

# Investigation into Control

Mr Kerry Packer/John Fairfax Holdings Ltd

A report on the Australian Broadcasting Authority's investigation into a possible breach of paragraph 60(b) of the *Broadcasting Services Act 1992*, by Mr Kerry Packer.

Australian Broadcasting Authority  
Sydney, NSW  
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## **PART ONE**

### **The Legal Framework of the control provisions of the Broadcasting Services Act 1992**

Section 60 of the Broadcasting Services Act 1992 (the Act) provides that a person must not be in a position to exercise control of:

- (a) a commercial television broadcasting licence and a commercial radio broadcasting licence that have the same licence area; or
- (b) a commercial television broadcasting licence and a newspaper that is associated with the licence area of the licence; or
- (c) a commercial radio broadcasting licence and a newspaper that is associated with the licence area of the licence.

The Australian Broadcasting Authority (ABA) “is given a monitoring role over the broadcasting industry and suitable powers of investigation in order to reach a conclusion as to whether a person is in a position to exercise control or not” of a licence, company or a newspaper (Schedule 1 subclause 1(2)).

#### **Associated newspapers and notification provisions**

The ABA maintains an Associated Newspaper Register (subsection 59(1)). A newspaper is associated with the licence area of a licence if the name of the newspaper is entered in the Register as being associated with the licence area of the licence (subsection 59(2)).

The Act also requires each commercial television and commercial radio broadcasting licensee to keep the ABA advised of persons who are in a position to exercise control of the licence (sections 62 and 63).

Each person who is in a position to exercise control of a commercial television or commercial radio broadcasting licence must also advise the ABA of any company interests which that person has in any newspaper that is associated with the relevant licence area as at the end of each financial year (section 65).

#### **1.1 Investigating the issue of Control**

The Act recognises that the concept of control can be a complex one and that control of a licence, newspaper or a company may be exercised in a number of ways. Control of a company or licence can also be exercised by more than one person (Schedule 1 subclause 2(4)).

Schedule 1 of the Act “sets out the mechanisms that are to be used in deciding whether a person is in a position to exercise control of a licence, a company or a newspaper for the purposes of” the Act (paragraph 7(a) of the Act). It also sets out the mechanisms that are to be used in tracing company interests (paragraph 7(b) of the Act). Subclause 1(1) of the Schedule states that the Schedule “is intended to provide a means of finding out who is in a position to exercise control of commercial television broadcasting licences, commercial radio broadcasting licences, newspapers and companies and a means of tracing company interests”.

Clauses 2 and 3 of Schedule 1 set out the rules for deciding when a position to exercise control exists. Schedule 1 also states that “While company interests may be important in deciding that question, they are only one issue. In some cases, it may be important to look at agreements and arrangements between people and at accustomed courses of conduct between people” (Schedule 1 subclause 1(1)).

By looking at both the formal and informal means by which control of a licence, a newspaper or a company may be exercised, rather than at a set of rigid rules, the ABA is able to focus on the issue of whether a person is **in fact** in a position to exercise control at any given time.

### **Control in Schedule 1 clauses 2 and 3**

Clauses 2 and 3 of Schedule 1 of the Act set out ways in which a person, either alone or together with an associate, will be in a position to exercise control of a commercial television or radio broadcasting licence, a newspaper or a company.

These include the following:

- Where a person is the licensee or is the publisher of the newspaper;
- Where a person is in a position to exercise control of the selection or provision of a significant proportion of:
  - i) the programs broadcast by a licensee; or
  - ii) the material to be published in a newspaper;
- Where a person is in a position to control a significant proportion of the operations of a licensee, a non-licensee company, a publisher of a newspaper or a company which publishes a newspaper;

- Where in relation to a company, a person is in a position to:
  - i) veto any action taken by the board of directors;
  - ii) appoint, secure or veto the appointment of at least half of the board of directors;
  - iii) exercise direction or restraint over any substantial issue affecting the management or affairs of the company; or
- Where more than 50% of the directors of a company act or are accustomed to act, or under a contract, arrangement or understanding are intended or expected to act, in accordance with the directions, instructions or wishes of or in concert with the person.

Clauses 2 and 3 of Schedule 1 are outlined in full in Appendix A of this Report.

### **Company interests as indicia of control**

The holding of company interests is one way in which a person may be in a position to exercise control.

Where a person has a shareholding interest, voting interest, dividend interest or winding-up interest in a company, the term “company interests” refers to the percentage of the person’s interest.

Where a person holds two or more of those interests, the term “company interests” refers to the interest which confers the greatest percentage. Different types of “company interests” are not added.

Because of the complexities involved in ascertaining whether a person is in a position to exercise control, Schedule 1 of the Act refers to certain levels of company interests which give rise to rebuttable presumptions in relation to the question of control.

The various company interest scenarios referred to in Schedule 1 of the Act are intended to assist the ABA in its role of monitoring the broadcasting industry by raising a presumption that a person is or is not in a position to exercise control at the point at which that person holds certain levels of company interests.

It is important to note that a presumption which may arise out of the application of Schedule 1 to any set of circumstances is not to be taken as conclusive evidence of whether or not a person is in a position to exercise control of a company. A presumption may be rebutted after a consideration of all of the circumstances of the case. Each case will be considered on its own facts.

An overview of how certain levels of company interests may give rise to a presumption in relation to the question of control is provided below.

### **Company interests of 15% or less**

Where a person has company interests of 15% or less the person will generally not be in a position to exercise significant influence over the company.

Therefore the Act recognises that, as a matter of practicality, a person with company interests of 15% or less will not normally be in a position to exercise control the company.

However, there may be cases where the holding of company interests of 15% or less does place a person in a position to exercise control of the company (Schedule 1 clause 1). In the example given in the Act, a person may hold company interests of only 10%, but no other person holds company interests of more than 2% and those other persons do not act in concert.

In such cases the ABA may find that a person with company interests of 10% may, in all the circumstances, be in a position to exercise control of the company.

### **Company interests exceeding 15% but not greater than 50%**

Where a person has company interests exceeding 15% but not greater than 50% the person will generally be in a position to exert significant influence over the company (Schedule 1 subclause 1(1)).

Accordingly, in the absence of proof to the contrary, the Act provides that such a person is to be regarded as being in a position to exercise control of a company (Schedule 1 subclause 6(1)).

This means that when a person acquires company interests exceeding 15%, the Act raises a presumption that the person is in a position to exercise control of the company. However, this presumption may be rebutted if the ABA is satisfied that, in all the relevant circumstances, the person is not in fact in a position to exercise control.

In considering whether it is satisfied that a person is not in a position to exercise control of a company the ABA may take into account information and evidence adduced by the person and otherwise inform itself in any manner it thinks fit (section 168).

For example, a person may have company interests of 18% in a company, but another person who is not an associate may have company interests of 51% in the same company. In such a case the ABA may be satisfied, without requiring proof to the contrary in terms of subclause 6(1) of Schedule 1 of the Act, that the person holding company interests of 18% is not in a position to exercise control of the company (see subclause 6(2)).

### **Company interests exceeding 50%**

The Act recognises that where a person has company interests exceeding 50% then the person would normally be expected to be in a position to exercise control (Schedule 1 subclause 1(1)). For example, a person with 53% of the voting interests of a company would normally be in a position to exercise control of the majority of votes cast at a general meeting of the company.

However, there may be cases in which, due to a number of other circumstances, the ABA is satisfied that a person who has company interests exceeding 50% is not in a position to exercise control of the company.

In the words of Schedule 1 subclause 1(1) “..there are cases where a person who would, looking at the person’s company interests (say 51%), be expected to be in a position to exercise control of the company but is not because of a number of other circumstances. Such a situation could arise, for example, where a person had given undertakings to a lender that the lender have a significant say in the activities of the company. Looking at the situation from the lender’s point of view, control can come about without any company interest at all”.

### **Associates and arrangements**

In determining whether a person is in fact in a position to exercise control of a licence, newspaper or company, the ABA may investigate any matter which it considers relevant to the question of control (section 168).

In some cases it may be important to look at whether there exists any agreement, arrangement or an accustomed course of conduct between particular people which has the effect of placing a person in a position to exercise control of a licensee, newspaper or company (Schedule 1 subclause 1(1)).

Paragraph 2(1)(a) of the Schedule provides that “a person is in a position to exercise control of a licence or a company if the person, either alone **or together with an associate of the person**, is in a position to exercise control of the licensee or the company” (emphasis added). The expression “associate” is also used in other paragraphs of that clause.



The expression “associate” is defined in section 6 of the Act in relation to a person in relation to control of a licence or a newspaper. It includes in paragraph (d) of that definition a person (whether a company or not) who:

- (i) acts, or is accustomed to act; or
- (ii) under a contract or an arrangement or understanding (whether formal or informal) is intended or expected to act;

in accordance with the directions, instructions or wishes of, or in concert with, the first-mentioned person or of the first-mentioned person and another person who is an associate of the first-mentioned person under another paragraph;...

However persons are not associates “if the ABA is satisfied that they do not act together in any relevant dealings relating to that company, licence or newspaper, and neither of them is in a position to exert influence over the business dealings of the other in relation to that company, licence or newspaper” (see the definition of associate in section 6).

Paragraph (d) of the definition of “associate” extends to any person who either acts or is accustomed to act or is intended or expected to act in a particular fashion. The actions must be such as to indicate that the person will act jointly with another or may submit his own will to that of the other.

In addition, where a person who has 51% of the company interests has come to an arrangement with a lender that the lender will have a significant say in the activities of the company it may be said that the lender exercises control of the relevant company even though the lender does not have any company interests (Schedule 1 subclause 1(1)).

## **1.2 Investigative powers of the ABA**

In order to investigate whether there are factors upon which it may be determined that a person is in a position to exercise control of a company the ABA has been given the power to consult with any persons, bodies or groups, conduct investigations, hold hearings and otherwise inform itself in any manner it thinks fit (paragraph 168(1)).

The ABA may in its discretion determine the procedure it will adopt in performing its monitoring role of the industry. This is subject to the requirement that whatever procedure is adopted by the ABA it must be a procedure that the ABA regards as being the quickest and most economical in the circumstances (paragraph 168(2)(a)). It must also be a procedure which will promote the due administration of the Act (paragraph 168(2)(b)).

In conducting an investigation the ABA may call for written submissions from members of the public, summon persons to attend an examination by delegates of the ABA and require persons to provide documents which may contain information relevant to the investigation (sections 172, 173, 174 and 177).

Following an investigation the ABA may determine whether a particular person is in breach of the control provisions of the Act and prepare a report (section 178). Such a report may be published (section 179).

In making decisions the ABA is not limited to a consideration of material made available to it through an investigation or hearing but may take into account such other matters as it considers relevant (section 169).

### **1.3 Breaches of the control provisions**

If the ABA is satisfied that a person is in breach of a control provision of the Act it may direct the person or the licensee by notice in writing to take action so that the person is no longer in breach (section 70).

Failure to comply with such a notice is an offence and may result in penalties of up to \$2,000,000 where the breach relates to a commercial television broadcasting licence and up to \$200,000 where the breach relates to a commercial radio broadcasting licence (section 72).

### **1.4 Prior opinions in relation to issues of control**

In order to provide certainty in the broadcasting industry section 74 of the Act enables a person to apply to the ABA for an opinion as to whether the person is in a position to exercise control of a licence, newspaper or company at any given time. A person may also apply for an opinion as to whether they would be in a position to exercise control if a transaction, contract, agreement or arrangement were entered into.

If the ABA gives an opinion that a person is not in a position to exercise control of a licence or newspaper such an opinion is binding on the ABA and any other government agency in relation to the question of control (subsection 74(5)).

The Act therefore enables the ABA to focus on the real issue of control in any given case without having to rely on artificial and arbitrary rules, whilst enabling members of the broadcasting industry to obtain certainty in relation to their particular activities.

## **PART TWO**

### **Background to the Investigation**

At the end of the 1993-94 financial year the licensees of commercial television broadcasting licences TCN9 Sydney and GTV9 Melbourne (the Nine licences) advised the ABA that Mr Kerry Packer and Consolidated Press Holdings Limited (CPH) were in a position to exercise control of the licences pursuant to section 62 of the Act. Section 62 requires each commercial television broadcasting licensee to advise the ABA of persons who, to the knowledge of the licensee, were in a position to exercise control of the licence at the end of each financial year.

The Nine licences operate in the licence areas of Sydney and Melbourne respectively.

In July 1994 the ABA noted the announcement that Nine Network Australia Limited (NNA) and Australian Consolidated Press Limited (ACP) planned to merge their television and magazine interests. Both these companies were controlled by Mr Packer. The merger was completed on 9 November 1994 at which time NNA changed its name to Publishing and Broadcasting Limited (PBL).

Following the merger the interests of Mr Packer and CPH in Nine became as follows:

- Mr Packer, through wholly owned subsidiaries, had 100% of the company interests in CPH.
- CPH, through wholly owned subsidiaries, had company interests of approximately 45.7% \* in PBL.
- PBL had 100% of the shareholding interests in Nine Television Pty Limited (Nine). Nine changed its name to Nine Network Australia Pty Ltd on 24 February 1995.
- PBL and Nine control the Nine licences. Nine controls the GTV9 licence through a trust arrangement in which Nine has the beneficial interest.

Diagram 1.1 sets out the company interests of Mr Packer and associated companies in Nine immediately after the merger.

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\* PBL has two classes of shares, preference shares and ordinary shares

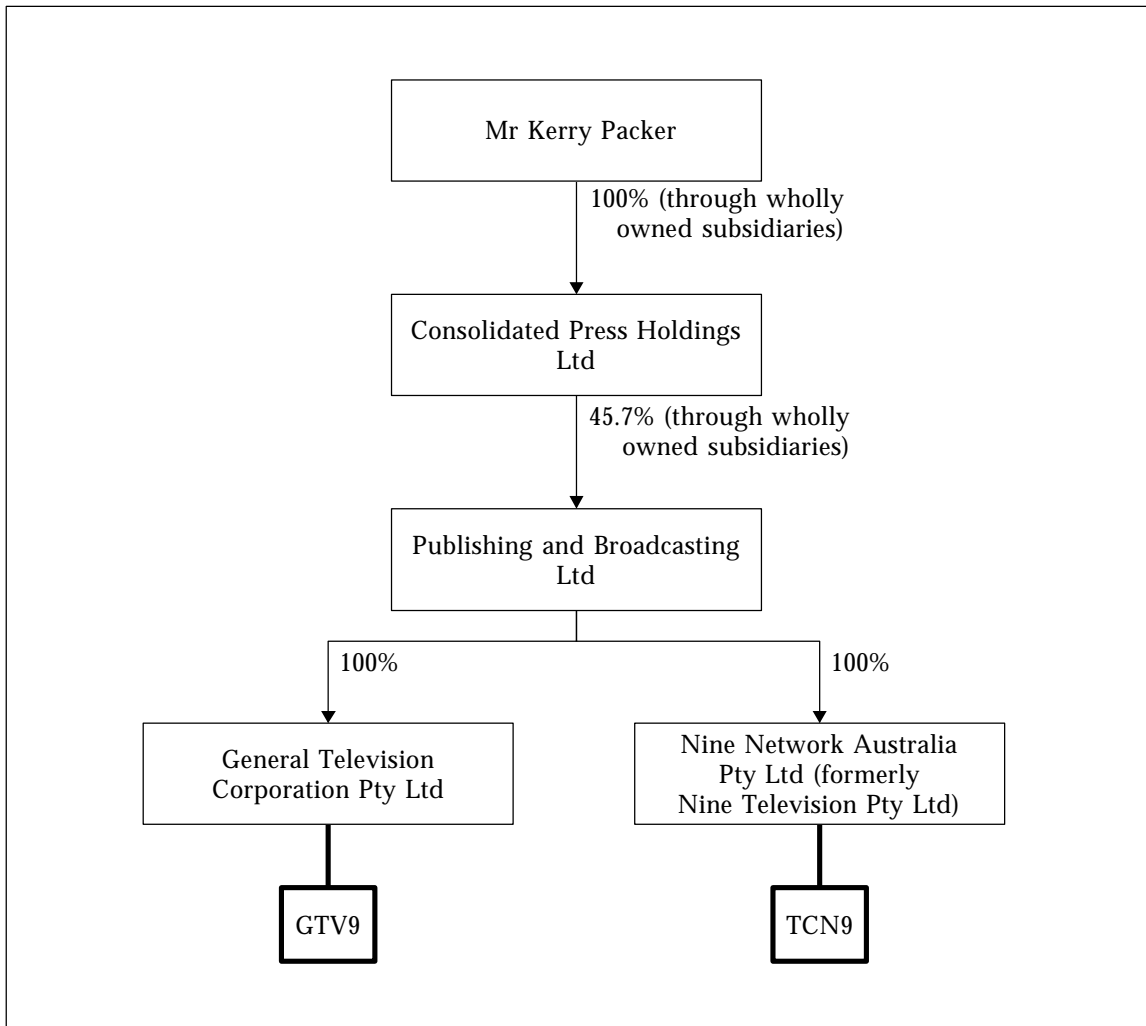


Diagram 1.1

The ABA noted that, as a result of the merger PBL became the second largest media company listed with the Australian Stock Exchange, The News Corporation Limited being the largest.

The ABA continued to monitor the interests of the various media organisations and noted that around January 1995 there was increased speculation in the media that Mr Packer and his associates were seeking to acquire further interests in John Fairfax Holdings Limited (Fairfax).

Fairfax, through its wholly owned subsidiaries, John Fairfax Publications Pty Limited and David Syme & Co. Limited (the publishing companies), publishes *The Sydney Morning Herald*, *The Australian Financial Review*, and *The Age* newspapers.

The ABA's Associated Newspaper Register lists *The Sydney Morning Herald* and *The Age* newspapers as being associated with the licence areas of TCN9 Sydney and GTV9 Melbourne respectively. The circulation of *The Australian Financial Review* is such that subsection 59(3) of the Act does not apply and it is not entered in the Register.

The ABA noted that if Mr Packer and/or CPH were in a position to exercise control of both the Nine licences and Fairfax there would be a breach of paragraph 60(b) of the Act.

On 14 February 1995 PBL advised the ABA as a matter of courtesy that, through its wholly owned subsidiary Nine, PBL's holding of ordinary shares in Fairfax was 64,139,671 shares representing 8.79% of the ordinary issued shares of Fairfax.

PBL also advised that Nine held 29,500,000 Fairfax Convertible Notes (the Notes). The ABA understands that as at the date of this report a total of 60,485,300 Notes are on issue.

In certain circumstances the Notes may be converted into ordinary shares.

In its letter to the ABA, PBL stated that if all the Notes were converted to ordinary shares, the total holding of PBL and its subsidiaries in Fairfax would be approximately 11.85% of the total issued capital.

PBL further advised that a wholly owned subsidiary of CPH and an associate of PBL, namely CPH Management Ltd (CPHM), held 36,000,000 ordinary shares in Fairfax, representing 4.93% of the issued share capital in Fairfax.

PBL indicated that if all the Notes were converted into ordinary shares then CPHM's interest would represent approximately 4.55% of the total issued capital of Fairfax.

Therefore, at 14 February 1995 the combined holding of PBL and its associates represented 13.72% of the ordinary shares of Fairfax.

If all the Notes on issue at 14 February 1995 were converted into ordinary shares, PBL indicated that the combined holding in total issued capital of Fairfax held by PBL and its associates would be approximately 16.4% (ie 11.85% held by PBL through Nine and 4.55% held by CPHM).

As at the date of this Report the Notes have not been converted. The status of the Notes as company interests is dealt with in Appendix B of this Report.

In view of these events the ABA commenced an investigation into whether Mr Packer and/or CPH was in a position to exercise control of both the Nine licences and Fairfax in breach of paragraph 60(b) of the Act.

Diagram 1.2 sets out the interests of Mr Packer and associated companies in Fairfax.

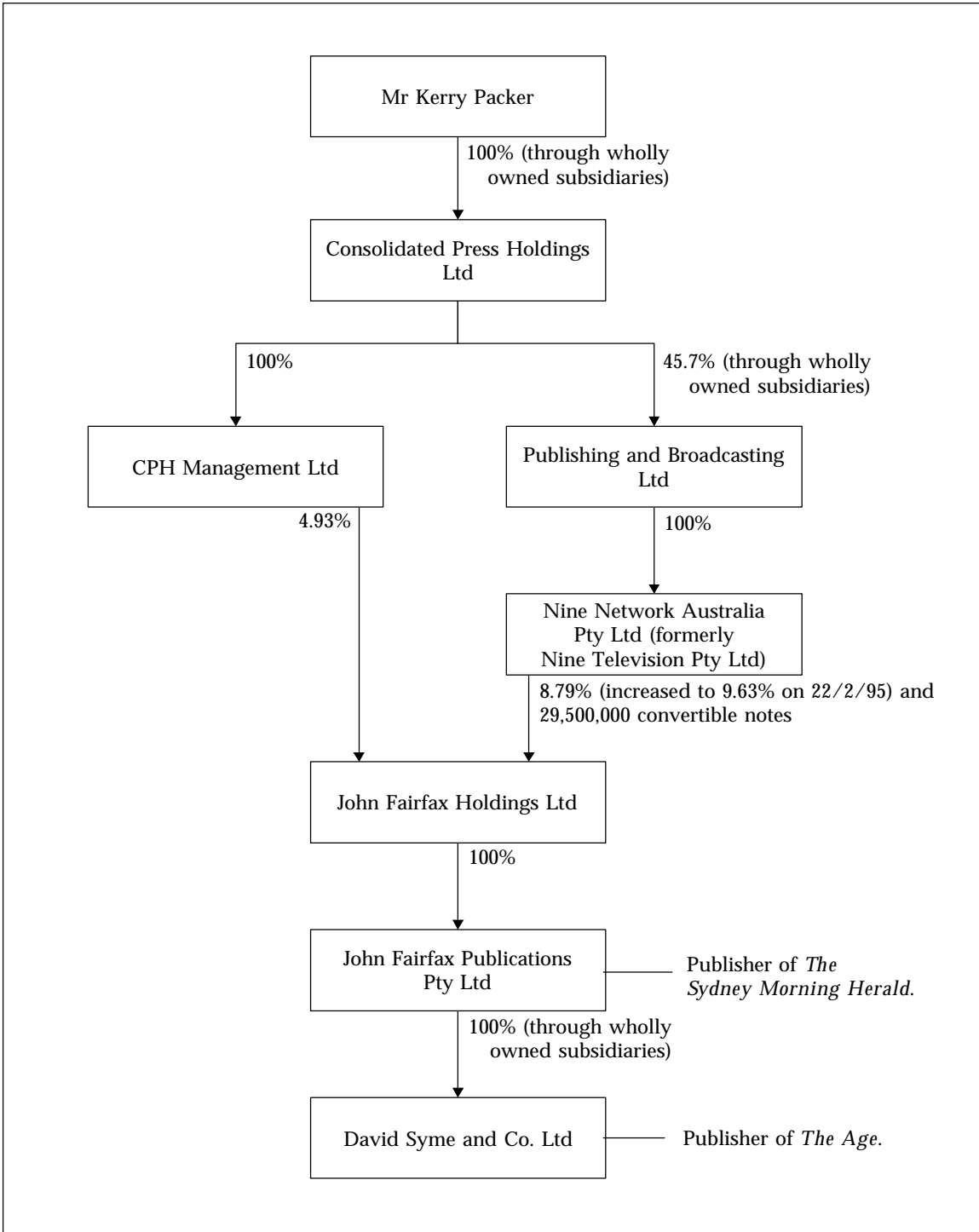


Diagram 1.2

## **PART THREE**

### **Is Mr Packer and/or CPH in a position to control a commercial television broadcasting licence and a newspaper in breach of the Act?**

In order to establish that there has been a breach of paragraph 60(b) of the Act it is necessary to establish that:

- i) a person is in a position to exercise control of a commercial television broadcasting licence; and
- ii) the person is also in a position to exercise control of a newspaper which is associated with the licence area of the commercial television broadcasting licence.

#### **3.1 Is Mr Packer and/or CPH in a position to exercise control of the Nine licences?**

In determining whether Mr Packer and/or CPH are in a position to exercise control of the Nine licences the following matters were considered:

- The licensees of TCN9 and GTV9 currently list Mr Packer and CPH as persons who are in a position to exercise control of those licences in the notifications provided to the ABA under section 62 of the Act;
- PBL controls the licences through its 100% interests in the licensee companies of the GTV9 and TCN9 licences;
- Nine is the licensee of TCN9 and controls GTV9 through a trust arrangement with the licensee;
- Mr Packer has made statements in public on a number of occasions to the effect that he is in a position to exercise control of the Nine licences; and
- Neither Mr Packer nor CPH has attempted to disprove the assertion that he or it is in a position to exercise control of the Nine licences.

The following matters are significant in determining the issue of whether Mr Packer and/or CPH control PBL:

- Mr Packer holds, through wholly owned subsidiaries, 100% of the company interests in CPH;
- CPH has approximately 45.7% of the company interests in PBL, a public listed company;
- As CPH's shareholding in PBL is greater than 15%, the Act deems Mr Kerry Packer and CPH to be in a position to exercise control of PBL in the absence of proof to the contrary;
- Mr Packer and CPH have not attempted to present proof that they do not control PBL;
- CPH's shareholding represents the largest block of shares in PBL;
- The remaining most significant PBL shareholders are National Mutual Life Association (7.1%), the AMP Society (5.5%), Permanent Trustee Company Ltd (3.8%) and Macquarie Bank Ltd (3.2%). These four shareholdings total only 19.6%;
- Mr Kerry Packer is the Chairman of PBL;
- Four of the nine PBL directors (Mr Kerry Packer, Mr James Packer, Mr Brian Powers and Mr Graham Cubbin) are also directors of CPH; and
- Mr Powers is the Chief Executive Officer and Managing Director of PBL and Managing Director of CPH.

## **Finding**

The ABA has found that Mr Packer and CPH are each in a position to exercise control of the Nine licences.



## **3.2 Is Mr Packer and/or CPH in a position to exercise control of a newspaper?**

### **3.2.1 Applying Schedule 1 Clauses 2 and 3**

Clause 3 of Schedule 1 provides a test for determining whether a person is in a position to exercise control of a newspaper.

Specifically, subclause 3(1) provides:

“For the purposes of this Schedule, a person is in a position to exercise control of a newspaper if:

- (a) the person is the publisher of the newspaper; or
- (b) the person is in a position, either alone or together with an associate of the person and whether directly or indirectly:
  - (i) to exercise control of a significant proportion of the operations of the publisher in publishing the newspaper; or
  - (ii) to exercise control of the selection or provision of a significant proportion of the material to be published in the newspaper; or
- (c) if the newspaper is published by a company:
  - (i) the person is in a position, either alone or together with an associate of the person, to exercise control of the company; or
  - (ii) the person, either alone or together with an associate of the person, is in a position to veto any action taken by the board of directors of the company; or
  - (iii) the person, either alone or together with an associate of the person, is in a position to appoint or secure the appointment of, or veto the appointment of, at least half of the board of directors of the company; or
  - (iv) the person, either alone or together with an associate of the person, is in a position to exercise, in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the company; or

(v) the company or more than 50% of its directors:

(A) act, or are accustomed to act; or

(B) under a contract or an arrangement or understanding (whether formal or informal) are intended or expected to act;

in accordance with the directions, instructions or wishes of, or in concert with, the person or of the person and an associate of the person acting together or, if the person is a company, of the directors of the person.”

Schedule 1 clause 2 is also relevant as it sets out the rules for deciding when a person is in a position to control a company. These rules would be relevant when seeking to determine whether Mr Packer or CPH control Fairfax or the publishing companies. To a large extent the rules in clause 2 are mirrored in clause 3 which is set out above.

In particular, the ABA has examined whether Mr Packer and/or CPH, either alone or together with an associate:

- is in a position to exercise control of Fairfax or the publishing companies;
- is in a position to exercise, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of Fairfax or the publishing companies; or
- is in a position to exercise control of the selection or provision of a significant proportion of the material to be published in the *The Sydney Morning Herald* and *The Age* newspapers;
- is in a position to exercise control of the selection or provision of a significant proportion of the operations of Fairfax or the publishing companies; or whether
- Fairfax or the publishing companies or more than 50% of the directors of those companies act, or are accustomed to act; or under a contract or an arrangement or understanding (whether formal or informal) are intended or expected to act, in accordance with the directions, instructions or wishes of, or in concert with, Mr Packer or CPH or of Mr Packer and an associate of Mr Packer acting together.

## Information Gathering by the ABA

In the course of its investigation the ABA obtained information from the following companies and persons:

- Fairfax;
- Ms Gail Hambly, Legal Counsel and Company Secretary of Fairfax;
- PBL, CPH, Mr Kerry Packer and associated companies;
- The Australian Securities Commission (ASC);
- Other interested persons, bodies and groups.
- Members of the Board of Directors of Fairfax:

Hon. Sir Laurence Street,

Mr Daniel Colson,

Mr Matthew Barger,

Hon. Conrad Black,

Sir Roderick Carnegie,

Rt Hon. Sir Zelman Cowen,

Mr David Gonski,

Mr Douglas Halley,

Mr Michael Hoy,

Mr Stephen Mulholland,

Mr Andrew Turnbull, and

Mr Dean Wills;

- Mr John Lyons, then Deputy Editor of *The Sydney Morning Herald* (Mr Lyons was appointed Editor of *The Sydney Morning Herald* on 27 March 1995); and
- Messrs Brian Powers and James Packer, directors of both PBL and CPH.

## **Information obtained from Fairfax**

On 15 February 1995 the ABA wrote to Fairfax seeking details of the terms and conditions upon which the Notes held by Nine could be converted into ordinary shares in Fairfax.

On 16 February 1995 Fairfax forwarded to the ABA a copy of the Terms and Conditions of the Notes.

The ABA wrote to Fairfax on 20 February 1995 seeking information about any persons who may be in a position to exercise control of Fairfax, *The Sydney Morning Herald* or *The Age* newspapers.

The ABA asked Fairfax to give particular attention to the information presented in *The Australian Financial Review* on Monday 20 February 1995 in an article headed "Packer's man tried to get me sacked: Fairfax chief". The article raised allegations by Mr Stephen Mulholland, Managing Director and Chief Executive of Fairfax, that Mr Brian Powers, Managing Director of CPH, had sought to have him removed from that position.

Fairfax responded by letter dated 23 February 1995 stating that it did not wish to provide any information which was not already publicly available because to do otherwise might result in a breach of its obligations to the shareholders of Fairfax.

Subsequently, on 23 February 1995 the ABA issued Ms Gail Hambly, Legal Counsel and Company Secretary of Fairfax, with a notice pursuant to section 177 of the Act. The notice required Fairfax to produce to the ABA any documents in its possession which related to "the issue of whether Mr Kerry Packer, Publishing and Broadcasting Limited, Consolidated Press Holdings Limited or any persons associated or related to those persons has attempted to influence (or has in fact exercised direction or restraint over) any substantial issue affecting the management or affairs of John Fairfax Holdings Limited, any of its subsidiaries, *The Age* or *The Sydney Morning Herald* newspapers".

In response to the section 177 notice a number of documents were produced. The ABA also met with Ms Hambly and Mr Daniel Colson, a director of Fairfax, on 24 February 1995.

The evidence collected by the ABA indicates that any attempt by Mr Powers to have Mr Mulholland removed from his position as Managing Director and Chief Executive of Fairfax has been unsuccessful. The ABA is of the view that it cannot infer control based on an unsuccessful attempt to influence the operations of a company.

## **Information obtained from PBL, CPH, Mr Packer and associated companies**

As noted at Part 2 above, on 14 February 1995 PBL wrote to the ABA advising of the shares and Notes held by Nine and CPHM in Fairfax.

On 15 February 1995 the ABA wrote to PBL seeking details of the terms and conditions upon which the Notes held by Nine could be converted into ordinary shares in Fairfax.

On 15 February 1995 PBL forwarded to the ABA a copy of the Terms and Conditions of the Notes.

On 20 February 1995 the ABA wrote to PBL seeking further details of the company interests held by Mr Packer and his associates. This information was sought to ascertain whether Mr Packer or any associated person had or held company interests exceeding 15% in Fairfax, *The Sydney Morning Herald* or *The Age* newspapers. If Mr Packer or associates did hold greater than 15% company interests, then in the absence of proof to the contrary, he or they would be deemed to be in a position to exercise control of Fairfax (Schedule 1 subclause 6(1)).

On 22 February 1995 PBL provided details of the interests held by PBL and associated companies as at that date. These details indicated that the only change in interests held since 14 February 1995 was that Nine had increased its shareholding interests in Fairfax from 64,139,671 to 70,267,571 ordinary shares. Nine's ordinary shareholding interests in Fairfax as at 22 February 1995 therefore constituted a 9.63% shareholding interest in Fairfax.

CPHM's shareholding interest in Fairfax as at 22 February 1995 remained at 4.93%.

In its letter of 22 February 1995 PBL also referred to a number of matters which it considered relevant to the ABA's inquiry. These included the following:

- The Telegraph plc has 2 nominee directors on the board of Fairfax, including the Deputy Chairman, and is represented on the Executive Committee. Mr Conrad Black is the only non-executive director on the Executive Committee;
- Neither PBL nor any of its associates has a nominee director on the board of Fairfax, nor any representative on the Executive Committee;
- Representatives of The Telegraph plc have made statements on a number of occasions that it exercises control of the board, the company and the management of Fairfax; and
- The Chief Executive of Fairfax, Mr Mulholland, has stated publicly on at least two occasions that Mr Packer, CPH and PBL do not control Fairfax.

Mr David Barnett, Counsel acting for Mr Packer, CPH and associated companies, also responded to the ABA's inquiry by letter dated 22 February 1995, in which he advised that Mr Packer and CPH stated that they each endorsed the response given to the ABA by PBL.

### **Information obtained from the Australian Securities Commission**

Searches carried out by the ABA at the ASC indicate that at the date of this report the composition of the boards of Fairfax, John Fairfax Publications Pty Limited (publisher of *The Sydney Morning Herald*) and David Syme & Co. Limited (publisher of *The Age*) are as follows:

#### **John Fairfax Holdings Ltd**

<b>Directors</b>	<b>Date of Appointment</b>
Hon. Sir Laurence Street	23 December 1991
Daniel W Colson	15 November 1991
Matthew R Barger	8 March 1993
Hon. Conrad M Black	15 July 1991
Sir Roderick Carnegie	7 January 1992
Rt Hon. Sir Zelman Cowen	23 December 1991
David M Gonski	29 September 1993
Douglas J Halley	1 July 1994
Michael J Hoy	1 July 1992
Stephen Mulholland	25 September 1992
Andrew Turnbull	22 June 1994
Dean R Wills	4 October 1994

#### **John Fairfax Publications Pty Limited**

<b>Directors</b>	<b>Date of Appointment</b>
James D Gilbert	12 May 1994
Michael J Hoy	22 July 1992
Stephen Mulholland	9 November 1992
Doreen Wilson	20 December 1994

#### **David Syme & Co. Limited**

<b>Directors</b>	<b>Date of Appointment</b>
Michael J Hoy	28 July 1992
Stephen J Lovass	23 December 1991
Stuart A Simson	5 April 1993

## **Other information about the Fairfax Board**

Of the current board of directors of Fairfax, Mr Black and Mr Colson are nominees of Mr Black's The Telegraph plc and Sir Roderick Carnegie and Mr Barger are nominees of Hellman and Friedman.

The remaining directors of Fairfax are not nominees of any particular shareholder of Fairfax.

## **Information obtained from interested persons, bodies and groups**

A number of interested persons, bodies and groups made oral and written submissions to the ABA in order to assist it with its inquiries.

Some of these submissions contained allegations about the influence of Mr Packer and/or persons associated with Mr Packer on the board of Fairfax, editorial decisions, and staffing arrangements.

In particular the submissions included the claim that Mr David Hickie's employment as editor of *The Sydney Morning Herald* was terminated in 1994 as a result of pressure being brought to bear by associates of Mr Packer.

It was also claimed that Ms Colleen Ryan, a senior journalist with *The Sydney Morning Herald* covering the Casino Tender Inquiry, in relation to which CPH was an interested party, was summoned on several occasions to the executive floor of Fairfax to meet with Mr Hoy, allegedly following complaints from Mr Packer or an associate of Mr Packer. It was also alleged that this was evidence of Mr Packer or his associates being in a position to exercise control of *The Sydney Morning Herald*.

The submission alleged that in December 1994 Mr John Lyons, the then acting editor and two senior journalists met with Mr James Packer and Mr Powers. During the meeting Mr James Packer allegedly outlined his complaints including allegations of bias by Ms Ryan since the 1980's. It was alleged that soon afterwards another journalist replaced Ms Ryan to cover the Casino Tender Inquiry. It was also alleged that this was evidence of Mr Packer or his associates being in a position to exercise control of *The Sydney Morning Herald*.

A submission noted the allegation by Mr Mulholland that Mr Powers, the Chief Executive of CPH, sought to have him removed as Chief Executive of Fairfax.

The ABA also received a submission expressing concern that Mr Packer and Mr Conrad Black, whose shareholding interests in Fairfax total 23.41%, may have jointly agreed to control Fairfax.

Another submission was received which alleged that pressure may have been brought to bear on Mr Lyons, then acting editor of *The Sydney Morning Herald*, not to publish a story the publication of which was contrary to the interests of Mr Packer. It was suggested that this pressure may have been exerted, either indirectly or directly, by Mr Packer or persons associated with Mr Packer.

In order to encourage individuals, bodies and groups to provide any information which they consider relevant to ABA inquiries in the future the ABA has decided to keep confidential which parties provided which information.

### **Information obtained from the directors of Fairfax**

As a result of an allegation made to the ABA that there was a bloc of 3 directors on the Fairfax board who were associates of Mr Packer and had acted together in relation to matters discussed at Fairfax board meetings the ABA wrote to each of the 12 directors of Fairfax on 6 March 1995. The ABA sought from each director information and/or evidence relevant to the issue of whether or not Mr Packer or any associate of his is in a position to exercise control of Fairfax and through it, *The Sydney Morning Herald* and *The Age*.

In addition the ABA asked each director to respond to the following questions:

1. Are any other directors of Fairfax accustomed to acting in accordance with the directions, instructions or wishes of, or in concert with Mr Packer or any person associated with him?
2. If so, which directors of Fairfax?
3. Please provide details of any specific instances of which you are aware in which directors have acted in the manner referred to in question 1.

The ABA received written and/or oral responses from each of the directors.

Of the 12 directors, ten responded in the negative to question 1. outlined above.

A number of the directors took the opportunity to reject the proposition that Mr Packer is in a position to exercise control of Fairfax.

The ABA received responses from two directors who alleged that certain directors are accustomed to act in accordance with the Packer interests. The ABA sought further information regarding these allegations to ascertain whether they could be substantiated.

Neither the two directors who made the allegations nor the ABA's own inquiries have substantiated the matters raised by the two directors.



## **Information obtained from Mr John Lyons, Mr James Packer, Mr Brian Powers, Mr Stephen Mulholland and Mr Michael Hoy**

On 7 March 1995 the ABA wrote to Messrs Brian Powers, James Packer, Stephen Mulholland, Michael Hoy and John Lyons (then Deputy Editor of *The Sydney Morning Herald*) to ascertain whether the allegations which had been made in submissions to the ABA could be substantiated.

Messrs John Lyons, James Packer and Brian Powers responded by letters dated 8 March, 15 March and 16 March 1995 respectively.

Mr Mulholland and Mr Hoy elected to respond under oath and were subsequently issued notices under section 173 of the Act to appear before the ABA. The examinations took place on 8 and 9 March 1995 respectively.

Each of Messrs Powers, Packer, Lyons, Mulholland and Hoy advised the ABA that concerns raised in regard to Mr Packer's influence over editorial decisions and staffing arrangements at *The Sydney Morning Herald* were, in their view, without foundation.

Neither the responses from the parties nor the ABA's own inquiries substantiate the allegations made in submissions to the ABA.

Mr Packer and CPH or persons associated with either of those persons may have on occasion written or telephoned the editors of both *The Sydney Morning Herald* and *The Age* to register complaints of alleged inaccuracies in articles that have appeared in those newspapers. The ABA is of the view that the responses made by those newspapers in relation to such complaints do not raise the inference that Mr Packer or CPH is in a position to exercise control of those newspapers.

### **Findings**

On the basis of the information and evidence obtained by the ABA in the course of its investigation the ABA has considered the provisions of Schedule 1 Part 2 clause 3 and made the following findings:

- Neither Mr Packer nor CPH nor any associate of either is in a position to exercise control of the operations of Fairfax or the publishing companies;
- Neither Mr Packer nor CPH nor any associate of either is in a position to exercise control of the selection and/or provision of a significant proportion of the material to be published by *The Sydney Morning Herald* and *The Age*;
- Neither Mr Packer nor CPH nor any associate of either exercise in any manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of Fairfax or the publishing companies;

- Neither Mr Packer nor CPH nor any associate of either has the right to appoint a director to the board of Fairfax or the publishing companies, to veto the appointment of other directors nor the right to veto any action taken by the board of directors of Fairfax or the publishing companies;
- The boards of Fairfax and the publishing companies neither act nor are accustomed to act, in accordance with the directions, instructions or wishes of, or in concert with, Mr Packer, CPH or any associates of either Mr Packer or CPH.

On the basis of these findings the ABA is satisfied that neither Mr Packer nor CPH nor any associate of either is in a position to exercise control of Fairfax, the publishing companies, *The Sydney Morning Herald* or *The Age* as a result of the application of Schedule 1 Part 2 clause 2 or 3.

### **3.2.2 Company Interests held by Mr Packer and CPH in Fairfax**

The ABA has examined the extent to which Mr Packer and/or CPH have company interests in Fairfax by virtue of any shareholding interests, voting interests, dividend interests and winding-up interests held by Mr Packer, CPH and associated companies.

The method used to assess these company interests is set out in Appendix B.

The ABA has found that Mr Packer and CPH have the following types of company interests in Fairfax:

<b>Type</b>	<b>Level</b>
Shareholding interests	9.33%
Voting interests	17.17%
Dividend interests	9.33%
Winding-up interests	10.32%

Where a person has two or more types of company interest, the Act treats the person's relevant company interest to be the company interest which confers the greatest percentage (section 6). The Act does not permit the accumulation of two or more different types of company interests.

The ABA has found that, as at the date of this Report and on the basis of the information available to it, the voting interests of 17.17% comprise the greatest percentage of the various company interests which Mr Packer and CPH have in Fairfax.

### 3.2.3 The operation of Schedule 1 clause 6

Schedule 1 clause 6 provides that if a person has company interests in a company exceeding 15%, the person is, in the absence of proof to the contrary, to be regarded as being in a position to exercise control of the company.

As the ABA has found that Mr Packer and CPH have company interests of 17.17% in Fairfax, Mr Packer and CPH are therefore to be regarded as being in a position to exercise control of Fairfax unless there is proof to the contrary.

#### Proof to the Contrary

The ABA has considered whether there is proof that neither Mr Packer nor CPH is in a position to exercise control of Fairfax for the purposes of rebutting the presumption raised by Schedule 1 subclause 6(1).

On the basis of the information and evidence obtained by the ABA in the course of its investigation and with particular regard to its findings in relation to Schedule 1 clauses 2 and 3, the ABA is satisfied that neither Mr Packer nor CPH is in a position to exercise control of Fairfax, *The Sydney Morning Herald* or *The Age*.

The ABA also notes that the other major shareholders in Fairfax as at 28 February 1995 are:

Shareholder	% Shareholding
Vanderkneep Holdings BV and associates	23.41
National Nominees Ltd	3.94
Chase Manhattan Nominees Ltd	3.72
Australian Mutual Provident Society	3.69
Westpac Custodian Nominees Ltd	3.66
ANZ Nominees Ltd	2.55

Vanderkneep Holdings BV, a company associated with Mr Black, also holds 20,734,360 Fairfax Convertible Notes.

#### Findings

The ABA finds that, as at the date of this Report, Mr Packer and CPH have company interests in Fairfax of 17.17%. However, the ABA is satisfied that in all of the circumstances, neither Mr Packer nor CPH is in a position to exercise control of Fairfax, rebutting the presumption raised by Schedule 1 subclause 6(1).

## **PART 4**

### **Conclusion**

The ABA has found that, as at the date of this report, neither Mr Packer, CPH nor any associate of either is in a position to exercise control of Fairfax, *The Sydney Morning Herald* or *The Age* newspapers as a result of the operation of Schedule 1 of the Act.

Accordingly, the ABA has found that neither Mr Packer, CPH nor any associated company is in breach of paragraph 60(b) of the Act.

However, in accordance with its statutory duty, the ABA will continue to monitor developments closely, to ensure that in all the circumstances, no person is in breach of the cross-media control provisions of the Act<sup>1</sup>.

24 April 1995

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<sup>1</sup> One of the ABA's functions is to monitor and to report to the minister on the operation of the Act.

The ABA will continue to monitor the operation of the cross-media rules to ensure that the rules operate in accordance with Parliament's intention and will report to the Minister as appropriate.

## **APPENDICES**

## **APPENDIX A**

### **EXTRACTS FROM SCHEDULE 1 OF THE BROADCASTING SERVICES ACT 1992**

#### **PART 2-WHEN PERSON IS IN A POSITION TO EXERCISE CONTROL**

##### **When person is in a position to exercise control**

**2.(1)** For the purposes of this Schedule, a person is in a position to exercise control of a licence or a company if:

- (a) the person, either alone or together with an associate of the person, is in a position to exercise control of the licensee or the company; or
- (b) in the case of a licence:
  - (i) the person is the licensee; or
  - (ii) the person, either alone or together with an associate of the person, is in a position to exercise (whether directly or indirectly) control of the selection or provision of a significant proportion of the programs broadcast by the licensee; or
  - (iii) the person, either alone or together with an associate of the person, is in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of the licensee in providing broadcasting services under the licence; or
- (c) in the case of a non-licensee company--the person, either alone or together with an associate of the person, is in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of the company; or
- (d) the person, either alone or together with an associate of the person, is in a position to:
  - (i) veto any action taken by the board of directors of the licensee or the company; or
  - (ii) appoint or secure the appointment of, or veto the appointment of, at least half of the board of directors of the licensee or the company; or
  - (iii) exercise, in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the licensee or the company; or

- (e) the licensee or the company or more than 50% of its directors:
  - (i) act, or are accustomed to act; or
  - (ii) under a contract or an arrangement or understanding (whether formal or informal) are intended or expected to act;

in accordance with the directions, instructions or wishes of, or in concert with, the person or of the person and an associate of the person acting together or, if the person is a company, of the directors of the person.

(2) Paragraph (1)(b) does not apply to the provision of programs by a person to a licensee under an agreement for the supply of programs to a licensee if the conditions of the agreement relate only to the programs so supplied or their promotion.

(3) An employee of a licensee or of a non-licensee company is not, except through an association with another person, to be regarded as being in a position to exercise control of a licence or a company under subclause (1) purely because of being an employee.

(4) More than one person may be in a position to exercise control of a licence or a company.

### **When person is in a position to exercise control of a newspaper**

**3.(1)** For the purposes of this Schedule, a person is in a position to exercise control of a newspaper if:

- (a) the person is the publisher of the newspaper; or
- (b) the person is in a position, either alone or together with an associate of the person and whether directly or indirectly:
  - (i) to exercise control of a significant proportion of the operations of the publisher in publishing the newspaper; or
  - (ii) to exercise control of the selection or provision of a significant proportion of the material to be published in the newspaper; or
- (c) if the newspaper is published by a company:
  - (i) the person is in a position, either alone or together with an associate of the person, to exercise control of the company; or
  - (ii) the person, either alone or together with an associate of the person, is in a position to veto any action taken by the board of directors of the company; or

- (iii) the person, either alone or together with an associate of the person, is in a position to appoint or secure the appointment of, or veto the appointment of, at least half of the board of directors of the company; or
- (iv) the person, either alone or together with an associate of the person, is in a position to exercise, in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the company; or
- (v) the company or more than 50% of its directors:
  - (A) act, or are accustomed to act; or
  - (B) under a contract or an arrangement or understanding (whether formal or informal) are intended or expected to act;

in accordance with the directions, instructions or wishes of, or in concert with, the person or of the person and an associate of the person acting together or, if the person is a company, of the directors of the person.

(2) Subparagraph (1)(b)(ii) does not apply to the provision of material by a person to a newspaper under an agreement for the supply of material of that kind if the conditions of the agreement relate only to the material so supplied.

(3) An employee of the publisher of a newspaper is not, except through an association with another person, to be regarded as being in a position to control the newspaper under subclause (1) purely because of being an employee.



## **APPENDIX B**

### **Assessment of “company interests”**

#### **Introduction**

A person may be in a position to exercise control of a company as a result of having company interests.

Section 6 of the Act defines company interests as follows:

““company interests”, in relation to a person who has a shareholding interest, a voting interest, a dividend interest or a winding-up interest in a company, means the percentage of that interest or, if the person has 2 or more of those interests, whichever of those interests has the greater or greatest percentage”

In order to ascertain the company interests of Mr Packer and CPH in Fairfax the ABA assessed each of the various company interests held by Mr Packer and CPH and then determined which confers the greatest interest.

#### **The shareholding interests of Mr Packer and CPH in Fairfax**

Subsection 8 (1) of the Act defines a shareholding interest as follows:

- (a) a person has a shareholding interest in a company if the person is beneficially entitled to, or to an interest in, shares in the company, whether or not any part of the legal ownership of the shares is vested in the person; and
- (b) the percentage of the interest is the value of the shares, or of the interest in the shares, as the case may be, on the basis that the value of the shares is equal to the amount paid on the shares, expressed as a percentage of the total of all amounts paid on shares in the company.

In determining the total shareholding interests of Mr Packer and CPH in Fairfax it is necessary to consider any shareholding interests held directly by Mr Packer and CPH, and also any shareholding interests which are held by companies in which Mr Packer and CPH hold company interests.

#### **Shareholding interests held by Mr Packer and CPH in Fairfax**

Neither Mr Packer nor CPH has what may be described as direct shareholding interests (as distinct from any traced shareholding interests) in Fairfax.

## **Shareholding interests of Companies in which Mr Packer and CPH hold company interests**

Mr Packer and CPH have company interests in Nine and CPHM, both of which have shareholding interests in Fairfax.

### **Shareholding Interests Held Through Nine**

Nine holds 9.63% of the ordinary shares in Fairfax. This gives Nine a shareholding interest of 9.63% in Fairfax.

Clause 8 of Schedule 1 of the Act provides that the company interests of a person through a chain of companies can be calculated using the fractional tracing method.

This method is best demonstrated by example:

A Person has 30% of the company interests in Company A

Company A has 10% of the company interests in Company B

The fractional tracing method calculates the Person's company interests in Company B by multiplying the Person's company interests in Company A, expressed as the fraction  $\frac{30}{100}$ , by Company A's company interests in Company B, expressed as the fraction  $\frac{10}{100}$ .

As  $\frac{30}{100} \times \frac{10}{100}$  produces the figure 3%, the Person's company interests in Company B are 3%.

The fractional tracing method therefore calculates Mr Packer's shareholding interests in Nine by multiplying Mr Packer's shareholding interests in CPH, expressed as the fraction  $\frac{100}{100}$ , by CPH's shareholding interests in PBL, expressed as the fraction  $\frac{45.7}{100}$ , by PBL's shareholding interests in Nine, expressed at the fraction  $\frac{100}{100}$ , by Nine's shareholding interests in Fairfax, expressed as the fraction  $\frac{9.63}{100}$ .

Thus:

$$\frac{100}{100} \times \frac{45.7}{100} \times \frac{100}{100} \times \frac{9.63}{100} = 4.40\%$$

The ABA has found that Mr Packer and CPH have shareholding interests, traced through Nine, of 4.40% in Fairfax.

## Shareholding Interests of CPHM

CPHM holds 4.93% of the ordinary shares in Fairfax.

As Mr Packer and CPH hold 100% of the shareholding interests in CPHM, and CPHM has 4.93% of the shareholding interests in Fairfax, the ABA has found that Mr Packer and CPH have shareholding interests, through CPHM, of 4.93% in Fairfax.

## Findings

The ABA has found that Mr Packer and CPH have a total shareholding interest of 9.33% in Fairfax as a result of their shareholding interests of 4.40% through Nine and 4.93% through CPHM.

## The voting interests of Mr Packer and CPH in Fairfax

In order to determine the voting interests held by Mr Packer and CPH in Fairfax it is necessary to consider the voting interests of the companies which Mr Packer or CPH control.

Mr Packer and CPH control Nine and CPHM, both of which have voting interests in Fairfax.

## Voting Interests

Voting interests are defined in subsection 8(2) as follows:

(2) For the purposes of this Act:

(a) a person has a voting interest in a company if the person is **in a position to exercise control of votes** cast on a poll at a meeting of the company; and

(b) the percentage of the interest is the greatest percentage of the number of votes, expressed as a percentage of the total number of votes that could be cast on any issue at a meeting of the company, the casting of which the person is in a position to control.

[bold added]

The Full Court of the Supreme Court of Victoria held in *Equiticorp Industries Ltd v ACI International Ltd* [1987] VR 485 at 489 that a person would be in “a position to control” a particular level of voting power where that person has “an enforceable and presently immediately existing right enabling the voting power to be controlled.”

### **What are the voting interests of CPHM?**

CPHM holds 4.93% of the ordinary shares of Fairfax. It does not hold any Convertible Notes in Fairfax.

The ABA has found that CPHM has voting interests of 4.93% in Fairfax.

As Mr Packer and CPH control CPHM the ABA has found that Mr Packer and CPH have voting interests of 4.93% in Fairfax through CPH Management.

### **What are the voting interests of Nine in Fairfax?**

As discussed at 3.1 of the Report, the ABA has found that Mr Packer and CPH control CPHM and Nine.

As CPHM and Nine hold 4.93% and 9.63% respectively of the issued share capital of Fairfax, and these shares confer voting interests, the ABA has found that Mr Packer and CPH is in a position to exercise control of these votes giving Mr Packer and CPH voting interests of 14.56%.

Nine also holds 29,500,000 of a total of 60,485,310 Notes in Fairfax on issue. In certain circumstances Nine may convert the Notes into fully paid shares.

In order to calculate the total voting interests held by Mr Packer and CPH in Fairfax it is necessary to determine whether the Notes held by Nine constitute voting interests.

### **Nine’s right to the conversion of Notes in Fairfax**

In determining whether the Notes constitute voting interests it is important to note that the right to vote attaches to a share, not to a Note. Nine can only validly cast votes at a Fairfax general meeting if the Notes are effectively converted into shares.

The Notes will therefore only give Nine a voting interest where Nine has an enforceable, present and immediately existing right to convert the Notes into shares.

Nine’s right to convert the Notes into shares is governed by the Terms and Conditions of Issue of the Convertible Notes (the Terms and Conditions).

The relevant sections of the Terms and Conditions are clauses 8 and 9. These provide as follows:

#### 8. Conversion

- (a) It is a condition precedent both to the coming into being of conversion rights and their exercise (but otherwise with all adjustments and rights as hereinafter provided), that a Conversion Notice be first delivered as hereinafter provided with accompanying Statutory Declaration, correct in all particulars in the form attached in Schedule 1 on behalf of the Noteholder but so that if assignment is proposed followed by conversion, by or on behalf of the relevant permitted assign, then the conversion rights only arise immediately after completion of such assignment and the statutory declaration and conversion notice shall apply to such permitted assign.

#### 9. Compliance with law

- (a) **A Noteholder must not convert** on its or its nominee's behalf any of its Notes and **no such purported conversion shall have any effect** unless:
  - (1) ...
  - (2) the conversion is not in breach of and does not cause the Issuer or its affiliates to be in breach of:
    - (A) ...
    - (B) ...
    - (C) any other applicable law including, without limitation, and without being limited by the foregoing, the Broadcasting Act 1942.
- (b) For the purposes of clause 9(a) references to the Broadcasting Act ... shall mean the relevant act as it may be amended or modified or replaced by another act dealing with similar subject matter.
- (c) The Noteholder acknowledges that no conversion rights come into being prior to satisfaction of the condition precedent set out in clause 8(a) hereof.

[bold added]

The effect of these provisions is that Nine's right to have the Notes converted to fully paid shares and thus acquire voting interests in Fairfax is subject to the proviso that the conversion will not result in a breach of the Act. Significantly, any purported conversion which actually results in a breach will have no effect.

## **Will conversion of the Notes result in a breach of the Act?**

To determine whether the Notes are convertible at any given time it is necessary, hypothetically, to convert them and determine whether they will result in voting interests which would place Mr Packer and CPH in control of both Fairfax and the Nine licences in breach of section 60 of the Act.

If there will be a breach of the Act then the Notes may not be converted. If there will not be a breach of the Act then the Notes may be converted, and would then give rise to immediate and present and existing voting interests.

It can be seen that there is an element of circularity of this process.

Applying the hypothetical test to the Notes the ABA has found that if all the Notes in Fairfax were converted Mr Packer and CPH would have total voting interests of 17.17% in Fairfax. This is made up of voting interests conferred by Nine's shares and Notes of 12.62% and CPHM's voting interest of 4.55%.

Subclause 6 (1) of Schedule 1 of the Act deems a person to be in control of a company where the person has company interests in that company which exceed 15%.

However, this presumption may be rebutted by proof to the contrary.

The ABA has considered the information and evidence obtained in the course of its investigation and discussed in the Report and is satisfied that, at the present time, Mr Packer and CPH would not be in a position to exercise control of Fairfax were the Notes converted to shares.

In these circumstances, the Notes can be validly converted and thus Nine has a present and existing voting interest of 12.62% in Fairfax by virtue of the Notes and shares held by it.

The ABA finds that Mr Packer and CPH are in a position to control 12.62% of the voting interests in Fairfax through Nine.

CPHM has a shareholding interest in Fairfax of 4.93%. If all the Notes in Fairfax were converted into shares the voting interests of CPHM would be 4.55% as the total number of shares in Fairfax on issue would increase from 730,013,166 to 790,498,476 following conversion.

## **Right to convert may be lost**

It is important to note that even though the Notes may be converted at this time, giving rise to present and existing voting interests, the right to convert may be lost in different circumstances where the conversion of the Notes would result in a breach of the Act.

## **Findings**

The ABA has formed the view that Mr Packer and CPH have voting interests in Fairfax of 12.62% based on its control of PBL which in turn controls Nine.

The ABA has also found that Mr Packer and CPH has a voting interest of 4.55% in Fairfax through CPHM.

The ABA has found that by virtue of its interests in Nine and CPHM, Mr Packer and CPH have a total voting interest in Fairfax of 17.17%.

## **The dividend interests held by Mr Packer and CPH in Fairfax**

Subsection 8(3) of the Act defines a dividend interest as follows:

(a) a person has a dividend interest in a company if:

(i) the person is, or would become if a dividend were declared, beneficially entitled to be paid or credited a dividend by the company; or

(ii) under the memorandum and articles of association of the company, a share of any profits of the company is to be, or may be, paid or credited to the person otherwise than as dividends on shares; and

(b) the percentage of the interest is:

(i) if subparagraph (a)(i) applies - the amount of the dividend to which the person is beneficially entitled or will become beneficially entitled expressed as a percentage of the total of all dividends to which members of the company become entitled at that time; or

(ii) if subparagraph (a)(ii) applies - the amount of the maximum share of any profits of the company that could be paid or credited to the person at a particular time expressed as a percentage of the total of all shares of profits that could be paid or credited to all members of the company at that time.

The Memorandum and Articles of Association of Fairfax provide for the declaration and payment of dividends “*in proportion to the amounts credited as paid on the shares*” during the period in respect of which the dividend is paid.

As a person's entitlement to a dividend in Fairfax is based on the amount credited as paid on shares and as all the ordinary shares in Fairfax have been fully paid up the dividend interests of Mr Packer and CPH in Fairfax are identical to their shareholding interests calculated at 3.2.3.

## **Findings**

The ABA has found that the dividend interests of Mr Packer and CPH in Fairfax is 9.33% as a result of the traced shareholding interests through Nine (4.40%) and the control of CPHM (4.93%).

## **The winding-up interests held by Mr Packer and CPH in Fairfax**

Subsection 8(4) of the Act defines a winding-up interest as follows:

(a) a person has a winding-up interest in a company if the person would be entitled to a share of the property of the company that could be distributed among members of the company if property of the company were distributed among members, whether as a result of a winding-up or otherwise; and

(b) the percentage of the interest is the percentage that the value of that part of the property of the company to which the person would be so entitled bears to the total value of the property of the company.

In order to determine the winding-up interests held by Mr Packer and CPH in Fairfax it is necessary to consider the winding-up interests of those companies in which Mr Packer or CPH have an interest.

Packer and CPH control Nine and CPHM, both of which have winding-up interests in Fairfax.

## **What are the winding-up interests of Nine in Fairfax?**

Nine has winding-up interests in Fairfax by virtue of its 9.63% shareholding.

On the question of whether Nine also has winding-up interests in Fairfax by virtue of its Convertible Notes the ABA sought the advice of the Office of General Counsel of the Attorney General's Department (OGC).

OGC advised that it is probable that the Notes do fall within the definition of winding-up interests and are therefore company interests for the purposes of the Act.



Counsel also indicated that:

“... if the Notes are a winding-up interest, and therefore a company interest for the purposes of the Act, the size of the interest may be added to the size of any other company interest the Note Holder may have in the Issuer (say for example, if the Note Holder held other winding-up interests in the Issuer by reason of holding shares in the Issuer).”

On the basis of this advice the ABA calculated the winding-up interests held by Mr Packer and his related companies in Fairfax based on the shareholdings and Convertible Notes held by Nine and CPHM in Fairfax.

The ABA has found that PBL has a winding-up interest by way of Nine’s shareholding in Fairfax of 70,267,571 ordinary shares plus its 29,500,000 Convertible Notes.

Therefore PBL’s winding-up interest in Fairfax is 12.62%, made up of 99,767,571 ordinary shares and convertible notes out of a total of 790,498,476 ordinary shares and convertible notes in Fairfax.

Clause 8 of Schedule 1 of the Act provides that company interests of a person through a broken chain of companies can be calculated using the fractional tracing method.

The fractional tracing method calculates Mr Packer and CPH’s winding-up interests in Fairfax by multiplying Mr Packer’s winding-up interests in CPH, expressed as the fraction  $\frac{100}{100}$ , by CPH’s winding-up interest in PBL, expressed as the fraction  $\frac{45.7}{100}$ , by PBL’s winding-up interests in Nine, expressed as the fraction  $\frac{100}{100}$ , by Nine’s winding-up interests in Fairfax, expressed as the fraction  $\frac{12.62}{100}$ .

Thus:

$$\frac{100}{100} \times \frac{45.7}{100} \times \frac{100}{100} \times \frac{12.62}{100} = 5.77\%$$

The ABA has found that the winding-up interests of Packer and CPH in Fairfax through Nine is 5.77%.

### **Winding-up interests in Fairfax held by CPHM**

CPHM holds a winding-up interest of 4.55% in Fairfax by virtue of its shareholding interests of 4.93%. As CPH controls CPHM as a result of its 100% shareholding interest the ABA has found that the winding-up interests of Mr Packer and CPH in Fairfax through CPHM is 4.55%.

### **Findings**

The ABA found that the total winding-up interests of Mr Packer and CPH in Fairfax is 10.32%, being 5.77% through Nine and 4.55% through CPHM.