Closed Session

Fundamental to the doctrine of "Crown privilege" or "public interest immunity" is one underlying rationale: the fact that proceedings in courts of law ordinarily take place in public. Even on the rare[5] occasions when it is permissible for a court to take

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[5] In Russell v. Russell, (1976) 134 C.L.R. 495, Barwick C.J. at p.506 observed that "The courts of the States ... are in general required, because of the nature of the courts themselves and of the functions they perform, to sit and exercise jurisdiction in a place open to the public. The [Commonwealth] Parliament, in my opinion, has no power or authority to command the court of the State to sit in a place to which the public is not admitted." In the same case, Gibbs J. said at p.520:

> "It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view' (Scott v. Scott, [1913] A.C. 417, at p.441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure' (McPherson v. McPherson, [1936] A.C. 177, at p.200)."

Stephen J., at p.532, said:

> "It would be an unnecessary and profitless digression to attempt any account of the long history and high significance attaching to open hearings in English courts of justice; it is all most eloquently exposed in the judgment of the members of the Full Court of Appeal in Scott v. Scott, ([1912] P. 241) and in the speeches of their Lordships in the appeal to the House of Lords ([1913] A.C. 417).

(continued...)

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evidence *in camera* - or to prohibit the publication of evidence - any document or oral testimony admitted into evidence must be disclosed to the parties and their legal representatives. In a jury trial, the evidence must also be disclosed to the ordinary citizens who comprise the Jury.

Generally speaking, therefore, when a document is sought to be tendered, or oral testimony is sought to be adduced, in proceedings in a court of law, the consequence of admitting the evidence is that it becomes public. In most cases, it is published to the world at large. In all cases, it is published - at the very least - to the parties and their legal representatives, and (in jury trials) to the members of the Jury. Thus, where a claim for "Crown privilege" or "public interest immunity" is advanced, the Judge must determine whether or not the circumstances of the case warrant that the document or information be made public, either in the sense of being published to the world at

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[5](...continued)

> "What I infer from all that was said in Scott v. Scott is that a tribunal which as of course conducts its hearings in closed court is not of the same character as one which habitually conducts its proceedings in open court. It is one of the 'ordinary incidents of English courts of justice' that its proceedings should be conducted in public (per Bramwell B. and per Williams J., H. (falsely called C.) v. C., ((1859) 29 L.J.(P. & M.) 29, at p.30), it being 'the primary function of the court ... to administer equal justice to all suitors in open court' (per Farwell L.J., Scott v. Scott, [1912] P., at p.287). Viscount Haldane L.C. said in that case, on appeal ([1913] A.C., at p.437), that, subject to three well established but only apparent exceptions, courts of justice must, as between parties, administer justice in public; the Earl of Halsbury (at p.440) spoke of every court of justice being open to every subject of the King, and Lord Shaw (at p.481) denied 'that it was open to the judges of England to turn their courts into secret tribunals'. In Dickason v. Dickason, (1913) 17 C.L.R. 50, at p.51, Barton A.C.J., speaking for the Court, referred to Scott v. Scott and described the admission of the public to attend proceedings as 'one of the normal attributes of a court'."

Restrictions on public access to courts, or on the publication of evidence given in courts, is generally confined to those criminal cases - for example, blackmail cases - in which there is a genuine need to protect the complainant; and cases involving sexual abuse of minors. Attempts to broaden the circumstances in which proceedings may be conducted *in camera*, or in which the publication of evidence may be suppressed, have been resisted by appellate courts in this country: see, for example, R. v. His Honour Judge Noud, ex parte MacNamara, [1991] 2 Qd.R. 86.

large, or (in rare cases) in the sense of being published to the parties and the members of the Jury.

To that extent, there is no analogy whatsoever with the proceedings of a Parliamentary inquiry. The committee conducting such an inquiry has an absolute discretion to receive evidence at a private session, and to regulate the use which may be made of that evidence. Indeed, rule 1(10) of the *Parliamentary Privilege Resolutions* of 25 February 1988 expressly provides that, where evidence is required to be given over objection, it must be confined to private sessions of a committee, unless the committee concludes that it is "essential to the committee's inquiry" that the evidence be made public.

It follows that there is no real analogy with the dilemma faced by courts of law in ruling upon such claims. For a court of law, there are only two choices: to admit the evidence, and thereby make it public, with whatever consequences that may have for the nation as a whole; or to exclude the evidence altogether. A Parliamentary committee may take the *via medium* of requiring that the evidence be given, but preventing its publication.

In this context, there is a much closer analogy between Parliamentary inquiries and inquiries conducted by Royal Commissions and Commissions of Inquiry. And it is a very common feature of Royal Commissions and Commissions of Inquiry for evidence to be taken in private, where the Commissioner or Commissioners are of the view that publication of the evidence would be contrary to the public interest. The taking of

evidence in private is expressly authorised by both Commonwealth and State legislation in relation to Royal Commissions and Commissions of Inquiry; and it has become a ubiquitous feature of such inquiries - for example, the Petrov Inquiry, the Stewart Inquiry, the Woodward Inquiry, the Costigan Inquiry, the Fitzgerald Inquiry, and many more besides.

Although reported cases are few, it may be taken that evidence received by a Royal Commission or Commission of Inquiry sitting in private may be excluded from evidence in subsequent proceedings before a court of law, for the very reason that a court of law may not (generally speaking) sit in private. Certainly, in London and County Securities Ltd. v. Nicholson, [1980] 3 All E.R. 861, Browne-Wilkinson J. seemed to accept that information provided confidentiality to an administrative inquiry might well be excluded from evidence, if it were to be shown that the confidence is of a kind which the public interest requires to be protected. It rather seems that a similar view was taken by Lord Denning M.R. in Re Pergamon Press Ltd., [1971] 1 Ch. 388 at p.400; and by the Full Court of the Federal Court of Australia in Bercove v. Hermes, (No.3), (1983) 51 A.L.R. 109, per Bowen C.J., Lockhart and Beaumont JJ., especially at pp.114 to 116.

Looking at the matter in a slightly different way, it may be said that the opportunity to take evidence in private is a weighty consideration to be taken into account when performing the "balancing exercise" adverted to by the High Court of Australia in cases like Sankey v. Whitlam. Where the only alternative is for evidence to be made public - which is generally the situation as regards proceedings in a court of law - the balance

may fall very heavily in favour of excluding the evidence altogether. But where evidence can be taken in private - as is the case in Royal Commissions and Commissions of Inquiry, and in Parliamentary inquiries - it would require very compelling reasons indeed to exclude evidence from consideration by a Royal Commissioner or a member of a Commission of Inquiry, or by the members of a Parliamentary committee. Indeed, it is difficult to imagine a case in which public policy considerations would prevent relevant evidence being received by the members of a Parliamentary committee, on the clear basis that dissemination of the evidence will be confined to the members of that committee and their staff.

3. The Importance of the Issues

It is also a mistake to think that one can look at a document and express a concluded view, one way or the other, as to whether it is capable of attracting "Crown privilege" or "public interest immunity". As Stephen J. observed in Sankey v. Whitlam at p.58, there are some categories of documents in respect of which "it will often appear readily enough that the balance of the public interest is against disclosure"; namely "defence secrets, matters of diplomacy or affairs of government at the highest level". But even in respect of such documents, it remains necessary to weigh the public detriment which may result from disclosure against the prejudice which will arise in the circumstances of a particular case if the evidence is excluded.

Clearly, that "balancing exercise" accommodates the consideration that, in a particular case, there is a public interest which militates in favour of disclosure, and which out-

weighs the public detriment which may result from disclosure. Indeed, the High Court considered that Sankey v. Whitlam was such a case. Thus, at pp.46-47, Gibbs A.C.J. said:

> "The documents in categories one, two and three are all 'state papers' within the meaning I have given to that expression. They belong to a class of documents which may be protected from disclosure irrespective of their contents. ... [I]f the documents can be withheld, the informant will be unable to present to the court his case that the defendants committed criminal offences while carrying out their duties as Ministers. If the defendants did engage in criminal conduct, and the documents are excluded, a rule of evidence designed to serve the public interest will instead have become a shield to protect wrongdoing by Ministers in the execution of their office."

In short, it is recognised that there are cases in which the public interest favouring disclosure out-weighs the public interests favouring non-disclosure, even as regards the most sensitive classes of documents and information.

In civil proceedings before a court of law, the only prejudice which is likely to result if relevant evidence is excluded is a prejudice to the parties to the litigation, or at least one of them. The prejudice may be a small or a substantial one, depending upon whether the evidence is likely to affect the outcome of the litigation, and depending upon the amount of money, or the value of property, at stake in the proceedings. Essentially, however, the prejudice will be a private rather than a public one.

The situation is slightly different in criminal proceedings. If a person is unjustly convicted of a criminal offence as a result of the withholding of relevant evidence, that is not merely a prejudice to the person immediately concerned; it is also a prejudice

to the public interest, to the extent that the public does have an interest that the criminal law be administered with fairness and justice. And, on the other hand, if the withholding of relevant evidence will lead to the acquittal of a person who is in fact guilty, there is a very strong public interest that the evidence be admitted. Significantly, the two leading High Court decisions in this field both concerned criminal proceedings: in Sankey v. Whitlam, the evidence under consideration was evidence sought to be adduced to prove the guilt of the defendants; in Alister v. The Queen, (1984) 154 C.L.R. 404, the evidence under consideration was sought to be adduced for the purpose of proving the defendants' innocence.

It may be said, however, that an even higher issue of public interest arises when a House of the Parliament deems a matter worthy of investigation by way of a Parliamentary inquiry.

Section 49 of *The Constitution* is premised on the assumption that both Houses of the Australian Parliament - not only the House of Representatives, but the Senate as well - are to possess and exercise the "powers, privileges and immunities ... of the Commons House of Parliament of the United Kingdom". Each House, independently, is charged with the function of acting as "the general inquisitors of the realm", or "the grand inquest of the nation".

In my opinion, it is not without significance that the founding fathers, in drafting the constitution which was subsequently approved by public referendum in each of the then Australian Colonies, foresaw that the Senate would exercise "powers, privileges

and immunities" co-extensive with those of the House of Representatives, and with those of the House of Commons in England. Given the structure of our Federation, and the fact that the Senate is elected on a very different franchise from the House of Representatives, it cannot have been beyond contemplation that the Government would, from time to time, be unable to command a majority in the Senate. *The Constitution* is thus predicated on the assumption that, even where the Government faces a hostile Senate, it is competent for the Senate to exercise its "powers, privileges and immunities" to inquire into matters which the Senate as a whole conceives to be of public importance.

The Australian Senate is often criticised as failing to fulfil its intended mandate to represent the interests of the States or, more accurately, the people of each State as separate polities. It is true that, in the Senate as in the House of Representatives, individual members organise themselves and (generally) vote along "Party lines". But that, in itself, is not inconsistent with the Senate's intended function. If a majority of Australians return a government of one political complexion through the election of members of the House of Representatives, that government undoubtedly has a right to govern. But if a majority of voters in a majority of States elect a majority of Senators of a different political complexion, then those Senators have both the Constitutional right, and the duty, to protect the interests of their constituents.

The issues presently under consideration by the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media are issues of undoubted public interest. It has been suggested that some wrong-doing has taken

place on the part of the Executive Government. It is irrelevant, for present purposes, whether there is any truth in those suggestions. The fact remains that there is a matter of national importance which the Australian Senate has deemed fit to investigate; and that in itself is a highly relevant factor in the "balancing exercise" which is called for by the decisions of the High Court.

THE PRESENT CASE

I have been furnished with a copy of a letter from the Treasurer, Mr. Willis, which argues that disclosure of the documents under consideration would be contrary to the public interest.

The letter from Mr. Willis asserts what might be described as an "ambit claim". It does not descend into an examination of particular documents. Rather, it asserts that the documents fall into a number of categories, each of which should be excluded from the Committee's consideration.

As Stephen J. observed in Sankey v. Whitlam (*supra* at pp.62-63):

> "Those who urge Crown privilege for classes of documents, regardless of particular contents, carry a heavy burden. As Lord Reid said in Rogers v. Home Secretary, [1973] A.C. 388 at p.400, the speeches in Conway v. Rimmer, [1968] A.C. 910 have made it clear 'that there is a heavy burden of proof' on those who make class claims. Sometimes class claims are supported by reference to the need to encourage candour on the part of public servants in their advice to Ministers, the immunity from subsequent disclosure which privilege affords being said to promote such candour. The affidavits in this case make reference to this aspect. Recent authorities have disposed of this ground as a tenable basis for privilege. Lord Radcliffe in the Glasgow

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> Corporation Case remarked ([1956] S.C.(H.L.) 1 at p.20) that he would have supposed Crown servants to be 'made of sterner stuff', a view shared by Harman L.J. in the Grosvenor Hotel Case ([1965] Ch. 1210, at p.1255): then, in Conway v. Rimmer (*supra*), Lord Reid dismissed the 'candour' argument but found the true basis for the public interest in secrecy, in the case of Cabinet minutes and the like, to lie in the fact that were they to be disclosed this would 'create or fan ill-informed or captious public or political criticism. ... the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind' (*supra*, at p.952); and see as to the ground of 'candour' per Lord Morris (at p.959), Lord Pearce (at pp.987-988) and Lord Upjohn (at pp.933-934). In Rogers v. Home Secretary ([1973] A.C. 388 at p.413) Lord Salmon spoke of the 'candour' argument as 'the old fallacy'."

My attention has helpfully been drawn to the decision of the Administrative Appeals Tribunal in the long-running case of Re Lordsvale Finance Ltd. and the Department of the Treasury, (1985) 9 A.L.D. 16; 3 A.A.R. 301; (1986) 12 A.L.D. 321; (1986) 12 A.L.D. 327. But that was a case of a very different character, involving the question whether access under the *Freedom of Information Act* should be excluded in the case of F.I.R.B. documents. To the extent that there was a "balancing exercise" to be undertaken in that case, it involved a balance between a foreign company's qualified statutory right to obtain access to documents, and the public interest in maintaining the confidentiality of those documents. Its relevance is merely to show that F.I.R.B. documents fall within a class of documents which are eligible to sustain a claim of public interest immunity; nothing in that case suggests that such a claim would in fact be sustained, in a case where powerful considerations militated in favour of disclosure.

The first (and I think most plausible) category of documents in respect of which the Treasurer has asserted a claim for public interest immunity includes advice from the F.I.R.B. or from the Treasury to the Government. I think it is fair to say that, if the claim

cannot be sustained in relation to that category, it cannot be sustained in relation to any of the categories adumbrated in the Treasurer's letter. I propose, therefore, to confine my attention to documents falling within that category.

One simply cannot anticipate how a court might determine a claim for "public interest immunity" in respect of such documents, without considering the hypothetical circumstances in which such a claim might arise. One conclusion which emerges, above all else, from the decision of the High Court in Sankey v. Whitlam is that such claims are not to be decided in a vacuum; they are to be decided having regard to the particular circumstances of the case presently before the Court. As Gibbs A.C.J. said in that case at pp.41-42:

> "The fundamental principle is that documents may be withheld from disclosure only if, and to the extent that, the public interest renders it necessary. That principle in my opinion must also apply to state papers. ... [T]he subject matter with which the papers deal will be of great importance, but all the circumstances have to be considered in deciding whether the papers in question are entitled to be withheld from protection, no matter what they individually contain.
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> "If state papers were absolutely protected from production, great injustice would be caused in cases in which the documents were necessary to support the defence of an accused person whose liberty was at stake in a criminal trial, and it seems to me to be accepted that in those circumstances the documents must be disclosed: Duncan v. Cammell, Laird & Co. ([1942] A.C. 624, at pp.633-634); Conway v. Rimmer ([1968] A.C. 910, at pp.966-967, 968); Reg. v. Lewes Justices, ex parte Home Secretary, ([1973] A.C. 388, at pp.407-408)."

Let one assume, for example, an hypothetical case in which a person faced a criminal charge involving allegations that he or she corruptly used his or her influence to achieve a particular result in relation to an application to the Foreign Investment

Review Board, perhaps for party political reasons. I stress that the example is only an hypothetical one; I do not suggest for a moment that any person has conducted himself or herself in a way which could possibly justify the bringing of such a prosecution. But if such a situation arose, it is to my mind unthinkable that the accused person would be denied access to F.I.R.B. and Treasury documents which might be relevant to showing that he or she was innocent of the charge; and it is to my mind equally unthinkable that the prosecution would be denied access to such documents in order to prove that person's guilt, particularly if he or she occupied high political office at the relevant time[6].

It is quite conceivable that the balance might tilt in the other direction, if the question arose in the course of civil litigation. But even then, I am not convinced that a court would necessarily uphold a claim of "public interest immunity". Again, by way of an hypothetical example, one might take the case of a prominent political personage who institutes proceedings for defamation in relation to a public statement which casts aspersions on his or her conduct as regards the matters presently under investigation by the Select Committee. I think it highly likely that, in such a case, the court would permit the plaintiff to have access to such documents, with a view to proving his or her innocence; and by the same token, it is also probable that a court would allow the defendant in such proceedings to have access to F.I.R.B. and Treasury documents which may assist in proving the truth of the defamatory imputations.

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6 cf. Sankey v. Whitlam (*supra*), and particularly the observation of Gibbs A.C.J. at p.47 that "if the defendants did engage in criminal conduct, and the documents are excluded, a rule of evidence designed to serve the public interest will instead have become a shield to protect wrongdoing by Ministers in the execution of their office."

Thus, if the issues presently under consideration arose in a court of law, it is quite conceivable that the claim for "public interest immunity" would be rejected. But what must be emphasised is that the court's decision would be governed by the circumstances of the particular case. If the documents in question were irrelevant, or of only marginal relevance, production would almost certainly be refused. If the issues arising in the litigation did not raise any questions of public importance, so as to outweigh the potential detriment which would result from disclosure, it is unlikely that production would be ordered. But if the documents were highly relevant, and the case involved issues of considerable public significance, it is quite probable that a court would require the documents to be produced.

Moreover, and perhaps more fundamentally, a court would not, in any case, determine the question without first inspecting the documents so as to form its own view as to the extent of any public prejudice likely to result from their disclosure. Since the decisions of the High Court in Sankey v. Whitlam and Alister v. The Queen, it is difficult to imagine any case in which a court would not avail itself of the opportunity to inspect the documents in question, before ruling on a claim for "public interest immunity".

Of course, without having seen the documents myself, I am at a disadvantage in attempting to foresee whether or not a claim for "public interest immunity" would be upheld in relation to all or any of them. I do, however, have the advantage of having seen a document which purports to be a copy of one of the documents under consideration; it is a copy of a Foreign Investment Review Board Minute dated 5 December 1991, which appears to have been the subject of a wide-ranging media

"leak"[7].

Having carefully perused that document, I must say that I am entirely at a loss to understand how it can be argued that production of the document might be inimical to the public interest. The document does not appear to contain any information which could be regarded as having any degree of continuing commercial sensitivity. One cannot seriously imagine that the members of the Foreign Investment Review Board would be less candid in providing advice to the Treasurer or the Government, were documents of this character to be available for public scrutiny: to echo the words of Lord Radcliffe in the Glasgow Corporation Case as adopted by Stephen J. in Sankey v. Whitlam, one would imagine that members of the F.I.R.B. are "made of sterner stuff". It is, of course, conceivable that commercial organisations might feel more reluctant in disclosing their commercial secrets to bodies like the F.I.R.B. if they were aware that such documents could ultimately become open to public scrutiny; but it does not appear to me that this particular document discloses any commercial secrets. It may be said that the workings of the F.I.R.B., and of the Treasury, may to some extent be prejudiced if the manner in which they operate becomes public information; but I cannot see anything in this particular document which might be thought to disclose some highly-sensitive *modus operandi* which justifies concealment of its contents.

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[7] I note, for example, that it was the subject of an interview between Mr. Laurie Oakes and the Treasurer, Mr. Willis, which was screened on the Nine Network television programme "*Sunday*" on 6 March 1994. From a transcript of that broadcast, I observe that Mr. Willis made no attempt to dispute the authenticity of this document.

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One is left with the very strong impression that the only real reason for opposing disclosure of this document is to protect the Government from criticism: criticism of the kind reflected in the interview between Mr. Oakes and Mr. Willis to which I have referred. I should say at once that that is not an altogether irrelevant consideration. As Lord Reid observed in Conway v. Rimmer, it may be entirely valid to maintain secrecy in respect of Cabinet minutes and the like, as disclosure could "create or fan ill-informed or captious public or political criticism", and might result in "the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind". Nonetheless, if the document which I have seen is representative of the documents falling within "Category 1", it cannot in my view be said that it underwrites a strong claim for "public interest immunity". Were a document of this character to be inspected by a Judge with a view to determining such a claim, in a case where the contents of the document were highly relevant to the issues being litigated, I think it quite unlikely that the claim would be upheld.

I do not know whether the document which I have seen is representative of the documents falling within the Treasurer's "Category 1". But, as an example of the documents falling within that category, it does not encourage much confidence in the view that the claim for "public interest immunity" which has been made by the Treasurer is well-founded.

Of course, it is one thing to say that a court would probably over-rule a claim for "public interest immunity" in respect of documents falling within "Category 1". For the

three reasons previously identified, the approach taken by a court of law in respect of documents sought to be adduced in evidence in proceedings before the court should not be taken as determinative of the way in which the Select Committee should determine the matter for itself in the present case. And, in the event that proceedings came before a court in which the court was called upon to make a "conclusive decision" in relation to the Treasurer's claim, I am strongly of the view that the court would apply very different considerations from those which would obtain if the same question arose in the course of ordinary litigation. For the three reasons previously mentioned, the arguments in favour of disclosure are very much stronger in the case of a Parliamentary inquiry, than in the case of proceedings before a court of law.

Nonetheless, if one proceeds on the hypothetical assumption that this question might arise in proceedings in a court of law to which the documents are relevant, then, if the court were satisfied that the issues arising in those proceedings were of sufficient public importance to out-weigh the risk of prejudice which might result from disclosure of the documents, it is unlikely in the extreme that the Court would hold, either that the documents belong to a class of documents which should not be disclosed on public interest grounds, or that disclosure of specific documents would be contrary to the public interest.

SUMMARY OF CONCLUSIONS

For the reasons stated, I am of opinion as follows:

1. It may not be doubted that the categories of documents referred to in the Treasurer's letter are categories of documents which are eligible to support a claim for "public interest immunity". It does not, of course, follow that such a claim would or should be upheld.

2. Were this issue to arise in ordinary litigation before a court of law, one cannot predict with certainty the way in which the question would be resolved. That is because, in such proceedings, the appropriate course would be for the court to:

   - Examine the documents individually, to ascertain the extent of any potential prejudice to the public interest arising from their disclosure; and

   - Weigh-up that potential prejudice against the detriment which may be caused if the documents are excluded from evidence in the circumstances of the particular case.

3. There may well be cases in which, if these documents were sought to be adduced in evidence in a court of law, a claim for "public interest immunity" would be upheld. But I am very firmly of the opinion that, provided the

documents were shown to be relevant to the issues arising in the case, and provided that those issues were of some public importance, the claim for "public interest immunity" would in all probability be over-ruled.

4. In particular, having had the opportunity to peruse a document which purports to be a copy of one of the documents in contention, I am entirely unimpressed with the proposition that disclosure of that particular document would be contrary to the public interest. I am unable to discern any feature of that document which could possibly support the view that public disclosure would be inimical to the public interest. Of course, I am not able to say whether that document is representative of the documents in respect of which the Treasurer has asserted a claim of "public interest immunity".

5. Notwithstanding my view that (depending on the circumstances of the particular case) it is unlikely that a claim for "public interest immunity" would be upheld by a court of law in respect of the documents under consideration, I feel it important to emphasise that it is most inappropriate for the Select Committee to approach this issue by reference to the way in which a court of law might determine the matter if it were to arise in the course of an hypothetical law-suit. I say that for three reasons:

- It is not, and has never been, the law, that the Houses of the Parliament, or the committees of either House, are governed in relation to Parliamentary inquiries by the principles applied by courts of law in

determining claims for "public interest immunity".

- Documentary and oral evidence given in a court of law is, generally speaking, accessible to the public. Thus, in determining claims for "public interest immunity", Judges are constrained to consider the consequences if the evidence is adduced and thereby becomes public. A Parliamentary committee is entitled to receive such evidence in a private session, and by doing so may allay any public prejudice which would arise if the evidence were disclosed in a public forum. A better analogy is offered by Royal Commissions and Commissions of Inquiry, which frequently receive evidence in closed hearings which might well be excluded if the same evidence were sought to be adduced in the public hearings of a court of law.

- Most fundamentally, the Senate and its various committees discharge an important public function when they investigate matters which the Senate deems to be of sufficient public importance to warrant such investigation. Thus, in the case of a Parliamentary inquiry, it is not a simple matter of balancing the public interest in maintaining confidentiality against the private interests of litigants; it is a matter of balancing one public interest against another public interest. Under *The Constitution*, the Senate - no less than the House of Representatives - has the power and the duty to investigate matters of public concern; and in pursuing such investigations, it is entirely inappropriate for the Senate

to constrain itself by analogy with the constraints applied by courts of law in determining issues of "public interest immunity".

6. I am quite confident that, if the Senate or the Select Committee were to determine that the public interest requires production of the documents in question in the course of the Select Committee's current inquiry, there is no significant risk that the decision could successfully be challenged in a court of law, even assuming that a court of law would have (or might be granted) jurisdiction to entertain such a challenge.

I advise accordingly.

With compliments,

ANTHONY J.H. MORRIS Q.C.
Chambers,
21 March 1994

APPENDIX I

CLERK'S ADVICE ON SUB-JUDICE

AUSTRALIAN SENATE

PARLIAMENT HOUSE
CANBERRA A.C.T. 2600
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OFFICE OF THE CLERK OF THE SENATE

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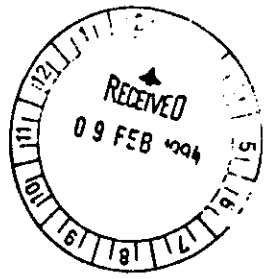

8 February 1994

Senator R Alston
Chair
Select Committee on Certain Aspects of
Foreign Ownership Decisions in Relation
to the Print Media
Parliament House
CANBERRA ACT 2600

Dear Senator Alston

Thank you for your letter of today's date in which you seek advice on a submission from solicitors representing Mr Mark Burrows to the effect that the sub judice principle should be applied to forgo the taking of evidence by the Committee from Mr Burrows.

The sub judice convention

The sub judice convention is a restriction on debate or inquiry which the Senate imposes upon itself, whereby debate or inquiry is avoided which could involve a substantial danger of prejudice to proceedings before a court, unless the Senate considers that there is an overriding requirement for the Senate to discuss or inquire into a matter of public interest.

The convention is not contained in the standing orders, but is interpreted and applied by the chair and by the Senate according to circumstances.

The concept of prejudice to legal proceedings involves an hypothesis that a debate or inquiry on a matter before a court could influence the court and cause it to make a decision other than on the evidence and submissions before the court. A danger of prejudice would not arise from mere reference to such a matter, but from a canvassing of the issues before the court or a prejudgment of those issues.

This concept of prejudice was well explained in the context of contempt of court by the Federal Court in a case before it in 1989, in which the court restrained a state commission of inquiry from conducting a public inquiry into matters before the court in a civil action. Justice Spender explained:

> It seems to me that there are really two aspects of the question of contempt in the context of a public prejudgment. The first concerns whether the prejudgment will be likely to hinder the Court in reaching a correct conclusion. Publicity which might taint the impartiality of the jurors or which might inhibit witnesses from giving evidence are of this kind; that is to say, they have a tendency to affect whether the right result was achieved. Because jurors are less resistant than judges in resisting improper influences, considerations of this kind are of much the greater concern when there is a jury. This factor, as well as the concern of courts when a person is in jeopardy of a criminal conviction, explains the concentration of attention on the effect of public prejudgment on criminal proceedings.

The justice referred to an additional reason for restraining public prejudgment of a case:

> The second aspect of contempt in the context of public prejudgment relates not so much to whether the process is likely to be poisoned, but to the judgment itself. The first, as I said, affects whether the result obtained might not be the right result. Yet, if the effect of a public prejudgment is to undermine public confidence in that judgment, even though it does not affect the process by which that judgment is reached, that equally is a contempt. It seems to me that a public prejudgment of a central issue in the Federal Court proceedings would work a usurpation of the function of the Federal Court and lower the respect and authority to which its determination is entitled. (*Sharpe v Goodhew* 1989 90 ALR 221 at 240-1)

The first paragraph is a succinct statement of the rationale of the sub judice principle, a rationale it shares with contempt of court. The second paragraph is a statement of an additional dimension of contempt of court which has not been regarded as part of the rationale of the parliamentary sub judice convention.

As the court suggested, the danger of prejudice to court proceedings is much greater where a jury is involved in the proceedings, because judges are unlikely to be influenced in the formation of their judgments by public or parliamentary debate or inquiry. There may also be a case for apprehending a greater danger of prejudice if

a matter is before a magistrate. There is also the possibility of witnesses being influenced.

In recent decades the interpretation of the sub judice convention in the Senate has changed. In earlier years there was a tendency to restrain debate on any matter which was before a court. In the 1960s and 1970s, however, there was a change in emphasis and a greater focus on the question of whether there was a danger of prejudice to proceedings.

In 1969 President McMullin ruled:

> "As a general rule the Chair will not allow references to matters which are awaiting or under adjudication in the courts if such reference may prejudice proceedings. But it does not necessarily follow that just because a matter is before a court every aspect of it must be sub judice and beyond the limits of permissible debate in Parliament. That would be too restrictive of the rights of Parliament". (Senate Debates, 20 May 1969, p. 1368)

In 1972 President Cormack stated that he had reviewed the sub judice principle, which he thought had been too restrictive in the past, and indicated the approach the Chair would take:

> "The prime question I must ask myself is, I think: Is parliamentary debate likely to give rise to any real and substantial danger of prejudice to proceedings before the court?" (Senate Debates, 19 September 1972, pp. 907-8)

An exposition of the sub judice convention was provided by the then Minister for Justice, Senator Tate, in debate in the Senate on 30 May 1989 in which a senator sought to discuss matters relating to the 1978 Sydney Hilton Hotel bombing when a criminal prosecution was pending. (A person had been arrested and charged with criminal offences in relation to the bombing.) Senator Tate said:

> Mr President, you are faced with a very difficult situation, as indeed is the Senate. In all questions of sub judice you have to balance the absolute privilege of this place with the absolute privilege of the courts. It is a contest between the two. I think in this particular instance, the question of the Hilton bombing, the subsequent court actions and, indeed, the public inquiry, the pardon, the compensation, and the events surrounding the allegations are matters of very genuine public interest of a greater scope than attends normal trials to do with the killing of persons in our community. Unless this chamber were

> convinced that what Senator Dunn is speaking about could cause real prejudice to the trial in the sense of either creating an atmosphere where a jury would be unable to deal fairly with the evidence put before it, or would somehow perhaps affect a future witness in the giving of evidence, whether for the prosecution or the defence, and unless we thought that the matters Senator Dunn was trying to speak about were likely to cause real prejudice to the outcome of that committal proceeding or trial, I think, on balance, given the nature of the matters surrounding this whole incident over many years, that the public interest probably would allow her to continue.

The President ruled:

> I will allow Senator Dunn to continue but I would advise her that she cannot question the merit or otherwise of likely evidence that could be used in the prosecution case, because it is obvious that this would prejudice any case that came before a jury. (Senate Debates, 30 May 1989, pp. 3062-5)

On a subsequent occasion, the same senator was asked to reframe her remarks when committal proceedings relating to the matter were in progress before a magistrate (Senate Debates, 27 September 1989, pp. 1472-3).

This treatment of this matter illustrates the three important principles of the sub judice convention:

- there should be an assessment of whether there is a real danger of prejudice in the sense explained by Senator Tate
- the danger of prejudice must be weighed against the public interest in the matters under discussion
- the danger of prejudice is greater when a matter is actually before a magistrate or a jury.

It would be an undue restriction on the freedom of the Senate to debate or inquire into matters of public interest if debate were to be restrained simply on the basis that matters may come before a court in the future. Thus the fact that writs have been issued, which does not necessarily mean that proceedings will ensue, does not give cause for the sub judice convention to be invoked (ruling of President Sibraa, Senate Debates, 10 May 1988, p. 2224).

The submission for Mr Burrows refers to the ruling of the President of the Senate in the case of the Westpac documents. The basis of that ruling was that disclosure of the documents could be prejudicial to legal proceedings, in that it could terminate proceedings whereby Westpac was seeking the suppression of the documents on the basis of legal professional privilege. President Sibraa indicated that, having weighed the contrary factors of prejudice to the legal proceedings and the right of the Senate to debate a matter of public interest, he had determined that disclosure of the documents in proceedings of the Senate should not be permitted. The President stated:

> The very subject matter of the case immediately before the courts, and in respect of which the sub judice claim is made, is the question as to whether the documents involved should be suppressed: to disclose the documents now would ipso facto abort that case. No clearer example of real and present danger to current legal proceedings could be imagined: indeed, it is not merely a matter of the present proceedings being prejudiced, but rather a particular litigant's rights being denied absolutely (Senate Debates, 12 February 1991, p. 356).

Thus the prejudice which was to be apprehended by disclosure of the documents in proceedings in the Senate was of an unusual character: such disclosure could render the court proceedings undertaken by Westpac ineffectual, in that the court would be unlikely to order the suppression of documents which had been tabled in the Senate and thereby made public.

That case is therefore not an instructive precedent in relation to the situation referred to in the submission.

Application to the present case

In determining whether the sub judice principle should be applied to restrain the Committee, therefore, the Committee should form a judgment as to whether hearing evidence from Mr Burrows would pose a substantial danger of prejudice to the legal proceedings referred to in the submission, and whether that danger of prejudice to the proceedings is outweighed by the public interest in the Committee pursuing its inquiry in relation to Mr Burrows.

The Senate's direction that an inquiry be undertaken is an indication of the Senate's belief that there is a significant public interest in the inquiry being held.

The submission states:

> The prejudice that would be suffered by our clients if called to give evidence to the Committee would be that they would be subjected to questioning on factual matters relevant to issues in the proceedings without the benefit of direct representation by Counsel. If the Senate Select Committee were to pursue its investigations into the conduct of our clients concerning the post-receivership reconstruction of Fairfax, it would be effectively setting itself up as an alternative forum to the court. We believe this would interfere with the course of justice.

This paragraph is not helpful to the Committee in seeking to establish whether there is a danger of prejudice to the proceedings. The subjection of witnesses to questioning on matters relevant to issues in legal proceedings, with or without representation by counsel, and the making of findings by the Committee on matters which are before the court, do not of themselves cause prejudice to the court proceedings.

Under the law of parliamentary privilege as elaborated by section 16 of the *Parliamentary Privileges Act 1987*, any evidence given before the Committee and any report by the Committee could not be admitted in evidence in the legal proceedings to support either party in those proceedings.

As has already been noted, prejudgment of issues likely to be determined by a court is not in itself a foundation of the sub judice principle.

As has been indicated, the principle is invoked only if there is a danger of prejudice to proceedings in the sense that the court may be prevented from making a correct finding because jurors or witnesses are influenced by the Committee's proceedings.

In order to assess whether there is any such danger of prejudice to the proceedings, the Committee needs to know:

- whether the matters before the court will be tried by a jury
- whether there are witnesses or potential witnesses who may be influenced by a hearing of evidence by the Committee
- whether the particular questions actually in issue in the legal proceedings are likely to be canvassed in any hearing of the Committee.

As has also been noted, the remote possibility of the justices of the court being influenced by the Committee's inquiry is not a factor in the assessment of any danger of prejudice.

It is presumed that the hearing of the Committee would not be contemporaneous with the court hearing and therefore would not disrupt the court hearing by occupying the parties or witnesses. It is also presumed that the Committee would not interfere with the court hearing by withholding original documents.

If the Committee were to come to the conclusion that there is a danger of prejudice to the court proceedings, the Committee has the option of avoiding that danger entirely by hearing evidence in camera and not publishing or reporting the evidence so heard until after the court hearing has taken place.

Please let me know if I can provide any elaboration or clarification of this advice.

Yours sincerely

(Harry Evans)

APPENDIX J

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APPENDIX K

TREASURER'S LETTERS
RE: PUBLIC INTEREST IMMUNITY

TREASURER
PARLIAMENT HOUSE
CANBERRA ACT

Senator Richard Alston
Chair
Senate Select Committee on Certain Aspects
of Foreign Ownership Decisions in relation
to the Print Media
Parliament House
CANBERRA ACT 2600

10 FEB 1994

Dear Senator Alston

I refer to your Committee's requirement that an officer of my department produce to it certain documents containing Foreign Investment Review Board (the Board) recommendations and advice to the Treasurer in relation to foreign ownership levels of the print media and documents relating to correspondence and contacts by interested parties and other persons. The purpose of my now writing is to inform you of the Government's decisions on the Committee's requests.

There are three categories of documents:

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.

2. Documents revealing information provided to the Government in confidence, to the release of which originators or affected parties object - the Government is not prepared to release these because to do so would be contrary to the public interest.

3. Information or documents given to the Government in confidence, to the release of which the originators or affected parties do not object - the Government is prepared to release these.

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 the 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'.

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.

2

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.

Category 2.

In the examination of foreign investment proposals, the Executive to the Board receives, on behalf of the Board, written submissions from foreign investors providing details of their investment plans, proposed arrangements for ownership and control of businesses and industries, reasons for proposals, claimed benefits associated with proposals, industry information and other information which may be relevant to the Board's consideration of the proposals against the Government's statement of foreign investment policy.

In the operation of the examination process, the Board relies on the co-operation of investors and potential investors and interested parties to provide information necessary for the evaluation of proposals. Much of the information is provided on a commercial-in-confidence basis and could give an unfair benefit to their competitors, to investors generally, or to prospective new entrants in the market, should it be released. Comment provided by third parties is also used to verify industry facts, legitimacy of claims concerning business interests and activities and could, if divulged, injure the interests of some or all of the parties concerned. With the exception of such information as is readily available from public sources (for example the statutory accounts of companies), it is the practice of the Board and the Executive to treat all information received in the course of considering a proposal under the Government's foreign investment policy in strict confidence. That is, details of a proposal are not disclosed to persons other than those from whom it originated except in special circumstances for purposes connected with furthering consideration of the proposal, and where the

relevant parties' consent is first obtained. Where information is received from other parties concerning a proposal that information is similarly protected.

For the information and guidance of foreign investors, authorisation has been given for the distribution of a booklet published by the Treasury entitled *Australia's Foreign Investment Policy - A Guide for Investors*. The booklet, which is widely distributed and readily available, states:

> "The Government fully recognises that much of the information which the Board will need in order to assess its attitude to a particular proposal will be sensitive commercial-in-confidence information. The Government will respect this confidential status and will award it appropriate security to ensure that it remains so.
>
> In the event that action is taken by third parties to obtain access to confidential information held by the Government, it will not be made available without the permission of the person who first gave the information to the Board, except upon order of a court of competent jurisdiction. In this respect the Government will in the ordinary course pursue the defence of its policy through the courts."

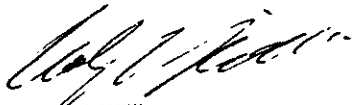
Attached to this letter is a schedule of documents relevant to the Committee's requests. Some of these documents were provided on a confidential basis as described above, and I consider that it would be against the public interest to release them to the Committee without authorisation from the originators or affected parties. My department has been consulting the affected parties and, while some are prepared to agree to material being released others may not, while others will only do so provided that I request the Committee to respect the confidential status of the documents. In accordance with the understandings of those providing confidential information to the Board and Treasury on foreign investment proposals that such will remain confidential, should any originator or affected party object to their release to the Committee even on a confidential basis, I feel bound to respect their views.

Accordingly, I have directed my department that officials should not provide to the Committee whether orally or by way of documents, information provided in confidence to the Board and the Treasury, where originators or affected parties indicate that they object to the release of the information. I have similarly directed Mr F.G.H. Pooley, a former official of my department.

Category 3.

The consultations necessary before any release can be made have been put in train and the Committee will be advised as quickly as possible of the outcome. As stated above some of the originators or affected parties have agreed to release their documents provided a request is made of the Committee that it safeguard their confidential nature; others may make similar requests. I note your statement at the Committee's hearing on 4 February 1994 that the Committee would not automatically publish or release material provided to it if the originators or affected parties approached the Committee with their concerns. I trust the Committee will honour these requests.

Yours sincerely



Ralph Willis

ATTACHMENT

DOCUMENTS CONDITIONALLY APPROVED FOR RELEASE TO THE SENATE COMMITTEE

File A

Doc No	Author	Addressee	Date	Description	No of pages
1	Mr P J Hunt BT Corporate Finance	Executive Member FIRB	19 Nov 1991	INP's application to acquire the Fairfax Group	209
2	BT Corporate Finance	Media Release	19 Nov 1991	Media Release announcing structure of Fairfax bid	6
3	Executive Member FIRB	Mr P Field Dept of Transport & Communications	26 Nov 1991	General liaison letter seeking comments on Tourang Ltd and INP proposed acquisition of the Fairfax Group	1
4	Mr P J Hunt BT Corporate Finance Ltd	Executive Member FIRB	4 Dec 1991	Revision of INP's application to acquire the Fairfax Group	351
5				The Fairfax Charter	1
6	Executive Member FIRB	Mr P J Hunt BT Corporate	9 Dec 1991	Advice letter stating that the Government has no objections to INP acquiring the Fairfax Group	4
7	The Treasurer Mr Willis	Press Release	13 Dec 1991	Media Release announcing approval of the restructured Fairfax bid	1

File B

Doc No		Addressee	Date	Description	No of pages
1	Mr S Chipkin Freehill Hollingdale & Page	Executive Member FIRB	20 Jan 1992	Copy of a letter sent to the Treasurer by Hellman and Friedman	5
2	Mr A C Harris Treasurer's Office	Mr Warren Hellman Hellman & Friedman	22 Jan 1992	Letter concerning Hellman & Friedman's request to increase its economic interest in Fairfax	2
3	Executive Member FIRB	Mr M Mangan Prudential Bache Securities	27 April 1992	Letter advising that the Government will not object to small foreign portfolio shareholdings in Fairfax	1
4	Executive Member FIRB	Mr S Chipkin Freehill Hollingdale & Page	27 April 1992	Advice letter that the Government has no objections to a revised proposal by Tourang to acquire Fairfax	1
5	Mr S Chipkin Freehill Hollingdale & Page	Executive Member FIRB	30 April 1992	Fax indicating that Freehill Hollingdale & Page has received FIRB advice of the 30 April 1992	1
6	Mr S Chipkin Freehill Hollingdale & Page	Executive Member FIRB	30 April 1992	Issues concerning Fairfax Group	1

File C

Doc No	Author	Addressee	Date	Description	No of pages
1	Freehill Hollingdale & Page Mr S Chipkin	Executive Member FIRB	11 Dec 1992	Application by "The Telegraph" to increase its interest in Fairfax to 25%. Attachments (1)Charter of Editorial Independence (2)Section 26 Notice	5 1 8
2	Freehill Hollingdale & Page Mr S Chipkin	Executive Member FIRB	11Dec 1992	Fax cover for above application also notifying the couriering of Fairfax Annual Report	1
3				Copies of News Articles	3
4	Executive Member FIRB	Mr Chipkin Freehill Hollingdale & Page	12 Jan 1993	Advice that Treasurer had signed an Interim Order prohibiting the acquisition for up to 90 days.	2
5			28 Jan 1993	News Article	1
6	AGPS Gazette Office	FIRB	20 Jan 1993	Gazettal of notice	1
7			12 Jan 1993	Copies of News Articles	2
8	Treasurer Mr Dawkins		11 Jan 1993	Copy of Interim Order	1
9		Press Release	23 Apr 1992	Small portfolio holdings	1

File C (continued)

Doc No	Author	Addressee	Date	Description	No of pages
10	Mr A. C. Harris Treasurer's Office	Mr Warren Hellman Freehill Hollingdale & Page	22 Jan 1992	Advice concerning request to increase interest in John Fairfax Holdings Limited	1
11	Treasurer Mr Willis	Press Release	13 Dec 1991	Approval of Restructured Tourang Proposal	1
12	Executive Member FIRB	Mr S Chipkin Freehill Hollingdale & Page	16 Dec 1991	Approval of Revised Tourang Proposal	1
13	Mr Robert McKay Managing Director AIN	Executive Member FIRB	5 Dec 1991	AIN bid for Fairfax	2
14 *	Mr Robert McKay Managing Director AIN	Executive Member FIRB	2 Oct 1991	AIN bid for Fairfax	2
15 *	Mr Mark Johnson Macquarie Hill Samuel	Executive Member	13 Aug 1991	Brief of features of AIN Proposal	3
16			28 & 29 Jan 1993	Copies of News Articles	2
17				Copies of News Articles	9
18	Executive Member	Mr S Chipkin Freehill Hollingdale & Page	20 April 1993	Copy of Press Release on foreign ownership of mass circulation newspapers	2
19				Copies of press articles	4

* Documents submitted to the Committee by AIN

File C (continued)

Doc No	Author	Addressee	Date	Description	No of pages
20	Executive Member	Mr S Chipkin Freehill Hollingdale & Page	21 April 1993	Advice letter that the Government had no objections to the Telegraph's application	1
21				Copies of press articles	13
22			May 1993	Copies of press articles	3
23			13 May 1993	Copy of Hansard - Question from Senator Hill to Senator Evans	1
24				Copies of press articles	5

File D

Doc No	Author	Addressee	Date	Description	No of pages
1	Treasurer	PRESS RELEASE	10 Oct 1991	Press Release on Print Media decision	1
2	Executive Member	Communications Law Centre	27 Nov 1991	Fairfax Bidders and Foreign Investment Policy advice	1
3	Communications Law Centre	Executive Member	21 Nov 1991	Letter requesting info re Fairfax Bidders and Foreign Investment Policy	2
4	TPC	Executive Member	26 Nov 1991	Fax with copy of ABT Media Release	2
5	Executive Member	Dept of Transport & Communications	Nov 1991	Request for comment on the proposals by Tourang and INP Consortium	1
6	Freehill Hollingdale & Page	Executive Member	1 Nov 1991	Application by Tourang for Fairfax Group	3
7	Baring Brothers Burrows & Co	Executive Member	5 Nov 1991	Letter concerning Fairfax reorganisation	3
8	Executive Member	Freehill Hollingdale & Page	6 Nov 1991	Letter requesting more information about consortium documentation	2
9	Freehill Hollingdale & Page	Executive Member	7 Nov 1991	Letter concerning Tourang application	133
10	Executive Member	Dept of Transport and Communications	26 Nov 1991	Request for comment on the proposals by Tourang and INP Consortium	14
11	TPC	Executive Member	26 Nov 1991	Fax concerning financial stats on paper reports (incomplete fax)	5

File D (continued)

Doc No	Author	Addressee	Date	Description	No of pages
12	TPC	Executive Member	26 Nov 1991	Fax concerning financial stats on paper reports	9
13	TPC	Executive Member	26 Nov 1991	Incomplete fax re The Age Classified Volume	3
14	Executive Member	Mr Frith		Extracts from "Guide for Investors"	4
15	Baring Brothers Burrows & Co	Executive Member	5 Nov 1991	Fax concerning Fairfax reorganisation	4
16	ABT	Executive Member		Chart relating to Consolidated Press and its network associates	2
17	The Australian	News clipping	19 Jul 1991	"Foreign snag in Packer's bid	2
18	Baring Brothers Burrows & Partners	Executive Member	13 Feb 1991	Letter relating to the current position with relation to Fairfax	13
19	Treasurer	PRESS RELEASE	10 oct 1991	Print Media Decision	1
20	The Age Newspaper		5 Aug 1991	Press Article relating to the Media and its ownership and control	12
21	Freehill Hollingdale & Page	Executive Member	26 Nov 1991	Request for more information in relation to JFG and Consolidated Press Holdings	77
22-24			various	Press Articles	1
25	Freehill Hollingdale & Page	Executive Member	4 May 1992	Fax acknowledging receipt of letter of 30/4/92	2

File D (continued)

Doc No	Author	Addressee	Date	Description	No of pages
26	Freehill Hollingdale & Page	Executive Member	30 Apr 1992	Faxed copy of letter re Fairfax and junk bondholders	2
27	Prudential-Bache	Executive Member	30 Mar 1992	Foreign ownership of mass circulation newspapers	1
28	Treasurer	PRESS RELEASE	10 Oct 1991	Print Media Decision	1
29-31			various	Press Articles	3
32	Executive Member	Freehill Hollingdale & Page	27 Apr 1992	Advice letter re portfolio holdings	1
33	Executive Member	Prudential-Bache	27 Apr 1992	Advice letter re Govt. decision on Tourang and the listing of Fairfax on ASX	1
34	Executive Member	Freehill Hollingdale & Page	24 Apr 1992	Fax re Press Release on Fairfax Newspaper Group	2
35-61			various	Press Articles	30
62	Office of the Treasurer	Hellman & Friedman	22 Jan 1992	Tourang's request for approval to increase interest in Fairfax (Tourang III)	1
63	Freehill Hollingdale & Page	The Treasurer	20 Jan 1992	Fax concerning Hellman & Friedman's proposal	5
64	Treasurer	PRESS RELEASE	13 Dec 1991	Fairfax restructured application approved under foreign investment policy	1

File D (continued)

Doc No	Author	Addressee	Date	Description	No of pages
65	Communications Law Centre	Executive Member	5 Dec 1991	Fairfax Bidders and Foreign Investment Policy	5
66	Executive Member	ABT, Sydney		Faxed copy of Press Release re restructured application for Fairfax	2
67	Executive Member	Freehill Hollingdale & Page	16 Dec 1991	Letter re approval for Tourang's II proposal	1
68	Treasurer's Office	PRESS RELEASE	13 Dec 1991	Copy of press release re restructuring of Fairfax	1
69	Freehill Hollingdale & Page	Executive Member	11 Dec 1991	Fax of revised Tourang II proposal	4
70	Executive Member	Freehill Hollingdale & Page	9 Dec 1991	Rejection letter concerning Tourang I proposal	1
71	Executive Member	Freehill Hollingdale & Page	9 Dec 1991	Fax re rejection letter to Tourang's I bid	2
72	Baring Brothers Burrows & Co	Executive Member	6 Dec 1991	Letter re background on AIN	7
73	AIN	Executive Member	6 Dec 1991	Fax re Fairfax Group and final bids	3
74	AIN	Executive Member	5 Dec 1991	Original of fax dated 6/12/91	2
75	TPC	Executive Member	4 Dec 1991	Fax re TPC's investigations into the acquisition of the Fairfax group	2
76	Freehill Hollingdale & Page	Executive Member	3 Dec 1991	Fax re letter from Tourang indicating its outlook on various business prospects	7

FAXED 11 2 94

TREASURER

PARLIAMENT HOUSE
CANBERRA

Mr F.G.H. Pooley
Commissioner
Insurance and Superannuation Commission
212 Northbourne Avenue
BRADDON ACT 2601

10 FEB 1994

Dear Mr Pooley

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

I hereby direct you as a former Treasury official not to provide to the Senate Select Committee, whether orally or by way of provision of documents, information or advice provided in confidence by the Foreign Investment Review Board and the Treasury to the government on matters associated with the 1991 and 1993 decisions on the Fairfax Group under the government's foreign investment policy.

Furthermore, I hereby direct you not to provide to the Senate Select Committee, whether orally or by way of provision of documents, information provided in confidence to the Foreign Investment Review Board and the Treasury on matters associated with the 1991 and 1993 decisions on the Fairfax Group under the government's foreign investment policy.

Yours sincerely

Ralph Willis

11/02 '94 09:03 ☎06 273 3420 TREASURER OFFICE +++ SECRETARI-AT 002

COPY

TREASURER
PARLIAMENT HOUSE
CANBERRA 2600

Mr E.A. Evans
Secretary to the Treasury
CANBERRA ACT 2600

10 FEB 1994

Dear Secretary

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

I hereby direct you and all officers of the Treasury not to provide to the Senate Select Committee, whether orally or by way of provision of documents, information or advice provided in confidence by the Foreign Investment Review Board and the Treasury to the government on matters associated with the 1991 and 1993 decisions on the Fairfax Group under the government's foreign investment policy.

Furthermore, I hereby direct you and all officers of the Treasury not to provide to the Senate Select Committee, whether orally or by way of provision of documents, information provided in confidence to the Board and the Treasury on matters associated with the 1991 and 1993 decisions on the Fairfax Group under the government's foreign investment policy, other than those documents I have approved for release and to the release of which the originators or affected parties have indicated they do not object. Attached is a copy of the schedule attached to my letter of 10 February 1994 to the Chairman of the Committee, which lists those documents I have conditionally approved for release.

Yours sincerely

Ralph Willis

CC Deputies
Jio Heads.
MS Dept

Mr. Hughes,
Please note the Treasurer's direction in your appearance before the Committee tomorrow
E.A.E.

TREASURER
PARLIAMENT HOUSE
CANBERRA 2600

Senator Richard Alston
Chair
Senate Select Committee on Certain Aspects
of Foreign Ownership Decisions in relation
to the Print Media
Parliament House
CANBERA ACT 2600

18 FEB 1994

Dear Senator Alston

Further to my letter of 10 February 1994 to you on matters connected with information and documents sought by your Committee, I am now writing to inform you of action I have taken with respect to two members of the Foreign Investment Review Board.

In view of the Committee's interest in Board members attending public hearings of the Committee, I have reminded the members of their duty not to disclose information received by them, or communicated by them to the Government. I have advised the members that in view of the public interest immunity existing in respect of these matters, I consider their duty of confidence precludes them from providing information to the Committee on the views, advice or recommendations they provided to me, other past Treasurers or the Government. Copies of my letters to the members are attached.

I wish also to draw to your and the Committee's attention the most unfortunate position in which you could be placing Board members as regards their clear duty of confidence as Board members, especially in view of the intimidatory remarks made by Senator Kernot last weekend in relation to the possible gaoling of witnesses.

I suggest it is unreasonable behaviour on the part of the Committee to insist on placing Board members in such a position in the knowledge that, as they have already informed you, their position of trust precludes them from giving the type of evidence the Committee seeks.

Yours sincerely

Ralph Willis

TREASURER
PARLIAMENT HOUSE
CANBERRA 2600

Mr K C Stone, AO
Acting Chairman
Foreign Investment Review Board
c/- The Treasury
Parkes Place
CANBERRA ACT 2600

18 FEB 1994

Dear Mr Stone

I understand you have seen my letters of 10 February 1994 to the Secretary to the Treasury and to the Chairman of the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media which include my statements and directions in relation to information sought by the Committee. I am writing to you and your colleague on the Board, Mr Halsted, to acquaint you personally with my views on this matter.

As I explained in my letter to the Committee Chairman, I consider that the Board plays a unique and major role in the public interest by advising me and the Government on foreign investment matters generally, in examining proposals by foreign interests for investment in Australia and in making recommendations to the Government on those proposals.

Confidentiality is inherent in your conditions of appointment as a Board member. Like the confidentiality that is integral to inter departmental, inter agency and inter Governmental consultations in this area, it provides the most favourable conditions for frank and candid advice to me in the administration of the Government's foreign investment policy. The fact that the advice you and your colleagues provide is and remains confidential, gives me confidence that the Board members will be free to proffer that advice comfortable in the knowledge that there will be no public or unintended consequences. I see this characteristic as being fundamental to the role and functions of the Board.

I view also the Committee's attempt to delve into advice given in confidence to government with the utmost concern given the impact it could have on current and future workings of the Board. Making the Board's views public could 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. 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.

In relation to the Committee's request that you attend public hearings, I would like to remind you of your duty as a Board member not to disclose information received by you, or communications made by you to the Government. The Committee might question you on the views, advice or recommendations you provided to me, other past Treasurers or the Government. In view of the

public interest immunity that exists in respect of these matters, I consider your duty of confidence precludes you from providing the answers to such questions.

In view of the Committee's further approaches to you, I have decided to provide the Chairman of the Committee with copies of this letter and that to Mr Halsted, in order to ensure that the Committee is in no doubt as to the Government's continuing stand on these issues and to draw to their attention as well the position they could be placing you in as regards your duty of confidence as a Board member.

Yours sincerely

Ralph Willis

TREASURER
PARLIAMENT HOUSE
CANBERRA 2600

Senator Richard Alston
Chair
Senate Select Committee on Certain Aspects
of Foreign Ownership Decisions in relation
to the Print Media
Parliament House
CANBERRA ACT 2600

20 APR 1994

Dear Senator Alston

Further to my letter of 10 February 1994 to you on matters connected with information and documents sought by your Committee, I am now writing to inform you of action I have taken with respect to Dr Darryl Roberts, a former Treasury officer and now Assistant Commissioner with the Insurance and Superannuation Commission.

I have directed Dr Roberts not provide to the Committee, whether orally or by way of provision of documents, information or advice provided in confidence by the Foreign Investment Review Board and the Treasury to the government on matters associated with the 1991 and 1993 decisions on the Fairfax Group under the government's foreign investment policy, or information provided in confidence to the Foreign Investment Review Board and the Treasury on matters associated with the 1991 and 1993 decisions on the Fairfax Group under the government's foreign investment policy.

Attached is a copy of my letter to Dr Roberts.

Yours sincerely

Ralph Willis

TREASURER
PARLIAMENT HOUSE
CANBERRA ACT

Dr D. Roberts
Assistant Commissioner
Insurance and Superannuation Commission
212 Northbourne Avenue
BRADDON ACT 2601

20 APR 1994

Dear Dr Roberts

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

I hereby direct you as a former Treasury official not to provide to the Senate Select Committee, whether orally or by way of provision of documents, information or advice provided in confidence by the Foreign Investment Review Board and the Treasury to the government on matters associated with the 1991 and 1993 decisions on the Fairfax Group under the government's foreign investment policy.

Furthermore, I hereby direct you not to provide to the Senate Select Committee, whether orally or by way of provision of documents, information provided in confidence to the Foreign Investment Review Board and the Treasury on matters associated with the 1991 and 1993 decisions on the Fairfax Group under the government's foreign investment policy.

Yours sincerely

Ralph Willis