

INVESTIGATION INTO CONTROL

Mr Brian Powers, Mr Kerry Packer and
Mr James Packer/
John Fairfax Holdings Limited

A report on the Australian Broadcasting Authority's investigation into whether Mr Brian Powers, Mr Kerry Packer, Mr James Packer, Publishing and Broadcasting Limited, Consolidated Press Holdings Limited or any related or associated persons have since 17 May 1998 committed any breaches of a provision in Division 5, 6 or 7 of Part 5 of the *Broadcasting Services Act 1992*.

Australian Broadcasting Authority

Sydney, NSW

March 1999

0 642 27028 7

© Commonwealth of Australia 1999

This work is copyright. Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the *Copyright Act 1968*, no part may be reproduced or transmitted, in any form, or by any means or process, without the written permission of the publisher.

Published by

Australian Broadcasting Authority
201 Sussex Street
Sydney NSW 2000

Printed by Kwik Kopy, Sydney

CONTENTS

CONTENTS	III
TABLE OF FIGURES	IX
TABLE OF CASES	IX
COMMON ABBREVIATIONS	X
ALPHABETICAL LISTING OF RELEVANT PERSONS AND COMPANIES	XI
EXECUTIVE SUMMARY	XIV
Introduction	xiv
Legal Framework	xiv
Key Events as Revealed by Investigation	xv
Is Mr Powers an Associate of the Packer Interests in Relation to Fairfax?	xv
Analysis of Evidence	xvi
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	xviii
Persons are not associates if the ABA is satisfied that ... 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	xviii
Associate Conclusion	xix
Are Any Other Fairfax Directors Associates of the Packer Interests in Relation to Fairfax?	xix
Is Mr Powers in a Position to Exercise Control of Fairfax?	xix
Other Findings	xx
Conclusion	xx
1. INTRODUCTION	1
1.1. Terms of reference	1
1.2. Investigation Process	1
1.2.1. Documents Produced	1
1.2.2. Examinations Under Oath	2
1.2.3. Public Hearing	3
1.2.4. Comment from Mr Powers and the Packer Interests on the Report	3
2. KEY EVENTS AS REVEALED BY INVESTIGATION	4
2.1. Formation of the FXF Trust	4

2.2.	Transfer of units in the FXF Trust from CPH to Mr Powers	5
2.3.	Appointment of Mr Powers to the Board of Fairfax	5
2.4.	Dismissal of Mr Alexander	5
2.5.	Appointment of Mr Powers as Chairman of Board of Fairfax	6
2.6.	The bid by Fairfax for Federal Capital Press (FCP)	6
2.7.	The Budget of Fairfax	6
2.8.	Staff Hiring Freeze	6
2.9.	Project Hercules (Review Process)	7
2.10.	Meetings Between Fairfax, Nine and PBL Online to Discuss Possible Online Alliance	7
2.11.	Resignation of Mr Muscat, CEO of Fairfax	8
3.	LEGAL FRAMEWORK AND FINDINGS ON NEWSPAPERS ASSOCIATED WITH LICENCE AREAS OF COMMERCIAL TELEVISION BROADCASTING LICENCES	9
3.1.	A Commercial Television Broadcasting Licence	9
3.2.	A Newspaper that is Associated with the Licence Area of the Licence	9
3.3.	In a Position to Exercise Control – Together With An Associate	10
3.3.1.	‘Together With’	10
3.4.	Findings	12
4.	ASSOCIATE RELATIONSHIP BETWEEN MR POWERS AND THE PACKER INTERESTS	13
4.1.	Legal Framework – Associates	13
4.1.1.	Joint Action: Scope of ‘Directions’, ‘Instructions’, ‘Wishes’ and ‘Acting in Concert’	14
4.1.1.1.	The Relationship Between Joint Action and a Director’s Fiduciary and Other Obligations	14
4.1.2.	Is Accustomed to Act	15
4.1.3.	The Exempting Provision	15
4.2.	The Packer Interests’ Ambitions for Fairfax	16
4.3.	Past Relationship between Mr Powers and Messrs Kerry and James Packer and CPH	17
4.3.1.	The Years Prior to 1991	17
4.3.2.	The Years Between 1991 and 1994	17
4.3.3.	The Years Between 1995 and 1998	18
4.3.3.1.	Events in 1995	18
4.3.3.2.	Events in 1996	19
4.3.3.3.	Events in 1997	19
4.3.3.4.	Events in 1998	19
4.3.3.4.1.	March 1998	19
4.3.3.4.2.	May 1998	20
4.3.4.	Findings of Fact	20

4.4. Circumstances surrounding the Appointment of Mr Powers to the Board of Fairfax by the FXF Trust	21
4.4.1. Finding	24
4.4.2. Transfer of units in the FXF Trust from CPH to Mr Powers and Arrangements For Finance of That Transfer	24
4.4.2.1. Finding	26
4.5. Mr Powers' relationship with The Packer Interests Since 18 May 1998	26
4.5.1. Consultancy Agreement	26
4.5.1.1. Terms of Agreement	26
4.5.1.2. Work Done Pursuant to Consultancy Agreement	27
4.5.1.3. Termination of Consultancy Agreement	28
4.5.1.4. Findings	28
4.5.2. New Regency Inc	28
4.5.2.1. Findings	30
4.5.3. Continuing Benefits Provided to Mr Powers by CPH	30
4.5.3.1. House	30
4.5.3.2. Secretarial Services	31
4.5.3.3. Mobile Phone	31
4.5.3.4. Sporting Club Memberships	31
4.5.3.5. Status Of These Arrangements	32
4.5.4. Nature of the relationship between Mr Powers and Messrs Kerry and James Packer	33
4.5.4.1. Mr Powers' Duties To Fairfax And The FXF Trust	35
4.6. Contact Between Mr Powers and The Packer Interests in Relation to Fairfax Since 18 May 1998	36
4.6.1. Meetings About On-Line Strategies	36
4.6.2. Lunch at Fairfax	38
4.6.3. Other Contact	40
4.7. Analysis	41
4.7.1. Is There a Prima Facie Associate Relationship?	41
4.7.2. Does the Exempting Provision Apply?	45
4.7.2.1. First Limb — Is the ABA Satisfied that Mr Powers and the Packer Interests do not Act Together in Any Relevant Dealings Relating to Fairfax?	45
4.7.2.2. Second Limb — Is the ABA Also Satisfied That Neither of Mr Powers nor any of the Packer Interests is in a Position to Exert Influence Over the Business Dealings of the Other in Relation to Fairfax?	46
4.8. Associateship And Control	47
5. ASSOCIATE RELATIONSHIP BETWEEN OTHER FAIRFAX DIRECTORS AND THE PACKER INTERESTS	49
5.1. Is Mr Gonski an Associate of the Packer Interests?	49
5.1.1. Relationship Between Mr Gonski and the Packer Interests	49
5.1.1.1. Other Matters	50
5.1.1.2. Findings	50
5.1.2. Analysis	51
5.1.3. Exempting Provision	51
5.1.3.1. First Limb — Is the ABA Satisfied that Mr Gonski and the Packer Interests do not Act Together in Any Relevant Dealings Relating to Fairfax?	51
5.1.3.1.1. Finding	52
5.1.3.2. Second Limb — Is the ABA Also Satisfied That Neither of Mr Gonski nor Any of the Packer Interests is in a Position to Exert Influence Over the Business Dealings of the Other in Relation to Fairfax?	52
5.1.3.2.1. Finding	52

5.1.4.	Conclusion	52
5.1.5.	Finding	53
5.2.	Is Sir Roderick Carnegie an Associate of The Packer Interests?	53
5.2.1.	Findings	53
5.3.	Is Mr Greaves an Associate of the Packer Interests?	53
5.3.1.	Findings	54
6.	IS MR POWERS IN A POSITION TO EXERCISE CONTROL OF FAIRFAX?	56
6.1.	Legal Framework – In a Position to Exercise Control	56
6.1.1.	‘Substantial Issue Affecting the Management or Affairs’	57
6.1.2.	‘Affairs of the Company’	57
6.1.3.	More Than One Person May be in a Position to Exercise Control	58
6.1.4.	The Role of a Chairman and the Question of Being in a Position to Exercise Control	58
6.1.4.1.	The Powers of A Chairman According to General Law	58
6.1.4.2.	The Powers of A Chairman of Fairfax, Under Fairfax’s Articles	59
6.1.4.3.	The Relationship Between Being in a Position to Exercise Control and a Director or Chairman’s Fiduciary and Other Obligations	59
6.1.4.4.	Role of Chairman Other Than Strictly as A Matter of Law	60
6.2.	The Operation of the Board of Fairfax	61
6.2.1.	Intention of Mr Powers on Appointment to the Board of Fairfax and as Chairman of Fairfax	62
6.2.2.	Attitude of Other Board Members Regarding Mr Powers’ Appointment to Fairfax and Appointment as Chairman of Fairfax	62
6.2.3.	Role of Board Sub-committees and the Involvement of Mr Powers in Board Sub-committees	63
6.2.3.1.	The Strategy Review Committee	63
6.2.3.2.	The Nomination Committee	63
6.2.3.3.	The Finance and Audit Committee	64
6.2.3.4.	The Remuneration Committee	64
6.2.4.	Findings	65
6.3.	Role of Mr Powers in Fairfax	65
6.3.1.	Mr Powers’ Role As Chairman	65
6.3.1.1.	The Role of Mr Powers as Chairman in Reviewing Board Papers and the Role of the Chief Executive Officer	67
6.3.1.2.	Finding	69
6.3.2.	Dismissal of Mr Alexander	69
6.3.2.1.	Finding	70
6.3.3.	The Promotion of Australian Consolidated Press Magazines in <i>The Sun Herald</i>	70
6.3.3.1.	Finding	70
6.3.4.	The Bid by Fairfax for Federal Capital Press (FCP)	71
6.3.4.1.	Findings	73
6.3.5.	The Budget of Fairfax	73
6.3.5.1.	The Decision to Aim for a Zero Cost Increase in the Budget	73
6.3.5.1.1.	Findings	74
6.3.5.2.	Treatment of Abnormal Expenses	74
6.3.5.3.	Staff Hiring Freeze	74
6.3.5.3.1.	Findings	75
6.3.6.	Project Hercules (Review Process)	76
6.3.7.	Meetings Between Fairfax, Nine And PBL Online To Discuss Possible Online Alliance	76
6.3.8.	Editorial Decision Making	79
6.3.9.	Resignation of Mr Muscat, CEO of Fairfax	80
6.3.9.1.	Finding	80
6.3.10.	Findings	81

6.4.	Conclusion On Section 6	81
6.4.1.	Findings	83
7.	CONTROL OF THE NINE NETWORK LICENCES	84
7.1.	Are Messrs Kerry Or James Packer, CPH Or PBL In A Position To Exercise Control Of The Nine Network Licences?	84
7.1.1.	Findings	85
7.2.	Is Mr Powers in a Position to Exercise Control of the Nine Network Licences?	86
7.2.1.	Finding	86
8.	CROSS MEDIA DIRECTORSHIPS	88
8.1.	Subsections 61(1) And (4) Of The Act	88
8.1.1.	Findings	90
8.2.	Subsection 61(2) Of The Act	90
8.2.1.	Findings	91
9.	MR KERRY PACKER AND CPH'S COMPANY INTERESTS IN FAIRFAX	92
9.1.	Mr Kerry Packer's Company Interests In CPH	92
9.2.	CPH's Company Interests In Fairfax	92
9.2.1.	Shareholding Interests in Fairfax	92
9.2.2.	Voting Interests in Fairfax	93
9.2.2.1.	Finding	95
9.2.3.	Bankers Trust and Tyndall Voting Restrictions in Fairfax	95
9.2.3.1.	Analysis	96
9.3.	Findings	96
10.	CONCLUSION	98
10.1.	Findings Re: Control Of Commercial Television Broadcasting Licences With Call Signs GTV And TCN	98
10.2.	Findings Re: Control Of The Sydney Morning Herald And The Age	99
APPENDIX 1.	CHRONOLOGY	101
APPENDIX 2.	CLAUSES 2 AND 3 OF SCHEDULE 1 TO THE ACT	107
APPENDIX 3.	COMPANY STRUCTURE CHARTS – NINE NETWORK LICENCES	109
APPENDIX 4.	COMPANY STRUCTURE CHART – JOHN FAIRFAX HOLDINGS LIMITED	111
APPENDIX 5.	STRUCTURE CHART OF FFX TRUST	112

TABLE OF FIGURES

Figure 1: Simplified shareholding and directors of New Regency Inc. as at 19 October 1998.	29
Figure 2: Simplified structure of company interests in the Nine Network Licences.	84
Figure 3: Simplified Chart of Mr Kerry Packer's company interests in CPH.	92
Figure 4: Structure of the FXF Trust's Holdings in Fairfax.	93
Figure 5: Structure of Control of the Nine Network Licences below PBL.	109
Figure 6: Structure of Mr Kerry Packer's Company Interests above PBL.	110
Figure 7: Structure of company interests of Fairfax.	111
Figure 8: Structure of the FXF Trust.	112
Figure 9: Structure of Mr Kerry Packer's unitholding in the FXF Trust.	113

Note: All charts are as at 24 August 1998 unless otherwise indicated.

TABLE OF CASES

Adsteam Building Industries Pty Limited v Queensland Cement and Lime Co. Limited (1984) 2 ACLC 829	16
Australian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia (1991) 104 ALR 199.....	16
AWA Limited v Daniels t/a Deloitte Haskins & Sells (1992) 9 ACSR 759	70, 98
Bond Corporation Holdings Limited v Sulan (1990) 3 WAR 49	69
Canwest Global Communications Corporation v ABA (1997) 71 FCR 485	67, 72, 110
Hely Hutchinson v Brayhead [1968] 1 QB 549	70
Hughes v NM Superannuation Pty Limited (1993) 29 NSWLR 653	70
Re Application of News Corporation Limited (1987) 15 FCR 227.....	17, 42, 67, 68, 69, 70, 71, 72, 110
Re Broadcasting Station 2GB Pty Limited [1964-1965] NSWLR 1648.....	17, 72
Standard Chartered Bank of Australia Limited v Antico (1995) 38 NSWLR 290.....	111
State Bank of Victoria v Parry (1990) 2 ACSR 15	70

COMMON ABBREVIATIONS

ABA	Australian Broadcasting Authority
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
BIL	Brierley Investments Limited
CEO	Chief Executive Officer
CPH	Consolidated Press Holdings Limited
CPH Group	Consolidated Press Holdings Limited; Australian Financial Times Pty Limited; Cairnton Holdings Limited; Cairnton Pty Limited; Cairnton Holdings Pty Limited; CPH Property Pty Limited; Consolidated Press International Holdings Limited; Consolidated Custodians International Limited; Consolidated Custodians Pty Limited; CPH Management Limited; Lenvoka Pty Limited; Manden Productions Pty Limited; Murray Leisure Group Limited; Natary Pty Limited; Publishing and Broadcasting Limited; Television Corporation of Australia Pty Limited; and related corporate entities
Daily Telegraph	Daily Telegraph plc
Fairfax	John Fairfax Holdings Limited
FCP	Federal Capital Press
PBL	Publishing and Broadcasting Limited
SMH	<i>The Sydney Morning Herald</i>
The Act	<i>The Broadcasting Services Act 1992</i>
The Nine Network Licences	TCN, GTV, QTQ, NTD
The Nine Network Licensee	TCN Channel Nine Pty Limited; General Television Corporation Pty Limited; Queensland Television Limited; and Territory Television Pty Limited
The Packer Interests	Mr Kerry Packer; Mr James Packer; and the CPH Group

ALPHABETICAL LISTING OF RELEVANT PERSONS AND COMPANIES

1. Mr John Alexander – former Editor-in-Chief of the *Sydney Morning Herald*;
2. Mr John Atanaskovic – Partner, Atanaskovic Hartnell (solicitors);
3. Brierley Investments Limited – significant shareholder of Fairfax until February 1999;
4. Mr Mark Burrows – Director of Fairfax;
5. Consolidated Press Holdings Limited – a company controlled by Mr Kerry Packer and a controller of the Nine Network Licences;
6. Sir Roderick Carnegie – Director of Fairfax;
7. Mr Nigel Dews – General Manager of Business Development at Fairfax;
8. Sir Roger Douglas – Director of Fairfax and representative of BIL on the Fairfax Board;
9. John Fairfax Holdings Limited – Publisher of the newspapers, *The Age* (Melbourne) and *The Sydney Morning Herald* (Sydney);
10. Mr David Gonski – Director of Fairfax;
11. Mr John Greaves – Executive Director of Fairfax; Director, Finance, Fairfax
12. Ms Gail Hambly – Company secretary of Fairfax;
13. Mrs Julia King – Director of Fairfax;
14. FXF Management Limited – the company which manages the FXF Trust;
15. FXF Trust – Trust which owns 14.66 % of shares in Fairfax;
16. Mr Neville Miles – Chairman of FXF Management Limited;
17. Mr Robert Muscat – Former Director and Chief Executive Officer of Fairfax;
18. One.Tel Limited – Telecommunications company of which Mr John Greaves is a Director and in which Mr James Packer has an interest;
19. Mr Kerry Packer – Chairman of CPH and the controller of the CPH group of companies, which control the Nine Network Licences;
20. Mr James Packer- son of Mr Kerry Packer and Executive Chairman of Publishing and Broadcasting Limited and Chief Executive Officer of Consolidated Press Holdings Limited;
21. Mr Jonathan Pinshaw – Deputy Chairman of Fairfax and representative of BIL on the Fairfax Board;
22. Mr Brian Powers – Prior to 18 May 1998, a director and the executive Chairman of PBL and Chief Executive Officer at CPH; as of 18 May 1998, director of Fairfax; as of 29 May 1998, Chairman of Fairfax;
23. Mr Rodney Price – Chairman of Fairfax until 29 May 1998, also director of Brierley Investments Limited;

24. Publishing and Broadcasting Limited – a company and controller of the Nine Network Licences, part of the CPH group;
25. Mr Dean Wills – Director of Fairfax.

EXECUTIVE SUMMARY

INTRODUCTION

Until 18 May 1998, Mr Brian Powers was a director and Executive Chairman of Publishing and Broadcasting Limited (PBL), and Chief Executive Officer of Consolidated Press Holdings Limited (CPH). CPH is a company controlled by Mr Kerry Packer, and PBL is a company within the CPH group. Both companies are in a position to control the commercial television broadcasting licences held by members of the Nine Network.

On 18 May 1998 John Fairfax Holdings Limited (Fairfax) announced that Mr Powers had been appointed to the Fairfax Board. CPH announced that Mr Powers had resigned from all his directorships with the CPH group. Mr Powers was nominated for this directorship by FXF Trust Management Limited, the manager of the FXF Trust which had been created as a result of PBL's decision to sell its stake in Fairfax. The CPH group holds 45% of the units in the FXF Trust and agreed to sell a 15% interest in the FXF Trust to Mr Powers.

In response to this announcement the ABA announced on 18 May 1998 that it had commenced an investigation into whether there had been a breach of the cross media rules of the Broadcasting Services Act ('the Act'). The terms of reference of the investigation are:

Whether Mr Brian Powers, Mr Kerry Packer, Mr James Packer, Publishing and Broadcasting Limited, Consolidated Press Holdings Limited or any related or associated persons have since 17 May 1998 committed any breaches of a provision in Division 5, 6 or 7 of Part 5 of the *Broadcasting Services Act 1992*.

On 29 May 1998 Fairfax announced Mr Powers' appointment as Chairman of the Fairfax Board. On 24 August 1998 Fairfax announced the resignation of its then Chief Executive Officer, Mr Robert Muscat.

The period of time which this investigation report addresses is the period from Mr Powers' appointment to the Fairfax Board until the resignation of Mr Muscat: that is, from 18 May 1998 to 24 August 1998.

LEGAL FRAMEWORK

Under the Act, a person must not be in a position to exercise control of both a commercial television broadcasting licence and a newspaper which is associated with the licence area of the broadcasting licence (section 60). The Act also provides that a person may be in a position to control a company, licence or newspaper alone, or together with an associate (clauses 2(1)(a) and 3(1) (c) of Schedule 1).

Fairfax publishes *The Sydney Morning Herald* in Sydney and *The Age* in Melbourne. Members of the Nine Network hold commercial television broadcasting licences in both those cities. If the same person, or persons, either alone or together with an associate, are in a position to exercise control of Fairfax and the relevant broadcasting licences, the cross media rules will have been breached.

Thus, the two principal questions considered by the ABA in this report are whether, during the period covered by the investigation, Mr Powers was an associate of the Packer Interests¹ and whether he was in a position to exercise control of Fairfax.

¹ 'The Packer Interests' have been defined in the report to include Mr Kerry Packer; Mr James Packer; Consolidated Press Holdings Limited; Australian Financial Times Pty Limited; Cairnton Holdings Limited; Cairnton Pty Limited; Cairnton Holdings Pty Limited; CPH Property Pty Limited; Consolidated Press International Holdings Limited; Consolidated Custodians International Limited; Consolidated Custodians Pty Limited; CPH Management Limited; Lenvoka Pty Limited; Manden Productions Pty Limited; Murray Leisure Group Limited; Natary Pty Limited; Publishing and Broadcasting Limited; Television Corporation of Australia Pty Limited; and related corporate entities.

KEY EVENTS AS REVEALED BY INVESTIGATION

On 3 September 1997 PBL announced its intention to sell its 14.99% stake in Fairfax, to a trust to be known as the FXF Trust. After completion of the necessary transactions, PBL held no shares in Fairfax. The FXF Trust held approximately 14.8% of the shares in Fairfax and the CPH group held approximately 45% of the units in the FXF Trust. The trust is managed principally by Mr Neville Miles, through FXF Management Limited.

On the same day as his appointment to the Fairfax Board, 18 May 1998, Mr Powers entered into an agreement for the purchase from CPH of 76 million units in the FXF Trust. The transaction was to be financed by a loan to Mr Powers from the ANZ Investment Bank, secured by a limited recourse guarantee from CPH. For the 5 year term of the loan, CPH agreed to guarantee to the bank the sum of approximately \$12, 200, 000 with recourse only to the units in the FXF Trust in the event of a default by Mr Powers.

At its meeting on 18 May 1998, the Fairfax Board received a presentation from Mr Muscat on the company's strategy for future development and Mr Muscat announced that McKinsey & Co had been retained to assist in process improvement and strategy review. The Board resolved to establish a committee to oversee the process, which came to be known within the company as "Project Hercules".

On 22 May 1998 Mr Muscat dismissed the then Editor in Chief of *The Sydney Morning Herald*, Mr John Alexander.

On 29 May 1998, Mr Powers was appointed as Chairman of the Fairfax Board.

In May 1998, the Federal Capital Press of Australia Pty Limited (FCP), publisher of *The Canberra Times*, was offered for sale. Fairfax considered purchasing FCP. The issue of whether, and how much, to bid was considered by Fairfax staff and Mr Powers, the Finance and Audit Committee of the Fairfax Board and the Board itself in meetings on 26 June, 10 July and 29 July 1998. At its meeting of 29 July 1998 the Fairfax Board resolved to make an offer for FCP.

Meetings between PBL On-line and Fairfax to discuss on-line issues and possible joint business activity in the on-line area took place at CPH's offices on 12 June 1998 and 25 June 1998. These meetings were attended by, among others, Mr Powers and Mr James Packer. Negotiations took place but were not finalised, and no decisions were taken.

Mr Powers testified that, upon his appointment as Chairman, he became closely involved in the preparation of Fairfax' 1998-99 budget, an unfinalised version of which was accepted by the Board at its meeting on 10 July 1998 as a "budget in progress".

At the 10 July 1998 meeting of the Fairfax Finance and Audit committee, it was noted that "the Budget forecast is for zero increase in costs". Mr Powers testified that, in pursuit of that target, he had suggested the implementation of a staff hiring freeze. The Board minutes of 26 June note a management intention to do so, and on 7 July Mr Muscat sent a memo to senior staff directing them to implement a hiring freeze.

On 18 August Mr Muscat told Mr Powers that he had accepted an offer to become CEO of Pacific Magazines, and that he wished to resign as CEO of Fairfax. Mr Muscat's resignation was announced in a press release on 24 August 1998.

IS MR POWERS AN ASSOCIATE OF THE PACKER INTERESTS IN RELATION TO FAIRFAX?

The relevant definition of 'associate' in section 6 of the Act is:

- (d) 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;

...

but 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.

In the context of the present inquiry, 'acting in concert' requires some form of common purpose or object, within the scope and purpose of the Act. Subject to the exempting provision at the end of the section, such action need not relate directly to the operations of the company, licence or newspaper in question. However in practice the ABA will always consider, through the operation of the exempting provision, whether the persons in question act together or exert influence on each other in relation to a particular company, licence or newspaper.

ANALYSIS OF EVIDENCE

There seems no doubt that Mr Powers was accustomed to act in accordance with the directions, instructions or wishes of CPH or Mr Kerry Packer whilst he was in the employ of the CPH group of companies.

The Act recognises that accustomed courses of conduct between people may be sufficient to found a view of an associate relationship.

Both Mr James and Mr Kerry Packer were involved in discussions with Mr Powers about various aspects of his move to Fairfax. They supported the move personally, and by facilitating Mr Powers' purchase of approximately 15% of the units in the FXF Trust.

On one view, this facilitation may evidence an implicit understanding reached between them. Mr Powers gave evidence that if Mr Packer were to contact him and ask if he 'could see his way clear' to reach agreement with CPH on a matter to which Fairfax was indifferent, he would probably do so, 'because Kerry's the type of guy ... who pays it back'. This evidence, although relating to a hypothetical situation, could be seen to indicate an implicit understanding that Mr Powers would not act against the Packer Interests in his role as a director of Fairfax, unless this would involve him in a breach of his director's duties. Mr Powers demonstrated in evidence that he clearly understands his duties and responsibilities to Fairfax and its shareholders.

On another view of the evidence Messrs Kerry Packer, James Packer and Powers were working jointly early in May 1998 to secure the appointment of Mr Miles to the Fairfax Board as nominee of the FXF Trust. It is reasonable to infer that their purpose was to secure improved performance of Fairfax, to increase shareholder value and to protect the long-term strategic interest of the Packer Interests in Fairfax, all through the agency of the FXF Trust. The substitution of Mr Powers for Mr Miles and the subsequent facilitation of his appointment to the Fairfax Board can be seen as new action in continuation of the same purpose. On this view it is reasonable to infer that the actions of Mr Powers and Messrs Kerry and James Packer in facilitating Mr Powers' acquisition of units in the FXF Trust was action in concert in relation to Fairfax, which action continues on foot at least until the guarantee, loan and sale of units have been completed.

On a further view of the evidence, Messrs Kerry and James Packer could be said simply to have noted that they had no choice but to let Mr Powers go, and to have provided him with financial facilitation simply as a matter of his convenience and good business for CPH. Although all three thought that his move to Fairfax would provide effective direction there, this was independent thought along similar lines rather than action in concert. On this view, there was no continuing or new understanding reached.

Upon his appointment to the Fairfax Board, Mr Powers became closely involved with Fairfax, and increased this involvement even further after becoming Chairman. At the same time, he was not quick to sever his administrative ties with CPH, which remained directly responsible for such things as his house lease, mobile telephone and club memberships, although subject to reimbursement. Mr Powers also retains an ongoing social relationship with Messrs James and Kerry Packer, although the latter was unwell from shortly after Mr Powers appointment to Fairfax until October 1998 when his doctor pronounced him fit enough to give evidence. Mr Kerry Packer lunched at Fairfax with Mr Powers and Mr Muscat on 20 July 1998, the day before his departure to the United States for surgery.

Both Mr Powers and Mr Kerry Packer in evidence identified on-line services as an area critical to Fairfax' future. As Chairman of Fairfax, Mr Powers personally attended a number of working meetings at CPH offices to discuss possible business alliances between Fairfax and Nine. This unusual course of action which may be open to interpretation as indicative of an implicit understanding that Mr Powers would not harm CPH's interest, may also indicate an understanding to pursue mutually beneficial avenues, such as an alliance with PBL On-line.

Mr Kerry Packer's view of his former relationship with Mr Powers is that it was effectively switched off after 18 May 1998, because the business connection upon which it was based (Mr Powers' employment) was no longer there. However, there have been and continue to be a number of other business connections between Mr Powers and CPH group.

Mr Powers remains a director of an offshore company involved in American film and television production and in which PBL has a holding of approximately 20%. He thus remains indirectly responsible to the Packer Interests to ensure the prosperity of this company. The ABA was informed that Mr James Packer is soon also to become a director of this company.

At the time of his departure from the CPH group Mr Powers entered into a consultancy agreement with CPH (terminated on 25 August 1998), as well as agreements for the acquisition of the FXF Units and the provision of CPH's guarantee to Mr Powers' financiers. The consultancy agreement specifically excluded the provision of advice on any matters relating to Fairfax. Mr Powers' evidence was that he was reluctant to enter into it and was required only to provide some limited financial advice, in the same way as any professional business adviser might be engaged to do so.

In considering Mr Powers' relationship with the Packer Interests four possible conclusions are available:

1. The past relationship could be characterised as the Packer Interests acting in concert with Mr Powers but with such a relationship ceasing as at 18 May 1998. Both aspects of this option are contained within the other options, obviating the need for further discussion.
2. The relationship of acting in concert could be seen to continue into the period the subject of this investigation.
3. The past relationship could be seen solely as an employment relationship, with Mr Powers acting on the instructions of his employer rather than acting in concert with the Packer Interests. As at 18 May a new understanding or agreement as to joint action could be said to have arisen and to continue at least until 24 August 1998.
4. Mr Powers could be seen solely as an employee prior to 18 May 1998 and not to have been acting in concert with the Packer Interests before or after that date.

Options 2 and 3 envisage the existence of a prima facie associate relationship. Either Mr Powers acted in concert with the Packer Interests prior to 18 May and continued thereafter to do, as he was accustomed, or he acted in concert with the Packer Interests during the period, the subject of this investigation, pursuant to an arrangement or understanding reached during the time he was leaving his former employment. Such a view puts particular emphasis on the nature of the past relationship between Mr Powers and Messrs Kerry and James Packer, the ongoing business discussions between Fairfax and PBL in the on-line area, the ongoing joint

financial interest in the FXF Trust, the consultancy agreement, the guarantee and other lesser connections during the relevant period.

Option 4 sees Mr Powers as having been an associate of the Packer Interests only by virtue of his employment by them, and regards the associate relationship as having terminated with the employment relationship.

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

In reaching a conclusion on the question of an associate relationship, the exempting provision in the definition must also be considered.

To be satisfied that Messrs Kerry Packer and Powers do not act together in relation to Fairfax, the ABA must consider the whole of the evidence.

The ABA is of the view that the meetings between Fairfax and PBL held at the CPH offices to discuss possible alliances between PBL Online and Fairfax are relevant dealings for the purposes of this limb of the exemption provision. Decisions about the future on-line strategy for Fairfax are important decisions. While it is not unusual for the chairman to be involved in activities where this strategy is being developed, these were essentially working meetings to thrash out issues and establish points of difference.

On the one hand the special focus by Mr Powers on attending meetings with PBL in this area of business activity could be seen to be justified simply by commercial common sense. On the other hand, it may indicate that Mr Powers is acting together with his old employer to bring about an alliance between Fairfax and PBL in this crucial area of business activity.

PERSONS ARE NOT ASSOCIATES IF THE ABA IS SATISFIED THAT ... 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

For this limb to apply the ABA must be satisfied that neither Mr Powers nor the Packer Interests are in a position to exert influence over the business dealings of the other in relation to Fairfax.

There is some evidence of interaction between Mr Powers and the Packer Interests in relation to business dealings generally. Mr Powers has provided services to the Packer Interests pursuant to the consultancy agreement.

Mr Powers had been involved with Fairfax personnel in meetings with PBL staff at CPH as discussed above.

Mr Powers gave evidence that, in a hypothetical situation, he expected that Mr Kerry Packer might attempt to exert influence over him in relation to the negotiations, although he indicated that he would only enter into such arrangements with PBL if it were in the best interests of Fairfax.

The issue here is whether the ABA can be satisfied, having regard to the entire factual matrix, that neither the Packer Interests nor Mr Powers are in a position to exert influence over the business dealings of the other in relation to Fairfax.

The above evidence does not clearly indicate whether Mr Powers is in a position to exert influence over PBL's on-line strategy in relation to Fairfax or whether the Packer Interests are in a position to exert influence over Mr Powers in this area.

ASSOCIATE CONCLUSION

The ABA has carefully weighed the arguments for and against reaching a view that Mr Powers is an associate of Mr Kerry Packer during the period 18 May 1998 to 24 August 1998. It has taken account of submissions on a draft report from solicitors for Mr Powers and solicitors for the Packer Interests. It considers that there are strong arguments for both views but that a final determination of the question would be required only if Mr Powers were in a position to exercise control of Fairfax.

If he were not, the nature of his relationship with the Packer Interests would not be a matter of legal significance. To make a finding on this issue, in the absence of a finding that Mr Powers was in a position to exercise control of Fairfax would serve no useful purpose in the terms of this report.

ARE ANY OTHER FAIRFAX DIRECTORS ASSOCIATES OF THE PACKER INTERESTS IN RELATION TO FAIRFAX?

The ABA has looked at any relationship of which it was aware at the commencement of the investigation or of which it has become aware during the course of the investigation between the Packer Interests and any other Fairfax director. This has caused it to look at the Packer Interests' links, however tenuous, with Mr Gonski, Sir Roderick Carnegie and Mr Greaves.

The ABA found that none of Mr Gonski, Sir Roderick Carnegie or Mr Greaves were associates of the Packer Interests for the purposes of this investigation.

IS MR POWERS IN A POSITION TO EXERCISE CONTROL OF FAIRFAX?

The tests for being 'in a position to exercise control' on the present facts are those set out in subclauses 2(1) and 3(1) of Schedule 1 of the Act:

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

...

(d) the person, either alone or together with an associate of the person, is in a position to:

...

(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;

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

...

(c) if the newspaper is published by a company:

...

(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.

The ABA examined each of the listed key events to ascertain what Mr Power's role had been in each case. In particular, the decision making processes relating to each event were scrutinized.

The ABA found that Mr Powers could not be said to exercise direction or restraint over any substantial issue affecting the management or affairs of Fairfax without including either or both of the Board and management, especially the executive directors. Mr Powers has clearly been influential in a number of key decisions taken at Fairfax. However, whilst being an active, intelligent and well informed chairman, who had played a close supportive role for Mr Muscat as CEO, he was and is only one on a Board of ten. The Board is functioning effectively. Substantial issues are ultimately considered and finally determined by the Board. While Mr Powers may be persuasive in arguing his particular point of view on any issue, this alone does not place him in a position to exercise control of Fairfax.

OTHER FINDINGS

The ABA has also found that CPH is in a position to exercise control of the FXF Trust and that Mr Kerry Packer has a 14.66% company interest in Fairfax.

CONCLUSION

The ABA has investigated whether Mr Kerry Packer and/or any of the CPH Group of companies are either alone, or together with an associate, in a position to exercise control of Fairfax. The ABA takes the view that to establish that a person 'together with' an associate is in a position to do something does not require proof of anything other than their association because it is inherent in the nature of their associate relationship that they will be in this position.

The ABA has found that none of the Packer Interests alone are in a position to exercise control of commercial television broadcasting licences with call signs GTV and/or TCN and Fairfax.

The ABA has also found that Mr Powers was not in a position to exercise control of Fairfax during the period 18 May 1998 to 24 August 1998.

It follows that, regardless of whether Mr Powers is considered an associate of Mr Packer during the period 18 May 1998 to 24 August 1998, there can be no finding that Mr Packer either alone or together with an associate is in a position to exercise control of Fairfax and thus there could be no breach of the Act by Mr Packer.

In these circumstances it is unnecessary to pursue the question of whether Mr Powers was an associate of Mr Packer during the period 18 May 1998 to 24 August 1998.

Mr Kerry Packer, Mr James Packer and the CPH group were not, during the period the subject of this report, in breach of the Act.

This matter will remain the subject of ongoing scrutiny by the ABA.

1. INTRODUCTION

On 18 May 1998, Fairfax announced that its Board of directors had appointed Mr Powers as a director of Fairfax. Mr Powers was nominated by FXF Trust Management Limited.¹ On the same day, Mr Powers resigned all of his positions with PBL and the CPH group of companies.

As a result of this announcement, the ABA announced on 18 May 1998 that it would conduct an investigation into whether there had been a breach of the cross media rules of the Act.

On 29 May 1998, Fairfax announced that Mr Powers was appointed as the chairman of the Board of Fairfax.

On 24 August 1998 Fairfax announced the resignation of Mr Muscat as CEO of Fairfax.

On 25 August 1998, the ABA announced that it had completed its evidence-gathering phase of the investigation.

1.1. TERMS OF REFERENCE

The terms of reference of this investigation are as follows:

The Australian Broadcasting Authority has decided to commence an investigation into whether Mr Brian Powers, Mr Kerry Packer, Mr James Packer, Publishing and Broadcasting Limited, Consolidated Press Holdings Limited or any related or associated persons have since 17 May 1998 committed any breaches of a provision in Division 5, 6 or 7 of Part 5 of the *Broadcasting Services Act 1992*.

The period of time that this investigation report addresses is that period from 18 May 1998 until 24 August 1998.

1.2. INVESTIGATION PROCESS

1.2.1. DOCUMENTS PRODUCED

Documents have been produced or information provided by the following persons and companies pursuant to notices issued by the ABA under section 173 of the Act:

1. Mr Brian Powers – Chairman of Fairfax (and former Chief Executive Officer of CPH and former Executive Chairman of PBL);
2. Mr Kerry Packer – controller of the CPH Group;
3. Mr James Packer – Executive Chairman of PBL and Chief Executive officer of CPH;
4. Publishing and Broadcasting Limited – a controller of the Nine Network licences;
5. Consolidated Press Holdings Limited – a controller of the Nine Network licences;
6. FXF Management Limited – Manager of the FXF Trust;

7. Mr Neville Miles – Chairman of FXF Management Limited;
8. John Fairfax Holdings Limited – controller of newspapers, *The Age* and *The Sydney Morning Herald*;
9. Mr David Gonski – Director of Fairfax;
10. Ms Gail Hambly – company secretary of Fairfax;
11. Mr John Greaves – Executive Director of Fairfax; Director, Finance
12. Mr Jonathan Pinshaw – Director of Fairfax;
13. Sir Roger Douglas – Director of Fairfax;
14. Mr Rodney Price – Director of Brierley Investments Limited (and former Chairman of Fairfax);
15. Sir Rodney Carnegie – Director of Fairfax;
16. Mrs Julia King – Director of Fairfax;
17. Mr Mark Burrows – Director of Fairfax;
18. Mr Robert Muscat – Former Director and Chief Executive Officer of Fairfax;
19. Mr Dean Wills – Director of Fairfax;
20. Mr John Atanaskovic- Partner, Atanaskovic and Hartnell (Solicitors);
21. Brierley Investments Limited – shareholder of Fairfax;
22. One.Tel Limited – telecommunications company of which Mr John Greaves is a Director and in which Mr James Packer has an interest;
23. Mankent Pty Limited – trustee company of which Mr David Gonski, Mr Brian Powers and Mr Nicholas Barham each have an interest.

1.2.2. EXAMINATIONS UNDER OATH

The following persons participated in formal examinations under oath:

1. Mr Neville Miles – 5 June 1998
2. Mr James Packer – 9 June 1998
3. Mr Brian Powers – 10 June 1998, 19 August 1998
4. Mr David Gonski – 11 June 1998
5. Sir Roger Douglas – 15 June 1998

6. Mr Robert Muscat – 16 June 1998, 18 August 1998, 24 August 1998
7. Mr Rodney Price – 28 June 1998
8. Mr John Alexander – 3 July 1998
9. Sir Roderick Carnegie – 6 July 1998
10. Mr John Greaves – 7 July 1998
11. Mr Nigel Dews – 31 July 1998
12. Mr Kerry Packer – 27 October 1998

NB: The ABA decided on 9 July 1998 to issue a notice to Mr Kerry Packer requiring him to attend for examination. However, Mr Kerry Packer was admitted to hospital in the week commencing 17 July 1998. On 14 August 1998, the ABA received a medical certificate, which stated that Mr Kerry Packer was unfit to attend for examination at least until 15 October 1998 and that his condition would be reviewed at that time.² On 16 October 1998, Mr Kerry Packer's medical practitioner advised the ABA that Mr Kerry Packer would be medically fit for oral examination by the ABA.³

1.2.3. PUBLIC HEARING

The ABA is of the view that it has sufficient statutory powers to gather the relevant evidence in this investigation without recourse to a public hearing. The ABA has chosen to conduct this investigation using its powers to seek documents and examine relevant persons in private pursuant to Division 2 of Part 13 of the Act.

The ABA is of the view that, for the purposes of this investigation, this has been a more effective and appropriate way of gathering the relevant information than conducting a public hearing. A public hearing can always be commenced at any time as part of the ABA's investigative process.

1.2.4. COMMENT FROM MR POWERS AND THE PACKER INTERESTS ON THE REPORT

On 3 December 1998, the ABA sent a draft of this report to Mr Powers and the Packer Interests.

On 18 December 1998, the ABA received submissions on the draft report from Atanaskovic Hartnell, solicitors, on behalf of Mr Powers. On 21 December 1998, the ABA received submissions from Gilbert & Tobin, solicitors, on behalf of the Packer Interests.

The ABA has taken these submissions into account in finalising this report.

2. KEY EVENTS AS REVEALED BY INVESTIGATION

2.1. FORMATION OF THE FXF TRUST

On 3 September 1997, PBL announced its intention to sell off its 14.99% stake in Fairfax.

Under the Scheme of Arrangement ('the scheme') entered into between PBL and its shareholders, PBL sold its Fairfax shares to companies controlled by Perpetual Trustee Company Limited ('the trustee').⁴ This occurred on or about 8 December 1997. As a result of the transaction, PBL no longer held Fairfax shares⁵ and the FXF Trust held approximately 14.8% of the issued shares in Fairfax.

PBL gave its shareholders, including CPH, units in the Trust, plus cash. At completion of the scheme, each PBL shareholder retained its shares in PBL but also held units in the FXF Trust whose main asset is the shares in Fairfax previously held by PBL ('the Fairfax shares').

The Trustee does not manage the FXF Trust. The FXF Trust is managed by a management company called FXF Management Limited ('the manager'). The Directors of the manager are Messrs Rod McGeoch, Neville Miles and Michael Hoy.

The role of the manager of the FXF Trust is to manage the FXF Trust and its trust property and trust liabilities until none remain.

The trustee financed the purchase of Fairfax shares from PBL through the issue of units in the FXF Trust. The remainder was financed by bank borrowings. The bank borrowings are supported by a put option between Chase Securities Australia Limited ('Chase Securities') and PBL which grants Chase Securities an option in certain circumstances to require PBL to purchase some or all of its shares in Fairfax.⁶

In relation to the establishment of the FXF Trust, Mr Powers gave the following evidence:

... [PBL's decision to exit its 15% stake in Fairfax] was my idea. I thought that Fairfax had become a distraction for PBL ... Once it was clear the cross media rules weren't going to change, I thought we would be much better getting Fairfax out of PBL.⁷

... So when it was clear they weren't going to change cross media and it would be a good long time before it even got looked at again, I thought it was much better from the market perception plus management to take it out of PBL and then let the shareholders decide whether they wanted to continue to hold an interest in that block of stock.⁸

Arrangements were made for the establishment of the FXF Trust and Mr Powers gave evidence that he approached Mr Miles to manage the FXF Trust:

Q. So how did the arrangements come about whereby Neville Miles was approached to take up the management of the trust?

A. Looked to find a team of people who'd bring various skills there to basically running that single asset, which is a block of stock, and would, hopefully, if they decided to hold it long-term, be able to have enough credibility to get on the Board and be involved in the management of the company, which, we had for a while thought was undermanaged.

So I would have gone to Neville, first order, and asked if he was interested, and then I don't remember whether I suggested at that point Rod McGeoch and Michael Hoy or whether they came out of discussions with Neville.

Q. Why did you approach Neville in the first instance?

A. He had some time on his hands, so he could spend some time. But I also thought he would be a – he had been involved in a lot of the media transactions that had taken place in the early '90s when a lot of the major media companies had been recapitalised. So he was involved in Fairfax and I believe he was involved in Channel Seven, he did the float. So he was an experienced media deal-doer and how their stake was handled ultimately to maximise value

in the final analysis would come down to deal. Now, there was management along the way; if it turned into a long-term hold, there was management along the way. So I thought Neville would bring that skill. I also thought that he would be – if he was able to get on the Board – a demanding Board member, which is what I thought that company needed.⁹

For more discussion on the formation of the FXF Trust, see section 4.3.3.3 of this report at page 19.

2.2. TRANSFER OF UNITS IN THE FXF TRUST FROM CPH TO MR POWERS

On 18 May 1998, Mr Powers entered into an agreement with CPH to purchase 76 million units in FXF Trust from CPH. The transaction was to be financed by a loan obtained by Mr Powers from the ANZ Investment Bank.

CPH has agreed to give a limited recourse guarantee in favour of the ANZ Investment Bank in respect of the monies borrowed by Mr Powers to the sum of approximately \$12,200,000. The term of the loan and guarantee is 5 years.

The finance made available by the ANZ Investment Bank to Mr Powers will be secured by a mortgage over Mr Powers' FXF Trust units and a 'make good' undertaking from CPH to the ANZ Investment Bank. As a result, in the event that the value of Mr Powers' FXF Trust units falls below his purchase price and accrued interest on the financing made available by the ANZ Investment Bank to Mr Powers, the loss will in the first instance fall on Mr Powers up to the amount of his cash contribution of approximately \$3,000,000. Thereafter, any shortfall in repayment of principal or interest will be made good by CPH, on the basis that neither CPH nor the ANZ Investment Bank has any further recourse to Mr Powers.¹⁰

CPH does, however, have recourse to the units that are transferred under the agreement. Upon default, CPH will instruct Mr Powers to sell the 76,000,000 units in FXF Trust and the proceeds of sale will meet any shortfall to the bank.¹¹

See section 4.4.2 of this report at page 24 for more discussion.

2.3. APPOINTMENT OF MR POWERS TO THE BOARD OF FAIRFAX

On 18 May 1998, Fairfax announced that its Board agreed to appoint Mr Powers as a director. See section 4.4 of this report at page 21 for discussion on the circumstances surrounding that appointment. Mr Powers was nominated by FXF Trust Management Limited. On the same day, Mr Powers resigned from all directorship positions with CPH and associated companies. See section 8 of this report at page 88 for the list of companies.

2.4. DISMISSAL OF MR ALEXANDER

On 22 May 1998, Mr Robert Muscat, Director and CEO of Fairfax dismissed Mr John Alexander, Editor in Chief of *The Sydney Morning Herald* from employment with Fairfax. For further discussion, see section 6.3.1 of this report at page 65.

2.5. APPOINTMENT OF MR POWERS AS CHAIRMAN OF BOARD OF FAIRFAX

On 29 May 1998, Mr Powers was appointed as the chairman of the Board of Fairfax. For further discussion, see section 6 of this report at page 56.

2.6. THE BID BY FAIRFAX FOR FEDERAL CAPITAL PRESS (FCP)

In May 1998, Resolis Pty Limited, a company controlled by Mr Kerry Stokes, offered the Federal Capital Press of Australia Pty Limited (FCP) for sale. Resolis Pty Limited was proposing to sell 100% of the issued shares in FCP. The offer was to remain open until 5.00 p.m. (Sydney time) on Friday 26 June 1998.¹² An information memorandum regarding FCP was forwarded to Fairfax as a prospective purchaser to assist it in deciding whether to proceed with a further investigation of FCP.¹³

The matter of whether and how much to bid for FCP was considered by staff of Fairfax and Mr Powers, the Finance and Audit Committee and the Board of Fairfax in meetings on 26 June 1998, 10 July 1998 and 29 July 1998. On 29 July 1998 the Board considered the recommendation and ultimately an offer of \$130 million was made. For further discussion, see section 6.3.4 of this report at page 70.

2.7. THE BUDGET OF FAIRFAX

Mr Powers gave evidence that one of the matters he had been involved in since becoming chairman of Fairfax was the preparation of the budget for the 1998-99 financial year.¹⁴

Mr Powers gave evidence that, before he became chairman, Mr Muscat, Mr Greaves and Mr Ashley Fenton had been primarily responsible for the preparation of the budget.¹⁵ Mr Powers indicated that it was his view that, when he began focussing on the preparation of the budget, the budget was not close to being finalised, despite the views of the management team that it was nearing completion.¹⁶

At the 26 June 1998 Fairfax Board meeting, the Board accepted the budget as a 'Budget in Progress'.¹⁷ At the 10 July 1998 meeting of the Finance and Audit Committee of Fairfax, it was 'noted that ... the Budget forecast is for zero increase in costs.'¹⁸

The issue of how the budget was developed and the role Mr Powers played in its development is dealt with in section 6.3.5 of this report at page 73.

2.8. STAFF HIRING FREEZE

Mr Powers gave evidence that, in order to achieve the desired budget outcome of a zero increase in costs, he had suggested that a staff-hiring freeze be implemented.¹⁹

The minutes of the 26 June 1998 meeting of directors of Fairfax record that:

Management will also institute a de facto hiring freeze on staff.²⁰

On 7 July 1998, Mr Muscat sent a memo to senior staff directing that there be a staff freeze implemented:

There is now a freeze on the replacement of staff that leave. Careful consideration should be given to improve processes to avoid replacement. In the event that replacement staff are considered necessary a proposal for the replacement should be forwarded to me through the Group HR Manager.²¹

The issue of how this freeze came to be in place and the role of Mr Powers in this is discussed in section 6.3.5.3 of this report at page 74.

2.9. PROJECT HERCULES (REVIEW PROCESS)

At the 18 May 1998 meeting of the Board, Mr Muscat reviewed the progress on strategy for the future development of Fairfax. At that time, Mr Muscat also announced that McKinsey & Company had been engaged to assist in process improvement and strategy review:

The Chief Executive reviewed the Company's progress on strategy including online business. He then reported on a Company-wide process improvement and strategy review to be undertaken with the assistance of McKinsey & Company.²²

The Board resolved to establish a committee to oversee the process:

IT WAS RESOLVED to form a Strategy Review Sub-committee comprising Sir Roger Douglas, Mr. Mark Burrows and Mr. Brian Powers to monitor the project.²³

The review process has since been colloquially dubbed 'Project Hercules'.²⁴ At the 26 June 1998 meeting of the Board of Fairfax, Mr Michael Rennie from McKinsey & Company gave a presentation on the review process.²⁵

Two committees of Fairfax have largely done the work on Project Hercules. One was the Board's strategy review committee. The other was a management committee, which had done most of the day to day work involved in carrying out the objectives of Project Hercules. Mr Powers gave evidence that he had not attended any of the management committee meetings.²⁶

For further discussion, see section 6.3.5.3.1 of this report at page 75.

2.10. MEETINGS BETWEEN FAIRFAX, NINE AND PBL ONLINE TO DISCUSS POSSIBLE ONLINE ALLIANCE

The evidence indicates that there were two meetings between NineMSN and Fairfax on 12 June 1998 and 25 June 1998 at CPH offices to discuss on-line issues.²⁷ Amongst others, Mr Powers and Mr James Packer were in attendance. In relation to his involvement in arranging the meetings, Mr Powers gave the following evidence:

Q. And I understand that as part of pursuing that strategy there had been a couple of meetings with PBL Online and NineMSN to advance that strategy. How did those meetings come about? What involvement did you have in setting them up?

A. I believe they had been set up either by Bob or Nigel, I think.

Q. At your suggestion?

A. I don't know. There has been, not so much with News, there has been duelling, papers back and forth, most frustrating thing I have ever seen. I thought media players, traditional media players were bad ... So there had been a series of meetings and working level meetings which have been unproductive and pointscoreing each other, so I know my view, I don't think I suggested it, but my view has been let's get everyone in the room and talk about it. Whether I said that or whether they were doing it and I said 'great idea', I don't know, but it is clearly what is needed for this thing to progress.²⁸

The purpose of the meetings between PBL and Fairfax was to discuss opportunities to have Fairfax content distributed on-line through NineMSN.²⁹ A number of matters were discussed including portal strategies and exclusivity.³⁰ The evidence is that negotiations took place, without finalisation or decision about matters discussed.³¹

For further discussion, see sections 4.6.1 and 6.3.7 of this report at pages 36 and 76 respectively.

2.11. RESIGNATION OF MR MUSCAT, CEO OF FAIRFAX

Mr Muscat had been approached by Mr Ken Cowley, chairman of Pacific Magazines, on a number of occasions to see if Mr Muscat was interested in taking up the position of CEO of Pacific Magazines upon Mr Ken Catlow's retirement.³²

On 18 August 1998, Mr Muscat told Mr Powers that he no longer desired to remain as CEO of Fairfax. Mr Muscat told Mr Powers at that time that he had received an offer to work for Pacific Magazines as CEO.³³

In a press release issued on 24 August 1998, Fairfax announced Mr Muscat's intention to resign as CEO and director of Fairfax. In that press release, Mr Powers said that, while the search was progressing for a replacement for Mr Muscat:

a three-person Management Committee will assume the duties of the Chief Executive. That committee will be comprised of Robert Whitehead, General Manager, Sydney Operations, John Greaves, Finance Director, and Brian Powers, who will serve as its chairman.

The detail of how this came about and the role of Mr Powers in this matter is set out in section 6.3.9 of this report at page 80.

3. LEGAL FRAMEWORK AND FINDINGS ON NEWSPAPERS ASSOCIATED WITH LICENCE AREAS OF COMMERCIAL TELEVISION BROADCASTING LICENCES

Paragraph 60(b) of the Act provides:

60. A person must not be in a position to exercise control of:
- ...
- (b) a commercial television broadcasting licence and a newspaper that is associated with the licence area of the licence.

3.1. A COMMERCIAL TELEVISION BROADCASTING LICENCE

Section 6 of the Act defines a commercial television broadcasting licence as

a licence to provide a commercial broadcasting service that provides television programs.

The ABA is required, under section 75 of the Act, to maintain, *inter alia*, a register of people who notify the ABA as controllers of commercial television broadcasting licences. That register indicates that commercial broadcasting licences with call signs GTV and TCN are controlled by General Television Corporation Pty Limited and TCN Channel Nine Pty Limited respectively, both wholly owned subsidiaries of Nine Network Australia Pty Limited.

3.2. A NEWSPAPER THAT IS ASSOCIATED WITH THE LICENCE AREA OF THE LICENCE

Section 6 of the Act defines, for the purposes of the Act, a newspaper to mean:

a newspaper that is in the English language and is published on at least 4 days in each week, but does not include a publication if less than 50% of its circulation is by way of sale.

Section 59 of the Act provides the basis for determining whether a newspaper is associated with the licence area of a particular broadcasting licence. Section 59 of the Act provides, where relevant:

- 59.(1) The ABA is to maintain an Associated Newspaper Register.
- (2) For the purposes of this Part, 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.
- (3) If the ABA is satisfied that at least 50% of the circulation of a newspaper is within the licence area of a commercial television broadcasting licence, the ABA is to enter the name of the newspaper in the Register in relation to that licence area.
- (4) If the ABA is satisfied that less than 50% of the circulation of a newspaper that is entered in the Register in relation to a commercial television broadcasting licence is within the licence area of that licence, the ABA is to remove the name of the newspaper from the Register in relation to that licence area.

The ABA's Associated Newspaper Register lists *The Sydney Morning Herald* and *The Age* as newspapers associated with the Sydney and Melbourne commercial television licence areas respectively. *The Age* is published by David Syme & Co. Limited, while John Fairfax Publications Pty Limited publishes *The Sydney Morning Herald*. Fairfax controls both of these companies. For more detail on the structure of control of

these newspapers, see APPENDIX 4 of this report at page 111. The commercial television broadcasting licence with call sign TCN is listed in the Associated Newspaper Register as being in the Sydney licence area. The commercial television broadcasting licence with call sign GTV is listed in the Associated Newspaper Register as being in the Melbourne licence area.

3.3. IN A POSITION TO EXERCISE CONTROL – TOGETHER WITH AN ASSOCIATE

Paragraph 7(a) of the Act provides:

7. Schedule 1 sets out mechanisms that are to be used in:
 - (a) deciding whether a person is in a position to exercise control of a licence, a company or a newspaper for the purposes of this Act.

A detailed exposition of the way the ABA has approached the concept of being in a position to exercise control is set out in section 6.1 at page 56. A detailed exposition of the way the ABA has approached the concept of being an associate of a person is set out in section 4.1 at page 13.

The primary test that the ABA has considered in this investigation is whether a person, together with an associate, is in a position to exercise control of a company or a newspaper.

Many of the tests in Schedule 1 to the Act specify that a person may be in a position to exercise control of a company, licence or newspaper if ‘the person, together with an associate of the person’ is in a position to exercise control of that company, licence or newspaper.

Finding persons to be associates of each other in relation to a company or newspaper is a separate exercise from finding either of those persons to be in a position to exercise control of a company or newspaper.

3.3.1. ‘TOGETHER WITH’

The ABA is of the view that to establish that a person ‘together with’ an associate is in a position to do something does not require proof of anything other than their association because it is inherent in the nature of their associate relationship that they will be in this position.

To the extent that considerations of action arise they do so at the level of the definition of ‘associate’ in section 6 of the Act. The definition of ‘associate’ is concerned with two notions. The first is joint action. The other is influence. The principal part of the definition is concerned with joint action, or the expectation or intention of joint action. The exempting provision, on the other hand is broader, and concerns itself not only with action but also with influence. Subject to the exempting provisions of the definition, it is sufficient to give rise to a relationship of association if there is the capacity for, or an expectation of, joint action or influence.

In contrast to the requirement of joint action for the purposes of the definition of ‘associate’ in section 6 of the Act, the expression ‘together with an associate’ in clauses 2(1)(a), 2(1)(b)(ii), 2(1)(b)(iii), 2(1)(c), 2(1)(d), 3(1)(b), 3(1)(c)(i), 3(1)(c)(ii), 3(1)(c)(iii) and 3(1)(c)(iv) of Schedule 1 to the Act does not require the ‘person’ to act together with the associate. The exempting provision of the definition makes it clear that the subject matter of the joint action or influence must be ‘dealings’ in relation to the company, licence or newspaper. The scope and significance of the definition of associate would be diminished if clauses 2(1)(a), 2(1)(b)(ii), 2(1)(b)(iii), 2(1)(c), 2(1)(d), 3(1)(b), 3(1)(c)(i), 3(1)(c)(ii), 3(1)(c)(iii) and 3(1)(c)(iv) of Schedule 1 to the Act were read as imposing a requirement for further joint action beyond that necessary to establish the associate relationship between them. Further, the ABA is of the view that, if the legislature had intended a requirement that the ‘person’ and the ‘associate’ act together for the purposes of these subsections, it could have and presumably would have said so: as it did in clauses 2(1)(e) and 3(1)(c)(v) of Schedule 1 to the Act.

Clauses 2 and 3 of Schedule 1 to the Act are extracted in full in APPENDIX 2 of this report at page 107.

3.4. FINDINGS

1. *The commercial television broadcasting licence with call sign TCN is associated with The Sydney Morning Herald newspaper.*
2. *The commercial television broadcasting licence with call sign GTV is associated with The Age newspaper.*
3. *The Sydney Morning Herald newspaper and The Age newspaper are owned and controlled by Fairfax.*

Thus, if a person, either alone or together with their associate, is in a position to exercise control of commercial television broadcasting licences with call signs GTV and/or TCN and Fairfax, that person would be in breach of paragraph 60(b) of the Act.

4. ASSOCIATE RELATIONSHIP BETWEEN MR POWERS AND THE PACKER INTERESTS

4.1. LEGAL FRAMEWORK – ASSOCIATES

The relevant definition of ‘associate’ in section 6 of the Act is:

- (d) 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;

...

but 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.

The term ‘associate’ is to be considered in the context of determining whether a person is in a position to exercise control. This is also emphasised in Schedule 1. Subparagraph 1(1) of Schedule 1 states:

Control – general

This 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 ...

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 or company. In this respect, the definition of ‘associate’ in section 6 of this Act is important.’

Clauses 2(1), 3(1)(b) and 3(1)(c) of Schedule 1 refer to control arising in certain circumstances where a person is in a position to exercise control of a newspaper 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 newspaper or company.

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 that it considers relevant to the question of control.³⁴ 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 or company (Subclause 1(1) of Schedule 1 to the Act).

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’. For further discussion, see section 4.1.1.1 of this report at page 14.

4.1.1. JOINT ACTION: SCOPE OF 'DIRECTIONS', 'INSTRUCTIONS', 'WISHES' AND 'ACTING IN CONCERT'

Subparagraph (d) of the definition of 'associate' in section 6 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 is going to submit their own will to that of the other.

The first concept of joint action is identified by the use of the words 'in concert with'. The latter form of action is identified by the words 'in accordance with the directions, instructions or wishes of ...' the other person. In terms of joint action the terminology of 'in concert with' has in other contexts been interpreted to require some form of common purpose or object. This was the view of McPherson J in *Adsteam Building Industries Pty Limited v Queensland Cement and Lime Co. Limited* (1984) 2 ACLC 829 at 832:

... I cannot see that it is possible for persons to 'act in concert' towards an end or an object, or even to simply act in concert, unless there is at least an understanding between them as to their common purpose or object.

In *Australian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia* (1991) 104 ALR 199 at 215, French J held that the commonality of purpose requires a consensual element between the two parties:

The phrase 'in concert' has been construed variously in the cases as involving knowing conduct, the result of communication between the parties and not simply simultaneous actions occurring spontaneously. It has been said to involve contemporaneity and a community of purpose which requires a consensual element ...

... the term ... does not apply to groups ... who ... engage in similar conduct for their own respective purposes ...

In the ABA's view, reference in the definition of 'associate' to 'acting in accordance with the directions, instructions or wishes' of another, or 'acting in concert' with another must be taken to refer to action within the scope and purpose of the Act itself. Subject to the exempting provision at the end of the section discussed below, such action need not relate directly to the operations of the company, licence or newspaper in question. However in practice the ABA will always consider, through the operation of the exempting provision, whether the persons in question act together or exert influence on each other in relation to a particular company, licence or newspaper.

4.1.1.1. THE RELATIONSHIP BETWEEN JOINT ACTION AND A DIRECTOR'S FIDUCIARY AND OTHER OBLIGATIONS

It should also be noted that there is no presumption that joint action within the scope of the definition of 'associate' must be improper or unlawful. For example, the intention of the parties to act jointly (and indeed its consequences) may be beneficial to the company, licence holder or newspaper in question. Similarly, there is no presumption that a person acting in accordance with the directions, instructions or wishes of another, or in concert with another, would do so to the extent of acting unlawfully or in breach of his or her fiduciary obligations. A finding of joint action is not of itself to be construed as a finding of wrongful action.

In *Re Broadcasting Station 2GB Pty Limited* [1964-1965] NSW 1648 at 1663 Jacobs J held that a decision to act in a certain way on the part of nominee directors in favour of their appointor:

is not reprehensible unless it can also be inferred that the directors, so nominated, would act even if they were of the view that their acts were not in the best interests of the company.

Jacobs J went on to say that:

the newly appointed directors were prepared to accept the position that they would follow the wishes of the Fairfax interests without a close personal analysis of the issues. I think that ... that is what they did, but I see no evidence of a lack in them of a bona fide belief that the interests of the Fairfax company were identical with the interests of the company as a whole. I realise that, upon this approach, I deny any right in the company as a whole to have each

director approach each company problem with a completely open mind, but I think that to require this of each director of a company is to ignore the realities of company organisation.

In *Re Application of News Corporation Limited* (1987) 15 FCR 227, Bowen CJ noted that:

were any assumptions needed to be made as to the conduct of the appointed directors, I would think it realistic to assume that they would act generally in the interests of the company which appointed them. Such behaviour would not, of itself, constitute a breach of duty 'unless it can also be inferred that the directors, so nominated, would so act even if they were of the view that their acts were not in the best interests of the company' (*Re Broadcasting Station 2GB Pty Limited* (1964-1965) N.S.W.R. 1648 at p.1663 per Jacobs J) ... It is both realistic and not improper to expect that such directors will follow the interests of the company which appointed them subject to the qualification that they will not so act if of the view that their acts would not be in the interests of the company as a whole ... Such an assumption does not, however, lead to the assumption they will act in breach of their fiduciary duty as directors.

Thus a nominee director may be assumed to be acting generally in the interests of, or in accordance with the wishes of, the company who appointed them without breaching their fiduciary duty to the company to which they have been appointed. This assumption is of course rebuttable by evidence to the contrary..

4.1.2. IS ACCUSTOMED TO ACT

'Accustomed to' is defined as 'in the habit of or habituated to; familiar with, used to': *The Macquarie Dictionary*, 3rd edition, 1997.

'Accustomed' is defined as 'made customary, habitual': *The Shorter Oxford English Dictionary*, 1992.

The test is expressed in the present tense. Therefore in considering whether a person is accustomed to act in accordance with the directions, instructions or wishes of, or in concert with another person the ABA is required to consider the present state of the subject relationship. Where, as in the present case, the investigation is confined to a particular period of time, the ABA is required to consider the state of the relationship as it existed at the end of that period. The state of the relationship at a point in time is likely to be informed by the past relationship between the persons but looks at whether one person is at that time in the habit of or used to acting, for example, in concert with the other.

Where there is a present pattern of behaviour similar to, or the same as, a pattern of behaviour which has occurred in the past, the ABA may infer that a relationship continues where one person is accustomed to act in accordance with the directions, instructions or wishes of, or in concert with another.

4.1.3. THE EXEMPTING PROVISION

The definition of 'associate' is qualified by an exempting provision which appears at the end of the section:

... 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.

This means that even if the relationship between two persons is deemed to constitute an associate relationship by paragraphs (a) to (e) of the definition, the ABA may nevertheless conclude, on the basis of appropriate evidence, that they are not associates for the purposes of the Act.

In deciding whether to apply the exempting provision, the ABA must consider whether the parties act together 'in relevant dealings' and whether one is in a position to exert influence over the 'business dealings' of the other relating to the company, licence or newspaper in question.

Both limbs of the exempting provision must be satisfied if the exempting provision is to apply. That is, the ABA must be satisfied that they do not act together in any relevant dealings but also that neither is in a position

to exert influence over the business dealings of the other in relation to the relevant company, licence or newspaper.

'Relevant dealings' is a wide term, and its application will depend on the particular facts. In considering the 'business dealings' limb of the exemption, the ABA is of the view that it must first examine the business dealings of each person in relation to the company, licence or newspaper in question and then consider whether either person is in a position to exert influence over the other's dealings of that kind. This limb of the exempting provision is very wide in scope, in that it addresses potential influence. In order for it to apply, the ABA must be satisfied that he or she is not *in a position* to exert influence over the business dealings of the other.

The exempting provision of the definition makes it clear that the subject matter of the joint action or influence must be 'dealings' in relation to the company, licence or newspaper.

4.2. THE PACKER INTERESTS' AMBITIONS FOR FAIRFAX

Mr Kerry Packer's interest in pursuing a relationship between Fairfax and companies associated with him has long been a matter of public record.

In an interview with journalists Trevor Sykes and Elisabeth Sexton, published in *The Bulletin* magazine on 28 February 1995, Mr Kerry Packer is quoted as describing a combination of Fairfax's newspapers and PBL's magazine and television assets as 'a perfect scenario'.³⁵ This ambition was clearly expressed to be a long term goal – 'This may be something my grandchildren do' – and contingent upon changes to the cross media rules – 'I have no intention of doing anything which is not legal and proper.'³⁶ Mr Powers is also quoted as having released a statement criticising the cross media rules as 'a disservice to the Australian public'.³⁷

In a statement released in September 1997, on the establishment of the FXF Trust, Mr James Packer noted that PBL's:

stated goal with respect to Fairfax [had been] to create a large, diversified and integrated Australian media company to take advantage of the strategic and operational synergies inherent in such a combination.³⁸

Rather than simply being sold off to third parties, PBL's company interests in Fairfax were placed into the FXF Trust with effect, for the purposes of the Act, that Mr Kerry Packer and CPH remained in a position to exercise control of the FXF Trust. For more information regarding Mr Kerry Packer and CPH's company interests in Fairfax through the FXF Trust, see section 9 of this report at page 92. For more information on the establishment of the FXF Trust, see section 2.1 of this report at page 4.

Mr James Packer also made it clear that these ambitions had not been entirely abandoned, rather recategorised as a longer-term possibility:

It is clear that it will not be possible to accomplish this objective **in the near term** ... As we have repeatedly said, we have no interest in remaining passive investors in Fairfax.³⁹

In evidence given to this investigation, Mr Kerry Packer confirmed this interest, saying:

Q. What are your current ambitions as regards Fairfax?

A. I'd love to own Fairfax, I'd love to control Fairfax, I'd love to run Fairfax. And at any point in time I may do it because, you know, I'm only responsible to you blokes while I have a television station, and at any point in time I can sell the ... television station and do what I like.⁴⁰

4.3. PAST RELATIONSHIP BETWEEN MR POWERS AND MESSRS KERRY AND JAMES PACKER AND CPH

4.3.1. THE YEARS PRIOR TO 1991

Mr Powers and Mr Kerry Packer first met 17 years ago in 1981-2. Mr Powers was then working in an investment bank named James D Wolfensohn Inc.⁴¹ They maintained contact with each other on an occasional basis for the next ten years while Mr Powers was at James D Wolfensohn Inc, and then at the Jardine Matheson group in Hong Kong and finally while Mr Powers was a partner of Hellman and Friedman investment bankers in the US.⁴² In 1991 Messrs Powers and Kerry Packer became more closely connected by reason of CPH, Hellman and Friedman and Daily Telegraph being partners in the Tourang bid for Fairfax. Fairfax was in receivership for the first time and there were a large number of parties interested in acquiring it.⁴³ In preparing and pursuing the bid, Mr Powers was the representative of Hellman and Friedman, Mr Kerry Packer the representative of CPH and Mr Daniel Colson was the representative of Daily Telegraph.

In 1991, Mr Kerry Packer offered Mr Powers the position of CEO of CPH. Mr Powers, after thinking about it for a month or two, declined the offer.⁴⁴ Mr Powers said of the relationship between himself and Mr Kerry Packer at this time:

You tend to associate with people that like you or respect you. I had always liked Kerry and had always been impressed by his business acumen, so I would routinely stay in touch with him when I was in the country.⁴⁵

The two men spent some time together during this period. Mr Powers was impressed by Mr Kerry Packer's business acumen and Mr Kerry Packer was impressed by Mr Powers' intellect.⁴⁶ Mr Kerry Packer and CPH withdrew from the Tourang syndicate in November 1991 but the bid was successful and Mr Powers went on to be a director of Fairfax.

4.3.2. THE YEARS BETWEEN 1991 AND 1994

From 1991 to 1993, Mr Powers remained a director of Fairfax.⁴⁷ In mid March 1993, Mr Powers accepted a further offer from Mr Kerry Packer to take up the CEO position at CPH. Mr Kerry Packer gave evidence that the reason that Mr Powers accepted at this time was that he gave him more money and that 'people who like one another and get on fairly well together, in the end if there is enough money in it they do it'.⁴⁸ Mr Powers retired as a director of Fairfax at this time and as a general partner of Hellman and Friedman.⁴⁹

One of the first major tasks that Mr Powers undertook as CEO of CPH was to sell CPH's stake in Westpac. A possible strategy considered by Mr Kerry Packer and Mr Powers was to try and get Mr Powers appointed to the Board of Westpac.⁵⁰ However, this option was not pursued and the decision was taken by Mr Kerry Packer and Mr Powers to sell the shares. Mr Powers was responsible for the negotiation of the sale.⁵¹

Part of Mr Powers' brief was to assist in the development of Mr James Packer:

I was his boss, and that was part of my brief to assist in the development of James in the hope that he would grow into being able to run the group at some point in the future.⁵²

Mr Powers was in fact Mr James Packer's immediate supervisor at PBL. Mr James Packer gave the following evidence:

Q. How did you find working with him when he first arrived?

A. Very pleasurable, I think I found him a really nice guy, a really nice guy and bright. So that to me was doubly good because he was someone who you could learn from and he was also someone who was capable of being a friend.⁵³

Messrs Powers and Kerry Packer got on well together. There were virtually no disputes between the two and Mr Powers had a fairly free reign in running the company.⁵⁴

In 1994 Nine Network Australia and Australian Consolidated Press were merged into one company, Publishing and Broadcasting Limited. Mr Powers was a strong proponent of the merger and as CEO of the major shareholder of each company was responsible for the necessary analysis and its implementation.⁵⁵ Messrs Kerry Packer and Powers spoke on almost a daily basis during this time, constantly discussing the business, and had a successful working relationship, without significant argument.⁵⁶

During his time at CPH, Messrs Powers and Kerry and James Packer had informal dealings discussing strategy of the CPH group. Mr Powers described it as follows:

if he [Mr Kerry Packer] was in the office ... I would go up to him many times, from one to 10 times a day ... the culture in CPH was not to schedule formal Board meetings or formal 2 o'clock, we'll sit down for two hours; it was if I was looking for him, I could find him. His office was 15 feet away. If he was looking for me, he could find me. And as James increasingly got more senior in the group, similarly with James; he would more and more be part of those discussions. So it could be a 10-minute discussion or a three-hour discussion.⁵⁷

4.3.3. THE YEARS BETWEEN 1995 AND 1998

4.3.3.1. EVENTS IN 1995

In February 1995, Mr Kerry Packer, through CPH Management Limited and Nine Network Australia Limited increased his company interests in Fairfax. At that time, the ABA found that Mr Kerry Packer had a 17.17% company interest in Fairfax by virtue of CPH Management Limited's voting interest of 4.55% and Nine Network Australia Limited's voting interest of 12.62%.⁵⁸ Mr Powers gave evidence that he played the same role as he did in everything in this transaction 'which was right at the centre of it'.⁵⁹

Mr James Packer gave the following evidence in relation to the decision to increase CPH's shareholding in Fairfax:

Q. Moving on a little bit in history, in '95, CPH increased its interests in Fairfax through CPH Management Limited and Nine Network Australia Pty Limited with some convertible notes up to about 17 per cent of Fairfax; do you recall that?

A. I recall it.

Q. Where did the idea for that come from?

A. I think the idea came from Brian, but it was three years ago and in the overall scheme of things, it was a transaction, while significant, not significant, significant, and so my memory is vague, but my belief was that it was Brian's idea. And the reason that I have that recollection is because, from memory, it involved an interpretation of the law, which is the sort of thing that Brian was much more adept at doing than Kerry or I due to his legal background.

Q. So how was that decision made? Do you recall that decision being made to embark on the purchase of those shares?

A. I think the decision was along the lines, made along the lines that we had publicly stated that it was our desire and goal to own more of the John Fairfax company and when it became apparent that there was arguably a mechanism which enabled us to do that, it was a fairly obvious conclusion from our prior stated objectives to acquire some shares through that opportunity.

Q. So who would have been the key people involved in making that decision?

A. Which decision?

Q. The decision to acquire additional —

- A. Brian and Kerry.
- Q. — Fairfax stock?
- A. Brian and Kerry. And I, I suppose; Brian and Kerry and I.⁶⁰

In a television interview with Mr Ray Martin on *A Current Affair* on 16 February 1995, Mr Kerry Packer said of his relationship with Mr Powers:

I don't want to do the day by day work and I have a managing director in Brian Powers who I have an exceptional rapport with. He is a man that I've only ever felt the same sort of rapport with once before which was a man called Harry Chester. He is doing a terrific job. He's managing director. He's running the business day to day. And we talk for an hour, maybe two hours every day. And I believe that it's a very good team.⁶¹

4.3.3.2. EVENTS IN 1996

In March 1996 Mr James Packer was appointed managing director of PBL. Mr Kerry Packer resigned as chairman of PBL and Mr Powers was appointed chairman. According to Mr James Packer, Mr Powers' role was Executive chairman.⁶² This was the first stage in the transition to Mr James Packer assuming a greater responsibility for the entire CPH Group's interests. On a day-to-day basis, Mr Kerry Packer would take a less hands-on approach to the running of PBL and Mr Powers and Mr James Packer would take more of a hands-on approach. However, Mr Kerry Packer reserved his right as majority shareholder to ensure that his views were known, and if necessary, to intervene.⁶³

4.3.3.3. EVENTS IN 1997

On 3 September 1997, PBL announced that it would be distributing its beneficial ownership in Fairfax to shareholders of PBL.⁶⁴ This was achieved through the establishment of the FXF Trust, the sale of Fairfax securities held by PBL to the FXF Trust for units in the FXF Trust and cash, and the offer of the units to PBL shareholders. For more information regarding the structure of this special distribution, see section 2.1 at page 4.

Mr Powers states it was his idea for PBL to exit its 15% stake in Fairfax.⁶⁵ Mr Kerry Packer testified that his reaction to the idea was favourable, 'otherwise it wouldn't have happened.'⁶⁶ Mr Powers stated that Fairfax had become a distraction for PBL because the market was fixated with whether the cross media rules were going to change allowing PBL to increase its stake. So when it became clear in mid 1997 that the Government's review of the rules was not going forward, PBL decided to dispose of the stake. The decision to keep the stake in a block was initially made by Mr Powers and then approved by the rest of the PBL Board.⁶⁷

Mr Kerry Packer also testified to the ABA that the residual interest in Fairfax, which CPH holds through units in the FXF Trust, provides a starting point if he wanted to buy Fairfax.⁶⁸

4.3.3.4. EVENTS IN 1998

4.3.3.4.1. March 1998

Mr Powers had four-year employment contracts with each of CPH and Consolidated Press International Holdings Limited, each with a one-year option which could be exercised by the employer. The contracts expired in March 1997. Mr Kerry Packer exercised the options for the fifth year taking the contracts through to March 1998. In discussions between Mr Powers and Mr Kerry Packer in March 1997 Mr Powers had indicated to Mr Kerry Packer that he wanted to leave in March 1998. However, in March 1998, Mr Kerry Packer and Mr Powers had a further discussion where Mr Powers agreed to stay on with the CPH Group until the end of 1998 when it was envisaged there would be a transition in management at both PBL and CPH and Mr James Packer would take up the role of chairman of PBL and CEO of CPH.⁶⁹ This transition in fact took

place on 18 May 1998 when Mr Powers resigned from PBL and the CPH group and took up his place as a director on the Board of Fairfax.

4.3.3.4.2. May 1998

Prior to 18 May 1998, Mr Powers was a director of a number companies in which Mr Kerry Packer, PBL or CPH had an interest or controlled. (See section 8 at page 88 of this report for the list of companies).

In a PBL Media Release entitled 'PBL Announces Management Transition and Board Additions' dated 18 May 1998, the following comments were made:

Mr Powers who also announced today that he was retiring from his position as Chief Executive Officer of CPH, PBL's 45% shareholder, said: 'The five years I have spent working for Kerry Packer have been the most interesting and enjoyable of my career from a personal as well as professional perspective. CPH and PBL are privileged to have a group of senior executives who, in my opinion, are, to a person, among the very best in Australia at what they do ... I will miss working with them all.'

James Packer commented: 'Working with Brian Powers has been both highly educational and enjoyable in every respect. I wish him well in his new endeavours and I am sure that he will continue to succeed in whatever he chooses to do next.'

Kerry Packer commented: 'Brian and I have worked together very closely and well over the past five years, talking or meeting on almost a daily basis. He has contributed greatly to the Group's success over that period for which I am very appreciative. I wish him the best of luck and look forward to continuing our friendship in the years ahead'.⁷⁰

In relation to this media release, Mr Powers gave the following evidence:

A. I would have drafted virtually all of it – people would come in on it – with the exception of Nick's quotes and James' quotes.

Q. So your quotes and Kerry's quotes are your text?

A. Yes, I obviously cleared them with Kerry. I had to ask Kerry what he wanted to say. He doesn't often put pen to paper.⁷¹

4.3.4. FINDINGS OF FACT

1. *Mr Powers and Mr Kerry Packer have known each other for approximately 17 years. They share a longstanding business relationship and friendship and each holds the other in high regard.*
2. *Were the law to permit it, Mr Kerry Packer has had and continues to have a long term interest in acquiring control of Fairfax.*
3. *In 1991 when Mr Kerry Packer sought to gain a significant financial interest in Fairfax by being a party to the Tourang bid, Mr Kerry Packer worked together with Mr Powers and others in progressing that bid.*
4. *When the Tourang bid was successful, Mr Powers was a director of Fairfax from 1991 – 1993.*
5. *In 1995 when CPH and PBL increased their company interests in Fairfax to 17.17%, Mr Powers was directly involved in the transactions as CEO of CPH and PBL.*
6. *Messrs Powers and Kerry Packer have worked very well and very closely together whilst Mr Powers was in the employ of PBL and the CPH group of companies.*

7. *Mr Powers played a significant role in shaping the vision of PBL and the CPH group of companies whilst in their employ.*
8. *Mr Powers was a major driving force in relation to PBL and CPH's actions and strategies with respect to Fairfax from 1993 to 1998. These actions and strategies were often instigated by him, were implemented under his direction and had the support of Messrs Kerry and James Packer.*
9. *Mr Powers was in the employ of the CPH group of companies between 12 March 1993 and 18 May 1998.*
10. *In May 1998, prior to the possibility of Mr Powers moving to Fairfax arising, Mr Powers was intending to stay with CPH/PBL until the end of 1998.*
11. *Whilst he was in the employ of the CPH group of companies, Mr Powers acted in accordance with the directions, instructions or wishes of the CPH group of companies and Mr Kerry Packer.*

4.4. CIRCUMSTANCES SURROUNDING THE APPOINTMENT OF MR POWERS TO THE BOARD OF FAIRFAX BY THE FXF TRUST

Mr Miles gave evidence that, in early 1998, as managing director of FXF Management Limited, he spoke with Mr Gonski about the FXF Trust nominating him as its representative for consideration by the Fairfax Board and:

said to him [Mr Gonski] would he informally speak to Rodney Price with a view to appointing myself to the Board as a representative of the trust ... he [Mr Gonski] in turn had numerous discussions with Rodney Price.⁷²

Mr Miles had approached Mr Gonski because Mr Gonski had done some work for and with him and for CPH and PBL.⁷³ The management of FXF Trust was unhappy with the way in which Fairfax was operating, especially in light of the fact that Fairfax had a non-resident chairman with many other commitments (Mr Price was based in London). The FXF Trust was not satisfied as a substantial shareholder with the operation of Fairfax and wanted Board representation.

Mr Miles then spoke to Mr Price in March 1998. On or around 5 May 1998, Mr Miles telephoned Mr Price and said to him:

that he should make up his mind one way or the other whether I was going to be appointed to the Board on the 18th of May ... because if I was not appointed to the Board, I would ... seek legal advice and would talk to the institutions ... and I would have to spill the Board so that we could get proper representation because enough time had elapsed.⁷⁴

Mr Powers gave evidence that there was concern by FXF Management Limited that Fairfax was not being managed effectively and was trying to get Board representation. Mr Powers was aware that the FXF Trust was having difficulty securing the appointment of Mr Miles to Fairfax. As a significant shareholder, FXF Trust had the full support of CPH in this regard. According to Mr Powers:

Q. ... So you knew that FXF Trust was getting more serious about pushing its case?

A. Absolutely. Certainly as a shareholder they had the full support of CPH for doing that. We thought the company was under managed and they'd better get involved. So I became interested (a), because I was ready to move on in any event, but why Fairfax? It was a – I thought that (a), if it had to go to a proxy fight, you know, Neville was not an ideal person to lead a proxy fight; but more importantly, it became clear that it didn't need just another – this sounds immodest – another, you know, solid businessman on the Board, which I think Neville would have been.

It maybe needed someone who was going to be more active, had time to be more active, and understood media better. It was clear from the outside that the company was under performing and that the Board was not adding as much value as it could, and basically both directing and then supporting management. You had a new management team there who

had never run public companies before. I mean, you had a Board that was, you know, absentee in terms of the key strategic shareholder and that just, by definition, paralysed the rest of the Board.⁷⁵

Two weeks before Mr Powers was appointed to the Board of Fairfax, Mr Price, Mr Kerry Packer and Mr Powers had a telephone conversation:

Then two weeks before I went on the Board ... Rod Price put a call in to Kerry Packer, and Kerry suggested that I join him when he returned that call. So we returned the call, with me on the speaker, and spoke to Rod Price and ... talked about Fairfax and said that we thought FXF Trust deserved a director. We thought that while Neville may not be the best candidate in the world, it was our view that he was a good candidate and would add value to the Board ... We then had a fairly frank discussion about what we thought was happening at Fairfax, saying we thought the Board needed help, that the Board wasn't functioning as well and therefore the company wasn't performing as well as it should.⁷⁶

On the Monday before 18 May 1998, Mr Price telephoned Mr Powers and stated that he was prepared to invite Mr Miles to the Board of Fairfax and to support him for a Board seat:

Rod would have called very early that next week and it may well be the Monday before the 18th ... and said, well, that he was prepared to invite Neville to a Board lunch after all and support him for a Board seat. I said, 'Fine.'⁷⁷

In relation to his involvement on behalf of the FXF Trust in gaining Board representation, Mr Powers answered as follows:

Q. ... what sort of direct intervention you had had or lobbying that you may have done on behalf of the FXF Trust to get representation on the Fairfax Board.

A. ... Taking 'lobbying' as broadly defined, I would have spoken several times to David Gonski, who during the period – David ended up to some extent as the go-between between the Fairfax Trust and Rod Price and was convinced that Rod intended, was predisposed to putting Neville on the Board and would progress it.

I talked to David directly or Neville would talk to me and bring me up to date on the conversation, which was 'Listen, do you think Price is really going to put him on the Board or is he stalling for some reason?', and David's view was that he intended to put him on the Board and that he was trying to do it in good order, et cetera.⁷⁸

Mr Powers then thought that perhaps he could put himself forward as the FXF Trust nominee:

Q. ... where did the idea come from that you rather than Miles would be the FXF Trust's nominee on the Fairfax Board?

A. It came from me, I think. It may have been subliminally planted, but it started as a 'what if' in my mind and really coming from the feedback that we thought Neville was going to get up, it was possible he wouldn't and we didn't fully trust Brierley.⁷⁹

Mr Kerry Packer summarised his impression of the discussions, recalling that Mr Powers said to him,

... 'Miles is not going on the Board, I would like to have a go at running the damn thing, I am going to leave at the end of the year anyway, what do you think?'⁸⁰

to which Mr Kerry Packer replied,

'If you want to, go ahead and do it.'⁸¹

The evidence of Messrs Powers and James Packer indicates that Mr James Packer and CPH had concerns about the performance of Fairfax. Mr Powers was nominated by the FXF Trust, with the full support and agreement of CPH and Messrs Kerry and James Packer, because Mr Powers had the relevant skills and expertise to contribute to the management of Fairfax and they anticipated that his contribution to the company was likely to lift its share price.

Mr Powers' account of how the matter progressed is as follows:

A. It was a kind of brainstorming about because it obviously was on our minds at that point in time because of the publicity and knowing that a meeting was coming up and Rod Price's phone call to James ... it was really floated as

a 'I'm almost tempted to do this myself' type thing, and Kerry's initial reaction was, 'Gees, you would be perfect for it, but', you know, 'you're going to hang around for a while longer'.

Q. It's too early.

A. Yes. Then I think James became more enthusiastic about it ... so I think James was saying that would be a good trump card. Anyway we had then a more serious discussion, the three of us, and again this would have been a rolling discussion, you know, and came to the – where was it left when Kerry went overseas ... Neville is probably going to get up. A bit of a hassle. I was ambivalent. I was saying do I really want to do this? I raised it and was thinking about it, but I was ambivalent about whether I really wanted to do it. So I left with Kerry saying, 'Listen, life's too hard. Let's stick to the transition plans we had in mind, you know, bottle that'. So that's how we left it ... I'm sure I would have made it clear that ... I wouldn't do it without an economic stake because I didn't have the credibility to do it, quite frankly, and the incentive to go do it.⁸²

I thought Brierley was screwing the company up. The ... shareholder I currently work for, CPH, had money and they were losing ...⁸³

I decided it was something I would like to do ... So I agreed to make myself available ... I talked to – I don't remember, Kerry or James first ... and then to both – had a serious talk to both of them and I don't remember in the first serious talk with Kerry whether or not he said, 'Fine. Go ahead and do it', or whether he and James spoke. I think he and James probably spoke privately ...⁸⁴

Mr Powers sought and obtained Mr Kerry Packer's consent to resign his positions at CPH for the purpose of taking up the position at Fairfax:

Anyway, it was pretty quickly decided that, 'Right. Listen, if you really want to do this, okay', and ... Early that week it would have been decided that it was okay for me to go look at it seriously ... I would have told Kerry I was serious about it and have his kind of permission to think about it more seriously ... kind of his consent that maybe he was inclined to let me go ... before I spoke to him [Mr Miles].⁸⁵

The idea of Mr Powers purchasing 15% of the units in the FXF Trust and this transaction being guaranteed by CPH was discussed and agreed to at the same time. Mr James Packer gave the following evidence:

Q. So Brian came in by himself and put that to you, said, 'I have this idea'?

A. I might have even come into Brian's office. But Brian said, 'Listen, I think this is something I would like to talk to you about and gauge your response to because it is something that I'm thinking about?

Q. But at the time he first talked to you, it was the complete package that he put to you in terms of the financing, his taking interest in the trust?

A. Yes.⁸⁶

Mr James Packer also gave the following evidence:

Went away and thought about it. I remember talking to dad about it and asking him what his view was, and his view basically was, 'Listen, Brian has made it perfectly clear that he is going to leave the group, so we may as well jump that hurdle because we are going to have to', and I remember thinking that – I remember asking Brian if we were sure that this didn't place the group in any legal jeopardies, if everything was above Board and hunky-dory, and we spoke with John Atanaskovic about that.⁸⁷

After his discussions with Messrs James and Kerry Packer, Mr Powers telephoned Mr Miles. Mr Miles stated in evidence:

I then got a call, it would have been about a week or so before the 18th of May, from Brian Powers and he said to me that he had had an interesting thought and that, as he was in any event was looking to retire, as it were, from Consolidated Press, he thought here was a great opportunity to take this on and resign his directorships and get involved in Fairfax, what did I think about that and would I support that.

... it seemed like a really good idea, so I said to him, well, we would be pleased from the trust's standpoint, make whatever inquiries or get whatever opinions he needs to ensure that there is no breach of any legislation and that, subject to those things being okay and subject to him being assured – when I say assured, had dealt with all these issues – I was happy on the basis that he was probably the most qualified person that I know to get involved ...⁸⁸

In a letter dated 18 May 1998, FXF Management Limited nominated Mr Powers to the Board of Fairfax. The letter states at page 2:

You will appreciate that the FXF Trust has a very large investment in your company and we have had to stand by and watch it drop in value over the entire period it has been held. We are aware ... that a number of major shareholders in the company are presently concerned at the direction, not just of the share price, but of the company's operations as a whole.

This concern has heightened our wish to achieve representation on the Board. To facilitate this ... we hereby request that Mr Brian Powers be appointed a director of the company at your Board meeting to be held today. This request is in substitution for our previous request concerning Mr Miles.⁸⁹

4.4.1. FINDING

1. Messrs James and Kerry Packer both supported the idea that Mr Powers move to Fairfax.

4.4.2. TRANSFER OF UNITS IN THE FXF TRUST FROM CPH TO MR POWERS AND ARRANGEMENTS FOR FINANCE OF THAT TRANSFER

On 18 May 1998, Mr Powers entered into a written agreement with CPH to purchase 76 million units in FXF Trust. The agreement was subject to a condition that Mr Powers was entitled to terminate the agreement if he was unable to procure finance in the form of a loan of 80% of the purchase price with the lender taking a first charge over the units and CPH providing 'a top up guarantee covering both interest and capital' on the loan.⁹⁰

It is a condition of the agreement that CPH procure the top-up guarantee. The term of the loan and guarantee is 5 years.

Neither the lender nor the guarantor would have any recourse against the assets of Mr Powers other than the 20% of the purchase price put forward by Mr Powers. The bank's recourse, upon default of the loan, is to be against the sale units and the top-up guarantee.

The agreement, once completed, would transfer 15% of the units in the FXF Trust to Mr Powers, resulting in Mr Powers and CPH becoming the two largest unit holders in the FXF Trust. CPH would hold 29.97% of the units in the FXF Trust (now holds 44.87%). The completion date for the agreement was set to be 20 days, which expired on 7 June 1998.⁹¹ On 5 June 1998, CPH agreed to extend the time for completion by another 45 days.⁹² Mr Powers agreed to purchase the 76 million units at 20 cents each for \$15.2 million. This was the market price for the units on the day the agreement was entered into.

On 28 May 1998, ANZ Investment Bank notified Mr Powers that funds would be available via a fixed rate fully drawn advance facility with a limit of \$12,160,000 to assist with the acquisition of 76 million units in the FXF Trust. The term of the loan facility will be five years from drawdown.

The completion of the sale agreement has not yet taken place. The reason given for this has been that the ANZ bank has had a number of logistic and legal problems to solve in order to implement the transaction in accordance with Mr Powers' instructions. The transaction has been proposed involving some offshore companies because Mr Powers has been aggregating his non-US investments in a Belgian company in preparation for his return to the USA to reside there.⁹³

Mr Kerry Packer when asked by the ABA why he agreed to provide the guarantee on the loan in this instance replied 'Because it was convenient for him'.⁹⁴ Mr Kerry Packer said:

I end up lending money to all sorts of people who I don't have anywhere near the relationship with that I have with Brian Powers. It is not quite – you know, as far as I am concerned, this is a conversation. The financing of Brian's shares is a conversation which would have taken 15 seconds.⁹⁵

The fact that it was a non-recourse guarantee was at Mr Powers' suggestion:

My sales pitch on that was that it is the – it was essential that I be 100 per cent independent in doing this and that if, you know, if they are banking me with recourse, people could assume that they had a hold over me. So I guess with Westpac, if there was a – if the value of the stock was down and it looked like I could be on the hook to lose a lot of incremental money, it could be viewed as having a hook over me. I was with non-recourse, yes. It's their risk and, you know, they can't come back and require anything of me.⁹⁶

According to Mr Kerry Packer, Mr Powers was not in need of the finance as his payment upon termination from the CPH Group was adequate to allow him to purchase the units himself.⁹⁷

However, Mr James Packer indicated that:

Well, I think Brian, from the start, made it clear that there would have to be some sort of non-recourse guarantee package made available to enable the transaction to proceed, because that was the only way within his personal financial position he could contemplate the transaction.⁹⁸

Mr Powers indicated that he communicated to Messrs Kerry and James Packer his desire to acquire an economic stake in the FXF Trust:

I'm sure I would have made it clear that ... I wouldn't do it without an economic stake because I didn't have the credibility to do it, quite frankly, and the incentive to go do it.⁹⁹

Mr Powers indicated:

What I said to Kerry/James, that it would be Kerry's decision ... and that I would put I originally said 10 or 20 per cent down, but would want them to – would want them to finance the rest of it; but we finally agreed on 20 per cent and they agreed to finance the rest of it or to provide, you know, a bank guarantee. We thought it would be cleaner to have a bank do it than CPH guarantee any shortfall.¹⁰⁰

Mr Kerry Packer, when asked about the detail of the guarantee said:

Well, I'm unaware of that. That would have been done maybe with James. It wasn't done with me.¹⁰¹

He also recalled Mr Powers saying as follows:

You know, 'I'm going to buy some shares, I need some bridging finance', or whatever the hell it is.¹⁰²

Mr Kerry Packer replied:

'Well, do whatever you like'.¹⁰³

The limited recourse nature of the guarantee, as agreed to between Mr Powers and CPH, is not a kind of transaction commonly entered into by CPH. In response to a notice issued to CPH in relation to this matter, Mr David Barnett, General Counsel for CPH, could recall such a guarantee being provided by companies in the CPH group on only two other occasions.¹⁰⁴

4.4.2.1. FINDING

- 1. Messrs Kerry and James Packer agreed to facilitate Mr Powers' entry to the Fairfax Board as an FXF Trust nominee director.*
- 2. Mr Powers felt that he needed an economic stake in the FXF Trust to ensure that he had the necessary credibility and financial incentive to be an FXF Trust nominee director.*
- 3. The limited recourse guarantee offered to Mr Powers by CPH is an unusual transaction for CPH.*

4. To facilitate Mr Powers acquiring an economic stake in the FXF Trust, CPH agreed to transfer some of its units in the FXF Trust to Mr Powers.

4.5. MR POWERS' RELATIONSHIP WITH THE PACKER INTERESTS SINCE 18 MAY 1998

4.5.1. CONSULTANCY AGREEMENT

4.5.1.1. TERMS OF AGREEMENT

On 18 May 1998, Mr Powers entered into a formal written agreement with CPH to provide advisory services to CPH. The key terms of the agreement are set out in a letter addressed to Mr Powers from CPH and signed by Mr James Packer dated 18 May 1998. The terms include the following:

- a term of 24 months;
- Mr Powers to provide assistance in various aspects of CPH's business, including, assisting in the management and investment of treasury and liquid assets. (clause 1);
- CPH to pay Mr Powers \$4000 per day when engaged, with an expectation that Mr Powers work no more than 70 days in a 12 month period (clause 2);
- CPH will not refer matters which may place Mr Powers in conflict with his position at Fairfax (clause 8); and
- either party can terminate the agreement upon giving 30 days written notice (clause 9).

Mr Powers gave evidence that the consultancy agreement arose because Mr Kerry Packer wanted a formal arrangement in place so that CPH could seek Mr Powers' advice 'if there was a 'crisis''.¹⁰⁵ Mr Powers agreed to this and the terms were settled. In particular, Mr Powers suggested that work under the consultancy agreement be supplied on a per diem basis and that there be a 70-day limit.¹⁰⁶ Mr Powers stipulated the 70-day limit because he did not want CPH to refer a large amount of work to him under the agreement.¹⁰⁷

Mr Kerry Packer gave the following evidence regarding the consultancy agreement:

Q. How did the discussion come about about the consultancy agreement which CPH entered into with Brian Powers?

A. I don't know.

Q. Did you have any discussion with Powers —

A. Bound to.

Q. — about providing ongoing services to the company?

A. Yes.

Q. Was that something that you sought from Powers when he said, 'I'm going to leave'?

A. I don't know who said what to whom, but the truth of the matter is I would have been very happy to have ongoing relationships with Brian after he left. It is very useful in America to keep an eye on things and give us information and be available. He is a very intelligent man and one well worth listening to his opinions.¹⁰⁸

One possible area of advice to be provided under the agreement is the management of the liquidity at CPH. There was a significant amount of cash to be managed, and Mr Powers had performed work at CPH over the past 12-18 months 'putting that money to work',¹⁰⁹ for example interviewing fund managers, and this was an area where the loss of Mr Powers' services would be clearly felt by CPH.

Mr Powers was to provide advice on the management and investment of liquid assets. He agreed with the ABA that as a result of providing this service he would be privy to the strategic direction of CPH and what it was doing with its cash.¹¹⁰

Under this agreement, it was intended that Mr Powers would assist in the recruitment of a chief executive for the Crown Casino, which would be billable to CPH.¹¹¹

Mr Powers said on 10 June 1998 that he had an expectation that the time required of him under the consultancy would 'dwindle'¹¹² and that he viewed the consultancy agreement as a 'liability' and was doing it out of an obligation to provide for a smooth transition in management at CPH. He said he would be happy if he was never asked for advice under the consultancy agreement. Mr Powers asserted that the consultancy agreement did not override his duties to Fairfax.¹¹³

4.5.1.2. WORK DONE PURSUANT TO CONSULTANCY AGREEMENT

As at 19 August 1998, Mr Powers gave evidence that the only services which he had provided under the consultancy agreement to date were assistance in the recruitment of an employee for Crown Casino and provision of advice relating to a fund manager with which CPH was looking to invest monies. Mr Powers had not at that time billed CPH for the provision of these services.¹¹⁴

Mr James Packer's evidence in relation to the purpose of the consultancy agreement corroborates the evidence of Mr Powers:

... there was a recognition that there would be a need for a transitional relationship in regards to a series of the CPH assets which didn't conflict with Fairfax which Brian had been effectively in charge of ... my role for the last 2 years has been purely concerned with Publishing and Broadcasting and CPH has a series of other assets and frankly I am not up to speed on those assets and my new responsibilities put me in charge of those assets and therefore ... in circumstances which do not conflict, Brian is available as a resource to enable me to maximise those assets.¹¹⁵

Mr James Packer indicated that it was intended that the consultancy agreement would encompass business decisions of CPH. He did not envisage that he would seek advice from Mr Powers outside the consultancy agreement.¹¹⁶ Mr Kerry Packer gave evidence that he had not called upon Mr Powers for advice under the consultancy, as he viewed the agreement as one that would operate primarily while Mr Powers was in the United States of America.¹¹⁷

In relation to other matters envisaged to be the subject of possible advice under the consultancy agreement, Mr James Packer stated:

... if the group sees an investment opportunity that doesn't conflict with Fairfax or PBL that, if my lawyers tell me that its legal to ask Brian, his view on it, I could see myself asking his view on it because I think that he's got a skill set in that area.¹¹⁸

4.5.1.3. TERMINATION OF CONSULTANCY AGREEMENT

Atanaskovic Hartnell has advised the ABA in a letter dated 26 August 1998 that Mr Powers and CPH agreed on 25 August 1998 to terminate the consultancy agreement. Mr Kerry Packer gave the following evidence on 27 October 1998 regarding the consultancy agreement and the circumstances surrounding its termination:

- Q. But there is a formal – there was a formal agreement entered into?
- A. There was a formal, which got torn up because of this.

Q. I'm trying to understand why that formal agreement was —

A. Because it looks like I have a situation of influence over Brian, which I don't have, and if he wants to do the job as chairman then the situation is that we can't have an ongoing relationship, which is on that basis.

...

Q. Were you desirous of him being available to provide services to CPH after he left?

A. Obviously I was in the beginning, but when it started to become a problem with the Broadcasting Tribunal or whatever the hell it is, tear it up.

A. So were you consulted about the termination of the agreement? How did that come about?

Q. Obviously I was consulted.

...

Q. My recollection may be incorrect, forgive me, but I think Mr Powers said that actually he wasn't particularly keen on having this ongoing consultancy agreement but there was a greater enthusiasm from your part?

A. I think that is probably right.¹¹⁹

4.5.1.4. FINDINGS

1. *The consultancy agreement between Mr Powers and CPH was entered into at the request of Mr Kerry Packer.*
2. *It was entered into as a result of Mr Kerry Packer's desire to retain a formal, contractual link with Mr Powers, which could be relied on in the event that CPH wanted Mr Powers to do work for CPH.*
3. *CPH and Mr Kerry Packer could not seek assistance from Mr Powers pursuant to the agreement on matters that would place Mr Powers in conflict with his position at Fairfax.*
4. *The consultancy agreement was current throughout the period the subject of this investigation.*

4.5.2. NEW REGENCY INC

Mr Powers is a director of Monarchy Enterprises Holdings BV, a company in which PBL holds a 20.5% interest.¹²⁰ Mr Powers was nominated as a director by PBL and appointed on 15 August 1994. Monarchy Enterprises Holdings BV is a company incorporated in the Netherlands. Monarchy Enterprises Holdings BV owns New Regency Inc., a company incorporated in the US that produces films for cinematic release.¹²¹

In a letter from PBL dated 11 September 1998, PBL indicated that Mr James Packer had been nominated by Nine Network (Netherlands Antilles) Pty Limited to be a director of Monarchy Enterprises Holdings BV. As at 19 October 1998, inquiries made by the ABA revealed that Mr James Packer had not yet been appointed as a director of Monarchy Enterprises Holdings BV. The ABA received advice that, as at 21 December 1998, PBL is not represented on the Board of Monarchy Enterprises Holdings BV.¹²²

Mr Powers continues to be a director of Monarchy Enterprises Holdings BV. PBL indicated that the reason for the continuation of Mr Powers as a director of Monarchy Enterprises Holdings BV was that Monarchy Enterprises Holdings BV had

requested that Mr Powers continue as a director pending the finalisation of [Monarchy Enterprises Holdings BV's] fundraising which was in train. [Nine Network (Netherlands Antilles) Pty Limited] agreed to that course. Following

completion of the fundraising, [Monarchy Enterprises Holdings BV] requested that Mr Powers remain as a director of [Monarchy Enterprises Holdings BV], in his individual capacity and not as [Nine Network (Netherlands Antilles) Pty Limited's] nominee. Mr Powers has, as PBL understands it, agreed to do so. [Nine Network (Netherlands Antilles) Pty Limited's] nomination of James Packer as a director of [Monarchy Enterprises Holdings BV] has been accepted by [Monarchy Enterprises Holdings BV], and will be formally implemented in the near future.

PBL understands from [Monarchy Enterprises Holdings BV] that [Monarchy Enterprises Holdings BV] desires to retain Mr Powers as a director and has offered to him to remain as an independent director. PBL understands from [Monarchy Enterprises Holdings BV] that Mr Powers is likely to accept such offer.¹²³

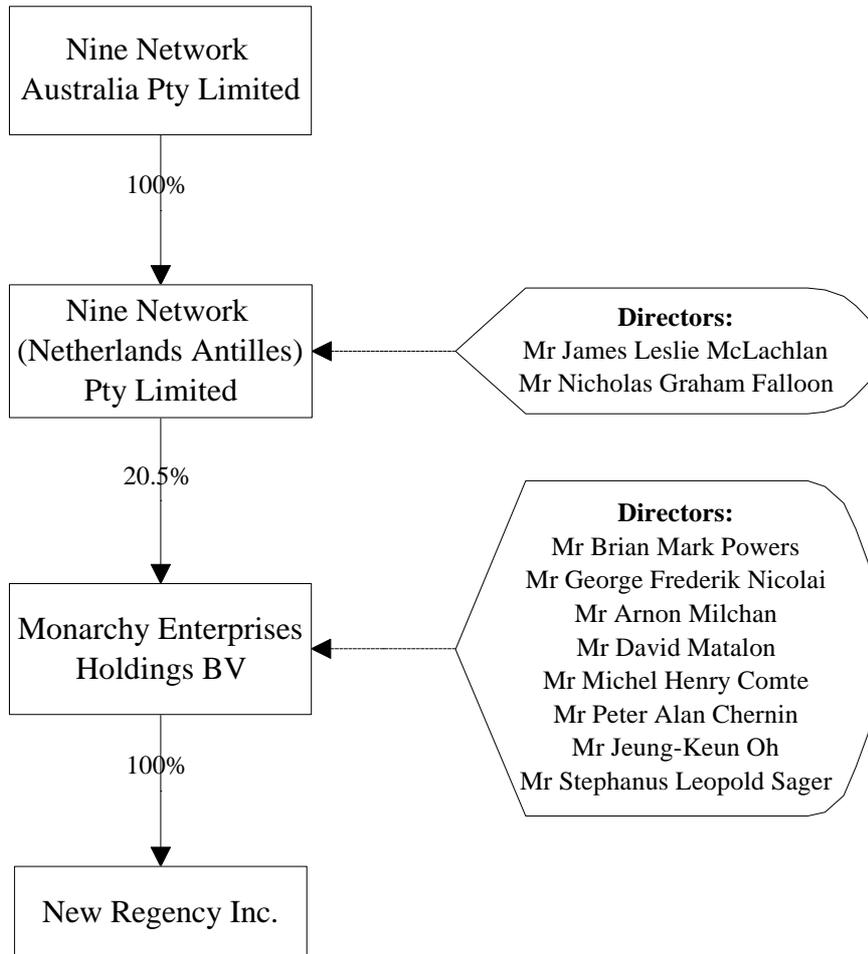


Figure 1: Simplified shareholding and directors of New Regency Inc. as at 19 October 1998.

(For more information of shareholding above Nine Network Australia Pty Limited see APPENDIX 3 of this report at page 109.)

Mr Kerry Packer is in a position to exercise control of PBL (see section 7.1 of this report at page 84). PBL holds 100% of the company interests in Nine Network Australia Pty Limited. Nine Network Australia Pty Limited holds 100% of the company interests in Nine Network (Netherlands Antilles) Pty Limited. By the application of subclause 6(1) of Schedule 1 to the Act, Nine Network (Netherlands Antilles) Pty Limited has a controlling interest in Monarchy Enterprises Holdings BV by virtue of its 20.5% interest in that company.¹²⁴

4.5.2.1. FINDINGS

1. Mr Kerry Packer is in a position to exercise control of Nine Network (Netherlands Antilles) Pty Limited.

2. *Nine Network (Netherlands Antilles) Pty Limited is in a position to exercise control of Monarchy Enterprises Holdings BV.*
3. *Mr Kerry Packer is in a position to exercise control of Monarchy Enterprises Holdings BV.*
4. *There is likely to be ongoing business contact between Messrs James Packer and Powers as directors of Monarchy Enterprises Holdings BV.*

4.5.3. CONTINUING BENEFITS PROVIDED TO MR POWERS BY CPH

4.5.3.1. HOUSE

On 10 June 1998 Mr Powers gave evidence that the lease for his current residence was between CPH and the landlord:

- Q. Just to make sure I'm clear. The house in Vaucluse, the lease is presently between CPH, is it, and the landlord?
- A. Correct.
- Q. And you're going to take over that lease or is it going to be a sublease?
- A. We haven't figured out yet.
- Q. What's your intention?
- A. Well, the economic – the deal is that I'm responsible for it, so I haven't even bothered looking about whether it's not worth doing a sublease or a signing lease. But just the net was the – it has been put in the company's name because it was – at one stage, I'm not sure it was any more – it was more tax efficient from my point of view for the company to be paying. But it has always been notionally that the cost of that has been deducted from my overall salary. I picked up the house and occupied it, but at one point in time it was tax advantageous to have it in the company's name.¹²⁵

On 19 August 1998, Mr Powers gave the following evidence in relation to his Australian residence:

- Q. The house in Vaucluse you are occupying was leased by CPH. Are you still resident in that house?
- A. Yes, and I'm paying —
- Q. Whose name is the house in?
- A. Theirs, because we do not want to buy the house and I am paying straight through on the deal.
- Q. When you say 'theirs', that is still CPH?
- A. CPH, yes. Dealing with the landlord is impossible. He is in gaol in China and his lawyers take nine months to get back on anything.
- Q. So you are paying rent to CPH?
- A. I pay the rent, yes. I am responsible for the lease. CPH pays it and I reimburse them.¹²⁶

4.5.3.2. SECRETARIAL SERVICES

As at 19 August 1998 Mr Powers gave evidence that he was still using secretarial services provided to him by CPH:

... a lot of my mail still goes to CPH and I have been very careful not to intertwine my personal stuff at Fairfax by using the secretarial service there, so my old secretary has been fielding phone calls and giving me forward addresses and mail and helping on scheduling and stuff, so I talk to her a lot, and James particularly if I go to pick up the mail once a week over there if she has not sent it over ...¹²⁷

4.5.3.3. MOBILE PHONE

On 10 June 1998, Mr Powers gave evidence that CPH owns the mobile phone used by Mr Powers:

I think the mobile phone I have is a CPH mobile phone. So I called James and said, 'Listen, anything – there's going to be stuff that bills will be dribbling in on. Till we change them over, just have Graham Cubbin keep a monthly account on anything that comes through for me.'¹²⁸

On 19 August 1998, Mr Powers gave evidence that CPH still owns the mobile phone used by Mr Powers:

Q. The mobile phone you had was owned by CPH. Have you returned that?

A. I have not.¹²⁹

4.5.3.4. SPORTING CLUB MEMBERSHIPS

On 10 June 1998, Mr Powers also gave evidence that CPH had payed for a corporate membership for Mr Powers at the Australian golf course:

A. ... And the only other thing in terms of full disclosure of that, it triggered my recollection, is that I'm a corporate member of the Australian golf course. Now, whether they're going to throw me out or not, but I've agreed till CPH reserves the right to throw me out, or Australian does, then since I'm on CPH's membership, I pay whatever the normal dues fees are. There's no cost to CPH.

Q. Are you intending to change that into your own name?

A. I haven't had a chance to look at it ...¹³⁰

On 19 August 1998, Mr Powers gave the following evidence regarding the status of his membership at the Australian Golf Course:

Q. Australian Golf Course ... annual memberships?

...

Q. ... That was being paid by CPH. Have any arrangements been paid in relation to these memberships?

A. In the Australian, I am reimbursing them the costs of that. When it comes up I will and whether they will throw me out or not I will find out ...

Q. Did you say you will reimburse them or you have?

A. I just got an account from them today, or yesterday, yes.¹³¹

Mr Powers also gave evidence that CPH had been, and would continue to pay his membership at the White City Tennis Club:

I haven't had a chance to look at it, but any time there's anything that's been related to White City, I think CPH pays my White City tennis club memberships. I haven't played there in two years, so it's not of much moment to me, so what I agreed with James is anything that – any expenses related to me, until we sort them out, basically just have Graham send me a monthly bill on until we move things over, and that's how we're handling all that stuff.¹³²

On 19 August 1998, Mr Powers gave the following evidence regarding the status of his membership at the White City Tennis Club:

Q. ... White City Golf Course annual memberships?

A. White City Tennis Club.

Q. Sorry, tennis club, you are right. That was being paid by CPH. Have any arrangements been paid in relation to these memberships?

A. ... White City, I don't know what has happened, I have used it once. I don't think I have used it in the last three years.¹³³

4.5.3.5. STATUS OF THESE ARRANGEMENTS

The ABA was advised on 26 August 1998 that the above arrangements extant at 18 May 1998 were in the process of being 'regularised'.¹³⁴ The ABA was advised that:

since he [Mr Powers] returned to Australia from the United States recently, Mr Powers has been seeking to finalise the regularisation of minor previous arrangements between him and CPH (eg relating to house rental, sporting club membership, etc), and he is hopeful that this will be complete by the end of this week.¹³⁵

On 21 December 1998, the ABA was advised that:

The tenancy of the Vaucluse house by Mr Powers and his family will come to an end in January 1999, when Mr Powers and his family will leave Australia. While CPH remains the Tenant under the relevant Lease, Mr Powers has reimbursed and will continue to reimburse CPH the rental and other moneys paid under the Lease. In the period prior to 19 August 1998, Mr Powers had a more substantial involvement with his secretary ... than has been the case since that date and particularly of more recent times ... Mr Powers will return the mobile phone he uses, which belongs to CPH, when he leaves Australia in January 1999. Since leaving CPH's employ, Mr Powers has reimbursed CPH all moneys expended by CPH in relation to that phone. Further, it was a matter of convenience for Mr Powers to retain the same mobile phone number that he had used for some significant period. When he leaves Australia, Mr Powers will not have any continuing arrangements, via CPH, with the Australia Golf Course or with the White City Tennis Club.¹³⁶

The ABA was advised on 17 February 1999 that:

The lease on the house at Vaucluse formerly occupied by Mr Powers and his family terminated on 31 January 1999, Mr Powers having previously met all commitments under that lease ... and vacated the premises. Ultimately ... the membership of the White City Tennis Club was a personal membership of Mr Powers and the subscriptions were paid for by him. Any fees and subscriptions payable in respect of the use made by Mr Powers of the facilities of the Australian Golf Club have been borne by Mr Powers. Use of the mobile phone originally provided to Mr Powers by CPH has, since he left CPH, been borne by Mr Powers.¹³⁷

4.5.4. NATURE OF THE RELATIONSHIP BETWEEN MR POWERS AND MESSRS KERRY AND JAMES PACKER

The historical aspects of these relationships are set out in sections 4.3 and 4.4 of this report at pages 17 and 21 respectively. Mr Powers, Mr Kerry Packer and Mr James Packer all gave direct evidence to the ABA about the current nature of these relationships.

Mr James Packer expects that Mr Kerry Packer's friendship with Mr Powers will continue but Mr James Packer does not expect that they will speak on a daily basis.¹³⁸ Mr James Packer commented on the friendship between Mr Kerry Packer and Mr Powers stating:

... Brian and Kerry's relationship was dominated by the fact that Brian had that job. That was the dominant force in their relationship. The dominant force in the relationship has now been removed, so the relationship is clearly a very, very different relationship. However, Brian and Kerry had got on well, but it would be wrong to think that the

friendship was one of a nature where Kerry would be able to influence Brian unduly on a going- forward basis, because that was not the nature of the relationship.¹³⁹

Mr Powers said of the relationship now:

A. Well, it's only changed over the last three weeks and he's [Kerry] been away during that period. So I think, as I've said publicly, I consider him a friend and I hope to maintain that friendship. I like Kerry and I've worked very, very closely with him and I think learned a lot. I think I've done a good job for him.

I have a history of, I think, by and large, keeping good relations at the places I've worked at. I've changed jobs more than most human beings I know, five-year jobs I think is probably the longest I've ever stayed at a place and I'm anywhere from close to very close with basically every place I've ever worked. But 'close' means friends and if they want to call me for advice or vice versa, I do that.¹⁴⁰

Q. I suppose what I'm suggesting to you is that you really have developed quite a close personal relationship with the Packer family as a result of being at CPH over the past five years?

A. I guess I developed a close, very close working relationship. I feel friends, you know, I don't see Kerry socially very often. I'd see him three hours a day sitting in my office ... I did one or two business trips that you also take a detour to Las Vegas on or something like that, but it's not like we hang around or played – I haven't been playing much golf. I play occasional golf with James, but otherwise don't see him socially other than that. It's not that we don't like each other, we are in different worlds. But I am close to them and consider them friends, both of them.¹⁴¹

Mr Kerry Packer said of the rapport he has with Mr Powers:

Q. You said in 1995, when CPH had taken its interest in Fairfax up to about 17 per cent, on 'A Current Affair' that you and Powers had an exceptional rapport and that you had only felt that rapport with one other who had worked with you, and that was Harry Chester; was that true?

A. Of course it was true; otherwise I wouldn't have said it.

Q. Okay. Do you still have that rapport with Mr Powers?

A. Yes, I still have a very close rapport with him, but you have to understand that the circumstances of the relationship change. When you are working with somebody on a day-to-day basis, the rapport you have with them is a business rapport. It's an understanding. It's a feeling of, 'Brian will know what to do about that' or, 'Brian will know what I think about that' or, 'I will know what Brian thinks about that'. That's what I'm referring to as that rapport. Therefore you don't have to have long conversations about it. You don't have to have situations where you have to go through and explain fundamentals to one another.

There is a capacity to talk in shorthand and to also be aware of what the other person's feelings are. Between an employer and an employee that's a pretty unique and successful relationship. That relationship no longer exists. Brian is no longer an employee of mine, any more than Trevor Kennedy is or Al Dunlap is or anybody else who's left. He has his own agenda to follow. He has his own life to lead. He has his own criteria, he has his own business to run and he will run them as his primary objective.

Q. But how do you simply just switch off that relationship?

A. Because it's based on business, and when the business relationship is no longer there ... Men's relationships are always formed around a mutual interest, whether it be golf, business or whatever the hell it is. When his business becomes different to my business, the relationship is not the same. That doesn't mean that we can't talk to one another. It doesn't mean that we don't laugh together. It doesn't mean that we don't even exchange views. But the truth of the matter is there's no compulsion for those views to be worked on.

...

Q. Because of that rapport, he doesn't really need to ask you what you want in a particular situation; he infers it?

A. I've been trying to tell you the truth rather than have you —

Q. I understand.

A. — twist it around to the suggestion that I can control Brian Powers by mental telepathy.

Q. No, I'm not twisting it.

A. The truth of the matter is Brian Powers is his own man and will run Fairfax as he wants to ...¹⁴²

Mr Kerry Packer gave evidence that, if schedules allowed, he would like to play golf in the future with Mr Powers, and would perhaps discuss issues relating to Fairfax on such occasions:

Q. So you would expect, I take it, to continue to see him socially, perhaps play golf with him if that is possible?

A. Well, I mean, the truth of matter is I wouldn't expect to see a lot of him for the simple reason that he's going to be living in America. So I wouldn't expect to be seeing him. If the opportunity arises, I certainly will be seeing him and playing golf with him and talking about Fairfax too, if I can, saying, 'What are you doing about getting those arseholes into shape? Have you got rid of any more people? Is this managing director of yours that you have appointed any bloody good?' To which he will say, 'Well, I don't know that I have got rid of as many as I should have; the managing director is terrific' or 'not terrific' or whatever the hell it is, 'I have made a mistake' or 'I haven't', and we will play the next shot.¹⁴³

Mr James Packer gave evidence as follows about a possible relationship with Mr Powers in the future:

Q. Would you expect to have an ongoing social relationship with Brian Powers?

A. I would be delighted to have a game of golf with Brian if he wanted to have a game of golf; so yes, absolutely.

...

A. ... I've probably played golf with Brian about half a dozen times over the last two years.¹⁴⁴

Mr Powers has had a number of conversations with Mr James Packer since his resignation on 18 May 1998. One such telephone conversation regarded the appointment by PBL of Mr Alexander as editor of *The Bulletin*. Mr Powers gave evidence that this discussion was not of a substantive nature:

Q. Have you spoken to James about that?

A. Yeah, when was it announced, a week or two? I said to James, yes, 'I see you have hired John', and he said, 'Yes, he should be real good' or something, but a throwaway, no substance.

...

Q. Where was this that you were talking to James about this?

A. It must have been on the phone.¹⁴⁵

Mr Powers also gave evidence that he had spoken with Mr James Packer on a number of occasions while Mr Powers was at the offices of CPH collecting mail which had not been forwarded by his CPH secretary.¹⁴⁶

Mr Powers gave evidence on 19 August 1998 that he had had two social dinners with Messrs Kerry and James Packer since his resignation from CPH on 18 May 1998:

Q. And do you interact with James Packer or Kerry Packer socially or have you since becoming chairman?

A. I have had a, well, they had a departure dinner for me and I had a dinner at Kerry's house when he came back from England. So I would have had two dinners with them in whenever he came back from England, that week.

Q. The departure dinner was the large dinner at the Catalina restaurant?

A. Yes, written up in great detail. And other than that, no. And James, not at all socially ... I consider James – if I am looking for a golf game and if James is home, I will call him. And if Kerry gets healthy, Kerry will be.¹⁴⁷

4.5.4.1. MR POWERS' DUTIES TO FAIRFAX AND THE FXF TRUST

In considering how Mr Powers might act as a director of Fairfax and whether such action might be as an associate of the Packer Interests it is appropriate to consider statements made by him as to how he might carry out his duties.

Mr Powers stated to the ABA as follows:

Q. I suppose in that type of environment, mightn't it be possible that Mr Packer does try to influence you to form an agreement on favourable terms with PBL?

A. I would be 100 per cent expecting him to, just like I'd expect him to do a deal that's favourable to Fairfax. I mean, that's the give and take of business, no question.

Q. But isn't there a likelihood that due to your past association that that will have some influence on the outcome of that negotiation, your relationship?

A. I'd like to argue that he got more out of the relationship than I do, and he owes me. Now, I'm not – but seriously, it will be done on a plain – you know, my pay cheque and my economic interests are more important and my duty and responsibility are to different shareholders now.¹⁴⁸

And:

Would I would seek advice from Kerry? Would I seek advice from Rupert Murdoch? And he would give it, absolutely. Would I or anyone else in the media? Absolutely. I will ask advice, if I want opinions from anyone, but I make my own decisions. And certainly friendship. You know, (a) I have my own money and (b) I have a duty to shareholders and I don't think anyone will ever find a case where I have had any confusion about who I owe my duties to. I have a legal background and I am very clear on that.¹⁴⁹

Mr Powers' name was put forward to Fairfax by the FXF Trust. A nominee director may well follow the interests of the company that nominated him but not breach the fiduciary duties owed to the company to which he is appointed: see *Re Application of News Corporation Limited* (1987) 15 FCR 227, per Bowen CJ.

Mr Powers' evidence about this matter was as follows:

Q. Do you see yourself as having a duty to the FXF Trust?

A. No, not different from any other shareholder.

Q. Not different from any other shareholder?

A. Not different than to any other shareholder.

...

Q. Do you see yourself as on the Board as its representative, if that means anything?

A. I don't know what that means.

...

A. ... but they don't have a legal right or a contractual right to a Board seat, as you can have in some jurisdictions, so I'm not representing their interests any more than I'm representing any other shareholder's interest.

...

Q. And you don't see yourself in anyway as representing its interests?

A. No different than any other shareholder. I mean, I was in a similar situation running PBL as chief executive then and chairman, as being the chief executive and a 46 per cent shareholder. I bent over backwards to make sure that anything we ever did was if anything slanted away from CPH.

Q. But economically you have a stake, which you wanted, you have a stake in the Trust as well, haven't you?

A. Yes, but that is-

Q. Economically it would not be human nature to want to further its interests?

A. When you look at how it is tied, basically there is one asset in that Trust, Fairfax shares. So if Fairfax shares appreciate in value the Trust's shares will appreciate in value.

Q. Sure, but I suppose the way in which you would manage or make decisions in relation to the business of Fairfax could impact differently on the share value and therefore on the Trust?

A. I think it is hard to imagine a case how.

Q. Really?

A. Yes. In theory, if someone clearly had Board control, if Brierley were able to transfer Board control arguably FXF has a stale stake of 15 per cent. Now, it is not used as a control stake now, they are trading at a big discount now so if they want to unlock value they simply transfer it to shareholders and trade it at market so instead of being 21 it would be 25 on a sell through basis. I don't see a conflict. If you play at the margins, compared to my reputation, impact upon reputation, it is irrelevant.¹⁵⁰

The ABA accepts Mr Powers' evidence. The ABA takes the view that Mr Powers might be said to be acting in accordance with the interests of the FXF unit holders. In relation to maximising profits for Fairfax the interests of the FXF Trust are no different from the interests of other shareholders. However, FXF Trust and other shareholders may not have the same view of every decision that comes before the Fairfax Board. The FXF Trust may have a longer term strategic view that other shareholders don't share.

4.6. CONTACT BETWEEN MR POWERS AND THE PACKER INTERESTS IN RELATION TO FAIRFAX SINCE 18 MAY 1998

4.6.1. MEETINGS ABOUT ON-LINE STRATEGIES

Mr Powers gave the following evidence:

Q. You identified Fairfax's on-line strategy as one of the three main issues?

A. Yes.

Q. That should be attended to when you first became chairman?

A. Yes.¹⁵¹

And in reference to decisions to be made about alliances in the on-line area, Mr Powers said:

These are fundamentally important, the most important decisions we will make strategically ... This is the future of our company ...¹⁵²

Mr Kerry Packer also views on-line strategies as of critical importance to Fairfax:

Q. So do you see it as essential that Fairfax get into the online business and be in the online business to protect that revenue stream?

A. Well yeah, I see it certainly as being essential they get into the online business ...¹⁵³

The evidence indicates that there were two meetings between NineMSN and Fairfax on 12 June 1998 and 25 June 1998 at CPH offices to discuss on-line issues.¹⁵⁴ Amongst others, Messrs Powers and Muscat were in

attendance for Fairfax and Messrs James Packer, Falloon and Petre for PBL.¹⁵⁵ Mr Powers' view was Fairfax's on-line strategy needed to be progressed and that it was a good idea for discussion to take place. He stated:

... there had been a series of meetings and working level meetings which have been unproductive and pointscore each other, so I know my view, I don't think I suggested it, but my view has been let's get everyone in the room and talk about it. Whether I said that or whether they were doing it and I said 'great idea', I don't know, but it is clearly what is needed for this thing to progress.¹⁵⁶

In relation to his involvement in arranging the meetings, Mr Powers gave the following evidence:

A. I believe they had been set up either by Bob or Nigel, I think.

Q. At your suggestion?

A. I don't know ...¹⁵⁷

The purpose of the meetings between PBL and Fairfax was to discuss opportunities for possible cooperation between PBL and Fairfax on the NineMSN website.¹⁵⁸

A number of options were discussed. Negotiations took place, without finalisation or any final decisions being made about matters discussed.¹⁵⁹

Mr Powers gave evidence that the two main content providers with which Fairfax may enter into arrangement are News Limited and PBL (NineMSN). Mr Powers gave the following evidence:

Q. How many of those alliances that you just identified in your own mind are realistic options?

A. Right now the two that are live are PBL. They have stalled. And I think when I left News was the more active of the two.¹⁶⁰

The evidence is that Mr Powers had not personally attended meetings with any other on line service provider and his involvement in negotiations/discussion has been only in relation to NineMSN.¹⁶¹ This is with the exception of a couple of lunches with Mr Lachlan Murdoch where Mr Powers said, 'if we can work something out, terrific'.¹⁶²

When asked why he had not attended meetings with other possible allies in this area of business, Mr Powers replied:

I wasn't invited to the others. There hasn't been any other meetings. The others basically were dead in the water when I got there. There has been a meeting with Telstra, again a low-level meeting, nothing that has really come up with that. I don't think Bob has been at, or John has been at, any News meetings together, because it is a much narrower thing. It is simply a classifieds joint venture and they are working on the technical, which is good, they are working on the technical elements of it and coming up with some clever ideas on how it might work, and when Nigel briefed me on it I said that sounds very clever, get some numbers to make sure we don't get lost between concept and reality.¹⁶³

Mr Powers gave evidence that he considered that NineMSN would be the winning portal at this stage of the game thus perhaps providing a justification for the focus on the meetings with PBL.¹⁶⁴

Mr Greaves, Chief Financial Officer of Fairfax gave evidence as regards Mr Powers' role in Fairfax's on-line strategy. Mr Greaves stated:

He's very active. He understands it, he understands where it is going.¹⁶⁵

Mr Dews is General Manager, Business Development and On-line Services at Fairfax. Mr Dews has the responsibility for all of Fairfax's on-line activities, eg. internet business and other on-line data business. Mr Dews gave the following evidence:

Q. Have you had any one-on-one meetings with him about online strategy?

A. Yeah, yeah, a couple of those.¹⁶⁶

Mr Powers gave evidence that he participated in meetings with Mr Muscat and Mr Dews in relation to Fairfax's on-line strategy. Mr Powers stated:

... we gave a full briefing to the Board at the 29th meeting, the June meeting ... I chipped in on my perspectives. Nigel made the presentation.¹⁶⁷

Mr Powers has expressed views to Mr Dews in relation to Fairfax's current strategy, including specific discussions about the pros and cons of forming an alliance with NineMSN. The evidence from Mr Dews is that Mr Powers, on the right terms, considers an alliance between Fairfax and NineMSN to be in Fairfax's best interests. Mr Dews gave the following evidence:

Q. And has he [Mr Powers] expressed his views about that to you?

A. We've discussed the pros and con, but whether – you know, that hasn't reached anything definitive.

Q. And I appreciate that. I suppose I'm trying to understand what you believe his view to be about that alliance, whether it's a good thing for Fairfax or not or whether he thinks it should be done?

A. I think on the right terms he'd consider it to be a good thing for Fairfax at the moment. But that's an 'I think'; that's not a —

... It certainly hasn't been definitively stated by him; but on the right terms, that it could be a good thing to happen to Fairfax.¹⁶⁸

Mr Powers also gave evidence that he had some concern that PBL might enter a joint venture in the on-line area without Fairfax. One of the reasons given by Mr Powers for the appropriateness of the lunch with Mr Kerry Packer was to avoid the possibility that PBL would go to a joint venture in this area without Fairfax.¹⁶⁹ Mr Powers indicated that if discussion was held at lunch about a possible on-line alliance, it was not substantial.¹⁷⁰

4.6.2. LUNCH AT FAIRFAX

On 20 July 1998, Mr Kerry Packer had lunch with Mr Powers and Mr Muscat at the offices of Fairfax in Sussex Street, Sydney. According to Mr Powers, Mr Muscat organised the lunch with Mr Kerry Packer.¹⁷¹ However, Mr Muscat indicated that this was at the general suggestion of Mr Powers.¹⁷² Mr Powers gave evidence that he had suggested to Mr Muscat that Fairfax ought to invite media proprietors to lunch to raise the profile of Fairfax in the marketplace.¹⁷³

Mr Kerry Packer gave the following evidence in relation to that encounter:

Q. Well, can we come to the lunch at Fairfax that you attended just before you went to America?

...

Q. Why did you go?

A. Because I'd never been inside the Fairfax building since the time that I'd owned a share in six years. I didn't even know what the building looked like. They said, 'Well, come down and have lunch'. I said, 'Fine, I'd like to'.

Q. How important was that to you to attend?

A. Well, obviously not very important or I would have been there six years earlier. I mean —

Q. The week prior I think you were in hospital and then the next day you were off to the States for surgery?

A. Well, that night I also had dinner with some politicians before I left too. I mean, you know, I don't happen to have a very – operations don't worry me a lot. That may sound very strange to you, but I've had a lot of them and I believe I'm bulletproof. Therefore, the fact that I'm going to go and have an operation doesn't change my life at all.¹⁷⁴

Messrs Kerry Packer, Powers and Muscat discussed business generally at the lunch. Mr Muscat gave evidence that the lunch was primarily of a social nature, although business was discussed:

Q. Would you describe it then as a social occasion?

A. Pretty much. A mix of both, I suppose. It is not unusual for business people from time to time to get together, even though they might work in opposite ends of the business, if you like, in terms of he is in television and magazines and we are in newspapers. But he obviously has an interest through the trust and we would be fooling ourselves if I didn't say he doesn't have an explicit interest in Fairfax, but he doesn't have a control, though.

Q. What you describe sounds like a social occasion?

A. Pretty much.

Q. I think it was your own newspaper that described it as a business lunch?

A. Mmm-hmm.

Q. Is that an accurate description?

A. Yeah, but let's face it, you have a social lunch like that and you talk about business generally, but we certainly didn't talk about business specifics, about Fairfax. It was generally what was happening within business.¹⁷⁵

Mr Powers gave evidence that the conversation at the lunch turned to matters relating to the direction of Fairfax:

Q. ... did he express any views about where he thought Fairfax should be going?

A. I am sure he did, but if they were – the only thing I remember at the lunch was the Canberra Times because that was – you know, a lot of the lunches, they talk about the newspaper industry and probably two-thirds of it would have been history, about what has happened to the Sunday paper, the Sunday market, why both are losing money, you idiots, here is how it happened in 1970 or something, and Bob has a great history in newspapers so they know the same people and there was a lot of talk about who was a good managing director of Fairfax in the old days, none of whom I had ever heard of, but in terms of – Kerry was unwell so, I mean, it was not a penetrating discussion.¹⁷⁶

Mr Kerry Packer gave evidence that he gave advice to Messrs Powers and Muscat at the lunch regarding the direction of Fairfax, which was not heeded:

Q. So did you discuss the direction of Fairfax at that lunch?

A. Well, I'm bound to have discussed it.

Q. It was just you and Muscat and Powers; is that right?

A. Yeah. 'What are you doing about this?', 'What do you think about that?', 'What's happening here?', 'What's going on there?' Three people, all in the same industry, of course we talked about it. Did they take any notice? None at all.

Q. How do you know that, that they took no notice?

A. Because nothing's changed.

Q. Nothing's changed at Fairfax?

A. No.¹⁷⁷

Later on Mr Kerry Packer qualified this comment by saying:

I said nothing's changed, which I don't really mean. There has been changes in staffing. There's been freezes obviously, from what you've told me, on staff numbers and things such as that, so those are changes within the area. And there's been some changes of editors, as I understand them. I'm not sure that they're actually improvements ...

Have the changes gone as far as I would have sat down and suggested at the luncheon if that was – no, I don't think anyone's taken any notice of them at all because mine are more mundane suggestions which come from being somebody who for five years worked in the production of newspapers on the factory floor ...¹⁷⁸

According to Mr Powers, Mr Kerry Packer had indicated at lunch that Fairfax ought to purchase the Canberra Times at any price:

The only substantive thing either Bob or I asked him is what he thought of the Canberra Times. And he essentially said, 'buy it at any price'.¹⁷⁹

To this suggestion, Mr Powers retorted:

sounds like Adelaide.¹⁸⁰

Mr Powers was referring to past discussions between Messrs Powers and Kerry Packer where Mr Powers and Mr Kerry Packer disagreed about the strategic value of PBL purchasing a commercial television broadcasting licence in Adelaide.¹⁸¹

4.6.3. OTHER CONTACT

The ABA also investigated a company and a related trust in which Mr Powers had an interest or was a director and in which persons related to Messrs Kerry or James Packer, and persons associated with Fairfax had interests. The purpose of this investigation was to ascertain whether there would be any ongoing contact between Mr Powers and Messrs Kerry or James Packer or CPH in this context, and if so, what the extent of that contact was likely to be.

The ABA is satisfied that neither the company nor the trust in question has had any dealings whatsoever with any of Messrs James or Kerry Packer or any of the companies in the CPH Group of companies, or with PBL. This is therefore a matter that the ABA has not taken into account in its assessment of the relationship between Mr Powers and Messrs Kerry or James Packer or the CPH Group.

4.7. ANALYSIS

4.7.1. IS THERE A PRIMA FACIE ASSOCIATE RELATIONSHIP?

In considering whether Mr Powers is accustomed to act in accordance with the directions, instructions or wishes of, or in concert with Mr Kerry Packer, Mr James Packer or the CPH group, the ABA is required to consider the present state of the relationship between the relevant persons. The relevant time period in which this assessment is to be made is from 18 May 1998, the date upon which Mr Powers resigned his positions with CPH and took up his position at Fairfax until 24 August 1998, the date upon which Mr Muscat announced his intention to resign as CEO of Fairfax.

In reaching a view about the nature of the relationship during this period, the nature of the past relationship between Mr Powers and the Packer Interests is important. It provides a context within which to assess the relationship. It establishes certain patterns of behaviour which, if they continue or re-appear, may lead to an inference being drawn about the continuity or otherwise of certain aspects of the past relationship.

It is clear that Mr Kerry Packer and Mr Powers have worked very well and very closely together. Mr Powers has very clearly understood Mr Kerry Packer's aspirations for Fairfax and has been involved either by himself or with Mr Kerry Packer at various times with ventures to acquire Fairfax, to be a director at Fairfax or to buy and sell stock in the company. The Tourang bid in 1991 brought Messrs Powers and Kerry Packer together in a joint bid. The nature of their relationship has been that there was a high degree of understanding between the two as to what each would think about a particular matter and accordingly what appropriate action should be

taken in a given situation. Mr Powers, on his own evidence and the evidence of Mr Kerry Packer, made his own judgements from the beginning but in an environment where Mr Powers knew Mr Kerry Packer's views. In Mr Kerry Packer's words, it was a relationship of 'owner and chief executive and friends'.¹⁸²

They had an exceptional rapport. According to Mr Kerry Packer, this rapport continues but in the context of a different relationship. Mr Powers has the business of Fairfax to concern himself with and Mr Kerry Packer has the business of CPH to concern himself with.

Mr Kerry Packer identifies the difference being that there is now no compulsion for the views expressed, or understood to be held by him, to be worked on by Mr Powers. Mr Powers simply considers that they are 'now in different worlds' but considers that he is still close to both Messrs James and Kerry Packer and considers them friends.

There seems no doubt that Mr Powers was accustomed to act in accordance with the directions instructions or wishes of CPH or Mr Kerry Packer whilst he was in the employ of the CPH group of companies.

The Act recognises that accustomed courses of conduct between people may be sufficient to found a view of an associate relationship.¹⁸³

At this point, it would be helpful to note that the ABA could come to four possible conclusions. The past relationship could be characterised as the Packer Interests acting in concert with Mr Powers but with such a relationship ceasing as at 18 May 1998. Secondly, the relationship of acting in concert together could be seen to continue into the relevant period.

Thirdly, the past relationship could be seen solely as an employment relationship, with Mr Powers always acting on the instructions of his employer, and thus not acting in concert with the Packer Interests, then as at 18 May, a new understanding or agreement as to joint action arises and continues at least until 24 August 1998. Fourthly, Mr Powers could be seen solely as an employee and not acting in concert with the Packer Interests prior to or after 18 May.

The context for the proposal for Mr Powers to take up a position on the Fairfax Board was the general agreement that a nominee director of the FXF Trust should be appointed. Messrs Kerry and James Packer were active participants in the attempt to secure the appointment of Mr Miles to the Fairfax Board. Their discussion and support for the proposal for the FXF Trust to nominate Mr Powers instead of Mr Miles, and their facilitation of it, was a continuation of this line of action.

Messrs James and Kerry Packer were both involved in discussion with Mr Powers about the various aspects of the proposal for Mr Powers to move to Fairfax. They both supported the move. On one view of the evidence, they agreed to the move and actively supported it by facilitating the purchase by Mr Powers of 15% of the units in the FXF Trust. By doing this an implicit understanding may have been reached between them. Mr Powers indicates in his evidence that if Mr Packer contacted him, asked him if he 'could see his way clear' to reach agreement with CPH on a matter to which Fairfax was 100% indifferent, then he would probably do it because 'Kerry's the type of guy if you do this because it happens to be important for them, and there's no detriment to us whatsoever, you know what, he's the type of guy who pays it back.'¹⁸⁴ This was evidence given by Mr Powers about a hypothetical situation but it could be seen to indicate an implicit understanding that Mr Powers would not act against any of the Packer Interests in his role as a director at Fairfax unless to do so would be in breach of his director's duties. Mr Powers does provide evidence that he clearly understands his duty and responsibility to Fairfax shareholders.

On another view of the evidence Messrs Kerry and James Packer and Powers were working jointly early in May 1998 to support the appointment of Mr Miles to the Fairfax Board as a nominee of the FXF Trust. It is reasonable to infer from the evidence that their purpose was to secure improved performance of Fairfax, to increase shareholder value and to protect the long-term strategic interest of the Packer Interests in Fairfax, all through the agency of the FXF Trust. The substitution of Mr Powers for Mr Miles in this action and the consequent facilitation of Mr Powers' appointment can be seen as new action in continuation of the same purpose. On this view it is reasonable to infer that the actions of Mr Powers and Messrs Kerry and James

Packer in facilitating the sale and purchase of the FXF Trust units was action in concert in relation to Fairfax, and this action continues until the guarantee, the loan and the sale of units have been completed.

On another view of the evidence, Messrs Kerry and James Packer could be said to have simply noted that they had no choice other than to let Mr Powers go and the financial facilitation was simply a matter of convenience for Mr Powers and good business for CPH. All three thought that his move to Fairfax would provide effective direction there, but that involved independently thinking along similar lines rather than action in concert. On this basis there was no continuing understanding or new understanding reached.

In any event, according to Mr Powers, Mr Kerry Packer indicated 'he would be perfect for it'¹⁸⁵ but said 'Well, if you don't get to be chairman or deputy chairman, you've wasted your time'.¹⁸⁶ Mr Kerry Packer considered that Mr Powers had much more talent than the people who had been there previously as chairman.

Two formal agreements between Mr Kerry Packer, Mr James Packer and Mr Powers were entered into at that time and were ongoing throughout the period of the investigation. The first was the guarantee provided in connection with the financing of Mr Powers' interest in the FXF Trust. Mr Powers took the view that he should have a financial interest in the FXF Trust to ensure that he had the necessary credibility and financial incentive to be an FXF Trust nominee director. He suggested to Mr Kerry Packer that he purchase from CPH approximately 15% of the units in the FXF Trust leaving CPH with approximately 30% of the units. He further suggested that he put up 10% or 20% of the purchase price and that CPH finance the rest of the purchase or guarantee the loan. Even though the transaction involved a substantial amount of money, and was of a kind not commonly entered into by CPH, CPH readily agreed. Mr Kerry Packer said that the 'financing of Brian's shares is a conversation which would have taken 15 seconds'.¹⁸⁷ A written agreement was entered into.

CPH's ultimate liability under the guarantee would only arise if both Mr Powers defaulted and the value of the shares upon sale was less than the amount secured by the guarantee.

The agreement to provide financial assistance seems to have been entered into by CPH to facilitate Mr Powers' convenience. Mr Kerry Packer recalls that he said to Mr Powers 'well do whatever you like'.¹⁸⁸ The outcome is that Mr Powers and CPH have a shared financial interest in the FXF Trust and CPH is financially supporting Mr Powers with his purchase, albeit on a limited recourse basis.

On the one hand, the transaction could be seen as unusual because guarantors usually retain the right to pursue all of the defaulting debtor's assets in order to recover amounts paid out on the debtor's behalf. The limited recourse nature of the guarantee in this case means that the risk assumed by CPH is, in theory at least, greater than that generally assumed by guarantors. It could be seen as representing a substantial expression of trust and as being indicative of the existence of a close relationship. On notice from the ABA, CPH's General Counsel could only recall two other occasions when CPH or a related company had given such guarantees.¹⁸⁹

The agreement could also be interpreted as being for the understandable commercial self-interest of CPH. On this interpretation, its limited recourse structuring only reflects a proper desire by CPH to avoid any suggestion that Mr Powers is or may become beholden to CPH in relation to the acquisition by him of the 15% units in the FXF Trust.

The upside for CPH, seen by Mr James Packer, was that Mr Powers was likely, in the short term, to have an influence at Fairfax that enhanced the value of the company thus enhancing the value of the units in the FXF Trust held by CPH.¹⁹⁰ Whilst Mr Kerry Packer said that he is not all that concerned about the value of his investment in Fairfax in the short-term, he stated that he could afford to keep it in his private CPH company as a long-term strategic interest regardless of its value.¹⁹¹

The ABA could take the view that the agreement to provide the guarantee has no continuing effect on the relationship between Messrs Powers and Kerry Packer because it is merely a matter of convenience that once agreed to provides no leverage by one party over another. In technical legal terms this may be an accurate description. However, the control rules are concerned also with practical and commercial considerations. Another view of the agreement is that it is indicative of a close relationship where Mr Kerry Packer and Mr Powers are accustomed to act together with each other with a shared vision or plan. This involves each person

having a high degree of trust towards each other and further that commonsense and a knowledge of human nature dictates that such a relationship can not simply be 'switched off' from one moment to the next.

This would mean that the guarantee is part of a relationship of interdependence between CPH and Mr Powers. Mr Powers is dependent on CPH for making the move to Fairfax in a way meaningful to him. Mr Powers is dependent on CPH putting into place the guarantee. In this regard, the ABA notes that as at 1 November 1998, nearly six months after the agreement was entered into, the guarantee and the loan had not been completed and Mr Powers had not purchased the units.¹⁹² This was despite the agreement indicating in its initial form that it should be completed within twenty days of its signing, and CPH agreeing to formally extend the time for completion for 45 days on 6 June 1998.¹⁹³ Whilst Mr Powers appears to have an enforceable agreement against CPH for completion to occur, this does not provide the same level of comfort to Mr Powers as a transaction which has been completed.¹⁹⁴ An increase in the future value of CPH's interest in Fairfax through the FXF Trust is dependent on Mr Powers having sufficient influence at Fairfax to improve its perception by the market and thus increase its share price. There is a sense therefore in which the interests in Fairfax of Mr Powers and CPH are enmeshed with each other.

In this context, it is important to remember that the ABA is looking at a period of time commencing on 18 May 1998, the day when Mr Powers resigned from his directorships with the CPH group of companies, the same day upon which he entered into a consultancy agreement with CPH and the day upon which he was appointed to the Board of Fairfax.

When transferring from one job to another, the effluxion of time can be expected to weaken old loyalties and replace them with new ones, as contact wanes with the former employment. In this case, no significant time at all elapsed between Mr Powers' departure from CPH and his arrival at Fairfax. Further, his personal affairs remained throughout the relevant period closely intertwined with his former employer. Apart from supporting the financing of his acquisition of a financial interest in Fairfax, CPH continued to provide Mr Powers' home, secretarial facilities, mobile telephone and social club memberships. He continued social and other contacts with both Messrs Kerry and James Packer.

The consultancy agreement also existed throughout the period the subject of this report, although it must be noted that it specifically excluded the provision of services that would conflict with Mr Powers' role at Fairfax.

The consultancy agreement between Mr Powers and CPH was entered into at the behest of Mr Kerry Packer. Mr Kerry Packer was still concerned that the transition for Mr James Packer from CEO of PBL to CEO of CPH may be too early and that CPH may still need support. Mr Powers, when first examined by the ABA indicated that he thought Mr Kerry Packer might still consider finding another senior person to work in support of Mr James Packer as CEO of CPH.¹⁹⁵ It was envisaged that Mr Powers would provide finance and treasury advice services for CPH under the agreement. The fact that it was acceptable to CPH that Mr Powers would be privy to this sensitive financial information could support a finding of an ongoing relationship between Mr Powers and CPH that involved a high degree of trust between the parties. This could also support the view that the relationship between Messrs Powers and Kerry Packer was not of a nature which was able to be comprehensively altered, almost literally overnight.

It is fair to say that the range of services envisaged to be provided under the consultancy agreement was rather broader than what in fact was provided. The agreement lasted three months. It was terminated on 25 August 1998. One of the reasons for this was because of a perception by CPH that the ABA had the view that it allowed Mr Kerry Packer undue influence over Mr Powers. The services provided under the agreement had not been charged for as at 19 August 1998.

It is unlikely that one will find clear statements of agreements or understandings between people that they will act together in a manner contrary to law (whether intentionally or not) and there is no direct evidence of any such agreement or understanding available to the ABA. Findings about the existence of such agreements or understandings necessarily will be reached by drawing inferences from a variety of circumstantial evidence.

Mr Powers has not been quick to sever his administrative ties with CPH and as chairman of Fairfax, has personally attended working meetings at CPH offices to discuss business in an area where Fairfax and Nine may well form an alliance. Both Mr Powers and Mr Kerry Packer have identified on-line services as an area

critical to Fairfax's future. This may be indicative of an implicit understanding that Mr Powers will not harm CPH's interest and may pursue business opportunities to form an alliance with PBL Online.

Since 18 May 1998, Mr Powers has become closely involved with Fairfax. His involvement increased considerably upon becoming chairman. He has maintained contact with Mr James Packer and Mr Kerry Packer.

Mr Kerry Packer was unwell from a time not long after Mr Powers left CPH until recently when he was medically fit to be examined by the ABA. Mr Kerry Packer and Mr Powers have been together on a couple of social occasions during the period of time this investigation is concerned with and had lunch together with Mr Muscat at Fairfax on 20 July 1998. Mr Powers intends to play golf with Messrs James and Kerry Packer if and when they are available and to see them socially.

Mr Powers is a director on the Board of a company where PBL has approximately a 20% interest. Thus he remains responsible, indirectly to the Packer Interests, to ensure this investment prospers. The company is involved in the production of film and television programs in the USA. Mr James Packer is soon also to be a director of this company.

Mr Kerry Packer says the relationship between himself and Mr Powers was simply switched off because it was a business relationship that is no longer there. However, there have been and continue to be a number of continuing 'associations' between Messrs Powers and Kerry and James Packer and the CPH group of companies. In this are included the consultancy agreement, the pending guarantee and the ongoing social relationship.

It has been argued that these relationships and agreements are not evidence of an understanding or agreement to act in concert. The consultancy agreement specifically excluded matters relating to Fairfax. Mr Powers seemed reluctant to enter into it and all he had to do was to provide independent financial advice. It could be seen as no different from any sort of agreement where a professional adviser is engaged to provide business advice.

The two ways of viewing the guarantee are set out above. The ongoing social relationship is something that may well be expected from people who have got on well together and share a strong interest in business generally.

As we have stated there are four possibilities. The first, that there was an 'in concert' relationship prior to 18 May which did not continue is of no real consequence as both aspects of this option are considered in other options. The second and third options envisage the existence of a prima facie associate relationship. Either Mr Powers acted in concert with CPH prior to 18 May and continues to act in concert as he is accustomed to or he acted in concert during the relevant period as a result of an understanding or agreement reached with CPH during the period Mr Powers was leaving their employ. Support for such findings puts particular emphasis on the nature of the past relationship between Mr Powers and Messrs Kerry and James Packer, the closeness and rapport that exists between Messrs Kerry Packer and Powers, the ongoing business discussions between PBL and Fairfax in the on-line area, the ongoing joint financial interest in the FXF Trust, the consultancy agreement, the guarantee and the other lesser connections during the relevant period.

The fourth option is that they did not act in concert during the relevant period, that Mr Powers was only an associate as an employee and this terminated with his employment.

In reaching a conclusion on the question of an associate relationship, the exempting provision in the definition must also be considered.

4.7.2. DOES THE EXEMPTING PROVISION APPLY?

The definition of associate in the Act is qualified by a 'two limb' exempting provision in section 6. Mr Powers is not an associate of Messrs Kerry or James Packer or CPH in relation to Fairfax if the exempting provision applies.

... 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.

Both limbs must be satisfied if the exemption provision is to apply.

'Relevant dealings' is a wide term and its interpretation depends on the facts. In considering 'business dealings', the ABA must examine the business dealings of each person and then consider whether either person is in a position to exert influence over the other's dealings of that kind. In this case, the relevant dealings and business dealings must relate to the operation of Fairfax.

4.7.2.1. FIRST LIMB — IS THE ABA SATISFIED THAT MR POWERS AND THE PACKER INTERESTS DO NOT ACT TOGETHER IN ANY RELEVANT DEALINGS RELATING TO FAIRFAX?

To be satisfied that Messrs Kerry Packer and Powers do not act together in relation to Fairfax, the ABA must consider the whole of the evidence.

When asked 'why should the ABA be satisfied that you are now not acting together with Brian Powers in relation to Fairfax?' Mr Kerry Packer responded:

Because I am not a liar and I'm telling you I'm not. I do not control Fairfax ... I do not control Fairfax and I never, ever have, much as I would like to, and much as one day maybe I will, but at this point in time, and since I have had shares in Fairfax, or at no point in my life, not for one moment of one – not for one second of one minute have I ever controlled Fairfax, unfortunately.¹⁹⁶

Mr Powers advised the ABA:

I consider myself independent of Kerry and James Packer and PBL and CPH. I have no doubt I will act independently. ... I don't feel at all constrained because of my past association with CPH and PBL about being as activist a chairman as I can. I intend to roll up my sleeves and work in this company. If that means I control it through force of personality, whatever, I'm not going to let that inhibit me, and the reason for that I don't – I view myself as totally independent from Kerry. I know what legal opinions can say: Well, he is independent but even if he weren't, does not control, et cetera. I am independent, and I've got to – this is my primary work and economic interest now and I've got to work very hard at it, but I'm going to be as active as I can.

And by the same token I'm not going to apologise or be at all disingenuous about my past relationship with Kerry or my prior desire to remain friendly with him. I'm going to be as upfront as I can about all of those issues and it's my understanding that they're all well within the law.¹⁹⁷

The ABA does not doubt that these views expressed by Mr Kerry Packer and Mr Powers are sincerely held by them. It accepts that both are credible and truthful witnesses. However, the Act is not concerned only with the parties' subjective assessment of the nature of their relationship but also with an objective evaluation of their interactions and business relationships.

The ABA is of the view that the meetings between Fairfax and PBL held at the CPH offices to discuss possible alliances between PBL Online and Fairfax are relevant dealings for the purposes of this limb of the exemption provision.

Decisions about the future on-line strategy for Fairfax are important decisions. It is not unusual for the chairman to be involved in activities where this strategy is being developed. These were, however, essentially working meetings to thrash out issues and establish points of difference.

On the one hand the special focus by Mr Powers on attending meetings with PBL in this area of business activity could be seen to be justified simply by commercial common sense. If NineMSN is to be the winning portal in the market and on-line strategy is vital for Fairfax's future, then the chairman's attention to this issue and his presence at meetings may not indicate an acting together with PBL in this particular dealing. On the other hand, it may indicate that Mr Powers is acting together with his old employer to bring about an alliance between Fairfax and PBL in this crucial area of business activity. He has attended meetings at the offices of

CPH soon after leaving their employ and is closely involved in the development of Fairfax's strategy on this issue.

4.7.2.2. SECOND LIMB — IS THE ABA ALSO SATISFIED THAT NEITHER OF MR POWERS NOR ANY OF THE PACKER INTERESTS IS IN A POSITION TO EXERT INFLUENCE OVER THE BUSINESS DEALINGS OF THE OTHER IN RELATION TO FAIRFAX?

For this limb to apply the ABA must be satisfied that neither Mr Powers nor the Packer Interests are in a position to exert influence over the business dealings of the other in relation to Fairfax.

When asked 'why should the ABA be satisfied that you are not now in a position to exert influence over the business dealings of [Mr] Powers as chairman of Fairfax in relation to Fairfax?' Mr Kerry Packer responded:

A. Why should the ABA assume that I am?

Q. Well, the test actually works around the other way.

A. ... The truth of the matter is, why do you assume that I can? On what – what tiny piece of information do you make that suggestion? Tell me what it is?

Q. Well, I suppose it is on the basis of a possible shared vision which continues on after the 18th of May?

A. A shared vision – we have our own agendas. My agenda is Channel Nine. His agenda is Fairfax. The vision is no longer shared. The vision was shared when we were both working for the one company.

Q. Notwithstanding the common interest in FXF?

A. In what?

Q. Sorry, the Trust?

A. The Trust – you know, in the Trust I have 20, 30 million dollars tied up in the Trust and a couple of billion in Channel Nine. Which one do you think I'm going to be interested in? Which one do you think I'm going to look after?

Q. I presume Channel Nine?

A. Yeah, so do I.¹⁹⁸

There is some evidence of interaction between Mr Powers and the Packer Interests in relation to business dealings generally.

Mr Powers has provided services to the Packer Interests pursuant to the consultancy agreement. He has provided advice to Mr James Packer on whether CPH should terminate its relationship with a certain fund manager and he has provided advice on a recruitment matter at a company related to CPH (Crown Casino).

Mr Powers has been involved with Fairfax personnel in meetings with PBL staff at CPH as discussed above.

Mr Powers gave evidence that, in a hypothetical situation, he expected that Mr Kerry Packer might attempt to exert influence over him in relation to the negotiations, although he indicated that he would only enter into such arrangements with PBL if it were in the best interests of Fairfax.

Mr Powers gave the following evidence:

Q. What happens in that type of situation? Let's say Mr Kerry Packer rings you and he says to you, 'Listen, this would really help us out at CPH if you can see your way clear for Fairfax to reach agreement with us on this matter'?

A. And Fairfax was 100 per cent indifferent?

Q. Yes.

A. I'd probably do the same thing for Kerry that I'd do for anyone. If it didn't cost me a penny in any way, shape or form and it could help build an alliance with him, I would do it because that's the way I do business, you know. That's not the normal way in Australia now. Basically, there's a lot of alliances not being done in media where people, you know, the newspapers are a perfect example, where both news and Fairfax could make a lot more money sharing world deliveries. It's a simple example ... I do business to say if it's going to help my company and it helps someone else more not to my detriment, that's fine.

Q. Isn't there some value that must flow through from the relationships that you've developed particularly with Mr Kerry Packer and Mr James Packer during your five years there that must – that would carry some weight or currency in your decision making and arguing of particular views at the Board?

A. I think the knowledge that I have of them overrides any friendship, so that – and it may well be, I use your example, listen, we're completely indifferent on this. It doesn't cost us anything. Do you know what? Kerry's the type of guy if you do this because it happens to be important for them and there's no detriment to us whatsoever, you know what, he's the type of guy who pays it back.¹⁹⁹

The issue here is whether the ABA can be satisfied, having regard to the entire factual matrix, that neither the Packer Interests nor Mr Powers are in a position to exert influence over the business dealings of the other in relation to Fairfax.

The above evidence does not clearly indicate whether Mr Powers is in a position to exert influence over PBL's on-line strategy in relation to Fairfax or whether the Packer Interests are in a position to exert influence over Mr Powers in this area..

4.8. ASSOCIATESHIP AND CONTROL

The ABA has carefully weighed the arguments for and against reaching a view that Mr Powers is an associate of Mr Kerry Packer during the period 18 May 1998 to 24 August 1998. It has taken account of submissions on a draft report from solicitors for Mr Powers and solicitors for the Packer Interests. It considers that there are strong arguments for both views. It believes sufficient evidence exists to warrant an examination of whether Mr Powers was in a position to exercise control of Fairfax during the relevant period.

If he were, the ABA would have to re-assess all the evidence and come to a firm conclusion.

If he were not, the nature of his relationship with the Packer Interests would not be a matter of legal significance. To make a finding on this issue, in the absence of a finding that Mr Powers was in a position to exercise control of Fairfax would serve no useful purpose in the terms of this report.

Thus it is now appropriate to proceed to consider the issue of Mr Powers' control of Fairfax.

The issue of whether it is necessary or appropriate to reach a final determination of this issue is dealt with in the conclusion to the report found in section 10 of this report at page 98.

5. ASSOCIATE RELATIONSHIP BETWEEN OTHER FAIRFAX DIRECTORS AND THE PACKER INTERESTS

A detailed exposition of the way the ABA has approached the question of whether a person is an associate of another person is outlined in section 4.1 of this report at page 13.

The ABA has looked at any relationship of which it was aware at the commencement of the investigation or of which it has become aware during the course of the investigation between the Packer Interests and any other Fairfax director. This has caused it to look at the Packer Interests' links, however tenuous, with Mr Gonski, Sir Roderick Carnegie and Mr Greaves.

5.1. IS MR GONSKI AN ASSOCIATE OF THE PACKER INTERESTS?

5.1.1. RELATIONSHIP BETWEEN MR GONSKI AND THE PACKER INTERESTS

Following Mr Gonski's involvement in the Tourang bid for Fairfax as structural adviser to Mr Black, and as 'emissary' between Mr Burrows and the Tourang consortium, Mr Gonski became a director of Fairfax in 1993.²⁰⁰ At the time that Mr Gonski became a director of Fairfax, Mr Powers had already ceased to be a director of Fairfax.²⁰¹

Mr Gonski gave evidence that approximately ten years ago he and his partner, Mr Richard Longes, established a business known as Wentworth Associates. Mr Gonski also gave evidence that at that time the business began to provide advice on 'structural matters, matters of structuring acquisitions and the like' to Mr Kerry Packer and his associated companies.²⁰²

Mr Gonski also gave evidence that Mr Kerry Packer has since continued to be a client of his firm. Mr Gonski gave evidence that, since the late 1980's, he had provided advice to the Packer Interests in relation to a number of transactions involving CPH or PBL. When questioned in relation to the general nature of work done involving CPH or PBL, Mr Gonski gave the following evidence:

Q. I'm trying to get a picture of your role, in a sense, in where you might participate in any strategy that's developed within CPH or PBL.

A. Yes. I think that you should assume that where there is a structure involved, for example, where the distribution recently of cash to PBL shareholders occurred and units in the FXF Trust, I was involved in that and I would have given advice on how the corporate law would work and how reductions of capital and schemes of arrangement work.

Q. That's traditionally always been your role with CPH-PBL. That's the sort of thing that they looked to you for.

A. That's the sort of thing we do. If they were to do a takeover we would, I hope be asked to advise on the Corporations Law aspects of that; but if they needed the documents, they would go to a lawyer. There's always a law firm involved because that's not the work we do.²⁰³

Mr Gonski gave evidence that his involvement in transactions with Mr Kerry Packer or CPH or PBL accounted for about twenty percent of his time. Mr Gonski also gave evidence that the revenue received by Wentworth Associates for performing work for Mr Kerry Packer, CPH or PBL in an average year was not greater than twenty percent of the total revenue of Wentworth Associates.²⁰⁴

Mr Gonski also gave evidence that he had been contracted by PBL to provide structural advice services in relation to the decision by PBL to distribute cash and its 15 per cent stake in Fairfax to shareholders of PBL. Mr Gonski gave evidence that it was his idea to establish a trust structure to achieve this.²⁰⁵

Mr Gonski gave evidence that during early 1998 Mr Kerry Packer, Mr James Packer, Mr Miles and Mr Powers lobbied him, as director of Fairfax, in relation to the nomination by the FXF Trust of Mr Miles as a director of Fairfax.²⁰⁶ Mr Gonski gave evidence that, despite his perceived ‘association’ with Mr Kerry Packer, there was no pressure put on him to support Mr Miles as a director of Fairfax:

Q. So you were lobbied by a number of people, but essentially took the matter —

A. Yes, but could I put on the record that none of them were seeking in any way to do anything other than lobby. Mr Packer did not say, as somebody suggested to me, you know, ‘You will lose your retainer unless you get the whole Board behind.’ It never would have occurred to him and it didn’t occur to me that he was talking that way.²⁰⁷

Mr Neville Miles gave evidence that, in early 1998, as managing director of FXF Management Limited, he spoke with Mr David Gonski about the FXF Trust nominating him as its representative for consideration by the Fairfax Board and:

said to him [Mr Gonski] would he informally speak to Rodney Price with a view to appointing myself to the Board as a representative of the trust ... he [Mr Gonski] in turn had numerous discussions with Rodney Price.²⁰⁸

Mr Miles said he had approached Mr Gonski because Mr Gonski had done some work for and with him and for CPH and PBL.²⁰⁹

Mr Gonski gave evidence that he had been contracted by CPH to give advice in relation to Mr Powers’ resignation from CPH and PBL, and provided Mr Powers with a first draft of Mr Powers’ consultancy agreement with CPH.²¹⁰ The evidence given by Mr Powers supports this.²¹¹

5.1.1.1. OTHER MATTERS

The ABA also investigated a company and a related trust in which Mr Gonski had an interest or was a director and in which persons related to Messrs Kerry or James Packer, and persons associated with Fairfax had interests. The purpose of this investigation was to ascertain whether there would be any ongoing contact between Mr Gonski and the Packer Interests in this context, and if so, what the extent of that contact was likely to be.

The ABA is satisfied that neither the company nor the trust in question has had any dealings whatsoever with any of the Packer Interests. The ABA is of the view that Mr Gonski’s interest in this venture does not provide any probative evidence on the issue of whether Mr Gonski is an associate of the Packer Interests in relation to Fairfax.

5.1.1.2. FINDINGS

- 1. Mr Gonski has provided, and continues to provide, legal structural advice to the Packer Interests;*
- 2. Mr Gonski has provided legal structural advice to the Packer Interests in relation to the FXF Trust;*
- 3. Mr Gonski was lobbied by Messrs Kerry and James Packer in relation to the FXF Trust’s nomination of Mr Miles to be a director of Fairfax;*
- 4. Mr Gonski assisted in the drafting of the consultancy agreement, dated 18 May 1998, between Mr Powers and CPH.*

5.1.2. ANALYSIS

On the evidence, the primary basis upon which the ABA could find an associate relationship between Mr Gonski and Messrs Kerry and James Packer and CPH is the role of Mr Gonski as legal adviser to the Packer Interests.

An argument for finding that a legal adviser acts, or is accustomed to act, in accordance with the directions, instructions or wishes of their client is that the role of a lawyer, by its nature, is to provide a service to the client in exchange for payment. Therefore, it could be argued that a lawyer will take instructions and directions from the client and will act accordingly, within the bounds of the law and providing there is no conflict of interest.

This does not mean that a lawyer is always an associate of his or her client for the purposes of the definition of associate in section 6 of the Act. The key issues are whether the lawyer and client act together in relevant dealings or are in a position to exert influence over the business dealings of the other in relation to the company, licence or newspaper in question. In most circumstances in a lawyer/client relationship, this will not be the case. Further, while lawyers may, in certain circumstances, implement the decisions of their client, they do so on instructions rather than through an exercise of their own independent judgment.

On his own evidence, Mr Gonski stated that he is involved in providing structural advice relating to CPH or PBL on an ongoing basis. The ABA is of the view that this requires Mr Gonski to take instructions from Messrs Kerry or James Packer or one of the CPH group of companies, and to act upon those instructions in the provision of the appropriate advice.

Thus, Mr Gonski, due to his continuing connection with the Packer Interests through Wentworth Associates, is a person who acts in accordance with the instructions of the Packer Interests.

5.1.3. EXEMPTING PROVISION

5.1.3.1. FIRST LIMB — IS THE ABA SATISFIED THAT MR GONSKI AND THE PACKER INTERESTS DO NOT ACT TOGETHER IN ANY RELEVANT DEALINGS RELATING TO FAIRFAX?

Mr Gonski provided structural advice to Mr Kerry Packer in relation to the FXF Trust. The FXF Trust was established by PBL as a vehicle to distribute to shareholders of PBL its company interests in Fairfax. However, Mr Gonski did not draft the legal documents that constituted the FXF Trust, and states that he does not play a continuing role in the ongoing business of the FXF Trust.²¹²

Mr Gonski assisted in the drafting of the consultancy agreement between CPH and Mr Powers dated 18 May 1998. However, the ABA is of the view that the consultancy agreement is not a ‘relevant dealing’ for the purposes of this limb of the exemption provision. This is because, on the evidence of Messrs Powers and Kerry and James Packer the consultancy agreement was intended to operate in relation to matters other than Fairfax.

The relationship between Mr Gonski and the Packer Interests is one of lawyer and client. The ABA is of the view that the concept of acting together outlined in the first limb of the exempting provision requires that persons act in concert, or with a common purpose. In this case, the provision by Mr Gonski of advice in relation to the above matters may more properly be characterised as acting under instructions.

The ABA has not found any evidence that Mr Gonski and any of the Packer Interests acts together in the sense of sharing a common purpose, vision, or goal, in relation to Fairfax.

5.1.3.1.1. Finding

1. The ABA is satisfied that Mr Gonski does not act together with the Packer Interests in any relevant dealings relating to Fairfax.

5.1.3.2. SECOND LIMB — IS THE ABA ALSO SATISFIED THAT NEITHER OF MR GONSKI NOR ANY OF THE PACKER INTERESTS IS IN A POSITION TO EXERT INFLUENCE OVER THE BUSINESS DEALINGS OF THE OTHER IN RELATION TO FAIRFAX?

Mr Gonski is a director of Fairfax and is often a legal structural adviser to the Packer Interests. On Mr Gonski's evidence, the legal structural advice provided by his firm, Wentworth Associates, to the Packer Interests amounts to approximately one fifth of his time and the firm's revenue. Further, on Mr Gonski's evidence, when approached by, amongst others, Messrs Kerry and James Packer, in relation to their desire that Fairfax appoint Mr Miles as a director, Mr Gonski was not influenced in relation to his decision regarding the appropriateness or otherwise of Mr Miles as a candidate.

Mr Muscat gave evidence that the issue of whether Mr Gonski might be associated with the Packer Interests had been discussed among the directors of Fairfax. Mr Muscat observed that he had not witnessed evidence that suggested that Mr Gonski might be aligned to the interests of Mr Kerry Packer, or with CPH or PBL.²¹³

When questioned in relation to Mr Gonski's perceived association with Mr Kerry Packer, CPH or PBL, Mr Price indicated that he was aware that Mr Gonski had been, and probably still is, a crucial legal adviser to Mr Kerry Packer and the CPH group of companies, but that he had not noticed Mr Gonski acting other than in the interests of all shareholders of Fairfax.²¹⁴

The ABA has considered the above evidence of Messrs Muscat and Price and the evidence relating to the possible appointment of Mr Miles to the Fairfax Board. This evidence, while not conclusive in relation to the question as to whether the Packer Interests are *in a position* to exert influence over Mr Gonski in relation to his business dealings in Fairfax, indicates to the contrary. The ABA has not found any evidence of influence being exercised over Mr Gonski by any of the Packer Interests in relation to Mr Gonski's business dealings in Fairfax. In the instance where the advancement of Mr Miles' case to become a director of Fairfax might have been an issue where influence was exercised, the evidence shows that Mr Gonski was lobbied by Messrs Kerry and James Packer but he had already raised the matter with Mr Price on behalf of Mr Miles. The matter was subsequently discussed between Mr Kerry Packer and Mr Price. Mr Gonski had his own position on the matter which was that any person with a 15% shareholding should have a director on the Board but there is no evidence to suggest that Mr Gonski was influenced by the Packer Interests on this matter.

5.1.3.2.1. Finding

1. The ABA is satisfied that neither Mr Gonski nor any of the Packer Interests is in a position to exert influence over the business dealings of the other in relation to Fairfax.

5.1.4. CONCLUSION

While Mr Gonski acts in accordance with the instructions of the Packer Interests, the ABA is satisfied that Mr Gonski and the Packer Interests do not act together in any relevant dealings relating to Fairfax, and that neither Mr Gonski, on the one hand, nor any the Packer Interests, on the other hand, are in a position to exert influence over the business dealings of the other in relation to Fairfax.

Thus, the ABA is satisfied that Mr Gonski is not an associate of the Packer Interests in relation to Fairfax.

5.1.5. FINDING

1. The ABA finds that Mr Gonski is not an associate of the Packer Interests.

5.2. IS SIR RODERICK CARNEGIE AN ASSOCIATE OF THE PACKER INTERESTS?

Sir Roderick Carnegie has been chairman of Hudson Conway Limited since 1987. CPH currently holds 19.47 per cent of the issued capital of Hudson Conway Limited. Sir Roderick Carnegie gave evidence that he had no link with Mr Kerry Packer other than that he had known Mr Kerry Packer for some time.²¹⁵

Sir Roderick Carnegie gave evidence that he had known Mr Kerry Packer since he was 15, and his family was friends with the Packer family. Sir Roderick Carnegie said that, apart from his connection with Mr Kerry Packer through Hudson Conway, he had had no business dealings with Mr Kerry Packer; his connection was purely social.²¹⁶

However, Sir Roderick Carnegie did give evidence that his son, Mr Mark Carnegie, a partner of Hellman and Friedman, had business dealings with CPH by reason of CPH and Hellman and Friedman both having a shareholding in Matrix Telecommunications.²¹⁷ Although Hellman and Friedman and CPH both have interests in Matrix Telecommunications, this fact does not, in the view of the ABA, cause Mr Mark Carnegie and CPH to be associates for the purposes of the Act. This is because, on their face, the circumstances are such that neither CPH nor Mr Mark Carnegie 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 other. It is the view of the ABA that, based upon the facts available to it, Sir Roderick Carnegie, Mr Mark Carnegie and CPH are not associates in relation to Fairfax.

5.2.1. FINDINGS

1. Although Sir Roderick Carnegie has given evidence that he has a social connection with Mr Kerry Packer and the Packer family in general, there is no evidence before the ABA that Sir Roderick Carnegie is a person who acts, or is accustomed to act, or 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, Mr Kerry Packer.

2. There is no evidence before the ABA to suggest that Sir Roderick Carnegie is an associate of the Packer Interests.

5.3. IS MR GREAVES AN ASSOCIATE OF THE PACKER INTERESTS?

Mr Greaves gave evidence that he resigned as finance director of Optus and was employed in that position at Fairfax in February 1996. He gave evidence that he was appointed a director of Fairfax on 9 September 1996.²¹⁸

Mr Greaves is currently a director and chairman of One.Tel Pty Limited. CPH currently holds 5.33% of the company interests in One.Tel Pty Limited through its wholly owned subsidiary, Dorigad Pty Limited. Mr Greaves gave evidence that Mr James Packer was also on the Board of One.Tel Pty Limited until he resigned when One.Tel Pty Limited was floated.²¹⁹ However, Mr Greaves said that Mr James Packer was more familiar

with other directors of One.Tel Pty Limited, Mr John 'Jodee' Rich and Mr Rodney Adler than he was with himself.²²⁰

Mr Greaves testified that although he had met Mr Kerry Packer through his association with Optus at a number of meetings, he was unsure if Mr Kerry Packer would remember him.²²¹

However, Mr Greaves gave evidence that Mr Powers had told him as early as 8 May 1998 that the FXF Trust was considering nominating Mr Powers as a director of Fairfax.²²² He also testified that he did not discuss the matter with anyone until 18 May 1998, when Mr Powers was appointed a director of Fairfax.²²³

5.3.1. FINDINGS

1. *There is no evidence before the ABA that Mr Greaves is a person who acts, or is accustomed to act, or 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, any of the Packer Interests.*
2. *There is no evidence before the ABA to suggest that Mr Greaves is an associate of the Packer Interests in relation to Fairfax.*

6. IS MR POWERS IN A POSITION TO EXERCISE CONTROL OF FAIRFAX?

6.1. LEGAL FRAMEWORK – IN A POSITION TO EXERCISE CONTROL

An explanation of where this chapter fits into the overall test under paragraph 60(b) of the Act can be found in section 3 of this report at page 9.

‘Control’ is defined in inclusive terms in subsection 6(1) the Act as follows:

control includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights.

The Explanatory Memorandum to the Broadcasting Services Bill states, in relation to this definition:

‘Control’ is a term fundamental to the operation of the ownership and control provisions of the Act. It is intended that it have a very broad meaning, covering a wide range of formal and informal arrangements whereby a person becomes in a position to exercise control over a broadcasting service licence, a company or a newspaper. This term maintains the meaning of ‘control’ as used in the 1942 Act.

Bowen CJ, in considering ‘control’ under the 1942 Act, said in *Re Application of News Corporation Limited* (1987) 15 FCR 227 at 240:

the term ‘in a position to exercise control of a company’ in s 92D(1) [of the predecessor to the Act – the *Broadcasting and Television Act 1942*] should be taken to mean the **power** to direct or restrain what the company may do on any substantial issue (emphasis added).

Lockhart J (15 FCR 227 at 246) said of the 1942 Act in its then form:

It is plain that questions of control, whether through voting power or financial interests, are to be determined by practical and commercial considerations rather than highly refined legalistic tests. The relevant provisions of the Act are not directed to or concerned with subtleties of company law.

Hill J in *Canwest Global Communications Corporation v ABA* (1997) 71 FCR 485 at 506 cited this passage with approval and said:

The same may with even greater force be said of the present legislation ... That the question is one of defacto rather than legal control is re-inforced by the inclusive definition of ‘control’ in s.6(1), which makes it clear that what are to be looked at are not merely legal and equitable rights and obligations, but arrangements, understandings and practices, whether or not enforceable.

The tests for being ‘in a position to exercise control’ on the present facts are those set out in subclauses 2(1) and 3(1) of Schedule 1 of the Act which include:

- 2(1) For the purposes of this Schedule, a person is in a position to exercise control of a licence or a company if:
 - ...
 - (d) the person, either alone or together with an associate of the person, is in a position to:
 - ...
 - (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;

- (4) More than one person may be in a position to exercise control of a licence or a company.
- 3(1) For the purposes of this Schedule, a person is in a position to exercise control of a newspaper if:
- ...
- (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;
- ...
- (c) if the newspaper is published by a company:
- ...
- (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.

Clauses 2 and 3 of Schedule 1 to the Act are fully extracted at APPENDIX 2 of this report at page 107.

The expression ‘direction or restraint’ in clauses 2(1)(d)(iii) and 3(1)(c)(iv) of Schedule 1 of the Act is intended to be synonymous with notions of ‘control’. The expression as it is used in the Act appears to have been adopted from the judgment of Bowen J in *Re Application of News Corporation Limited* (1987) 15 FCR 227.

The reference to ‘power’ to direct or restrain carries with it the suggestion of authority or compulsion.

Accordingly, to the extent that the words ‘direction’ and ‘restraint’ in clauses 2(1)(d)(iii) and 3(1)(c)(iv) of Schedule 1 to the Act can be considered in the abstract, the ABA considers that the legislative framework of the ‘control’ provisions require more than persuasive influence. In the view of the ABA, the words ‘direction’ and ‘restraint’ require an element of compulsion or authority.

Mere guidance or instruction would be insufficient. In any given factual situation a particular person may be able to compel a particular result (either by way of direction or restraint) by the mere expression of a wish. They may also be able to do this by force of economic circumstances, by force of personality or by other means altogether. Each situation must be assessed on its own particular facts. As Bowen CJ observed in *Re Application of News Corporation Limited* (1987) 15 FCR 227 in relation to the 1942 Act: ‘the application of such a definition may give rise to difficult questions of fact’.

6.1.1. ‘SUBSTANTIAL ISSUE AFFECTING THE MANAGEMENT OR AFFAIRS’

It is the view of the ABA that the expression ‘a substantial issue’ in clauses 2(1) and 3(1) of Schedule 1 to the Act refers to an issue of substance or import rather than an issue which is large in size or quantity. The word ‘substantial’ is defined in the Macquarie Dictionary, to include ‘of or pertaining to the essence of a thing; essential, material, or important’.

6.1.2. ‘AFFAIRS OF THE COMPANY’

The expression the ‘affairs of the company’ is an expression of wide import: *Bond Corporation Holdings Limited v Sulan* (1990) 3 WAR 49. In that case Malcolm CJ cited the *Oxford English Dictionary*:

'affair' means primarily:

'What one has to do, or has to do with; what has to be done; business, operation. *More vaguely* a thing that concerns any one; a concern, a matter ...'

The secondary meaning of 'affair' is:

- a. Ordinary business or pursuits of life ...
- ...
- b. Commercial or professional business.'

The expression 'affairs of a body corporate' has also been defined in section 53 of the *Corporations Law* so as to include:

- (a) the ... business, trading, transactions and dealings ... of the body' and
- ...
- (c) the internal management and proceedings of the body.

The expression 'substantial' has the effect of narrowing the application of the provision. In the ABA's view the expression 'a substantial issue' in this context refers to an issue of substance or import rather than an issue which is large in size or quantity. The word 'substantial' is defined in *The Macquarie Dictionary*, relevantly as follows:

2. of ample or considerable amount, quantity, size, etc. (not adopted)
- ...
8. of or pertaining to the essence of a thing; essential, material, or important.

6.1.3. MORE THAN ONE PERSON MAY BE IN A POSITION TO EXERCISE CONTROL

The purpose of subclause 2(4) of Schedule 1 to the Act is to allow the ABA to make a finding that a person may be in a position to exercise control of a licence or a company, despite finding that another person is in a position to exercise control of that licence or company. The ABA is of the view that subclause 2(4) of Schedule 1 to the Act does not preclude a finding by the ABA that different persons who are not associates are all in a position to exercise control of a particular licence or company.

6.1.4. THE ROLE OF A CHAIRMAN AND THE QUESTION OF BEING IN A POSITION TO EXERCISE CONTROL

6.1.4.1. THE POWERS OF A CHAIRMAN ACCORDING TO GENERAL LAW

As a matter of general law, the chairman's essential function is to preside at Board meetings. There is *obiter dicta* in cases to the effect that the chairman has no more authority to bind the company than any other director acting singly: for example, *Hely Hutchinson v Brayhead* [1968] 1 QB 549 and *State Bank of Victoria v Parry* (1990) 2 ACSR 15 at 29. The chairman does not usually have the power to perform ordinary business operations, such as making or terminating contracts, on behalf of the company: see for example, *Hughes v NM Superannuation Pty Limited* (1993) 29 NSWLR 653, where the chairman was found to lack the authority to authorise the company secretary to send a facsimile notifying of the company's intention to terminate a contract.

However, in *AWA Limited v Daniels t/a Deloitte Haskins & Sells* (1992) 9 ACSR 759 at 867, it was said that the chairman:

is responsible to a greater extent than any other director for the performance of the Board as a whole and each member of it.

Chairmen commonly receive more remuneration than other directors do and there may well be some things that the chairman of a public company is impliedly authorised to do beyond those within the usual authority of a single director.²²⁴ However, a chairman may not have any greater authority at law than that of an ordinary director. The degree and level of authority given to a chairman may depend upon whether a managing director has been appointed, and if so, what level of executive authority has been given to the managing director by the Board.²²⁵

6.1.4.2. THE POWERS OF A CHAIRMAN OF FAIRFAX, UNDER FAIRFAX'S ARTICLES

The articles of a company prescribe the chairman's role, duties and authority. In respect of the articles of Fairfax, the chairman of a general meeting may, under certain circumstances, refuse admission to a person to the meeting, or require a person to leave and remain out of the meeting.²²⁶ The chairman must, if he is present within 15 minutes after the time appointed for the general meeting and willing to act, preside as chairman of each general meeting of members of Fairfax.²²⁷ As chairman of a general meeting, he may, with the consent of the meeting, adjourn the meeting from time to time and from place to place,²²⁸ call for a poll on a resolution,²²⁹ and determine objections to the qualification of persons to vote at general meetings.²³⁰ A director must not leave a meeting by telephone or audio or audiovisual communication unless the director has previously obtained the consent of the chairman of the meeting.²³¹

In addition, at general law, the chairman of Fairfax would have wide powers and discretions as to the conduct of a general meeting not prescribed by the Corporations Law or Fairfax's articles of association.

The chairman of the Fairfax Board is to be elected by the directors of Fairfax and the person so elected must, if present within 10 minutes after the time appointed for the holding at such meeting, preside at each meeting of the Fairfax Board.²³² The chairman is generally responsible for the good running of Board meetings.

In the case of equality of votes on any proposed resolution of the Board, the chairman of Fairfax does not have a casting vote at Board meetings and the proposed resolution is to be taken as having been lost.²³³

6.1.4.3. THE RELATIONSHIP BETWEEN BEING IN A POSITION TO EXERCISE CONTROL AND A DIRECTOR OR CHAIRMAN'S FIDUCIARY AND OTHER OBLIGATIONS

Strictly speaking, the issue of the directors' adherence to their fiduciary duty is irrelevant to the question of whether a director is in a position to exercise control of a company. In *Re Application of News Corporation Limited* (1987) 15 FCR 227, the court considered the question of whether a company (TNCL) was in a position to exercise control of another company (NTHL) within the terms of the *Broadcasting Act 1942* (the predecessor to the Act). NTHL had seven Board members, three of which were appointed by TNCL. TNCL was, by virtue of its being capable of appointing a fourth director, 'in a position to exercise control' of NTHL. It was argued by counsel that in order to hold that TNCL was in a position to exercise control of NTHL the court would have to assume that the appointed directors would vote en bloc at the direction of TNCL. This was to assume that the directors would act in breach of their fiduciary obligation to the company. However, Bowen CJ stated:

Strictly speaking, the issue of the directors' adherence to their fiduciary duty is irrelevant to this question. It is TNCL's power to appoint directors not its control of what they do, which is determinative of whether it is thereby in a position to exercise control of NTHL. But were any assumptions needed to be made as to the conduct of the appointed directors, I would think it realistic to assume that they would act generally in the interests of the company which appointed them. Such behaviour would not, of itself, constitute a breach of duty 'unless it can also be inferred that the directors, so nominated, would so act even if they were of the view that their acts were not in the best interests of the company' (*Re Broadcasting Station 2GB Pty Limited* [1964-1965] NSW 1648 at 1663, per Jacobs J. As was pointed out in the

2GB case, it would make the position of a nominee or representative director an impossibility to require that the approach each company problem with a completely open mind. It is both realistic and not improper to expect that such directors will follow the interests of the company which appointed them, subject to the qualification that they will not so act if of the view that their acts would not be in the interests of the company as a whole. In my opinion, it may be assumed that the nominee directors of NTHL will act in such a way. Such an assumption does not, however, lead to the assumption they will act in breach of their fiduciary duty as directors. The applicants argument must therefore be rejected.

In *Canwest Global Communications Corporation v ABA* (1997) 71 FCR 485, Hill J stated:

In determining whether persons who have been appointed directors would act generally in the interests of a company which appointed them, or here which financed the entire activity of the company, even if technically it did not appoint the directors, the fact that the directors would act in accordance with their fiduciary duty does not negate a finding of control, notwithstanding a strong submission to the contrary: cf *Re Application of News Corporation Limited* (1987) 15 FCR 227 per Bowen CJ at 244-5. The test is one of commercial and economic reality rather than of legal theory.

A person may be in a position to exercise control of a company whilst complying with all fiduciary and other responsibilities. This may be so even where the effect of that person being in that position is to the overall benefit of a company and its shareholders.

The Act places restrictions on particular persons being in a position to exercise control of particular companies, even though in exercising that control that person may be acting within all other legal, contractual and fiduciary requirements and for the overall benefit of the relevant company.

6.1.4.4. ROLE OF CHAIRMAN OTHER THAN STRICTLY AS A MATTER OF LAW

The ABA views the question of control in the context of real commercial and practical considerations, as well as under the provisions of company articles and at general law.

It has been said in the Australian context that, in a commercial sense, it is the chairman's role to ensure that the Board performs effectively its responsibilities in relation to corporate governance, corporate strategy, policy, business planning and compliance/control, to initiate review and implement effective structures and relationships to support corporate governance, to be the primary channel of communication between the Board and the CEO, to be a guide and mentor to the CEO, to plan and control the agenda and business of Board meetings, and to ensure that the Board is in control of the company and delivers increasing shareholder value.²³⁴

In terms of what happens in practice, in general terms, business literature from the United Kingdom suggests that although in law all directors have equal responsibilities and the chairman is equal with other Board members, and although the Board as a whole is in fact responsible for a company's strategy and decisions, the chairman is more visible and is expected to take primary responsibility.²³⁵

There is also literature which suggests that, in a commercial sense, a chairman's role includes the setting of standards of performance in terms of such criteria as product quality, customer service, technological leadership, market share, and financial measures (margins and growth) that will ensure an above-average profit/earnings ratio.²³⁶

In practice, the ABA will look closely at the actual role played by a particular chairman. The ABA has considered the role played by Mr Powers at Fairfax, the influence he has had and the form of that influence to see whether he is, in fact, in a position to exercise control of Fairfax.

6.2. THE OPERATION OF THE BOARD OF FAIRFAX

There are currently ten directors on the Board of Fairfax. Those directors are Mr David Gonski, Mr Dean Wills, Sir Roderick Carnegie, Mr Mark Burrows, Mr John Greaves, Sir Roger Douglas, Mr Jonathan Pinshaw, Mrs Julia King, Mr David Shein and Mr Brian Powers. Mr Brian Powers is chairman. Mr Jonathan Pinshaw is deputy chairman. Mr Robert Muscat was a director of Fairfax until 2 September 1998. Mr David Shein was

appointed a director on 29 September 1998. Because of the time involved in gathering and analysing evidence and reporting, the ABA has had to consider the issue of control for a finite period. This issue of control is considered from the time of Mr Powers' appointment as a director of Fairfax until the resignation of Mr Robert Muscat.

The articles of Fairfax provide that any director may convene a Board meeting.²³⁷ If the chairman is present within 10 minutes of the start of the meeting, the chairman is to preside over the meeting.²³⁸ If the chairman is not present, then the deputy chairman is to preside over the meeting.²³⁹ Alternatively, if there is no deputy chairman, the directors must elect a chairman from among the directors to preside over the meeting.²⁴⁰ Each director is entitled to one vote, and if on any issue the vote is equally divided, the chairman does not have a casting vote and the motion is taken as being lost.²⁴¹

Sir Roger Douglas gave evidence that there were no voting blocs or factions on the Fairfax Board.²⁴² The evidence of Mr Muscat and Mr Price supports this.²⁴³ Mr Powers gave evidence that he encourages the directors to express their views at meetings of the Board.²⁴⁴

Sir Roderick Carnegie stated his view of the relationship between the Board and management as follows:

The basic principles are important. The job of the Board is to advise on major policy recommendations coming from the management. The job of the Board is to appoint the chief executive and either back him or sack him. The job of the Board is to consent to major policy recommendations or strategic commitments made by the – recommended by the managing director.

It is not the Board's job to run the business; it's the management's job to run the business. Therefore, I believe that what we will get is a set of suggestions about areas that we should go in to protect our classified revenue, and that's obviously been something which has led to the [Fairfax] online [strategy].²⁴⁵

The Board of Fairfax has met 9 times during the 1997-1998 financial year. Mr Powers gave evidence of how the Board is working since he became chairman on 29 May 1998:

A. ... I made it clear to everyone in the Board, including [Mr Muscat] – my style of the Board is to fully debate everything. Board members generally don't give views. I want their views. I made that clear to them. People are talking now.

Q. At the Board meetings?

A. Oh, absolutely. People have come up and said, 'That's the first intelligent discussion we've had in five years on the Board'. I draw out people's opinions.²⁴⁶

Mr Powers gave evidence of saying to each director he has talked to:

'Listen, vote how you want to. We don't have to be unified on everything. We have to support decisions maybe.'²⁴⁷

The Board of Fairfax has formed four sub-committees. Those sub-committees are the finance and audit committee, the strategy review committee, the nomination committee and the remuneration committee. The finance and audit committee was established to oversee processes such as the budget of Fairfax. The strategy review committee was established to oversee Project Hercules. The nomination committee was established to assist the Fairfax Board in selecting directors. The remuneration committee was established to oversee the remuneration of directors.

According to Mr Powers, the sub-committees do not have any formal delegated authority from the Board or formal decision-making role. Mr Powers does state however that the committees can review matters before they go to the Board, decide whether matters should go to the Board and implement decisions of the Board and perhaps makes some decisions about process.²⁴⁸

For more information on how these sub-committees operate in practice, see section 6.2.3 of this report at page 63.

6.2.1. INTENTION OF MR POWERS ON APPOINTMENT TO THE BOARD OF FAIRFAX AND AS CHAIRMAN OF FAIRFAX

Mr Powers joined Fairfax with the intention of taking an active role and having some impact on the management of Fairfax. Mr Powers gave the following evidence:

... we thought the Board needed help, that the Board wasn't functioning as well and therefore the company wasn't performing as well as it should.²⁴⁹

I don't feel that all constrained because of my past association with CPH and PBL about being as activist a chairman as I can. I intend to roll up my sleeves and work in this company. If that means I control it through force of personality, whatever, I'm not going to let that inhibit me ... I've got to work very hard at it, but I'm going to be as active as I can.²⁵⁰

In discussions with Sir Roger Douglas prior to his appointment, Mr Powers gave evidence that he stated:

There's a lot to be done in this company. This management has been let down by the Board, by not receiving enough direction.²⁵¹

6.2.2. ATTITUDE OF OTHER BOARD MEMBERS REGARDING MR POWERS' APPOINTMENT TO FAIRFAX AND APPOINTMENT AS CHAIRMAN OF FAIRFAX

The Fairfax directors gave full support to Mr Powers' appointment as a director.²⁵² Mr Powers was welcomed by the Fairfax directors because they believed he possessed valuable business skills, which they believed would benefit Fairfax.²⁵³

Further, Sir Roger Douglas gave evidence that BIL, Fairfax's largest shareholder, supported Mr Powers' appointment as chairman of Fairfax and that BIL expected Mr Powers to have a significant role in the review process in achieving a better costs and revenue outcome for Fairfax.²⁵⁴

Mr Muscat was aware that it was expected by BIL that Mr Powers would work closely with Mr Pinshaw and be active in looking at various aspects of Fairfax's business.²⁵⁵ Mr Greaves was also aware, from conversations with Mr Muscat, that the appointment of Mr Powers as chairman of Fairfax had the endorsement of BIL.²⁵⁶

All directors present at the meeting unanimously endorsed Mr Powers' appointment as chairman.²⁵⁷ The directors examined by the ABA gave their support to Mr Powers as chairman or expressed the view that he would be more active than previous chairmen of Fairfax were in steering the strategic direction of the company.²⁵⁸

6.2.3. ROLE OF BOARD SUB-COMMITTEES AND THE INVOLVEMENT OF MR POWERS IN BOARD SUB-COMMITTEES

On Mr Powers' appointment to the Fairfax Board on 18 May 1998, Mr Powers expressed a desire to be a member of any of the company's Board sub-committees:

... I found myself under-employed, so if there were any Board committees that were going to be substantively looking at any of the issues facing the company, I would be delighted to be a member of that.²⁵⁹

As a result of the expression of this wish Mr Powers was appointed to the Strategy Review Committee on 18 May 1998.

In examination, Mr Powers expressed the view that the role of a chairman of a Fairfax Board sub-committee was to:

take responsibility for organising agendas, reviewing the papers before they go out and quite frankly spotting issues that ought to be on it.²⁶⁰

In May and in June 1998, Mr Powers talked to the Board members with a view to altering the membership of the Board sub-committees:

... because there was Rod Price resigning from the Board, my election and then Jonathan Pinshaw's election, we had vacancies on several Board committees, so I talked to them [Board directors] about those Board committees and we discussed how we would alter those Board committees. In fact we did [that] at the June meeting.²⁶¹

Mr Powers initiated this process. He reviewed the composition of the Board sub-committees, developed proposals for their composition and then discussed those with the other directors and the deputy chairman, Mr Pinshaw.²⁶² Mr Powers' review resulted in a change in the membership of the sub-committees. Most of his suggestions were adopted: see below.

6.2.3.1. THE STRATEGY REVIEW COMMITTEE

This committee was formed on 18 May 1998, and comprised Sir Roger Douglas and Messrs Burrows and Powers.²⁶³ Mr Muscat stated in evidence that the membership had changed so that now the members became Messrs Powers, Pinshaw, Burrows, Greaves and Muscat:

Q. ... the review Board committee of yourself, Brian Powers, Mark Burrows and Jonathan Pinshaw. Why were those persons chosen and what was to be each person's role on that committee, who chose them?

A. ... in discussions between ... John Greaves and myself, about the make-up of that ... if we were going to have a commitment to this process that the Board should play a role in that and it would be good for those people within the company to recognise that the Board was actually supporting the process they were involved in. So it was to give it the right sort of focus and give it the right sort of tone and the right sort of ownership as well, and it was our view that whoever was on that needed to actually play a pretty important role in how it would work and also the selection of the criteria process as well.²⁶⁴

According to Mr Muscat, this committee was 'part of the Hercules review' and was set up to:

ensure that there was support from the Board in what the management was doing with that process and there were representatives on the Board who actually would be supportive of management of what they were doing ... so that the Board actually had an understanding and it was seen that not only was it something that the management was pursuing but the Board was also in support of that process.²⁶⁵

6.2.3.2. THE NOMINATION COMMITTEE

The nomination committee considers the appointment of new directors.²⁶⁶ In relation to this committee Mr Powers stated:

A. We had a vacancy where Rod Price had gone off, and we also had Bob Muscat on it. I thought it was inappropriate for a chief executive to be on a nomination committee ... This is nominations not for employees but for Board members. It is very unusual for the chief executive to sit on that committee and I thought it was inappropriate. I proposed that Jonathan go on that, I think having 25 per cent shareholding he ought to be represented, and I volunteered to be chairman of that.

Q. Why did you do that?

A. I think it is an important committee. I think the Board needs ... expanding and strengthening in a couple of key areas, so I wanted to devote sometime to that.

Q. You see that as the chairman's role?

A. Not necessarily but I don't think it is inconsistent. I think it is inconsistent to be chairman of the audit and finance committee. I think it is reasonably typical but certainly not inconsistent for a chairman to chair both.²⁶⁷

Mr Muscat resigned from this committee on 26 June 1998.²⁶⁸ Messrs Powers and Pinshaw became members of this committee on this date with Mr Powers as chairman of the Committee.²⁶⁹ The committee members were then: Mr Powers (Chair), Mrs King, and Messrs Pinshaw and Wills.

6.2.3.3. THE FINANCE AND AUDIT COMMITTEE

In relation to this committee Mr Powers in evidence stated that:

I proposed that I join the committee, that Jonathan joins and takes Sir Roger's place. Roger had made it clear that, he, on day-to-day issues, preferred Jonathan to take the lead, that he really didn't have the time to do it and that it was an important part of Jonathan's job running BIL in Australia, he would make time to do it. So I said, on that assumption, take some time, you should come on in Roger's place and I felt he should be the chairman of it. He in fact said I should be chairman. I think it is bad practice, I don't think a chairman should be the chairman of an audit committee because I have access to auditors in my role as chairman and you want someone on the audit committee that has separate access, which I think is critical. He agreed with that basically, and then Mark and David Gonski stayed on.²⁷⁰

On 26 June 1998, Sir Roger Douglas resigned from the Finance and Audit Committee and was replaced by Messrs Powers and Pinshaw, with Mr Pinshaw as chairman of that committee.²⁷¹

The committee members were then: Mr Pinshaw (Chair), and Messrs Burrows, Gonski and Powers. A meeting of this committee was held on 24 June 1998. Mr Powers was present at this meeting. Decisions made at that meeting concerned the treatment of abnormal expenses in the accounts, a recommendation on dividends and an agreement that the Finance and Audit committee would review the 1998 final Budget when completed.

Another committee meeting was held on 10 July 1998. Messrs Powers and Gonski sent their apologies. Items discussed and decisions made at that meeting concerned an update on the budget process, the indicative bid for FCP, the compilation of an information memorandum for a proposed sale of an asset, and the authorisation of the CEO to proceed with the divestiture of another asset.

Mr Muscat was not a member of the Finance and Audit Committee though he did attend its meetings. Although Mr Muscat attended these meetings, the members of the Committee made decisions at these meetings.²⁷²

6.2.3.4. THE REMUNERATION COMMITTEE

Mr Powers is not on this committee. In Mr Powers' view this committee is not critical in terms of the operations of Fairfax. Mr Powers did, however, have a role in identifying members of the committee. He asked Mrs King if she wanted to be on that sub-committee.²⁷³ Mrs King was subsequently appointed as Chair of this committee.

6.2.4. FINDINGS

- 1. The Board of Fairfax were enthusiastic about Mr Powers joining as a director.*
- 2. Mr Powers and a majority of directors of Fairfax were of the view that Mr Powers would be a considerably more active chairman than Fairfax had had since they had been directors and expected that Mr Powers would be influential on the way management does its job.*
- 3. BIL, the largest shareholder in Fairfax, expected Mr Powers to have a significant role in the improvement of the costs and revenue of Fairfax.*
- 4. Mr Muscat was aware that BIL supported Mr Powers' appointment as chairman of Fairfax.*
- 5. Mr Greaves was aware that BIL supported Mr Powers' appointment as chairman of Fairfax.*

6. *Mr Powers is a member of the Finance and Audit, and the Strategy Review sub-committees, and chairman of the Nomination sub-committee, being three of the four sub-committees which have been formed by the Fairfax Board.*
7. *Mr Powers influenced the composition of the Fairfax Board sub-committees.*
8. *The sub-committees of the Fairfax Board have been re-enlivened by Mr Powers and appear to be operating efficiently.*

6.3. ROLE OF MR POWERS IN FAIRFAX

This part of the report examines the role of a chairman in general, the role of the position of chairman in Fairfax and the actual exercise by Mr Powers of his duties as chairman. It should be noted that the focus of this part is not on whether Mr Powers was or was not exercising his duties and functions in accordance with the Corporations Law, the articles of Fairfax or in accordance with his fiduciary duties or whether in the exercise of his duties Mr Powers was or was not acting beyond his authority. The question is whether he is in a position to exercise control of Fairfax.

6.3.1. MR POWERS' ROLE AS CHAIRMAN

Mr Powers stated that he has taken an active role in Fairfax since his appointment as chairman.²⁷⁴ Mr Muscat confirms this and states that Mr Powers has spent on average two to three days a week at Fairfax.²⁷⁵ Mr Dews stated that Mr Powers was a much more active chairman than any chairman Fairfax has had since Mr Dews joined and more engaged in the business of Fairfax than any previous chairman had been.²⁷⁶

Mr Powers gave evidence that Mr Kerry Packer had indicated to him that unless Mr Powers was elevated to the position of chairman or deputy chairman of Fairfax, then he would be wasting his time:

I remember Kerry saying that if you – I wouldn't have announced it was my aspiration, that's not generally what I do, but I do remember Kerry at one point saying, 'Well, if you don't get to be chairman or deputy chairman, you've wasted your time. You won't be able to make a difference.' I remember him opining on that. I think that was before the 18th, it could have been after, to tell you the truth. I didn't discuss – yeah, I remember – I had discussions with Kerry, assuming James, but definitely Kerry because I can remember Kerry saying that. So I think I remember him saying that more than once, thinking that, from my point of view, I'm being stupid if I don't become a chairman or deputy chairman.²⁷⁷

Mr Kerry Packer gave evidence of his view of the importance of the position of chairman:

Q. Did you have discussion with Brian Powers at that time – this is when he first mentioned the idea of moving to Fairfax – about him becoming chairman of Fairfax? Would you have said to him, 'Well, if you don't get to be chairman or deputy chairman, you've wasted your time'?

A. I probably said that at some stage. I don't know whether it would have happened in the beginning, but at some stage I would have said that to him.

Q. Presumably because it represented your view, obviously?

A. I just think he's got so much more talent than the people who were there as chairman ...

Q. But given your views about Boards which you expressed, do you think it makes any significant difference whether you're chairman of the Board or a director on the Board?

A. I think chairman's a different position to a Board member.

Q. Why is that?

A. Because you have more direct access to the management.

Q. Yes?

A. And the management has to report to you and everything goes through you.²⁷⁸

Later, Mr Kerry Packer gave further evidence of the importance of the position of chairman:

A. What I suppose I'm really trying to say is that a chairman holds a disproportionate – whether he be executive or non-executive – influence over the directors and management to all other directors.

Q. And is that because, because he's chairman, he has direct access to the managing director and the management?

A. Yes, yes.²⁷⁹

Mr Kerry Packer also stated:

Q. So the chairman represents the Board?

A. The chairman is the Board and, in my view, is always the conduit between the managing director and the Board. And the Board are not even entitled to get in touch with the managing director except through the chairman. I think that's pretty common in most companies. That obviously means that the chairman says to the managing director, 'This is the Board's view' at all points of time where there's not an actual Board meeting going on. So his position is completely different to that of an ordinary Board member.

Q. Right.

A. Now, there are exceptions to that rule, but not many.

Q. And it's with that in mind that you held the view that he was wasting his time if he wasn't chairman?

A. Well, I just thought he was – I thought as a chairman he was streets ahead of anybody else sitting on the Board, streets ahead.²⁸⁰

In evidence to the ABA, Mr Kerry Packer put these remarks in the context of his views on the role of a chairman.

In terms of the influence of Mr Powers' presence on Mr Muscat and Mr Greaves, Mr Dews gave evidence that:

Q. I suppose the thing I'm trying to identify, I suppose, to what extent you think that they might be sort of reverential to him as a sort of active chairman?

A. No, I think it makes them – I think it makes us work harder. I don't think either of them are intimidated by him, but it's made us all work a lot harder in some areas and make sure that we are thoroughly justifying everything that we want to do.²⁸¹

Mr Powers does not see himself as managing director of Fairfax. This role he ascribed to Mr Muscat.²⁸² Mr Powers did not regard Mr Muscat as being compliant with his views.²⁸³ Mr Powers stated that he thought Mr Muscat was a strong chief executive officer and gave an example of two occasions where Mr Muscat had made decisions that were contrary to those he would have made.²⁸⁴ These related to the termination of the employment of Mr Alexander and the speed of recruitment of his replacement.²⁸⁵

Mr Powers gave evidence that Mr Muscat had requested Mr Powers to attend meetings with senior staff in relation to Fairfax matters.²⁸⁶ Mr Powers has stated that he did not go to staff meetings unless requested by Mr Muscat, as he had tried not to undercut Mr Muscat's authority. He has on occasion spoken to staff for updates, if they pass him in the corridors at Fairfax.²⁸⁷

6.3.1.1. THE ROLE OF MR POWERS AS CHAIRMAN IN REVIEWING BOARD PAPERS AND THE ROLE OF THE CHIEF EXECUTIVE OFFICER

Mr Powers is of the view that he has the full support and the implied authority of the Board to vet Board papers before they go to the Board. This was particularly in the context of the development of Fairfax's budget for the 1998/1999 financial year and to deal with the then negative market perceptions of Fairfax's performance.²⁸⁸ Mr Powers had become the 'point man for the Board' ... 'I was the primary point of contact as chairman responsible for reviewing stuff.'²⁸⁹

Mr Powers saw his role as reviewing or vetting all material before it goes to the Board:

Q. Would this be fair, that nothing goes to the Board without you reviewing it first?

A. I would not – in good practice, I would not send anything to the Board without me reviewing it first. In fact things do get through and I think some of the little things get through the other stuff.

Q. Okay. Just looking at the practice, if you see something that is intended for the Board from management or one of these committees and you look at it and you say to yourself, 'I don't think this is right, I think we should have another look at this before it goes to the Board', you can make that decision?

A. Yes ... I don't know any companies that I'm involved with where a chairman hasn't read Board papers before they've gone and been given a period to comment before they go to the Board. It's his meeting, in the sense that the management has – but the chairman has to, I think, as a final arbiter of what needs to be approved by the Board, go to the Board, et cetera. It's pretty non-controversial. In this case it's usually non-controversial; it's routine.²⁹⁰

Mr Powers gave the following evidence in relation to the demeanour of a chief executive and of Mr Muscat in particular:

Q. ... It's from the nature of things that the chief executive wants to have a unanimous position with the chairman at the Board meeting; is that what you said?

A. Yeah, human nature, you want to go with the consensus view.

Q. Right. That means —

A. I don't care too much about it. I'm happy to debate things at Boards. Most people don't like debating things at Boards.

Q. But that's Muscat's view?

A. Yeah, Bob very much wanted to work something out on Canberra Times.

Q. Wants to have you on side?

A. Yep.

Q. And you know that?

A. Yes.

Q. Then isn't it right that, just from the way things are operating in practice, as a matter of practice you have a right of veto over what's going to the Board and what's not going to the Board, because if you tell Bob, 'Look, I don't want this to go to the Board because I disagree with it', it won't happen, it won't go?

A. No, that's overstating it. If Bob – suppose on the budget I had said, 'Bob the run rate last year was 805, we have to get down to 760 by 1 September and that's the recommendation you'd better get on Board', Bob would have said, 'No, I can't do that'.

Q. Sure, I follow that.

A. He would have said, 'Listen, this is the budget I'm putting up and we'll fight it out at the Board'.

Q. See, to me I wouldn't – and I just want to get clear – describe that as a right of veto, what you described. That's you not getting your way positively with something with Bob. What I was suggesting was something rather to the contrary, and that was that if management, led by Bob, wanted to put a proposal to the Board or a paper putting forward a particular proposal and you disagreed with it, that he would not go forward with it, that you would be able to veto his going forward with something, not that everything that you wanted to go forward necessarily would go forward. Do you follow the difference?

A. I do follow the difference. I think that on a major issue, material issue, he wouldn't feel constrained. I hope he wouldn't feel constrained. I made it clear to everyone in the Board, including – my style of the Board is to fully debate everything. Board members generally don't give views. I want their views. I made that clear to them. People are talking now.²⁹¹

Mr Powers states that his role in reviewing the papers is for 'quality control', for example, to ensure that management has considered all relevant issues. In that regard he cited the recommendation to the Fairfax Board on the bid to be made by Fairfax for the Canberra Times, discussed in section 6.3.4 of this report at page 71.²⁹²

In talking about the relationship between Mr Muscat and himself on the putting together of the recommendation that went to the Board Powers cited a conversation he had with Mr Muscat and the other staff involved as follows:

... it's interesting, Canberra Times, when we were debating it, I said, 'Listen, if you guys feel differently on this' – Bob said, 'We should go in with a unified position'. I said, 'We don't have to'. I said, 'We have difference of opinions. We can work around it. But feel free, raise this with the Board. They may feel differently'.²⁹³

Mr Muscat's evidence suggests that Mr Powers' views or wishes were considered and a consensus was generally reached, though on some occasions one person agreed to differ. In those circumstances he saw the chairman's position as important in that he would like to have the support of the chairman.²⁹⁴ He stated:

I certainly see the chairman as someone who is important within the company and certainly in terms of the relationship between he and I, that is important ... I would like to think that I have got the chairman's support in the job that I've got to do.²⁹⁵

Mr Powers gave evidence that Mr Muscat listens to Mr Powers' suggestions. Mr Powers gave the following evidence:

Q. What about in your one-on-one dealings with Bob, you making suggestions; what's his reaction to that? What sort of weight do your suggestions carry with him, from your observation?

A. He listens to them. He listens and considers them. I think we have a very open relationship, and not confrontational in the sense that, you know, if I say something – I don't know about it, so I'm reasonably careful to say, 'Listen, you're an expert in this industry but, geez, it looks to me like this', and Bob will say, 'No, but' or 'Yes, but', or, 'Yeah, but if we do it too quickly, this will happen', or, 'We've got to watch it this way', and stuff.²⁹⁶

Mr Powers is aware that where possible it appears that Mr Muscat would like to have the support of Mr Powers before making a recommendation to the Board of Fairfax:

A. ... Any chief executive wants the chairman to vet the papers.

Q. Any chief executive wants a chairman to vet the papers?

A. Absolutely.

Q. Would it be the case that he feels he needs your support before he can go to the Board, that's his personality?

A. No, but it's any chief executive's personality. You have someone who is going to be conducting the meeting, the last thing you want is to put up a paper and say, 'Listen, I read this last night. Geez, this is ridiculous'. You'll have a fiasco on your hands.²⁹⁷

However Mr Powers gave evidence that, on a material issue, Mr Muscat would not feel constrained in taking a recommendation to the Board of Fairfax when he knew that Mr Powers disagreed. Mr Powers gave evidence that:

I think that on a major issue, material issue, he wouldn't feel constrained. I hope he wouldn't feel constrained. I made it clear to everyone in the Board, including – my style of the Board is to fully debate everything. Board members generally don't give views. I want their views. I made that clear to them. People are talking now.²⁹⁸

6.3.1.2. FINDING

1. *Mr Muscat as an executive director had his own access to the Board through meetings but also conducted direct discussions with other directors, notably Messrs Gonski, Burrows and Greaves.*

6.3.2. DISMISSAL OF MR ALEXANDER

On 22 May 1998, Mr Muscat dismissed Mr John Alexander, Editor in Chief of *The Sydney Morning Herald*, from employment with Fairfax.

Mr Muscat gave evidence that he took the matter to the Fairfax Board meeting on 18 May 1998 to seek its endorsement for him to dismiss Mr Alexander.²⁹⁹ Mr Muscat gave the following reason to the Board of Fairfax for his decision to seek its endorsement for his intended course of action:

I basically said to the Board that ... I was seeking from the Board their support in my dealing with that in any way that I thought it was appropriate. I didn't use the word 'sacking,' but I said, 'It needs to be dealt with and I'm not sure what the outcome of my discussions might be with John Alexander but, at the end of the day, it will have to be my decision in terms of what needs to be done.'³⁰⁰

In evidence, Mr Muscat cited irreconcilable differences as the grounds for his decision to dismiss Mr Alexander.³⁰¹ Mr Muscat gave evidence that he had made his mind up before the Fairfax Board meeting of 18 May 1998 in relation to the course of action he would take:

Q. At the time you presented the matter to the Board on 18 May, was it within your contemplation that you may have to sack Alexander?

A. Yes.

Q. Was that a real possibility? Was that what you were thinking, that you were going to the Board to get final endorsement?

A. Yes.

Q. Did you have other strategies that you thought may have resolved the situation?

A. No, I was pretty convinced that that was the sort of outcome.³⁰²

Mr Muscat gave evidence that the appointment of Mr Powers as a director of Fairfax did not have any bearing on his decision to dismiss Mr Alexander, and that he acted within the week of the 18 May 1998 Fairfax Board meeting because it was likely that the substance of his discussion on 18 May 1998 with the Fairfax Board was to be published in the weekend edition of the newspaper:

Q. Did it have any bearing on your judgment of the fact that Brian Powers had joined the Board that Monday, that there was in fact a bit of a shake-up coming through?

A. No, I think pretty much the deciding factor, from my point of view, was the seriousness of the issue, the fact that on the Saturday there was a story being published in the Financial Review weekend edition, which basically talked

about my discussion at the Board meeting to sack Alexander – as I say the word ‘sacking’ wasn’t mentioned – and that if I was going to act on that issue, which I saw as pretty serious, I had to basically do it before the weekend.³⁰³

The evidence suggests that Mr Muscat dismissed Mr Alexander for reasons other than those to do with the appointment of Mr Powers as a director of Fairfax. Mr Muscat raised the matter at the 18 May 1998 Fairfax Board meeting. This was the same meeting that appointed Mr Powers as a director.

6.3.2.1. FINDING

1. Mr Alexander’s dismissal from Fairfax was not due to the circumstances surrounding the appointment of Mr Powers as a director of Fairfax.

6.3.3. THE PROMOTION OF AUSTRALIAN CONSOLIDATED PRESS MAGAZINES IN THE SUN HERALD

During August 1998, *The Sun Herald* newspaper promoted an offer in which the purchase of two *Sun Herald* newspapers would entitle the reader to a free magazine published by Australian Consolidated Press (ACP).

Mr Muscat gave evidence that, to his knowledge, the idea had been developed by the publisher of *The Sun Herald*.³⁰⁴ Mr Muscat gave evidence that Mr Powers was not involved in the idea or its development.³⁰⁵ Mr Powers gave evidence consistent with this that, despite an article appearing in *The Daily Telegraph* crediting Mr Powers with the idea,³⁰⁶ he did not become aware of the arrangement until after it had been finalised:

Q. ... there are no other business links or possible business links?

A. No. There was a major – I saw we were giving away free ACP magazines. I didn’t know about it until it had happened.

Q. We will be coming to that.

A. I didn’t know about it until the day it happened. Bob called me and said ‘you got credit’.³⁰⁷

Mr Powers also gave evidence that he had no involvement in the ACP magazine offer, except to be appraised of the arrangement once it had been finalised.³⁰⁸

6.3.3.1. FINDING

1. Mr Powers did not influence decisions made in relation to The Sun Herald promotional offer of providing free ACP magazines to The Sun Herald readers.

6.3.4. THE BID BY FAIRFAX FOR FEDERAL CAPITAL PRESS (FCP)

In May 1998, the Federal Capital Press of Australia Pty Limited (FCP) was offered for sale by Resolis Pty Limited, a company controlled by Mr Kerry Stokes. Resolis Pty Limited was proposing to sell 100% of the issued shares in FCP. The offer was to remain open until 5.00 p.m. (Sydney time) on Friday 26 June 1998.³⁰⁹ An information memorandum regarding FCP was forwarded to Fairfax as a prospective purchaser to assist it in deciding whether to make a bid.³¹⁰

According to Mr Muscat, the management of Fairfax had been considering the question of whether to invest in FCP for some time.³¹¹

According to Mr Powers, prior to the Board meeting on 26 June 1998 Mr Muscat asked Mr Powers to join him and Mr Greaves 'so that they could take me through it so we could decide what we were going to do at the Board meeting.'³¹² According to Mr Powers:

I was provocative in that meeting. I think I said I'd rather shoot myself in the head. I said, 'I'm happy to put an indication of interest in'. They gave me a three-page summary. I said 'Based upon this, you don't make any case for doing it.' I didn't believe the cost cutting they felt we could do ...

First of all, I said, 'I don't know anything about this paper other than what you've just shown me and I think it's way overvalued'. I said, 'Listen, take me through the strategic arguments' and they made some ... arguments ...³¹³

Mr Powers then suggested that the matter be taken to the Board:

I said, 'Listen, we certainly should put in an expression of interest and go do our homework'. We then went to the Board meeting and brought it up. We had a discussion. I said, 'Listen, we're going to put an expression of interest in, non-binding' – I forget what it was, \$157m, \$160m – to get us to the next round.

I said, 'Listen, we ought to have a discussion on this'. I said, 'My view is that this doesn't have any strategic value', and I went through the reasons why, a little less pejoratively than I just did. I said, 'No-one can use it as a launching pad against us. It doesn't give us any prestige. We have no growth opportunities out of it.

... we went around the Board, and it's interesting, David [Gonski] said that he thought that it was of strategic value and I think the consensus was, 'Yeah, if we get a good buy, it's worth looking at'. It was early stages so no one took it that seriously.³¹⁴

On 26 June 1998 the Fairfax Board resolved to 'make a non-binding indicative offer of \$155 million for the purchase of Federal Capital Press in terms outlined by the Chief Executive.'³¹⁵ On 10 July 1998 the Finance and Audit Committee noted that 'An indicative offer of \$155 million was tendered following which an invitation was extended for Fairfax to proceed to due diligence.'

The next Board meeting of Fairfax was in Melbourne on 29 July 1998. Discussions took place between Messrs Nick Leader, Nigel Dews, Bob Muscat and Brian Powers prior to that Board meeting. According to Mr Powers:

Then coming up to the July meeting, when a formal bid was going to be due I think two or three days after a meeting — ... we needed to make a decision. We'd had one or two more meetings on it, and these weren't two-hour meetings, they'd be 20-minute minutes ...

Bob, Nigel, John Greaves I think was in some, and Nick Leader was in them. Management was more besotted with the idea of owning it than I was and willing to pay more than I was.³¹⁶

A draft paper dated 22 July 1998 prepared for the Board by Fairfax staff members Nick Leader and Nigel Dews stated:

It is recommended that Fairfax submit a binding offer to buy FCP for \$176 million on 30 July, 1998.³¹⁷

Mr Muscat, in evidence, stated that a price of \$176 million was what staff thought appropriate at 22 July 1998. He said he took the view at that time that FCP was worth \$155 million though he probably does not still hold that view.³¹⁸ This was prior to a review on the effect on share price conducted by Mr Nick Leader, which was initiated by Mr Brian Powers.³¹⁹ Between 22 July 1998 and 27 July 1998 the offer figure for FCP in internal documentation fell from \$176 million to \$155 million.³²⁰ A revised draft of this document dated 27 July 1998 stated:

It is recommended that Fairfax submit a binding offer to buy FCP for \$155 million on July 30, 1998.³²¹

In relation to this document Mr Powers stated:

Then this one was prepared two days before our Board meeting, but, through scheduling matters, we didn't get to discuss it. We actually discussed it on the morning of the Board meeting. So we discussed it down in Melbourne, at

the Board meeting in Melbourne. We went in at 7 o'clock in the morning to discuss it. That would have been the people I described in that meeting. The idea was to have a unified front, unified position to go to the Board.

I had real questions about whether we could get any of the savings we were talking about ... you had a business development team who had never really managed a business, and I've seen plenty of them in my life. Basically they said it's very easy to get these savings ... I just felt we didn't have the management resources, especially to drive the benefits that we need to drive. I looked at that and I said, 'My vote is we pass on this, you guys' ...³²²

The document in its final form, dated 29 July 1998 stated:

It is recommended that Fairfax submit a binding offer to buy FCP for \$125 million on July 30, 1998.³²³

This was the document that ultimately went to the Fairfax Board on 29 July 1998.

Q. And the result of that meeting was, what, this final, was it, on 29 July which was provided to the Board? Was it provided to the Board?

A. Yeah, I believe it was. I think it was handed out, but it was mostly spoken to at the Board.³²⁴

The recommendation of \$125 million was made at the Board meeting of 29 July 1998.³²⁵ Between 22 July 1998 and 27 July 1998 Mr Powers spoke with Mr Gonski, Mr Burrows and Mr Pinshaw about the possible value of FCP to Fairfax.³²⁶

As a result of discussions at the Board meeting a final offer of \$130 million was agreed to. It was not expected that such a bid would succeed.³²⁷ Mr Powers acknowledged that there was a difference of the view in relation to the level of the bid that was made and that management left to their own devices would probably have suggested a higher offer.³²⁸

The figure of \$125 million was worked out through discussions between Mr Powers and staff. Mr Muscat stated that he was the person who made the decision that \$125 million should be final offer figure for the FCP bid to be recommended to the Fairfax Board. Mr Muscat, however, states in evidence, that Mr Powers was influential in relation to the final figure that was recommended to the Board and that Mr Powers' view of the value of the investment prevailed.³²⁹ In this regard Mr Muscat noted the experience of Mr Powers in the area of acquisitions. It is also noted that in Mr Muscat's view it becomes a question of 'how much support you have in' your view.³³⁰ He states that 'I suppose we got convinced by good argument at the end of the day.'³³¹ He also notes that the issue of the valuation of FCP was one in which he and Mr Powers had a difference of view and that in that case, the view of Mr Powers' prevailed.³³²

Mr Powers stated that Mr Muscat wanted a consensus or unified position to be reached on the offer figure before he would decide to recommend it to the Board. Mr Powers stated 'Bob has made a point of wanting to go to the Board with a unified position on stuff.'³³³ Mr Powers' evidence indicates that it is a natural inclination for any chief executive to want the support of a person in the position of the chairman, before going to the Board with a recommendation.³³⁴

According to Mr Powers, the figure of \$125 million was reached through consensus between staff, including Mr Muscat, and Mr Powers.³³⁵ Mr Powers states that he made 'it clear to the Board that left to management's own devices they would have been more aggressive, but left to my own devices I would not bid at all.'³³⁶

On 29 July 1998 the Board considered the recommendation and ultimately an offer of \$130 million was made after discussion. Mr Powers gave evidence that there was a view at the Board that a bid of \$125 million was insulting.³³⁷

6.3.4.1. FINDINGS

1. Mr Powers' view as to what the quantum of the recommended bid that should be put to the Board of Fairfax prevailed over staff views, including Mr Muscat's view.

2. *This occurred as a result of the exercise of the power of argument by Mr Powers rather than the exercise of direction or restraint over this issue.*
3. *Mr Powers was influential in the determination of the ultimate bid made by Fairfax for the Canberra Times but the Board of Fairfax ultimately decided the matter.*

6.3.5. THE BUDGET OF FAIRFAX

Control over a company's budget is of significance because a budget can act as a restraint over the management or affairs of a company. The relevant question is whether Mr Powers has control over the 'restraints' or the figures that ultimately appear in the budget of Fairfax. Mr Powers gave evidence that one of the matters he had been involved in since becoming chairman of Fairfax was the preparation of the budget for the 1998-99 financial year.³³⁸

Mr Powers gave evidence that, before he became chairman, Mr Muscat, Mr Greaves and Mr Ashley Fenton had been primarily responsible for the preparation of the budget.³³⁹ Mr Powers indicated that it was his view that, when he began focussing on the preparation of the budget, the budget was not close to being finalised, despite the views of the management team that it was nearing completion.³⁴⁰

6.3.5.1. THE DECISION TO AIM FOR A ZERO COST INCREASE IN THE BUDGET

Mr Powers gave evidence that, when he first arrived at Fairfax, the management had prepared a draft budget which recommended that costs be increased by \$25 to \$35 million in relation to the 1997-98 financial year's actual expenses of around \$805 million. Mr Powers also gave evidence that he considered that such an increase of budgeted expenses to \$830 or \$840 million was not acceptable.³⁴¹

Mr Powers gave evidence that it was his view that the budget should be presented to the Board of Fairfax with the recommendation that further work be done in order to achieve a final budget of \$805 million for expenses which was a zero cost increase from the previous financial year. Mr Powers gave evidence that he discussed with management the prospect that the budget be presented to the 26 June 1998 Board meeting with the recommendation that it be adopted as a work in progress in order to achieve the \$805 million figure.³⁴² Mr Powers gave evidence that he thought that, if this proposal were presented to the Board with his endorsement, then the Board would accept the recommendation of himself and management.³⁴³

Mr Powers gave evidence that he had discussions with various members of the Fairfax Board in the week prior to the Board meeting of 26 June 1998, while the budget was being finalised, in order to explain why the budget would not be finalised by the 26 June 1998 Fairfax Board meeting, and also what the wider issues were in relation to the budget process.³⁴⁴

At the 26 June 1998 Fairfax Board meeting, the Board accepted the budget as a 'Budget in Progress'.³⁴⁵ At the 10 July 1998 meeting of the Finance and Audit Committee of Fairfax, it was 'noted that ... the Budget forecast is for zero increase in costs',³⁴⁶ but adopted a cost target of \$816 million. The way this was arrived at was through a discussion that involved Messrs Muscat, Powers, Pinshaw and Burrows.³⁴⁷

6.3.5.1.1. Findings

1. *Mr Powers was influential in determining that the budget to be presented to the 26 June 1998 Fairfax Board meeting be presented as a 'Budget in Progress' by convincing other directors, including Mr Muscat, that further work still needed to be done.*
2. *The final costs target in the 1998-99 Fairfax budget was arrived at through the involvement of other Fairfax directors.*

3. *Mr Powers was influential in the recommendation that there be moves towards a zero growth in expenses in the budget for the coming financial year.*
4. *Attempts made by management towards the achievement of a zero growth in expenses for the budget were at the suggestion of Mr Powers.*
5. *The Board of Fairfax did not ultimately adopt a zero costs growth budget.*

6.3.5.2. TREATMENT OF ABNORMAL EXPENSES

One of the issues Mr Powers dealt with when preparing the budget was the treatment of abnormal expenses. Mr Powers gave evidence that the management of Fairfax had classified certain items as abnormal halfway through the 1997-98 financial year.³⁴⁸ Mr Powers gave evidence that, at meetings with management, he had disagreed that these items ought to have been classified as abnormal. Mr Muscat gave evidence that advice had been received from Mr Brian Long of Ernst & Young, Fairfax's auditors, that it was appropriate to classify those items as abnormal.³⁴⁹ While Mr Powers did not agree with the commercial desirability of certain items being treated as abnormal, at no time did he suggest that such a treatment was improper or contrary to law – it was a matter for judgment and resolution of the interplay of commercial and accounting issues.³⁵⁰

At the 24 June 1998 meeting of the Fairfax Finance and Audit Committee, the issue of abnormal items was discussed:

Treatment of abnormal items was discussed and it was agreed to continue with the treatment used at the half year with the exception of defamation. It was agreed not to treat the increase in the defamation provision as abnormal.³⁵¹

This matter was discussed at the Fairfax Board meeting on 26 June 1998 and the Board endorsed the position of the sub-committee:

Mr Greaves outlined the debate at the Finance and Audit Committee re abnormal items. Directors discussed alternative methods of treating the abnormal items.³⁵²

Mr Powers agreed that it was better not to amend the half-yearly statements during the current fiscal year. He gave evidence that to go back and amend the half-yearly statements would, in his view, give the market the impression that the Board of Fairfax were not shrewd financial managers.³⁵³

However, Mr Powers gave evidence that he still preferred the view that it would be better to give the market the information regarding the treatment of abnormal expenses when the budget is released, so that the market can objectively ascertain the financial position of Fairfax and how it will compare from year to year.³⁵⁴ Mr Powers' view as to the treatment of abnormal expenses seems likely to prevail for the next financial year.³⁵⁵

6.3.5.3. STAFF HIRING FREEZE

On 7 July 1998, Mr Muscat sent a memo to senior staff directing that there be a staff freeze implemented:

There is now a freeze on the replacement of staff that leave. Careful consideration should be given to improve processes to avoid replacement. In the event that replacement staff are considered necessary a proposal for the replacement should be forwarded to me through the Group HR Manager.³⁵⁶

Mr Powers gave evidence that, in order to achieve the desired budget outcome of a zero increase in costs, he had suggested that a staff freeze be implemented.³⁵⁷ Mr Muscat gave evidence that Mr Powers had raised the issue of a staff and wages freeze as part of the cost cutting review process.³⁵⁸

Mr Powers gave evidence that he met with Mr Muscat to discuss the form any announcement regarding the staff freeze should take:

Q. Was there much debate about that at the meeting or did it get to the stage where you made the suggestion and it was agreed to?

A. I said, 'Let me tell you what I would do if I was in your positions' I think that is you how I think I put it – 'why don't you go ahead and think about it'. So I think we decided next day, I think Bob said, 'I think you are right, we have to shoot for that', he and John probably talked privately, '... I don't want to make that official but de facto ... hiring freeze, I don't want to put a big announcement out but I will make that understood throughout the organisation'.

So we then took the decision to inform the Board of that, so we would give them a look, a very watered down version of this, and the Board papers saying, here is where the first cut came out, our goals will be to go back and come to the base of an 805, run rate with a zero cost increase and, to help jumpstart that, a de facto hiring ... freeze ...³⁵⁹

The minutes of the 26 June 1998 meeting of directors of Fairfax indicated that management intended to initiate a *de facto* staff hiring freeze:

Management will also institute a de facto hiring freeze on staff.³⁶⁰

Mr Powers gave evidence that Mr Muscat preferred to talk to managers regarding the staff hiring freeze rather than sending out a statement, although he had communicated to Mr Muscat a desire to have the freeze formalised.³⁶¹ However, Messrs Muscat and Greaves prepared a memo to all staff indicating that there was to be a staff hiring freeze.³⁶² Mr Muscat gave evidence that, while Mr Powers had suggested the idea of formalising the staff hiring freeze, he had considered it a good idea, and had needed no encouragement to prepare the memo outlining the position in relation to staff:

Q. To what extent was him raising that issue with you part of your reason for firming up the arrangements and putting on a staff freeze?

A. I'm sure that any idea that is a good idea and has merit you would be foolish not to pick up, and I didn't see it as a bad idea. I probably thought that there was enough of an understanding but you have to think about the breadth of the company and it is not just a Sydney operation, you have got regional newspapers and you have got suburban newspapers and you have got metropolitan newspapers in Melbourne so generally speaking if you are going to do something it should be right across the company rather than in pockets.

So it probably would have been done as part and parcel of our review process, but it certainly spiked a view in my head that we probably should firm that up.³⁶³

6.3.5.3.1. Findings

1. *It was at the suggestion of Mr Powers that the decision was made by Mr Muscat to introduce and formalise the hiring freeze by sending a memo to staff.*
2. *Although Mr Muscat adopted Mr Powers' suggestion that the staff freeze be introduced and formalised, Mr Muscat made his own decision to draft and send the memorandum.*

6.3.6. PROJECT HERCULES (REVIEW PROCESS)

At the 18 May 1998 meeting of the Board of Fairfax, Mr Muscat reviewed the progress on strategy for the future development of Fairfax. At that time, Mr Muscat also announced that McKinsey & Company had been engaged to assist in process improvement and strategy review within Fairfax:

The Chief Executive reviewed the Company's progress on strategy including online business. He then reported on a Company-wide process improvement and strategy review to be undertaken with the assistance of McKinsey & Company.³⁶⁴

The Board resolved to establish a committee to oversee the process:

IT WAS RESOLVED to form a Strategy Review Sub-committee comprising Sir Roger Douglas, Mr. Mark Burrows and Mr. Brian Powers to monitor the project.³⁶⁵

This committee later comprised Messrs Burrows, Powers, Pinshaw, Muscat and Greaves.

At the 26 June 1998 meeting of the Board of Fairfax, Mr Michael Rennie from McKinsey & Company gave a presentation on the review process.³⁶⁶

Mr Powers gave evidence that he had become a member of the Board sub-committee dedicated to the review of Fairfax.³⁶⁷ The review process had been labelled 'Project Hercules'.³⁶⁸ Mr Powers gave evidence that his involvement had been purely as a member of the sub-committee.³⁶⁹ However, Mr Powers also gave evidence that he took an interest, outside committee meetings, in the work being done by Mr Muscat and Mr Greaves in relation to Project Hercules.³⁷⁰

Mr Muscat said that the work done by management on Project Hercules was intended to identify where costs could be improved and to take action to improve the situation.³⁷¹

Two committees had largely done the work on Project Hercules. One is the Board's strategy review committee. The other is a management committee, which does most of the day to day work involved in carrying out the objectives of Project Hercules. Mr Powers gave evidence that he had not attended any of the management committee meetings.³⁷²

Mr Powers gave evidence that he thought that the work on Project Hercules was progressing too slowly.³⁷³ Mr Powers testified that it was not a question of persuading Mr Muscat of the particular decisions to make, rather just encouraging him to quicken his pace.³⁷⁴ This was largely done through the strategy sub-committee that, Mr Powers testified, was sensitive to the need to move quickly on the issue.³⁷⁵

Mr Powers also gave evidence that he was involved in providing general guidance to the management committee through his involvement on the strategy sub-committee.³⁷⁶ Mr Muscat gave evidence that the strategy sub-committee was essentially to provide support for management's involvement in Project Hercules.³⁷⁷

6.3.7. MEETINGS BETWEEN FAIRFAX, NINE AND PBL ONLINE TO DISCUSS POSSIBLE ONLINE ALLIANCE

This matter is also referred to in section 4.6.1 of this report at page 36.

Mr Powers gave the following evidence:

Q. You identified Fairfax's on-line strategy as one of the three main issues?

A. Yes.

Q. That should be attended to when you first became chairman?

A. Yes.³⁷⁸

Mr Powers' view was Fairfax's on-line strategy needed to be progressed and that it was a good idea for discussion to take place. He stated:

... there had been a series of meetings and working level meetings which have been unproductive and pointscoring each other, so I know my view, I don't think I suggested it, but my view has been let's get everyone in the room and talk about it. Whether I said that or whether they were doing it and I said 'great idea', I don't know, but it is clearly what is needed for this thing to progress.³⁷⁹

Fairfax has spoken to other major players in the on-line industry; the evidence indicates that negotiations and discussions between Fairfax and content-providers are still continuing. Mr Powers gave the following evidence on 19 August 1998:

Q. What is the status of the proposal at the moment or the discussions between you and Fairfax and NineMSN for a possible alliance?

A. ... The way I left it, can I just say the state of play as I understood it eight weeks ago and three weeks ago, was that an outline on how we might work together had been discussed and there were open issues on three or four substantial points, whether it was bid and ask, how much we would get of the NineMSN portal, of that joint venture if we came in, how we would share revenues on transactions growing out of our classifieds, who actually controlled the manipulation of the classifieds, who controlled pricing. Actually, I think we had resolved that, but a couple of big issues.

... I thought there were more preliminary issues that we needed to resolve to decide whether or not we wanted to do a deal and whether a deal made sense.³⁸⁰

Mr Greaves gave evidence that Mr Powers has played a role in Fairfax's on-line strategy to date. Mr Greaves stated:

He's very active. He understands it, he understands where it is going.³⁸¹

Mr Nigel Dews is General Manager, Business Development and On-line Services at Fairfax. Mr Dews has the responsibility for all of Fairfax's on-line activities, eg. internet business and other on-line data business. Mr Dews gave the following evidence:

A. ... with the exception of a couple of meetings on the Canberra Times, most of my meetings with him [Mr Powers] would have been related to online strategy but they've nearly always been either – not all of them, but most of them would have been. Bob Muscat's also been in attendance at, so there would be – oh, let me just think. I mean, I'd have to give you a broad band of meetings because I don't diarise them all and, I mean, you know, it's just impossible to tell, but it's sort of the order of six to twelve meetings, that sort of thing.

Q. Have you had any one-on-one meetings with him about online strategy?

A. Yeah, yeah, a couple of those.³⁸²

Mr Powers gave evidence that he participated in meetings with Mr Muscat and Mr Dews in relation to Fairfax's on-line strategy. Mr Powers stated:

... we gave a full briefing to the Board at the 29th meeting, the June meeting ... I chipped in on my perspectives. Nigel made the presentation.³⁸³

Mr Powers gave evidence that the two main content providers with which Fairfax was considering entering into an arrangement are News Limited and PBL (NineMSN). Mr Powers gave the following evidence:

Q. How many of those alliances that you just identified in your own mind are realistic options?

A. Right now the two that are live are PBL. They have stalled. And I think when I left News was the more active of the two.³⁸⁴

Mr Powers was briefed directly by Mr Dews in relation to the discussions with News Limited:

... when Nigel [Dews] briefed me on it I said that sounds very clever, get some numbers to make sure we don't get lost between concept and reality.³⁸⁵

There is evidence that Mr Powers has been closely involved in strategy development and negotiations with PBL concerning possible alliances between Fairfax and NineMSN.

Mr Powers has expressed views to Mr Dews in relation to Fairfax's current strategy, including specific discussions about the pros and cons of forming an alliance with NineMSN. The evidence from Mr Dews is

that Mr Powers, on the right terms, considers an alliance between Fairfax and NineMSN to be in Fairfax's best interests. Mr Dews gave the following evidence:

Q. And has he [Mr Powers] expressed his views about that to you?

A. We've discussed the pros and con, but whether – you know, that hasn't reached anything definitive.

Q. And I appreciate that. I suppose I'm trying to understand what you believe his view to be about that alliance, whether it's a good thing for Fairfax or not or whether he thinks it should be done?

A. I think on the right terms he'd consider it to be a good thing for Fairfax at the moment. But that's an 'I think'; that's not a —

...

A. It certainly hasn't been definitively stated by him; but on the right terms, that it could be a good thing to happen to Fairfax.³⁸⁶

Mr Powers gave evidence that he had some concern that PBL would enter a joint venture in the on-line area without Fairfax. This comes in the context of the lead-up to the lunch between Messrs Powers and Muscat with Mr Kerry Packer held at Fairfax on 21 July 1998:

And we talked, you know, that it is – to some extent we were pursuing PBL more than they were pursuing us and our great fear was that PBL would go to a joint venture without us.³⁸⁷

Mr Powers gave evidence that there was no substantial discussion at the lunch about on-line strategy.³⁸⁸

The evidence indicates that there were two meetings between NineMSN and Fairfax on 12 June 1998 and 25 June 1998 at CPH offices to discuss on-line issues.³⁸⁹ Amongst others, Brian Powers and James Packer were in attendance. In relation to his involvement in arranging the meetings, Mr Powers gave the following evidence:

Q. And I understand that as part of pursuing that strategy there had been a couple of meetings with PBL Online and NineMSN to advance that strategy. How did those meetings come about? What involvement did you have in setting them up?

A. I believe they had been set up either by Bob or Nigel, I think.

Q. At your suggestion?

A. I don't know. There has been, not so much with News, there has been duelling, papers back and forth, most frustrating thing I have ever seen. I thought media players, traditional media players were bad ... So there had been a series of meetings and working level meetings which have been unproductive and pointscoreing each other, so I know my view, I don't think I suggested it, but my view has been let's get everyone in the room and talk about it. Whether I said that or whether they were doing it and I said 'great idea', I don't know, but it is clearly what is needed for this thing to progress.³⁹⁰

The purpose of the meetings between PBL and Fairfax was to discuss opportunities to have Fairfax content distributed on-line through NineMSN.

A number of matters were discussed including portal strategies and exclusivity.³⁹¹ The evidence is that negotiations took place, without finalisation or decision about matters discussed.³⁹²

The evidence is that Mr Powers has not been involved in negotiation with any other content-provider and his involvement in negotiations/discussion has been only in relation to NineMSN.³⁹³ This is with the exception of a couple of lunches with Mr Lachlan Murdoch.³⁹⁴

Mr Powers gave evidence that discussions about Fairfax's strategies in pursuing PBL in relation to on-line services are not taking place at the Board level but at the working level.

... these are all working level stuff at this stage. We briefed the Board and told them what we were doing and the Board said, fine, but they are too complicated for the Board unless you really have a real deal. We briefed them about what we were talking about with PBL and what we were talking about with News ...³⁹⁵

Mr Powers has produced a number of documents to the ABA, which indicate that he was involved in or made aware of detailed proposals by correspondence between PBL and Fairfax.³⁹⁶ Mr Powers has also produced documents which indicate that Mr Powers was made aware of information concerning negotiations with News Limited.³⁹⁷

6.3.8. EDITORIAL DECISION MAKING

Mr Alexander gave the following evidence in relation to editorial decisions made at Fairfax in the past:

When I became editor, I came in really at the end of the old system. Until then, my understanding from Chris Anderson was that any editorial on an election, state or otherwise, was a subject which was discussed at dinner at James Fairfax's or Warwick Fairfax's house with the editor in chief and the editor. That is how it was done. When Sir Warwick Fairfax, Warwick Fairfax's father, was still in charge – he left about 1981 – every editorial in the paper went through his hands. But until then, of course, the main function of the editor was to write editorials, not to worry about the rest of the content of the paper. So we are talking about changing the industry.³⁹⁸

Mr Alexander also gave evidence of the nature of editorial decision making in the period since Fairfax has been publicly listed and prior to his departure from Fairfax:

A. ... If we are doing a leader about how you should vote in next Saturday's election, unquestionably I would read it. That would be written probably a week out, for example. Anything that was sensitive or even vaguely controversial, I would go over with a fine tooth comb. The reality with a paper like the Herald is that all the copy comes together largely for the next day's paper in about an hour and a half's time frame. Your ability to read what's appearing is more limited than one would necessarily expect, so you've really got to pick and choose. You've got to pick the things that you think might —

Q. What about an article like how are you going to vote in next week's election? Would anyone above you look at that?

A. In the past, yes, but not under this regime and not, to be perfectly frank, Muscat nor any of the Board have ever tried to interfere or intervene in an editorial stance on any topic. Nor did Mansfield before him, and nor did Mulholland before him. Conrad Black, for all the stuff written about him, was remarkably non-interventionist.³⁹⁹

There is no evidence of Mr Powers seeking to influence editorial decisions. Comment was sought from Mr Powers by journalists regarding an article to be written in the *Australian Financial Review* relating to CPH and PBL under Mr James Packer's guidance but Mr Powers did not respond to these queries.⁴⁰⁰ It was suggested in *The Daily Telegraph* that these articles indicated that Mr Powers was having an editorial influence at Fairfax such that 'relations between Fairfax and Packer grow more cosy with every passing day.'⁴⁰¹ However Mr Kerry Packer, when interviewed by the ABA was of the view that:

What I find so extraordinary is that if I control Fairfax, do you think they'd run the stories they run about me? If I controlled Fairfax, do you think that they would actually be running those stories? I mean, I would have thought it was self-evident that I have no damned control of Fairfax.⁴⁰²

These judgments are clearly subjective in nature and the ABA has not found any evidence of partisan influence on the conduct of Fairfax newspapers.

6.3.9. RESIGNATION OF MR MUSCAT, CEO OF FAIRFAX

Some time prior to Mr Powers' appointment as a director of Fairfax on 18 May 1998, Mr Ken Cowley, Chairman of Pacific Magazines, approached Mr Muscat. Mr Cowley told Mr Muscat that Mr Ken Catlow, the CEO of Pacific Magazines, was intending to retire in the near future. Mr Cowley asked Mr Muscat if he would be interested in replacing Mr Catlow as CEO of Pacific Magazines. Mr Muscat declined the offer.⁴⁰³

However, on 3 August 1998, Mr Muscat met with Mr Catlow and discussed his pending retirement. According to Mr Muscat, Mr Catlow:

just talked generally about a number of issues and he raised his pending retirement and basically said that he'd worked too hard in the company to see it go to someone who didn't quite understand the business and didn't have the sort of background that he thought was necessary and would I be at all interested in reconsidering my position.⁴⁰⁴

According to Mr Muscat, it was after this discussion that he began to change his mind in relation to accepting the position.⁴⁰⁵ Mr Muscat indicated to Mr Catlow that he might reconsider, and on the evening after his conversation with Mr Catlow, Mr Muscat received a telephone call, in which the offer was discussed again.⁴⁰⁶

On 18 August 1998, Mr Muscat told Mr Powers that he no longer desired to remain as CEO of Fairfax. Mr Muscat told Mr Powers at that time that he had received an offer to work for Pacific Magazines as CEO.

In evidence given to the ABA on 24 August 1998, Mr Muscat indicated that his decision to leave Fairfax was based upon 'instability in the share register'.⁴⁰⁷ He said he saw the PMP position as an opportunity for himself and that Mr Powers' role at Fairfax had no bearing on his decision.⁴⁰⁸ Mr Muscat stated that the stability of the share register had been an issue when he joined Fairfax in 1996. Mr Muscat also said that, although that issue had not changed in his mind since he first rejected the offer made by Mr Cowley, the opportunity to work with Mr Cowley in future had become more appealing over time.⁴⁰⁹ Mr Powers gave evidence that he indicated to Mr Muscat that he was disappointed and that both personally and professionally he would prefer Mr Muscat to stay.⁴¹⁰

Mr Powers testified that, on 19 August 1998, Mr Muscat had told him that Mr Muscat's reasons for leaving Fairfax were not to do with Mr Powers 'crowding him out'. He said to Mr Powers that he thought they were working well together. Mr Powers told the ABA that he thought they were working well together; although, given another four months of working together, Mr Muscat had said that he might find that Mr Powers was 'getting on his nerves'.⁴¹¹ Mr Powers stated that Mr Muscat had said that the instability in the Fairfax share register was a factor in his decision to resign as CEO of Fairfax.⁴¹²

In a press release issued on 24 August 1998, Fairfax announced Mr Muscat's intention to resign. In that press release, Mr Powers said that, while the search was progressing for a replacement for Mr Muscat:

a three-person Management Committee will assume the duties of the Chief Executive. That committee will be comprised of Robert Whitehead, General Manager, Sydney Operations, John Greaves, Finance Director, and Brian Powers, who will serve as its chairman.

The ABA's investigation has not conducted a detailed examination of the operation of this committee. The issue of whether Mr Powers is in a position to exercise control of Fairfax has been restricted to the period between 17 May 1998 and 24 August 1998.

6.3.9.1. FINDING

1. The ABA finds that Mr Muscat did not resign as CEO of Fairfax as a result of any disagreement with Mr Powers or any undue influence brought to bear on him by Mr Powers.

6.3.10. FINDINGS

1. As a matter of company law and according to the articles of Fairfax, Mr Powers is not, merely by being chairman inherently in a position to exercise control of Fairfax.

2. *The Fairfax Board consists of ten Board members. Mr Powers has the power to exercise only one vote in ten. This will not enable him to veto any decisions of the Board or to ensure any decision he favours to be made.*
3. *Mr Powers takes an active role in supporting the management of Fairfax. This has been most apparent in settling the budget for the company and in the development of major strategic initiatives such as the bid for FCP.*
4. *This approach has the agreement and support of the Board and acceptance by the executive directors.*

6.4. CONCLUSION ON SECTION 6

The role of a chairman of a listed company is an important one. The chairman forms the link between the Board and management, is likely to have regular dealings with management, particularly the chief executive, and may act as a spokesperson for the company.

In *AWA Limited v Daniels t/a Deloitte Haskins & Sells* (1992) 9 ACSR 759 at 867 the (then) Chief Judge of the Commercial Division of the New South Wales Supreme Court, Mr Justice Rogers, stated that:

The chairman is responsible to a greater extent than any other director for the performance of the Board as a whole and each member of it. The chairman has the primary responsibility of selecting matters and documents to be brought to the Board's attention, for formulating policy of the Board and promoting the position of the company.

In discussing his plans to seek nomination to the Board of Fairfax, Mr Kerry Packer and Mr Powers had a conversation in which Mr Packer indicated his view that Mr Powers would be wasting his time if he did not become chairman.⁴¹³

Mr Powers indicated in evidence that he would not consider seeking a nomination to the Board of Fairfax without some level of personal financial stake.⁴¹⁴ He has clearly considered that he would be able to make a substantial difference to the company's performance and to improve returns.

Mr Powers indicated to the ABA that he proposed to be a strong and active chairman. See section 6.2.1 of this report at page 62 for more information.

Mr Powers, as soon as he was appointed chairman of Fairfax on 29 May 1998, took a hands-on role in relation to his duties. Some of the issues he involved himself in include the budget of Fairfax, Project Hercules, Fairfax's on-line strategy, and the bid by Fairfax for FCP. In all of these issues, Mr Powers worked closely with management, other directors, the Board, and sub-committees of the Board. Mr Powers was clearly influential in the outcome of many of these areas. His scrutiny and analysis of budget documents led management to revise them and to finally go to the Board with a zero cost increase budget rather than a cost increase budget. In preparing Fairfax's bid for FCP, his involvement caused a significant revision downwards by staff of their opinion of the value of FCP to Fairfax. His view prevailed in the recommendation that was made to the Board and by and large also in the Board decision to lodge a rather low bid that directors knew was unlikely to succeed.

However, Mr Powers' role in influencing the outcome of these areas appears to have been through the provision of ideas and suggestions, and the persuasive argument of those ideas and suggestions, rather than through the exercise of any direction or restraint. The role of Mr Powers as chairman seems to have been that of facilitator and advocate; he is not 'the Board'.⁴¹⁵

The Board of Fairfax meets regularly and, except for the formalisation of the staff hiring freeze, has considered all the matters in which Mr Powers has had an influence. Further, Mr Powers has encouraged discussion and debate at the Board level, and has sought the views of other directors to ensure that all views are put and presented.

Mr Powers appears to have re-enlivened debate at the Fairfax Board level and re-enlivened the operation of the Fairfax Board sub-committees.

It is important to note that there have also been a number of significant Board and management decisions where Mr Powers has not influenced the outcome, for example the termination of Mr Alexander's employment.

Mr Powers is clearly influential in the operation of Fairfax, but its Board and management are making the key decisions. This is not conclusive in that the Act contemplates that more than one person can be in a position to exercise control of a company.⁴¹⁶ However, his role in relation to Mr Muscat appears to be one of a chairman supporting a CEO, rather than directing or controlling the CEO. A number of Mr Powers' suggestions were adopted by Mr Muscat but not because Mr Muscat felt compelled to do so. Mr Muscat adopted these suggestions because he believed them to be good suggestions and in the best interests of Fairfax. Mr Muscat had held a number of senior executive positions with News Limited before joining Fairfax including being chief operating officer for News Limited for one year and group general manager for News Limited for some ten years. His experience in the running of newspapers far exceeded that of Mr Powers and as such he did not feel compelled to adopt Mr Powers' suggestions. He knew, and advised the ABA, that Mr Powers could not direct him in relation to the performance of his duties and denied that he felt any compulsion to act. Mr Greaves, CFO said of the suggestion that Mr Powers was directing him:

I wouldn't say directing, [I would say] encouraging in the way we go about things. He is very – he is very in the business.⁴¹⁷

The two key managerial officers, the CEO and the CFO, are themselves members of the Fairfax Board, and involved in all Board discussions. These officers are largely responsible for the execution of directives by the Board of Fairfax, and for the day-to-day management of the company.

There has been no opportunity for Mr Powers to exclude the CEO or the CFO from the decision making process at Board level. Further, the ABA is of the view that, while Mr Powers may be influential in the way management performs its duties, he is not in a position to direct or restrain them in their duties in running Fairfax day-to-day. Mr Powers has the power to vet papers that come from management to the Board but management has the power to raise issues with other directors in the event that they disagree with Mr Powers. Mr Muscat indicated that he had relationships with a number of other directors including Mr Pinshaw, the deputy chairman, Mr Burrows and Mr Gonski. In this way issues could still get to the Board despite Mr Powers' role in vetting Board papers.

The concept of control in the Act is not of a single, completely dominant role, rather only of being in a position to exercise, either directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of a company.

Mr Powers is a talented, experienced, active and interventionist chairman with considerable media industry expertise. The ABA has considered arguments both for and against the proposition that his role as chairman of the company together with his close personal involvement in a number of substantial issues affecting the management or affairs of Fairfax are sufficient to put him in a position to exercise control of Fairfax. The ABA has also considered Mr Powers' relations with senior managers prior to the formation of a Committee of Management following the resignation of Mr Muscat, which falls outside the period covered by this report.

On balance, the ABA is of the view that Mr Powers could not exercise direction or restraint over any substantial issue affecting the management or affairs of Fairfax without including either or both of the Board and management, especially those members of management who sit on the Board. The ABA has not found that any of the Board of Fairfax are associates of Messrs Kerry or James Packer or CPH. It has investigated those relationships which might have indicated associate relationships and formed the view that no such associate relationships exist. Mr Powers has clearly been influential in a number of key decisions taken at Fairfax. However, whilst being an active, intelligent and well informed chairman, who has played a close supportive role for Mr Muscat as CEO, he is only one on a Board of ten. The Board is functioning effectively. Substantial issues are ultimately considered and finally determined by the Board. While Mr Powers may be persuasive in arguing his particular point of view on any issue, this alone does not place him in a position to exercise control of Fairfax.

6.4.1. FINDINGS

1. *The Board of Fairfax meets regularly and makes decisions on substantial issues affecting the management and affairs of the company.*
2. *The sub-committees of the Board of Fairfax have become more active under Mr Powers' chairmanship.*
3. *The Board of Fairfax is in a position to exercise direction or restraint over any substantial issue affecting the management or affairs of Fairfax.*
4. *Mr Powers is not in a position to exercise control of the Board of Fairfax.*
5. *Mr Powers is not in a position to exercise control of Fairfax.*

7. CONTROL OF THE NINE NETWORK LICENCES

7.1. ARE MESSRS KERRY OR JAMES PACKER, CPH OR PBL IN A POSITION TO EXERCISE CONTROL OF THE NINE NETWORK LICENCES?

TCN Channel Nine Pty Limited, General Television Corporation Pty Limited, Queensland Television Limited and Territory Television Pty Limited (the Nine Network Licensees) are the licensees of commercial television broadcasting licences with call signs TCN, GTV, QTQ and NTD in the Sydney, Melbourne, Brisbane and Darwin licence areas respectively (the Nine Network Licences). The Nine Network Licensees currently list Mr Kerry Packer, CPH and PBL as persons who are in a position to exercise control of the Nine Network Licences in the notifications provided to the ABA under section 62 of the Act.

Mr Kerry Packer holds, through wholly owned subsidiaries, 100% of the company interests in CPH.⁴¹⁸ CPH has approximately 45.26%⁴¹⁹ (as at 24 September 1998) of the company interests in PBL, a publicly listed company. PBL has 100% of the company interests in Nine Network Australia Pty Limited.

Nine Network Australia Pty Limited holds 100% of the company interests in TCN Channel Nine Pty Limited, General Television Corporation Pty Limited, Queensland Television Limited and Television Holdings Darwin Pty Limited. Nine Network Australia Pty Limited also holds 32.82% of the company interests of Territory Television Pty Limited. Television Holdings Darwin Pty Limited holds 67.78% of the company interests of Territory Television Pty Limited.

As Mr Kerry Packer’s company interest in CPH is greater than 15%, CPH’s company interest in PBL is greater than 15%, PBL’s company interests in Nine Network Australia Pty Limited are greater than 15%, and Nine Network Australia Pty Limited’s company interests in the Nine Network Licensees are greater than 15%, clauses 6 and 7 of Schedule 1 to the Act deem Mr Kerry Packer, CPH, PBL and Nine Network Australia Pty Limited to be in a position to exercise control of the Nine Network Licensees, and hence, by virtue of paragraph 2(1)(a) of Schedule 1 to the Act, the Nine Network Licences.

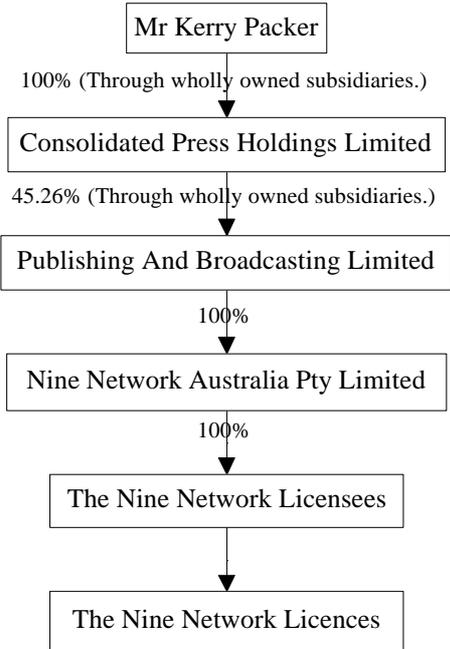


Figure 2: Simplified structure of company interests in the Nine Network Licences.

(More detailed company structure charts for the Nine Network Licences are set out at APPENDIX 3 of this report at page 109.)

Mr James Packer is the son of Mr Kerry Packer. The Act provides that an:

associate, in relation to a person in relation to control of a licence or a newspaper, or control of a company in relation to a licence or a newspaper, means:

- (a) the person's spouse (including a *de facto* spouse) or a parent, child, brother or sister of the person;

...

but 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.

Mr James Packer is the Chairman of PBL. Mr James Packer is also Chief Executive Officer of CPH.⁴²⁰ Mr James Packer gave evidence that Mr Kerry Packer, as owner and controller of CPH, is in a position to exercise ultimate decision-making within CPH.⁴²¹ As Chief Executive Officer of CPH, Mr James Packer has admitted that he would be subject to Mr Kerry Packer's ultimate direction or restraint in relation to decisions made within the company.

7.1.1. FINDINGS

1. *Mr James Packer is the son of Mr Kerry Packer and therefore satisfies paragraph (a) of the definition of associate in section 6 of the Act in relation to control of CPH, in relation to control of the Nine Network Licences.*
2. *The ABA is not satisfied that neither Mr Kerry Packer nor Mr James Packer is in a position to exert influence over the business dealings of the other in relation to CPH.*
3. *Mr James Packer is an associate of Mr Kerry Packer in relation to CPH.*
4. *Mr Kerry Packer is in a position to exercise control of CPH.*
5. *Together with Mr Kerry Packer, Mr James Packer is in a position to exercise control of CPH.*
6. *CPH is in a position to exercise control of PBL.*
7. *Messrs Kerry and James Packer are in a position to exercise control of PBL.*
8. *PBL is in a position to exercise control Nine Network Australia Pty Limited.*
9. *Nine Network Australia Pty Limited is in a position to exercise control of the Nine Network Licensees.*
10. *The Nine Network Licensees are the licensees of their respective licences.*
11. *Each of Messrs Kerry and James Packer, CPH and PBL are in a position to exercise control of each of the Nine Network Licences.*

7.2. IS MR POWERS IN A POSITION TO EXERCISE CONTROL OF THE NINE NETWORK LICENCES?

Until 18 May 1998, Mr Powers was executive Chairman of PBL and CEO of CPH, companies which are in a position to exercise control of the Nine Network Licences (see finding above in section 7.1.1 of this report at page 85).

From 18 May 1998, Mr Powers ceased to be executive Chairman of PBL. Since 18 May 1998, the ABA has collected no evidence that would indicate that Mr Powers is in a position to exercise control of the Nine Network Licences, or is an associate of either of Messrs Kerry or James Packer, CPH or PBL in relation to the Nine Network Licences. Even if the ABA were to make a finding that Mr Powers is an associate of Messrs James and Kerry Packer and CPH *in relation to Fairfax*, the ABA has no evidence that Messrs James or Kerry Packer or CPH act, or are accustomed to act, in accordance with the directions, instructions or wishes of, or in concert with Mr Powers *in relation to the Nine Network Licences*.

7.2.1. FINDING

1. *Mr Powers is not in a position to exercise control of the Nine Network Licences.*

8. CROSS MEDIA DIRECTORSHIPS

8.1. SUBSECTIONS 61(1) AND (4) OF THE ACT

Subsections 61(1) and (4) of the Act provide:

- 61.(1) A person must not be a director of:
- (b) a company that is in a position to exercise control of a commercial television broadcasting licence and a company that is in a position to exercise control of a newspaper that is associated with the licence area of that licence;
- ...
- (4) A person must not:
- (a) be in a position to exercise control of a newspaper that is associated with the licence area of a commercial television broadcasting licence or a commercial radio broadcasting licence; and
 - (b) be a director of a company that is in a position to exercise control of that licence.

On 20 May 1998, Mr Powers (through his solicitor, Mr Atanaskovic) advised the ABA that he had resigned as director from all relevant companies associated with CPH and PBL on 18 May 1998.

Mr Powers indicated that he had been a director of the following companies in a position to exercise control of the Nine licences:

- Consolidated Press Holdings Limited;
- Consolidated Press International Limited (a foreign registered company);
- CPH Management Pty Limited;
- CPH Property Pty Limited;
- Publishing and Broadcasting Limited; and
- Murray Leisure Group Limited.

Australian Securities and Investment Commission ('ASIC') records confirmed this information regarding the companies registered in Australia. ASIC records confirmed that Mr Powers resigned from these companies.

There are three foreign companies (registered in The Bahamas) in the Nine ownership structure:

- Consolidated Press International Limited;
- Consolidated Custodians International Limited; and
- Consolidated Press International Holdings Limited.

Information regarding the share ownership and directorships of the above three foreign companies was obtained from the General Counsel of CPH. The information supplied indicated that Consolidated Press International Limited was the only above foreign company of which Mr Powers was previously a director, from which he had resigned on 18 May 1998.

Mr Powers also held directorships in a number of other companies that are related corporate entities of PBL or CPH. These companies are listed below:

- Australian Consolidated Press Limited;
- Bareage Pty Limited;
- Chemplex (NZ) Holdings Limited;
- Consolidated Press (Finance) Limited;
- Darling Casino Management Pty Limited;
- Felgray Pty Limited;
- HCPH Holdings Pty Limited;
- Huntcon Pty Limited;
- Huntsman Chemical Company Australia Pty Limited;
- Huntsman Australia R&D Pty Limited;
- Huntsman Chemical Company (Holdings) Pty Limited;
- Huntsman Chemical Company (New Zealand) Limited;
- Huntsman Chemical Company Australia (Sales) Pty Limited;
- Hydrocarbon Products Pty Limited;
- Midland Corporation of Kansas;
- Midland Credit Management Inc;
- Mokpo Pty Limited;
- PBL Casino Holdings Inc.;
- PBL Casino Services Inc.;
- PBL Gaming Management Pty Limited;
- Perisher Blue Pty Limited;
- Publishing and Broadcasting International Holdings Limited;
- Publishing and Broadcasting International Limited;
- Revinex Australia Pty Limited;

- Shertip Pty Limited; and
- Wenblue Pty Limited.

Searches of the ASIC database confirm Mr Powers was a director of the Australian companies listed above and ceased being a director of each of these companies on 18 May 1998. The relevant Nine Network Licensees have not notified that these companies are in a position to exercise control of the Nine Network Licences.

ASIC searches show no record of Mr Powers as director of any other company that is a related corporate entity of PBL or CPH. However, Mr Powers revealed in examination that he was, and continues to be, a director of Monarchy Enterprises Holdings BV, a company incorporated in the Netherlands. PBL has a company interest of 20.5% in Monarchy Enterprises Holdings BV. ABA enquiries have not revealed that Monarchy Enterprises Holdings BV is in a position to exercise control of the Nine Network Licences. For more information regarding the relationship between Mr Powers and the Packer Interests in relation to Monarchy Enterprises Holdings BV, see section 4.5.2 of this report at page 28.

ASX and ASIC records indicate that Messrs Kerry and James Packer are both directors of PBL, a company that is in a position to exercise control of the Nine Network Licences.

8.1.1. FINDINGS

1. *Mr Powers became a director of Fairfax from 18 May 1998;*
2. *Neither Messrs Kerry nor James Packer are directors of Fairfax;*
3. *Mr Powers resigned from all directorial positions of all companies which were in a position to exercise control of the Nine Network Licences as at 18 May 1998;*
4. *Mr Powers is not currently a director of any such company;*
5. *Messrs Kerry and James Packer are directors of a company that is in a position to exercise control of the Nine Network Licences;*
6. *Messrs Powers and Kerry and James Packer are not in breach of subsections 61(1) or (4) of the Act.*

8.2. SUBSECTION 61(2) OF THE ACT

Subsection 61(2) of the Act provides:

61.(2) A person must not:

(a) be in a position to exercise control of a commercial television broadcasting licence; and

(b) be a director of:

...

(ii) a company that is in a position to exercise control of a newspaper that is associated with the licence area of the commercial television broadcasting licence.

Messrs Kerry and James Packer are in a position to exercise control of each of the Nine Network Licences (see section 7.1.1 of this report at page 85). Neither of Messrs Kerry or James Packer are listed by the ASX or ASIC as being directors of Fairfax.

Mr Powers is not in a position to exercise control of any of the Nine Network Licences (see section 7.2.1 of this report at page 86).

ASX and ASIC records indicate that the directors of Fairfax are: Mr Powers (Chairman); Mr Pinshaw (Deputy Chairman); Mr Burrows; Sir Roderick Carnegie; Mr Douglas; Mr Greaves; Mr Gonski; Mrs King; Mr Shein; and Mr Wills.

8.2.1. FINDINGS

1. Messrs Powers and Kerry and James Packer are not in breach of subsection 61(2) of the Act.

9. MR KERRY PACKER AND CPH'S COMPANY INTERESTS IN FAIRFAX

9.1. MR KERRY PACKER'S COMPANY INTERESTS IN CPH

Mr Kerry Packer currently has 100% of the company interests in CPH through companies in which he holds 100% of the company interests.⁴²²

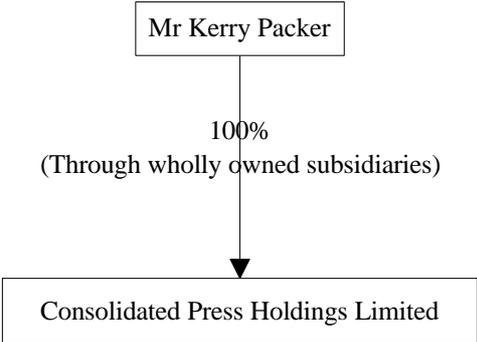


Figure 3: Simplified Chart of Mr Kerry Packer's company interests in CPH.

(For a more detailed chart see APPENDIX 3 of this report at page 109.)

9.2. CPH'S COMPANY INTERESTS IN FAIRFAX

9.2.1. SHAREHOLDING INTERESTS IN FAIRFAX

Subsection 8(1) of the Act provides:

- 8(1) For the purposes of this Act:
- (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 that 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.

The principal FXF Trust asset is 200 shares in FXF Holdings Pty Limited. The registered holder of the Fairfax shares is FXF Investments Pty Limited, a company ultimately owned and relevantly 'controlled' by the trustee through its shareholding in FXF Holdings Pty Limited and that latter company's shareholding in FXF Finance Pty Limited and FXF Investments Pty Limited.

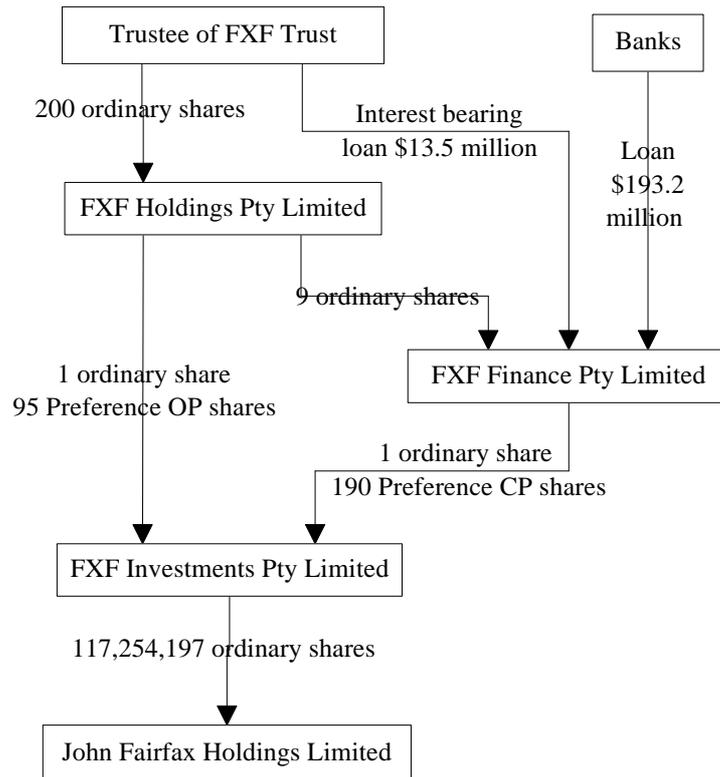


Figure 4: Structure of the FXF Trust's Holdings in Fairfax.⁴²³

9.2.2. VOTING INTERESTS IN FAIRFAX

Subsection 8(2) of the Act provides:

- 8(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 exercise control.

In the present context, the question of control is to be determined by practical and commercial considerations rather than highly refined legalistic tests: *Re Application of News Corporation Limited* (1987) 15 FCR 227 at 246 per Lockhart J; *Canwest Global Communications Corporation v ABA* (1997) 71 FCR 485 at 506.

Actual control of votes to be cast on a poll is not the test of 'voting interests'. The test is whether a person is in a position to exercise control of votes to be cast on a poll and in determining that question regard may be had not merely to legal agreements, but arrangements, understandings and practices, whether or not enforceable: *Canwest Global Communications Corporation v ABA* (1997) 71 FCR 485 at 506.

The FXF Trust Consolidated Trust Deed, dated 24 October 1997 ('the Trust Deed') establishes the FXF Trust. The Trust Deed sets out the voting rights in relation to the Fairfax securities held on behalf of the FXF Trust,⁴²⁴ and also outlines the rights and obligations of the trustee, the manager and the unit holders of the FXF Trust. Perpetual Trustee Company Limited is the trustee, and FXF Management Limited is the manager of the FXF Trust.

The trustee (and relevantly FFX Investments as its delegate) has no power to exercise or direct the exercise of any voting rights attaching to Fairfax securities unless directed or required to do so either by the manager or by the unit holders at a meeting. The trustee must exercise its powers in accordance with any such direction (subject to a right to refuse where the direction might compromise its duties as trustee).⁴²⁵

A meeting of unit holders may give to the trustee or the manager directions the meeting thinks appropriate to be given. As it holds more than 20% of the units, CPH can requisition a meeting of unit holders without the support of any other unit holders: clause 38 of the Trust Deed. Each unit holder is entitled to one vote per unit on a poll. An Ordinary Resolution requires a simple majority.⁴²⁶ There is no suggestion in the Trust Deed that a direction by unit holders to the trustee as to how to exercise voting rights on Fairfax Securities (pursuant to clause 14 of the Trust Deed) requires anything more than an ordinary resolution.

As at 30 September 1998 CPH held 44.88% of the units in the FFX Trust. Chase Manhattan Nominees Limited, the next largest unit holder, held 6.2% of the units in the FFX Trust. Deutsche Australia Limited and SAS Trustee Corporation, the next largest unit holders, each held 5.71% and 5.32% of the units in the FFX Trust respectively. Evidence gathered by the ABA indicates that CPH has agreed to sell 14.9% of the units in the FFX Trust to Mr Powers. On completion of this transaction, CPH will hold 29.97% of the units in the FFX Trust.⁴²⁷

CPH will not have ‘legal control’ of how the voting rights attaching to the Fairfax Securities are exercised. Neither its 44.88% nor 29.97% holdings will give it an enforceable and presently and immediately existing right to control a majority of votes at a general meeting of unit holders. It cannot directly control how the trustee’s delegate will vote at a meeting of Fairfax. However, the question is whether CPH will have indirect or ‘*de facto*’ control of how the trustee’s delegate will vote at a meeting of Fairfax.

By the relative proportion of its unit holding in the trust, CPH is in a position to exercise control of votes cast on a poll at a meeting of Fairfax. In other words, CPH has *de facto* control of the general meeting of unit holders and can accordingly direct how the voting rights in relation to Fairfax shall be exercised.⁴²⁸

This reasoning is analogous to that reflected in the ‘legislative essay’ in Schedule 1 of the Act which provides that control of a company could be achieved:

where a person holds company interests of say 10% but no other person holds company interests of more than say 2% and those other persons do not act in concert.

Control in similar circumstances was recognised in *Standard Chartered Bank of Australia Limited v Antico* (1995) 38 NSWLR 290 at 324, where Hodgson J said:

Pioneer had effective control of Giant. It had this by virtue of its 42 per cent shareholding, where the only other significant shareholders held respectively about 10 per cent, 6 per cent, 6 per cent and 3 per cent of the shares.

In accordance with paragraph 8(2)(b) of the Act, the percentage of CPH’s voting interest in Fairfax will correspond to the percentage of Fairfax shares held by FFX Investments Pty Limited (or within the trust structure).

Records of the ASX indicate that as at 1 September 1998 Fairfax had 799,910,595 securities on issue. FFX Investments Pty Limited currently holds 117,254,197 Fairfax securities. This represents 14.66% of the issued securities of Fairfax.

9.2.2.1. FINDING

1. Given the very high proportion of its unit holding in the FFX Trust, both in absolute and relative terms, it is reasonable to expect that CPH, whether having an interest of 44.87% or 29.97% of the units in the FFX Trust, will be able to exert its will on a meeting of unit holders and so effectively direct how the trustee’s delegate exercises the voting rights, which the delegate controls, in relation to Fairfax.

9.2.3. BANKERS TRUST AND TYNDALL VOTING RESTRICTIONS IN FAIRFAX

On 8 August 1996, the Treasurer announced that Bankers Trust Australia Limited (BT) could acquire up to 14.99% of Fairfax and that BT had undertaken to limit the voting of its portfolio in Fairfax to 5%.

On 4 August 1998, the Treasurer announced that Tyndall Australia Limited (Tyndall) could acquire up to 10% of Fairfax but that approval was conditional on Tyndall limiting the voting of its portfolio in Fairfax to 5%.

In its substantial shareholder notice dated 11 August 1998 Tyndall notified the ASX that the total number and percentage of shares in each class of voting shares in Fairfax to which it is entitled is 6.31%. In its substantial shareholder notice dated 27 July 1998 Bankers Trust notified the ASX that the total number and percentage of shares in each class of voting shares in Fairfax to which it is entitled is 8.36%.

Each of the Tyndall and Bankers Trust entitlements is subject to conditions imposed by the Treasurer pursuant to section 25 of the *Foreign Acquisitions and Takeovers Act 1975*. Failure to comply with those conditions is an offence.⁴²⁹ In a letter dated 28 July 1998 the Treasury wrote to Tyndall's solicitors Messrs Norton Smith & Co. and indicated that approval was given for the proposed acquisition by Tyndall of up to a further 4.94% interest in Fairfax which would result in Tyndall holding a total interest of up to 10%, on condition that:

Tyndall limits its voting of the portfolio interest in Fairfax to one vote less than 5%. In relation to the shares in excess of this proportion, the Trustee/Custodian or beneficial owner of those shares could exercise their votes directly, provided the Trustee/Custodian was not a foreign interest and/or an associate of Tyndall or of any other foreign interest.⁴³⁰

In a letter from the Treasury to Bankers Trust dated 9 August 1996, the Treasury noted that for a period of 12 months only it had no objection to a proposal by Bankers Trust to increase its portfolio interest in Fairfax to 14.99% 'on condition that Bankers Trust limits voting of this portfolio interest in Fairfax to less than a 5% voting interest'.⁴³¹

Of the total number of shares held by Tyndall, 9,968,108 shares are shares in respect of which Tyndall, in order to comply with the *Foreign Acquisitions and Takeovers Act 1975* directive, may not exercise a vote. In the case of Bankers Trust, 26,255,899 shares are shares in respect of which in order to comply with the *Foreign Acquisitions and Takeovers Act 1975* directive Bankers Trust may not exercise a vote. These shares will be hereinafter referred to as 'the excess shares'.

The ABA is unaware whether Tyndall will vote on 5% of its shares and if so whether Tyndall will ensure or has ensured that a third party has the capacity to vote the remaining 1.31% of shares in excess of the 5% limit. The ABA has been advised by Bankers Trust that, under 'contractual arrangements' implemented by Bankers Trust any shares whose voting rights are controlled by Bankers Trust, and which are in excess of the Treasurer's 5% limit, cannot be cast by any third person. The ABA assumes that the limit placed upon Bankers Trust continues, despite the expiration of the 12 month period specified on 9 August 1996.

The total issued share capital of Fairfax is currently 799,918,595. If the excess shares are deducted from the total issued share capital, there are 763,694,588 remaining issued shares. FFX Investments holds 117,254,197, or 15.354% of those remaining issued shares.

Clause 6 of Schedule 1 to the Act provides that if a person has company interests in a company exceeding 15%, the person is to be regarded as being in a position to exercise control of the company. 'Company interests' are defined in section 6 of the Act to include 'a voting interest'. A voting interest is defined as:

- 8(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.

9.2.3.1. ANALYSIS

The level of voting interest which CPH has in Fairfax hinges upon the question of whether the votes attaching to the excess shares are properly to be included in determining ‘the total number of votes that could be cast on any issue at a meeting of the company’.

If Bankers Trust complies with the condition imposed by the Treasurer in 1996 then the votes attaching to the excess shares held by it may not be exercised by a third party at a general meeting of Fairfax. If Bankers Trust wishes to comply with the *Foreign Acquisitions and Takeovers Act 1975* condition, it may not exercise the vote itself. It is not clear what will happen with the votes attaching to the excess shares held by Tyndall.

However, the incentive (or disincentive) for Bankers Trust not to exercise the votes attaching to the excess shares does not have the consequence that those excess shares held by it are properly to be deducted from the issued share capital, thus reducing the ‘total number of votes that could be cast on any issue at a meeting of the company’. The ABA is of the view that the consequence flowing from a breach of the *Foreign Acquisitions and Takeovers Act 1975* condition does not mean that the votes attaching to the excess shares are as a matter of law **not** ‘votes that **could** be cast’.

For example, those shares could be transferred by Bankers Trust to a third party not constrained by the *Foreign Acquisitions and Takeovers Act 1975* condition. In the same vein, an undertaking or obligation on the part of Bankers Trust not to exercise the votes attaching to the excess shares does not mean that they cannot be voted by Bankers Trust at a general meeting. A breach of such an undertaking or obligation may give rise to sanctions or liabilities but it would not render the resolution of the company in general meeting invalid.

The position might be different if the memorandum or articles of association of Fairfax provided that members were not able to exercise voting rights if to do so would give rise to a breach of the *Foreign Acquisitions and Takeovers Act 1975* or the Act. They do not.

9.3. FINDINGS

1. Mr Kerry Packer has a 100% company interest in CPH.
2. CPH is in a position to exercise control of the FXF Trust.
3. The ABA finds that the ‘voting interest’ of the FXF Trust in Fairfax is not influenced by any undertakings given in relation to the excess shares held by Tyndall or Bankers Trust.
4. The FXF Trust has a 14.66% voting interest in Fairfax.
5. CPH has a 14.66% voting interest in Fairfax through the FXF Trust. Accordingly, the ABA finds that CPH has a 14.66% company interest in Fairfax.
6. Mr Kerry Packer has a 14.66% company interest in Fairfax.

10. CONCLUSION

The ABA has investigated whether Mr Kerry Packer and/or any of the CPH Group of companies are either alone, or together with an associate, in a position to exercise control of Fairfax. As stated in section 3.3.1 at page 10 of this report, the ABA takes the view that to establish that a person 'together with' an associate is in a position to do something does not require proof of anything other than their association because it is inherent in the nature of their associate relationship that they will be in this position.

The ABA has found that none of the Packer Interests alone are in a position to exercise control of commercial television broadcasting licences with call signs GTV and/or TCN and Fairfax.

The ABA has also found that Mr Powers was not in a position to exercise control of Fairfax during the period 18 May 1998 to 24 August 1998.

It follows, that regardless of whether Mr Powers is considered an associate of Mr Packer during the period 18 May 1998 to 24 August 1998, there can be no finding that Mr Packer either alone or together with an associate is in a position to exercise control of Fairfax and thus there could be no breach of the Act by Mr Packer.

In these circumstances it is unnecessary to formally make any finding on the question of whether Mr Powers is considered by the ABA to have been an associate of Mr Packer during the period 18 May 1998 to 24 August 1998.

The following findings are the major findings made in this report, and which lead to the ultimate finding that Mr Kerry Packer, Mr James Packer and the CPH group were not, during the period the subject of this report, in breach of the Act.

10.1. FINDINGS RE: CONTROL OF COMMERCIAL TELEVISION BROADCASTING LICENCES WITH CALL SIGNS GTV AND TCN

1. *Mr James Packer is an associate of Mr Kerry Packer;*
2. *Mr Kerry Packer is in a position to exercise control of CPH because Mr Kerry Packer has company interests in CPH which, when traced through a chain of companies and added to company interests traced through other chains of companies, exceeds 15%; (Clauses 6(1), 7 and 8)*
3. *CPH is in a position to exercise control of PBL because CPH has company interests in PBL which, when traced through a chain of companies and added to company interests traced through other chains of companies, exceeds 15%; (Clauses 6(1), 7 and 8)*
4. *PBL is in a position to exercise control of commercial television broadcasting licences with call signs TCN in the Sydney licence area and GTV in the Melbourne licence area because PBL has company interests exceeding 15% in companies which is maintained throughout a chain of companies to companies which are the licensees of commercial television broadcasting licences with call signs TCN and GTV; (Clauses 2(1), 6(1) and 7)*
5. *Mr Kerry Packer, Mr James Packer and CPH are in a position to exercise control of the commercial television broadcasting licences with call signs TCN in the Sydney licence area and GTV in the Melbourne licence area because Mr Kerry Packer, Mr James Packer and CPH have company interests which, when traced through a chain of companies and added to company interests traced through other chains of companies, exceeds 15% in companies which are the licensees of commercial television broadcasting licences with call signs TCN and GTV. (Clauses 2(1), 6(1), 7 and 8)*

10.2. FINDINGS RE: CONTROL OF THE SYDNEY MORNING HERALD AND THE AGE

1. *Fairfax is in a position to exercise control of John Fairfax Publications Pty Limited and David Syme and Co. Limited because Fairfax has company interests exceeding 15% which is maintained throughout the chain of companies to John Fairfax Publications Pty Limited and David Syme and Co. Limited; (Clauses 6(1) and 7)*
2. *John Fairfax Publications Pty Limited is in a position to exercise control of The Sydney Morning Herald because John Fairfax Publications Pty Limited is the publisher of The Sydney Morning Herald; (Clause 3(1)(a))*
3. *David Syme and Co. Limited is in a position to exercise control of The Age because David Syme and Co. Limited is the publisher of The Age; (Clause 3(1)(a))*
4. *The Sydney Morning Herald is a newspaper associated with the Sydney commercial television licence area; (Subsection 59(2))*
5. *The Age is a newspaper associated with the Melbourne commercial television licence area; (Subsection 59(2))*
6. *Mr Powers is not in a position to exercise control of Fairfax because Mr Powers is not in a position to exercise, indirectly, direction or restraint over any substantial issue affecting the management or affairs of Fairfax; (Clause 2(1)(d)(iii))*
7. *Mr Powers is not in a position to exercise control of John Fairfax Publications Pty Limited and David Syme and Co. Limited because Mr Powers is not in a position to exercise control of Fairfax, a company in a position to exercise control of John Fairfax Publications Pty Limited and David Syme and Co. Limited, almost wholly owned subsidiaries of Fairfax; (Clause 2(1)(a))*
8. *Mr Kerry Packer, Mr James Packer and CPH, are not in a position to exercise control of The Sydney Morning Herald and The Age because Mr Powers is not in a position to exercise control of John Fairfax Publications Pty Limited and David Syme and Co. Limited; (Clause 3(1)(c)(i))*
9. *Mr Kerry Packer, Mr James Packer and CPH are not in breach of paragraph 60(b) of the Act because Mr Kerry Packer, Mr James Packer and CPH are in a position to exercise control of TCN, a commercial television broadcasting licence, but not The Sydney Morning Herald, a newspaper that is associated with the licence area of TCN;*
10. *Mr Kerry Packer, Mr James Packer and CPH are not in breach of paragraph 60(b) of the Act because Mr Kerry Packer, Mr James Packer and CPH are in a position to exercise control of GTV, a commercial television broadcasting licence, but not The Age, a newspaper that is associated with the licence area of GTV;*
11. *As of 24 August 1998, ABA finds that Mr Powers, Mr Kerry Packer, Mr James Packer, Publishing and Broadcasting Limited, Consolidated Press Holdings Limited or any related or associated persons have not since 17 May 1998 committed any breaches of a provision in Division 5, 6 or 7 of Part 5 of the Broadcasting Services Act 1992.*

This matter will remain the subject of ongoing scrutiny by the ABA.

APPENDIX 1. CHRONOLOGY

Time	Date	Event
	21 February 1997	Mr Rod Price becomes deputy chairman of Fairfax
	3 September 1997	PBL announces to the Australian Stock Exchange Limited that it intends to exit its 15% stake in Fairfax
	23 September 1997	PBL announces the trustee and the Board of management of the FXF Trust
	21 November 1997	Mr Rod Price becomes chairman of Fairfax
	November – December 1997	Mr Rod Price meets with Mr Neville Miles in relation to the FXF Trust wanting a director on the Board of Fairfax
	February 1998	Mr Kerry Packer telephones Mr David Gonski about Mr Neville Miles' nomination as a director of Fairfax
	February 1998	Mr James Packer discusses with Mr David Gonski, Mr Neville Miles' nomination as a director of Fairfax
14:05	19 February 1998	Meeting of Fairfax directors discussing Mr Neville Miles' nomination as a director of Fairfax
	March 1998	Mr Brian Powers telephones Mr David Gonski telling him that he supports Mr Neville Miles' appointment to the Board of Fairfax
	March 1998	Mr Neville Miles telephones Mr David Gonski to discuss Mr Neville Miles' appointment to the Board of Fairfax
	23 March 1998	BIL Board meeting notes that FXF Trust is keen to make a Board appointment to Fairfax
	27 March 1998	Board meeting of Fairfax in Melbourne
	27 March 1998	Mr David Gonski meets with Mr Rod Price in Melbourne about Mr Neville Miles' nomination as a director of Fairfax
	April 1998	Mr Robert Muscat speaks with Mr James Packer about Mr Neville Miles' nomination as a director of Fairfax
09:00	21 April 1998	FXF Management Limited Board meeting
	27 April 1998	Sir Roger Douglas becomes chairman of BIL
	20 April 1998 – 1 May 1998	Mr Rod Price telephones Mr James Packer to discuss Mr Neville Miles' possible appointment as a director of Fairfax
	20 April – 1 May 1998	Mr Neville Miles telephones Mr Rod Price.
	4 – 6 May 1998	Mr Brian Powers and Mr Kerry Packer returns the call of Mr Rod Price on the speaker phone about FXF

Time	Date	Event
		representation on the Board of Fairfax
	4 – 8 May 1998	Mr John Greaves speaks with Mr David Gonski about the termination of Mr John Alexander
	6 – 8 May 1998	Mr Rod Price tells Mr Brian Powers that BIL is not opposed to Mr Neville Miles' appointment as a director of Fairfax
	8 May 1998	Mr Brian Powers tells Mr John Greaves that he is considering putting himself forward as the FXF Trust's nominee as a director of Fairfax
	11 May 1998	Mr Brian Powers telephones Mr Neville Miles to inform him that he is willing to put himself forward as the FXF Trust's nominee as a director of Fairfax
AM	12 May 1998	Mr Brian Powers tells Mr David Gonski he is going to put himself forward as the FXF Trust's nominee as a director of Fairfax
PM	12 May 1998	Mr David Gonski talks to Mr Dean Wills about Mr Brian Powers' decision to put himself forward as the FXF Trust's nominee as a director of Fairfax
	12 – 14 May 1998	Sir Roderick Carnegie speaks to Sir Roger Douglas about the transition at BIL and its implications for Fairfax
	14 May 1998	Mr Brian Powers speaks to Mr David Gonski about Mr Brian Powers' proposal to suggest that he be put forward as the FXF Trust's nominee as a director of Fairfax
	14 May 1998	Mr Brian Powers visits Sir Roderick Carnegie in Melbourne to inform Sir Roderick Carnegie that Mr Brian Powers was putting himself forward as the FXF Trust's nominee as a director of Fairfax
	14 May 1998	Mr David Gonski speaks to Mrs Julia King about the FXF Trust's nomination of Mr Brian Powers' as a director for Fairfax
	15 May 1998	FXF Management Limited Board meeting agrees to nominate Mr Brian Powers as a director of Fairfax
	11 – 16 May 1998	Mr Robert Muscat speaks with Mr Rod Price about terminating the employment of Mr John Alexander
	11 – 16 May 1998	Mr Robert Muscat speaks with Mr John Greaves about terminating the employment of Mr John Alexander
PM	17 May 1998	Mr Neville Miles telephones Mr Brian Powers about Mr Brian Powers putting himself forward as the FXF Trust's nominee as a director of Fairfax

Time	Date	Event
18:00	17 May 1998	Mr Rod Price meets with Sir Roger Douglas at the Ritz Carlton about <i>inter alia</i> Mr Neville Miles and Mr Rod Price's future at Fairfax
	18 May 1998	CPH meetings where Mr Brian Powers resigns as director and/or CEO of CPH and related entities
	18 May 1998	Mr Brian Powers agrees with CPH to provide 'advisory services' over the next 24 months
AM	18 May 1998	Mr Rod Price speaks to Mr David Gonski after the Fairfax audit meeting about Mr Brian Powers' decision to put himself forward as the FXF Trust's nominee as a director on the Board of Fairfax
07:00	18 May 1998	Mr Neville Miles meets with Mr Brian Powers at CPH offices in Park Street
07:00	18 May 1998	Mr Neville Miles telephones Mr Rod Price from CPH offices in Park Street informing him that Mr Brian Powers would be the FXF Trust nominated director for Fairfax
07:40	18 May 1998	Mr Rod Price arrives at Fairfax offices
07:45	18 May 1998	Mr Rod Price telephones Mr Brian Powers
08:00	18 May 1998	Mr Rod Price speaks with Mr Robert Muscat about the nomination of Mr Brian Powers' as a director of Fairfax
09:30	18 May 1998	Fairfax meeting appointing Mr Brian Powers as director
10:37	18 May 1998	PBL meeting at which Mr Brian Powers resigns
11:00	18 May 1998	Mr Brian Powers, Mr Rod McGeoch and Mr John Atanaskovic meet at ABA offices with ABA chairman and deputy chairman
12:45	18 May 1998	Fairfax Board Lunch
19:30	18 May 1998	Dinner in Fairfax Board room. Attendees: Mr Rod Price; Mr Mark Burrows; Mr Jonathan Pinshaw; Mr John Alexander; senior management
	19 May 1998	BIL Board meeting at which it is noted that Mr Brian Powers has been appointed to the Board of Fairfax
	20 May 1998	Mr David Gonski leaves Australia for Italy
09:00	20 May 1998	Mr Brian Powers is briefed by Mr Robert Muscat, Mr John Greaves, Ms Gail Hambly and Mr Nigel Dews about the Fairfax budget
10:00	20 May 1998	Mr Brian Powers meets with Mr Robert Muscat in Muscat's office about the termination of Mr John Alexander's

Time	Date	Event
		employment at Fairfax
PM	20 May 1998	Mr Robert Muscat tells Mr John Greaves that he is going to terminate the employment of Mr John Alexander at Fairfax
PM	21 May 1998	Mr Robert Muscat tells Mr John Alexander that his employment with Fairfax has been terminated
PM	21 May 1998	Mr John Alexander rings Mr Mark Burrows about the termination of his employment at Fairfax
PM	21 May 1998	Mr John Alexander rings Mr John Atanaskovic regarding the termination of his employment at Fairfax
PM	21 May 1998	Mr John Atanaskovic rings Mr John Alexander with information regarding the termination of Mr Alexander's employment at Fairfax
PM	21 May 1998	Mr John Alexander rings Mr Brian Powers about the termination of his employment with Fairfax
	22 May 1998	Mr John Alexander's employment with Fairfax ceases
PM	25 May 1998	Mr Brian Powers meets with Sir Roger Douglas and is later joined by Mr Jonathan Pinshaw
16:00	25 May 1998	Mr Jonathan Pinshaw meets with Mr Brian Powers, Mr Robert Muscat and Sir Roger Douglas
	26 May 1998	Mr Brian Powers meets with Sir Roger Douglas about a proposal that Mr Brian Powers' become chairman of Fairfax
18:00	26 May 1998	Mr Robert Muscat meets with Sir Roger Douglas and Mr Jonathan Pinshaw about a proposal that Mr Brian Powers' become chairman of Fairfax
18:30	26 May 1998	Mr Robert Muscat tells Mr John Greaves that it has been proposed that Mr Brian Powers will become chairman, and Mr Jonathan Pinshaw will become deputy chairman of Fairfax
	27 May 1998	Mr Brian Powers meets with Mr Robert Muscat and Mr John Greaves about a replacement for Mr John Alexander
	27 May 1998	Mr Brian Powers telephones Sir Roger Douglas (in New Zealand) about the Chair of Fairfax
	27 May 1998	Mr David Gonski telephones Mr Brian Powers regarding the rumour that Mr Brian Powers would be nominated for chairman of Fairfax
	27 May 1998	Mr Rod Price telephones Mr Robert Muscat, learning that there was another item on the agenda of the Board meeting other than the issue of the replacement of Mr John

Time	Date	Event
		Alexander
	27 May 1998	Mr Rod Price telephones Sir Roger Douglas, learning that Mr Brian Powers will nominate for chairman of Fairfax at the next Board meeting
	28 May 1998	Ms Gail Hambly arranges Fairfax Board meeting for 29 May 1998
09:30	28 May 1998	Mr Brian Powers meets with Mr Robert Muscat, Mr Jonathan Pinshaw and Mr John Greaves
PM	28 May 1998	Mr Gordon (Mr David Gonski's business partner) telephones Mr David Gonski in Italy informing him of rumours that Mr Brian Powers would be nominating for chairman of Fairfax
PM	28 May 1998	Mr Brian Powers telephones Mrs Julia King's office
PM	28 May 1998	Mr Brian Powers telephones Mr David Gonski's office
PM	28 May 1998	Mr Brian Powers talks with Mr John Greaves
PM	28 May 1998	Mr Rod Price telephones Mr David Gonski regarding Mr Brian Powers' possible appointment as chairman of Fairfax
PM	28 May 1998	Mr Rod Price telephones Sir Roger Douglas regarding the proposal that Mr Brian Powers be appointed as chairman of Fairfax
	29 May 1998	Sir Roger Douglas faxes to Mr Brian Powers that Mr Rod Price will resign as chairman and as a director of Fairfax
	29 May 1998	Mr Brian Powers talks with Mr Mark Burrows regarding the proposal that Mr Brian Powers be appointed as chairman of Fairfax
	18 – 29 May 1998	John Fairfax Holdings Board Sub-Committee for the Review Process is established
AM	29 May 1998	Mr Brian Powers talks with Mr David Gonski regarding the proposal that Mr Brian Powers be appointed as chairman of Fairfax
PM	29 May 1998	Mr Brian Powers talks with Sir Roderick Carnegie regarding the proposal that Mr Brian Powers be appointed as chairman of Fairfax
17:20	29 May 1998	Mr Brian Powers talks with Mrs Julia King regarding the proposal that Mr Brian Powers be appointed as chairman of Fairfax
17:30	29 May 1998	Fairfax Board meeting at which Mr Brian Powers is appointed chairman of Fairfax. Mr Jonathan Pinshaw is

Time	Date	Event
		appointed deputy chairman
AM	30 May 1998	Mr Brian Powers speaks to Mr Kerry Packer regarding Mr Brian Powers' appointment as chairman of Fairfax
PM	31 May 1998	Mr Brian Powers leaves Australia
AM	6 June 1998	Mr Brian Powers arrives in Australia
PM	9 June 1998	Mr Brian Powers speaks to Mr James Packer at CPH Offices in Park Street
14:30	24 June 1998	Fairfax Finance and Audit Committee Meeting
09:00	26 June 1998	Fairfax Board meeting
	7 July 1998	Mr Robert Muscat sends memo on staff freeze to senior staff of Fairfax
	10 July 1998	Finance and Audit Committee Meeting
	21 July 1998	Mr Kerry Packer meets with Mr Robert Muscat and Mr Brian Powers at Fairfax for lunch
	22 July 1998	Mr Kerry Packer flies to the USA for surgery
	29 July 1998	Fairfax Board meeting in Melbourne
	31 July 1998	Mr Brian Powers departs Sydney for overseas
	3 August 1998	Mr Ken Catlow meets Mr Robert Muscat regarding the offer to Mr Robert Muscat of a position at Pacific Magazines
	12 August 1998	Mr Brian Powers returns to Sydney
15:00	18 August 1998	Mr Robert Muscat tells Mr Brian Powers that he intends to resign from Fairfax
17:00	24 August 1998	Fairfax announces the resignation of Mr Robert Muscat
16:00	25 August 1998	The ABA announces that it has completed the evidence-gathering phase of its investigation

APPENDIX 2. CLAUSES 2 AND 3 OF SCHEDULE 1 TO THE ACT

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 a 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, 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 3. COMPANY STRUCTURE CHARTS – NINE NETWORK LICENCES

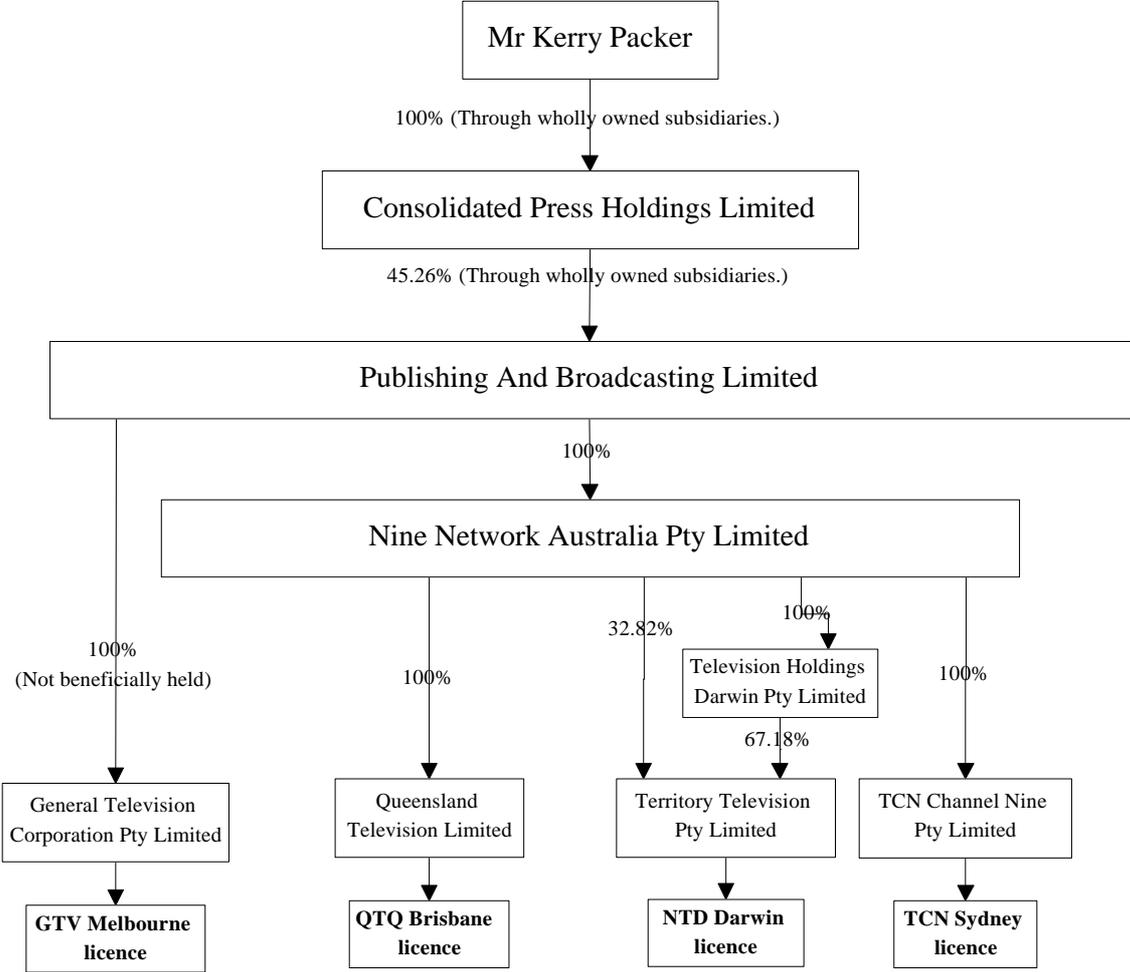


Figure 5: Structure of Control of the Nine Network Licences below PBL.

(For more information regarding Mr Kerry Packer's Company Interests above PBL see Figure 6 at page 110.)

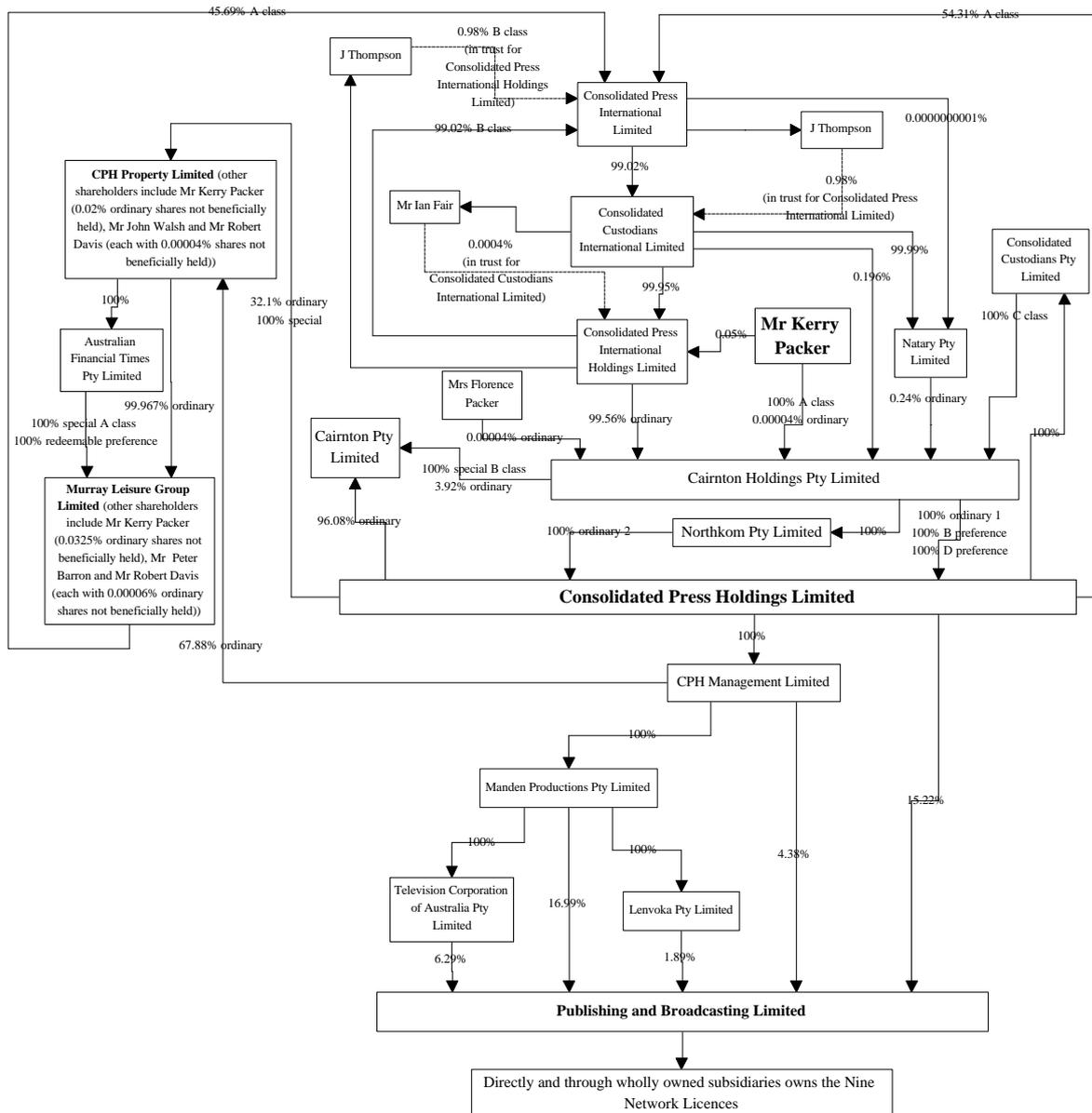


Figure 6: Structure of Mr Kerry Packer's Company Interests above PBL.

(For more information regarding Mr Kerry Packer's Company Interests below PBL, see Figure 5 at page 109.)

APPENDIX 4. COMPANY STRUCTURE CHART – JOHN FAIRFAX HOLDINGS LIMITED

* The figures indicated do not reflect shareholding but relevant entitlements under the *Corporations Law* as indicated in most recent substantial shareholder notices.

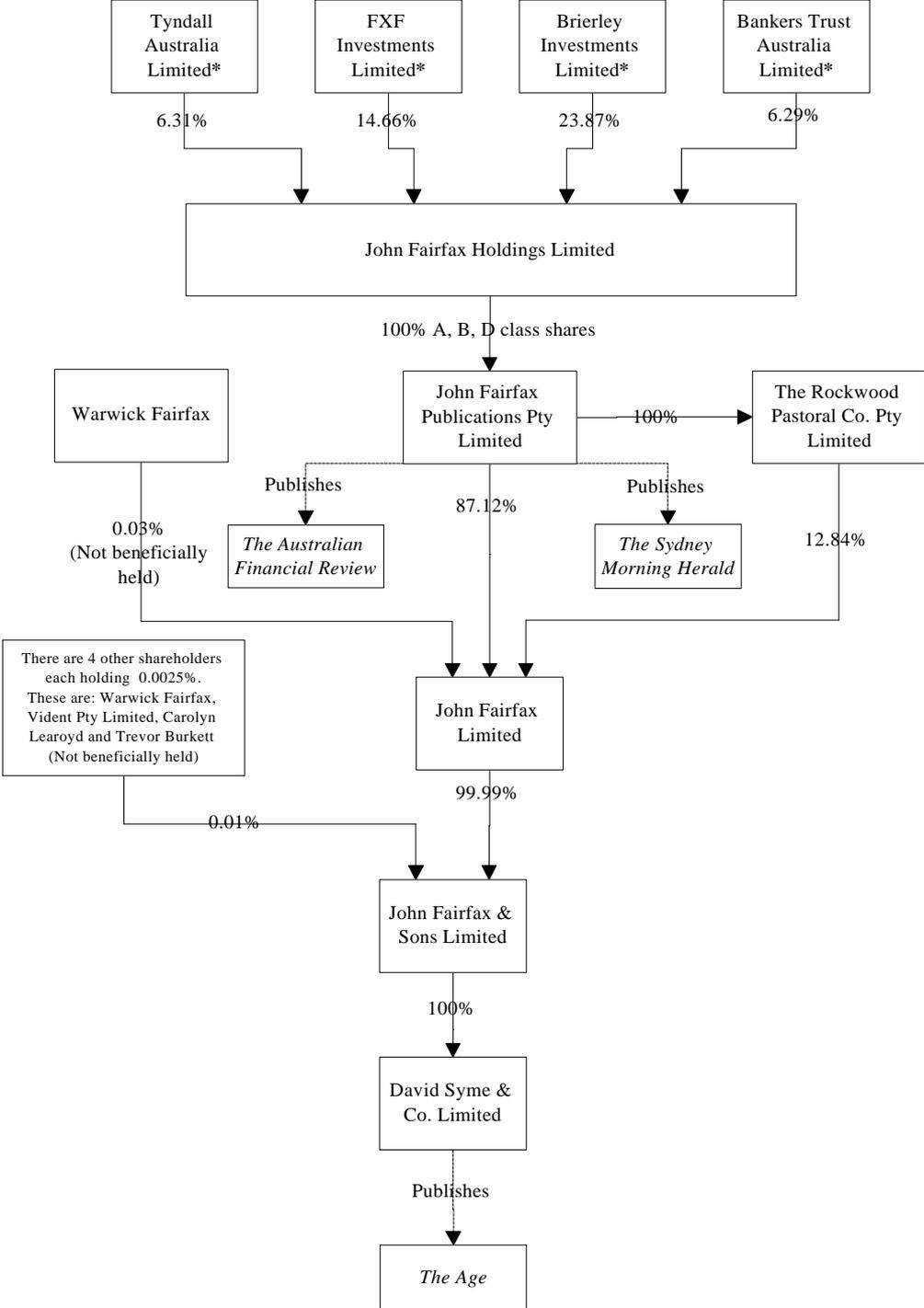


Figure 7: Structure of company interests of Fairfax.

(For more information regarding the structure of the FXF Trust’s interests in Fairfax see Figure 8 at page 112.)

APPENDIX 5. STRUCTURE CHART OF FXF TRUST

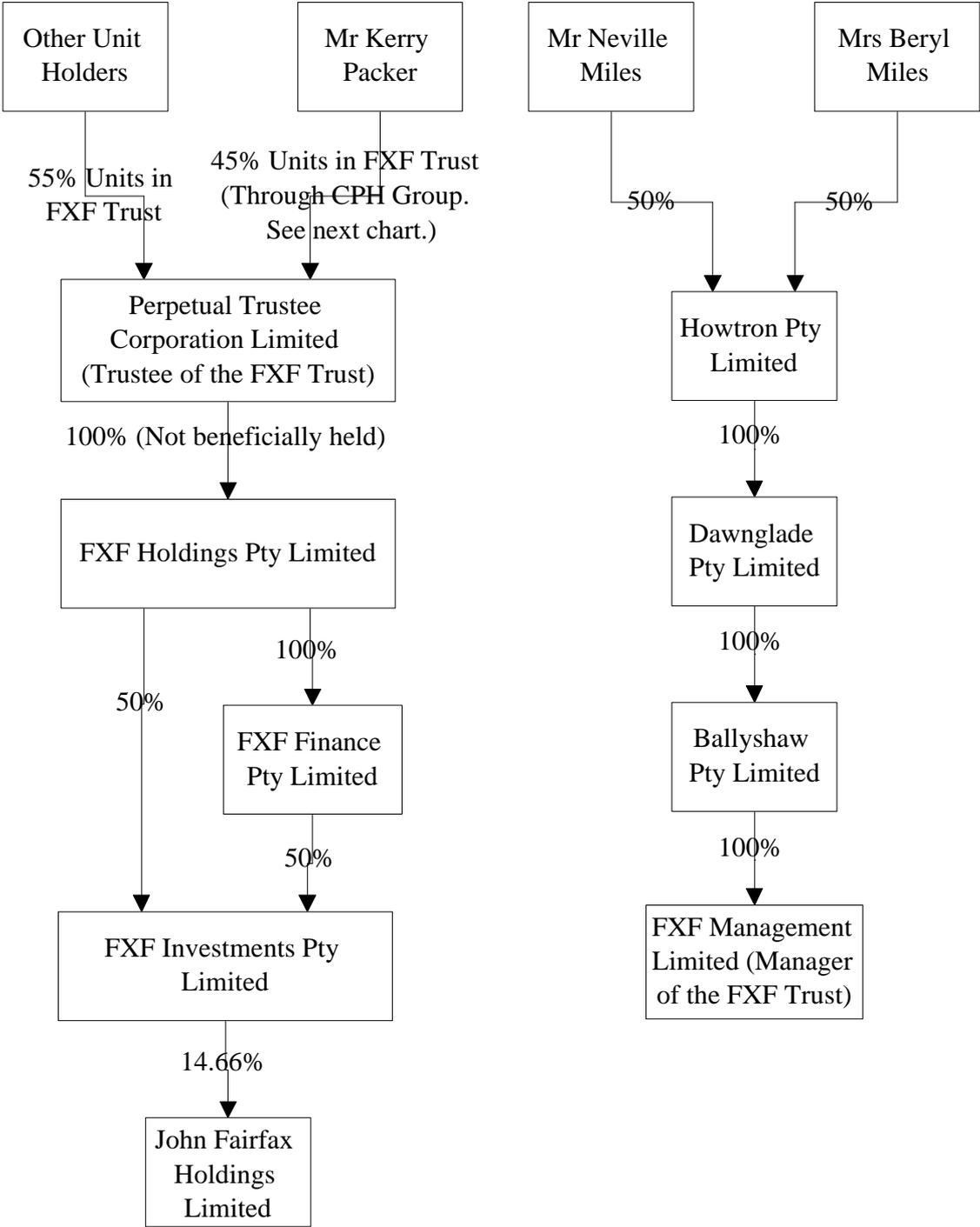


Figure 8: Structure of the FXF Trust.

(For more information on Mr Kerry Packer’s unit holdings in the FXF Trust, see Figure 9 at page 113.)

ENDNOTES

- ¹ Letter of 18 May 1998 from FXF Trust Management Limited to Fairfax.
- ² Letter dated 14 August 1998 from Professor J S Horvath, Area Director, Renal Services, Royal Prince Alfred Medical Centre to John Corker, General Counsel, Australian Broadcasting Authority.
- ³ Letter dated 13 October 1998 from Professor J S Horvath, Area Director, Renal Services, Royal Prince Alfred Medical Centre to John Corker, General Counsel, Australian Broadcasting Authority.
- ⁴ The Trustee acquired shares in wholly owned subsidiaries, including FXF Finance Pty Limited and FXF Investments Pty Limited. FXF Finance Pty Limited was set up to make bank borrowings. FXF Investments Pty Limited has been established to hold the Fairfax Shares.
- ⁵ It held 26 foundation units in the Trust which were swamped by the 509M units that were issued.
- ⁶ Draft Put Option Agreement between Chase Securities Australia Limited and Publishing and Broadcasting Limited dated 24/11/97 containing final amendments, p 2.
- ⁷ Powers (#1) transcript, p. 11.
- ⁸ Powers (#1) transcript, p. 12.
- ⁹ Powers (#1) transcript, p. 15.
- ¹⁰ Letter dated 26 August 1998 from John Atanaskovic, Atanaskovic Hartnell to the ABA.
- ¹¹ Letter faxed 26 August 1998 and the following documents produced to the ABA by CPH: (a) Facsimile to D'Arcy Ford, ANZ Banking Group from CPH dated 18 May 1998 re Mr Powers' loan; (b) Agreement for the sale of 76 million units in FXF Trust between CPH and Mr Powers dated 18 May 1998; (c) letter dated 18 May 1998 from D'Arcy Ford, ANZ Investment Bank to Mr Powers re: fixed rate fully drawn advance facility (acceptance document is unsigned).
- ¹² *The Federal Capital Press of Australia Pty Limited, Information Memorandum*, May 1998, p. 1.
- ¹³ *The Federal Capital Press of Australia Pty Limited, Information Memorandum*, May 1998.
- ¹⁴ Powers (#2) transcript, p. 3:
The big matters that we focused on after I was elected Chairman, one was the budget. We had a new budget needed to be adopted for the July 1 start of the fiscal year. That has taken a lot of time.
- ¹⁵ Powers (#2) transcript, p. 4:
A. The first major meeting I went to on the budget, I would have seen some very early drafts of the budget. We had a rather long meeting, I am guessing, sometime the second week of June, with Bob Muscat, John Greaves and Ashley Fenton to go over what was then a reasonably early budget. I think they viewed it as a rather late draft, I viewed it as a reasonably early draft in terms of my introduction to the budget. And it went through where that budget was coming out and I think it was the first time to some extent that everyone but maybe Ashley Fenton, who had mechanically put it together, but I think the first time that Bob and John got to put it in overall context and sit down and think about it. So we went through in detail the budgets for the major mastheads.
- ¹⁶ Powers (#2) transcript, p. 43:
Q. ... You said, perhaps as a throw-away line, that when you are presented with the book, the black book which I think is exhibit B, as far as you were concerned it was an early draft but as far as the people presenting it to you were concerned, it was a late draft.
A. Yeah.
Q. What did you mean by that?
A. They had been through two or three working sessions on each master head budget – I think primarily John; I don't think Bob had been very involved. So this would have been second or third iterations of each section of this, if you will. I haven't seen any of them. Also, in terms of quality of presentations, I viewed it early stage, yeah.
Q. I think what I'm trying to get at is that, from the point of view of the management, that document which they presented to you more or less represented their not concluded but close to final view of where the budget should be going?
A. Yeah, fair question. I don't want to be critical of them. I think the process had just – it's a case where the process had a life of its own and that it's not an interventionist management team, if you know what I mean. It was a legitimate process that publishers worked through and everything was okay and stuff, but, you know, Bob had not, I don't believe – I could be wrong – had sat down and said, 'Wait a minute. You've got to be kidding me. I think Sydney Morning Herald ... had a budget with substantial cost increasing, including on, I think, marketing and publicity another 4 million or something'. I just use that as an example. But do I think if I wasn't there it would have gone much closer to the original draft to the Board rather than the way we went? Yes, I believe it would have.
- ¹⁷ Minutes of 26 June 1998 meeting of directors of Fairfax, p. 3.
- ¹⁸ Minutes of 10 July 1998 meeting of Finance and Audit Committee Meeting, p. 1.
- ¹⁹ Powers (#2) transcript, p. 4:
Q. What about staff recruitment processes that may have been in train. Are there any of those?
A. Well, we put a – part of the budgeting process – we put a non-announced but a de facto hiring ... freeze into effect.
Q. Where did that idea come from?
A. Out of the budget process, but I think I was the one that initiated it.
- ²⁰ Minutes of 26 June 1998 meeting of Fairfax directors, p. 3.
- ²¹ Memorandum dated 7 July 1998 from Mr Muscat to senior Fairfax staff.
- ²² Minutes of 18 May 1998 meeting of Fairfax directors, p. 3.

²³ Minutes of 18 May 1998 meeting of Fairfax directors, p. 3.

²⁴ Muscat (#2) transcript, p. 4:

Q. What do you call that process?

A. We have deemed that to be the Hercules project. I actually call it the review process but it was dubbed the Hercules project to give it a name that people could actually tag.

²⁵ Minutes of 26 June 1998 meeting of Fairfax directors, p. 3.

²⁶ Powers (#2) transcript, p. 42:

Q. But the detail of that, do you have conversations with John Greaves about that?

A. No. John will sometimes give me 30-second briefings on what's happening on project Hercules and stuff. I'll go by and say, 'How's it going?' Morale and stuff dragging along. But the real work on that is done in the project Hercules sub-committee meetings.

Q. Right. Do you attend those?

A. The sub-committee meetings, yes. Not any of the other ones.

Q. Right. So just when the Board sat —

A. I don't think I've gone – for example, there's one tomorrow. Tomorrow I think there's a long session – actually, this afternoon I think there's a long session on project Hercules.

Q. Of the staff committee?

A. Bob and, yeah, the management committee. I haven't gone to any of them.

²⁷ Dews transcript, p. 9:

Q. Just before we fully identify the document, the two meetings, the two last pages, do they refer to meetings held before or after 12 June – Presuming that the first three pages refer to a meeting held on 12 June, is that right? ... Let us look at the first one for 12 June 1998. Can you tell us who was present there? There are some initials at the top of the page?

A. Yes. That is Brian Powers, Daniel Petre, James Packer, Nick Falloon and Bob Muscat.

Q. Where was this meeting held?

A. It was held at Park Street.

Q. At the offices of CPH?

A. Yes.

Q. And what was the purpose of the meeting?

A. The purpose of the meeting was to discuss opportunities for us to have Fairfax content distributed and online through NineMSN.

Dews transcript, p. 16:

Q. Was there to be follow up meetings?

A. Yes. There was an intention that there would be follow-up meetings.

Q. And do you know if there have been any?

A. There has been one follow-up meeting, but not between any of those people in fact. I'll just check if I have these dates right. 12/6? Yes, there was one follow-up meeting between those people and one other, and then there has subsequently been one other meeting between two people who weren't at that meeting

Q. And where was that meeting held?

A. Also at Park Street. Yes, actually here it is. It is on the 25th.

²⁸ Powers (#2) transcript, p. 49.

²⁹ Dews transcript, p. 10:

Q. And what was the purpose of the meeting?

A. The purpose of the meeting was to discuss opportunities for us to have Fairfax content distributed and online through NineMSN.

³⁰ Dews transcript, p. 11:

Q. So back to my question. Perhaps you can go through the notes and explain them to us and tell us about the meeting?

A. Sure. We talked about portal, strategies and what it meant to them. We talked about exclusivity, meaning that if we were to do anything we would be interested. We thought there would be some issues around exclusivity for them, and how did they all feel about that.

³¹ Dews transcript, p. 14:

Q. What was the response to that? What was your understanding there?

A. There were no definitive answers on anything, really from either side. It was very much exploratory. But nothing was being ruled out, nothing was being ruled in; it could be, it might not; if you get one you might get the other; if you didn't you might not get either; would there be any legal implications of all three. That kind of stuff. The question was posed: Could there be a veto right over what each other does with News Limited? And no answer ...

³² Muscat (#3) transcript, p. 2:

Q. How did that job offer come about?

A. It came about as a result of an approach by the Chairman of PMP, Mr Ken Cowley, who I know and am certainly a friend of his, but I know him from my days in News where I worked basically with him for 28 years. And it was a case of a number of approaches rather than just one to head up PMP with the pending retirement of Mr Ken Catlow, who is the current chief executive of PMP, so we had some discussion. I indicated that I wasn't interested. We had another discussion. Also had a discussion with Ken Catlow, who came to see me, and it was from that discussion – and there were some other discussions as well with Mr Cowley and Mr Catlow separately – that I decided that it may well be an interesting job offer for me to take on, so I decided to accept that offer.

³³ Powers (#2) transcript, p. 71:

A. Yes, yesterday afternoon Bob asked to see me and told me he had decided he wants to leave the company, he has another job offer which he had decided after much soul searching he wants to take. We talked about it yesterday afternoon. We talked about it again today. I told him I was disappointed and that my preference, both professionally and personally, is that he stay. He said he had done a lot of thinking and really didn't want to. I asked him why and got an unclear answer.

Again, this is market sensitive information. It must stay in this room. He is going to work for Pacific Magazines. He worked for Ken Cowley for 30 years and Ken is Chairman of that, he will go and run that. He just said he felt more comfortable in doing that ...

Q. Thanks for that.

A. The last thing you need is to publish a report without —

Q. There are two things I would like to ask about that. One is, what time was it that he told you that? Was it before he saw us yesterday or afterwards? What time of day?

A. I think it was right before he saw you.

Q. What time of day was it?

A. 3 o'clock.

³⁴ Section 168 of the Act provides, where relevant:

168.(1) In informing itself on any matter relevant to its functions, the ABA:

(a) may consult with such persons, bodies and groups as it thinks fit, and may form consultative committees for that purpose; and

(b) may conduct investigations and hold hearings; and

(c) may otherwise inform itself in any manner it thinks fit.

(2) Subject to any directions by the Minister under this Part, the procedure that the ABA adopts in informing itself on any matter relevant to its functions is to be that which the ABA considers:

(a) will be the quickest and most economical in the circumstances; and

(b) will also promote the due administration of this Act.

³⁵ Trevor Sykes and Elisabeth Sexton, 'Packer's 'Perfect Scenario'', in *The Bulletin*, 28 February 1995, p. 72.

³⁶ Trevor Sykes and Elisabeth Sexton, 'Packer's 'Perfect Scenario'', in *The Bulletin*, 28 February 1995, p. 72.

³⁷ Trevor Sykes and Elisabeth Sexton, 'Packer's 'Perfect Scenario'', in *The Bulletin*, 28 February 1995, p. 73.

³⁸ PBL Preliminary Final Report, 3 September 1998.

³⁹ PBL Preliminary Final Report, 3 September 1998 (emphasis added).

⁴⁰ Kerry Packer transcript, p. 13.

⁴¹ Powers (#1) transcript, p. 4:

A. Okay ... The first time I met Kerry Packer would have been in 1981 and 1982. I worked in an investment bank named James D Wolfenshon Incorporated at that time and CPH and Kerry were a client of that bank. I would have met him three or four times over a three or four-year period, maybe five times, never did any subsequent work for him.

⁴² Powers (#1) transcript, p. 4:

A. ... I would have met him three or four times over a three or four-year period, maybe five times, never did any subsequent work for him.

Q. So that's '81, '82?

A. '81, '82, '83, '84, '85. After that I —

Q. Where were you based at that time?

A. In New York. After I left that bank, I worked for the Jardine Matheson group in Hong Kong. We had some investments down here, Franklins and a few other businesses down here, so I would come down once a year and I think I saw Kerry two times during that period, just a professional courtesy call without a lunch or dinner to keep the contact up.

Had, I don't believe, any contact with Kerry after Jardines until I was working for Hellman & Friedman, which is a direct investment fund in San Francisco, which would have been in the northern hemisphere spring of '91.

⁴³ Powers (#1) transcript, p. 4:

A. ... Hellman & Friedman was looking at making an investment or being part of a group to recapitalise John Fairfax, which was in receivership at the time.

It was widely speculated that CPH would be an interested party in investing. I had a friend call Kerry and say I'd like to speak with him about that if he was willing to. The word came back he was happy to sit down and talk and that we could either do it by phone or I could go meet with him in London, which would have been May in 1991. I went and met with him in London.

Q. What was your position with Hellman & Friedman at that time?

A. General partner in the investment fund. I went over and met with Kerry and during a two-day period met with Kerry, Conrad Black. And Malcolm Turnbull, who was representing the bondholders, one of the large American bondholders, came over for the meeting and Neville Miles came over as a potential broker to our transaction.

Q. It was agreed at that point in time that we would form or attempt to form a consortium among the Daily Telegraph, Conrad Black's organisation, Hellman & Friedman and Consolidated Press to lead a recapitalisation of Fairfax. That consortium reached a tentative agreement or an in-principle agreement with the bondholders that we would contract to buy those bonds at a discount, a substantial discount to their face amount.

⁴⁴ Powers (#1) transcript, p. 6:

A. ... When I had gone to London in 1991 to broach the subject of co-investing in Fairfax with Kerry, the top issue, the top priority on his agenda was trying to — Trevor Kennedy was in the process of retiring. He tried to recruit me to become chief executive officer of CPH at that point in time.

I thought about it. I obviously informed my partners in San Francisco that he had raised the subject. I didn't want to be in a conflict situation as we were negotiating a potential deal. I thought about it for about a month or two and told him that I did not want to do it, so – and he went out and subsequently hired someone else.

⁴⁵ Powers (#1) transcript, p. 6.

⁴⁶ Kerry Packer transcript, p. 6:

Q. Was it during this time that you got to know Brian Powers better than you had previously known him?

A. I had a high regard for him from the time that I first met him and I liked him.

Q. What was it about him that impressed you?

A. His intellect.

Q. His business acumen?

A. His intellect. He's a smart feller.

⁴⁷ Powers (#1) transcript, p. 5:

A. ... I then served on the Board of Fairfax, which would have been whenever the first Board meeting was of the recapitalised Fairfax, some time in early '92.

I served on the Board of Fairfax as a non-executive director until March of 1993 ...

⁴⁸ Kerry Packer transcript, p. 9:

Q. Then again in 1993 you asked him if he wanted to take up that position and he accepted?

A. Yep.

Q. Why did he accept at that time?

A. Because I gave him more money.

Q. Okay. And that's the primary thing that you think was different that made him take up the position?

A. It's been my experience in life that people who like one another and get on fairly well together, in the end if there's enough money in it they do it.

⁴⁹ Powers (#1) transcript, p. 5:

A. ... I served on the Board of Fairfax as a non-executive director until March of 1993, at which time I left being a general partner at Hellman & Friedman and joined Consolidated Press Holdings as their chief executive officer and I resigned from Fairfax, obviously, upon taking up that appointment.

⁵⁰ Powers (#1) transcript, p. 7:

Q. The decision to sell out of Westpac, how was that taken at CPH?

A. It was taken by – I think when I got there Kerry probably had a predisposition to sell out. I said I'd like to look at it first. I'd looked at it and said I thought it was a \$5 stock within 18 months – we were selling it at about \$3.75 or \$4 – and that I thought liquidity would be limited for a while and that we should take a look to see if there was a buyer. It would have been very hard or impossible to do a placement of the stake – excuse me, a public offering, a secondary offering of the stake at that stage because of the condition that Westpac was in.

So I said, 'Let's see if we can find a buyer at market. If we can go ahead and do it. Otherwise, I'll go on the Board if they'll have me and we'll work it.' But we took the strategic decision we'd rather sell and, as it happened, Lend Lease was prepared to buy.

⁵¹ Powers (#1) transcript, p. 7:

A. ... So I said, 'Let's see if we can find a buyer at market. If we can go ahead and do it. Otherwise, I'll go on the Board if they'll have me and we'll work it.' But we took the strategic decision we'd rather sell and, as it happened, Lend Lease was prepared to buy.

Q. And the whole stake was sold in a single parcel; is that right?

A. Correct.

Q. So were you responsible for the negotiation?

A. Yes.

Q. Of that sale?

A. Yes. Kerry was overseas at the time.

⁵² Powers (#1) transcript, p. 7.

⁵³ James Packer transcript, p. 6.

⁵⁴ Powers (#1) transcript, p. 10:

Q. Did you have, I suppose, disputes between yourself and Mr Kerry Packer about the direction of strategy from time to time?

A. It sounds bizarre working for Kerry, but we had virtually no disputes. We had a lot of discussions and debate but would generally wrestle the issue to the ground and if we're talking – it may take a couple of weeks, not straight-through talking about it because that's not either of our natures, but would – very few times – I mean there were times when we'd do something and I'd say, 'Oh, look, this is 50/50, I'd quite probably go the other way, but if you want to do it.' It is on very routine things; there wasn't much ambivalence on the bigger issues, and there'd be times he'd say, 'Oh, you're running the place. Go ahead and do it,' but no major confrontations.

Q. So how would generally disagreements about different approaches to strategies be resolved?

A. Just sit down and talk them through till one convinced the other.

Q. Were there times Kerry Packer would say to you, 'Listen, this is my company. I own it, this is the way I want it done'?

A. No, believe it or not. He was always in the position to do that. If it applied to CPH, he would have a perfect right; if it applied to PBL, it would have been a much more difficult issue.

⁵⁵ Powers (#1) transcript, p. 8:

Q. A major event following after that would have been the merger of Nine Network Australia and ACP?

-
- A. Correct.
- Q. And the creation of PBL in 1994?
- A. Correct, yes.
- Q. What role did you play in that?
- A. I led that effort. As chief executive of the major shareholder of each, I did the analysis or led the team that did the analysis and then led the team that implemented doing it.
- Q. Where did that idea come from initially? Was that something that came from you or came from Kerry or elsewhere?
- A. I don't honestly know. I know I was a big proponent of it. I always believed that scale was helpful and it can be increasingly important to media companies and that when you have two public companies in media in Australia when the lines between different forms of media are blurring that it was going to be a potential for conflicts. I didn't want to have CPH being viewed as being favouring either Nine or ACP. We had the luxury of owning almost equal amounts in each, so it was very easy. I think the merger was very non-controversial because we'd done it at market and we were indifferent to the terms.
- ⁵⁶ Powers (#1) transcript, p. 10:
- Q. Did you have, I suppose, disputes between yourself and Mr Kerry Packer about the direction of strategy from time to time?
- A. It sounds bizarre working for Kerry, but we had virtually no disputes. We had a lot of discussions and debate but would generally wrestle the issue to the ground ...
- ⁵⁷ Powers (#1) transcript, p. 9.
- ⁵⁸ ABA Report, 1995, *Investigation into Control: Mr Kerry Packer / John Fairfax Holdings Limited: 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*, Appendix B.
- ⁵⁹ Powers (#1) transcript, p. 9:
- Q. Just going back a bit in time, I think it would have been early '95 that CPH through CPH Management Pty Limited and Nine Network Pty Limited increased its interest in Fairfax up to, together with some notes, about 17 per cent at that stage?
- A. Yeah, yeah.
- ...
- Q. And what role did you play in that?
- A. I probably played the same role I did in everything, which was right at the centre of it, yeah.
- ⁶⁰ James Packer transcript, p. 9.
- ⁶¹ Mr Ray Martin interview of Mr Kerry Packer, *A Current Affair*, 16 February 1995, 6:30 pm.
- ⁶² James Packer transcript, p. 10:
- Q. Moving on a little bit further then to March 1996. When there was a series of appointments, you were appointed as managing director of PBL —
- A. PBL?
- Q. — at that time. Brian was appointed as?
- A. Executive Chairman.
- Q. Executive Chairman of PBL?
- A. Yeah.
- ⁶³ James Packer transcript, p. 11:
- Q. So it was part of that transition of Kerry taking a less hands-on approach to the running of the businesses and you taking, you and Brian taking more of a hands-on approach?
- A. On a day-to-day basis, that would probably be a fair representation, but Kerry has unashamedly always, and I believe to the company's benefit, reserved the right that, in the case of PBL, the majority shareholder has to exert his or her opinions or views on particular issues. So on a day-to-day basis, yes, but that doesn't mean that he hasn't reserved the right to ensure that his views are known.
- ⁶⁴ PBL News Release, dated 3 September 1997, p. 4.
- ⁶⁵ Powers (#1) transcript, p. 11:
- Q. Let's turn to the decision of PBL to exit its 15 per cent Fairfax stake?
- A. Yes.
- Q. How was that decision made and whose idea was it?
- A. That was my idea. I thought that Fairfax had become a distraction for PBL not so much for management because of the way we structured PBL by having the magazines and television operations separately and then having the enterprise unit, who worry about diversifying investments and new investments, whether it was pay television or Fairfax or Regency and the movie area.
- But the market was fixated by whether or not we were going to — 'we' being PBL — at this point in time we were going to just hold onto — well, until it was clear of course the cross-media rules weren't going to change whether we would do a transactions, what kind of transaction. Once it was clear the cross-media rules weren't going to change, I thought we would be much better getting Fairfax out of PBL.
- ⁶⁶ Kerry Packer transcript, p. 16:
- Q. ... Were you involved in the decision of PBL to exit its 15 per cent stake in Fairfax?
- A. Of course.
- Q. And how were you involved?
- A. It was run past me.

Q. Where did the idea come from?

A. I don't know. Damned if I remember. I don't care.

Q. What was your reaction to the idea?

A. Obviously favourable, or it wouldn't have happened.

⁶⁷ Powers (#1) transcript, p. 9:

Q. But the three of you, James and Kerry and yourself, would be the three major people involved in the discussion about the strategy of the group?

A. To the extent – definitely to the extent they affected CPH. To the extent they affected PBL, it would be a wider group. If it was television-related, especially free-to-air television-related, David Leckie would be very much involved. If it was related to pay or on-line, someone like Nick Falloon and James McLachlan would be involved. So the decision on something like Fairfax would be, I can't remember who bought the last stake in Fairfax. I guess it must have been PBL bought the last. Yeah, we moved it into PBL, decided for conflicts we shouldn't have it in separate piles. Then that would have been initiated by Kerry and I, and then James would have been involved and Nick Falloon would have been involved and then obviously the rest of the Board of PBL once the decision was taken to do something.

⁶⁸ Kerry Packer transcript, p. 16:

Q. Why were you favourable to the idea?

A. Because of the – because the classified business is vulnerable.

Q. Sure.

A. Well, the asset that was being held by the public company, Publishing and Broadcasting, at that point in time was likely to lose value.

Q. But in the end you still ended up with a financial interest in that stake. It is not as if —

A. In the private company.

Q. In the Trust, well, the 15 per cent —?

A. But the private company owns the shares in the Trust; not the publicly listed company. Now, if I choose to have an indulgence and sit in a situation where I have a capacity to maybe do something or maybe not, but at least I have a starting point if I ever want to, and that is my indulgence in my own private company, why not? Whereas as a business decision, for Publishing and Broadcasting – perfectly correct business decision.

Q. Yes, and that is the reason that you decided to, as it were, maintain through your private company that little interest in Fairfax?

A. You know, I may still buy Fairfax.

Q. It is to keep your options open?

A. Absolutely. And my options are open.

⁶⁹ Powers (#1) transcript, p. 22:

Q. I'll just ask you now about your decision to leave PBL. When did you first decide that you wouldn't stay longer than five years at PBL-CPH?

A. I had a four year contract with an option. That option Kerry exercised last March, a year ago March, so March 1997. The contract expired in March 1998 and I had been reinforcing to Kerry that I wanted to leave at the end of the contract. You know, I had told him I would rather leave basically last August, a year ago, that was ideally from a whole bunch of things that I wanted to do; on personal decisions that was ideal. Kerry, I made that clear to him probably March, April, May last year. I'd say look, if I had my transition, and Kerry said, 'Well listen, that's really a pain to me. It's too early for a transition'. I didn't disagree with him. I said it was a hassle. I said, 'Let's sit down and talk about it'. So that would have been a 10 minute discussion on that-

Q. So you started raising it about 12 months ago?

A. On that one, yeah, and while I was raising even leaving it earlier, you know; not through any dissatisfaction. It was just that I like moving on. But Kerry came to – would have come to accept it. I think he always thought he'd talk me into staying longer – came to accept probably around Christmas last year, Christmas '97, that I wasn't going to – that I did want to leave during, you know – and I could tell that it wasn't convenient for him, et cetera. Anyway, when we got to the end of the contract I said, 'Kerry, listen, I am happy to – at the outside, you know, if you want to delay a transition I'll stay towards the end of this year; but I don't want to work full-time after that and also I'm going to – I want time to split my time between here and the US'. I'd most likely go back to calling on the States than – I sort of want to have more of a presence in the States. I like Australia, I think there are some things to do down here and make some money, but you know – so Kerry came —

⁷⁰ PBL Media Release dated 18 May 1998.

⁷¹ Powers (#1) transcript, p. 79.

⁷² Miles transcript, p. 17.

⁷³ Miles transcript, p. 18:

Q. Why was it that you approached David Gonski in the first instance?

A. Well, mainly because I know David quite well and David sat on the Board and, you know, it seemed the logical place to make it – to make the request.

Q. Just in relation to that, what sort of prior dealings, I suppose, have you had with David Gonski? Why is that —

A. Well, I mean, David does some work obviously for Consolidated Press as well as other things and we've been involved, David and I have been involved in a – I mean, for example, I did the float of Hoyts of which David was the Chairman, so I've been involved in that float with him.

We've done other things together, and he also gives me personal advice. He's structured my own personal trust companies, et cetera.

-
- ⁷⁴ Miles transcript, p. 21.
- ⁷⁵ Powers (#1) transcript, p. 25.
- ⁷⁶ Powers (#1) transcript, p. 19.
- ⁷⁷ Powers (#1) transcript, p. 20.
- ⁷⁸ Powers (#1) transcript, pp. 20.
- ⁷⁹ Powers (#1) transcript, p. 25.
- ⁸⁰ Kerry Packer transcript, p. 23.
- ⁸¹ Kerry Packer transcript, p. 23.
- ⁸² Powers (#1) transcript, p. 27.
- ⁸³ Powers (#1) transcript, p. 28.
- ⁸⁴ Powers (#1) transcript, p. 29.
- ⁸⁵ Powers (#1) transcript, p. 29.
- ⁸⁶ James Packer transcript, p. 27.
- ⁸⁷ James Packer transcript, p. 29.
- ⁸⁸ Miles transcript, p. 22.
- ⁸⁹ Letter dated 18 May 1998 from FFX Management Limited to the Chairman and Board of Fairfax.
- ⁹⁰ Agreement between CPH and Mr Powers dated 18 May 1998.
- ⁹¹ Agreement for sale of 76 million units in FFX Trust between CPH and Mr B Powers dated 18 May 1998. The date set for completion is 'within 20 days of the first date' upon which Mr Powers resigned from the CPH group of companies. This occurred on 18 May 1998.
- ⁹² Agreement extending completion date for sale of 76 million units in FFX Trust, between CPH and Mr Powers dated 5 June 1998. This agreement amends the original sale agreement by replacing the 20 day completion date with a 65 day completion date.
- ⁹³ Powers (#2) transcript, p. 61:
- A. ... Then ANZ, who will make the loan and then be guaranteed by CPH, they ran into, well, we ran collectively into a tax problem since they don't have a branch in Belgium, so they spent three weeks trying to find a branch ... Anyway, the bottom line I understand as of yesterday is that ANZ, a Belgium bank will make it, ANZ will guarantee it ... and CPH will guarantee that so it is the same substantive thing, and we will close it soon as that is all finalised. ANZ has been slow. But I am legally obligated. It is a binding contract. There is not an out in the contract.
- ⁹⁴ Kerry Packer transcript, p. 23:
- Q. So why did you agree to lend the money or guarantee the loan in this instance?
- A. Because it was convenient for him.
- ⁹⁵ Kerry Packer transcript, p. 25.
- ⁹⁶ Powers (#1) transcript, p. 32.
- ⁹⁷ Kerry Packer transcript, p. 27:
- Q. But is your understanding that he had adequate funds to purchase the units himself?
- A. Oh, yeah. He's been handsomely paid and he's a rich man.
- ⁹⁸ James Packer transcript, p. 31.
- ⁹⁹ Powers (#1) transcript, p. 27.
- ¹⁰⁰ Powers (#1) transcript, p. 32.
- ¹⁰¹ Kerry Packer transcript, p. 24.
- ¹⁰² Kerry Packer transcript, p. 25.
- ¹⁰³ Kerry Packer transcript, p. 25.
- ¹⁰⁴ Filenote of conversation between John Corker, General Counsel, ABA and David Barnett, General Counsel, CPH, 31 July 1998.
- ¹⁰⁵ Powers (#1) transcript, p. 33:
- A. Kerry had always been very concerned that whenever I left, that he – you know, that I would be available basically to provide advice if there was a crisis, you know, and we really had had discussions about looking at it at the end of the year and Kerry wanted a contract to do that. I wanted – I said, 'Kerry, look, I'd much rather just work and if there's a real crisis, you know, you really need help', I said, 'your friend will help. You don't have to worry about that. I'm not going to take another full-time job, so I'm going to have time'. He had made it clear in prior discussions he wanted something more formal than that. Just, you know, he obviously wanted to pay for it, et cetera, and the – and he reiterated that point, you know, as part of these discussions.
- ¹⁰⁶ Powers (#1) transcript, page 34:
- Q. So how did the terms and conditions of that agreement come about?
- A. I sat down and said, 'Fine, I'll work on a per idem basis'. Can't be – I said, 'Listen clearly, you know, Fairfax is going to be my primary focus now, so there can't be anything that conflicts with that', and from my point of view obviously I had said – I'd rather work for free. I'd get asked fewer questions. To some extent I'd feel guilty asking. So I said, 'We've got to pay you. So we're now to pick a' – it looks like a lot of money, but by what I'm used to getting paid it isn't a huge amount of money, you know, so I don't want incentives to go work on it. So it was two minutes. It was like, 'Well, we'll do it on a per diem basis, no more the next day's and listen, if it is distracting from something else I want to do, you can obviously cancel whatever you want and I can cancel whatever I want'.
- ¹⁰⁷ Powers (#1) transcript, p. 35:
- Q. Where did the figure of 70 days come from?
- A. I just wanted to make it clear that they couldn't just refer huge amounts of stuff to me.

- Q. That's your suggestion?
- A. Yes, that's my suggestion.
- Q. That's your limit?
- A. Yes.
- ¹⁰⁸ Kerry Packer transcript, p. 38.
- ¹⁰⁹ Powers (#1) transcript, p. 24:
- A. ... on CPH we'd sold a lot off assets and I wasn't optimistic about this being a time to be putting a lot of money to work. So I'm saying, you know, we were in the process of building a new investment team;
- ¹¹⁰ Powers (#1) transcript, p. 35:
- Q. ... Would it be fair to say that in providing advice on the management investment of liquid assets, that you necessarily would be fairly privy to the strategic direction of CPH and what it was doing with its cash?
- A. Yes, that would be very fair. Its very transparent ...
- ¹¹¹ Powers (#1) transcript, p. 36:
- Q. Okay. Are there any other specific projects that have been discussed or that are in contemplation that you might be providing advice on pursuant to this agreement?
- A. Well, I mean it's going to be kind of a hodgepodge during the transition. One thing I think I'm going to bill them for, CPH had an investment in Crown Casino and Hudson Conway. Crown Casino was recruiting a chief executive, it happened to be someone I know well, I hired to run the Mandarin Hotel Group when I was running Jardines ten years ago —
- Q. Sorry, could you repeat that?
- A. Someone I know well, I actually went to law school with, but I hired when he was running J D Matheson in Hong Kong as chief executive of the Mandarin Hotel Group public company Hong Kong, which he'd been doing for ten years, Lloyd Williams had been trying to recruit him, so he asked when Robert and his family came down to make a final decision, if I'd come down and join them for a few days, if I'd go down and talk to Robert and spend some time with him.
- Q. Okay.
- A. And help sell him on the idea of going to work for Crowns.
- Q. Right.
- A. So I mean that is a one-off sort of deal. That would be an example of things that — you know, the history, I was in the best position to do, you know.
- ¹¹² Powers (#1) transcript, p. 34:
- Q. So would you expect to be providing that advice in the near future to CPH?
- A. Yes, but I think a lot less. This says up to 60 or 70 days. I said we have to limit this because, you know, we might not even be able to ask for — we wanted to make sure there were no false expectations. Yes, I think we do less than provided in here. I think it is usually the case of, 'The King is dead. Long live the King' ... But certainly I'm privy at this stage, again, I think my expectation is that will dwindle, human nature being what it is, especially once they get strong, you know, they're out looking for a strong investment person, yes. If I happened to have a peculiar knowledge about one of the managers or about a deal they would be looking at, I would be consulted, but I wouldn't — you know, I would be surprised knowing human nature nearly as much as Kerry would have anticipated when he signed this.
- ¹¹³ Powers (#1) transcript, p. 77:
- Q. But it's not entirely clear-cut for you in a sense that you still have some sort of consultancy agreement with CPH and may well be managing their cash assets?
- A. Listen, the consultancy agreement I view as a liability. I'm not trying to be snide, and I intentionally made the economic —
- Q. A liability for you?
- A. Yeah, I'm doing that simply because as an obligation to provide a transition. I don't view that agreement as an asset. If I never got called up, would I be ever a happy man, and that's not saying anything about Kerry or James. I enjoyed working with them tremendously, but that is not the business I want to be in.
- Q. But don't you think that that has the potential to perhaps muddy the waters as far as what your duties are —
- A. Absolutely not.
- Q. — at Fairfax?
- A. Not in the slightest.
- Q. No?
- A. No. The opposite, if there was risk it would be because of the working relationship not because of the money. I don't think there's any risk whatsoever. I'm very clear about my duties and the company and who they lie to. So I don't see any risk at all, but the —
- ¹¹⁴ Powers (#2) transcript, p. 64:
- Q. Have you in relation to your consultancy agreement, if that is the right word for it of 18 May 1988, have you in fact provided any services to CPH or any other company in that group since that agreement and, if so, what?
- A. I have shortly after 18 May, Crown Casino, which CPH owns a shareholding in, was recruiting someone who I happened to know well from Hong Kong, so I went down for two days and helped recruit him at the request of Lloyd. But I view that as a CPH matter and I have billed him for it. I have answered questions, although in a dwindling thing, basically on the external management.
- Q. You have not billed for any of this work?
- A. No.

-
- Q. Have you billed for any work?
- A. No.
- Q. Anything else that you have done for them pursuant to this agreement?
- A. No, other than talk, other than answering questions and giving views on a fund manager, which quite frankly is something course, I haven't done it.
- ¹¹⁵ James Packer transcript, pp. 27.
- ¹¹⁶ James Packer transcript, p. 39:
- Q. But apart from consultancy, are you likely to turn to him for advice on business decisions or personal matters?
- A. Apart from the consultancy?
- Q. Yes.
- A. Well, the consultancy really encompasses business decisions, doesn't it? Wouldn't that be a fair representation?
- Q. Yes, and I'm saying apart from the consultancy apart from matters that are formally dealt with under that consultancy agreement, are you likely to – do you envisage contacting him to seek advice?
- A. I mean, I don't envisage it, but I don't envisage not doing it. I really haven't thought about what I'm going to speak to Brian about in the future or not speak to Brian about in the future. From my perspective, I like Brian, he's a friend. I think that there will be areas that I will turn to him for advice on in relation to the CPH business. And on a personal level, he's a friend. So I'm sure you don't know what you're going to speak to your friend about in three months time. I don't know what I'm going to speak to Brian about, or nothing, in three month's time.
- Q. But you would expect that friendship or relationship to continue?
- A. I would hope so.
- ¹¹⁷ Kerry Packer transcript, p. 38:
- Q. Did you ever make use of his services under that agreement?
- A. He never left.
- Q. I'm sorry?
- Q. Under the consultancy agreement?
- A. Christ, he is not back in America.
- ¹¹⁸ James Packer transcript, p. 44.
- ¹¹⁹ Kerry Packer transcript, p. 38.
- ¹²⁰ James Packer transcript, p. 45:
- Q. We have no further questions. Mr McLachlan, do you wish to ask any questions of Mr Packer or make any statements in respect of matters raised during the examination?
- MR McLACHLAN: No, just simply to this: In relation to the last question, Brian continues to be PBL's nominee director on the Board of New Regency, which is a company that PBL has a 20 per cent investment in. I think the answer was correct, because that's not a role with CPH or PBL, but it is the case that he continues to be PBL's nominee on that company's Board.
- ¹²¹ James Packer transcript, p. 45:
- Q. What's the function or operation of that company?
- MR McLACHLAN: It's a Hollywood film production house.
- ¹²² Submissions dated 21 December 1998 from Gilbert & Tobin, solicitors, to the ABA, Appendix, p. 11.
- ¹²³ Letter from Mr James McLachlan, Group General Counsel of PBL to Anita Sekar, ABA dated 11 September 1998.
- ¹²⁴ Subclause 6(1) of Schedule 1 to the Act provides:
- 6.(1) If a person has company interests in a company exceeding 15%, the person is to be regarded as being in a position to exercise control of the company.
- ¹²⁵ Powers (#1) transcript, p. 83.
- ¹²⁶ Powers (#2) transcript, p. 60.
- ¹²⁷ Powers (#2) transcript, p. 65.
- ¹²⁸ Powers (#1) transcript, p. 83.
- ¹²⁹ Powers (#2) transcript, p. 60.
- ¹³⁰ Powers (#1) transcript, p. 83.
- ¹³¹ Powers (#2) transcript, p. 60.
- ¹³² Powers (#1) transcript, p. 83.
- ¹³³ Powers (#2) transcript, p. 60.
- ¹³⁴ Letter dated 26 August 1998 from John Atanaskovic, Atanaskovic Hartnell to John Corker, General Counsel, ABA.
- ¹³⁵ Letter dated 26 August 1998 from John Atanaskovic, Atanaskovic Hartnell to John Corker, General Counsel, ABA, p. 2.
- ¹³⁶ Submissions dated 21 December 1998 from Gilbert & Tobin, solicitors, to the ABA, Appendix, p. 10.
- ¹³⁷ Letter dated 17 February 1999 from John Atanaskovic, Atanaskovic Hartnell to John Corker, General Counsel, ABA.
- ¹³⁸ James Packer transcript, p. 40:
- Q. So I presume you would expect that relationship which your father refers to continuing, the friendship to go on into the future?
- A. Well, I don't —
- Q. Your father says I —
- A. I don't expect them to be speaking on a nearly daily basis or anything like that, but I would expect that Brian's friendship with Kerry would continue. Kerry likes Brian, Brian likes Kerry, they got on well, no reason for them suddenly to be not friends.
- ¹³⁹ James Packer transcript, p. 40.

¹⁴⁰ Powers (#1) transcript, p. 10.

¹⁴¹ Powers (#1) transcript, p. 80.

¹⁴² Kerry Packer transcript, p. 11.

¹⁴³ Kerry Packer transcript, p. 41.

¹⁴⁴ James Packer transcript, p. 36.

¹⁴⁵ Powers (#2) transcript, p. 63.

¹⁴⁶ Powers (#2) transcript, p. 65:

Q. And do you interact with James Packer or Kerry Packer socially or have you since becoming Chairman?

...

A. ... And James, not at all socially. I will talk to James – a lot of my mail still goes to CPH and I have been very careful not to intertwine my personal stuff at Fairfax by using the secretarial service there, so my old secretary has been fielding phone calls and giving me forward addresses and mail and helping on scheduling and stuff, so I talk to her a lot, and James particularly if I go to pick up the mail once a week over there if she has not sent it over I will see James for two minutes, but in terms of socialising, not at all. We are friends. I consider James – if I am looking for a golf game and if James is home, I will call him.

¹⁴⁷ Powers (#2) transcript, p. 65.

¹⁴⁸ Powers (#1) transcript, p. 77.

¹⁴⁹ Powers (#2) transcript, p. 67.

¹⁵⁰ Powers (#2) transcript, p. 67.

¹⁵¹ Powers (#2) transcript, p. 49.

¹⁵² Powers (#2) transcript, p. 53.

¹⁵³ Kerry Packer transcript, p. 7.

¹⁵⁴ Dews transcript, p. 17:

A. There has been one follow-up meeting, but not between any of those people in fact. I'll just check if I have these dates right. 12/6? Yes, there was one follow-up meeting between those people and one other, and then there has subsequently been one other meeting between two people who weren't at that meeting.

...

Q. And when would that meeting have been held?

A. That meeting – sorry to be vague about it. That meeting was held sometime – it doesn't appear to be in my diary, but I went on leave on the 26th.

Q. Of June?

A. Yes. So it was held sometime between then and the 26th. I think it was actually in the last week, so it was some time between the 22nd and the 26th.

Q. And where was that meeting held?

A. Also at Park Street. Yes, actually here it is. It is on the 25th.

¹⁵⁵ Dews transcript, p. 10:

Q. Let us look at the first one for 12 June 1998. Can you tell us who was present there? There are some initials at the top of the page?

A. Yes. That is Brian Powers, Daniel Petre, James Packer, Nick Falloon and Bob Muscat.

Q. Where was this meeting held?

A. It was held at Park Street.

Q. At the offices of CPH?

A. Yes.

¹⁵⁶ Powers (#2) transcript, p. 50.

¹⁵⁷ Powers (#2) transcript, p. 49.

¹⁵⁸ Dews transcript, p. 10:

Q. And what was the purpose of the meeting?

A. The purpose of the meeting was to discuss opportunities for us to have Fairfax content distributed and online through NineMSN.

¹⁵⁹ Dews transcript, p. 14:

Q. What was the response to that? What was your understanding there?

A. There were no definitive answers on anything, really from either side. It was very much exploratory. But nothing was being ruled out, nothing was being ruled in; it could be, it might not; if you get one you might get the other; if you didn't you might not get either; would there be any legal implications of all three. That kind of stuff. The question was posed: Could there be a veto right over what each other does ... And no answer. There was no definitive answer one way or the other.

¹⁶⁰ Powers (#2) transcript, p. 52.

¹⁶¹ Powers (#2) transcript, p. 53:

Q. Why is it then that you have I suppose attended a couple of meetings with NineMSN but not with any of the other?

A. I wasn't invited to the others. There hasn't been any other meetings. The others basically were dead in the water when I got there. There has been a meeting with Telstra, again a low level meeting, nothing that has really come up with that. I don't think Bob has been at, or John has been at, any News meetings together, because it is a much narrower thing. It is simply a classifieds joint venture and they are working on the technical, which is good, they are working on the technical elements of it and coming up with some clever ideas on how it might work, and when Nigel briefed me on it I said that sounds very clever, get some numbers to make sure we don't get lost between concept and reality.

¹⁶² Powers (#2) transcript, p. 52:

Q. In possible alliances with News, have you attended any meetings with them to discuss—

A. No, I don't think – I don't think there has been a senior level meeting with them. It has been, as I understand it, it was done through a couple of levels down. I have had a couple of lunches with Lachlan Murdoch where I said, if we can work something out, terrific ... it would make sense. In our view it makes sense ... us and News together as an exclusive classified provider to who we think will be the winning portal, which I happen to think at this stage of the game will be NineMSN. That to us is the equivalent that PMT would have been in pay television instead of three losers. It is a much, much more frustrating process than I first thought.

¹⁶³ Powers (#2) transcript, p. 53.

¹⁶⁴ Powers (#2) transcript, p. 52:

A. ... quite frankly, us and News together as an exclusive classified provider to who we think will be the winning portal, which I happen to think at this stage of the game will be NineMSN.

¹⁶⁵ Greaves transcript, p. 35.

¹⁶⁶ Dews transcript, p. 23.

¹⁶⁷ Powers (#2) transcript, p. 54.

¹⁶⁸ Dews transcript, p. 24.

¹⁶⁹ Powers (#2) transcript, p. 55

Q. I wanted to ask you about Kerry Packer attending for lunch with you and Bob Muscat on [21 July 1998]. How did that come about?

A. Bob [Muscat] I think organised it.

Q. Did you make any suggestion to him beforehand that it might be an appropriate thing to do?

A. I don't think so. I don't think I did. I think it was appropriate. And we talked, you know, that it is – to some extent we were pursuing PBL more than they were pursuing us and our great fear was that PBL would go to a joint venture without us.

¹⁷⁰ Powers (#2) transcript, p. 57:

Q. Did you talk at all about the on-line business?

A. If we did it was not substantial.

¹⁷¹ Powers (#2) transcript, p. 55:

Q. I wanted to ask you about Kerry Packer attending for lunch with you and Bob Muscat on [21 July 1998]. How did that come about?

A. Bob [Muscat] I think organised it.

¹⁷² Muscat (#2) transcript, p. 54:

Q. What made you decide to invite Kerry Packer at that particular point in time? Was it triggered by anything that someone else had said?

A. Well, I knew that he hadn't actually been into this building, I'm not sure whether he had been into the Broadway building, but I knew he hadn't been in this building, and I have had lunch prior with him outside of this building when I first joined Fairfax with Dan Colson and Brian Powers was at that lunch.

Q. Why did it occur to you now?

A. Oh, no particular reason.

Q. Did Brian Powers ever suggest it?

A. Oh, in general conversation we talked about ACP and Packer and Brian said that there was some weeks prior to that that Kerry would love to come to lunch here or come into the building and I said we should have him in one day, as we should have other media chiefs as well. And I've had lunch with Kerry Stokes at his office and I've had lunch with Lachlan Murdoch, but not at his office, certainly in a restaurant. Wait until we invite him into the building!

¹⁷³ Powers (#2) transcript, p. 56:

Q. I will be candid with you because we were talking with Bob Muscat yesterday and my recollection of what Bob Muscat said – and I immediately concede that my recollection may be wrong and I have not read the transcript – I think he may have said that you may have made the suggestion to him first before he did. I think he said that?

A. It wouldn't surprise me, because we had a talk about getting everybody in. Fairfax basically has been invisible in terms of being a player. For someone with the strength of products we have, we don't get listened to in Canberra, we wouldn't get the time of day in Canberra, we are not in the mainstream of what is happening in media. I have made the point that we ought to get not only politicians and stuff – we had Kennett at a Board lunch – I want to get someone important at each Board lunch we do and I said we ought to get all the media people through here. I may have had that before the conversation. I can't remember whether I had that before or after the conversation.

¹⁷⁴ Kerry Packer transcript, p. 35.

¹⁷⁵ Muscat (#2) transcript, p. 48.

¹⁷⁶ Powers (#2) transcript, p. 58.

¹⁷⁷ Kerry Packer transcript, p. 35.

¹⁷⁸ Kerry Packer transcript, p. 35.

¹⁷⁹ Powers (#2) transcript, p. 57.

¹⁸⁰ Powers (#2) transcript, p. 58.

¹⁸¹ Powers (#2) transcript, p. 30:

Q. What did you think of the idea strategically in terms of requiring Federal Capital Press?

A. I thought it had no strategic value whatsoever.

Q. Why was that?

A. Well, the same argument I always had with Kerry Packer about acquiring the Adelaide station – who cares? If you have Sydney, Melbourne and Brisbane, who cares about having Adelaide? If you can buy it financially at an attractive price, I'm open-minded on it, but it's not a strategic asset whatsoever.

¹⁸² Kerry Packer transcript, p. 10.

¹⁸³ Subclause 1(1) of Schedule 1 to the Act:

1(1) ... In some cases, it may be important to look at agreements and arrangements between people and at accustomed courses of conduct between people. In this respect, the definition of *associate* in section 6 of this Act is important.

¹⁸⁴ Powers (#1) transcript, p. 68.

¹⁸⁵ Powers (#1) transcript, p. 26:

A. I don't remember, but it would have been – you know, again it wasn't set out 'here's a formal idea'. It was a kind of brainstorming about because it obviously was on our minds at that point in time because of the publicity and knowing that a meeting was coming up and Rod Price's phone call to James; it would have been after Rod's – certainly after Rod's phone call to James. It was the topic of discussion certainly around the office. So I don't remember if it was James first, Kerry first or both of them together, and it was really floated as a 'I'm almost tempted to do this myself' type thing, and Kerry's initial reaction was, 'Gees, you would be perfect for it, but', you know, 'you're going to hang around for a while longer'.

¹⁸⁶ Powers (#1) transcript, p. 49:

A. ... I remember Kerry saying that if you – I wouldn't have announced it was my aspiration, that's not generally what I do, but I do remember Kerry at one point saying, 'Well, if you don't get to be Chairman or Deputy Chairman, you've wasted your time. You won't be able to make a difference.' I remember him opining on that. I think that was before the 18th, it could have been after, to tell you the truth. I didn't discuss – yeah, I remember – I had discussions with Kerry, assuming James, but definitely Kerry because I can remember Kerry saying that. So I think I remember him saying that more than once, thinking that, from my point of view, I'm being stupid if I don't become a Chairman or Deputy Chairman.

¹⁸⁷ Kerry Packer transcript, p. 25:

A. I end up lending money to all sorts of people who I don't have anywhere near the relationship with that I have with Brian Powers. It is not quite – you know, as far as I am concerned, this is a conversation. The financing of Brian's shares is a conversation which would have taken 15 seconds.

¹⁸⁸ Kerry Packer transcript, p. 25:

A. You know, 'I'm going to buy some shares, I need some bridging finance', or whatever the hell it is. 'Well, do whatever you like'.

¹⁸⁹ Filenote of conversation between John Corker, General Counsel, ABA and David Barnett, General Counsel, CPH, 31 July 1998.

¹⁹⁰ James Packer transcript, p. 49:

A. CPH, which previously owned 45 per cent of the FXF Trust and now owns 30 per cent of the FXF Trust, CPH believes that the value of its remaining 30 per cent will be increased by Brian's participation in the Fairfax company and I have no doubt that his contribution will make Fairfax worth more and therefore we're going to make more money than we would have otherwise.

¹⁹¹ Kerry Packer transcript, p. 16:

Q. Why were you favourable to the idea?

A. Because of the – because the classified business is vulnerable.

Q. Sure.

A. Well, the asset that was being held by the public company, Publishing and Broadcasting, at that point in time was likely to lose value.

Q. But in the end you still ended up with a financial interest in that stake. It is not as if —

A. In the private company.

Q. In the Trust, well, the 15 per cent —?

A. But the private company owns the shares in the Trust; not the publicly listed company. Now, if I choose to have an indulgence and sit in a situation where I have a capacity to maybe do something or maybe not, but at least I have a starting point if I ever want to, and that is my indulgence in my own private company, why not? Whereas as a business decision, for Publishing and Broadcasting – perfectly correct business decision.

Q. Yes, and that is the reason that you decided to, as it were, maintain through your private company that little interest in Fairfax?

A. You know, I may still buy Fairfax.

Q. It is to keep your options open?

A. Absolutely. And my options are open.

¹⁹² The ABA was advised on 19 January 1999 that the CPH had transferred 76,000,000 units in the FXF Trust to Force Investments BVBA (a company incorporated in Belgium and controlled by Mr Powers).

¹⁹³ Time for completion of sale extended by CPH for 12 weeks as at 30 May 1998 but evidence of any further extension has not been provided to the ABA.

¹⁹⁴ The ABA was advised on 19 January 1999 that the CPH had transferred 76,000,000 units in the FXF Trust to Force Investments BVBA (a company incorporated in Belgium and controlled by Mr Powers).

¹⁹⁵ Powers (#1) transcript, p. 24:

A. ... So they were kind of the prime motivations to leave. The CPH was going to be trickier in a lot of ways because, you know, we didn't know who would be brought in as kind of the senior non-family member.

Q. Yes.

A. Yes.

Q. So what's actually happened with CPH is James has become chief executive?

A. James has become chief executive and he will hire a senior person to work with him, I assume.

Q. Right.

A. And that process had started before the Fairfax thing.

Q. Yes.

¹⁹⁶ Kerry Packer transcript, p. 47.

¹⁹⁷ Powers (#1) transcript, p. 87.

¹⁹⁸ Kerry Packer transcript, p. 47.

¹⁹⁹ Powers (#1) transcript, p. 68.

²⁰⁰ Gonski transcript, p. 5:

A. My involvement in Tourang, which is well documented by a number of books on the subject, is fairly uncontroversial. I was approached by Conrad Black when he came to Australia. His problem was that he wanted to make a bid for the Fairfax assets to the banks that presently had it, or had it at that time, and he wanted his bid to look bigger, to be blunt, than what it was, and he looked around for somebody who was involved in structuring and structuring transactions and he chose me.

I visited with him and spent a lot of time with him in the five days he was here and that was my intro into Tourang.

Already it had been going for some time and I showed him various ways that I thought could improve the look of the bid and at that stage that was very important and I became part of the team.

My second claim to fame was that I knew Mark Burrows, who was acting for the banks, and I became the emissary who went between the Tourang Group and Mark Burrows to negotiate the deal.

I stuck with it, I might say, despite the fact that in the end Mr Black decided to pay full price. Therefore, he didn't need a beautification, if I can call it that, of his bid; but by then I was very involved in how we structured the bond holder arrangements and so on. So I came to know quite a lot about Fairfax, a company I hadn't known a great deal about before, and we spent a lot of time together and that was that.

They had a Board of directors. They had a prospectus, as you know, and I was not part of that; but then some time down the track Conrad Black's associate, Dan Colson, asked if I would have breakfast with him at the Ritz-Carlton in Double Bay and he asked if I would be interested in joining the Board, and I decided it was a good thing for me and I said yes.

²⁰¹ Gonski transcript, p. 10:

Q. Okay. One question, going back in time: when you were first appointed as a Fairfax director was Brian Powers a director of Fairfax at that time?

A. No.

Q. He had already left the Board?

A. He'd left the Board.

²⁰² Gonski transcript, p. 4:

Q. ... Perhaps you could just start by giving us a bit of a sketch of your background and particularly as it relates to work that you have done for Mr Packer or CPH or PBL?

A. Well, I am by training a solicitor and some 10 years ago I, together with a partner, Richard Longes, commenced a business known as Wentworth Associates. About a few months later than that we first started to advise Mr Packer and his associated companies. Our advice was sought not on general legal matters but on structural matters, matters of structuring loans, structuring acquisitions and the like, and Mr Packer has continued to be a client of our firm.

The firm over the last 10 years has grown with the addition of Mr Gordon and another partner, Geoff Levy, and basically we have operated giving structural advice to various clients, quite a number of clients, and also we have given corporate advice generally to a number of clients.

²⁰³ Gonski transcript, p. 9.

²⁰⁴ Gonski transcript, p. 9:

Q. Could I ask you this: How significant a client are CPH and PBL for you personally?

A. For me personally? I don't know how you define 'significant'. If you define in terms of time – is that – or are you talking dollars?

Q. I could talk time or I could talk revenue. I'll leave it to you.

A. We can talk both.

Q. Talk both. We'll get a better picture.

A. Yes. In terms of time, perhaps I'm like some of you as well, when I add up the percentages of my time, sometimes it comes to more than 100 per cent; but I think that one could say that it is around about 20 per cent of my time, if not less; certainly not more. In terms of revenue, the way our firm works is that it is not that easy to work out which revenue is whose. What I can say to you is that our firm would – it varies what we receive from them in each year, but take this year as an average year, it is not greater than 20 per cent of our revenues.

²⁰⁵ Gonski transcript, p. 10:

Q. Right. Okay. Can you tell us then what involvement you have had in the decision by PBL to exit its 15 per cent Fairfax stake recently and to establish the FXF Trust?

A. When they decided that they wanted to exit the 15 per cent, Brian Powers wanted to work out how legally, properly and commercially, one could do that, and as I mentioned earlier, he put together a team, on which I was.

Q. Who else was on that team?

A. The team included a partner of Minter Ellison by the name of Leigh Brown. It included two partners from the firm of Ernst & Young – actually more than two, two tax partners from the firm of Ernst & Young, namely, Tony Versi and Michael Johnston. There were other partners of Ernst & Young, which changed a bit from the audit corporate side and to be honest, I can't remember which one it was because it seemed to be changing.

In addition to that, that formed a nucleus, together with Graham Cubbin, who was basically the chairman of the committee, and he ran the meetings and called us when things were wanted and demanded things when we didn't provide them.

There were a number of other people from PBL and ACP from time to time seconded to that committee as it proceeded and that's what happened.

Q. At what stage was that established in relation to the public announcement on 3 September 1997 to the Stock Exchange that PBL did intend to exit its stake?

A. I can't remember exactly, but it would have been commenced well before that announcement, because we would have worked out a lot before that announcement.

Q. A matter of weeks or months or —

A. Weeks; not months, but weeks.

Q. When that committee was first convened by Graham Cubbin what were the instructions given to you at that time?

A. Well, the instructions given to the whole committee —

Q. And the reasons for wanting to exit the stake.

A. Yes, I think that the overall reason was that they wanted, firstly, to make a capital repayment to shareholders, a cash payment to shareholders. So can I just say that was – I know that everybody says that it must have been FXF that was the major thing. The major thing was the 800, or whatever, 850m, it was a lot of money, to actually work out how to do that and give it to shareholders tax free and in the best commercial way. That involved obviously their bankers because one had to make sure they were happy; it involved working out how the shareholders would react, how it should be done and so on; and that's where Graham Cubbin came into it because he is a finance person and that was the major thrust of it.

At the same time it was clear that the market didn't like PBL being in Fairfax. They saw PBL as a cashflow company.

The Fairfax stake, as I recall, and you can check this with others, was unable to be equity accounted. They couldn't have a director on the Board, they couldn't get 20 per cent, so it was a dead asset and it was putting down their earnings and they travelled at a multiple of earnings in the stockmarket, so they wanted out of it, and I think that was the reason and I think that's what was given to us on that day.

Q. When did the idea of creation of a trust come into the scheme of things?

A. Well, you know, it came in in discussions —

Q. Where did it come from?

A. Yes, it came in when we were told of the problem. The problem was that PBL wanted to be out of the holding. At the same time they wanted something that would be palatable to shareholders. It was Brian Powers that told us that he believed that the 15 per cent holding had more value as a holding, rather than everybody getting 2,000 shares, which was the alternative, and I remember that I put together some concepts of distributing the shares themselves, which would have meant that Consolidated Press would have got roughly 7 per cent of Fairfax, with 8 per cent being distributed to other shareholders.

I also put together the concept of a trust and I think that's where the concept of a trust came from. This then would have been ploughed over and worked over by the tax people, the Ernst & Young tax partners, and of course it was up to Brian to talk to people like Kerry Packer about it. And I can say that barring one discussion, I never spoke to Kerry Packer about that trust in the entire period I was on that committee, and the only discussion I had with him was on the name because we had to fill it in and he definite views it should be FXF.

Gonski transcript, p. 15:

Q. In September 1997, moving forward to the end of the year, the establishment of the trust, of the documentation and the listing of it, what involvement did you have in that process?

A. This committee I spoke of continued and indeed it is that that I have referred to when I talked about having dealings with Nick Falloon and Graham Cubbin in my responses that you asked for. My recollection, just looking at my diary, that really kept going until almost the end of December 1997. There were lots of things like, for example, shareholders having small interests in the unit trusts and so on, we had to involve a stockbroker, so that committee kept going and that was my involvement in that.

Q. Okay. So who were you acting for at that stage?

A. Well, I saw the committee as being a coordinating committee. Undoubtedly we were acting for PBL and I mean, that's not – what's the word? – that different because the people who are getting the benefit were PBL shareholders, so there was a symmetry involved.

Q. But PBL would be paying you fees, I presume?

A. PBL did pay our fees, yes.

²⁰⁶ Gonski transcript, p. 27:

Q. You said in answer to the question on the notice ... The question was:

Have you had any association, contact or dealings with any of the persons specified in schedule 2 to this notice between December '97 and the present in connection with:

One was FXF Management Limited, and I think you replied:

In each case, my reason for answering question in respect of subparagraph (a) above is because I have had contact with relevant persons in respect of the relevant subject matter and not because I have had any association or dealing with those person in that regard.

The persons I had contact with were Kerry F B Packer and James Packer. In addition, I also had contact with Graham Cubbin and Nick Falloon, who acted as representatives of CPH Limited; in the case of Graham Cubbin in PBL, in the case of Nick Falloon at some meetings I attended in December '97 in respect of the establishment. Fairfax Management limited the reduction in capital of PBL that occurred at that time.

Now, you've given evidence about your involvement through the latter part of 1997 in the development and the listing of FXF Trust Limited. I suppose I'm focusing more on the contact you had with Kerry Packer and James Packer during that period of time. Can you tell us about that, please?

A. In connection with the items that are referred to here?

Q. Yes.

A. The essence —

Q. And any contact or dealings, really?

A. Well, they would be numerous. I think, if I may answer it this way: over the period from December 1997, I would have had a number of discussions with James and Kerry on general matters which have no relevance whatsoever to your inquiry. I suppose that's for you to judge, forgive me, but they would be to do with CPH matters, estate planning matters, matters such as that. So if I may exclude those, in connection why I actually said yes to this question, I would have had the occasional discussion with Kerry and James in December of 1997 as to how the reduction of capital and establishment of FXF was going and, from time to time, Kerry would ring and say, 'Are you working hard on our behalf on that committee?' et cetera, those sorts of discussions. There would have been nothing really of any moment to report on those discussions.

The reason I answered yes in connection with the period after January, if I may divide that, was that I had a call from Kerry Packer along the way in support of Neville Miles and basically saying to me that he didn't understand why the Board wouldn't accept Neville Miles, and that spirit was also echoed in discussions with James Packer.

I can't give you exact dates, but I do know, you know, I have a very clear recollection of feeling that Kerry felt that we as directors, and maybe me in particular, had not recognised that Neville should come on the Board when it was right and that he felt it should happen.

Q. So this would have been what, January/February, '97, I suppose?

A. Or even February/March '97. It was just that period leading up to that meeting when basically Brian came on Board.

Q. As a result of that call from Kerry Packer or discussions with James Packer, did you take any action? Did you further raise the matter with Rod Price?

A. Let me firstly say that the fact that I had raised it with Rod Price, I said that to Kerry.

Q. I suppose what I'm trying to get is the order of approaches. It seems that a number of people have approached you about this issue?

A. Yes.

Q. Kerry Packer, James Packer, Neville Miles, Brian Powers?

A. Those are the four.

Q. And I'm trying to get an order in which they've approached you if your memory allows that?

A. I think that I mentioned it to Rod, as I said earlier in my testimony, and we had that meeting, which was in Melbourne, on the day of the Melbourne meeting.

Q. The Melbourne Fairfax meeting?

A. Yes.

Q. 27 March?

A. Yes, which was on 27 of March. Before that time, I would have received one or two calls from each of those people, basically I suppose the way one might put it is lobbying me, and saying that they felt it was the right thing. After that time, I had less calls because I am aware that the Chairman did take it up with them. I did, however, have a few discussions leading up to the call I told you about on that Tuesday morning from Brian Powers throwing his own hat in the ring.

And I attended a meeting on something else at Park Street, the offices of CPH, and Mr Packer was there and he took me aside and said, 'Well, what's happening with Neville Miles?' and I said that it was a Board matter. I did tell him that I do believe, and I do, that unless there's a legal problem, a person who owns 15 per cent should have a representative on a Board of a major company. That's my belief. So he was in no qualms as to the fact that, on that basis, I supported it.

Q. This is Mr Packer senior you're talking about?

A. Mr Packer senior, and he, I think, was having difficulties understanding why the Board didn't envelop Neville and I just told him it as I saw it.

²⁰⁷ Gonski transcript, p. 30.

²⁰⁸ Miles transcript, p. 17.

²⁰⁹ Miles transcript, p. 18:

Q. Why was it that you approached David Gonski in the first instance?

A. Well, mainly because I know David quite well and David sat on the Board and, you know, it seemed the logical place to make it — to make the request.

Q. Just in relation to that, what sort of prior dealings, I suppose, have you had with David Gonski? Why is that —

A. Well, I mean, David does some work obviously for Consolidated Press as well as other things and we've been involved, David and I have been involved in a – I mean, for example, I did the float of Hoyts of which David was the Chairman, so I've been involved in that float with him.

We've done other things together, and he also gives me personal advice. He's structured my own personal trust companies, et cetera.

²¹⁰ Gonski transcript, p. 23:

Q. Yes, he is, yes. Did you have any involvement in the drafting of any of the documents associated with Mr Powers' resignation from CPH and the associated companies?

A. I did have an involvement in the resignation of the directorships. He asked me what sort of document to get off all the Boards and I told him what sort of document, but I did not have and I'm not familiar with the funding of his acquisitions.

Q. Of the trust. You haven't had any dealings – you weren't asked for any advice about that?

A. About the funding?

Q. About his purchase of the 15 per cent stake in the FXF units?

A. No, that came up. I mean, he told me that he was thinking of putting his hat into the ring as a director. He confirmed to me also in discussions that he was going from CPH. He did ask on a subsequent phone call what formalities had to be gone through and I did advise on that. But in terms of buying units, that seemed to come up, at least from my perspective, later in the piece and I didn't play any part in the funding of that.

Q. What about the agreement – so are you aware that he has an ongoing consultancy agreement with CPH?

A. I am aware of that, yes.

Q. Did you have any involvement in the preparation of that agreement or the terms of the conditions of the agreement?

A. I have spoken to him about that, yes, and in terms of the ongoing consultancy arrangement, I have given advice on kind of how the consultancy could work from his point of view and also from the group's point of view.

Q. Do you mind telling us the nature of that advice?

A. Yes, the nature of the advice fell into two respects: one was that I knew his service agreement previously, so the question was how did that – how do you terminate that and move into a consultancy role? That has effects in terms of residency requirements in Australia and the like, and I did indeed refer him to Ernst & Young to get advice on what sort of visa he needs to stay on.

The second thing is that in terms of what sort of consultancy letter he should have, I did draft a very rough concept for him and, I don't know, I assume he retyped it. He is a lawyer and presumably he did something. I haven't seen a signed, you know – but I just gave him it and that was that.

²¹¹ Powers (#1) transcript, p. 34:

Q. Who would have drafted this agreement?

A. David Gonski, I believe.

²¹² Fairfax Annual General Meeting, 6 November 1998.

²¹³ Muscat (#1) transcript, p. 40:

Q. There is always the suggestion, as much in the media as anywhere else, that people generally in the media here either have some association with News Limited or they have some association with Packer and CPH. Does that suggestion ever arise in conversations with Fairfax directors or in conversations either at Board meetings or outside of Board meetings that you have witnessed that involve Fairfax directors?

A. Well, it has only come from – the only instance that – I think there was in a story, and that was the association of David Gonski with the Packer group, where there was an accusation made that they already had a Board seat in that, so why would the trust want another seat. That was basically what was said, and I think at the time it was PBL that made the suggestion.

Q. Do you think there is any truth in that from your observations of —

A. Nothing that I have witnessed at all. I have not seen anything during the course of the Board meetings or discussions that I have had with David Gonski, or anyone else, to suggest they are aligned to anyone.

²¹⁴ Price transcript, p. 35:

Q. ... I suppose what I'm looking for is any patterns or allegiances and in particular in relation to CPH or PBL. I mean, maybe I should ask you specifically are you aware of any Fairfax Board members that are associated with Mr Packer or CPH or PBL?

A. Well, I think that the obvious area for that is with David Gonski, who I've known for a very long period of time. Mr Gonski has been or has been known to be a key part of the Packer group's external consultants/lawyers, and I assume still is, but I don't have any knowledge of whether they are or they aren't and all I can say is that, having said that, while I've been on the Board of Fairfax, I think that David Gonski has always been a serious contributor to the wellbeing of Fairfax and all the shareholders of Fairfax and we have on a number of occasions had the benefit of his knowledge and experience in a whole wide range of areas. I've always found him to be what I would call a good, useful director who applies himself, who's prepared to put in the effort and has always joined in the debate on a logical and intelligent manner. So there's been no evidence to me of him being just sort of a blind Packer fan. You know, I think he would be one of the directors that I would rate as having made a genuinely serious contribution to helping us to improve the company.

²¹⁵ Carnegie transcript, p. 12:

I have no link with Kerry other than that I've known him for some time, which I'll come back to if you want to ask me

...

²¹⁶ Carnegie transcript, p. 19:

-
- Q. Okay. Can you tell us about your relationship with Mr Kerry Packer? How long have you known Kerry Packer?
- A. Since I was 15. He was about – oh, maybe it was 18. He came to Geelong Grammar, where I was a little older than him, so I knew his brother, I knew him. My family had known his family; so just like I had the room next to Rupert Murdoch and the families have been friends, so, yes.
- Q. What business dealings have you had with him since that period of time since you first met?
- A. Oh, I don't think I've had any businesses with Kerry. I don't think he was – I think he was an investor in some small mining companies and we might have occasionally in CRA talked to him about something like that, but nothing was ever serious about that. So I know him personally, but I don't – I haven't done any business with him. And then Hudson Conway, because of the relationship between Lloyd Williams and he, you know, I barrack for their horses in the Derby or the cup or whatever it is, but that's it.
- ²¹⁷ Carnegie transcript, p. 20:
- Q. And then the other relationship directly or indirectly through your son in terms of Hellman & Friedman —
- A. Absolutely.
- Q. — having a shareholding —
- A. Absolutely, absolutely, absolutely.
- Q. — in Matrix Telecommunications —
- A. Yes, yes.
- Q. With PBL?
- A. CPH.
- Q. Or CPH?
- A. Yes.
- ²¹⁸ Greaves transcript, p. 4:
- Q. Can you just tell us in short compass what background you have in newspaper publishing or in publishing generally?
- A. My occupation is limited to two and a half years at John Fairfax. I joined Fairfax at the end of February '96.
- Q. I understand that you were appointed a director of John Fairfax Holdings on 9 September '96. I take it that you joined John Fairfax as an employee, had you, prior to that point in time?
- A. That's right, yes.
- Q. Could you just tell us the circumstances in which you first became an employee of John Fairfax?
- A. Bob Mansfield and I were working together at Optus. And he resigned as the chief executive of Optus to take up the position of chief executive of Fairfax. Having worked with him for a long time he felt comfortable with me as his finance director, and asked me to join the company after the resignation of the incumbent.
- Q. What were the circumstances in which you became a director of John Fairfax Holdings in September of '96?
- A. It was always the understanding that I would become a director of John Fairfax Holdings. It was part of the – after a period of, I suppose, probation.
- ²¹⁹ Greaves transcript, p. 10:
- Q. Could you look at that document, please. Is that a resolution of directors of One-Tel Limited dated 27 August 1997 which, amongst other things, resolved to appoint James Packer as a director of the company to have immediate effect, and resolved to issue 3,333,333 fully paid ordinary shares to Dorigad Pty Limited?
- A. Mmm.
- Q. And options in the same terms?
- A. Mmm-hmm.
- ...
- Q. Were you aware of that resolution?
- A. Yes.
- Q. I take it you signed it down the bottom there?
- A. I signed it, yes.
- Q. So what were the circumstances in which James Packer was appointed a director of the company at that time?
- A. Oh, somebody is going to put in \$3 million at \$1.50. He asked for a seat, and we gave him one. I mean, it is a significant investment. That was the reason.
- Q. Now, I understand that in the preparation of the prospectus for the float that James Packer was to be a director of the float entity; is that right?
- A. It was envisaged that way, yes.
- Q. But when the company was actually floated he —
- A. He resigned.
- Q. — he resigned. What were the circumstances in which that occurred?
- A. It was his decision not to have the onerous position of a director of another company, in my view. It was his decision. I don't really know exactly why he asked if he could resign. We said, 'Yes, if you want to'. The fewer directors we have the easier it is to run a company.
- Q. Did he come to a meeting and talk about the issue?
- A. I can't remember how we did it. We tabled the resignation. He might have been there. He came to a couple of meetings – he came to several.
- ²²⁰ Greaves transcript, p. 7:
- Q. So how did the relationship between you and James Packer come about in relation to One-Tel?

A. James Packer is a very close friend of Jodee Rich; is an equally close friend of Rodney Adler. And as a founding shareholder – Optus was the founding shareholder in One.Tel. I was the Optus representative on the Board. So, those things sort of evolved that way.

²²¹ Greaves transcript, p. 15:

Q. Could I just ask you about Mr Kerry Packer, whether you know him; on what occasions you have met him?

A. I've met him —

Q. You said a little bit about PBL and Optus meeting together and you being present during some of those meetings.

A. He is a very independent individual. He comes and goes in and out of meetings. Probably doesn't remember me.

Q. Have you ever met him socially?

A. I've been a guest at his house in the United Kingdom once, obviously to discuss Optus issues with Bob Mansfield.

Q. When would that have been?

A. Well, it would have had to have been in – prior to '96. It would have been in '95. Probably the summer of '95. The UK summer of '95, I think. Either '94 or '95. I can't remember.

²²² Greaves transcript, p. 18:

Q. When did you first find out that the FXF Trust was considering proposing Brian Powers as its nominee rather than Neville Miles?

A. When?

Q. Yes. When and how?

A. Was in a conversation that I had with Brian Powers that he was considering it.

Q. He was appointed on 18 May, that Monday.

A. That's right.

Q. When would it have been, in relation to that, this conversation that you had?

A. Less than two weeks prior to that.

Q. What were the circumstances in which that conversation came about? Did he ring you, or was he there? Was it on the phone?

A. It was in his office.

Q. In his office at Park Street?

A. Park Street, yes.

Q. What were you doing there?

A. I went to speak to James about some One-Tel issues; to have a look at issues. And he told me there in his office, asked me in and, as everybody does with the trust, 'What's wrong with Neville?' Came up with a proposal. I took it on Board and didn't do anything with it. Lots of things come past your mind in this world.

Q. Sorry, those sort of things?

A. A lot of things come through your mind. That was a suggestion that he was debating. It wasn't anything to do with me. It was a conversation that I didn't think might not have had legs.

Q. This was a conversation with Powers?

A. Yes.

Q. After you had a conversation with James Packer?

A. Yes, yes.

Q. What did he say at that time, that he was thinking about it, or did he sound out your views? Did he want to know what you thought about the idea?

A. He asked me my views on the trust having a Board member. As I said earlier, I sympathised with it, and I still do. I told him that I thought Neville was inappropriate.

...

Q. You said it was sort of within two weeks of the actual appointment. Can you be more accurate than that? Was it in the week prior or the fortnight prior?

A. It was the – prior to that. Friday night prior to that, because ... It was the night I was going to the Tattersalls Club for dinner, which is just around the corner. It was the night of the Tattersalls dinner, the 8th of May.

²²³ Greaves transcript, p. 21:

Q. Who did you discuss that issue with between then and 18 May when the appointment was made?

A. Nobody, actually.

Q. Did it come as a bit of a surprise to you that Brian might be the FXF nominee rather than Neville?

A. Yes. Maybe that's why I didn't think it would happen. It was a surprise, because I always thought he was quite entrenched in CPH. But now I know subsequent to that that his contract was coming to an end and he wanted to get out, and he had done his five years. I mean, it all makes sense when you look back on it, in my view, anyway.

Q. I mean, wouldn't you have mentioned it to Bob Muscat? There is a two-week period there, or thereabouts.

A. No. Maybe I should have. Maybe I – but I didn't. I didn't mention it to anybody. I didn't really think much of it, whether it was going to happen.

Q. You were a bit sceptical about it, the actuality of it, is that —

A. It seemed an interesting scenario to me, whether it could happen or not.

²²⁴ H A J Ford & R P Austin, 1995, *Ford's Principles of Corporations Law*, 7th edn, Butterworths, North Ryde, p. 512.

²²⁵ Roman Tomasic & Stephen Bottomley, 1995, *Corporations Law in Australia*, Federation Press, Sydney, p. 402.

²²⁶ Clause 5.3

²²⁷ Clause 5.5

²²⁸ Clause 5.6

²²⁹ Clause 5.7

²³⁰ Clause 5.8

²³¹ Clause 6.7

²³² Clause 6.11

²³³ Clause 6.12

²³⁴ See, for example Report of the Independent Working Party into Corporate Governance chaired by Frederick G. Hilmer, 1993, *Strictly Boardroom: Improving Governance to Enhance Company Performance*, Melbourne, Business Library, and Ivor Francis, 1997, *Future Direction: The Power of the Competitive Board*, South Melbourne, FT Pitman.

²³⁵ 'What makes a good Chairman and why it matters' by Viscount Blakenham *Executive Development, Vol 6 No.3, 1993*. He further states:

It is the Chairman's responsibility to ensure that the information flow coming to the Board is comprehensive. Now, if there is a full-time Chairman with a strong supportive Board of executive and non-executive directors, who is the boss? The answer is the Chairman, and to call anyone else the chief executive is often to misinterpret the reality. But perhaps this is where we get into semantics. There are two distinct roles to be played, although they overlap. One is the external relations strategic Chairman and leader of the Board role, and the other, the chief operator in charge of the day-to-day running of the business.

²³⁶ 'The Company Chairman – His Role and Responsibilities' by Hugh Parker, *Long Range Planning* Vol.23 August 1990. Parker further states:

The primary job of the Chairman is to run the Board. This means that he must decide on its composition, ensure that it is balanced, set out its agenda, organise its work efficiently, and guide its deliberation to reach sound strategic and policy decisions. It is through the Board that the company takes drumbeat from the Chairman.

²³⁷ Clause 6.8.

²³⁸ Clause 6.11(d).

²³⁹ Clause 6.11(e).

²⁴⁰ Clause 6.11(f).

²⁴¹ Clause 6.12.

²⁴² Douglas transcript, p. 38:

Q. ... Until say around May, how would you say the Board of Fairfax worked? Were there any cliques or voting blocs, factions within the Board?

A. No.

Q. Were there any groups of investors that —

A. Not that I noticed.

Q. — had factions in terms of a shareholding stake? ...

A. No.

²⁴³ Muscat (#1) transcript, p. 39:

Q. Just a couple of questions about how the Board of Fairfax has worked while you have been a director there. Have there been any sort of clique or factions within the Board members? Are there any definable groups?

A. No, none that you would describe as definable groups or factions, as such. There has been innuendo of representing people outside, or having or taking an interest, but I don't have anything substantial to say that there is.

Price transcript, p. 36:

Q. So then I suppose coming back to my more general question ... about cliques or voting blocs, are there any particular issues that — I suppose it's difficult. Are there any issues that have directly or indirectly concerned Mr Packer's or CPH interests that have been for determination by the Board whilst you've been a member of the Board of Fairfax?

A. No, I mean, the whole objective of the Board is to improve the value of the business for the benefit of the shareholders ... And I think that the Board had got to the stage of working extremely well and was not blind-sided or consumed with the activities of the opposition or PBL/Packer. There's no evidence during my time on the Board of that being the case and I think that, you know, just to make the point in a real — in a professional business sense, the change from Conrad Black and Dan Colson provided the opportunity for, I think, a united Board. You know, it was less political and we were trying to be totally focussed on improving the business, not politics either in Canberra or within the company.

²⁴⁴ Powers (#2) transcript, p. 70:

A. ... I make a point at every Board meeting to go around to every director and ask them if they want to raise any issues and encourage them to ... Sometimes you regret that.

²⁴⁵ Carnegie transcript, p. 38.

²⁴⁶ Powers (#2) transcript, p. 48.

²⁴⁷ Powers (#2) transcript, p. 45.

²⁴⁸ Powers (#2) transcript, p. 39:

Q. What's the role of committees? Are decisions made by committees? This is the Board sub-committees I'm talking about.

A. ... I don't think there's any formal delegated authority. Take, for example, the audit committee. It wasn't clear whether they formally review budgets or not. I believe they should because I think you need a serious working session of Board members going through the numbers at a reasonably serious stage. So next year we will ... The committee reviews the accounts recommended, but it doesn't approve the accounts, the Board approves the accounts. So I don't think there's any binding decision-making authority there.

... committees can implement decisions ... Certainly on Hercules sub-committee ... decisions come out of that and a plan of action, a formal – ‘We need to accelerate this’, or, ‘Let’s look at this issue before this issue’.

Q. So it [made] process decisions as opposed to substantive type decisions?

A. Yeah. They can’t buy or sell assets – no hiring or firing. I forget what nomination committee – Board members would vet Board members and come up with a recommendation but then bring it to the full Board ... The Board approves the accounts. The audit committee basically has a job of vetting, saying we’re happy with them, but then the Board ultimately approves them. There was serious discussion with the Board on that abnormal thing.

²⁴⁹ Powers (#1) transcript, p. 19

²⁵⁰ Powers (#1) transcript, p. 87.

²⁵¹ Powers (#1) transcript, p. 54.

²⁵² Gonski transcript, p. 21:

A. And my recollection is that he would have told me on Tuesday morning of the 12th. And the reason I know that is that I had a Coca-Cola Board meeting that afternoon and I took Dean aside and said, ‘There’s been an unbelievable development. It may well be that Brian is thinking of putting his name forward as the nominee,’ and Dean’s response to me was, ‘That’s fantastic, because I believe that the trust should have a nominee and he is an excellent businessman.’ I decided, rightly or wrongly, that I should ring Julia because I felt that I had spoken to her before. I rang —

Q. You knew her concerns, yes?

A. That’s right. I rang Julia, and actually I went across to the road and saw her, just to talk it over. She was delighted. She said that this was a person who had business acumen. That’s exactly what she wanted, different kettle of fish, and she hopes that they’d go ahead with it because Brian had raised it tentatively, and those were the two discussions I had.

Q. And then what was the next time you were involved in a discussion about that matter?

A. The next time was on Monday morning. I was there for the audit meeting, which took place prior to the Board meeting and Rod Price asked if I could come and see him. He’s not a part – was not a part of the audit meeting. So I went and saw him and he said, ‘There’s been a dramatic turn of events. I received a call this morning. Brian Powers is being put up as the nominee of FXF; do you know about it?’ And I was honest about it. I said yes, I did, and he said, ‘What do you think?’ And I said, ‘What do you think?’ and he said that he thought it was a different kettle of fish, that he thought it was a very good situation for the Board and a very good outcome, and he said that he was assuming that Neville’s candidacy would be totally withdrawn.

At that point, he hadn’t received any letters, so I went back to the meeting and he called systematically each of us out.

Everybody came back dying to talk about it. And after the audit meeting, I had occasion to talk to Roger Douglas, Julia and a couple of other directors, I think Mark Burrows and Roderick Carnegie, as they sort of wandered into the Boardroom, and it was undoubtedly general support for Brian Powers as a candidate.

Douglas transcript, p. 15:

Q. Going now to the 18th, you said that you got a call in the morning, I think?

A. Yes.

Q. Who was that from?

A. I had a call from Mr Powers. I was meeting with Rodney Price prior to the Board meeting. I am not 100 per cent certain of this, but I believe Rodney had advised me that the trust nomination was not now for Neville Miles but rather for Brian Powers, and he was comfortable with that and felt that he would make a good director. During that discussion I had a phone call from Mr Powers saying he had sent a letter and hoped that I would support his nomination.

Q. And what did you say to that?

A. This is the best of my recollection, given that I knew he was going to be the nomination, that he was coming to lunch at that stage, ‘I look forward to working with you. See you at lunch.’

Q. Did he say anything about Fairfax or how it was run or his intentions?

A. The phone call was probably 30 seconds to a minute, no more.

Q. How well did you know Mr Powers?

A. I had never met him before in my life.

Q. So just introduced himself?

A. That was the purpose of the call. In my understanding, he was endeavouring to ring as many of the directors as he could.

Q. And what time was that?

A. It was shortly before the Board meeting. My memory was that I took the phone call and stood up and went into the Board meeting.

Q. That conversation was very brief. Did he mention Kerry Packer at all or CPH?

A. No.

Q. ... Were you happier with Mr Powers as director as opposed to Neville Miles?

A. Well, I had not met either of them, but people told me that Mr Powers would make an excellent director.

Q. Who were they?

A. I think Rodney believed that he would be, and I think people at the Board, other members of the Board, expressed that view when it was discussed.

Q. We will go to that now ... Sir Roger, you were ... present?

A. I was.

Q. There is a notation of the letters received by all directors from the FXF Trust nominating Mr Brian Powers to be director. The directors discussed his credentials and publishing experience. It was resolved to invite Mr Brian Powers to join the

Board subject to him severing all ties with PBL and satisfying the rulings of the Australian Broadcasting Authority. Could you recount briefly the discussion that took place at that meeting amongst the Board members?

- A. I think a number of Board members expressed confidence in Mr Powers' experience and ability to do the job. I think Mr Price raised the issue of the potential need to satisfy the Australian Broadcasting Authority, and felt that that was for Mr Powers to handle primarily.

Price transcript, p. 24:

- Q. So when did you first hear that Powers was to be nominated as a director of Fairfax?

A. Early on the morning of the 18th.

- Q. And from whom did you hear that?

A. Neville Miles.

- Q. What was your reaction to that?

A. Well, to be honest with you, I thought it was positive.

Carnegie transcript, p. 25:

So I was aware and, I mean, if had you asked me whether or not I would support Brian Powers going on the Board, the answer is yes because I thought he is a sensible business person who discusses the issues sensibly and if he – so as soon as the possibility came of him being on the Board, I was in favour and I was not opposed to the idea that Rod Price should step down as Chairman and that Brian Powers should take over.

Greaves transcript, p. 20:

- Q. What was your attitude? What did you say to Powers about it?

A. I was pretty keen to support it. I have a lot of respect for Brian Powers' ability as a businessman.

Muscat (#1) transcript, p. 20:

- Q. ... So at the Board meeting when the discussion took place in relation to Powers' appointment, what can you recall of that discussion? Did you express any views about the matter?

A. No, I think, if memory serves me correctly, it was the Chairman making reference to the letter from the trust and then putting it – and then asking for views and comment. I don't think I put a specific view. I think the general consensus within the room was that Brian Powers brought a great deal of experience with him in terms of media and publishing in particular and if there was going to be an appropriate representation from the trust, that he would be the right sort of candidate providing it met with the proper legal questions that you would ask in relation to the ABA, et cetera, and those other matters.

²⁵³ Muscat (#1) transcript, p. 20:

- A. ... I think the general consensus within the room [at the Board meeting on 18 May 1998] was that Brian Powers brought a great deal of experience with him in terms of media and publishing in particular and if there was going to be an appropriate representation from the trust, that he would be the right sort of candidate providing it met with the proper legal questions that you would ask in relation to the ABA, et cetera, and those other matters.

²⁵⁴ Douglas transcript, p. 26:

- A. ... We came to the view that the appointment of Mr Powers as Chairman was in BIL's interest, that he had the time and that he had the skills to do the job. In fact, one person believed that there wasn't anyone better equipped in Australia to do that, that our interests were aligned, Mr Powers and BIL's interest were aligned. We both wanted to improve the performance and, as a result of improving the performance, improve the share price. It was generally agreed amongst us that it was appropriate that we move in that direction

...

We discussed whether he was an appropriate person and had the skills to carry out the job of Chairman but, more particularly, did he have the skills along with Jonathan Pinshaw to undertake the review which aimed at increasing the revenue line and reducing the cost line which would bring about an improvement in our performance and therefore the share price, and the answer was yes.

²⁵⁵ Muscat (#1) transcript, p. 37:

- Q. Were you aware of any discussions between Pinshaw and Powers as to how their relationship as Chairman and Deputy Chairman would work in practice?

A. No, but I think there was some discussion when I was talking about Sir Roger Douglas, with Pinshaw in the room, that, as Deputy Chairman, Jonathan would be closely involved with Brian as Chairman and that he would be quite active as well, looking at various aspects of business.

- Q. Is that your understanding of how things are now to work?

A. That involvement and interest?

- Q. Yes.

A. Yes, sure.

²⁵⁶ Greaves transcript, p. 31:

- Q. Okay. When did you first hear that Brian Powers was to become Chairman of Fairfax? How did that come about?

A. Bob had a meeting with Sir Roger Douglas and Jonathan Pinshaw one evening. He came out of his office and told me that he was going to be put up, that Jonathan would be Deputy Chairman, Rod Price would resign, and Brian would be nominating himself as Chairman.

- Q. What was your reaction to that?

A. I was surprised. I mean, a 25 per cent shareholder giving up the Chairmanship is a surprise in my view.

- Q. And —

A. Yes, I was just surprised. It doesn't usually happen that way.

- Q. How was it explained to you in terms of what was the strategy or how do you understand how that came about?

A. The marketplace had been very critical of Rod Price sitting in London and being Chairman of a reasonably dynamic organisation, and I felt that personally; so did Bob. It is very difficult working with – ostensibly the Chairman is your boss as a representative of the Board. So I thought it was a pretty good idea to have a Sydney based Chairman. I wouldn't have liked to see Roger Douglas for the same reason living in New Zealand. I think it was probably perceived as a better role for the marketplace for Brian to be, as opposed to Jonathan, who was just into BIL several months prior to his appointment on our Board. Brian was the logical person for it.

²⁵⁷ Minutes of 29 May 1998 meeting of Fairfax directors, p. 2. Sir Roger Douglas tabled the resignation of Mr Price in his absence at the beginning of the meeting. Mr Wills was not present at the meeting, and Mrs King was not present for the motion to elect Mr Powers as Chairman.

²⁵⁸ Douglas transcript, p. 25:

Q. 4pm on the 26th. Were there any discussions between the end of that meeting and the beginning of the next meeting between you and anyone else about the meeting?

A. Yes.

Q. Who was that with?

A. By the end of the meeting I was of a mind that we needed to move on the Chairmanship earlier than I had earlier contemplated. I therefore discussed that view with BIL executives in the Australian office. That would have been Peter Pedley, Don Conway, Jonathan Pinshaw and also Paul Collins, our former CEO who was in Australia. We came to the view that the appointment of Mr Powers as Chairman was in BIL's interest, that he had the time and that he had the skills to do the job. In fact, one person believed that there wasn't anyone better equipped in Australia to do that, that our interests were aligned, Mr Powers and BIL's interest were aligned. We both wanted to improve the performance and, as a result of improving the performance, improve the share price. It was generally agreed amongst us that it was appropriate that we move in that direction ...

Gonski transcript, p. 35:

Q. How do you think the Board will change in its operation now that Brian Powers is Chairman of the Board?

A. I think that Brian Powers will be a much more active Chairman than we have had before. I think that Brian Powers is more of a businessman than we've ever had, during my time on the Board. He is more of a businessman than the previous Chairman. My view is that the budgetary process that we would be going through in the next month or two will be much more precise, exact and have much more involvement of the Board than previously, and in fairness to Rod Price, he envisaged that as well.

My view is that the Board is more harmonious, as I've said earlier, than ever before ...

Carnegie transcript, p. 39:

Q. And what sort of work do you think he'd be doing?

A. I think he'd be seeing – I hope is he going to be seeing major advertisers and major people that are sources of revenue. I hope that he is seeing all the facilities and the major sources of cost. I hope he is talking to the journalists to get some independent sense, maybe some of the people in the teaching in the universities, to get some sense of whether the quality of the journalists, which is ultimately the material upon which the integrity of the paper is based, whether that is a standard that is satisfactory. I would hope that he is spending some of his time in trying to get a sense of the electronic media and the way in which the developments in the electronic media might have an impact on Fairfax.

Q. And I presume you expect him to be working closely with management on these issues?

A. I totally – absolutely, in all of those.

Q. So in that capacity, what influence do you think he would have in relation to those issue in relation to management developing proposals or—

A. I hope that he has a questioning attitude which says, 'Is this going to give us a significantly stronger position in three years than we have today?' because I don't think that he should be involved in what I call the day-to-day, this year, which would have an impact on this year, he should be saying, 'Look, if we do that, where are we going to be in three years? Where are we going to be in five years?' that's it.

Q. Even that sort of attitude, isn't that likely to be influential on the way management does its job?

A. I hope so, I hope so. It would be very nice to have a Chairman who is putting up much time and asking those kinds of questions in Fairfax because it's a long time since it existed.

Greaves transcript, p. 31:

A. ... ostensibly the Chairman is your boss as a representative of the Board. So I thought it was a pretty good idea to have a Sydney based Chairman ... He understands our business ... he is understanding the dynamics of how we've grown and how our cost base should come down, and what his views are and that; and he supports this process that we're going through at the moment, so he's quite involved in that. And he also adds a lot of knowledge from the online interactive media type world that we're going into where nobody really knows where it's going to end up. His experience in pay TV, my experience, and all our online development, we've got to be there. We've got to do something. And he's a great mind in that regard. I think it's fantastic that he is there.

Muscat (#1) transcript, p. 39:

Q. So you would expect him to have, I suppose, a fairly hands on role —

A. I would expect —

Q. — in the future of Fairfax?

A. I would expect that as Chairman, and probably more so than previous chairmen, because of the fact that he is residing here. He does not appear to have any other job that he needs to worry about so he can give it full focus. He has a good strategic mind and a high energy level, so I am sure that he will have a lot of time to think about it. I would hope that, from my point of view, that will be a support to me as much as anything else.

-
- ²⁵⁹ Powers (#1) transcript, p. 47.
- ²⁶⁰ Powers (#2) transcript, p. 18.
- ²⁶¹ Powers (#2) transcript, p. 17.
- ²⁶² Powers (#2) transcript, p. 19:
- Q. So the process was you reviewing the composition of these committees, having some ideas and discussing them with Jonathan, with your Deputy Chairman?
- A. Yes, and then the other directors.
- Q. Sounding out some of the other directors in accordance with your ideas with Jonathan and then the matter finally being discussed at the Board meeting?
- A. I think I spoke to the other directors, other than Sir Roger who Jonathan undertook to talk to ...
- Q. How many directors would you have caucused with about this prior to the Board meeting?
- A. I think – John reminds me not Dean Wills because he wasn't —
- Q. But virtually all the others?
- A. I believe all the other non executive directors and I believe I probably – and I believe both John Greaves and Bob Muscat I would have talked to before.
- ²⁶³ Minutes of 18 May 1998 meeting of Fairfax directors, p. 3.
- ²⁶⁴ Muscat (#1) transcript, p. 23.
- ²⁶⁵ Muscat (#2) transcript, p. 44.
- ²⁶⁶ Muscat (#2) transcript, p. 53:
- Q. Just a few queries. The nomination committee, what does that do?
- A. The nomination committee, that looks at directors and new directors and that sort of thing.
- ²⁶⁷ Powers (#2) transcript, p. 18.
- ²⁶⁸ Minutes of 26 June 1998 meeting of Fairfax directors, p. 4.
- ²⁶⁹ Minutes of 26 June 1998 meeting of Fairfax directors, p. 4.
- ²⁷⁰ Powers (#2) transcript, p. 17.
- ²⁷¹ Minutes of 26 June 1998 meeting of Fairfax directors, p. 3.
- ²⁷² Muscat (#2) transcript, p. 53:
- Q. That committee, it does make some decisions, is that right, because from my reading of —
- A. Yes, it does. It talks about upcoming results and how they are going to be handled and matters in relation to finance and housekeeping matters in that respect.
- Q. And the people that come together to make the decisions are Mr Pinshaw, Mr Gonski, Mr Burrows and Mr Powers. It is not yourself?
- A. John Greaves is on that committee as well.
- Q. Is that right?
- A. Finance director.
- Q. Because our records don't seem to indicate that.
- Q. So although you may attend these meetings, you don't actually have a decision-making role, although these four other people or whoever is on the committee do?
- A. I certainly have an input in when I think it is appropriate.
- Q. How are decisions made there? ... Those committee members present?
- A. Yes.
- ²⁷³ Powers (#2) transcript, p. 18:
- A. No-one thought they were on the committee and for some reason when they redid Bob Muscat's contract earlier in the year Rod Price decided everyone should be on the committee. It made me wonder why there was a committee, but they ended up doing the contract without bringing him in the committee in any event. But compensation committees are usually ones quite frankly that look at stock options and look at the chief executive's salary, I think part of the unusual committees that are not very active, quite frankly. I think this company will need a reasonably active compensation committee because we are in a cyclical business and we will basically have to have on our staff side a lot more variable than fixed costs, which means minimising salary increases in the future and going to a bonus incentive system ... I looked down the list and thought who might be knowledgeable and might have an interest in doing some work on that list and I thought that, who expressed an interest and looked like she was looking at numbers more closely than some Board members was Julia King, if she was willing to do it, because she is in Sydney so it is easier for management, who would be doing a lot of the spade work on that too, so I suggested her and asked her if she would do it ... she said she didn't know, she would have to think about it for a day or two. So she thought about it and said yes, because it hadn't taken any time to date before.
- ²⁷⁴ Powers (#2) transcript, p. 2:
- Q. A general question: What role have you been playing as Chairman of Fairfax since your appointment on 29 May, about ten weeks ago? Just quoting you back, you said you were going to roll up your sleeves and work in the company. Have you been doing that?
- A. Yes.
- ²⁷⁵ Muscat (#2) transcript, p. 2:
- Q. When you spoke to us on June the 10th you indicated you expected Brian Powers to have a fairly hands-on role as Chairman ... Has this been the case?
- A. Well, certainly having a lot more interest in the detail of the business, but no more than a residing Chairman, if you like ... Brian resides in Sydney, that obviously makes it easier from his point of view to spend more time, so he is spending

more time in the office. But they are on issues in relation to the overall company and what we are doing, so there is certainly an interest there but, yes, certainly more time than previous chairmen ... in the office two or three days ... There was an office available for each of the chairmen to use.

²⁷⁶ Dews transcript, p. 36:

Q. Can I just ask you a general question about what influence do you think Brian Powers' presence at Fairfax has had in general and has he sort of caused any change in the way Fairfax is run or in its operations since he arrived?

A. Well, he's certainly a much more active Chairman than any Chairman we've had since I've been there and he's certainly much more engaged in the business from my perspective than any other Chairman.

²⁷⁷ Powers (#1) transcript, p. 49.

²⁷⁸ Kerry Packer transcript, p. 27.

²⁷⁹ Kerry Packer transcript, p. 29.

²⁸⁰ Kerry Packer transcript, p. 29.

²⁸¹ Dews transcript, p. 37.

²⁸² Powers (#2) transcript, p. 54:

Q. Do you see yourself as a managing director?

A. Definitely not. If I wanted to be managing director I would have stayed in my last job.

Q. Is there a managing director of Fairfax?

A. Unquestionably Bob.

²⁸³ Powers (#2) transcript, p. 70:

Q. ... do you regard Mr Muscat as compliant to your views?

A. No.

Q. In his executive role?

A. No.

Q. In relation to Board matters or in relation to matters that might go to a Board, will he only do what he knows you are in agreement with?

A. No, not at all ...

Q. If you differ with Mr Muscat on a matter that he wishes to go to the Board and you do not, would your view be determinative, that is, that it should not go to the Board?

A. No.

²⁸⁴ Powers (#2) transcript, p. 54:

A. ... Bob's a strong chief executive. Some of the questions about Bob being kind of dominant, Bob is a very strong chief executive. Two decisions that quite frankly I made it clear, certainly Bob would have a take that I wouldn't have fired John Alexander if I were he ...

²⁸⁵ Powers (#2) transcript, p. 54:

Q. Do you see yourself as a managing director?

A. Definitely not. If I wanted to be managing director I would have stayed in my last job.

Q. Is there a managing director of Fairfax?

A. Unquestionably Bob. Bob's a strong chief executive. Some of the questions about Bob being kind of dominant, Bob is a very strong chief executive. Two decisions that quite frankly I made it clear, certainly Bob would have a take that I wouldn't have fired John Alexander if I were he ... I made that clear to Bob. I said I would support it if that is what he wants, but reluctantly. Bob is strong, as he should be, or he would be ineffectual in that position.

Q. The decision about Alexander was made before you got into place as Chairman, isn't that fair?

A. Oh, before Chairman, he was authorised to look into, not as clear – yes, several Board members expressed concern about that, they were very surprised that he actually went and fired him, although I think he was clearly given authority. Bob is not a weak chief executive.

Q. And the other decision you mentioned ... that is very much a matter for him, isn't it?

A. No, it is a Board decision ... and I went along with the recommendation ...

²⁸⁶ Powers (#2) transcript, p. 53:

A. Bob will say, 'Will you sit in on this meeting', and I will say, 'Yes', and I will go in and then I will say, 'Listen, it sounds good to me but what we need to see is numbers on how it will really work'.

Q. These are nitty gritty staff meetings?

A. No, not nitty gritty, they are 10 minute meetings in Bob's office. Bob will come back my office and say, 'Listen, we are going to talk about this, do you want to come in'.

Q. With subordinates of Bob?

A. Nigel Dews, who runs this area, and I think he has been, and then when he was going to go away Nick set up one of the meetings.

²⁸⁷ Powers (#2) transcript, p. 59:

A. ... I have tried to be effective as a Chairman but not undercutting Bob as chief executive, which is why I don't go to staff meetings and stuff or anything like that. Other than getting information from John, if someone walks past the office I will chat with them, but I don't call meetings or hold meetings or intervene other than through primarily Bob's request.

²⁸⁸ Powers (#2) transcript, p. 44:

A. Well, the market made the wake-up call and then I didn't let them hit the snooze alarm, is probably the best way to put it. The wake-up call had come and they were maybe going to hit the snooze alarm before they said, 'Oh, shit, I've got to get up'. I said, 'You know what? No snooze alarm', or 'a two-minute snooze alarm, not a five-minute'.

-
- Q. But that came from you?
- A. Yeah, yeah. It came from me because I had become the point man for the Board. I don't have any doubt over my conversation with the Board. The Board was not pleased with what had happened. It's the Board's fault as much as management's fault, and I think the Board realised that and said – they were on the hot seat. They understood that.
- Q. The point man I'm familiar with from reading American military novels. That's a military term, right, for someone who's leading the patrol in combat?
- A. Yep, yep.
- Q. Isn't that right?
- A. Now you've got me intrigued. Yeah. I'll rephrase it, because it hasn't been combat, at least not from my perspective, and I don't think from anyone else's perspective. But I was the primary point of contact as Chairman responsible for reviewing stuff. I don't send stuff to the Board, important stuff to the Board as a Chairman without having reviewed it. I don't receive Board papers at the same time other people do and I don't think any Chairman I know does.
- ²⁸⁹ Powers (#2) transcript, p. 44:
- A. I had become the point man for the Board. I don't have any doubt over my conversation with the Board. The Board was not pleased with what had happened. It's the Board's fault as much as management's fault, and I think the Board realised that and said – they were on the hot seat. They understood that.
- Q. The point man I'm familiar with from reading American military novels. That's a military term, right, for someone who's leading the patrol in combat?
- A. Yep, yep.
- Q. Isn't that right?
- A. Now you've got me intrigued. Yeah. I'll rephrase it, because it hasn't been combat, at least not from my perspective, and I don't think from anyone else's perspective. But I was the primary point of contact as Chairman responsible for reviewing stuff. I don't send stuff to the Board, important stuff to the Board as a Chairman without having reviewed it. I don't receive Board papers at the same time other people do and I don't think any Chairman I know does.
- ²⁹⁰ Powers (#2) transcript, p. 47.
- ²⁹¹ Powers (#2) transcript, p. 47.
- ²⁹² Powers (#2) transcript, p. 71:
- Q. What is the function you are playing in reviewing Board papers that management has prepared?
- A. I think a variety of roles. One is quality control, as I said, in a sense that to make sure the relevant position put forward, that they are conveying what is intended to be conveyed and that they will anticipate and answer questions that the average Board member will have, and the level of ... Board papers is still very low. There is not enough information to make fully – again, the Canberra Times, as you saw, that is what they wanted to give the Board to make a \$176m bid, or 155 then 135. That is not a Board paper in my mind when you are going to spend up to half of your spending power. But any Chairman has to, and that would be a process to. Primarily quality control and also, if I disagree with something, yeah, I want to make sure that we have discussed it.
- Q. But a disagreement in your view, would it mean that Board paper wouldn't go ahead?
- A. No. Again, the Canberra Times, I said, 'Listen I am real happy, we don't have to have a unified position on this. I am happy to take this to the Board and they may feel differently?'
- ²⁹³ Powers (#2) transcript, p. 45.
- ²⁹⁴ Muscat (#2) transcript, p. 45:
- Q. And how is that difference of view accommodated, by consensus, everyone —
- A. Not always.
- Q. When it is not accommodated by consensus, what happens, as you see it?
- A. Well, someone has a different point of view.
- Q. But how are all those different points of view resolved? How is the difference resolved?
- A. Sometimes it hangs in the balance, I suppose. Someone's point of view that might be different on an issue continues to be different.
- Q. But something has to happen to resolve those differences of view, doesn't it?
- A. I suppose the person with the difference of view goes with the rest. It happens.
- ...
- Q. But ultimately someone's say has to prevail and usually that person will be the most senior person in the company; right? Isn't that right?
- A. Yes.
- Q. Well, isn't the Chairman senior to you, for example?
- A. Well, I certainly see the Chairman as someone who is important within the company and certainly in terms of the relationship between he and I, that is important.
- Q. What do you mean by important?
- A. Well, I would like to think that I have got the Chairman's support in the job that I've got to do.
- Q. Do you feel you are able to cross him, do something without his support?
- A. I have not experienced that yet.
- Q. Hasn't happened?
- A. No.
- Q. And do you expect it to happen on anything?
- A. Oh, I'm sure it will. It might be minor, it might be major.
- Q. And if it's major, how do you think you would resolve that disagreement between the chief executive and the Chairman?

- A. I'm not sure yet. I'm only saying that I haven't had that experience yet and I will wait and see what happens when it does. But I haven't had any issues with Brian Powers that have necessitated a slinging match, if that is what you mean.
- Q. ... there has not been a single issue where really you and Mr Powers have had a disagreement of view?
- A. Probably had different points of view but not to the point that there has been any aggressive debate. I suppose the Canberra Times is an issue that we might have had a difference of view, in terms what my view of the value of something might have been given what was in the offering.
- Q. So his view prevailed there, really?
- A. I suppose it has but we also took a view that it wasn't something – that it was something that we needed to be measured in in whatever we did at the end of the day. And I think also, we also took a view that readers of Rural Press would actually take a more emotional and more aggressive view about the Canberra Times because of them being a regional player, them having more to gain by being the owners of the Canberra Times, also the fact that the Chairman of Rural Press, John B Fairfax, was once the general manager of the Canberra Times, so there was some links from that point of view. So we knew that there would be somewhere well out of reach of what we would ultimately want to pay. I don't know what the final number was from their point of view because there has been no announcement, so it is still up in the air.
- ²⁹⁵ Muscat (#2) transcript, p. 45.
- ²⁹⁶ Powers (#2) transcript, p. 28.
- ²⁹⁷ Powers (#2) transcript, p. 45.
- ²⁹⁸ Powers (#2) transcript, p. 48.
- ²⁹⁹ Muscat (#1) transcript, p. 30:
- Q. At the time you presented the matter to the Board on 18 May, was it within your contemplation that you may have to sack Alexander?
- A. Yes.
- Q. Was that a real possibility? Was that what you were thinking, that you were going to the Board to get final endorsement?
- A. Yes.
- Q. Did you have other strategies that you thought may have resolved the situation?
- A. No, I was pretty convinced that that was the sort of outcome.
- ³⁰⁰ Muscat (#1) transcript, p. 29.
- ³⁰¹ Muscat (#1) transcript, p. 28:
- Q. So what was it that led to the – what was the straw that broke the camel's back?
- A. Well, I was questioned by the journalist's House Committee within the organisation and they put exactly that point: What was the straw that broke the camel's back and alluded to a fact that there was a story published about a leaked letter from Steve Harris to John Alexander that was sent to him in confidence about a number of measures such as merging of bureaus and overseas bureaus et cetera. What I said was it wasn't the straw that broke the camel's back, it was a decision I made and came to of irreconcilable differences that I had with John Alexander. So although the publishing of the article wasn't the issue, it was a matter of whether I had faith in him to do what needed to be done and it was a culmination of a number of things and me taking a view that at some point it had to be dealt with, and I thought the point had come.
- Q. If it wasn't that particular issue then, why had the point come?
- A. Well, purely because we were going to embark upon a whole process within the company where things needed to be looked at differently. There needed to be a fresh approach and people were needed to leave behind some of the things they thought were absolutely necessary and I suppose, in part as well, that he'd established himself as a power base, had all the resources, which is fine, except didn't see those as being part of the overall company success but saw it as his individual success and the success of the Sydney Morning Herald at everyone else's expense. So one of the things I suppose I get paid for is to make judgments about people and their ability as much for today as for the changes that we would be looking forward to tomorrow, so I took the view that there needed to be a change.
- ³⁰² Muscat (#1) transcript, p. 30.
- ³⁰³ Muscat (#1) transcript, p. 30.
- ³⁰⁴ Muscat (#2) transcript, p. 50:
- Q. What level was that offer taken? Do you know, at the editor level?
- A. Well, the publisher level.
- Q. The publisher, sorry.
- ...
- Q. And have you had discussions with the editor of the Sun Herald about this matter?
- A. Only in relation to, I asked him the question, 'Where did the idea come from', because I don't attend their meetings every week but I just rang him and said, 'Where did that idea come from, it is a good promotion', and he said, 'Internally' and he said I think the circulation department came up with the idea.
- ³⁰⁵ Muscat (#2) transcript, p. 50:
- Q. The Sun Herald in Sydney, sorry. How did that arrangement come about?
- A. I might ask the same question. Basically it was an initiative by the Sun Herald and I'm not sure whether it was something that – I think it was through the circulation department and in discussion with the publisher of the Sun Herald, Alan Ravell, but there was certainly no involvement of Mr Powers or any relationship that he has with ACP that prompted any of that.
- ³⁰⁶ Bryce Corbett, 'Alexander Cosy at House of Packer', *The Daily Telegraph*, 5 August 1998, p. 13.

³⁰⁷ Powers (#2) transcript, p. 56.

³⁰⁸ Powers (#2) transcript, p. 63:

Q. The other matter we were talking about before, are you aware of the basis upon which Conspress magazines are being offered in Fairfax newspapers two for one at present?

A. To tell you the truth, I don't know that I know the terms of it. I knew about it, that it was going to happen, as we had a cover price increase. We had a couple of promotions planned, one of which Bob said was with ACP and then he made a comment that when someone in the paper said that Brian Powers is working with ACP, I didn't know about it until Bob told me. I don't know what the business deal was.

³⁰⁹ *The Federal Capital Press of Australia Pty Limited, Information Memorandum*, May 1998, p. 1.

³¹⁰ *The Federal Capital Press of Australia Pty Limited, Information Memorandum*, May 1998.

³¹¹ Muscat (#2) transcript, p. 31:

From the management's point of view, and this is going back some time, I mean, it was when we did our strategy review process in terms of opportunities and things that we may want to do, that was certainly one of the properties that we saw as being appropriate ... except the view was that the share price of that was over the top... we always took the view that we were going to be very careful about the sort of interest we might project, and it wasn't going to be 'a must-have'; it had more of a flavour of 'It would be nice to have at the right price.'

³¹² Powers (#2) transcript, p. 29:

A. ... Bob was definitely there – it was in his office – and I think John Greaves, so they asked me if I'd come in so they could take me through it so we could decide what we were going to do at the Board meeting. I went through the numbers. This is an area I've had a lot of experience in, buying and selling companies.

³¹³ Powers (#2) transcript, p. 30.

³¹⁴ Powers (#2) transcript, p. 31.

³¹⁵ Minutes of 26 June 1998 meeting of Fairfax directors, p. 4.

³¹⁶ Powers (#2) transcript, p. 32.

³¹⁷ Document entitled 'Draft – Federal Canberra Press (FCP)' dated 22 July 1998.

³¹⁸ Muscat (#2) transcript, p. 33:

... I certainly took a view that it was worth probably more to the tune of 150, 155m ... Do I still hold that view? No, probably not, because there really isn't sufficient upside in the business to justify that sort of investment, and that's why ... our bid price ended up being 130 ... which we knew was going to be well short of what was being sought ...

³¹⁹ Muscat (#2) transcript, p. 34:

Q. Who did the review on the impact on the share price?

A. ... I think Nick Leader [looks after new business development at Fairfax] did that, and there was certainly some discussion with Brian Powers on that impact that would have ...

Q. Who initiated that review on the impact on the share price?

A. I think it came up in discussion that we had with Brian on this document, with Brian Powers and myself, and I think John Greaves at the time.

Q. So he suggested it, Brian Powers?

A. Yes, he did.

³²⁰ Muscat (#2) transcript, p. 35:

Q. And what would it have been over that five-day period that would have caused the bid recommendation to drop in that way?

A. Oh, internal discussions with Brian, Nigel Dews, myself ... I just think some wholesome discussion and a different point of view. Brian was not keen on the Canberra Times' purchase purely and simply that, on a valuation, you know, looking at this sort of price, he thought that it was too much to pay, given the sort of investment that it was, not enough upside ... there was healthy and open discussion on the merits.

³²¹ Document entitled 'Revised Draft – Federal Canberra Press (FCP)' dated 27 July 1998.

³²² Powers (#2) transcript, p. 34.

³²³ Document entitled 'Federal Canberra Press (FCP)' dated 29 July 1998.

³²⁴ Powers (#2) transcript, p. 36.

³²⁵ Powers (#2) transcript, p. 38:

Q. And the recommendation that went into the Melbourne Board meeting was, what, 125; is that right?

A. Yes.

³²⁶ Powers (#2) transcript, p. 36:

Q. During that period from, let's say, 22 July through to the 29th, what input did you have into this issue from other Board members?

A. ... I think I saw David Gonski once and pushed him on – asked him what he thought the price would go at and I pushed him again on the strategic point ... I had a conversation with Jonathan Pinshaw and I believe Mark Burrows, both of them, which I would have done after one of the Hercules sub-committee meetings, I'm not sure if it was together. I remember talking to Mark about valuations ... Mark said maybe it's worth 130, 140, 150. I said that's where I'm coming out. This would have been before I really sat down and did all my homework. I just did numbers for the first time. Then with Jonathan – Jonathan's view was at the right price. I said, 'Yeah, it is, but we're not going to get it at the right price. Also, I really have questions about management. They're stretched'. Jonathan said, 'The more I think about it, you're right on that. This isn't critical. Let's not stretch them anymore'.

³²⁷ Powers (#2) transcript, p. 38:

- Q. And, as a result of discussions at the Board meeting, a bid was made for 130?
 ...
- A. ... Basically it was kind of a compromise recommendation. I said left to my own devices I wouldn't bid on this company because I thought this is the meeting with management. I thought the management issues and capital issues were dispositive. I said, 'Tell me if you can steal it, put in a bid'. I said, 'I don't mind'. I said, 'I wouldn't do it. We're not going to get it, so it's academic, but if you want to put in a bid, as far as I'm concerned, I'm happy to have a bid go in'. So it went to the recommendation with 125 ...
- Q. So a bid went in knowing effectively that it wouldn't succeed?
 A. Yes. Management wanted to put a bid in.
- ³²⁸ Powers (#2) transcript, p. 39:
- Q. Was there much discussion at that Board meeting?
 A. No, there wasn't because Bob went through it and was a bit diplomatic. I said, 'listen, I think there's probably a difference of view on this. I think management would pay more'. I said, 'It's going to be a joint position, but I feel strongly' – and I took them through the reasons why. Everyone basically said, 'That sounds right'.
- Q. So the Board basically went with your analysis of the view?
 A. Management wasn't arguing against it, mind you.
- ...
- A. [\$125 million.] That's what we jointly agreed to go to. I believe management, left to their own devices, would have wanted to bid somewhere from 150 to 180 for this paper.
- ³²⁹ Muscat (#2) transcript, p. 36:
- Q. Where did you stand in the debate on the purchase?
 A. Well, my view was I thought it was a reasonable addition to have. I wasn't hung up on the price, although I took a view at the start that it was certainly north of 155 but not much more. ... at the end of the day, I suppose, what we did do is have a number of discussions and worked through a final figure that we were happy with.
- Q. Yes.
 A. ... as a final analysis we said, 'Let's put the bid in at 130.'
- Q. When you say 'we', the question I'm focusing on is before it went to the Board, what the recommendation was?
 A. That would have been my decision.
- Q. And to what extent was Brian Powers —
 A. Oh, well, he had a view that —
 Q. — influential in that decision?
 A. Oh, he was reasonably influential in that decision, yes.
- Q. I mean, hasn't it always been his view that it was much too high and that he'd been driving the price down?
 A. Yeah, he had a view it was certainly not worth the sort of numbers that we were talking about originally ...
- Q. In essence, that view has prevailed, hasn't it?
 A. Well, it certainly prevailed in the bids we put in.
- ³³⁰ Muscat (#2) transcript, p. 40:
- A. ... And I suppose it becomes a question of how much support you have in that view, versus other people's view, and ... there was a Board that has a number of people who have been involved in making these sorts of bids and these sorts of decisions that have had input, and I include in that Brian Powers, as I do David Gonski and Mark Burrows ... they certainly provided their view and input at those meetings and there was certainly a consensus at the end of the day that we shouldn't put in a bid that was too high, and I suppose we got convinced by good argument at the end of the day that that was appropriate, full stop ... 'we' meaning the people that were responsible for working this thing through, namely, Nigel Dews, Nick Leader, who did the groundwork for this, and John Greaves and I, who had the discussions with them on the subject, and then, after that, discussions with the Chairman and others.
- Q. So it's fair to say you were, in the end, largely convinced by Brian Powers and possibly David Gonski; is that right?
 A. And possibly Mark Burrows.
- Q. Do you disagree with the proposition that Brian Powers was significantly influential in arriving at the price —
 A. No, I don't, I don't —
 Q. — that was put to the Board?
 A. I don't disagree that he was. I mean, he certainly had a view, and a strong view, but he didn't say, 'Now, listen, don't do this because I don't agree.' He said, 'Well, you know, this is my view on it.' Now, he's certainly done more deals than I have in my lifetime, so you're obviously ... going to take some note of that, and I think that's one of the strengths he brings to Fairfax, that he has done a few deals ... which means that he's had some experience in those areas, as have some other members of the Board. So, you know, sure he's going to have some influence in relation to his view.
- Q. And he did on this occasion?
 A. Yeah, yeah, I think he'd be a dud Chairman if he didn't.
- ³³¹ Muscat (#2) transcript, p. 40:
- A. ... So, I mean, they were providing – they certainly provided their view and input at those meetings and there was certainly a consensus at the end of the day that we shouldn't put in a bid that was too high, and I suppose we got convinced by good argument at the end of the day that that was appropriate, full stop.
- ³³² Muscat (#2) transcript, p. 46:
- A. ... I suppose the Canberra Times is an issue that we might have had a difference of view, in terms what my view of the value of something might have been given what was in the offering.
- Q. So his view prevailed there, really?

A. I suppose it has but we also took a view that it wasn't something – that it was something that we needed to be measured in in whatever we did at the end of the day.

³³³ Powers (#2) transcript, p. 45.

³³⁴ Powers (#2) transcript, p. 45:

Canberra Times, when we were debating it, I said, 'Listen, if you guys feel differently on this' – Bob said, 'We should go in with a unified position'. I said, 'We don't have to'. I said, 'We have difference of opinions. We can work around it. But feel free, raise this with the Board. They may feel differently' ... So that Bob has made a point of wanting to go to the Board with a unified position on stuff. He felt very strongly on the Canberra Times ... it's any chief executive's personality. You have someone who is going to be conducting the meeting, the last thing you want is to put up a paper and say, 'Listen, I read this last night. Geez, this is ridiculous'. You'll have a fiasco on your hands.

³³⁵ Powers (#2) transcript, p. 70:

A. Well, we went to a recommendation and a consensus recommendation to the Board that we have put an offer in at 125. The Board then decided to raise it to 130.

Q. So it was the Board's decision?

A. Yes.

³³⁶ Powers (#2) transcript, p. 70:

Q. So it was the Board's decision?

A. Yes. I made it clear to the Board that left to management's own devices they would have been more aggressive, but left to my own devices I would not bid at all.

³³⁷ Powers (#2) transcript, p. 38:

Q. And, as a result of discussions at the Board meeting, a bid was made for 130?

A. Is that what it made finally?

Q. I believe so. You went overseas, didn't you, during the period after the end of the Board meeting?

A. Yeah, I went overseas. Basically it was kind of a compromise recommendation. I said left to my own devices I wouldn't bid on this company because I thought this is the meeting with management. I thought the management issues and capital issues were dispositive. I said, 'Tell me if you can steal it, put in a bid'. I said, 'I don't mind'. I said, 'I wouldn't do it. We're not going to get it, so it's academic, but if you want to put in a bid, as far as I'm concerned, I'm happy to have a bid go in'. So it went to the recommendation with 125. We defined what stealing it was. I still think that's pretty full price. We defined what stealing was, went to the Board.

I think David Gonski said, 'If it's cost us \$130m, you'll insult them if you put less in'. I said, 'Well, if that's his cost' – and someone said, 'No, I think it's cost us 90', so he said if we verify the cost as 130, you put 130 then. But when it came back it wasn't the cost. But they still put 130. It was moved we weren't going to get it at 125 or 130.

³³⁸ Powers (#2) transcript, p. 3:

The big matters that we focused on after I was elected Chairman, one was the budget. We had a new budget needed to be adopted for the July 1 start of the fiscal year. That has taken a lot of time.

³³⁹ Powers (#2) transcript, p. 4:

A. The first major meeting I went to on the budget, I would have seen some very early drafts of the budget. We had a rather long meeting, I am guessing, sometime the second week of June, with Bob Muscat, John Greaves and Ashley Fenton to go over what was then a reasonably early budget. I think they viewed it as a rather late draft, I viewed it as a reasonably early draft in terms of my introduction to the budget. And it went through where that budget was coming out and I think it was the first time to some extent that everyone but maybe Ashley Fenton, who had mechanically put it together, but I think the first time that Bob and John got to put it in overall context and sit down and think about it. So we went through in detail the budgets for the major mastheads.

³⁴⁰ Powers (#2) transcript, p. 43:

Q. Just one last question before you do, and it's sort of catching up with something you said earlier, quite a long time ago now. You said, perhaps as a throw-away line, that when you are presented with the book, the black book which I think is exhibit B, as far as you were concerned it was an early draft but as far as the people presenting it to you were concerned, it was a late draft.

A. Yeah.

Q. What did you mean by that?

A. They had been through two or three working sessions on each master head budget – I think primarily John; I don't think Bob had been very involved. So this would have been second or third iterations of each section of this, if you will. I haven't seen any of them. Also, in terms of quality of presentations, I viewed it early stage, yeah.

Q. I think what I'm trying to get at is that, from the point of view of the management, that document which they presented to you more or less represented their not concluded but close to final view of where the budget should be going?

A. Yeah, fair question. I don't want to be critical of them. I think the process had just – it's a case where the process had a life of its own and that it's not an interventionist management team, if you know what I mean. It was a legitimate process that publishers worked through and everything was okay and stuff, but, you know, Bob had not, I don't believe – I could be wrong – had sat down and said, 'Wait a minute. You've got to be kidding me. I think Sydney Morning Herald, who just fired John Alexander for blowing out costs, had a budget with substantial cost increasing, including on, I think, marketing and publicity another 4 million or something'. I just use that as an example. But do I think if I wasn't there it would have gone much closer to the original draft to the Board rather than the way we went? Yes, I believe it would have.

³⁴¹ Powers (#2) transcript, p. 7:

-
- Q. I am trying to understand what sort of views you were expressing about, if any at that stage, about the extent of cost cutting and what matters, the shape of the budget —
- A. Well, jumping to the bottom line —
- Q. — the shape of the budget type comments?
- A. Jumping to the bottom line, and we can go back and talk about the process of the meeting if you like also, but jumping to the bottom line, I think I may be wrong in the numbers, I think we decided that if you really took costs that were actual recurring costs and regardless of how you classify them for accountant purposes, that the actual expenses for fiscal year 1997/98 were about 805m. That is after backing out of business we sold. I am confused about \$10m still, but I think 805.
- This budget was coming in I believe at \$25m to \$35m more than that on the expense side and approximately 8m or 9m of that was coming out of paper and the rest just other increases in costs. We took it masthead by masthead and came to pretty much the same conclusion, that that was an unacceptable increase in costs, that that was something that, as I said, 'We will all be unemployed and I can go back to America and work, I don't know what you blokes will do'. I think if that was the budget we had adopted we would have been slaughtered by the market. It was not a prudent or acceptable budget.
- ³⁴² Powers (#2) transcript, p. 11:
- A. ... So we then took the decision to inform the Board of that, so we would give them a look, a very watered down version of this, and the Board papers saying, here is where the first cut came out, our goals will be to go back and come to the base of an 805, run rate with a zero cost increase and, to help jumpstart that, a de facto hiring and wage freeze for other than contracted wage increases, of which there were some.
- Q. That idea or that decision to implement, I am not sure how it is you characterise it, was taken to the 26 June meeting?
- A. Correct.
- Q. How would you characterise it?
- A. Well, generally what happens is management presents a budget, so it would be the management budget, management says the budget we have is not good enough, here is what we will bring back next time, so it was a recommendation from management to the Board.
- Q. But at that stage in a sense you, with management, had —
- A. Certainly that was our recommendation. We believed it was the right thing for the company to do and was going to ask the Board to endorse that.
- ³⁴³ Powers (#2) transcript, p. 11:
- Q. You expected the Board to endorse that?
- A. Yes, I did expect, certainly by the time we got to the Board meeting, I talked to the other directors before the Board meeting. Yes, I was concerned that some would say it wasn't tough enough, that it wasn't a very good effort, but I figured ultimately that if management said that was the best they could do under the circumstances, and I endorsed that, that they ultimately would agree.
- Q. What is it that the Board endorsed?
- A. We went to the Board meeting and the Board endorsed — basically that is at the June Board meeting — not to formally adopt the budget but to direct management to come back or agree with management they should come back with a new detailed budget, hopefully at the July meeting, if not at the September meeting, which would show zero cost increases year on year and understood that to help get there we would have a de facto hiring and wage freeze.
- ³⁴⁴ Powers (#2) transcript, p. 16:
- Q. So in the run-up to that June 26 meeting, this approach that you had in terms of putting a semi-complete budget before the Board, as it were, which other members of the Board did you discuss that strategy with or try to meet?
- A. I really did two things during those meetings. I went and gave a — I wanted to talk about this because I wanted to tell them they were getting Board papers without a proper budget and explain the reasons why, where we were going and give them a general update on my impressions of what was going on, what I thought were bigger issues. I saw Jonathan Pinshaw, I saw Julia King, David Gonski, I believe Mark Burrows. Who else is there? Jonathan undertook to talk to Sir Roger about it. I think I saw Rod Carnegie. Whether or not he was travelling, I think I saw him but I'm not sure to tell you the truth. If I saw him it would have been over the phone. I would have had a phone conversation with him. I think that is all the external directors.
- Q. When would those discussions have taken place in relation to —
- A. Before the Board meeting, probably a week, just ten days before the Board meeting.
- Q. So after the papers had been finalised or before that?
- A. No, I think probably while they were still being worked on.
- Q. And did you get any feedback from those discussions which you fed back into the preparation of the papers?
- A. In terms of the budget I think people said they agreed that the budget was unacceptable. I think I said I would have liked to set the bar a little lower than the 805, I would hope, but management was convinced that was as far as we could go so I accepted that, and I think most people shared my view that, okay, we wish it was better but it is okay, probably under the circumstances of project Hercules running at the same time it was probably the right way to go. So I went through that.
- ³⁴⁵ Minutes of 26 June 1998 meeting of Fairfax directors, p. 3.
- ³⁴⁶ Minutes of 10 July 1998 meeting of the Finance and Audit Committee Meeting, p. 1.
- ³⁴⁷ Powers (#2) transcript, p. 21:
- A. ... As you will see from the budget, I'm going from memory, we didn't hit our 805 target. It would have been — I was overseas, Bob called me before they were going to have a finance committee meeting, either finance or cost cutting

meeting, I forget which it was, and said, 'Listen, it is too difficult to get the 805, what we can do is get to 805 plus the 11m increase in the on-line budget'. I said, 'Disappointing but if that is the best you can do I accept your judgment but you have to convince the other guys, if you can take them through the numbers and convince them why', then —

Q. By 'the other guys' you mean the other directors?

A. No, they had either a finance committee or cost cutting, project Hercules meeting in my absence, so that would have been Jonathon, Pinshaw and Mark Burrows. And I said if they endorsed it I could live with it, so they went through it and they endorsed it. So I think that is where it came —

Q. It came out at 816?

A. Yes.

³⁴⁸ Powers (#2) transcript, p. 6:

We spent a lot of time on the comparisons to last year on the costs side. As you know, the markets have been critical of the company for letting costs escalate more quickly than they might have. The difficulty with understanding a comparison of year to year is that the company chose its mid-year report to characterise a fair amount of reports as abnormal expenses, abnormal expenses, so we had a big debate as to whether they were really abnormal and if we were going to do a proper year to year comparison, which is where you always start with budgets, whether or not we should consider them abnormal or not.

³⁴⁹ Muscat (#2) transcript, p. 28:

The other view was that it was quite a legal and appropriate treatment in financial terms, and we were advised on that by Brian Long, and we took a view at this point that you couldn't necessarily go back, given that you'd taken a position at the half year. You couldn't then change that view or position for the full-year result. So our view was, 'Well, if it's been an error of judgment but not an error in the way it would be treated in legal terms, then we'll have to stay with that and we may, in fact, take a different view in the future.'

³⁵⁰ Submissions, dated 18 December 1998, received from Atanaskovic Hartnell, solicitors, on behalf of Mr Powers.

³⁵¹ Minutes of 24 June 1998 Fairfax Finance and Audit Committee Meeting, p. 1.

³⁵² Minutes of 26 June 1998 meeting of Fairfax directors, p. 2.

³⁵³ Powers (#2) transcript, p. 15:

A. ... And essentially what management was doing is anything they could classify as abnormal, classify as abnormal to make the above the line results look better. It turned out in retrospect to be a big mistake. You never fool the market on that. But what happened, to try to please the market this year, what you do is create a very tough comparison for next year. What I was trying to educate, make sure everyone understood, my recommendation was that we didn't go back and change it ...

Q. You put out half annual statements?

A. Yes, where we had taken a decision to classify a lot of them as abnormal.

Q. So you changed that at the end of the financial year?

A. You go back and it raises all sorts of questions ...

³⁵⁴ Powers (#2) transcript, p. 15:

Q. What is the outcome of that issue with the company for the next financial year?

A. It is an issue we are working on but I think our intent is to explain very clearly to the market when we put our results out on the 4th or the 5th or the 7th now of September exactly what had happened. From an accounting point of view and from accounting principles it is proper the way we did it, you can do it either way, but that we think when you really look at the business you ought to look at it this way so we will give them the numbers how we look at it as runners of the business and say that is how we will be comparing ourselves year on year.

³⁵⁵ Muscat (#2) transcript, p. 29:

Q. And is that likely to change the policy of the company?

A. It may well, yes.

Q. But it can't at the moment because of the treatment in the financial year?

A. Well, we took a view that it would be very difficult, it would be inappropriate for us to change something for the full year when we'd already made the decision for the half year that it was impacting on.

Q. But the general feeling of the meeting was that if the matter was looked at —

A. Yeah.

Q. — at an appropriate time, maybe that some of those abnormal items —

A. Yeah, we might have a different view about abnormal items, yeah.

Q. — could be treated as above-the-line items?

A. Yeah, in the future.

³⁵⁶ Memorandum dated 7 July 1998 from Mr Muscat to senior Fairfax staff.

³⁵⁷ Powers (#2) transcript, p. 4:

Q. What about staff recruitment processes that may have been in train. Are there any of those?

A. Well, we put a — part of the budgeting process — we put a non announced but a de facto hiring and wage freeze into effect.

Q. Where did that idea come from?

A. Out of the budget process, but I think I was the one that initiated it.

³⁵⁸ Muscat (#2) transcript, p. 11:

Q. What is your position at the moment in terms of engaging new staff?

A. We have got a freeze on.

Q. When was that put on?

A. That was put on – it is probably two months old. I'm not sure. To give you an absolute answer I would have to – there is a definite memo that went out to people regarding replacement staff and salaries.

Q. And who made that decision to put on a staff freeze?

A. I made that decision. Brian and I talked about staff generally. He said, 'Is there an understanding about staff replacements?'. I said, 'There is a loose understanding in relation to' — when I say a loose understanding, 'there is an arrangement whereby people have to get written permission for replacements but as far as wages there is also an understanding of that but there hasn't been anything formally put out', and he said, 'Do you think you should consider that', and I said, 'Well, it is probably something we are going to have to do'. It was in that context. And I don't think I said to him, I think it was some weeks later we were looking at things that needed to be done in relation to our plan, that we put out a note saying that that was the case ...

So it probably would have been done as part and parcel of our review process, but it probably spiked a view in my head that we should probably firm that up.

³⁵⁹ Powers (#2) transcript, p. 10.

³⁶⁰ Minutes of 26 June 1998 meeting of Fairfax directors, p. 3.

³⁶¹ Powers (#2) transcript, p. 12:

Q. Do you know when that decision was communicated to staff and by whom?

A. No, I think the decision, well, the decision on the —

Q. Just focussing on the staff freeze?

A. I think what happened is that anyone who was really running a division, I think Bob, rather than putting out – my preference would have been to put out a statement because that would send a strong message. I think also it sends a good message to staff, that we will not hire people if it means we have to fire some people we don't want to fire, voluntary redundancies or not. Bob said he would rather do it simply by just talking to the managers and putting it in a de facto way, so I think he communicated reasonably quickly after, before the Board meeting but after the meeting we are talking about, both that we have to go back and get more costs out to the various profit centres as well as the, well, if it is not a contracted wage increase we will not give it to them and that we should not be filling any vacancies other than with his permission, so it would have been I assume over the next week.

³⁶² Muscat (#2) transcript, p. 11

A. ... And we were careful how we worded the memo because you are in a competitive environment and what you can't afford to do is put in a regime that says 'no staff replacements' when in fact or 'no salary increases', when you might have people under pressure to join an opposition or you might have people who are put into new positions of responsibility where they do need to be reviewed.

Q. When you say 'we were careful about drafting a memo', who do you mean, 'we'?

A. We, meaning I think John Greaves and I talked about it in general terms.

Q. Was Brian consulted on that memo?

A. Not one bit.

³⁶³ Muscat (#2) transcript, p. 11.

³⁶⁴ Minutes of 18 May 1998 meeting of Fairfax directors, p. 3.

³⁶⁵ Minutes of 18 May 1998 meeting of Fairfax directors, p. 3.

³⁶⁶ Minutes of 26 June 1998 meeting of Fairfax directors, p. 3.

³⁶⁷ Powers (#2) transcript, p. 3:

The big matters that we focused on after I was elected Chairman, one was the budget. We had a new budget needed to be adopted for the July 1 start of the fiscal year. That has taken a lot of time. The second major area has been, as part of our sub-committee of the Board, working on project Hercules, which is a name given to the cost reduction program that is going on at Fairfax.

³⁶⁸ Muscat (#2) transcript, p. 4:

Q. And what are the processes that have been going on in Fairfax where that cost control issue has arisen?

A. Well, some months ago, it was actually prior to Brian joining, we actually looked at the next part of our process, which was to be a fairly extensive review of all the things we were doing within the company, particularly pertaining to costs, and we worked towards having a zero based budget as we went into this next financial year and part of what we would then do as a continuing review would be to have McKinseys come in and support the management on reviewing the cost structure and how we could actually manage it down without having a negative impact on the performance of the products on an every day basis.

Q. What do you call that process?

A. We have deemed that to be the Hercules project. I actually call it the review process but it was dubbed the Hercules project to give it a name that people could actually tag.

Q. Was it your idea, that name?

A. No, it wasn't actually, it was someone else's idea. I said, 'Oh, well', we have another project called project eagle, so I suppose it is someone else's view to tag those review processes, if you like. I don't mind it being called the Hercules project but I just refer to it as a review process. Just where I come from, that is all.

³⁶⁹ Powers (#2) transcript, p. 23:

Q. If I can ask you a general question: What role have you been playing in relation to the review process or project Hercules?

A. By and large the role I played there has been as a member of the sub-committee. Now, I probably have more conversations with John and Bob in the whole about the status of project Hercules than some of the specifics, but in terms of the major input on project Hercules it has been two or three meetings, three meetings now of that sub-

committee attended by Jonathan, Mark, myself, as well as Bob Muscat, John Greaves, probably Ashley Fenton I think, and then one, two or three representatives from McKinsey.

³⁷⁰ Powers (#2) transcript, p. 23:

Q. What about outside of that —

A. Three or four.

Q. — semi, well, it is a formal structure, it is a sub-committee, it is a formal structure. What about outside of that formal structure?

A. Again, if I would see them in the hall, for example, with the first round of redundancies in the editorial ranks were announced last week so I would ask Bob how that was going, how many volunteers we had, just to keep abreast of what was happening.

Q. This is on redundancies, did you say?

A. Yes, we put out an announcement that we would have 40 editorial redundancies last week. And so I saw Bob on Monday, I just asked him how that was going, but that is not a direction or decision-making, it is just mere curiosity.

³⁷¹ Muscat (#2) transcript, p. 20:

A. No, not specifically, and that is why we elected to do the review process, the Hercules process, because I think it is one thing for the management internally to just say, look, we think the costs are here, and remembering that over a period of some years there has been a fair amount, a fair number of layers put onto the cost base that do need a proper review process. I mean, there may be a view that isn't quite right in relation to certain cost areas. There might be a view that we are very fat in areas. But I think until you actually go through and ask the questions and come up with an answer, it is pretty hard to draw an assumption.

Q. So in terms of the paper that goes to the Board, the budget papers that go to the Board, whose decision is it as to what projected revenue and cost increases are included in that document?

A. Mine.

³⁷² Powers (#2) transcript, p. 42:

Q. But the detail of that, do you have conversations with John Greaves about that?

A. No. John will sometimes give me 30-second briefings on what's happening on project Hercules and stuff. I'll go by and say, 'How's it going?' Morale and stuff dragging along. But the real work on that is done in the project Hercules sub-committee meetings.

Q. Right. Do you attend those?

A. The sub-committee meetings, yes. Not any of the other ones.

Q. Right. So just when the Board sat —

A. I don't think I've gone — for example, there's one tomorrow. Tomorrow I think there's a long session — actually, this afternoon I think there's a long session on project Hercules.

Q. Of the staff committee?

A. Bob and, yeah, the management committee. I haven't gone to any of them.

³⁷³ Powers (#2) transcript, p. 27:

We thought that the process that they had outlined was good but there was zero sense of urgency. This company was, for the first time in its history, prepared to accept some change and accept some cost cutting and belt tightening, and at that pace it would have happened in nine months to 12 months, and that was unacceptable.

That's been 90 per cent, or 95 per cent, of both my involvement and the sub-committee's involvement on it — basically saying, 'Listen, you can do it in nine months in terms of identifying the areas and that's not technology driven, it's just taking the hard decisions. Let's make them and take them'. That's really where we've been, I think, the most active.

³⁷⁴ Powers (#2) transcript, p. 27:

Q. I'm still trying to understand, I suppose, the process internally within the company, whereby you get this information, you come to these deductions as a result of it, as a result of your analysis and insight into the information. Then what processes flow from that? Do you go to Bob and say, 'Listen, you've got to do something about this'?

A. The numbers I just referred to I had dug out as part of the budget process. When I said, 'I think we ought to have an immediate cost freeze', I wanted to have a sense of how bad the blowout had been. You couldn't get the numbers. There were no five-year histories that were comparable on staff costs because they keep changing classifications and everything else. So on that I said, 'Look, Bob, guess what the numbers are', and he didn't have an idea. I'm not saying that critically, because clearly it's the management information system. We could have no increases for 15 years and basically we'll be at inflation.

Q. What did he say to you?

A. He said, 'Yeah, you're right'. I don't think we've had any disagreements, substantive disagreements. It's more a question of pace. I'm less patient than he is. Mind you, I don't have to do it. It's very easy to say, 'Accelerate the process' when you're not at the coalface doing it. So I'd been more stiffening his back and encouraging him to do it. I strongly believe you have to do it quicker rather than slower because the longer it hangs over people's heads, the worse it is for morale, et cetera.

³⁷⁵ Powers (#2) transcript, p. 28:

Q. Would this be fair, that you have instilled the sense of urgency into both the management and the sub-committee?

A. I think the sub-committee has its urgencies. I think Jonathan and Mark Burrows, they heard — Fridays are sensitive. They maybe heard about Greg Stewart letting the costs go up over the last year, and Mark Burrows was on these committees and he's sensitive to it. So I think in terms of sense of urgency on them, I think they had plenty of it. I think with management, yes, the sub-committee has been instrumental in putting a sense of urgency on that. The markets, mind you, send a strong message that they want these changes.

³⁷⁶ Powers (#2) transcript, p. 23:

- Q. If I can ask you a general question: What role have you been playing in relation to the review process or project Hercules?
- A. By and large the role I played there has been as a member of the sub-committee. Now, I probably have more conversations with John and Bob in the whole about the status of project Hercules than some of the specifics, but in terms of the major input on project Hercules it has been two or three meetings, three meetings now of that sub-committee attended by Jonathan, Mark, myself, as well as Bob Muscat, John Greaves, probably Ashley Fenton I think, and then one, two or three representatives from McKinsey.
- Q. And there have been three of those meetings?
- A. I believe so.
- Q. What about outside of that —
- A. Three or four.
- Q. — semi, well, it is a formal structure, it is a sub-committee, it is a formal structure. What about outside of that formal structure?
- A. Again, if I would see them in the hall, for example, with the first round of redundancies in the editorial ranks were announced last week so I would ask Bob how that was going, how many volunteers we had, just to keep abreast of what was happening.

³⁷⁷ Muscat (#2) transcript, p. 44:

- A. Well, the review committee – and that was part of the Hercules review committee – that was purely and simply to ensure that there was support from the Board in what the management was doing with that process and there were representatives on the Board who actually would be supportive of management of what they were doing and that was first seen as an appropriate support committee for —
- Q. — management?
- A. Management, than anything else, so that the Board actually had an understanding and it was seen that not only was it something that the management was pursuing but the Board was also in support of that process.

³⁷⁸ Powers (#2) transcript, p. 49.

³⁷⁹ Powers (#2) transcript, p. 50.

³⁸⁰ Powers (#2) transcript, p. 50.

³⁸¹ Greaves transcript, p. 35.

³⁸² Dews transcript, p. 23.

³⁸³ Powers (#2) transcript, p. 54.

³⁸⁴ Powers (#2) transcript, p. 52.

³⁸⁵ Powers (#2) transcript, p. 53.

³⁸⁶ Dews transcript, p. 24.

³⁸⁷ Powers (#2) transcript, p. 55.

³⁸⁸ Powers (#2) transcript, p. 57:

- Q. Why did he come? It was most unfortunate that his health was in a pretty parlous condition?
- A. Why would he come? The same way he would drag himself into the office after he flew back nine or ten days after surgery against doctor's orders and played polo the day after a heart attack. He does not want to be seen not being able to do something because of his health. He also likes Bob, yeah, because Bob is a newspaper man, so most of the lunch is sitting around telling old newspaper stories.
- Q. Did you talk at all about the on-line business?
- A. If we did it was not substantial.
- ³⁸⁹ Dews transcript, p. 17:
- A. There has been one follow-up meeting, but not between any of those people in fact. I'll just check if I have these dates right. 12/6? Yes, there was one follow-up meeting between those people and one other, and then there has subsequently been one other meeting between two people who weren't at that meeting.
- Q. When you say 'those people', who do you mean?
- A. All of the people that were there, plus one other person.
- Q. Who was?
- A. Jeremy Philips.
- Q. Who is?
- A. Who works for PBL.
- Q. And when would that meeting have been held?
- A. That meeting – sorry to be vague about it. That meeting was held sometime – it doesn't appear to be in my diary, but I went on leave on the 26th.
- Q. Of June?
- A. Yes. So it was held sometime between then and the 26th. I think it was actually in the last week, so it was some time between the 22nd and the 26th.
- Q. And where was that meeting held?
- A. Also at Park Street. Yes, actually here it is. It is on the 25th.
- ³⁹⁰ Powers (#2) transcript, p. 49.
- ³⁹¹ Dews transcript, p. 11:
- Q. So back to my question. Perhaps you can go through the notes and explain them to us and tell us about the meeting?

A. Sure. We talked about portal, strategies and what it meant to them. We talked about exclusivity, meaning that if we were to do anything we would be interested. We thought there would be some issues around exclusivity for them, and how did they all feel about that.

³⁹² Dews transcript, p. 14:

Q. What was the response to that? What was your understanding there?

A. There were no definitive answers on anything, really from either side. It was very much exploratory. But nothing was being ruled out, nothing was being ruled in; it could be, it might not; if you get one you might get the other; if you didn't you might not get either; would there be any legal implications of all three. That kind of stuff. The question was posed: Could there be a veto right over what each other does with News Limited? And no answer. There was no definitive answer one way or the other.

³⁹³ Powers (#2) transcript, p. 53:

Q. Why is it then that you have I suppose attended a couple of meetings with NineMSN but not with any of the other?

A. I wasn't invited to the others. There hasn't been any other meetings. The others basically were dead in the water when I got there. There has been a meeting with Telstra, again a low level meeting, nothing that has really come up with that. I don't think Bob has been at, or John has been at, any News meetings together, because it is a much narrower thing. It is simply a classified joint venture and they are working on the technical, which is good, they are working on the technical elements of it and coming up with some clever ideas on how it might work, and when Nigel briefed me on it I said that sounds very clever, get some numbers to make sure we don't get lost between concept and reality.

³⁹⁴ Powers (#2) transcript, p. 52:

Q. In possible alliances with News, have you attended any meetings with them to discuss—

A. No, I don't think – I don't think there has been a senior level meeting with them. It has been, as I understand it, it was done through a couple of levels down. I have had a couple of lunches with Lachlan Murdoch where I said, if we can work something out, terrific ... it would make sense. In our view it makes sense ... us and News together as an exclusive classified provider to who we think will be the winning portal, which I happen to think at this stage of the game will be NineMSN. That to us is the equivalent that PMT would have been in pay television instead of three losers. It is a much, much more frustrating process than I first thought.

³⁹⁵ Powers (#2) transcript, p. 55.

³⁹⁶ Facsimile from Robert Muscat cc Brian Powers, Nick Leeder and Nigel Dews to James Packer dated 26 June 1998 detailing key issues on portal joint venture between Fairfax and NineMSN, including structure of the proposed joint venture; memorandum to Daniel Petre from Nigel Dews, cc Brian Powers, James Packer, Robert Muscat, Nick Falloon dated 18 June 1998 covering the proposed arrangements for Fairfax becoming part of the NineMSN portal.

³⁹⁷ Letter dated 22 April 1998 to Graham McVean, Director – Corp Development, Seven Network Limited from Nigel Dews (unsigned); Inter Office Memorandum dated 23 June 1998 to Bob Muscat from Nigel Dews and Nick leader; Memorandum dated 7 August 1998 to Brian powers and others from Nigel Dews.

³⁹⁸ Alexander transcript, p. 32.

³⁹⁹ Alexander transcript, p. 32.

⁴⁰⁰ Michael Yiannakis, 'Packer III, But PBL in Safe Hands', in *The Australian Financial Review*, 20 July 1998, p. 1.

Powers (#2) transcript, p. 63:

Q. There were a number of articles in the Fairfax press about CPH and PBL under James Packer's guidance?

A. I was a little sorry to see that. I was hoping they would say how much they missed me.

Q. Any comments you made may have found their way into those articles?

A. No, I intentionally didn't respond to that. I don't see any problem, it is just that I don't respond to press inquiries, routinely I don't. Mind you, I wouldn't feel constrained against it.

⁴⁰¹ Bryce Corbett, 'Page 13: Alexander Cosy at House of Packer', in *The Daily Telegraph*, 5 August 1998, p. 13.

⁴⁰² Kerry Packer transcript, p. 25.

⁴⁰³ Muscat (#3) transcript, p. 2:

Q. How did that job offer come about?

A. It came about as a result of an approach by the Chairman of PMP, Mr Ken Cowley, who I know and am certainly a friend of his, but I know him from my days in News where I worked basically with him for 28 years. And it was a case of a number of approaches rather than just one to head up PMP with the pending retirement of Mr Ken Catlow, who is the current chief executive of PMP, so we had some discussion. I indicated that I wasn't interested.

⁴⁰⁴ Muscat (#3) transcript, p. 4.

⁴⁰⁵ Muscat (#3) transcript, p. 2:

A. ... Also had a discussion with Ken Catlow, who came to see me, and it was from that discussion – and there were some other discussions as well with Mr Cowley and Mr Catlow separately – that I decided that it may well be an interesting job offer for me to take on, so I decided to accept that offer.

⁴⁰⁶ Muscat (#3) transcript, p. 4:

I said, 'Well' – my answer to him [Mr Catlow] was that I'd pretty well considered it and he just went on to talk about the company, some of the views that he had, what he thought was necessary, the people, that sort of thing. And I said, 'Oh, well, I suppose it is worth thinking about a bit more', and with that I got a call that night that he'd had some discussion – that Ken Cowley had had some discussions with other directors, including Ken Catlow, about I might be convinced to come and join them, and so it went from there. So really I suppose the real turnaround in my view was after the visit of Ken Catlow on August 3.

⁴⁰⁷ Muscat (#3) transcript, p. 4:

Q. What was it at that time that caused you —

-
- A. It was more about —
- Q. — to change your position again?
- A. Well, I suppose it was more about what was, the things that were being thought about and considered at PMP in terms of just where they were at as a business. Also my considerations obviously reflected on things like the stability of the major shareholder within Fairfax, you know, what would happen if BIL were to sell, who they would sell to, who would be the next major shareholder, so those sort of things were obviously a consideration. And it was more about that than any divisions within Fairfax or on the Board. It was certainly more about the stability of ownership than anything else.
- ⁴⁰⁸ Muscat (#3) transcript, p. 6:
- Q. Okay. In making your decision to accept this offer from Pacific Magazines, what influence if any has Brian Powers coming to Fairfax had on you making that decision?
- A. Nothing specifically. It was just another change I suppose within the company. Brian is the third Chairman that I've had to deal with since I arrived but he specifically hasn't had a bearing on my decision. I mean, my decision is basically about what I see as an opportunity for me now, given that the offer is on the table, and also the fact that the future as far as the ownership question of Fairfax I think is still – there is still some doubt in relation to what could occur, particularly when you look at the sort of pressure that BIL are currently under as an investment vehicle, so there's likely to be another change there.
- And I took a view that, given that this was an opportunity that would go away, I gave it due consideration and decided to accept it. But it is not as a result of any clash or any issue that I have had with Brian Powers.
- ⁴⁰⁹ Muscat (#3) transcript, p. 14:
- Q. ... from what you have said I think you reconsidered because the stability of the share register at Fairfax was a factor?
- A. It wasn't – in any, whatever I suppose the process is, one of the things I would have considered and did consider is the stability of the shareholding within Fairfax. But it wasn't the deciding factor, it wasn't the only factor, there were a whole host of things.
- Q. Earlier in this examination you mentioned two factors, and only two I think, you said the stability of the share register of Fairfax and there was something about the offer that made it more attractive at that point?
- A. Well, it was the opportunity to work with Ken Cowley as Chairman of PMP was a factor.
- Q. So that was a change from the original offer? Is that what you made you decide that you would now reconsider?
- A. No, no.
- Q. What was the factor that actually made you reconsider, because you were offered it in May?
- A. Just started to think about it after the visit from Ken Catlow and subsequent discussions I had with Ken Cowley.
- Q. What made you start thinking about it again or reconsider?
- A. The visit I had from Ken Catlow.
- Q. Was there anything about that visit, because in May you thought it wasn't something you would accept and you changed your mind?
- A. In May I sort of considered it and decided to discard it. Well, it was purely and simply the discussion I had with Catlow and then the next approach I had again from Ken Cowley.
- Q. What aspect of the job made it more attractive for you to change your mind?
- A. It was just brought up, because at the time it was first raised I actually didn't even consider talking about it in the detail of what the company was doing and what some of the opportunities were. It was purely and simply, 'Do you want to consider this job as Chief Executive of PMP' and I said, 'Well, not really', and that was about it, so I didn't take it any further.
- After that, when I had a visit from Ken Catlow and we talked about things generally, I then went a bit further and learned a bit more about the company and what they were doing and what the plans were for some of the strategic things, et cetera, so that made it a little bit more attractive.
- Q. So what aspects of the job made it attractive to you?
- A. Just generally the whole business in terms of opportunity, I suppose. It is hard to compare that with Fairfax. It is very different. It is like anyone considering —
- Q. Can you identify any aspect of the job that makes it more attractive than the job you are currently in?
- A. No.
- Q. In terms of the stability of the share register of Fairfax, had that changed between the 17th or around May when you were initially approached and early August?
- A. No.
- Q. So it didn't become a new factor?
- A. No, it has been there, and I think most people know that although BIL say they are in for the long haul they are in there as long as the share price is where it is at versus where they would like it to be.
- Q. And you were conscious of that in early May when you were first approached?
- A. I was conscious of that when I joined Fairfax. When I say that, if you think about, I've been with the company two years, Telegraph told me they were in there for a long time and within three months they were out of there, so BIL have been there since then, since November of 1996, is it, and they are in there for the long haul too except we know that they are an investment company.
- ⁴¹⁰ Powers (#2) transcript, p. 71:
- A. ... yesterday afternoon Bob asked to see me and told me he had decided he wants to leave the company, he has another job offer which he had decided after much soul searching he wants to take. We talked about it yesterday afternoon. We talked about it again today. I told him I was disappointed and that my preference, both professionally and personally, is

that he stay. He said he had done a lot of thinking and really didn't want to. I asked him why and got an unclear answer.

⁴¹¹ Powers (#2) transcript, p. 72:

I asked him, was I crowding him too much. I just asked him that this morning, and he said, no, as a matter of fact he thought we worked well together, he said that four months from now we may find that I am getting on his nerves. We have been very open. I think we were actually working well.

⁴¹² Powers (#2) transcript, p. 72:

He said there was instability in the share register, he doesn't know who will be the 25 per cent shareholder and that he thought he would be happier in the other job.

⁴¹³ Powers (#1) transcript, p. 49:

I do remember Kerry at one point saying, 'Well, if you don't get to be Chairman or Deputy Chairman, you've wasted your time. You won't be able to make a difference.'

Kerry Packer transcript, p. 27:

Q. Did you have discussion with Brian Powers at that time – this is when he first mentioned the idea of moving to Fairfax – about him becoming Chairman of Fairfax? Would you have said to him, 'Well, if you don't get to be Chairman or Deputy Chairman, you've wasted your time'?

A. I probably said that at some stage. I don't know whether it would have happened in the beginning, but at some stage I would have said that to him.

⁴¹⁴ Powers (#1) transcript, p. 27:

I'm sure I would have made it clear that ... I wouldn't do it without an economic stake because I didn't have the credibility to do it, quite frankly, and the incentive to go do it.

⁴¹⁵ Kerry Packer transcript, p. 29:

The Chairman is the Board ...

⁴¹⁶ See subclause 2(4) of Schedule 1 to the Act and section 6.1.3 of this report at page 58.

⁴¹⁷ Greaves transcript, p. 32.

⁴¹⁸ Letter dated 21 August 1998 from CPH to the ABA.

⁴¹⁹ This figure was obtained from the database of the Australian Stock Exchange Limited.

⁴²⁰ James Packer transcript, p. 3:

Q. Would you please state your name, address and occupation?

A. ... Name: James Douglas Packer and my occupation is chief executive of Consolidated Press Holdings ...

⁴²¹ James Packer transcript, p. 8:

Q. What about the actual decision-making process – this is what I'm sort of interested in, I suppose – Board meetings, committee meetings, what was the structure at that time for decisions to be made?

A. Within CPH?

Q. Within CPH?

A. Much as it is now, which is that whilst always attempting to and hopefully successfully ensuring that the company fulfills its obligations all – obligations under the Corporations Law or whatever pertinent and applicable laws there are, at the end of the day, it's a company that's owned and controlled by Kerry and so ownership has its joys including ultimate decision-making. And Brian was Kerry's most senior executive and so he obviously discussed issues with Brian, the way you do with the most senior executive in a corporation.

⁴²² Letter dated 21 August 1998 from CPH to the ABA.

⁴²³ According to the Memorandum and Articles of Association of FFX Investments Pty Limited (the company) dated 16.10.97, dividends from Preference CP shares are derived from the capital profit accounts and revenue profits realised as a result of the company holding shares in John Fairfax Holdings, net of any income tax expenses. Dividends for CP shares rank in priority to dividends on all other shares in the company as determined by the Directors. Holders of Preference OP shares are entitled to receive a dividend which is payable out of revenue profits, after allowing for any income tax expenses attributable to those profits. The dividend entitlement for both Preference CP shares and Preference OP shares is non-cumulative.

⁴²⁴ The Fairfax securities are defined in the Trust Deed as 'securities issued by John Fairfax Holdings Limited ACN 008 663 161 or by any related body corporate of that company'.

⁴²⁵ Clause 14 of the Trust Deed.

⁴²⁶ Clause 39 of the Trust Deed.

⁴²⁷ The ABA was advised on 19 January 1999 that the CPH had transferred 76,000,000 units in the FFX Trust to Force Investments BVBA (a company incorporated in Belgium and controlled by Mr Powers).

⁴²⁸ Clause 14 of the Trust Deed.

⁴²⁹ Paragraph 25(1C)(c) of the *Foreign Acquisitions and Takeovers Act 1975*.

⁴³⁰ Letter dated 28 July 1998 from the Treasury to Messrs Norton Smith & Co.

⁴³¹ Letter dated 9 August 1996 from the Treasury to Bankers Trust.