



The ABA has, since early 1993, been monitoring the Ten Network and, more recently, has been investigating a possible breach or breaches of section 57 of the *Broadcasting Services Act 1992* by CanWest Global Communications Corporation.

The investigation

Section 57 of the *Broadcasting Services Act 1992* (the Act) provides:

- 57 (1) A foreign person must not be in a position to exercise control of a commercial television broadcasting licence.
- (2) A foreign person must not have company interests in a commercial television broadcasting licensee that exceed 15%.
- (3) 2 or more foreign persons must not have company interests in a commercial television broadcasting licensee that exceed 20%.

The limits on foreign control in the Act are aimed at ensuring that Australians have effective control of the more influential broadcasting services.

The provisions in the Act focus on the concept of control of a licence in which the level of equity holding is only one factor. The Act recognises that the concept of control can be a complex one and that control of a licence, newspaper or a company may be exercised in a number of ways. Control of a company or licence can also be exercised by more than one person.

In reaching a decision about when a position to exercise control exists, the Act states: 'While company interests may be important in deciding that

question, they are only one issue. In some cases, it may be important to look at agreements and arrangements between people and at accustomed courses of conduct between people'.

By looking at both the formal and informal means by which control of a licence is exercised, the ABA is required to focus on the issue of whether a person is in fact in a position to exercise control at any given time.

(TGL), which purchased Network Ten Ltd (NTL) from Westpac Banking Corporation (Westpac) on 30 December 1992. NTL controls, through wholly owned subsidiaries, commercial television licences TEN Sydney, ATV Melbourne and TVQ Brisbane.

CanWest first signalled its interest in acquiring NTL in a meeting with the ABA's predecessor the Australian Broadcasting Tribunal (ABT) on 4 May 1992. In that meeting

identified as TGL which represented an investment consortium including CanWest. The transaction was completed on 30 December 1992.

The ABT and ABA met with CanWest, Westpac and other relevant parties on a number of occasions prior to completion of the transaction. During the period October to December 1992, the ABA sought information from the parties on ownership and control issues.

On 30 December 1992, on the occasion of the announcement of the completion of the sale of NTL to TGL, the ABA issued a press release stating 'At this stage the ABA does not believe it is necessary to take further action. However, Mr Johns (former ABA Chairman) said the Act obliges the ABA to monitor events in order to ensure ownership and control provisions continue to be met.'



CanWest Global
Communications Corp.

Purchase of Network Ten Ltd

CanWest Global Communications Corporation (CanWest) is a Canadian corporation controlled by Mr Israel Asper, a Canadian citizen. CanWest was the founding member of a consortium which became known as The Ten Group Ltd

Mr Asper advised that CanWest was putting a proposal to Westpac to acquire NTL. The ABA commenced operation on 5 October 1992 under the Act. On 17 November 1992 Westpac announced that a formal agreement for the sale of its shareholding in NTL had been signed on 16 November 1992. The purchaser was iden-

Major areas of investigation

The major issues addressed by the ABA were:

- ownership structure of TGL;
- terms of issue and rights attaching to the subordinated and convertible debentures;
- appointment of directors to



the boards of TGL, NTL and the licensee companies;

- operation of the board of directors of TGL, NTL and the licensee companies;
- the NTL executive committee and role of Mr Peter Viner until 31 March 1993;
- role of Mr Gary Rice, CEO NTL, from January 1993 until his resignation on 7 May 1993;
- appointment of Mr Viner as an NTL director and as the TGL CEO;
- appointment of the TGL Chairman;
- provision of consultancy services by CanWest;
- budget issues and preparation of the 1993-94 budget;
- selection and provision of programming; and
- role of CanWest in development of corporate opportunities for Ten.

Foreign company interests in TGL

During its investigation the ABA examined the ownership structure of TGL with particular emphasis on the level of company interests held by CanWest, a foreign person for the purposes of the Act, and other foreign persons.

On the basis of the evidence before it the ABA's findings about company interests are that CanWest has company interests of 15.00 per cent in TGL and the aggregate company interests held by all foreign persons in TGL is 19.23 per cent.

Neither the subordinated debentures nor convertible debentures confer a shareholding interest, voting interest, dividend interest or winding-up interest on CanWest. The subordinated debentures and convertible debentures held by CanWest are therefore not company interests for the purposes of the Act.

In addition to the 15 per cent company interests held by CanWest, Winston Capital Inc. and Mr Peter Viner (being foreign persons for the purposes of the Act) respectively hold company interests of 1.61 per cent and 0.79 per cent in TGL. Other foreign persons

have traced company interests of 1.83 per cent through Telecasters North Queensland Ltd.

Possible foreign control of the Ten network

The ABA has undertaken an exhaustive investigation of the operations of TGL, NTL and the licensee companies, the boards of directors and management, to see whether there was any possible control of TGL, NTL and the licensee companies by CanWest.

On 25 October 1994 the ABA obtained a copy of a statement made by Mr Michael Lattin, former General Manager Programming at Ten, which had been filed and served in the proceedings *Capital Television Group Ltd and Anor v Darling Downs TV Limited*. The ABA examined Mr Lattin on 7 November 1994 about CanWest's involvement in Ten. Mr Lattin provided evidence from which inferences could be drawn rel-

evant to the question of control of TGL by CanWest.

Since the examination of Mr Lattin the ABA has conducted a further 17 examinations of directors, senior managers and persons associated with TGL, NTL and CanWest. In the course of its investigation the

ABA has obtained over nine hundred and fifty pages of transcript from 18 examinations and approximately one thousand documents totalling over fifteen thousand pages.

ABA findings relevant to the determination of control

Appointment of directors

CanWest only has two of eleven directors on the Board of TGL. CanWest has at no stage appointed more than two directors to the board of any Ten licensee company. As the number of directors has not fallen below ten for any Ten licensee company in the period under investigation, CanWest has thus not exceeded the 20 per cent limit set down in the Act.

The executive committee of NTL

The NTL Board set up an Executive Committee in January 1993 initially comprising Messrs Harris, Whyte, Singleton, Gross and Viner. This

Committee assumed the responsibility of the management of the Ten companies and undertook many of the responsibilities normally associated with a CEO.

Decisions of the Executive Committee had to be unanimous. If a unanimous decision on any issue could not be reached, the matter had to be referred to the Board of TGL. Accordingly, CanWest was not in a position to determine decisions relating to a significant proportion of the operations, or of the management or affairs, of TGL or NTL through the participation of CanWest employees Messrs Gross and Viner on the Executive Committee.

Mr Viner was appointed to the position of CEO of TGL, replacing Mr Gary Rice, with a commencement date of 1 April 1993, the day after his resignation from CanWest.

Provision of consultancy services by CanWest to Ten

On 6 July 1993 NTL and CGS, a CanWest subsidiary, entered into a Consultancy Agreement whereby CGS would provide advice and assistance to the Ten group of companies. TGL and NTL directors anticipated benefits would accrue to Ten by entering into the Consultancy Agreement with CanWest. The respective boards of TGL and NTL not only voluntarily entered into the Consultancy Agreement but actively sought to commit CanWest to providing the requisite consultancy services.

The ABA found evidence that on a number of occasions CanWest's advice was not accepted by the TGL board. In the view of the ABA, the inference could then be drawn that on the occasions where the





advice was accepted, it was accepted on its merits. It also took the view that such evidence indicates that the person giving advice is not in a position to compel, or direct, acceptance of such advice.

The Consultancy Agreement was terminated on 30 June 1994. The concern expressed by the ABA about the potential operation of the Consultancy Agreement was a significant factor in the decision to terminate the Consultancy Agreement.

Since the termination of the Consultancy Agreement TGL continues to receive limited information and advice about pay TV and general programming trends from CanWest.

The role of Mr Viner

Mr Viner acted as a consultant to the Ten network during early 1993. During this period a decision was made to axe the program 'E Street'. Based on Mr Viner's evidence, it would appear that he effectively made the decision to cancel that program.

Both documentary and oral evidence provided to the ABA suggests that at that time, (March 1993), 'E Street' was an expensive program that was not performing well in terms of its profit margin. It appears that no-one at TGL disagreed with that proposition. There was widespread support among Ten management for the decision to drop the program.

In the view of the ABA, Mr Viner was in a position to make decisions, or influence the making of decisions to axe programs, where these programs had no support from management or the Executive Committee, but he did not have the power to direct or to veto choices or decisions made

by management of Ten which conflicted with his own.

Mr Viner was not in a position at the time of the axing of 'E Street' to control the selection or provision of a significant

relationship in terms of the Act continued to exist.

The ABA believes that Mr Viner came to his own conclusion about matters, although he consulted widely. When Mr Viner accepted Mr

nor any other foreign person has been or is in a position to exercise control of TGL, NTL or the respective licensee companies by means of any of the formal arrangements in place at Ten.

The ABA has examined the way in which key decisions have been reached within the Ten companies and relationships between persons within and outside those companies, and has concluded that neither CanWest nor any other foreign person has been or is in a position to exercise control of TGL, NTL or the respective licensee companies by way of any informal arrangements.

The ABA has found that the ultimate decision makers at Ten were and are the Board of Directors of TGL and NTL.

CanWest has provided, and continues to provide, advice to Ten on a range of broadcasting related issues. However, the ABA is of the view that where advice is accepted on its merits, the provision of that advice cannot amount to the exercise of control. The ABA has also found evidence which indicates that at times CanWest's advice to Ten has not been accepted by the Board. Taking into account such evidence, the ABA has found that where advice has been accepted by the directors, it has been accepted on its merits. ☐



Mr Viner

cant proportion of programs broadcast by the licensee.

Was Mr Viner an independent CEO of Ten?

Once Mr Viner resigned from his positions at CanWest, effective from 1 April 1993, he could no longer be regarded as an associate of CanWest unless there was evidence which suggested that he acted at the direction, or on the instructions or in accordance with the wishes, of Mr Gross, Mr Asper or CanWest. The ABA investigated Mr Viner's relationship with those three persons with a view to determining whether an associate

Gross' advice, he did so on the merits of the issue. Mr Lattin was involved in some of the conversations.

The ABA also investigated all the assertions made by Mr Lattin which could possibly raise an inference of an associate relationship between Mr Viner and either or all of Mr Gross, Mr Asper or CanWest. After its investigation the ABA found that the evidence did not support such a finding.

Conclusion

Having considered the evidence and the relevant provisions of Schedule 1 of the Act the ABA has reached the conclusion that neither CanWest

Copies of the ABA's report *Investigation into Control: CanWest Global Communications Corporation/The Ten Group Ltd*, price \$30, 208 pages, are available from the ABA, (02) 334 7700.