
[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

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:

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

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

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.

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.

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.

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.

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 signed⁷⁶, 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 submission⁷⁷; and whether or not FIRB obtained any expert technical or financial opinion to assess whether Fairfax required foreign expertise⁷⁸.

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 overseas⁷⁹; giving evidence on how FIRB monitors overseas investment projects to a Senate committee on 8 March 1991⁸⁰; and the changes to policy in 1986⁸¹.

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

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

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.

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.