




## Proposals

- Introduce separate and equivalent creative elements tests for Australian and New Zealand programs and recognise programs that have a mix of Australian and New Zealand creative elements.
- Include a provision in the standard giving the ABA discretion to disallow a program that meets a creative elements test but has significant non-Australian or non-New Zealand content.
- Not adopt any form of on-screen test in the revised standard.
- Remove the 10BA gateway from the revised standard.
- Retain Australian official co-productions as a gateway in the revised standard.
- Increase the documentary subquota from 10 to 20 hours a year, but make no changes to drama or children's drama subquota.
- Make no changes to the transmission quota.
- Introduce a requirement that for children's C drama programs to count towards the children's drama quota, licensees or networks must pay a minimum fee of A\$45 000 per half hour for the broadcasting rights.
- Reduce the time period in which adult drama (other than feature films) must be broadcast if it is to be counted under the drama quota of the standard. The time band would be reduced from 5.00 p.m. – 12 midnight to 5.00 p.m. – 11.00 p.m.
- Define first release programs to exclude back catalogue material by requiring that programs other than feature films are broadcast within eighteen months of completion of production.
- Place no specific limits on subsidised programs.
- Include telemovies previously broadcast on pay TV as eligible first release drama.
- Tighten the definition of documentary to exclude sports coverage and light entertainment programs.
- Redraft the definition of sketch comedy to make clear that it is comprised of individual sketches.
- Include specific criteria relating to the creative elements test for animation.
- Include a grandfather clause for programs which comply with the current definition of Australian program, documentary program and sketch comedy program and have been acquired pursuant to a legally binding agreement or arrangement entered into before the release of the draft standard. 

**The proposed amended standard and accompanying discussion paper, along with proposed consequential amendments to the Children's Television Standards, are available on the ABA's web site at <[www.aba.gov.au/what/program/oz\\_review](http://www.aba.gov.au/what/program/oz_review)>.**

**Details on how to make a submission are included in the discussion paper.**

**The deadline for submissions is 8 December 1998.**

# ABA concludes CanWest/Ten network control investigation

**The ABA has now concluded its CanWest/Ten Group investigation.**

The ABA has found that Canadian company CanWest Global Communications Corporation's failure to comply with the terms of a notice to remedy a breach of the Broadcasting Services Act for a period of four months was unintentional and the breach was of a minor technical nature. The clause that was of concern to the ABA has now been removed from the relevant document.

Under the terms of the notice issued by the ABA on 4 April 1997, CanWest had until midnight on 6 April 1998 to remedy the breach which resulted from it being in a position to control the Ten network television licences. The Act says a foreign person must not be in a position to exercise control of a commercial television licence.

As a result of a series of major transactions involving the float of Ten Network Holdings, the ABA found the inclusion of a clause in a transaction document resulted in CanWest still being in a position to exercise control of the licences. The ABA has decided this breach was rectified on 30 July 1998.

In considering what action to take, the ABA noted CanWest had made significant efforts to remedy the original breach through a series of major transactions. The non-compliance with the notice resulted from the inclusion of a clause which gave CanWest veto rights over amendments





to certain limited Articles of Association of The Ten Group Limited.

Given the inadvertence of the non-compliance with the notice, the nature of the breach and the fact that the breach has since been rectified the ABA has formed the view that no further action is warranted.

### Investigation

In its second investigation into whether CanWest was in breach of a provision of Part 5 of the Broadcasting Services Act, on 3 April 1997 the ABA found that CanWest was in breach of section 57(1) of the Act by being in a position to exercise control of the Ten network television licences. (The ABA's first investigation, completed in November 1995, found no breach.)

The ABA was satisfied that CanWest had company interests of 52.49 per cent in The Ten Group Limited because CanWest was in a position to exercise control of 52.49 per cent of the votes cast on a poll at a shareholders' meeting of The Ten Group Limited.

The ABA was also satisfied a breach of section 57(3) of the Act had occurred as two or more foreign persons had company interests in a commercial television broadcasting licensee that exceeded 20 per cent.

The ABA issued notices to CanWest to remedy the breaches within six months.

On 29 April 1997 CanWest

and others filed applications in the Federal Court for review of the Authority decisions, under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). CanWest also challenged these decisions in the High Court. These proceedings were remitted by the consent of the parties to the Federal Court.

Donholken Pty Limited and Selli Pty Limited also sought judicial review of the ABA's decisions, under the ADJR Act. On 8 August 1997, the Federal Court dismissed all applications.

CanWest and others appealed to the Full Federal Court on the question of whether CanWest was in control of a commercial television licence. On 27 February 1998, Black CJ, Lockhart and Beaumont JJ dismissed the appeal.

### Application for extension of time

On 8 August 1997, CanWest applied for an extension of the time in which to remedy the breaches. On 2 October 1997, the ABA granted CanWest an extension of four and a half months, until midnight, 13 February 1998.

On 29 October 1997, CanWest sought reasons, pursuant to section 13 of the ADJR Act, for the determination by the ABA to grant CanWest the four and a half month extension of time. On

20 November 1997, the ABA provided CanWest with a statement of reasons, pursuant to section 13 of the ADJR Act, regarding its decision

On 12 December 1997, CanWest filed a notice of motion in the Federal Court challenging the ABA's statement of reasons. The hearing was heard before Justice Branson in Sydney on 18 December 1997.

On 14 January 1998 Justice Branson found that the ABA had not taken into account the most current information available to it relevant to the decision to grant an extension of time. Consequently, the decision of the ABA which fixed midnight 13 February 1998 as the end of the period of the extension was set aside and the ABA was directed to redetermine the period by no later than 13 February 1998.

On 22 January 1998, the ABA extended the period of time in which CanWest had to rectify the breaches until 4 April 1998.

### Compliance action

The following steps were taken by CanWest:

- On 4 March 1998 Ten Network Holdings Limited acquired the 174,175,101 shares in The Ten Group Limited (the 38.28 per cent interest which put CanWest in breach).
- The public offering of Ten Network Holdings Limited shares (the vehicle designed to hold the offending 38.28 per cent CanWest company

interest) was opened on 10 March 1998. The public offering closed on 27 March 1998.

- Telecasters North Queensland Limited (TNQ) held 40 per cent of The Ten Group Limited. On 24 March 1998, TNQ shareholders voted on a scheme of arrangement for TNQ which involved TNQ shareholders exchanging their shares for Ten Network Holdings Limited shares. TNQ is a wholly owned subsidiary of Ten Network Holdings. Ten Network Holdings holds 40 per cent of the Ten Group Limited through TNQ.

- In August 1998, after investigating whether CanWest had rectified the breach by the due date, the ABA formed the view that CanWest had not rectified the breach of section 57(1) until 30 July 1998.

Having regard to the fact that the cause of the breach of section 57(3), had been rectified, the ABA decided not to pursue further investigation of compliance with this notice.



**The ABA report, Investigation into Control: CanWest Global Communications Corporation /The Ten Group Limited. Third investigation is on the ABA web site <[www.aba.gov.au](http://www.aba.gov.au)>.**

**Copies are also available from the ABA, price \$30, tel: (02) 9334 7700.**