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)**
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> 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.
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> 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]
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> **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.
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> ooo
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> ... 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.
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> **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.
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> 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.**