

# Comment

## *Federal Court tells CanWest to take its time*

**W**hen News Corporation decided to sell out of its 14.9 per cent stake in the Seven Network before Christmas, someone at News rang a stockbroker and told them the price they'd accept. It was several cents below the price the shares were trading at that morning. The shares were gone before the market closed that day.

Eight months earlier, the Australian Broadcasting Authority (ABA) had found that CanWest was in a position to exercise control of the Ten Network. As a foreign company, this represented a breach of the Broadcasting Services Act. CanWest would have to do what News would do later in the year – offload some shares in a highly profitable Australian commercial television network.

CanWest seems to have found the job rather more difficult. It's been trying to complete the necessary transactions since April 1997, but as *Communications Update* went to press, it still hasn't got there.

Why is it taking so long? Because no-one wants to buy shares in the Ten Network? Of course not. It's because CanWest doesn't want to sell the shares, and is taking as long as possible to do it. Further, CanWest is trying to sell the shares in a way that restores the sort of farcical situation which existed for years whereby CanWest had a majority economic interest (about 57 per cent) in the network but didn't, in the eyes of the ABA, actually control it (ie. it had, among other things, less than a 15 per cent voting interest).

Selling shares in a profitable TV network is not brain surgery but this kind of fancy corporate footwork does take a little more time.

It shouldn't surprise us that CanWest doesn't want to sell down its most profitable investment. What should surprise us is when the Federal Court knocks over a decision of the ABA which, in effect, did nothing more than tell CanWest that it should get on with it. That's what happened in a decision of Branson J handed down on January 14, 1998.

Some background. The ABA found CanWest to be in breach of the Act in April 1997 following its acquisition of more shares in the Ten Network. It did not come as a great shock to anyone who knew anything about Australian television that the ABA had finally found that CanWest was in charge at Ten. CanWest had, from the outset, employed corporate and shareholding structures which ran hard against the lines of the ownership and control rules. The ABA had been looking at it for years. CanWest had finally gone over the edge.

This was no mere trifle. It was an offence for which parliament has set a fine of \$2 million per day. Clearly, the people we elect to make the rules in our democracy think this is a Very Bad Thing. Their legislation said they wanted it fixed.

But their legislation also said you can take a little time to fix this kind of thing – between one month and two years, and perhaps an extension for the same period, up to a maximum of a year, if the ABA thinks it's "appropriate in all of the circumstances". In making its decision, the ABA has to have regard to the seriousness of the breach, the endeavours which have been made in attempting to fix the problem, and the difficulties encountered in fixing it. But the ABA must not

have regard to any financial disadvantage that fixing the problem might cause.

The intention seems fairly clear. You can take a little time, because this stuff can be complicated, but if your problem is that selling up is going to hurt you financially, well tough. No one made you buy in the first place.

The ABA gave CanWest six months. CanWest then asked for more time. The maximum the ABA could give was another six months. It decided on four-and-a-half. That's 10-and-a-half months in total. News Corporation got it done inside a working day.

The seriousness of the breach? Had the fines run from the day the ABA found the breach (and one might well ask, in public policy terms, why they shouldn't) the network would have run up a bill of around \$650 million by the final date the ABA gave Ten to fix the problem (mid-February). That seems pretty serious.

The endeavours made to fix the problem? The ABA found "the majority of this effort occurred in the latter part of the [first six month] period for remedying the breach...". There'd been no great urgency. This conclusion was not challenged.

The difficulties experienced in attempting to fix the problem? The ABA found "various significant difficulties" but some "were of the applicant's own making". This conclusion was not challenged either.

But Branson J thought the ABA had got it wrong. She determined that the ABA had not accorded CanWest natural justice because a letter which contained information relevant to the ABA's decision was not listed in the ABA's Reasons for Decision. The decision hangs on this microscopic hook, despite the overwhelming weight of evidence that the ABA carefully considered everything before it and recognised, like Blind Freddie, what was going on.

Most amazingly, the court agreed that the ABA had to recognise how tough it is to get anything done in Australia in January.

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## CanWest

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One of the witnesses associated with CanWest had said that "business in Australia comes to a standstill from Christmas to the last week in January". Just as well, it seems, although one wonders if CanWest's financial advisers admit that the whole country's been at the beach for five weeks when they're sending the bills.

CanWest has chosen, for its own reasons, a fabulously complicated way out of its control of the Ten Network. There were many others. They could have put an ad in the *Trading Post* and it would have been over in a fortnight. Tops.

Why public policy should still be waiting, nearly a year on, for so blatant a breach of this law to be corrected, is anyone's guess.

Jock Given

## Kroger's appointment rattles ABC watchers

The federal government's announcement on February 5, 1998 of the appointment to the ABC board of banker Michael Kroger was greeted with dismay by the Labor Party, Friends of the ABC groups and several newspaper columnists who claimed that it was a political appointment designed to further undermine the national broadcaster's independence, if not its future.

The facts are as follows: Mr Kroger, 40 has business credentials. He is chief executive of Melbourne-based merchant banker J.T. Campbell and Co. Mr Kroger has no experience in broadcasting (apart from listening to ABC radio and being a "long-term watcher" of ABC television).

According to Senator Richard Alston, the Minister for Communications, Mr Kroger brings to the job "extensive management experience in the finance, legal and political fields gained through his involvement in J.T. Campbell, his operation of a successful law firm, and as a former office holder of the Liberal Party, including a term as president of the Victorian division".

It is this last credential which worries those claiming that Mr Kroger's appointment is a political one and, therefore, potentially damaging to the ABC's independence. As president of the Victorian Liberal Party and a

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## How to be in pictures, according to summer school

The Melbourne University Summer School in film-making, held between January 12-20, informed, educated and entertained students ranging from recent VCE graduates to grandparents.

"In the beginning was the word" was how the screenwriting day commenced. Many words later, the audience knew a lot more about pitching a concept, writing a treatment, and producing their own script. Only one thing more was needed – a good idea to base it on.

Students were instructed how to visualise a script by way of camera and lighting use, and how important production design and production management were to a successful product.

The production manager is the organiser of the film world. He or she has to know all, keep schedules, and be able to soothe sometimes irascible, directors, producers, writers and actors.

In production, marketing and distribution, it was taught that film-making is three things: a business where risk is minimised; a creative enterprise based on collaboration; and a complex technical enterprise. It should also be good fun, but that is optional.

Alan Finney from Village Roadshow talked about distribution. Only two out of 10 films make money, he said, and if a film doesn't work in the first week, it's over. This was the case with David Parker's recent film *Diana and Me*.

Students learned that comedy is

something that makes you laugh. Good comedy makes you laugh a little, cry a little and think a little, and this is not easy to do.

On the final day of the course Nadia Tass ran a director's masterclass. She emphasised that research and an excellent knowledge of the film's subject was what gave life to her films. And she revealed her special filmmaking secret: graphs. Using numerous graphs, she said, enables her to understand at all times during shooting what is happening with the story, and where the characters are.

But as one ex-maths student in the class was heard to sigh, "graphs are what I'm trying to get away from".

Bruce Shearer