



The ABA has completed its investigation into whether Mr Brian Powers, Mr Kerry Packer, Mr James Packer, Consolidated Press Holdings, Publishing and Broadcasting Limited nor any related or associated persons committed any breaches of the cross-media rules of the Broadcasting Services Act from 18 May to 24 August 1998.

ABA finds no breach by Packer interests in relation to Fairfax

The ABA has found that none of Mr Brian Powers, Mr Kerry Packer, Mr James Packer, Consolidated Press Holdings, Publishing and Broadcasting Limited nor any related or associated persons committed any breaches of the cross-media rules of the Broadcasting Services Act in the period 18 May to 24 August 1998.

'The ABA is satisfied, after a thorough investigation of the circumstances, that no breach of the Act has occurred,' said Professor David Flint, ABA Chairman.

The two main issues the ABA examined were: whether Mr Brian Powers was an associate of Mr Kerry Packer, Mr James Packer and the Consolidated Press Holdings group of companies (the Packer interests) during the relevant period; and whether Mr Brian Powers was in a position to exercise control of Fairfax.

The ABA has found that Mr Brian Powers was not in a position to exercise control of John Fairfax Publications Pty Ltd and David Syme and Co. Ltd in that period.

The ABA was 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 sat on the board. Substantial issues were ultimately considered and finally determined by the board.

As the ABA found Mr Powers did not control Fairfax, it was not necessary to reach a finding on whether Mr Powers was an associate of Mr Kerry Packer during the period 18 May 1998 to 24 August 1998.

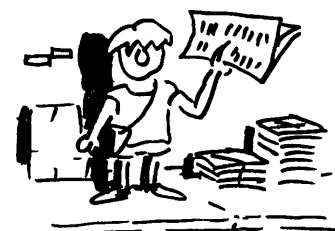
The ABA sought documents from 23 persons and companies and formally examined 12 people during its investigation. Because of serious illness, examination of Mr Kerry Packer was delayed until 27 October 1998.

'In all its activities, the ABA's aim is to be prompt, effective and transparent. The ABA has been dealing with matters that are both commercially sensitive and legally complex with potentially serious conse-

quences flowing from any adverse finding. Complex commercial documents and lengthy transcriptions of witness evidence had to be carefully considered. The ABA had to make findings of both law and fact,' Professor Flint said.

Mr Kerry Packer was unavailable due to serious illness in the period July to October 1998, which understandably delayed the evidence-gathering phase of the investigation. Once the ABA had completed a draft report, the procedural fairness requirements under the Broadcasting Services Act meant that the ABA had to provide those persons whose interests may be adversely affected by publication of the report an opportunity to comment. Consideration of detailed submissions on law and fact from solicitors for those persons meant that the ABA was not able to complete and publish the report of its investigation until 8 March 1999.

Professor Flint said he would particularly like to thank Mr John Corker, ABA General Counsel, and his staff for conducting the investigation in a thoroughly professional manner.



The ABA's investigation covered the period 18 May to 24 August 1998, the dates between which Mr Powers was appointed as a director of Fairfax and the date Mr Muscat resigned as CEO of Fairfax.

'The present situation at Fairfax, with Professor Fred Hilmer as Chief Executive Officer and Mr Powers as Chairman, leads the ABA to conclude that no further investigation is required at this time. This matter will remain the subject of ongoing scrutiny by the ABA,' said Professor Flint.

Copies of the ABA report, *Investigation into Control: Mr Brian Powers, Mr Kerry Packer and Mr James Packer / John Fairfax Holdings Limited* are available from the ABA, price \$40. The report is also available on the ABA web site, <www.aba.gov.au/what/owner/index.htm>. An executive summary of the report is available at the same location or by contacting the ABA.



Legal framework

Consolidated Press Holdings Limited (CPH), and Publishing and Broadcasting Limited (PBL) (and others) are registered with the ABA as being in a position to exercise control of the Nine network commercial television licences. Under section 60(b) of the Broadcasting Services Act, they are prohibited from being in a position to exercise control of newspapers, which are associated with the licence area of those licences.

If a newspaper is published by a company, a person is in a position to exercise control of that newspaper if the person is in a position to exercise control of the company, either alone or together with an associate.

John Fairfax Holdings Ltd (Fairfax) publishes newspapers (the *Sydney Morning Herald* and the *Age*) which are associated with the licence areas of the Sydney and Melbourne television licences of the Nine network. Accordingly, CPH and PBL are prohibited from being in a position to exercise control of Fairfax, either alone or together with an associate.

In addition, section 61(1)(b) of the Broadcasting Services Act provides that a person must not be a director of 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.

Control is defined to include, 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.

Schedule 1 of the Broadcasting Services Act sets out the mechanisms that are to be used in deciding whether a person is in a position to exercise control of a newspaper or a company and tracing company interests.

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

- where a person is the publisher of the newspaper;
- where a person, alone or together with an associate, is in a position to exercise control of the selection or provision of a significant proportion of the material to be published in a newspaper;
- where a person, alone or together with an associate, is in a position to control a significant proportion of the operations of a company, a publisher of a newspaper or a company which publishes a newspaper;
- where in relation to a company a person, alone or together with an associate, is in a position to:
 - veto any action taken by the board of directors;
 - appoint, secure or veto the appointment of at least half of the board of directors;
 - exercise direction or restraint over any substantial issue affecting the management or affairs of the company;
- where more than 50 per cent of the directors of a company act or are accustomed to act, or under a contract, arrangement or understanding are intended or expected to act, in accordance with the directions, instructions or wishes of or in concert with the person; and
- if a person has company interests in a company ex-

ceeding 15 per cent, the person is to be regarded as being in a position to exercise control of the company.

Company interests, in relation to a person who has a shareholding interest, a voting interest, a dividend interest or a winding up interest, means the percentage of that interest. A person may have a voting interest, a dividend interest or a winding up interest in a company even if the person does not have a beneficial entitlement to, or to an interest in, shares in the company.

The investigation

Until 18 May 1998, Mr Brian Powers was a director and Executive Chairman of PBL, and Chief Executive Officer of 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 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 per cent of the units in the FXF Trust and agreed to sell a 15 per cent 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 terms of reference of the investigation were:

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.

Key events

On 3 September 1997 PBL announced its intention to sell its 14.99 per cent 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 per cent of the shares in Fairfax and the CPH group held approximately 45 per cent 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 five 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. 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 of-

fered 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 NineMSN and Fairfax to discuss online issues and possible joint business activity in the online 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's 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 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 he wished to resign as CEO of Fairfax. Mr Muscat's resignation was announced in a press release on 24 August 1998.

Findings

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 start 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 ABA is of the view, on balance, 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 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.

FXF Trust

The ABA has also found that



Examinations under oath

The following persons participated in formal examinations under oath:

- Mr Neville Miles - 5 June 1998
- Mr James Packer - 9 June 1998
- Mr Brian Powers - 10 June and 19 August 1998
- Mr David Gonski - 11 June 1998
- Sir Roger Douglas - 15 June 1998
- Mr Robert Muscat - 16 June, 18 August and 24 August 1998
- Mr Rodney Price - 28 June 1998
- Mr John Alexander - 3 July 1998
- Sir Roderick Carnegie - 6 July 1998
- Mr John Greaves - 7 July 1998
- Mr Nigel Dews - 31 July 1998
- Mr Kerry Packer - 27 October 1998

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. 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.



CPH is in a position to exercise control of the FXF Trust and that Mr Kerry Packer has a 14.66 per cent 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. This is 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 is 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.



For the first time, the ABA has issued a notice to the ABC, recommending that it broadcast an apology.

ABA asks ABC to broadcast apology after breach of code

Television viewers are entitled to have the news presented to them fairly and accurately. The ABA will react firmly to any distortion of the news. Whenever a broadcast news report is subsequently shown to be inaccurate, it is fair and proper that a correction, and where appropriate, an apology be made. This should be as soon as possible, and at a time as likely to reach the same viewers as is reasonably possible,' said Professor David Flint, ABA Chairman.

Professor Flint was commenting on the release of a report on an investigation into a complaint about accuracy and fairness in which the ABA found that the national broadcaster, the ABC, breached its code of practice.

As a result of the ABA's findings, the ABC was issued with a notice on Friday 26 February 1999 formally recommending that it broadcast an apology in the form specified by the ABA. This is the first time the ABA has issued such a notice to a national broadcaster. After receiving the ABA's notice, the ABC broadcast an apology that same evening during its 7.00 p.m. news bulletin.

The complaint was that, in its 7.00 p.m. news bulletin on 30 August 1998, the ABC had substituted a different question from the question asked of the Prime Minister, Mr John Howard, at the news conference at which Mr Howard had announced the forthcoming election on 3 October 1998. The complainant alleged the ABC edited the story in a way that portrayed the Prime Minister in a negative light.

'This was a clear case of substitution of a question which gave a misleading impression. This was the lead item on the 7.00 p.m. news on the day the Federal election was announced. Unless a viewer had watched the earlier news conference, he or she would have gained an entirely different impression from the answer. It doesn't matter if the person is the Prime Minister or a private citizen, the principle is the same—viewers must not be misled by 'voiceovers' or other editing,' said Professor Flint.

By retaining the footage of the Prime Minister laughing while not including any reference to what the Prime Minister was laughing at, the ABC

created a misleading impression, which the ABC admitted. Until the broadcast of the apology, the ABC had not explained how the creation of this misleading impression occurred. While it may have been inadvertent, it nevertheless amounted to an inaccuracy as regards the factual content of this news item. It is the ABA's view that an inaccuracy can result from the omission of relevant information, as well from providing incorrect information. In this case the ABC omitted relevant information by showing the response of an interviewee (the Prime Minister) to a question without putting that response into its proper context by broadcasting the entire question which was put to him.

The ABC, in its response to the ABA, said that the complainant, 'made a reasonable point on this occasion. The ABC's story did not appropriately place in context the Prime Minister's response to the question about the timing of the election'.

The ABA upheld the complaint, finding that the ABC breached clause 4(1)(a) of its