

INVESTIGATION INTO CONTROL

CanWest Global Communications Corporation/
The Ten Group Ltd

A report on the Australian Broadcasting Authority's
investigation into a possible breach of
section 57 of the *Broadcasting Services Act 1992*,
by CanWest Global Communications Corporation

Australian Broadcasting Authority
Sydney, NSW
November 1995

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COMMON ABBREVIATIONS USED IN THIS REPORT

ABA	Australian Broadcasting Authority
the Act	<i>Broadcasting Services Act 1992</i>
Consultancy Agreement	the Consultancy Agreement between CGS and NTL dated 6 July 1993
CanWest	CanWest Global Communications Corporation
CEO	Chief Executive Officer
CGS	CGS International Holdings (Netherlands) BV (a wholly owned subsidiary of CanWest)
CGS Shareholding	CGS Shareholding (Netherlands) BV
CGS Debenture	CGS Debenture Holding (Netherlands) BV
Columbia TriStar	Columbia TriStar Television Pty Ltd
Convertible Debentures	the 455,000 convertible debentures issued by TGL
Executive Committee	the executive committee of the NTL Board of directors
Fox	Twentieth Century-Fox Film Corporation
MCA	MCA International BV
MCA Australia	MCA Australia Pty Ltd
NATPE	National Association of Television Program Executives
NTL	Network Ten Limited (formerly Television and Telecasters Limited)
Oltec	Oltec Limited
Subordinated Debentures	the 45,500,000 subordinated debentures issued by TGL
Spelling	Spelling Entertainment Inc.
TGL	The Ten Group Limited (formerly Oltec Limited)
TTL	Television and Telecasters Limited
TTL (Sydney)	Television and Telecasters (Sydney) Limited (licensee of TEN Sydney)
TTL (Melbourne)	Television and Telecasters (Melbourne) Limited (licensee of ATV Melbourne)
TTL (Brisbane)	Television and Telecasters (Brisbane) Limited (licensee of TVQ Brisbane)
Ten	comprises any combination of the above five companies
Ten network	comprises commercial television broadcasting licences TEN Sydney, ATV Melbourne and TVQ Brisbane
TNQ	Telecasters North Queensland Limited
Westpac	Westpac Banking Corporation
Worldvision	Worldvision Enterprises, Inc.

COMPANY NAMES

On 16 November 1992 the Westpac Banking Corporation signed a formal agreement with Oltec Limited for the sale of Westpac's shareholding in Television and Telecasters Ltd. The acquisition was completed on 30 December 1992.

Television and Telecasters Ltd holds all the shares in the licensee companies of commercial television broadcasting licences TEN Sydney, ATV Melbourne and TVQ Brisbane, collectively known as the Ten network. The licensee companies are Television and Telecasters (Sydney) Ltd, Television and Telecasters (Melbourne) Ltd and Television and Telecasters (Brisbane) Ltd respectively.

On 30 April 1993 Oltec Limited changed its name to The Ten Group Limited.

On 17 February 1994 Television and Telecasters Limited changed its name to Network Ten Limited.

For the purposes of this report the ABA will refer, as appropriate, to either TGL or NTL. The ABA will not be using the previous names of those companies ie Oltec Limited and Television and Telecasters Ltd.

The descriptor 'Ten' is used in this report to identify any combination of TGL, NTL and the three licensee companies, in circumstances where more precise references to individual members of the group would not add further to the discussion.

ALPHABETICAL LISTING OF PERSONS REFERRED TO IN THIS REPORT

Mr Israel Asper	Deputy Chairman and Director of TGL, Chief Executive Officer and Chairman of CanWest
Mr Alan Bateman	former General Manager Network Productions and Operations of NTL
Mr Gerald Carrington	former General Manager Network Finance of NTL
Mr George Chapman	Director of TGL
Mr Pal Cleary	Managing Director of MCA (Australia) Pty Ltd
Mr Bert Cohen	Executive Vice President and Chief Operating Officer of Worldvision Enterprises, Inc.
Mr Jack Cowin	Director of TGL
Mr Laurence Freedman	Director of TGL
Mr Stephen Gross	former Deputy Chairman and Director of TGL, former Director of CanWest
Ms Valerie Hardy	General Manager Network Production of NTL
Mr Paul Harris	Director of TGL
Mr Doug Hoover	employee of CanWest
Mr Michael Lattin	former General Manager Network Programming of NTL
Mr Warren Lee	former General Manager Network Corporate Development of NTL
Mr Isi Leibler	Director of TGL
Mr Peter Liba	Director of TGL and Executive Vice-President of CanWest
Ms Kristin Marlow	General Manager Network Programming of NTL
Mr John McAlpine	General Manager Network Sales of NTL
Mr Peter Myers	Chief Financial Officer of NTL

Mr Gerry Noble	Chief Executive Officer of TV3 New Zealand and former CanWest Executive
Mr Brian Rhys-Jones	Managing Director of Worldvision Enterprises of Australia Pty Ltd
Mr Gary Rice	former Chief Executive Officer and former Managing Director of NTL
Mr Brian Sherman	Director of TGL
Mr John Singleton	former Director of TGL
Mr Thomas Strike	Director, Vice President Finance and Chief Financial Officer of CanWest, alternate Director of TGL
Mr John Studdy	Chairman and Director of TGL
Ms Carmel Travers	former General Manager Network News & Current Affairs of NTL
Mr Gerry Thorley	General Manager Sydney of NTL
Mr Peter Viner	Chief Executive Officer of TGL, Director of NTL and former Executive and Director of CanWest
Mr Robert Whyte	Director of TGL, former Acting Chairman of TGL, former Deputy Chairman of TGL

CHRONOLOGY

OUTLINE OF EVENTS FROM MAY 1992 TILL THE EXAMINATION OF MR LATTIN ON 7 NOVEMBER 1994

4 May 1992 Mr Asper (CEO and controlling shareholder of CanWest) met with the ABA's predecessor, the Australian Broadcasting Tribunal (ABT), to discuss the regulatory framework in Australia and to notify the ABT that CanWest was putting a proposal to Westpac to acquire the Ten network.

At the time CanWest controlled 5 licensed television stations in Canada as well as several rebroadcasting stations and was the largest private television operator in Canada in terms of total advertising revenues. CanWest held a 20% interest in TV3 in New Zealand with an option to go to 50%. CanWest had also entered into a management agreement with TV3 on 16 December 1991.

15 October 1992 The ABA met with Mr Asper to discuss progress in the possible acquisition of the Ten network by a CanWest led consortium.

In a series of meetings in November 1992 and December 1992, the ABA discussed the configuration of the TGL consortium and Board, the participation of Australian media companies in the consortium and the appointment of an independent Chairman to the TGL Board. The ABA informed CanWest that it would be monitoring CanWest's compliance with the Act, particularly section 57 relating to foreign control and ownership.

13 November 1992 At a meeting between the ABA and Westpac, Westpac outlined the prospects for the sale and its possible terms. The ABA indicated to Westpac that it would be examining the TGL consortium's compliance with the ownership and control requirements of the Act.

16 November 1992 Westpac signed a formal agreement with TGL for the sale of Westpac's shares in NTL. The completion date was anticipated to be the end of December 1992.

24 November 1992 The ABA wrote to TNQ requesting information about TNQ's possible participation in the TGL consortium. TNQ replied on 25 November that TNQ was at that stage undertaking a due diligence exercise but that no commitment had been made.

- 30 November 1992 TNQ met with the ABA to discuss TNQ's possible involvement in TGL. TNQ provided the ABA with a copy of TNQ's Notice of Extraordinary General Meeting (to be held on 23 December 1992) at which it was proposed to increase the share capital of TNQ to enable TNQ to participate in the TGL consortium.
- 18 December 1992 TNQ informed the ABA that it had agreed to participate in the consortium conditional upon the signing of the other Australian investors.
- 30 December 1992 TGL's acquisition of the Ten network from Westpac was completed. The final composition of the TGL consortium is presented and considered against the ownership and control provisions at parts 3 and 4 of this report.
- 27 January 1993 TGL held its first board meeting. The number of directors and the entitlement of the consortium members to nominate directors is considered at part 4.1.1 of this report. At the board meeting Messrs Gross and Whyte were both appointed Deputy Chairmen of TGL. Mr Whyte was appointed acting Chairman of TGL until an independent Chairman was appointed.
- 31 March 1993 Mr Viner formally severed all ties with CanWest and at the NTL Board meeting on 23 April, Mr Viner was formally appointed as a Director of the company.
- 13 April 1993 Oltec Limited changed its name to The Ten Group Limited (TGL).
- 4 May 1993 Mr John Studdy was appointed as Chairman for both TGL and NTL. Details of the role and appointment of the Chairman are considered at part 4.1.4 of this report.
- 9 June 1993 The TGL Board resolved to appoint Mr Peter Viner as CEO of TGL, Mr Michael Lattin as General Manager for Network Programming of NTL and Ms Valerie Hardy as General Manager for Network Production of NTL.
- The NTL Board accepted Mr Rice's resignation as CEO of NTL with the date of effect being 7 May 1993.
- The NTL Board resolved to enter into a Consultancy Agreement with CGS International Holdings (Netherlands) BV (a wholly owned subsidiary of CanWest).
- 22 June 1993 Ms Carmel Travers was appointed to the position of General Manager of News and Current Affairs of NTL.

1 July 1993	Mr Gross resigned from a number of the positions he held at CanWest, but remained a director of CanWest. He was appointed to a CanWest position which was responsible for CanWest's South Pacific interests and was responsible for provision of CanWest's consultancy services to Ten and management services to TV3 in New Zealand.
6 July 1993	NTL and CGS formally signed the Consultancy Agreement whereby CGS would provide advice and assistance to the Ten group of companies.
10 September 1993	Guy Dunstan, General Manager Corporate Development resigned from NTL.
1 October 1993	Ten entered into a program agreement with Worldvision Enterprises, Inc. Details of the negotiation of the World Vision contract are presented and considered at part 4.4 of this report.
5 October 1993	Ten entered into a program agreement with Columbia TriStar Television Pty Ltd for the provision of programming material. Details of the negotiation of the agreement are presented and considered at part 4.4 of this report.
16 November 1993	TGL acquired 50% of the equity in the Capital Television Group Ltd for \$12.5 million. This acquisition is considered at part 4.5 of this report.
6 December 1993	Mr Warren Lee was appointed to the position of General Manager Corporate Development of NTL.
14 February 1994	Mr Peter Myers was appointed to the position of Chief Financial Officer of NTL.
17 February 1994	Television & Telecasters Limited changed its name to Network Ten Limited (NTL).
April 1994	It was confirmed that Ten would retain the run of series on all product from Twentieth Century Fox Film Corporation (Australia) Pty Limited previously contracted to Ten.
24 June 1994	Mr Gross resigned from all positions held with CanWest and its subsidiaries.
28 June 1994	Mr Studdy informed the ABA that the TGL board had resolved to terminate the Consultancy Agreement at its meeting on 22 June 1994.

30 June 1994	NTL terminated the Consultancy Agreement between itself and CanWest. A payment was made to CGS in consideration of the termination.
30 June 1994	Mr Gerald Carrington, General Manager Network Finance, resigned from NTL.
7 September 1994	Mr Gross resigned from the boards of TGL, NTL and the subsidiaries of NTL.
5 October 1994	NTL entered into a programming agreement with MCA TV International BV. Details of the negotiation of the agreement are presented and considered at part 4.4 of this report.
15 October 1994	The General Manager Network Programming, Mr Lattin, resigned from NTL.
25 October 1994	An article appeared in the <i>Canberra Times</i> referring to a statement by Mr Lattin, filed and served in the proceedings <i>Capital Television Group Limited and Anor v Darling Downs TV Ltd</i> . On the same day the ABA issued a section 177 notice to Mallesons Stephen Jacques to produce the affidavit of Mr Lattin. The ABA received this statement later in the day.
27 October 1994	The ABA informed Mr Asper of CanWest that the ABA was continuing its investigation into CanWest and its subsidiaries in relation to compliance by CanWest and its subsidiaries with part 5 of the Act and in particular with section 57 of the Act.
28 October 1994	Mr Peter Liba was appointed as a director of TGL and NTL to replace Mr Gross as one of the two CanWest nominees on the boards. Mr Liba holds the position of Executive Vice President of Operations at CanWest.
4 November 1994	Ms Kristin Marlow was appointed General Manager Network Programming of NTL. This was Mr Lattin's former position.

LIST OF PERSONS EXAMINED BY THE ABA

The following persons have been examined:

7 November 1994	Mr Mike Lattin	former General Manager Network Programming of NTL
30 November 1994	Mr John Studdy	Chairman and Director of TGL
9 December 1994	Mr Peter Liba	Director of TGL
14 December 1994	Mr Peter Viner	Chief Executive Officer of TGL
24/25 January 1995	Mr Stephen Gross	former Deputy Chairman and Director of TGL
31 January 1995	Mr Gerald Carrington	former General Manager Network Finance of NTL
1 February 1995	Mr Pal Cleary	Managing Director of MCA (Australia) Pty Ltd
1 February 1995	Mr Brian Rhys-Jones	Managing Director of Worldvision Enterprises of Australia Pty Ltd
6 February 1995	Mr Israel Asper	Deputy Chairman and Director of TGL, Chief Executive Officer and Chairman of CanWest
9 February 1995	Ms Kristin Marlow	General Manager Network Programming of NTL
13 February 1995	Ms Carmel Travers	at that time General Manager Network News & Current Affairs of NTL
14 February 1995	Mr Robert Whyte	Director of TGL
15 February 1995	Mr Paul Harris	Director of TGL
15 February 1995	Mr John Cowin	Director of TGL
17 February 1995	Mr Warren Lee	former General Manager Network Corporate Development of NTL

List of persons examined

17 July 1995	Mr Gary Rice	former Chief Executive Officer and former Managing Director of NTL
21 July 1995	Mr Warren Lee	former General Manager Network Corporate Development of NTL
23 August 1995	Mr Peter Viner	Chief Executive Officer of TGL

1.

Executive Summary

This is a report on the Australian Broadcasting Authority's (ABA) investigation into a possible breach or breaches of section 57 of the *Broadcasting Services Act 1992* (the Act) by CanWest Global Communications Corporation (CanWest).

Section 57 of 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%.

PURCHASE OF NETWORK TEN LTD

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 (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 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 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.'

LEGAL FRAMEWORK

Section 2 of this report outlines the ownership and control provisions of the Act, the policy intent behind them and the ABA's interpretation of them.

The limits on foreign control in the Act are aimed at ensuring that Australians have effective control of the more influential broadcasting services in terms of object 3(d) of the Act.

Although the limits on foreign ownership for commercial television have been retained at the same level as under the previous legislation (*Broadcasting Act 1942*), the provisions in the Act now 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.

Clauses 2 and 3 of Schedule 1 set out the rules for deciding when a position to exercise control exists. Schedule 1 also states that ‘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’ (Schedule 1 subclause 1(1)).

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.

FOREIGN COMPANY INTERESTS IN TGL

Section 3 of this report examines 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.

At the date of this report TGL has an issued capital of 45,500,000 ordinary shares. TGL has also issued 45,500,000 subordinated debentures and 455,000 convertible debentures. CanWest holds 6,824,999 ordinary shares (1 share below 15.00%), all 45,500,000 subordinated debentures and all 455,000 convertible debentures.

In the course of its investigation the ABA has examined the different types of securities held by CanWest to determine whether they constitute company interests for the purposes of sections 57(2) and (3) of the Act. The ABA reported in its 1992/93 annual report that the 1992 transaction to acquire the Ten network met the control requirements of the Act in terms of company interests.

POSSIBLE FOREIGN CONTROL OF THE TEN NETWORK

Section 4 of this report addresses the issue of possible control of TGL, NTL and the licensee companies by CanWest. The ABA has undertaken an exhaustive investigation of the operations of TGL, NTL and the licensee companies, the boards of directors and management. Each issue has been assessed against the terms of clauses 2 and 3 of Schedule 1 to the Act.

Throughout 1993 and 1994 the ABA continued to monitor the structure and operations of TGL, NTL and the licensee companies.

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.

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 relevant 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. A list of persons examined by the ABA precedes this part of the report.

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.

The evidence obtained in the examinations and information provided by the relevant parties forms the basis of the ABA's findings at parts 3,4 and 5 of this report.

ABA FINDINGS ABOUT COMPANY INTERESTS

On the basis of the evidence before it the main findings of the ABA are:

- CanWest has company interests of 15.00% in TGL.

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.

- The aggregate company interests held by all foreign persons in TGL is 19.23%.

In addition to the 15% 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% and 0.79% in TGL. Other foreign persons have traced company interests of 1.83% through Telecasters North Queensland Ltd.

ABA FINDINGS RELEVANT TO THE DETERMINATION OF CONTROL

Parts 4 and 5 contain a summary of the evidence collected by the ABA in its investigation. They also contain the factual findings made by the ABA which enable it to draw its conclusions about control.

The factual findings are based on the evidence collected. Some of this evidentiary material contained internal conflicts. Where there is conflicting evidence the ABA's findings have been drawn on the basis of the ABA's preference for one version of events over another.

Below is a summary of the findings the ABA made about the evidence.

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% limit set down in subsection 58(1) of 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 Messrs Gross and Viner on the Executive Committee.

The position of Mr Rice

Mr Rice was nominally the NTL CEO and Managing Director. Mr Rice was not appointed to the Executive Committee and, notwithstanding his appointment as CEO (on a month by month basis only), he did not thereafter function as a CEO with fully delegated Board authority.

The appointment of Mr Viner to the Executive Committee and as the CEO of TGL

The TGL Board made Mr Viner's appointment to the position of Chairman of the Executive Committee conditional on his resigning and relinquishing his positions and shareholdings with CanWest. Despite the condition, Mr Viner was operating as the Chairman of the Executive Committee prior to his resignation of all positions with CanWest. Mr Viner resigned and relinquished his positions and shareholdings with CanWest on or about 31 March 1993.

A number of the non-CanWest directors on the TGL Board were of the view that Mr Viner would be a suitable appointee to the CEO position. The new TGL Chairman, Mr Studdy, recommended the appointment to the TGL Board, and the Board resolved to appoint Mr Viner to the TGL CEO position.

Mr Viner entered into an employment contract with TGL on 15 June 1993 and was duly appointed to the position of CEO of TGL with a commencement date of 1 April 1993, the day after his resignation from CanWest.

The appointment of the Chairman of TGL and NTL

The Share Subscription Agreement relating to TGL provided that the Chairman of TGL would be independent. Mr Studdy was and is independent of the TGL shareholders. CanWest had no involvement in the selection of Mr Studdy as the Chairman.

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 terms of the Consultancy Agreement were restricted to the giving of advice. The Consultancy Agreement provided that there was no obligation to act in accordance with or to accept the advice provided by CGS. The Consultancy Agreement provided that it could be terminated at any time with the giving of three months notice. As such, neither the terms of the Consultancy Agreement nor the provision of services in accordance with

it would of themselves mean that CanWest was in a position to exercise direction or restraint over any substantial issue affecting the management or affairs of the licensees.

However, the ABA decided to examine how the Consultancy Agreement was actually put into effect during the period of its operation.

Key operational activities were to be the focus of CanWest's advice provided under the Consultancy Agreement. Consideration of the provision of advice under the Consultancy Agreement has been grouped under three main areas in this report. These areas are budget matters (considered at part 4.3), programming (considered at part 4.4) and corporate development (considered at part 4.5).

The ABA took the view that the directors or management of Ten could not be said to be acting in accordance with the directions, instructions, or wishes of CanWest (or its associates) unless it could find evidence that the relevant individual(s) had subordinated their will to CanWest.

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. Where advice is accepted on the basis of an independent assessment by the individual directors of the board, as a meritorious business suggestion from a proven source, that advice cannot amount to the exercise of control.

It also took the view that the directors or management of Ten could not be said to be acting in concert with CanWest unless it could find evidence that there had been an understanding between them as to their common purpose or object. Merely being members in common of the same company or organisation, or coincidentally holding similar views on a matter was regarded as being insufficient to form a basis for a finding that one individual is subject to the control of another.

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.

A Committee was set up to determine the terms on which the Consultancy Agreement would be terminated. That Committee recommended to the TGL Board that \$3.4 M be paid to CGS on termination of the Agreement. The Committee resolved on that course of action before broaching the matter with CanWest.

There were discussions between CanWest and the Committee, and there may have been negotiations over the size of the payment and whether it should be discounted to reflect the present value of a future payment of cash.

There was no legal obligation under the Consultancy Agreement to make that payment. The TGL Board made the decision on the basis of what they regarded as an 'obligation in spirit'. This 'obligation in spirit' was based on the assistance CanWest had provided in

rapidly achieving the progress envisaged over the whole term of the Consultancy Agreement.

There is no evidence to indicate that pressure was applied by CanWest or persons associated with CanWest against any TGL directors, the TGL sub-committee or the TGL Board itself in relation to this payment.

BUDGET ISSUES AND PREPARATION OF THE 1993-94 BUDGET

Control of budgetary matters is relevant to whether CanWest is in a position to exercise restraint over a substantial issue affecting the management of affairs of Ten, as well as other matters identified in Schedule 1 to the Act.

The TGL Board entered into an informal consultancy agreement with CanWest (whose officers had conducted due diligence examinations of Ten in late 1992) in January 1993 to ensure CanWest's expertise was available to formulate a business plan and to assess management information systems and productivity. The involvement of CanWest in budgetary matters was formalised on 6 July 1993 by NTL entering into the written Consultancy Agreement with CanWest. Under the Agreement advice could be sought on operational efficiency and annual budgeting.

The TGL Board rejected the cost side of the 1993-1994 budget in June 1993 when the \$20 million cost cut identified in CanWest's due diligence process was not reflected in the 1993-1994 budget. CanWest consultants, including Mr Viner, had assisted in the formulation of this budget.

In early 1993, prior to his appointment as CEO, Mr Viner was involved in the preparation of the 1993-94 budget for submission to the TGL Board in his capacity as consultant. He was also Chairman of the Executive Committee.

Mr Viner was also Chairman of the Budget Review Committee during this period. In relation to operational matters of substance, the Committee only had powers to recommend. It reported, through Mr Viner, to the Executive Committee. The Executive Committee was fully apprised of issues considered by the Budget Review Committee. Mr Viner was not in a position to exercise control of any substantial issue affecting the management or affairs of Ten by virtue of his position as Chairman of the Budget Review Committee.

Following the rejection of the 1993-94 budget, TGL sought the provision by CanWest under the Consultancy Agreement of a task force, under the supervision of Mr Viner, to prepare a recast 1993-1994 budget by 31 December 1993. The TGL Board was briefed throughout the remainder of 1993 on the progress being made in improving the financial reporting.

The participation of CanWest employees was sanctioned by the TGL Board. They provided advice only and did not control the determination of the figures in the final budget. The figures were determined by management. Ultimately the Board of TGL approved the budget in December 1993.

The ABA took the view that even though the TGL Board may have delegated preparation of the 1993-94 budget, it retained control over the budget because it retained and exercised veto power or ultimate control over the it.

SELECTION AND PROVISION OF PROGRAMMING

Selection of General Manager, Programming

Mr Viner was significantly involved in the selection of Mr Lattin as General Manager Programming. As the Executive Committee was not formalised until the TGL Board meeting of 27 January 1993, Mr Viner's discussions with Mr Lattin in early to mid January 1993 concerning Mr Lattin's appointment were conducted either in his capacity as a consultant to Ten or in anticipation of his future role on the NTL Executive Committee.

Following the creation of the Executive Committee, Mr Viner's involvement in the selection of Mr Lattin is consistent with the functions of a member of the Executive Committee to review the appointments of senior executives.

National News Service

Mr Strike, a CanWest employee, advised Mr Rice to stop all plans for a national news service in late 1992. However, it was as a result of the request of the then owners, Westpac, that Mr Rice ceased pursuing the possible introduction of a national news service at that time. Mr Rice was not following the advice or instructions of Mr Strike.

After the acquisition of NTL by the new consortium, the matter was not pursued due to a lack of any real support within Ten.

Role of Mr Gross in program issues

There were regular and extensive communications between Mr Viner and Mr Gross about programming matters until June 1994. Mr Viner often sought the advice of, and consulted with, Mr Gross before making decisions about programs and Mr Gross expressed his views to Mr Viner. However Mr Viner was not required and did not regard himself as being required to act in accordance with the instructions, wishes or directions of Mr Gross or of CanWest.

On occasions (the axing of *Hinch* and the broadcast of *Level 23*) Mr Viner acted in a manner contrary to the advice received from Mr Gross. This indicates that Mr Gross did not have the final say and could not veto decisions taken by Mr Viner. Mr Viner accepted Mr Gross' advice in relation to program matters only when, in Mr Viner's own view, it was appropriate.

The TGL Board and the Executive Committee were regularly apprised of developments relating to programming matters.

International agreements

Mr Gross provided assistance and advice to Mr Viner and Mr Lattin, both Ten employees, in securing, and/or negotiating Ten's major international program agreements. Despite the assistance provided by Mr Gross in relation to the strategy and negotiation of international program contracts, the ABA is of the view that this evidence does not indicate that Mr Gross or CanWest controlled the selection or the provision of programs broadcast by Ten. This is because the assistance of Mr Gross was in the form of advice only and because Mr Viner and the TGL Board had ultimate responsibility for and control of those contracts.

Worldvision program agreement

According to Mr Lattin, Mr Gross told him that Ten would have to take *General Hospital* so that TV3, a New Zealand station controlled by CanWest, could obtain Worldvision programming. Mr Lattin gave evidence to the ABA that this was the only reason Ten ever included *General Hospital* in its contract with Worldvision.

Mr Rhys-Jones (an employee of Worldvision) gave evidence that there was no connection between Ten taking *General Hospital* and the TV3 programming contract. It appears from the evidence of Mr Rhys-Jones that Ten was expected to include *General Hospital* in its program agreement with Worldvision. Mr Lattin's evidence was that Mr Rhys-Jones agreed that Ten was not required to include *General Hospital* in the agreement.

The facts in relation to this issue are difficult to ascertain because of contradictory accounts given by Mr Lattin, Mr Rhys-Jones, Mr Viner and Mr Gross.

The evidence of Mr Rhys-Jones in relation to whether or not an agreement had been reached between Mr Lattin and himself in relation to *General Hospital* contradicts that of Mr Lattin. In view of the doubt created in relation to Mr Lattin's evidence by this contradictory evidence, and the evidence of Mr Viner and Mr Gross (which also contradicts that of Mr Lattin) it is difficult to find with any certainty what the factual situation was. The ABA cannot find, on the evidence before it, that Mr Gross exercised authority or control over Mr Lattin and/or Mr Viner over this aspect of their negotiations of the Worldvision contract.

Columbia TriStar program agreement

The TGL Board requested the assistance of Mr Gross to secure Columbia TriStar programming. In assisting with the Columbia TriStar program agreement, Mr Gross was providing advice under the Consultancy Agreement.

The TGL board approved of Ten entering the contract before it was signed by Mr Viner. Mr Viner, whilst responsible for the negotiation of programming agreements, kept the TGL Board informed of his progress in resolving major issues affecting Ten's programming. Mr Viner was not required, and did not regard himself as being required, to act in accordance with the instructions, wishes or directions of Mr Gross.

The circumstances of the negotiation of the Columbia TriStar agreement with Ten do not indicate Ten was required to take programming from Columbia TriStar at the direction of CanWest or any person associated with CanWest.

Extension of the MCA program agreement

Mr Gross initiated moves to extend the MCA program agreement by suggesting to Mr Viner and Mr Lattin that the contract be extended. This advice was acted upon by Mr Viner and Mr Lattin because in their view it was a good strategy. Mr Lattin conducted much of the negotiations with the Australian representative of MCA.

Mr Gross, in assisting with the MCA program agreement, was providing advice and assistance under the Consultancy Agreement. Mr Viner was ultimately responsible for program issues.

Fox program agreement

The TGL Board requested management and CanWest to come up with a plan to obtain international programming. Mr Gross, in helping to secure the Fox program agreement, was providing advice and assistance under the Consultancy Agreement.

The evidence in relation to the Fox contract does not suggest that as a result of its connections with CanWest, Ten was required to take programming at the direction of CanWest.

CANWEST'S ROLE IN CORPORATE DEVELOPMENT PROJECTS AT TEN

On 7 November 1994 the ABA examined Mr Lattin about CanWest's involvement in Ten. Mr Lattin referred to a number of corporate development projects which he thought were CanWest concerns rather than Ten's.

Capital Television Group Ltd (Capital)

As early as January 1993 Mr Gross had advised the TGL Board that Ten should acquire the Westfield interest in Capital which controlled Ten affiliates in Adelaide, Perth and Southern NSW. Mr Asper supported this advice. The TGL Board rejected this advice from CanWest.

In August 1993 the TGL Board requested that Mr Gross prepare a report under the Consultancy Agreement relating to corporate development opportunities for Ten. In September 1993 Mr Gross reported to the TGL Board, recommending that TGL acquire the 50% Capital interest. On this occasion the TGL Board accepted the advice of Mr Gross to acquire the Capital interest.

The circumstances of the Board's decision-making in relation to the Capital investment show that the TGL Board did not regard itself as being required to accept advice provided to it by CanWest under the Consultancy Agreement. The advice to purchase an interest in Capital was only accepted when it was regarded as being meritorious advice by the Board itself.

Northern Rivers Television Pty Ltd (NRTV)

From as early as March 1993, and throughout 1993, TGL had been considering the possible acquisition of NRTV. Mr Gross supported the acquisition of NRTV by TGL and made a number of reports throughout 1993 recommending such an acquisition. The participation of Messrs Gross and Noble in the due diligence of NRTV was in accordance with the provision of consultancy services under the Consultancy Agreement between CanWest and NTL. CanWest, through Mr Gross, had considerable involvement in TGL considering whether to acquire NRTV. Ultimately Mr Gross' recommendation was not adopted by the TGL Board, although TGL's reasons for not pursuing the acquisition are not clear.

The circumstances of the decision-making in relation to the possible investment in NRTV indicates that the TGL Board did not always accept the advice of, or suggestions made by, Mr Gross or Mr Asper and is consistent with a finding that the Board members of TGL were not bound by, nor felt obliged to follow, such advice or suggestions.

Australis Media Ltd (Australis)

Mr Gross and CanWest advised the TGL Board to acquire an interest in Australis. This advice was rejected by the TGL Board. The circumstances of decision-making in relation to the possible investment in Australis indicate that the TGL Board did not always accept the advice or suggestions made by Mr Gross or Mr Asper and are consistent with a finding that the Board members of TGL were not bound by, nor felt obliged to follow, such advice or suggestions.

PMT consortium

Mr Gross and CanWest advised the TGL Board not to enter into the so called PMT consortium. The TGL Board rejected this advice and agreed to take an interest in the consortium. The PMT consortium was formed by Mr Kerry Packer, Mr Rupert Murdoch and Telstra for the purposes of exploring opportunities in subscription television broadcasting.

The pursuit of pay TV opportunities

From as early as March 1993 and throughout 1993 and 1994 the TGL Board had demonstrated a strong commitment to identifying and pursuing pay TV opportunities in Australia. TGL requested and was provided with considerable assistance by CanWest.

Mr Gross in his capacity as a CanWest consultant was to report regularly to the TGL Board and to the Executive Committee on developments. Pay TV was a standing item for consideration by the Executive Committee. Mr Viner and subsequently Mr Warren Lee, General Manager Network Corporate Development of NTL, were to report, and did report, to the TGL Board on a regular basis about strategies in relation to MDS and pay TV.

Mr Asper and/or CanWest were also pursuing pay TV opportunities in Australia in their own right in 1994. However, the pursuit of pay TV opportunities in Australia by Ten executives and staff was intended to be, and was in fact, undertaken in the interests of

Ten. Very little assistance was provided by Ten employees, Messrs Lee, Myers and Lattin, in research undertaken by CanWest in relation to pay TV opportunities.

UKTV

Mr Lattin was requested to provide information for the CanWest UKTV venture by Mr David Asper. Mr Lattin provided the requested information. Mr Lattin's involvement in this project would appear minimal and of little or no consequence in the performance of his duties as the General Manager Programming at Ten.

VOX

Mr Asper and Mr Lattin did participate in a telephone hook-up to discuss possible programming for the Vox project.

Mr Lattin's involvement in this project would appear minimal and of little or no consequence in the performance of his duties as the General Manager Programming at Ten.

Had CanWest been successful in obtaining an interest in the Vox network there may have been a benefit for Ten if it could supply programs to the Vox network on a commercial basis.

Indonesia

Ten sent Ten executives to Indonesia to consider a possible Indonesian project. This was a TGL exercise. Despite CanWest's interest in pursuing the Indonesian venture with TGL, TGL ultimately did not proceed.

Movie channel

A possible venture involving the creation of a Columbia TriStar-Paramount-MCA pay TV channel was explored. This possible venture was a TGL exercise undertaken in the interests of Ten. The venture was ultimately not pursued by TGL.

PROVISION OF ADVICE SINCE THE TERMINATION OF 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. Some advice or suggestions provided by Mr Asper have not been pursued. The UKTV venture has been pursued by TGL on a provisional basis only.

Since September 1994 no one from CanWest has been involved in any capacity in any of the contracts negotiated by the General Manager Programming Ten.

THE ROLE OF MR VINER

WHAT WAS MR VINER'S INVOLVEMENT WITH TEN WHILST HE WAS STILL AN EMPLOYEE OF CANWEST?

Programming Decisions

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*.

Evidence was given by Mr Rice that axing of programs was the kind of decision which a CEO might make. In addition Mr Viner and Mr Rice stated that the Board did not make these kinds of decisions. There is no evidence that the Executive Committee made the decision. Based on Mr Viner's evidence, it would appear that he effectively made the decision to cancel that program.

The question then is whether the cancellation of *E Street* by Mr Viner is evidence that he was in a position to control the selection or provision of a significant proportion of programs broadcast by the Ten licensees.

The evidence on this issue is at best ambiguous. It is necessary to consider whether Mr Viner's influence in the dropping of *E Street* is indicative of a more pervasive power to make decisions about the selection or provision of programming, even in the face of opposition.

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 proportion of programs broadcast by the licensee.

WAS MR VINER AN INDEPENDENT CEO OF TEN?

Once Mr Viner resigned from his positions at CanWest 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 relationship in terms of the Act continued to exist.

MR VINER'S RELATIONSHIP WITH MR ASPER

Mr Asper was primarily concerned with the corporate development aspects of Ten and not with its day to day running, which was Mr Viner's domain. All corporate development propositions were debated and decided at Board level. Mr Viner had little decision-making role in these non-operational matters.

Mr Asper discussed with Mr Viner his broad conceptual views of where Ten could go but did not direct Mr Viner as to how he should be performing his duties at Ten.

Mr Viner consulted broadly before making some decisions, including with the directors of TGL and the Executive Committee generally. His consultations with Mr Asper were no different, in effect, to similar consultations with other directors of TGL.

TNQ, a shareholder in TGL, had directors on the Board who were interested in ensuring that Mr Viner acted in the interests of TGL as a whole and that he did not act on the directions, instructions or wishes of CanWest.

MR VINER'S RELATIONSHIP WITH MR GROSS

Mr Gross' views were sought by Mr Viner because Mr Gross was a personal friend and, in some cases, had experience and knowledge that Mr Viner felt may be superior to his own, eg the negotiation of international programming contracts and financial matters. Mr Gross' views were not sought because Mr Viner was compelled to seek or to follow those views. In much the same way Mr Viner also sought the views of other directors although not nearly to the same extent.

The ABA believes that Mr Viner came to his own conclusion about matters, although he consulted widely. When Mr Viner accepted Mr Gross' advice, he did so on the merits of the issue. Mr Lattin was involved in some of the conversations.

There was no evidence to suggest that Mr Gross used their contact to give Mr Viner directions or instructions, or exercise any form of restraint over Mr Viner in his role of CEO of TGL.

Mr Viner and Mr Gross disagreed in relation to some matters. Ultimately Mr Viner had the final say or the matter was referred to the Board for resolution.

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 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.

2.



Introduction

2.1 BACKGROUND

The Broadcasting Services Act 1992 (the Act)

The Broadcasting Services Act 1992 came into effect on 5 October 1992. The then Minister for Transport and Communications, Senator Collins, in his Second Reading Speech for the Broadcasting Services Bill 1992, stated that the philosophy behind the Bill was the provision of a coherent regulatory framework based on the need to accommodate future developments. Senator Collins stated that the new regime would continue to recognise that broadcasting was integral to developing an Australian identity and cultural diversity and that it was vital to the operation of a democratic society (see Second Reading Speech, 4 June 1992, page 3600).

Underpinning the framework was the intention that different levels of regulatory control apply across the range of broadcasting services according to the degree of influence that such services are able to exert (see Second Reading Speech, 4 June 1992, page 3600). Commercial television broadcasting services are regarded as being the most influential of services regulated by the Act.

Foreign ownership and control under the Act

The limits on foreign control in the Act are aimed at ensuring that Australians have effective control of the more influential broadcasting services in terms of object 3(d) of the Act.

Although the limits on foreign ownership for commercial television have been retained at the same level as under the previous Broadcasting Act 1942 regime, the current provisions focus on the concept of control of a licence in which the level of equity holding is only one factor. The Explanatory Memorandum to the Broadcasting Services Bill states in its ‘Outline’ that the Bill:

...emphasises ‘control’ more than ‘ownership’ thereby concentrating on the person who ‘pulls the strings’...

Monitoring compliance with the control provisions of the Act

In recognition of the increasing complexity of corporate structures the rules in the Act have moved from attempting to describe every possible ownership and control structure. Instead the ABA has been given a monitoring role over the broadcasting industry with suitable powers of investigation in order to reach a conclusion as to whether a person is in a position to exercise control of a licence, company or newspaper where such control would cause a breach of the Act (Schedule 1 part 1).

In the general discussion relating to part 5 of the Broadcasting Services Bill, the Explanatory Memorandum to the Bill states:

The ownership and control provisions recognise that ‘control’ depends on particular circumstances and that any attempt to be definitive is almost certain to leave loopholes - indeed, this has been a major failing of the 1942 Act.

Does the ABA’s monitoring require a triggering event?

The ABA is empowered to monitor the industry and to investigate and act on any suspected artifice or arrangement that may seek to contravene the Act. The ABA may assess any corporate structure, agreement or association to determine if it confers control on any person without waiting for a transaction or other trigger to enable it to inquire. In terms of the Explanatory Memorandum, in the general discussion relating to part 5 of the Broadcasting Services Bill, the following appears:

The ownership and control regime will not create loopholes by omission. Rather, it will require the ABA to monitor the industry and empower it to investigate and decide where it considers, *prima facie*, that a breach of the limits may exist without waiting for a transaction or other trigger to enable it to enquire.

This monitoring role is continuous. The ABA has been monitoring the ownership and control of the Ten licences as well as all other commercial broadcasting service licences since its inception.

The use of investigative powers under the Act for the purpose of monitoring compliance

In order to determine, as part of its monitoring function, whether a person is in a position to exercise control of a company or a licence the ABA may consult with any persons, bodies or groups, conduct investigations, hold hearings and otherwise inform itself in any manner it thinks fit (subsection 168(1)).

The ABA may in its discretion determine the procedure it will adopt in performing its monitoring role of the industry. This is subject to the requirement that the procedure adopted by the ABA must be the procedure it considers will be the quickest and most economical in the circumstances (paragraph 168(2)(a)). It must also be a procedure which will promote the due administration of the Act (paragraph 168(2)(b)).

In conducting an investigation the ABA may call for written submissions from members of the public, summon persons to attend an examination by delegates of the ABA and require persons to provide documents which may contain information relevant to the investigation (sections 172, 173, 174 and 177). Following an investigation the ABA may determine whether a particular person is in breach of the control provisions of the Act and prepare a report (section 178). Such a report may be published (section 179).

In making decisions the ABA is not limited to a consideration of material made available to it through an investigation or hearing but may take into account such other matters as it considers relevant (section 169).

Investigating the issue of control

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 (Schedule 1 subclause 2(4)).

Schedule 1 of the Act ‘sets out the mechanisms that are to be used in deciding whether a person is in a position to exercise control of a licence, a company or a newspaper for the purposes of’ the Act (paragraph 7(a) of the Act). It also sets out the mechanisms that are to be used in tracing company interests (paragraph 7(b) of the Act). Subclause 1(1) of the Schedule states that the 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’.

Clauses 2 and 3 of Schedule 1 set out the rules for deciding when a position to exercise control exists. Schedule 1 also states that ‘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’ (Schedule 1 subclause 1(1)).

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

Prior opinions in relation to issues of control

In order to provide certainty in the broadcasting industry section 74 of the Act enables a person to apply to the ABA for an opinion as to whether the person is in a position to exercise control of a licence, newspaper or company at any given time. A person may also apply for an opinion as to whether they would be in a position to exercise control if a transaction, contract, agreement or arrangement were entered into. Such an opinion is binding on the ABA and any other government agency in relation to the question of control (subsection 74(5)). It should be noted, however, that no opinion was sought in this case.

Breaches of the control provisions

If the ABA is satisfied that a person is in breach of a control provision of the Act it may direct the person or the licensee by notice in writing to take action so that the person is no longer in breach (section 70).

Failure to comply with such a notice is an offence and may result in penalties of up to \$2,000,000 where the breach relates to a commercial television broadcasting licence and up to \$200,000 where the breach relates to a commercial radio broadcasting licence (section 72).

Section 66 provides that a person is guilty of an offence where:

- a transaction takes place that puts a person in breach of the ownership and control rules of the Act; and

- the person knew or reasonably ought to have known that a result of the transaction would be to place that person in such a breach; and
- the person was a party to the transaction or was in a position to prevent the transaction taking place; and
- the ABA has not approved the breach.

The penalty for such a breach is a fine of up to \$2,000,000 where the breach relates to a commercial television broadcasting licence and up to \$200,000 where the breach relates to a commercial radio broadcasting licence.

2.1.1 THE LIMITATIONS ON FOREIGN CONTROL OF COMMERCIAL TELEVISION

Limit on control

Subsection 57(1) provides that a foreign person must not be in a position to exercise control of a commercial television broadcasting licence.

Limit on ownership by a foreign person

Subsection 57(2) provides that a foreign person must not have company interests in a commercial television broadcasting licensee that exceed 15%.

Limit on ownership by foreign persons

Subsection 57(3) provides that 2 or more foreign persons must not have company interests in a commercial television broadcasting licensee that exceed 20%.

Limit on directorships

Subsection 58(1) provides that not more than 20% of the directors of each commercial television broadcasting licensee may be foreign persons.

2.2 PRINCIPLES USED TO DETERMINE WHETHER CONTROL EXISTS

2.2.1 MEANING OF ‘FOREIGN PERSON’, ‘COMPANY INTEREST’, ‘CONTROL’ AND ‘ASSOCIATE’ UNDER THE ACT

Foreign person

The expression ‘foreign person’ is defined in section 6 of the Act:

‘foreign person’ means:

- (a) a natural person who is not an Australian citizen; or
- (b) a company, wherever incorporated, where natural persons who are not Australian citizens hold company interests in the company exceeding 50%; or
- (c) a company, wherever incorporated, where:
 - (i) a company referred to in paragraph (b); or
 - (ii) natural persons who are not Australian citizens and a company or companies referred to in paragraph (b);hold company interests in the company exceeding 50%;

Company interest

Where a person has a shareholding interest, voting interest, dividend interest or winding-up interest in a company, the term ‘company interests’ refers to the percentage of the person’s interest. Where a person holds two or more of those interests, the term ‘company interests’ refers to the interest which confers the greatest percentage. Different types of ‘company interests’ are not added. Section 8 further defines the expressions shareholding interest, voting interest, dividend interest and winding up interest.

Control

Section 6 of the Act defines in an inclusive way the methods by which control can be achieved and 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. As was noted by the Department of Communications (1986 Report on Ownership and Control of Commercial Television, Future Policy Directions), ‘control’ is a much looser concept than ‘ownership’:

‘Control’ is a far more elusive relationship [than ownership]. Generally speaking it will be understood to mean a relationship in which one party exercises restraint or direction upon the free action of another, ie it implies domination or command. It refers to a person in a position to impose his will upon another.’

In relation to the definition of ‘control’ in clause 6 of the Broadcasting Services Bill, the Explanatory Memorandum states:

‘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.

Schedule 1 of the Act sets out the mechanisms that are to be used in deciding whether a person is in a position to exercise control of a company or licensee (s7).

Clause 2 of Schedule 1 of the Act sets out ways in which a person, either alone or together with an associate, will be in a position to exercise control of a commercial television or radio broadcasting licence. In broad terms that clause provides that a person is in a position to exercise control of a licence or a company if the person alone or together with an associate is in a position to :

1. exercise (whether directly or indirectly) control of the licensee or company (clause 2(1)(a));
2. exercise (whether directly or indirectly) control of the selection or provision of a significant proportion of the programs broadcast by the licensee (clause 2(1)(b)(ii));
3. exercise (whether directly or indirectly) control of a significant proportion of the operations of the licensee in providing broadcasting services under the licence or the operations of the company (clause 2(1)(b)(iii) and 2(1)(c));
4. veto any action taken by the board of directors of the licensee or the company (clause 2(1)(d)(i));
5. 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 (clause 2(1)(d)(ii)); or
6. 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 (clause 2(1)(d)(iii));
7. or where the licensee or the company or more than 50% of its directors act, or are accustomed to act; or 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 (clause 2(1)(e)).

Clause 2 of Schedule 1 is attached at Appendix A of this report.

Significant proportion

The expression ‘significant proportion’ appears in clause 2(1)(b) and clause 2(1)(c) of Schedule 1.

The ABA has determined that the word ‘significant’ in these provisions does not mean ‘substantial’. It could include a proportion which was less than half, or not substantial, as long as such a proportion was ‘significant’ or relevant or material in terms of determining whether there is control generally over the program material broadcast by a licensee company or over the operations of a licensee.

This provision clearly would not be applicable to a single instance of control being exhibited in relation to a matter falling within the operations of a company. In addition a direction in relation to the broadcast of a single program would not amount to a ‘significant proportion’ of the programs broadcast.

Control of the selection or provision of programs broadcast by a licensee

Relevant to the question of control of programming matters is the question of who has ultimate control, eg can instruct, direct or restrain (in relation to direction or restraint see below), or has veto power over any of the following decisions:

1. the decision to purchase programs from a particular program producer, supplier or distributor;
2. the programs chosen to be purchased from that program producer, supplier or distributor;
3. the terms of an agreement with any such producer, supplier or distributor;
4. the decision to axe a particular program;
5. the decision to broadcast a particular program;
6. scheduling decisions;
7. the decisions which set budgeting limits on the purchase of programming; and
8. the decision to exceed a budgeting limit relating to programming.

Control of any of those decisions may be relevant to the question of whether a person controls the selection or provision of a significant proportion of the programs broadcast by a licensee in terms of clause 2(1)(b)(ii).

Direction or restraint

The expression ‘direction’ appears in clause 2(1)(d)(iii). The word ‘direction’ in *The Macquarie Dictionary*, Second Revised Edition is relevantly defined in the following ways:

1. the act of directing, pointing, aiming, etc.
6. order; command.
7. management; control.

In the ABA's view, the phrase 'to exercise direction', in the context of the Act, refers to more than mere guidance, instruction or advice. It requires some kind of authority over a substantial issue affecting the management or affairs of the company.

The expression 'restraint' appears in clause 2(1)(d)(iii). The expression 'restraint' is defined in *The Macquarie Dictionary* as follows:

- 3. the act of restraining, or holding back, controlling, or checking.

By way of example, 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 in terms of clause 2(1)(d)(iii).

The relevant question then may be who has control over the 'restraints' or the figures which ultimately appear in the budget.

Substantial issue affecting the management and affairs

The expression the 'affairs of a company' is an expression of wide import: *Bond Corporation Holdings Ltd v Sulan* (1990) 2 ACSR 435. In that case Malcolm CJ at page 442-3 cited the *Oxford 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.

Acting in accordance with the directions, instructions or wishes of, or in concert with a person

The expression ‘act in accordance with the directions, instructions or wishes of, or in concert with a person’ appears in clause 2(1)(e) of Schedule 1. The expression also appears in paragraph (d) of the definition of ‘associate’.

The word ‘direction’ was discussed above. In the context in which ‘directions’ appears here, in conjunction with ‘instructions or wishes’, the ABA takes the view that it means ‘order or command’, rather than ‘the act of directing or aiming’.

In *The Macquarie Dictionary*, the word ‘instructions’ is defined in the following ways:

- 2. knowledge or information imparted.
- 4. (*usu. pl.*) an order or direction.
- 5. the act of furnishing with authoritative directions,

the word ‘instruct’ is defined in the following ways;

- 1. to direct or command; furnish with orders or directions.
- 3. to furnish with information, inform or apprise,

and the word ‘wish’ is defined in the following ways;

- 10. a distinct mental inclination towards the doing, obtaining, attaining etc of something, a desire, felt or expressed.
- 12. that which is wished.

To act in accordance with a person’s directions, instructions or wishes or in concert with a person requires more than the mere coincidence of the act and the advice given. What is required in terms of the expression to act in accordance with a person’s directions, instructions or wishes is to submit one’s will to the will of the ‘controlling’ party or the subordination by one party to the wishes of another.

In addition what is required in terms of the phrase ‘acting in concert’ in clause 2(1)(e) is joint action. The expression ‘in concert’ requires an understanding between the parties as to their common purpose or object, ie: it requires consent obtained or reached as a result of communication between the parties.

The expression is not meant to encompass simply simultaneous actions occurring spontaneously between parties who engage in similar conduct for their own respective purposes. Merely being members in common of the same company or organisation, or coincidentally holding similar views on a matter is insufficient.

It is noted that the expression to ‘act in concert’ appears in almost identical language in the definition of ‘associate’ in section 6 of the Act:

- (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;...

However section 6 provides that 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 qualifiers relating to relevant dealings and influence in relation to dealings relating to the relevant licence or company do not appear where the words 'in concert' are used in the control rules in Schedule 1.

A company may act together with another in a number of ways, for example by way of partnership in a joint venture. If a licensee company were to engage in such a venture, independent of its broadcasting activities, it would not necessarily follow that mere participation in the joint venture would be enough to confer control of the licensee company or its licence on the joint venture partner. Provided that the joint venture and activities conducted in relation to it did not influence the operations, management or affairs of the licensee company in the provision of broadcasting services pursuant to its licence, there would be no prima facie presumption of control by the joint venture partner.

This approach is supported by advice the ABA has received from Mr Jim Spigelman QC and Mr Alan Robertson of Counsel, in a different context:

Unlike the parallel provisions in the takeover legislation there is no subject matter to which any concert or directions or instructions must relate. In the takeover context the words are confined by reason of express reference to the election of directors or the acquisition or disposal of shares. In the Broadcasting Services Act 1992 however there is no such reference. In our opinion it is not the case that any kind of arrangement pursuant to which the parties may either act in concert or in accordance with some direction or instruction or wish in some matter totally unrelated to the provisions of the Broadcasting Services Act would be enough to trigger what we have described as the deeming effect of the definition of associate prior to the application of the dispensing power in the final words of the definition. In our opinion any relevant 'concert' as with any relevant 'direction, instruction or wish' must be read down in some manner relating to the scope of that legislation.

For more analysis of the expression to 'act in concert' see below in relation to 'associates'.

Act, or are accustomed to act

The above expression appears in clause 2(1)(e) of Schedule 1, and requires that the action be part of a custom or practice or that the conduct or acts continue.

It should be noted that clause 2(1)(e) of Schedule 1 does not use the expressions 'have acted' or 'has acted'. Accordingly the implication from this may be that the action must either exist at the relevant time or be part of a practice or custom. This interpretation of the provision is in line with the other parts of Schedule 1 which refer to a 'significant proportion' and a 'substantial issue'. It is not meant to catch a single immaterial instance of authority being exercised in relation to a matter but rather the continued or habitual subversion of one company's will to another.

Advice, influence and control

A question which may arise is whether the giving of advice such as to influence ultimate decision making may amount to control. In terms of clause 2 of Schedule 1 the relevant advice given which could influence decision making may relate to:

- the selection or provision of a significant proportion of the programs broadcast by the licensee, clause 2(1)(b)(ii); or
- a significant proportion of the operations of the licensee, clause 2(1)(b)(iii) and clause 2(1)(c); or
- a substantial issue affecting the management or affairs of the licensee, clause 2(1)(d)(iii).

The ABA is of the view that where advice is accepted on the basis of an independent assessment by the individual directors of the board, as a meritorious business suggestion from a proven source, that advice cannot amount to the exercise of control. This view is confirmed by advice from external legal counsel. Mr Bret Walker SC has advised that:

Finally, I was asked to consider whether the mere giving of assistance or advice under the Consultancy Agreement could constitute proscribed control, even where it amounted to no more than mere influence rather than direction or restraint....in my opinion assistance or advice considered on its merits and rejected from time to time, is scarcely consistent with control, direction or restraint.

Mr Walker also advised:

In relation to the domestic programming decisions and the cost-cutting plan, the acceptance by Ten's board of the plan and the consequential budgets should not be seen as evidence of control. While it may be consistent with control, it is just as consistent with the independent decision-making of the individual directors and of the board as whole to accept the meritorious business suggestions from a proven source.

Mr Walker also advised that:

The authorities ... suffice to illustrate the established difference between a person persuading a board or licensee to take a particular course, on the merits, and that same person exercising control of the board or licence.

This view is also supported by the authors of *Media Law and Practice*, Messrs Paul Mallam and James McLachlan who write at page 18-561:

Mere acquiescence by others in a course of action proposed or undertaken by a person would not give that person control because the person would have no power to compel the continued acquiescence.

The ABA is of the view that where there is evidence that at times advice on significant matters was not accepted by the Board, it may be inferred that on the occasions where the advice is accepted, it is done so by directors based on assessment of the merits of that advice.

Such evidence would also indicate that the person giving advice is not in a position to compel, or direct that other person to accept such advice. Mr Walker SC expressed this view of the facts:

..the approach taken in the investigations to testing the existence of alleged control by enquiring as to the occurrence of contradictory events has proved useful. In this case, it produced apparently credible

evidence that the Canadian connections had been unsuccessful in significant ways on a significant number of occasions in persuading Ten's board, and perhaps management as well, to their preferred business approaches. The existence of these contradictory occasions strongly reinforces my view that, taken overall, the material which shows a whole hearted acceptance by Ten's board of other approaches, such as cost-cutting, reflect decisions on the merits as a result of persuasion.

The effect of veto power over the control exercised by a person

In some circumstances a person may have delegated to him by the board of directors of a company control or decision-making power in respect of certain aspects of the operations of a company. Where the board has veto power or ultimate control over the matters delegated to that person the question arises as to whether that person still retains control in terms of the Act. The authors of *Media Law and Practice*, Messrs Paul Mallam and James McLachlan suggest at page 18-558 as follows:

Where control by a person of the operations of a licensee, company or newspaper would otherwise arise from an agreement, but a legal right of veto or ultimate control is reserved to the licensee or publisher, it is suggested that the test of 'control of operations' would not be satisfied. That is because compliance with the course of action undertaken by the person is by the acquiescence of the licensee or publisher and not pursuant to a power of direction or restraint... So, it is suggested that a management agreement which allows a person to manage the operations of a licensee subject to the veto of the licensee's board of directors would not give rise to 'control of the operations'.

The ABA agrees with this view subject to the proviso that the person with veto power or ultimate control must have knowledge of, or be apprised of, the decisions of the person to whom control or management is delegated. If that is not the case any veto power retained cannot effectively be exercised.

The holding of convertible debentures

The concept of a debenture is a broad one and covers many types of transaction. It has been described simply as a document that creates a debt, or a document in which a company acknowledges that it owes a debt to a person. The document is issued to the debenture holder. The Corporations Law defines a debenture in section 9 as meaning a document issued by a body corporate that evidences or acknowledges indebtedness of the body corporate in respect of money that is deposited or may be deposited with or lent to the body corporate, whether constituting a charge on the property of the company or not.

The holder of a debenture does not have a say in the management, affairs or operations of a company, in the same way as a shareholder or equity holder. This is because unlike shares, debentures do not confer on the debenture holder the right to vote at a General Meeting. Debentures are more akin to debt.

Mr Bret Walker SC was asked in December 1993 to consider the relevance of the debentures held by a subsidiary of CanWest in the Ten Group Limited in terms of control. In advice on this point he observed:

A creditor and debenture holder has standing to enforce the discharge by a company and its officers of the company's financial obligations and the officers' fiduciary and statutory obligations which, without any great imagination, could give rise to considerable persuasive force when representatives of the creditor and debenture holder, speaking as directors of the company or directly in that representative role, put forward proposals for the conduct of the company's business...

When the Authority considers the position of CanWest as a debenture holder, it will be relevant to bear in mind that, in some important respects, a disgruntled debenture holder presents less of a threat to the board of a licensee company than would a dissatisfied financier who has lent in a more or less orthodox secured-debt fashion (eg. a bank). In most commercial contexts, a bank will be able to threaten and achieve financial disaster for the company much more readily than a debenture holder (assuming a debenture holder could at all). Accordingly it would be inappropriate for the Authority to assimilate the obligations of Channel 10 to CanWest under the debentures to the case of ordinary debt obligations such as those which will be owed by Channel 10 to its bankers.

The rights conferred on CanWest in respect of the debentures which it holds in TGL are set out in the Terms and Conditions of Issue for both Convertible and Subordinated Debentures.

The \$45.5M worth of Subordinated Debentures are held by CanWest through a subsidiary. They are not secured and on a winding up rank behind all other debts of the company (clause 5(a)). They rank equally with shares except where these debentures are held by a foreign person and such a ranking would cause a breach of the Act (Clause 5(a)). They may be transferred (clause 3(c)).

The requirement to make payments and the right of recovery in respect of these debentures does not arise where such payments would cause TGL to become insolvent (clause 5(b)). No payments can be made in respect of the debentures where any amount is outstanding on other debt of TGL (clause 5(j)). The Subordinated Debentures cannot be redeemed until the expiration of 50 years (clause 8).

Where, on a winding up, there is a distribution of assets of TGL to the shareholders of TGL then if such an equivalent distribution to the debenture holders would not amount to a breach of the Act, the debenture holders are entitled to redeem their debentures plus unpaid interest and are entitled to a share in any surplus (clause 8).

Where any options, rights or placements are granted to shareholders, the Subordinated Debenture holders are entitled to be granted options to take up Subordinated Debentures on equivalent terms as long as such a grant would not cause a breach of the Act (clause 10).

The \$459,550 Convertible Debentures are held by CanWest through a subsidiary and are paid up to \$45,500. They may be transferred (clause 3(c)). They are unsecured and on a winding up of TGL rank equally with other unsecured debt (clause 5).

The Convertible Debentures may be redeemed in the following circumstances:

- after 45 years (clause 9(a));
- if an order is made or a resolution passed for a dissolution, winding up, total liquidation or reorganisation of the company or upon any enforcement of any security granted by the company (clause 9(b)); or
- by conversion to shares (this is only permitted where it would not cause a breach of the Act and therefore does not apply to CanWest) (clause 10).

The only real power that could hypothetically be wielded by CanWest as a debenture holder is the threat of redemption or the right to enforce payment of interest under the debenture

contract. There may also be the power to enforce company officers' fiduciary and statutory obligations.

The right of CanWest to redeem its debentures is non-existent before 50 years for the Subordinated Debentures, and arises in very limited circumstances for the Convertible Debentures (ie winding up, dissolution etc before 45 years). Enforcement action in relation to the Subordinated Debentures can only be taken where this would not threaten TGL's solvency.

In terms of clause 2 of Schedule 1, its status as a debenture holder does not appear to confer on CanWest any substantive right to have a say in the operations, management or affairs of TGL or its subsidiaries, beyond that obtained by any ordinary unsecured creditor.

CanWest could not threaten redemption in order to gain or exercise control of TGL. The threat of enforcement action should TGL default in making payments is minimal, especially as no such threat can be made if to do so would cause TGL to be insolvent or where payments are outstanding on any other debt.

In relation to all the transaction documents, including the debenture documents, Mr Walker advised that the 'mere execution of the transaction documents by CanWest may properly be viewed by the Authority as going nowhere towards a contravention of subsection 57(1).'

Company interests as indicia of control

The holding of company interests is one way in which a person may be in a position to exercise control.

Because of the complexities involved in ascertaining whether a person is in a position to exercise control, Schedule 1 of the Act refers to certain levels of company interests which give rise to rebuttable presumptions in relation to the question of control.

Where a person has company interests exceeding 15% the person will generally be in a position to exert significant influence over the company (Schedule 1 subclause 1(1)). Accordingly, in the absence of proof to the contrary, the Act provides that such a person is to be regarded as being in a position to exercise control of a company (Schedule 1 subclause 6(1)).

Where a person has company interests of 15% or less the person will generally not be in a position to exercise significant influence over the company. However, there may be cases where the holding of company interests of 15% or less does place a person in such a position (Schedule 1 clause 1). In the example given in the Act, a person may hold company interests of only 10%, but no other person holds company interests of more than 2% and those other persons do not act in concert. In such cases the Act suggests the ABA may find that a person with company interests of 10% may, in all the circumstances, be in a position to exercise control of the company.

The expression ‘in a position to exercise control’

The expression ‘in a position to exercise control’ refers to a presently exercisable power, whether or not the power has been invoked, and whether or not control is in fact being exercised. There is no requirement that the power be a legally enforceable right.

The Full Court of the Supreme Court of Victoria in *Equiticorp Industries Ltd v ACI International Ltd* (1987) VR 485 at 489 held, in a different context, that a person would be ‘in a position to control’ a particular level of voting power where that person had:

...an enforceable and presently and immediately existing right enabling the voting power to be controlled. It must be more than control in certain eventualities. (per Murphy, Fullagar and Gobbo JJ)

In practice however it is difficult to determine that a person is in a position to exercise control, in the absence of a legal right to that effect, where there are no instances of the actual exercise of control. The ABA has been advised that what amounts to ‘a position to exercise control’ is a matter of fact and degree and is likely to depend on changes in practices in a company from time to time as well as from case to case. On 18 December 1993 Mr Bret Walker SC advised:

In considering this factor, the Authority is entitled (and may be obliged) to distinguish between theoretical possibilities and possibilities which are substantiated by actual conduct suggesting that control has actually been exercised in the past. The question ‘in a position to exercise control ...’ probably does not apply to cases of theoretical possibility, that is potential control which is potential only in the sense that it has not yet been exercised and its exercise is not threatened.

Associates

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 which it considers relevant to the question of control (section 168). 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 (Schedule 1 subclause 1(1)).

Paragraph 2(1)(a) of the Schedule provides that ‘a person is in a position to exercise control of a licence 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 licensee or the company’. The expression ‘associate’ is also used in other paragraphs of that clause.

The expression ‘associate’ is defined in section 6 of the Act in relation to control of a licence or a newspaper. It includes in paragraph (d) of that definition 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;...

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'.

Subparagraph (d) of the definition of 'associate' 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 may submit his 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 Ltd v Queensland Cement and Lime Co. Ltd* (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 ...

Renard and Santamaria, in *'Takeovers and Reconstructions in Australia'*, at para (430) in the context of company law, state:

One is left with the clear impression that the criteria of an understanding or an arrangement between two parties apply equally in determining whether they are associated. There must be a meeting of minds, a mutual expectation about the actions and attitudes of each of the parties. Merely being members in common of the same company or organisation, or coincidentally holding similar views on a matter is insufficient to form a basis for being associated.

Evidence

The ABA applied the above interpretations, among others, in reaching conclusions about the evidence placed before it.

The ABA obtained evidence through issuing notices for documents from a range of parties, including contracts, minutes of meetings, filenotes, correspondence and telephone and facsimile records. The ABA also obtained information through examinations of persons under oath.

Where findings have been reached or conclusions drawn in the light of evidentiary material which contains internal conflicts, the conclusions have been drawn on the basis of the ABA's preference for one version of events over another.

3.

Company Interests

Legislative context

This part of the report assesses the level of CanWest's company interests in TGL and the licensee companies of commercial television broadcasting licences TEN Sydney, ATV Melbourne and TVQ Brisbane for the purposes of determining whether CanWest has company interests in the licensee companies which exceed 15% in breach of section 57(2) of the Act.

Subsections 57 (2) and (3) of the Act provide:

- (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%.

Company interests are defined in Section 6 of the Act as follows:

'company interests', in relation to a person who has a shareholding interest, a voting interest, a dividend interest or a winding-up interest in a company, means the percentage of that interest or, if the person has 2 or more of those interests, whichever of those interests has the greater or greatest percentage.

Shareholding interests, voting interests, dividend interests and winding-up interests are defined at Section 8 of the Act.

In order to determine the company interests held by foreign persons in the licensee companies it is first necessary to establish which persons holding company interests in the licensees are foreign persons for the purposes of the Act.

This part of the report explains why CanWest is a 'foreign person' in terms of the Act.

Section 6 of the Act defines 'foreign person' as follows:

- (a) a natural person who is not an Australian citizen; or
- (b) a company, wherever incorporated, where natural persons who are not Australian citizens hold company interests in the company exceeding 50%; or
- (c) a company, wherever incorporated, where:
 - (i) a company referred to in paragraph (b); or
 - (ii) natural persons who are not Australian citizens and a company or companies referred to in paragraph (b);hold company interests in the company exceeding 50%.

3.1 OWNERSHIP STRUCTURE OF THE TEN NETWORK

The commercial television broadcasting licences which make up the Ten network are TEN Sydney, ATV Melbourne and TVQ Brisbane. The licensee companies are Television and Telecasters (Sydney) Ltd (TTL (Sydney)), Television and Telecasters (Melbourne) Ltd (TTL (Melbourne)) and Television and Telecasters (Brisbane) Ltd (TTL (Brisbane)) respectively. The three licensee companies are wholly owned subsidiaries of Network Ten Ltd (NTL).

On 17 November 1992 the Westpac Banking Corporation announced that a formal agreement for the sale of its shareholding in NTL had been signed after close of the market on 16 November 1992. The purchaser was identified as TGL which represented an investment consortium including CanWest.

TGL was incorporated in the Australian Capital Territory on 29 September 1992 as Kanthos Ltd. On 15 October 1992 it changed its name to Oltec Ltd and subsequently to TGL on 30 April 1993.

TGL advised the ABA on 30 December 1992 that at the date of the acquisition of NTL it had an issued capital of 45,060,445 ordinary \$1.00 shares. The shareholders of TGL were as follows:

TNQ Television Ltd	18,200,000 shares	(40.39%)
Audant Communications Pty Ltd (Mr R Whyte)	6,824,999 shares	(15.15%)
CGS Shareholding (Netherlands) BV (CanWest)	6,759,066 shares	(15.00%)
Belshaw Pty Ltd (Mr J Singleton)	4,550,001 shares	(10.10%)
Corom Pty Ltd (Mr J Cowin)	4,550,000 shares	(10.10%)
Leibler Media Holdings Pty Ltd (Mr I Leibler)	2,275,000 shares	(5.05%)
Winston Capital Inc. (Mr S Berney)	1,401,379 shares	(3.11%)
Copplemere Pty Ltd (Mr J Skala)	500,000 shares	(1.11%)

On 13 September 1995 TGL advised the ABA that at 4 September 1995 the issued capital of the company was 45,500,000 ordinary \$1.00 shares. At 4 September 1995 the shareholders of TGL were:

TNQ Television Ltd	18,200,000 shares	(40.00%)
CGS Shareholding (Netherlands) BV	6,824,999 shares	(15.00%)
Audant Communications Pty Ltd	4,574,999 shares	(10.05%)
Belshaw Pty Ltd	4,550,001 shares	(10.00%)
Corom Pty Ltd	4,550,000 shares	(10.00%)
Australian Mutual Provident Society	2,932,500 shares	(6.45%)
Leibler Media Holdings Pty Ltd	2,275,000 shares	(5.00%)
Winston Capital Inc.	732,501 shares	(1.61%)
Copplemere Pty Ltd	500,000 shares	(1.10%)
Rosendale Investments Ltd (Mr P Viner)	360,000 shares	(0.79%)

CGS Shareholding (Netherlands) BV (CGS Shareholding) is a subsidiary of CanWest. In addition to its shareholding interest CGS Shareholding was issued with 455,000 Convertible Debentures) in TGL. The Convertible Debentures have a face value of \$1.01 being paid up to 10 cents each.

CGS Debenture Holding (Netherlands) BV (CGS Debenture), also a CanWest subsidiary, was issued with 45,500,000 Subordinated Debentures in TGL. The Convertible Debentures have a face value of \$1.00 and are fully paid up.

Diagram 1.1 shows the shareholding structure of TGL at 5 September 1995.

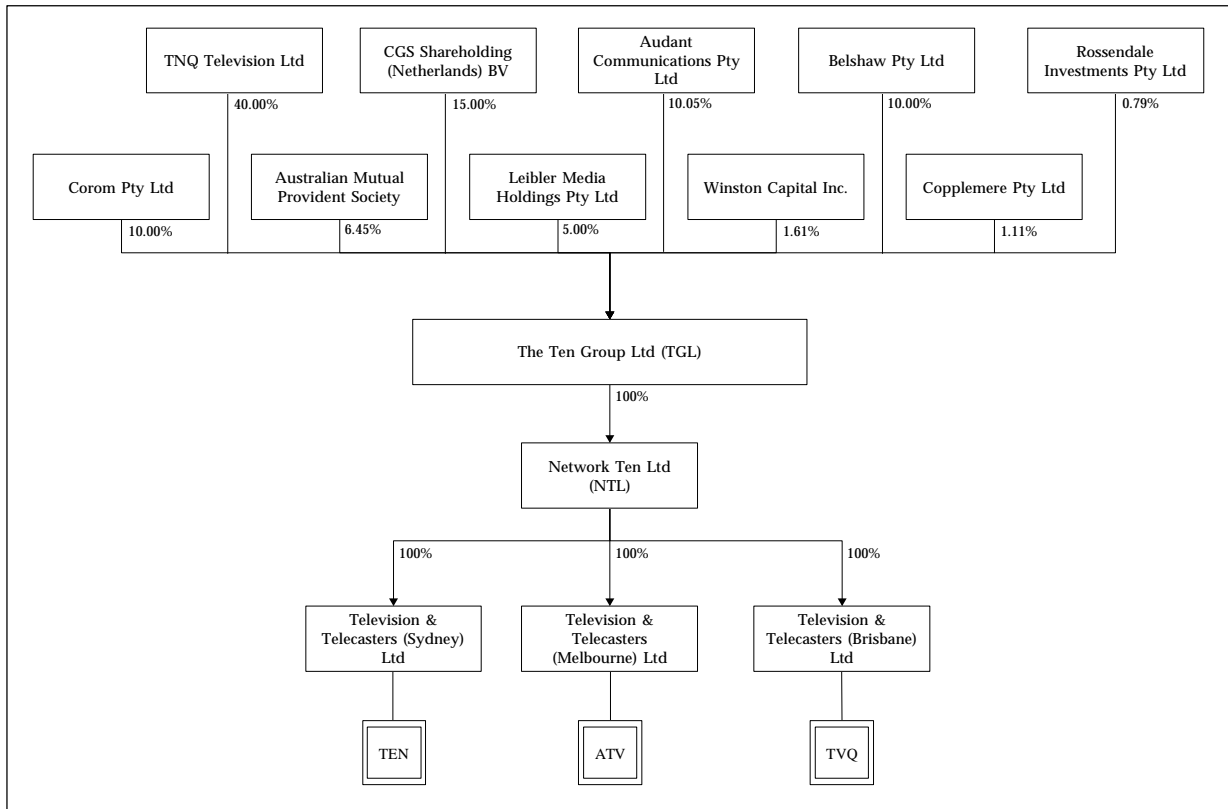


Diagram 1.1 - Shareholding structure of The Ten Group Ltd at 5 September 1995.

3.2 ARE THE CANWEST GROUP OF COMPANIES FOREIGN PERSONS FOR THE PURPOSES OF THE ACT?

In determining whether the CanWest group of companies are foreign persons for the purposes of the Act the ABA obtained information about the ownership structure of the group from CanWest, Mr Asper and various on-line information sources.

Diagram 1.2 sets out the ownership structure of the CanWest group of companies.

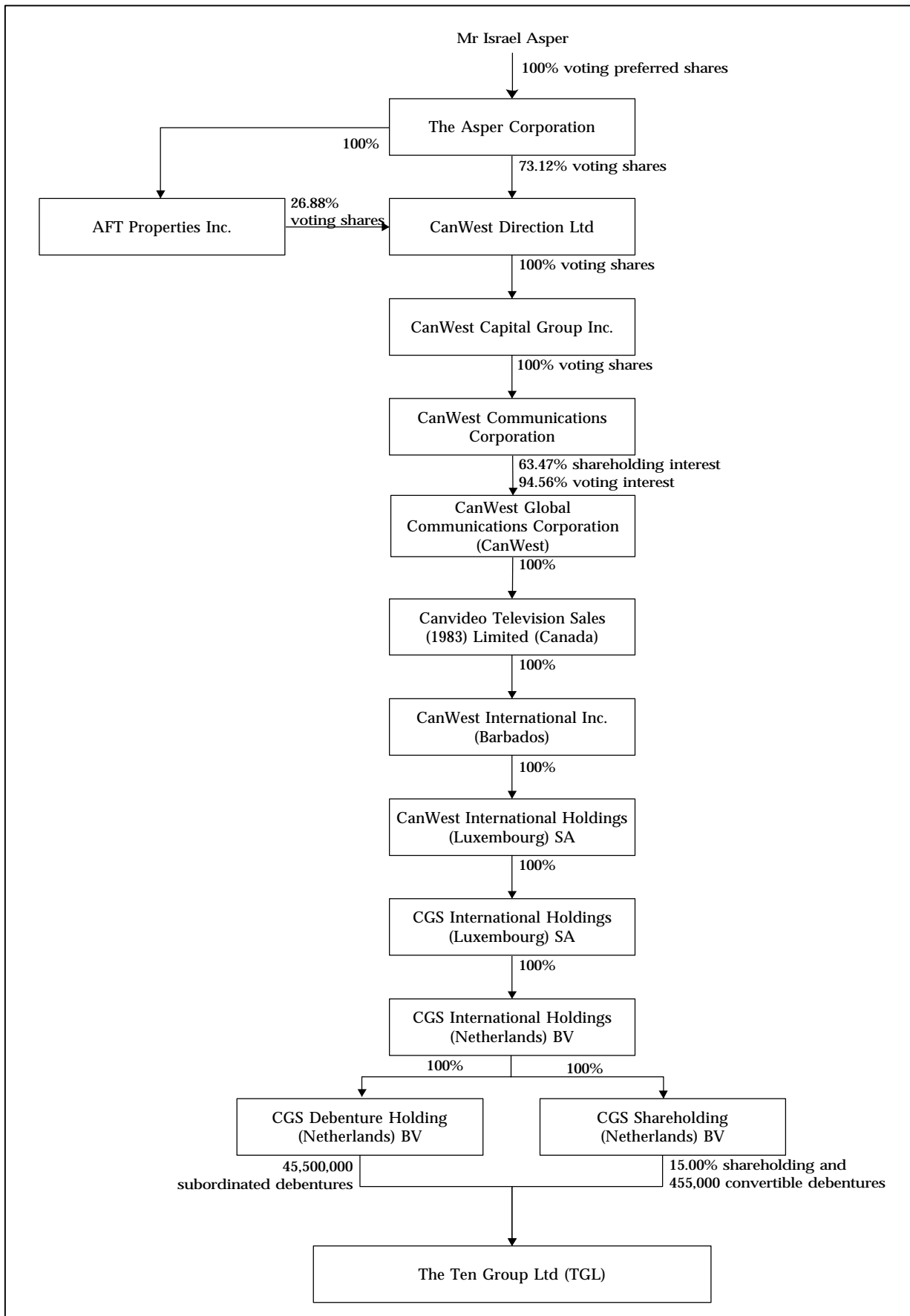


Diagram 1.2 - Ownership structure of the CanWest group of companies at 25 September 1995 as they relate to CanWest's interest in TGL.

To establish whether a company is a 'foreign person' it is necessary to look behind the company in order to establish that natural persons who are not Australian citizens hold company interests in the company exceeding 50%.

In the case of CGS Shareholding, the first company in the chain, CGS International Holdings (Netherlands) BV (CGS) has a 100% company interest in CGS Shareholding. It is therefore necessary to establish whether CGS is a foreign person for the purposes of the Act. As in the case of CGS Shareholding it is necessary to look behind CGS to establish whether natural persons who are not Australian citizens hold company interests in the company exceeding 50%.

Working up the chain of companies this process is repeated until a company is found where natural persons hold company interests in the company exceeding 50%. The first company where a natural person holds company interests in the company exceeding 50% is The Asper Corporation.

Mr Israel Asper has a 100% company interest, being a voting interest, in The Asper Corporation. Mr Asper, being a natural person who is not an Australian citizen, is a 'foreign person' under paragraph (a) of the definition. The Asper Corporation is therefore a 'foreign person' under paragraph (b) of the definition of 'foreign person' as a non-Australian natural person (Mr Asper) holds company interests in it exceeding 50%.

On 26 March 1993, the ABA received an advice from Counsel (Mr Jim Spigelman QC and Mr Alan Robertson) regarding the use of the fractional tracing method in clause 8 of Schedule 1 of the Act in ascertaining compliance with the aggregate foreign company interest limits in sections 57 and 109 of the Act. Counsel advised 'that the Authority is obliged to conduct such a tracing exercise for purposes of determining foreign ownership. Section 7 of the Act refers to Schedule 1 as setting out mechanisms that 'are to be used' in tracing company interests. These are mandatory words.'

Counsel noted 'that the concept of 'company interest' and accordingly the question of tracing such interest, arises within the definition of 'foreign person' itself.' It is therefore mandatory that the ABA use the fractional tracing method for determining whether a person or company is a 'foreign person' in terms of the Act.

Using the fractional tracing method Mr Asper, being a non-Australian natural person, holds company interests of 73.12% in CanWest Direction Ltd. As this exceeds 50% CanWest Direction Ltd is a 'foreign person' under paragraph (b) of the definition. Similarly, it can be shown that Mr Asper holds company interests exceeding 50% in every company in the chain down to and including CGS Shareholding (see Diagram 1.2). Accordingly, each of these companies is a 'foreign person' under paragraph (b) of the definition.

FINDINGS

On the basis of the evidence before it the ABA finds that:

- 1. Mr Asper is a foreign person for the purposes of the Act under paragraph (a) of the definition of foreign person in section 6 of the Act.*
- 2. The following persons are each foreign persons for the purposes of the Act under paragraph (b) of that definition:*

*The Asper Corporation;
AFT Properties Inc.;
CanWest Direction Ltd;
CanWest Capital Group Inc.;
CanWest Communications Corporation;
CanWest;
CanVideo Television Sales (1983) Ltd;
CanWest International Inc.;
CanWest International Holdings (Luxembourg) SA;
CGS International Holdings (Luxembourg) SA;
CGS;
CGS Shareholding; and
CGS Debenture.*

3.3 ASSESSING THE COMPANY INTERESTS HELD BY CANWEST AND MR ASPER IN THE LICENSEE COMPANIES

In order to ascertain the company interests of CanWest and Mr Asper the ABA assessed each of the various interests held by each and then determined what level of company interest, if any, was conferred on the holder.

In this regard, the ABA received advice from Counsel (Mr Bret Walker) on 18 December 1992 that the documents ‘pursuant to which the various purchase and financing transactions will be accomplished by the consortium, succeed in their evident intent to ensure that CanWest will not cause a contravention of sub-sections 57(2) (the 15% foreign limit) and (3) (the 20% aggregate foreign limit) by reason of the consortium’s purchase of Channel 10.’

In addition, as part of the agreement to sell, Westpac required TGL to provide advice from a Queen’s Counsel that the proposed capital and debt structure would not breach section 57 of the Act. The ABA was provided with a copy of an advice from Mr Peter Hely QC and Mr David Catterns QC on 9 December 1992 advising that such a breach would not arise.

3.3.1 THE SHAREHOLDING INTERESTS OF CANWEST AND MR ASPER IN TGL AND THE LICENSEE COMPANIES

For the purposes of the Act, subsection 8(1) of the Act defines a shareholding interest as follows:

- (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 the 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.

TGL advised the ABA on 13 September 1995 that at 4 September 1995 CGS Shareholding held 6,824,999 shares out of a total of 45,500,000 shares. This equates to a shareholding interest of 15.00% in TGL.

Neither CanWest nor Mr Asper has a direct shareholding interest in TGL. However, CanWest and Mr Asper have traced shareholding interests through CGS Shareholding (see Diagram 1.2).

Clause 8 of Schedule 1 of the Act provides that the company interest of a person through a chain of companies can be calculated using the fractional tracing method.

This method is best demonstrated by example:

A Person has 30% of the company interests in Company A.

Company A has 10% of the company interests in Company B.

The fractional tracing method calculates the Person's company interests in Company B by multiplying the Person's company interests in Company A, expressed as the fraction $\frac{30}{100}$, by Company A's company interests in Company B, expressed as the fraction $\frac{10}{100}$.

As $\frac{30}{100} \times \frac{10}{100}$ produces the figure 3%, the Person's company interests in Company B are 3%.

Using the fractional method CanWest has a shareholding interest of 15.00% in TGL and Mr Asper has a shareholding interest of 9.52% ($\frac{15}{100} \times \frac{63.47}{100}$). The 63.47% interest is the shareholding interest CanWest Communications Corp. has in CanWest.

The licensee companies are wholly owned subsidiaries of NTL, which is, in turn, a wholly owned subsidiary of TGL. Using the fractional tracing method CGS Shareholding and CanWest therefore have shareholding interests of 15.00% in each of the licensee companies. Mr Asper has a shareholding interest of 9.52% in each of the licensee companies.

FINDINGS

On the basis of the evidence before it the ABA finds that:

3. *CanWest has a shareholding interest of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane).*
4. *Mr Asper has a shareholding interest of 9.52% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane).*

3.3.2 THE VOTING INTERESTS OF CANWEST AND MR ASPER IN TGL AND THE LICENSEE COMPANIES

Voting interests are defined in subsection 8(2) of the Act as follows:

- (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.

[emphasis added]

What voting interests are conferred on CanWest and Mr Asper by virtue of the shareholding interests of CGS Shareholding?

CGS Shareholding holds 15.00% of the ordinary shares in TGL. Under the Memorandum and Articles of Association of TGL each share entitles the holder to one vote on a poll cast at a general meeting and one vote per member present on a show of hands.

The ABA has found that CGS Shareholding has a voting interest of 15.00% in TGL by virtue of its shareholding in TGL. Using the fractional tracing method this equates to a voting interest of 15.00% in each of the licensee companies.

As found in 3.3.1 CanWest has the same shareholding interest in the licensee companies as CGS Shareholding using the fractional tracing method. CanWest therefore has a voting interest of 15.00% in the licensee companies.

The ABA has found that Mr Asper is in a position to control the votes of CGS Shareholding by virtue of his traced company interest of 63.47% in CGS Shareholding giving him an enforceable and presently immediately existing right enabling the voting power to be controlled.

In this regard, the Full Court of the Supreme Court of Victoria held in *Equiticorp Industries Ltd v ACI International Ltd* (1987) VR 485 at 489 that a person would be in ‘a position to control’ a particular level of voting power where that person has ‘an enforceable and presently immediately existing right enabling the voting power to be controlled.’

Therefore, the ABA has found that Mr Asper has a voting interest, by virtue of the shares held by CGS Shareholding, of 15.00% in TGL and the licensee companies.

FINDINGS

On the basis of the evidence before it the ABA finds that:

5. *CanWest has a voting interest of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane) by virtue of its traced shareholding interest in TGL.*
6. *Mr Asper has a voting interest of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane) by virtue of his being in a position to exercise control of the votes of CGS Shareholding.*

Do the Convertible Debentures held by CGS Shareholding constitute voting interests?

In order to calculate the total voting interests held by CanWest and Mr Asper in TGL and the licensee companies it is necessary to determine whether the Convertible Debentures held by CGS Shareholding constitute voting interests for the purposes of the Act.

CGS Shareholding was issued with 455,000 Convertible Debentures in TGL. The Convertible Debentures have a face value of \$1.01 being paid up to 10 cents each.

In determining whether the Convertible Debentures constitute voting interests it is important to note that the right to vote attaches to a share. Therefore, the Convertible

Debentures will only give CGS Shareholding a voting interest where CGS Shareholding has an enforceable, present and immediately existing right to convert the Convertible Debentures into shares.

Each Convertible Debenture is convertible to 100 shares but only if a qualifying requirement, defined in clause 1 of the Terms and Conditions of Issue in the Convertible Debenture Deed, is satisfied. This qualifying requirement requires that either:

- (a) (1) the Noteholder or its nominee is an Australian resident; and
(2) the conversion of the Notes under clause 9 is not in breach of and does not cause the Issuer or its affiliates to be in breach of Foreign Control and Ownership Legislation or any mandatory directive given thereunder, in regard to any approvals or authorisations given thereunder; or
- (b) the Foreign Control and Ownership Legislation (including any mandatory directive given thereunder) at the relevant time and taking into account any approvals or authorisations given thereunder permits conversion of the Notes under clause 9 in favour of the Noteholder or its Nominee notwithstanding that such Noteholder or its Nominee is not an Australian Resident.

Under the definitions in the Terms and Conditions of Issue, 'Australian Resident' means:

a person who is not a 'foreign person' within the meaning of both the Foreign Acquisitions and Takeovers Act 1975 and the Broadcasting Services Act 1992 as each may be amended or varied or replaced with another Act dealing with similar subject matter (each or such Acts as so amended varied or replaced being collectively referred to as 'Foreign Control and Ownership Legislation').

The Notes may only be converted when:

Subject to the Qualifying Requirement having been satisfied and the Noteholder having paid the balance of the unpaid amounts payable on the Notes in accordance with clause 8(b), a Noteholder may from time to time at its option by way of redemption of the Notes and upon giving at least one (1) Business Day's notice to the Issuer, convert some or all of its Notes into fully paid Shares subscribed for at the Subscription Price by delivering to the Issuer:

- (1) that Note or Notes; and
- (2) a duly completed Conversion Notice relating to that Note or those Notes.

The effect of these provisions is that CGS Shareholding's right to convert the Convertible Debentures to ordinary shares is subject to the proviso that such a conversion will not result in a breach of the Act or the *Foreign Acquisitions and Takeovers Act 1975* (FATA).

Will conversion of the Convertible Debentures result in a breach of the Act?

To determine whether the Convertible Debentures are convertible at any given time it is necessary, hypothetically, to convert them and determine whether they will result in company interests which would place CGS Shareholding in breach of section 57(2) of the Act.

If there will be a breach of the Act or the FATA then the Notes may not be converted. If there will not be a breach of either Act then the Notes may be converted, and would then give rise to immediate, present and existing company interests.

Applying the hypothetical test to the Convertible Debentures the ABA has found that if the Convertible Debentures were converted CGS Shareholding would hold 52,324,999 shares out of a total of 91,000,000 shares on issue giving it shareholding interest of 57.50% leading to a breach of section 57(2) of the Act.

FINDING

On the basis of the evidence before it the ABA finds that:

7. *At the present time, CGS Shareholding has no enforceable right to convert the Convertible Debentures to shares and therefore the Convertible Debentures do not confer voting interests on any of CGS Shareholding, CanWest or Mr Asper.*

Do the Subordinated Debentures held by CGS Debenture constitute voting interests?

As for the Convertible Debentures, in order to calculate the total voting interests held by CanWest and Mr Asper in TGL and the licensee companies it is necessary to determine whether the Subordinated Debentures held by CGS Debenture constitute voting interests for the purposes of the Act.

CGS Debenture, a subsidiary of CanWest, holds 45,500,000 Subordinated Debentures in TGL. The Subordinated Debentures have a face value of \$1.00 being fully paid-up. The Subordinated Debentures are not convertible to shares and do not carry an entitlement to vote at a general meeting of TGL. The Subordinated Debentures are not to be redeemed until the expiration of 50 years from the date of issue except in limited circumstances including the dissolution, winding-up, total liquidation or reorganisation of TGL.

FINDING

On the basis of the evidence before it the ABA finds that:

8. *The Subordinated Debentures do not confer voting interests on any of CGS Debenture, CanWest or Mr Asper.*

3.3.3 DIVIDEND INTERESTS HELD BY CGS, CANWEST AND MR ASPER

For the purposes of the Act, subsection 8(3) of the Act defines a dividend interest as follows:

(a) a person has a dividend interest in a company if:

- (i) the person is, or would become if a dividend were declared, beneficially entitled to be paid or credited a dividend by the company; or

(ii) under the memorandum and articles of association of the company, a share of any profits of the company is to be, or may be, paid or credited to the person otherwise than as dividends on shares; and

(b) the percentage of the interest is:

(i) if subparagraph (a)(i) applies - the amount of the dividend to which the person is beneficially entitled or will become beneficially entitled expressed as a percentage of the total of all dividends to which members of the company become entitled at that time; or
(ii) if subparagraph (a)(ii) applies - the amount of the maximum share of any profits of the company that could be paid or credited to the person at a particular time expressed as a percentage of the total of all shares of profits that could be paid or credited to all members of the company at that time.

What dividend interests are conferred on CanWest and Mr Asper by virtue of the shareholding interests of CGS Shareholding?

The Memorandum and Articles of Association of TGL provide for the declaration and payment of dividends of an amount that, in the judgement of the directors, the financial position of the company justifies.

As a person's entitlement to a dividend in TGL is based on the amount credited as paid on shares and as all the ordinary shares in TGL have been fully paid up, the dividend interest of CGS Shareholding, CanWest and Mr Asper by virtue of the shareholding of CGS Shareholding are identical to their shareholding interests calculated at 3.3.1 above.

FINDINGS

On the basis of the evidence before it the ABA finds that:

9. *CanWest has a dividend interest of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane) by virtue of its traced shareholding interest in TGL.*
10. *Mr Asper has a dividend interest of 9.52% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane) by virtue of his traced shareholding interest in TGL.*

However, in order to calculate the total dividend interests held by CanWest and Mr Asper in TGL and the licensee companies it is necessary to determine whether the Convertible Debentures and/or Subordinate Debentures held respectively by CGS Shareholding and CGS Debenture constitute dividend interests for the purposes of the Act.

Do the Convertible Debentures constitute dividend interests?

As noted in 3.3.2 above, CGS Shareholding holds 455,000 Convertible Debentures in TGL. Under the Terms and Conditions of Issue of the Convertible Debentures the holder is entitled to an annual interest payment calculated at a specified rate. Under clause 1 of the Terms and Conditions of Issue the 'Interest Rate' means:

the rate determined by the Issuer in good faith to be the rate offered by the Commonwealth Bank of Australia (or its successor or, in the absence of any successor, any Australian trading bank determined by the Issuer) on the immediately preceding Interest Payment Date (or, in the case of the first Interest Payment Date, the date of issue of the Notes) for a term deposit of one year in an amount equal to the then paid up value of the Notes.

The ABA received advice from Mr Robert Orr of the Office of General Counsel, Attorney General's Department on 15 March 1995 regarding the status of convertible notes (and debentures). This advice stated that 'As a matter of form, the Noteholder is entitled to 'interest', not to a dividend. As a matter of substance, whilst the term 'dividend' is not defined in the Act, general company law principles suggest that a dividend is something that attaches to an issued share.' Accordingly, the interest payment on the Convertible Debentures cannot be regarded as a dividend payment in terms of s.8(3)(a)(i) of the Act.

As the interest rate bears no relationship to the performance of TGL it cannot be regarded as a payment which involves a share of the profits of TGL in terms of s.8(3)(a)(ii) of the Act as set out above.

FINDING

On the basis of the evidence before it the ABA finds that:

- 11. The interest payments on the Convertible Debentures do not constitute a dividend interest for the purposes of the Act.*

Do the Subordinated Debentures constitute dividend interests?

As noted in 3.3.1 above, CGS Debenture holds 45,500,000 Subordinated Debentures in TGL. Clause 6(b)(1) of The Terms and Condition of Issue of the Subordinated Debentures provides for the payment of interest to the holder at the rate of 15% per annum (the Maximum Rate) paid annually in arrears payable on 31 December each year (the Interest Payment Date). However, the amount of interest actually required to be paid in any one year is not to exceed the Subordinated Debenture holder's pro rata proportion of the Equivalent Distribution (ED).

The ED is calculated using the formula at clause 6(b)(2) of the Terms and Conditions of Issue. Specifically, clause 6(b)(2) provides:

The Equivalent Distribution or ED shall be determined by the following formula:
 $ED = A/B \times C$, where A, B and C have the meanings below,

A = the number of shares into which the Notes of that Noteholder and all other Noteholders would notionally convert into at the time of the relevant Distribution were the Notes able to be converted into Shares (calculated in the first instance on a one for one basis by reference to the Factor under clause 9(a) but subject to that Factor being itself adjusted by clause 9(b) (where applicable).

B = the number of Shares actually on issue at the time of the relevant distribution.

C = an amount equal to the relevant Distribution (other than on Notes).

Distribution is defined at clause 1 of the Terms and Conditions of Issue to mean:

- (a) a dividend (which, without limitation includes an issue of shares in lieu of a cash dividend and credited as fully or partly paid out of profits or reserves); or
- (b) any other distribution which, without limitation, includes a capital distribution, a cash distribution, a distribution of property, rights or any other benefit whatsoever,
given or made available to any Long Term Security Holder in his capacity as such by the Issuer or any other person and made, paid or credited in respect of any Long Term Security, other than
- (a) a distribution of a type referred to in clause 10, or
- (b) a distribution which constitutes a 'winding-up interest' within the meaning of the Broadcasting Services Act 1992 (hereinafter called 'the Act' and 'Winding-up Interest respectively) except where:-
 - (1) such distribution is in favour of a Noteholder who is not a 'foreign person' within the meaning of the Act, or
 - (2) in the event that in the future such entitlement to such distribution would not give rise to a breach of the Act.

Clauses 6(b)(3) and 6(b)(4) of the Terms and Conditions of Issue provide a means for the auditor of TGL to set and vary the rate of interest at the commencement of each year for the ensuing year.

In theory, CGS Debenture is paid interest of 15% per annum on the Subordinated Debentures. However, if in any one year the ED (in effect dividends, to date) is greater than the Maximum Rate, the excess is added to the ED for the ensuing year and the Maximum Rate is accordingly adjusted upwards by the auditor of TGL. If the ED in any one year is less than the Maximum Rate, TGL is not required to pay the shortfall to the CGS Debenture but rather it is accumulated on an annual basis for so long as there is such a shortfall.

In practice, if a dividend is declared by TGL and payment is made to shareholders provision is made for an equivalent interest payment to be made to CGS Debenture on 31 December of that year.

As noted above, the ABA was advised by Mr Orr of Counsel in March 1995 that, 'As a matter of form, the Noteholder is entitled to 'interest', not to a dividend.' Although the equivalent interest payment is linked to the payment of dividends to shareholders, it is not a dividend in terms of Section 8(3)(a)(i) of the Act as set out above.

The equivalent interest payment made to CGS Debenture could arguably be regarded as a share of the profits, however because that distribution is not provided for under the Memorandum and Articles of Association of TGL it cannot be regarded as a company interest in terms of Section 8(3)(a)(ii) of the Act as set out above.

FINDING

On the basis of the evidence before it the ABA finds that:

12. *The equivalent interest payment on the Subordinated Debentures does not constitute a dividend interest for the purposes of the Act.*

3.3.4 WINDING-UP INTERESTS HELD BY CANWEST AND MR ASPER

Subsection 8(4) of the Act defines a winding-up interest as follows:

- (a) a person has a winding-up interest in a company if the person would be entitled to a share of the property of the company that could be distributed among members of the company if property of the company were distributed among members, whether as a result of a winding-up or otherwise; and
- (b) the percentage of the interest is the percentage that the value of that part of the property of the company to which the person would be so entitled bears to the total value of the property of the company.

What winding-up interests are conferred on CanWest and Mr Asper by virtue of the shareholding interests of CGS Shareholding?

The Memorandum and Articles of Association of TGL provide for the distribution of property of the company to members in proportion to the number of shares held irrespective of the amounts paid or credited as paid on the shares.

As a person's entitlement to a distribution of the property of TGL is based on the number of shares held the winding-up interest of CanWest and Mr Asper by virtue of the shareholding interests of CGS Shareholding is identical to their shareholding interests calculated at 3.3.1 above.

FINDINGS

On the basis of the evidence before it the ABA finds that:

- 13. *CanWest has a winding-up interest of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane) by virtue of its traced shareholding interest in TGL.*
- 14. *Mr Asper has a dividend interest of 9.52% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane) by virtue of his traced shareholding interest in TGL.*

However, in order to calculate the total winding-up interests held by CanWest and Mr Asper in TGL and the licensee companies it is necessary to determine whether the Convertible Debentures held by CGS Shareholding and/or Subordinate Debentures held by CGS Debenture constitute winding-up interests for the purposes of the Act.

Do the Convertible Debentures constitute winding-up interests?

Clause 9 of the Terms and Conditions of Issue of the Convertible Debentures provides that if an order is made or a resolution passed for any dissolution, winding-up, total liquidation or reorganisation of the Issuer then 'following a request by the Noteholder the relevant Notes must be immediately redeemed in cash by the Issuer and the Issuer must repay to that Noteholder, in respect of each Note redeemed, the paid-up value of that Note and must pay any accrued interest in accordance with clause 6(b).'

However, the Convertible Debentures do not entitle the holder to a share of the property of the company that could be distributed among members as a result of a winding-up or otherwise.

FINDING

On the basis of the evidence before it the ABA finds that:

15. *The Convertible Debentures do not constitute a dividend interest for the purposes of the Act.*

Do the Subordinated Debentures constitute winding-up interests?

Clause 5(a) of the Terms and Conditions of Issue of the Subordinated Debentures provides:

The Notes constitute the unsecured and subordinated obligations of the issuer and rank behind all other present and future obligations of the Issuer (whether secured or unsecured and whether or not subordinated) but

(1) shall rank (for principal or interest) equally with Shares in respect of Notes where at the time the relevant Noteholder beneficially owning those Notes is not a Foreign Person within the Act or if the relevant Noteholder were such a Foreign Person, only if such ranking in the relevant circumstances would not give rise to a breach of the Act, and

(2) in any other case for so long as paragraph (1) is inapplicable shall not rank (for principal or interest) on a winding up or otherwise so as to confer a 'winding up interest' within the meaning of the Act and in consequence will have no right to redemption proceeds under clause 8(b) or surplus assets available for distribution as referred to in clause 8(c)

AND references to Notes and Noteholders in the succeeding provisions of this clause 5 shall distinguish between the Notes and Noteholders referred to in paragraph (1) from the Notes and Noteholders referred to in paragraph (2).

In addition clause 7 provides:

Notwithstanding any other term or condition of these Notes, no entitlement or benefit in relation to the Notes or the holder thereof shall arise or be permitted under clause 6 or under any other provision of these terms and conditions beyond that which would be permitted without contravention of the Act at the time such entitlement or benefit would or could otherwise arise and in the event of dispute as to this, the opinion of the Issuer's lawyers (confirmed if required by either the Issuer or Noteholder by independent Senior Counsel) shall be conclusive.

The ABA is satisfied that whilst CGS Debenture, or any other foreign person for the purposes of the Act, remains the holder of the Subordinated Debentures it is not entitled to any redemption proceeds or surplus assets available for distribution in the event of a winding-up of TGL.

FINDING

On the basis of the evidence before it the ABA finds that:

16. *Whilst CGS Debenture remains the holder of the Subordinated Debentures they do not constitute a winding-up interest for the purposes of the Act.*

3.3.5 OTHER INTERESTS HELD BY CANWEST AND MR ASPER IN TGL

In a Notice dated 18 November 1994 the ABA sought from CanWest 'all documents recording and comprising financial assistance given by CanWest, a CanWest related company, Mr Asper or any associate of Israel Asper's to any person holding (directly or indirectly) company interests in TGL.'

CanWest responded on 2 December 1994 noting that CanWest International Inc. (CII) had transferred an amount of cash to a trust account of Freehill Hollingdale and Page (in December 1992) to be loaned to Oltec to allow completion of the purchase of TTL in the event that funds from other shareholders did not arrive in time to effect the closing of the purchase transaction. However, the other shareholders' funds did in fact arrive on the closing date and the funds were returned to CII.

On 6 July 1995 the ABA issued Notices to CanWest, Fulcrum Capital Corporation Ltd (Fulcrum), John Mitchell and Partners Pty Ltd (JMP), Turnbull and Partners Ltd and Capital Television Holdings Ltd seeking all documents recording and/or relating to the following:

- any interest in, or any mortgage, charge, guarantee or security in respect of, shares or other securities forming part of the capital of Fulcrum Capital Corporation Ltd (ACN 003 195 588) by CanWest, any CanWest related company, Mr Asper or any associate of Mr Asper; and
- financial assistance given by CanWest, a CanWest related company, Mr Asper or any associate of Mr Asper to Fulcrum Capital Corporation Ltd or to any person holding (directly or indirectly) company interests in Fulcrum Capital Corporation Ltd.

The ABA has received documents from a number of parties in response to these Notices. In particular, CanWest responded on 4 August 1995 stating, amongst other things:

Neither CanWest, any CanWest related company, Mr Asper nor any associate of Mr Asper had during the period under your review (5 October 1992 to 4 July 1995) any beneficial interest in any shares or other securities of Fulcrum Capital Corporation Ltd, whether by mortgage, charge, guarantee, security interest, or otherwise.

Neither CanWest, any CanWest related company, Mr Asper nor any associate of Mr Asper provided during the period under your review any financial assistance to Fulcrum.

Inquiries of our subsidiary, CII, indicate that, in the course of its business, it entered into a loan, trust and agency agreement with a Canadian Investment company, Gabtech Resources Inc (Gabtech). Gabtech and its principals were well known to CII.

CanWest also provided a number of documents indicating that CII was acting as agent for Gabtech and had advanced monies to JMP in order to allow it to acquire shares in Fulcrum and Kanji Ltd (Kanji), a shareholder in Fulcrum.

CanWest is of the view that CII was merely acting as agent for Gabtech and had no beneficial interest in shares in Fulcrum and Kanji held by JMP on behalf of CII in its capacity as agent for Gabtech.

On 25 August 1995 CanWest indicated in a letter to the ABA that: 'The transaction in question came to the attention of CanWest executives from Mr John Mitchell, an Australian financial broker. CanWest declined to make the proposed investment but referred the opportunity to [a Canadian investor], who did make the investment, through his company, Gabtech, as a principal and not as an agent for CanWest or any of its subsidiaries.'

The shares in Fulcrum and Kanji were sold in May 1994. In June 1994 the loan, agency and trust agreements between CII and Gabtech were terminated. At the time, Fulcrum was a substantial shareholder in TNQ, which in turn held 40.39% of the issued capital of TGL.

The ABA is continuing its inquiries in relation to this matter.

3.3.6 COMPANY INTERESTS HELD BY CANWEST AND MR ASPER

Section 6 of the Act provides:

'company interests', in relation to a person who has a shareholding interest, a voting interest, a dividend interest or a winding-up interest in a company, means the percentage of that interest or, if the person has 2 or more of those interests, whichever of those interests has the greater or greatest percentage.

As CanWest and Mr Asper have shareholding, voting, dividend and winding-up interests in the licensee companies their company interest for the purposes of the Act is the one which has the greatest percentage.

FINDINGS

On the basis of the evidence before it the ABA finds that:

17. *CanWest has company interests for the purposes of the Act of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane).*
18. *Mr Asper has company interests for the purposes of the Act of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane).*

CONCLUSION

On the basis of its findings in relation to voting interests addressed in part 3.3.2 of this report the ABA concludes that:

CanWest has a voting interest of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane); and

Mr Asper has a voting interest of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane).

On the basis of its findings in relation to dividend interests addressed in part 3.3.3 of this report the ABA concludes that:

CanWest has a dividend interest of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane); and

Mr Asper has a dividend interest of 9.52% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane).

On the basis of its findings in relation to winding-up interests addressed in part 3.3.4 of this report the ABA concludes that:

CanWest has a winding-up interest of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane); and

Mr Asper has a winding-up interest of 9.52% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane).

On the basis of its findings in relation to parts 3.2 - 3.3.5 of this report the ABA concludes that:

CanWest is a foreign person for the purposes of the Act;

CanWest has company interests of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane);

CanWest is not in breach of Section 57(2) of the Act;

Mr Asper is a foreign person for the purposes of the Act;

Mr Asper has company interests of 15.00% in each of the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane); and

Mr Asper is not in breach of Section 57(2) of the Act.

3.4 THE AGGREGATE LEVEL OF COMPANY INTERESTS IN THE TEN LICENSEES HELD BY FOREIGN PERSONS

Subsection 57(3) of the Act provides:

2 or more foreign persons must not have company interests in a commercial television broadcasting licence that exceed 20%.

In order to assess the total company interests held by foreign persons in TGL and the licensee companies it is first necessary to establish which persons holding company interests in TGL are foreign persons. It is also necessary to look behind the persons having a direct shareholding in TGL to establish whether any foreign persons have company interests in those companies giving rise to traced foreign company interests in TGL.

3.4.1 WHICH PERSONS HOLDING DIRECT COMPANY INTERESTS IN TGL ARE FOREIGN PERSONS?

As discussed at part 3.1 the shareholders of TGL at 30 December 1992 (the date of the acquisition of NTL by TGL) were identified as CGS, TNQ Television Ltd, Audant Communications Pty Ltd, Belshaw Pty Ltd, Corom Pty Ltd, Leibler Media Holdings Pty Ltd, Winston Capital Inc. and Copplemere Pty Ltd.

Having already established that CGS is a foreign person under the Act (see part 3.2 above) the ABA has also identified Winston Capital Inc. (Winston) as being a foreign person for the purposes of the Act. Winston is wholly owned by Mr Sheldon Berney who is a Canadian citizen. At 30 December 1992 Winston held company interests of 3.11% in TGL. At 5 September 1995 Winston's company interests had decreased to 1.61% in TGL. (see 3.1 above).

Company searches indicate that Belshaw Pty Ltd, Corom Pty Ltd, Leibler Media Holdings Pty Ltd and Copplemere Pty Ltd are all wholly owned by individuals who are Australian citizens. These companies are therefore not foreign persons for the purposes of the Act.

Company searches indicated that at 30 December 1992 Audant Communications Pty Ltd was a wholly owned subsidiary of Audant Investments Ltd. As more than 50% of the company interests in Audant Investments Ltd were held by Mr Robert Whyte, an Australian citizen, neither Audant Investments Ltd nor Audant Communications Pty Ltd is a foreign person for the purposes of the Act.

TNQ Television Ltd is a wholly owned subsidiary of Telecasters North Queensland Ltd (TNQ), a public company listed on the Australian Stock Exchange. At 30 December 1992 TNQ was the licensee of commercial television broadcasting licence TNQ Regional Queensland. Under section 57(3) of the Act two or more foreign persons must not have company interests in a commercial television broadcasting licensee that exceed 20%. Therefore the level of company interests held by foreign persons in TNQ, being a licensee company, is restricted to a maximum of 20% and, as this is below 50%, TNQ is not a

foreign person for the purposes of the Act. As TNQ Television Ltd is a wholly owned subsidiary of TNQ it is also not a foreign person for the purposes of the Act.

Since the acquisition of NTL by TGL the Australian Mutual Provident Society (AMP) has acquired a shareholding interest of 6.45% in TGL. As the AMP has no share capital it is owned by its policy holders, the majority of whom are individual Australian citizens. The ABA is satisfied that AMP is not a foreign person for the purposes of the Act.

In June 1995 Rossendale Investments Ltd (Rossendale) acquired 360,000 shares (0.79%) in TGL. Mr Peter Viner, Chief Executive Officer of TGL and a Canadian citizen is the beneficial owner of all the shares in Rossendale. Rossendale is therefore a foreign person for the purposes of the Act.

FINDINGS

On the basis of the evidence before it the ABA finds that:

19. *At 30 December 1992 the foreign persons holding direct company interests in TGL were:*

CGS Shareholding with a direct company interest of 15.00%; and

Winston with a direct company interest of 1.61%.

20. *At 5 September 1995 the foreign persons holding direct company interests in TGL were:*

CGS Shareholding with a direct company interest of 15.00%;

Winston with a direct company interest of 1.61%; and

Rossendale with a direct company interest of 0.79%.

3.4.2 TRACED COMPANY INTERESTS HELD BY FOREIGN PERSONS IN TGL

Clause 8 of Schedule 1 of the Act provides that the company interests of a person through a chain of companies can be calculated using the fractional tracing method as set out in 3.3.1 above.

In this regard the ABA wrote to TGL on 12 January 1993 seeking details of the traced foreign company interests in the licensee companies through TGL. On 19 January 1993 Freehill Hollingdale and Page (Freehill's) responded on behalf of TGL stating that the traced company interests held by foreign persons in TGL were 1.89% traced through the shareholders of TNQ. This figure was based on statutory declarations and other information provided by shareholders of the company.

On the same date Audant Communications Pty Ltd responded stating that the ownership and capital structure of the company had changed and that all the issued ordinary shares in the company were beneficially held by Mr Robert Whyte, an Australian citizen.

On 16 December 1993 John Singleton Advertising Ltd (JSA) became a listed public company and Mr Singleton transferred his interest in Belshaw Pty Ltd to JSA.

The ABA again wrote to TGL on 17 July 1995 seeking an update of details of all the foreign company interests, direct or traced, in TGL. On 28 September 1995 Freehill's response on behalf of TGL stated that the traced company interests held by foreign persons in July 1995 were 1.83% through the shareholders of TNQ. The figure was based on information provided by TNQ and JSA. Freehill's stated 'Ten understands that each of these companies reviews the level of foreign company interests on a regular basis.'

As discussed in part 3.2 above, the ABA has found that Mr Asper, The Asper Corporation, CanWest Direction Ltd, CanWest Capital Group Inc., CanWest Communications Corporation, CanWest, CanVideo Television Sales (1983) Limited, CII, CanWest International Holdings (Luxembourg) SA, CGS International Holdings (Luxembourg) SA and CGS are foreign persons for the purposes of the Act. Each of these persons has a company interest in TGL traced through CGS Shareholding.

However, the ABA is not required to add the company interests held by each person in the CanWest group of companies for the purpose of Section 57(3) of the Act. In this regard, Counsel (Mr Jim Spigelman QC and Mr Bret Walker SC) advised that 'It does not matter how many foreign corporations are interposed in the chain. They all hold an indirect interest in the same 15% of the total votes, shares, dividends or distribution on a winding-up.'

FINDINGS

On the basis of the evidence before it the ABA finds that:

21. *At 30 December 1992 the level of traced company interests held by foreign persons in TGL was 1.89% traced through TNQ.*
22. *At July 1995 the level of traced company interests held by foreign persons in TGL was 1.83% traced through TNQ.*

CONCLUSIONS

On the basis of its findings in relation to the aggregate level of company interests held by foreign persons addressed in parts 3.4, 3.4.1 and 3.4.2 of this report the ABA concludes that:

at 30 December 1992 the aggregate level of company interests held by foreign persons in the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane) was 20.00% being 15.00% held by CGS Shareholding, 3.11% held by Winston and 1.89% traced through TNQ;

at July 1995 the aggregate level of company interests held by foreign persons in the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane) was 19.23% being 15.00% held by CGS Shareholding, 1.61% held by Winston, 0.79% held by Rossendale and 1.83% traced through TNQ;

two or more foreign persons do not have company interests in any or all of commercial television broadcasting licensees TTL (Sydney), TTL (Melbourne) and TTL (Brisbane) that exceed 20%; and

there is no breach of Section 57(3) of the Act.

4.

Foreign Control Of The Ten Licences

Legislative context

Subsection 57(1) of the Act provides that:

57(1) A foreign person must not be in a position to exercise control of a commercial television broadcasting licence.

Subclause 6(1) of Schedule 1 to the Act provides that:

6. (1) If a person has company interests in a company exceeding 15%, the person is, in the absence of proof to the contrary, to be regarded as being in a position to exercise control of the company.

As found by the ABA in part 3 of this report, CanWest does not have company interests in any of the Ten licensees that exceed 15%. Therefore, in accordance with Schedule 1 subclause 6(1), no rebuttable presumption arises that CanWest is in a position to exercise control of TGL, or NTL or the licensee companies.

However, as set out in part 2 of this report, the holding of company interests is one of a number of ways in which a person may be in a position to exercise control of a company or licence.

In the situation where a person has company interests of 15% or less the Act suggests that the person will not normally be in a position to exercise control of the company. However, there may be circumstances where the holding of company interests of 15% or less does place a person in a position to exercise control of the company (Schedule 1 clause 1).

In broad terms Schedule 1 clause 2 provides that a person is in a position to exercise control of a licence or a company if the person alone or together with an associate is in a position to do certain things, (refer to Appendix A for a full extract of clause 2). It is against these provisions that the ABA must assess the circumstances of CanWest, its directors, employees and associates in relation to TGL and the Ten licences to determine whether CanWest, alone or together with an associate is in a position to exercise control of the Ten licences.

CanWest could be found to be in a position to exercise control of the Ten licences by:

- i) being in a position to exercise control of the Ten licensees directly and therefore controlling the Ten licences; or
- ii) by being in a position to exercise control of TGL and therefore the Ten licences. This is because TGL, through its 100% company interest holding in NTL, is in a position to exercise control of NTL, and NTL, through its 100% company interest holding in the Ten licensees, controls the licensee companies.

In the course of its investigation, the ABA has considered a number of significant matters in determining whether CanWest or any other person is in a position to exercise control of TGL, NTL or the Ten licences.

4.1 APPOINTMENT OF DIRECTORS, THE EXECUTIVE COMMITTEE, THE CEO AND CHAIRMAN OF TGL

Part 4.1 addresses the following issues:

- the appointment of directors to the boards of TGL, NTL and the licensee companies;
- the composition and powers of the Executive Committee of NTL, including the roles of Messrs Viner and Rice;
- the appointment of Mr Viner as a director of NTL and as the Chief Executive Officer of TGL; and
- the appointment of Mr John Studdy as Chairman of TGL and NTL.

The ABA assessed the Articles of Association of TGL and the Share Subscription Agreement between the Original Shareholders of TGL in order to satisfy itself as to whether CanWest was in a position to secure the appointment of, or veto the appointment of, at least half the boards of directors of the boards of TGL, NTL and the respective licensee companies contrary to clause 2(1)(d)(ii) of Schedule 1 of the Act.

As well, the ABA has looked at the composition of the boards of directors of the respective licensee companies to determine whether they comply with the ‘20% foreign director limit’ prescribed in Section 58 of the Act.

The ABA looked at the role and powers of the Executive Committee of NTL, which exercised significant decision making powers. In particular, the ABA examined the roles of Messrs Gross and Viner on that Committee to determine whether CanWest was in a position to exercise control of NTL by way of the Executive Committee. The ABA also examined the role of Mr Rice (CEO of NTL in early 1993) to clarify how decisions were made prior to the appointment of Mr Viner as CEO.

Mr Viner was appointed as a director of NTL on 23 April 1993 and CEO of TGL on 9 June 1993 with a commencement date of 1 April 1993. Although Mr Rice had indicated his wish to resign in late March 1993, he did not formally resign as CEO until 7 May 1993. Mr Viner effectively took over the role of CEO in early April 1993.

Prior to his appointment to these two positions Mr Viner held a number of positions in the CanWest group of companies. The ABA examined the circumstances in which Mr Viner was appointed as CEO of TGL. The ABA sought documentary evidence from the relevant parties to determine the nature of Mr Viner’s formal relationship with CanWest, particularly in the period leading to his appointment as CEO.

The ABA examined the circumstances in which Mr Studdy was appointed as Chairman of TGL and NTL to determine whether CanWest had any role in identifying or appointing him. The ABA also examined whether Mr Studdy was independent from all shareholders of TGL.

4.1.1 APPOINTMENT OF DIRECTORS TO THE BOARDS OF TGL, NTL AND THE LICENSEE COMPANIES AND THE 20% FOREIGN DIRECTOR LIMIT OF THE ACT

Subsection 58(1) of the Act provides:

(1) Subject to subsection (2), not more than 20% of the directors of each commercial television broadcasting licensee may be foreign persons.

Subsection 58(2) allows the ABA to approve a higher percentage of foreign directors for a period of 28 days if it considers that special circumstances exist requiring such an approval.

Under the TGL Articles of Association (clause 6(1)(a)), the number of directors of TGL must not be less than ten and not more than fifteen. For as long as it holds more than 14% of the issued capital of TGL, CanWest is entitled to appoint the number of directors that represents 20% of the total number of directors (taken to the nearest whole number) (clause 6(1)(b)(1)).

Each member of TGL who holds 10% or more of the issued capital of the company has the right to appoint one director for every tranche of shares representing 10% of the issued capital (clause 6(1)(b)(ii)).

Similar provisions are included in the Share Subscription Agreement. This agreement was entered into by the Original Shareholders of TGL prior to completion of the agreement to acquire NTL on 30 December 1992. The respective Original Shareholders entered into the Share Subscription Agreement on varying dates, with CGS and TNQ being the initial consortium members. As shown by the Share Subscription Agreement the Original Shareholders comprised: CanWest, TNQ and such other persons who signed an 'Accession Deed' in accordance with clause 2.4(a) of the Share Subscription Agreement.

The Share Subscription Agreement provided that Mr Isi Leibler should be a director provided that interests associated with him subscribed to approximately 5% of the issued capital and became an Original Shareholder (clause 6.1(h)(8)).

The following directors were nominated to the TGL Board and attended the first TGL Board meeting on 27 January 1993:

- Mr I Leibler nominated by Leibler Media Holdings Pty Ltd;
- Mr G Chapman, Mr P Gleeson, Mr P Harris and Mr D Manor, all nominated by TNQ Television Limited;
- Mr J Cowin nominated by Corom Pty Ltd;
- Mr J Singleton nominated by Belshaw Pty Ltd;
- Mr R Whyte nominated by Audant Communications Pty Ltd; and
- Mr I Asper and Mr S Gross nominated by CGS Shareholding (Netherlands) BV.

Mr Gross and Mr Whyte were both appointed Deputy Chairmen of TGL with Mr Whyte appointed as Acting Chairman until the selection and appointment of an independent Chairman.

At the TGL Board meeting on 27 January 1993 the Board resolved that the directors of the respective licensee companies should have the same directors as those on the Boards of TGL and NTL. The above listed directors of TGL, along with Mr Gary Rice, also met on 27 January 1993 as the Board of directors of NTL. The NTL Board had exactly the same directors as the TGL Board except that Mr Rice sat on the NTL Board as Managing Director of NTL. Mr Rice was a director of NTL until his resignation on 7 May 1993. Mr Peter Viner became a director of NTL on 23 April 1993. Neither Messrs Rice nor Viner have been directors of TGL.

At 30 June 1995 the boards of directors of the respective companies were:

TGL	NTL	Licensee companies
Mr I Asper	Mr I Asper	Mr I Asper
Mr G Chapman	Mr G Chapman	Mr G Chapman
Mr J Cowin	Mr J Cowin	Mr J Cowin
Mr L Freedman	Mr L Freedman	Mr L Freedman
Mr P Harris	Mr P Harris	Mr P Harris
Mr I Leibler	Mr I Leibler	Mr I Leibler
Mr G Levy	Mr G Levy	Mr G Levy
Mr B Sherman	Mr B Sherman	Mr B Sherman
Mr J Studdy	Mr J Studdy	Mr J Studdy
Mr R Whyte	Mr R Whyte	Mr R Whyte
Mr P Liba	Mr P Liba	Mr P Viner
	Mr P Viner	

A list of the directors of TGL, NTL and the Ten licensee companies since 30 December 1992 appears at Appendix B of this report. Analysis of the list of directors since 30 December 1992 reveals that at no stage has there been more than two foreign directors on the boards of the Ten licensee companies (at 30 June 1995 Messrs Asper and Viner). It also reveals that at no stage has CanWest made more than two appointments to the boards of TGL and/or NTL (at 30 June 1995 Messrs Asper and Liba).

FINDINGS

On the basis of the evidence before it the ABA finds that:

23. *In accordance with the Share Subscription Agreement and the TGL Articles of Association CanWest can appoint and only has appointed two directors out of a possible ten to twelve directors (20% rounded to the nearest whole number) to the TGL Board.*
24. *At no stage have more than two foreign persons, of a total of eleven persons, sat on the boards of the Ten licensee companies. Thus not more than 20% of the directors of the Ten licensee companies have been foreign persons.*

4.1.2. THE ROLE OF THE NTL EXECUTIVE COMMITTEE AND CEO IN EARLY 1993

At a meeting on 27 January 1993, the following matters were resolved by the TGL Board:

- that Mr Rice be appointed as the CEO of NTL;
- that the directors of NTL be requested to appoint Mr Viner a director of NTL and its wholly owned subsidiaries on the condition that he resign from any position held with CanWest and its affiliates and that he relinquish any shareholdings or other benefits that he held in that organisation;¹
- an Executive Committee of NTL be formed consisting of Mr Viner as Chairman (subject to the same conditions listed above), Mr Gross, Mr Harris, Mr Singleton and Mr Whyte. The decisions of this committee were to be unanimous and in the event they were not unanimous, they were to be referred to the Board; and
- that Mr Viner be provided with a remuneration package upon his ceasing his employment at CanWest.

On 28 January 1993 at a meeting with the ABA, Messrs Chapman, Asper and Gross informed the ABA that Mr Viner (who had been in Australia the previous two months as part of CanWest's due diligence team) would remain in Australia to make initial recommendations to the Board on how it should proceed with the consortium business plan. They said the TGL Board was keen for Mr Viner to work permanently for TGL and that CanWest agreed to let Mr Viner leave CanWest. The purpose of the Executive Committee was to get consensus on the business plan, they told the ABA.

On 2 February 1993 Mr Kim Santow of the law firm Freehill Hollingdale and Page Solicitors (Ten's legal advisers) advised the ABA that Mr Viner would be leaving Canada and taking out Australian citizenship and that he would be migrating to Australia on or about 1 April 1993.

On 10 March 1993 Mr Gross supplied the ABA with a copy of a document setting out the Executive Committee's duties. The following was stated in the document:

The purpose of the Committee is to reduce the workload of the Board and delegate non strategic decisions and generally speed up the decision making process and implementation of Board or budget decisions. The Committee will deal with matters which a Board would in the normal course delegate to the CEO and one director.

On 24 March 1993 the ABA wrote to TGL seeking clarification on some aspects of the role and operation of the Executive Committee.

On 31 March 1993 TGL responded that:

- the Executive Committee comprised Messrs Harris, Singleton, Gross and Whyte;
- Mr Viner attended meetings of the Executive Committee and would formally join it upon fulfilment of the condition that he resign from any position with CanWest and relinquish any shareholding or other benefits in CanWest;

¹ Evidence provided to the ABA and presented at Part 4.1.3 indicates that Mr Viner did not resign from all positions with CanWest until 31 March 1993. It is for this reason that this part of the Report is focussed on the role of Mr Viner until 31 March 1993.

- the Executive Committee dealt with matters which in the normal course would be dealt with by the CEO and one director;
- all decisions of the Executive Committee must be unanimous or, if not, referred to the Board;
- the TGL Board had resolved that any two members of the Executive Committee be entitled to approve capital expenditures of amounts of between \$250,000 and \$1 million with amounts above this being submitted to the full Board for approval;
- the Executive Committee was to review senior staff appointments, with top appointments being determined by the Board;
- Mr Viner had received a permit for temporary residence and he intended applying for permanent residence and citizenship in due course. Consideration was also being given to Mr Viner becoming the CEO of TGL at a future date; and
- Mr Rice was currently the Managing Director and CEO of NTL subject to a confidentiality arrangement about which an announcement would be made at least seven days prior to 7 May 1993.

By letter dated 30 April 1993 NTL advised the ABA that Mr Whyte and Mr Rice had jointly announced that day that Mr Rice would be leaving Ten on 7 May 1993. The attached media release stated that Mr Rice's departure followed a proposed management restructuring and the creation of a new position of CEO of TGL which would have an increased range of responsibilities and more diverse duties such as responsibility for Pay TV.

On 10 November 1993 the ABA wrote to the Chairman of TGL, Mr Studdy, requesting the provision of, amongst other things, documentation relating to Board sub-committees, including their purpose, membership, relationship with network executives and copies of agenda papers and minutes of meetings. On 1 December 1993 TGL provided relevant information.

With regard to the Executive Committee, TGL provided the required information. However, with regard to the eight meetings of the Executive Committee between 5 February 1993 and 29 April 1993, the only material provided was the agenda for each of the meetings.

On 21 December 1993 the ABA wrote to TGL requesting, amongst other things, the provision of a copy of the minutes of the Executive Committee for those first eight meetings. On 13 January 1994 TGL responded to the ABA's letter, indicating that there were no minutes of the first eight Executive Committee meetings. TGL did however provide copies of Executive Committee reports to the Board dated 1 March 1993 and March 1993.

The Executive Committee's report to the TGL Board of 1 March 1993, was provided to the Board under Mr Viner's name and on behalf of Messrs Whyte, Harris, Singleton and Gross. The report indicated that the Executive Committee had been meeting weekly. A further Executive Committee report to the TGL Board report of March 1993 was provided to the Board under Mr Viner's name indicating it was provided for the Executive Committee. This report indicated that Mr Viner would provide an update on the Executive Committee's progress at the Board dinner.

Evidence of Mr Gary Rice

Mr Rice gave evidence to the ABA on 17 July 1995.

Mr Rice testified that on more than one occasion during October-November 1992, Mr Asper had told him that he wanted him to stay on as the CEO. Messrs Gross and Viner confirmed to him that this was Mr Asper's intention.

It was suggested to Mr Rice that in the early stages of the new ownership there would be an Executive Committee. He took this to indicate that he would be involved with that Executive Committee and that he would continue to be the Managing Director and CEO of NTL. Nobody indicated to him that there would be an overriding board (TGL or NTL).

The Executive Committee that was put in place in late January 1993 did not include Mr Rice. It was never revealed to him why he was not on the Executive Committee nor whether the Executive Committee reported to the NTL Board or the TGL Board.

Mr Rice testified that Mr Whyte confirmed with him that the Board wanted him to stay on as the CEO. Mr Rice was not happy about not being on the Executive Committee as he could not understand how he could be the NTL CEO and yet not be on the Executive Committee that addressed the policy issues of the company.

Mr Rice's contract as CEO of NTL ceased with the sale of Ten to the TGL consortium and his contract with the new owners was on a month to month basis. For whatever reasons, TGL did not want to enter into a long term agreement with him. Around the time of the 27 January 1993 board meeting Mr Rice was of the view that he did not have much of a future at Ten.

A reorganisation or review committee was set up whilst he was overseas in February 1993 and he was invited to these meetings when he returned but had little involvement. Some time in March 1993 he first indicated to Mr Viner that there was probably no point in him continuing at Ten. Mr Whyte was still keen for him to continue and was prepared to put him on the Executive Committee. Mr Whyte wanted an undertaking from Mr Rice to stay as CEO until the end of the year.

Mr Rice testified that he did not really act as the CEO in a conventional sense from the time of the first meeting of the TGL Board on 27 January 1993 until he left Ten. Theoretically he reported to the Board but in practical terms he liaised with Messrs Viner or Gross. He was not directed or instructed by Messrs Viner or Gross but he had little involvement in the decision making process as shown by the decision to drop *E Street*. He was still the CEO but he was only told about the decision to drop *E Street* after he had heard of the decision to drop it.

In the period February-March 1993 Mr Rice was not in a position to say to whom Mr Lattin as General Manager Programming was answerable. Technically it was him as CEO but he certainly was not making the decisions. Mr Rice was never involved in budget preparation under the TGL consortium.

Evidence of Mr Harris

Mr Harris gave evidence to the ABA on 15 February 1995.

Mr Harris testified that there was some debate in January 1993 on the TGL Board as to whether Mr Rice should continue in the role as the CEO.

Mr Harris was involved in negotiations as to whether Mr Rice would stay. Mr Whyte was a supporter of Mr Rice and Mr Harris was probably instrumental in changing Mr Whyte's mind, arguing that in fact TGL would be better with Mr Viner.

Mr Harris' personal view had always been that Mr Rice would probably have to go, that he would not be able to operate with new owners who had differing philosophies about where the business was going and what had to be done. Mr Harris formed the view before TNQ finalised the Shareholders Agreement with CanWest in late 1992 that Mr Viner would reflect the philosophy CanWest had held in regard to television and costs. This was the same philosophy held by TNQ.

Mr Harris testified that before the acquisition was completed in 1992 it was understood then by the new investors that Mr Viner was a potential CEO and he was put forward by CanWest. The TGL Board was concerned to ensure that if Mr Viner was given that role that he would act as a chief executive and not as some sort of Canadian proxy. The Board did satisfy itself over a period that Mr Viner acted as a legitimate chief executive.

Mr Harris testified that the report tabled by Mr Viner at the TGL Board meeting of 11 March 1993 would have been tabled by Mr Viner in his capacity as a member of the Executive Committee. The Executive Committee was formed as it was impractical to get the Board together on a week by week basis. The shareholders of TGL needed to quickly determine how Ten was operating and the Executive Committee was a way in which Board members or some Board members could be more involved on a more regular basis.

Mr Harris also testified that around February-March 1993 the TGL Board had come to the view that Mr Viner was going to be CEO. It was then quite a considerable time before the Board was able to reach an arrangement with Mr Rice as to how and when he would go, but effectively over that period it was realised that Mr Rice was not going to be the CEO. In authorising Mr Viner to authorise expenditure in March 1993, the TGL Board considered Mr Viner as the 'CEO elect' at that stage.

Evidence of Mr Whyte

Mr Whyte gave evidence to the ABA on 14 February 1995.

Mr Whyte testified that, in the period January to March 1993, Mr Rice as the CEO was responsible for the day to day operational control of the business. Mr Viner was Chairman of the Executive Committee from January 1993 or perhaps a month later. He was charged with the responsibility of overseeing the business in total and where cost savings could be put into effect. Mr Rice's role was a day to day operational role

and Mr Viner's was seeing how the business looked and what could be effected to improve it for the future.

Mr Viner spoke to the TGL shareholders and said he believed that certain cost cuts could be effected and the TGL Board resolved that he should be placed at Ten with a view to seeing whether those cost cuts could in fact be implemented. Mr Viner was placed at Ten in the medium term without any long term commitment by the TGL Board. There was a period in which Ten was considering whether Mr Rice would continue as the NTL CEO and Mr Viner would continue in some other capacity. When Mr Rice resigned it came as a bit of a surprise because Mr Whyte thought the TGL Board was managing it pretty well.

Mr Whyte testified that he thought Mr Rice resigned because he perceived that his authority had probably been undermined by the Executive Committee; that he had had total control before and less control now. Mr Whyte thought this was a fair perception of Mr Rice's as he thought some of Mr Rice's authority in that process had been watered down in relation to capital expenditure matters and budget matters and that they were now a matter for the Board and the Executive Committee.

Mr Whyte negotiated Mr Rice's salary package and his continuing at Ten and said to Mr Rice, 'But you must recognise that we are looking to effect \$20 million worth of cost savings in this budget, and Mr Viner will be involved intimately with that.' There was a desire on the part of the TGL Board that Mr Viner might be a long term candidate but the resolution of the Board was only documented when it actually entered into the CEO employment contract with Mr Viner.

Mr Whyte testified that as Chairman of the Executive committee, Mr Viner had no decision making role; he had only a recommendation role. Mr Viner was part of the review process, the cost cutting, and to that extent as Chairman of the Executive Committee he could call on people to give him advice and recommendations about cost cutting but this did not confer on Mr Viner a management function. Even though Mr Viner chaired a Budget Review Committee meeting on 24 February 1993, he did not have a management function. The executives present in the Budget Review Committee meeting would not have been answerable to Mr Viner. If Mr Viner had not been chair of the Executive Committee at the time of his chairing the Budget Review Committee it would have struck Mr Whyte as unusual that Mr Viner was chairing the meeting. A TGL Board resolution on 11 March 1993 conferred on Mr Viner the authority to authorise expenditure of up to \$250,000 in his capacity as the Chairman of the Executive Committee.

Mr Whyte also testified that when the TGL Board appointed Mr Rice as the CEO the Board said that that it was subject to his performance, that Ten would be a more active company with a more active Board and that there may be a role as general manager for him and not CEO. Mr Whyte saw Mr Rice more as a general manager than a chief executive and envisaged someone coming in over the top of Mr Rice potentially later on as Mr Rice was not chief executive material as far as Mr Whyte was concerned.

Evidence of Mr Cowin

Mr Cowin gave evidence to the ABA on 15 February 1995.

Mr Cowin testified that in January 1993, the job of cost cutting had really just started and there had to be some structural changes in the business rather than just tinkering at the edges. Mr Rice had done a good job in holding the ship together during what was obviously some tough times but was not going to be able to adapt to significant structural change with regard to management.

In January 1993, Mr Viner became associated with the company as a consultant to put together a plan of direction that the TGL Board would implement in regard to the \$20 million cost reduction. Mr Viner's job was to get in and understand what the local costs and conditions were and put a proposal or advice back to the TGL Board where the action was going to take place.²

Mr Rice was appointed to the CEO position by the TGL Board because at that time (January 1993) the Board was anxious to try and make Ten work. The Board was conscious of the fact that it could be left in the lurch with no one (Rice or Viner) in charge so the Board confirmed Mr Rice as the CEO.

Evidence of Mr Gross

Mr Gross gave evidence to the ABA on 24 and 25 January 1995.

Mr Gross testified that in the first few months of 1993 there was a situation where the management of the company was not familiar to the new owners. CanWest, as represented by himself and Mr Viner, didn't know whether the management was really in accordance with what the new owners felt should be done. CanWest was there to advise management, to discuss with them what was happening and to report back to the Board and tell the Board whether CanWest thought what was happening was appropriate.

Mr Gross testified that he was answerable to the Board, however, at that time there was a very active Executive Committee which held fairly regular meetings with the Board to bring it up to date. The Executive Committee was involved in assessing the management. In the period January/February/March 1993 if it was an operational matter then Mr Viner would have the final say as to what CanWest's representation to the Board should be. Mr Viner was a consultant and the only way that CanWest could operate or do anything was through the Board.³ CanWest didn't have the authority to tell anybody to do anything. In presenting the Executive Committee report to the

² Mr Viner's activities as a consultant to Ten are considered within the ABA's examination of a Consultancy Agreement between Ten and CanWest, specifically at Parts 4.2 Provision of Consultancy Services By CanWest To Ten, Part 4.3 Budget Issues and Preparation of The 1993-94 Budget, at Part 4.4 Selection and Provision of Programming, and also at Part 4.5 CanWest's Role in Corporate Development Opportunities.

³ As for the above footnote, Mr Viner's activities as a consultant are considered at Parts 4.2, 4.3, 4.4 and 4.5.

TGL meeting of 11 March 1993, Mr Viner was a member of the Executive Committee and in fact, he may have been the Chairman of the Committee.

The TGL Board wanted to make sure that a proper assessment of Ten's operations and proper recommendations for where the company should go were being made. The TGL Board was heavily involved through the Executive Committee which met every week in those initial times. TGL was never certain whether Mr Rice was with the program or not—sometimes he said he wanted to be part of the new ownership group to comply with the objectives that the new owners had and then other times he didn't want to.

Evidence of Mr Asper

Mr Asper gave evidence to the ABA on 6 February 1995.

Mr Asper testified that the intention had been to complete a transaction with Mr Rice, that he had discussed with Mr Rice in May 1992 in Los Angeles, to run Ten. He (Mr Asper) had advised the TGL shareholders as they joined the consortium that this was his expectation. When the Ten-Rice relationship didn't work, the other TGL shareholders insisted that Mr Viner remain. CanWest acquiesced to Mr Viner terminating his employment at CanWest. It was Mr Asper's hope that both Mr Rice and Mr Viner would perform in their respective roles at Ten.

Mr Asper testified that it was a realistic expectation that there could be a role for Mr Rice as the NTL CEO and for Mr Viner as the Managing Director of NTL and Chairman of the NTL Executive Committee. Mr Viner's role would not have been a day to day operating role whereas Mr Rice would run Ten with Mr Viner running a parallel authority as (a) an adviser to Mr Rice and (b) a developer of opportunity for Ten. It obviously did not work.

Evidence of Mr Viner

Mr Viner gave evidence to the ABA on 14 December 1994 and 23 August 1995.

Mr Viner testified that, in the period January to March 1993, he was acting as a consultant to Ten, on loan from CanWest on an informal basis. He did not have any powers as such and no staff at Ten were answerable to him. He was charged with meeting with staff and assessing the operations of Ten from the inside, as opposed to the due diligence process where he was essentially working from the outside.

Mr Viner testified that he became a member of the Executive Committee around February/March 1993 however, he was unsure of the precise date of this appointment or precisely when he became Chairman of that Committee. He believed it would have been around March 1993 when he had obtained a work permit and could thus be paid directly by an Australian corporation.

Summary of evidence with regard to the Executive Committee, the role of Mr Viner up until 31 March 1993 and the role of Mr Rice until his resignation on 7 May 1993

The documentary evidence provided to the ABA, commencing with the TGL Board minutes of the meeting of 27 January 1993, clearly demonstrates that the TGL Board anticipated a long term role for Mr Viner at Ten.

The TGL Board minutes of 27 January 1993 recorded the proposal to appoint Mr Viner to the NTL Board and to the position of Chairman of the Executive Committee on the condition that he resign from any positions with CanWest and relinquish any shareholdings and benefits held with CanWest. Evidence presented at part 4.1.3 of this report indicates that Mr Viner did not resign from his positions with CanWest until 31 March 1993.

The TGL letter to the ABA of 31 March 1993 indicated Mr Viner had been attending the Executive Committee meetings. The Executive Committee reports under the name of Mr Viner to the TGL Board of March 1993 confirm that Mr Viner was performing Executive Committee tasks. Messrs Gross and Harris gave evidence that Mr Viner would have been a member of the Executive Committee prior to 31 March 1993. Messrs Whyte and Viner gave evidence that Mr Viner would have been Chairman of the Executive Committee from around February/March 1993.

TGL's letters of 10 March and 31 March 1993 to the ABA set out details of the establishment of the Executive Committee, its composition and purpose and the requirement that any decision of the Committee must be unanimous or if not, referred to the TGL Board. Messrs Harris, Whyte and Gross confirmed the significance of the Executive Committee and the way it was used to involve members of the Board on a regular basis to enable a proper assessment of the operations of Ten and its management and to facilitate the decision making processes.

Mr Rice confirmed the significance of the Executive Committee in his evidence, indicating that from around the time that he realised he was not to be on the Executive Committee he realised that he did not have a future at Ten and that he did not act in the conventional sense as the CEO from that time as well. Mr Rice further indicated that he was not involved in the decision making process as shown by the decision to drop *E Street* (considered at part 5 of this report); his lack of awareness of to whom Mr Lattin as the General Manager Programming was answerable, and also his lack of involvement in budget preparation under the new TGL consortium (from 30 December 1992).

The evidence of Messrs Harris, Whyte and Gross confirmed this marginalisation of Mr Rice from the decision making process. The evidence of Messrs Harris and Cowin was that Mr Viner would be a more suitable appointee to the role as CEO than Mr Rice.

FINDINGS

On the basis of the evidence before it the ABA finds that:

25. *Prior to, and for some time after, the purchase of Ten from Westpac by TGL, members of the consortium (subsequently the TGL Board) held differing views about the future management of the company. They were, as a group, determined to cut costs substantially, but they initially disagreed over the management structures*

and the personnel that might have been appropriate to achieve the budget reductions.

26. *On 27 January 1993, Mr Rice was appointed CEO of NTL and Mr Viner was appointed to the NTL Board and as Chair of the Executive Committee of NTL. Mr Rice was not appointed to the Executive Committee and, notwithstanding his appointment as CEO (on a month by month basis only), he did not thereafter function as a CEO with fully delegated Board authority.*
27. *As early as January 1993 the TGL Board envisaged a long term appointment of Mr Viner to a position at Ten either as an employee or as a director or both.*
28. *The TGL Board made Mr Viner's resignation and relinquishing of positions and shareholdings with CanWest, a condition of his appointment.*
29. *Despite the TGL Board's condition, Mr Viner was operating as the Chairman of the Executive Committee prior to his resignation of all positions with CanWest.*
30. *The Executive Committee assumed the responsibility of the management of the Ten companies and effectively undertook the responsibilities normally associated with a CEO.*
31. *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. The Executive Committee reported to the Board of TGL on a regular basis.*
32. *Given NTL's establishment of the Executive Committee and of the limitations on its charter, CanWest, through the participation of Messrs Gross and Viner on the Executive Committee, and notwithstanding Mr Viner's presence on that Committee before he formally resigned his positions with CanWest, was not in a position to exercise control of TGL, NTL or the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane).*
33. *Eventually, the disagreement and uncertainty about management structures and personnel was resolved with the resignation of Mr Rice. Mr Viner then had the full support of the TGL Board to assume the CEO role for TGL.*

4.1.3 APPOINTMENT OF MR VINER AS A DIRECTOR OF NTL AND AS THE CEO OF TGL

Mr Whyte, the acting Chairman of TGL, notified the ABA in a letter dated 31 March 1993 that consideration was being given to the appointment of Mr Viner as the CEO of TGL at some future date. Mr Whyte also stated that he had been advised that Mr Viner had received a permit for temporary residence in Australia and that he intended applying for permanent residence and citizenship in due course.

On 14 April 1993 CanWest issued a news release indicating that Mr Viner had resigned as President and CEO of CanWest Broadcasting Ltd and U.TV Vancouver. It was further stated that Mr Viner had also resigned from all other boards and offices of CanWest's operating companies in Canada. On 1 December 1994, the ABA was provided with documentary evidence by CanWest of Mr Viner's resignation from the CanWest companies. This evidence comprised Mr Viner's written resignation from the respective positions and directorships he held and the acceptance of those resignations by the relevant Boards of directors. Mr Viner tendered the respective resignations on 31 March 1993. Also on 1 December 1994 CanWest advised that Mr Viner retained no position, consultancy or directorship with CanWest or any of its related companies.

On 23 April 1993 the NTL Board formally appointed Mr Viner as a Director of the company. On 7 June 1993, the new Chairman of TGL, Mr Studdy, advised the ABA that he would be recommending to the TGL Board the appointment of Mr Viner to the CEO position at TGL. On 9 June 1993 TGL announced the appointment of Mr Viner as CEO of TGL.

Mr Viner had served in the following capacities in the Canadian media industry:

- President and CEO of CanWest Broadcasting from 1990 to April 1993;
- General Manager of U.TV/CKVU;
- Executive Vice President Telemedia Inc.;
- English Publishing and Broadcasting from 1988 to August 1990;
- President Telemedia Communications Ontario Inc. from 1984 to 1988;
- President CKVU TV Vancouver from 1980 to 1984; and
- Vice President Marketing, Global Communications from 1974 to 1980.

In a news release of 9 June 1993 TGL indicated that in April 1993 CanWest had announced that Mr Viner had severed his relationship with CanWest including all contractual and executive ties. TGL also indicated that over recent months Mr Viner had assisted the Executive Committee of the Ten Board. Examination of the contract of employment between Mr Viner and TGL indicates that Mr Viner and Mr Studdy (on behalf of TGL) signed the contract on 15 June 1993 with a commencement date of 1 April 1993.

Evidence of Mr Viner

Mr Viner testified that he retained his superannuation shares in CanWest. In regard to his appointment as the CEO, Mr Studdy met with him several times over a two to three week period. Mr Studdy indicated to him that the purpose of the meetings was for Mr Studdy to determine whether they could work together and that Mr Studdy was not prepared to recommend him until he had a sense of what Mr Viner had done.

FINDINGS

On the basis of the evidence before it the ABA finds that:

34. *Mr Viner resigned and relinquished his positions and shareholdings with CanWest on or about 31 March 1993.⁴*
35. *The TGL Chairman, Mr Studdy, who had himself been appointed on 4 May 1993, recommended to the TGL Board, and the Board resolved, to appoint Mr Viner to the CEO position at TGL.*
36. *Mr Viner entered into an employment contract with TGL on 15 June 1993 and was duly appointed to the position of CEO of TGL with a commencement date of 1 April 1993.*

4.1.4 APPOINTMENT OF THE TGL CHAIRMAN

In a series of meetings between CanWest and the ABA in November and December 1992, the ABA discussed the configuration of the TGL consortium and Board and the independence of the Chairman of the TGL Board.

On 7 December 1992 at a meeting with the ABA, Mr Asper indicated to the ABA that CanWest had incorporated into the Share Subscription Agreement the requirement that an independent Chairman, with a casting vote, be selected by the directors nominated to the TGL Board by the Original Shareholders. Further, Mr Asper advised that the independent Chairman of TGL would not be a CanWest nominee nor would CanWest vote on the selection of the Chairman.

Clause 6.1 (h)(7) of the Share Subscription Agreement provides that the directors appointed by the Original Shareholders to the TGL Board shall elect an additional director who shall act as an independent chairman and the independent chairman shall only having a casting vote where the number of directors in office is an even number. The TGL Articles of Association also provide that where there is an even number of directors and there is an equality of votes upon a resolution then the chairperson has a second and casting vote (clause 6.12(c)).

On 28 January 1993 at a meeting with the ABA, Messrs Chapman, Asper and Gross informed the ABA that the TGL Board had not determined who was to be the independent chairman. On 19 April 1993 the ABA wrote to Mr Whyte, the then acting Chairman of TGL, expressing its concern at the failure by TGL yet to appoint a chairman independent of all shareholders. On 23 April 1993 Mr Whyte responded to the ABA's letter indicating that TGL had on the day of writing, invited a person to be the chairman. The person had confirmed his availability and arrangements would be finalised in the next ten days.

On 28 April 1993 the ABA wrote to the TGL Deputy Chairman, Mr Gross, extending an invitation to the new TGL chairman to discuss with the ABA:

⁴ Mr Viner's superannuation fund holds subordinated voting shares in CanWest. The retention of the subordinated shares constitutes Mr Viner's superannuation entitlement, earned during his period with CanWest.

- the role of the independent chairman of TGL;
- the chairman's relationship with senior management;
- the role and membership of the Executive Committee; and
- the nature of the ABA's involvement.

On 4 May 1993 TGL announced the appointment of Mr John Studdy as the new Chairman of TGL and NTL. Mr Studdy was also appointed to the Board of each of the Ten licensee companies. As announced in the Ten press release, Mr Studdy was (at the time) Chairman of Goodman Fielder Ltd and Mercantile Mutual Holdings Ltd and was a director of a number of other companies including Australian National Industries Ltd, Pancontinental Mining Ltd and Paribas Group (Australia) Pty Ltd. On 4 May 1993 the ABA announced in a news release that it had met with Mr Studdy the previous day.

Evidence of Mr Studdy

Mr Studdy gave evidence to the ABA on 30 November 1994.

Mr Studdy testified that he had no previous experience in the broadcasting industry prior to his appointment to the TGL Board. He was approached by Mr Cowin and asked if he was interested in the position of Chairman of TGL. Subsequently he met with Messrs Cowin, Whyte and Harris whom he understood to be a selection committee for the TGL Board. He first met with Mr Asper when Mr Asper had been informed that he was the preferred candidate for the position of TGL Chairman. This meeting was a few days prior to the TGL Board meeting that appointed him to the position.

Evidence of Mr Asper

Mr Asper testified that CanWest had made no recommendations for the shortlist for an independent Chairman due to its lack of knowledge of the Australian landscape. CanWest would have supported any of the people on the shortlist. Ultimately the rest of the TGL Board reached a consensus that Mr Studdy should be the Chairman.

Evidence of Mr Whyte

Mr Whyte testified that the TGL Board appointed a sub-committee to select the Chairman. The committee comprised himself and Messrs Cowin, Leibler and perhaps Mr Harris. The TGL Board never considered appointing a Chairman from one of the Original Shareholders in TGL as such an appointment was precluded by the Articles of Association.

The ABA confirmed Mr Whyte's evidence as to the creation of the TGL Board sub-committee through the examination of TGL Board minutes. The TGL Board minutes of the meeting of 11 March 1993 record that it was resolved that a sub-committee be formed consisting of Messrs Chapman, Cowin, Leibler and Whyte.

FINDINGS

On the basis of the evidence before it the ABA finds that:

37. *The Share Subscription Agreement provides that the Chairman of TGL shall be independent.*
38. *Mr Studdy was, and is, independent of the TGL shareholders.*
39. *CanWest had no involvement in the identification or appointment of Mr Studdy as the Chairman.*

CONCLUSION

On the basis of its findings relating to matters addressed in part 4.1 of this report, namely:

the appointment of directors and the possible control of the respective Ten boards;

the composition and powers of the Executive Committee;

the performance of duties by Mr Viner up until 31 March 1993 as a consultant and as a member of the Executive Committee;

the resignation of Mr Rice from his positions as the Managing Director and CEO of NTL;

the appointment of Mr Viner to the position of CEO of TGL; and

the appointment of Mr Studdy as the Chairman of TGL;

the ABA has considered the evidence and the relevant provisions of Schedule 1 part 2 clause 2 to the Act and concludes that:

there has not been a breach of the foreign directorship limit set down in subsection 58(1) of the Act with regard to the Ten licensee companies;

CanWest, whether alone or together with an associate, was not in a position to veto any action taken by the boards of directors of the Ten licensee companies or NTL or TGL (clause 2(1)(d)(i));

CanWest, whether alone or together with an associate, was not in a position to appoint or secure the appointment of, or veto the appointment of, at least half of the directors of any of the Ten licensee companies or of NTL or TGL (clause 2(1)(d)(ii));

CanWest, whether alone or together with an associate, was not 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 Ten licensees or TGL or NTL (clause 2(1)(d)(iii));

neither NTL, TGL nor more than 50% of the directors of each of those companies acted (or were intended or expected to act under a contract, arrangement or understanding) in accordance with directions, instructions or wishes of CanWest or of CanWest and an associate of CanWest or of the directors of CanWest (clause 2(1)(e)).

4.2 PROVISION OF CONSULTANCY SERVICES BY CANWEST TO TEN

On 27 January 1993 the TGL Board ratified interim arrangements with CanWest for the provision by CanWest of personnel for the conduct of consultancy services. On 9 June 1993 the NTL Board resolved to enter into formal Consultancy Agreement with CGS International Holdings (Netherlands) BV (a wholly owned subsidiary of CanWest).

The ABA examined the entry by NTL into the Consultancy Agreement with CanWest to determine whether CanWest applied any pressure on, or issued any instructions or directions to, NTL or the TGL Board to do so.

The ABA examined the terms of, and the provision of services in accordance with, the Consultancy Agreement in order to form a view as to whether the agreement placed CanWest in a position to exercise control of TGL, NTL or the Ten licences. Of particular significance to the question of control are clauses 2(1)(b)(iii), 2(1)(c), 2(1)(d)(iii) and 2(1)(e) of Schedule 1 of the Act (see Appendix A).

The ABA expressed its concerns to TGL about the potential operation of the Consultancy Agreement on a number of occasions. On 28 June 1994 TGL advised the ABA that the Consultancy Agreement was to be terminated on 30 June 1994.

The ABA examined the termination of the Consultancy Agreement with CanWest. In particular, the ABA sought to determine whether CanWest applied any pressure on the TGL Board to authorise payment of compensation for the early termination of the Consultancy Agreement.

4.2.1 THE CONSULTANCY AGREEMENT

On 27 January 1993 the TGL Board ratified interim arrangements with CanWest for the provision by CanWest of personnel for the conduct of consultancy services. Further, the TGL Board resolved to enter into a formal consultancy agreement with CanWest with: an annual payment to be payable in equal monthly instalments; out of pocket expenses to be reimbursed; an incentive payment to be payable from 1 July 1993 based on Earnings Before Interest and Tax (EBIT) performance of TGL; and the agreement able to be terminated by TGL at any time.

The following day Messrs Asper, Gross and Chapman met with the ABA. Amongst other things, the ABA was informed that:

- CanWest would play an advisory role to the Board only, not to management;
- the provision of advice would be on request from the Board for an indefinite time; and
- this advice would be related to the business plan, management information systems, productivity and other matters as they arose.

On 9 June 1993 the TGL Board resolved to recommend to the NTL Board that NTL enter into a consultancy agreement with CGS (a wholly owned subsidiary of CanWest). On 9 June 1993 the NTL Board resolved to enter into the Consultancy Agreement. The Consultancy Agreement between CGS and NTL was signed on 6 July 1993. The payments under the Consultancy Agreement (as set out in the TGL Board minutes of 27 January 1993) were: an annual fee payable in equal monthly instalments from 1 March 1993; reimbursement of out-of-pocket expenses incurred by the consulting company commencing 31 March 1993, and an incentive payment commencing 1 July 1993 calculated on the EBIT over a certain amount.

The consultancy was envisaged to operate for a three year period (clause 8(a) of the agreement) and could be terminated by either CGS or NTL at any time by the giving of three months written notice (clause 8(c)). The services offered under the Agreement covered a comprehensive range of key operational activities (clause 3) undertaken by NTL such as:

- strategic planning;
- operational efficiency and effectiveness;
- acquisitions and start-ups;
- annual budgeting;
- strategic partnerships and mergers;
- affiliate agreements;
- advertising sales, production and advertising rates, and other aspects of revenue generation and optimisation;
- program selection, acquisition, distribution and scheduling;
- equipment and capital acquisition and replacements; and
- broadcasting signal extensions.

On 29 July 1993 in response to a request by the ABA, Allen Allen and Hemsley (Allens), solicitors acting on behalf of TGL, provided the ABA with a copy of the Consultancy Agreement. On 6 August 1993 the ABA wrote to Allens informing them that, for the following reasons, the Consultancy Agreement appeared more akin to a management agreement than to a consultancy arrangement:

- a) the sizeable fixed component of the fee, which was incurred irrespective of the number of services rendered;
- b) the arrangement for incentive payments to the consultant for virtually any growth of EBIT sustained during the period of the agreement;
- c) the considerable length of time before a review of the agreement was contemplated; and
- d) the comprehensive range of management matters on which advice may be sought.

The ABA requested information about the CanWest executives to be consultants or advisers under the agreement, the likely amount of work currently in contemplation and about CGS. On 7 September 1993 Allens replied to the ABA's letter of 6 August 1993.

The following matters were presented in the response:

- for the year prior to any CanWest consortium involvement, Ten had been operated by its banker and before that, its receivers;
- Ten had suffered huge losses in those years and there had been significant changes in senior management;
- Ten's image in the market place both with its audience and advertisers had suffered;
- consultancy services were viewed by the Consortium and subsequently by the Board of Ten as being necessary to assist in the turnaround and improvement of Ten's operations;
- Ten perceived that having access to CanWest's expertise in operations, program acquisition, financial analysis and sales could only be of benefit to it;
- there were a number of elements provided for in the Consultancy Agreement that the Ten Board insisted on;
- the agreement is not a management agreement. CGS reports to the Board, the Board is not bound to accept the advice and has not done so on occasions;
- the fixed component of the fee and the incentive payments are justified given the expectation of a long term arrangement, that Ten will act in its best interests to ensure sufficient services are rendered and the fees could be pro rated on termination;
- the agreement is under continual review;
- the comprehensive range of services to be provided by CGS reflected the Board's perception that every aspect of the operation of Ten needed to be looked at;
- apart from TNQ and CGS, there were no other members of the Consortium with the requisite expertise; and
- in its intent, express terms and in its operation, the agreement does not give rise to any management authority for CGS or CanWest.

On 14 September 1993 the ABA requested advice from counsel (Mr Roger Gyles QC) on whether or not the Consultancy Agreement between NTL and CGS could put CanWest in a position to exercise control of the Ten licences. On 24 September 1993 Mr Gyles provided written advice to the ABA as follows:

In my opinion the terms of the document (Consultancy Agreement), and the provision of services in accordance with it, would not of themselves mean that CanWest is in a position to exercise direction or restraint over any substantial issue affecting the management or affairs of the licensee. Indeed the document has no doubt been carefully drawn to achieve this result. In my view, what the clause deals with is actual direction or restraint rather than the capacity to influence the management or affairs of the licensee in relation to substantial issues.

Mr Gyles was referring to clause 2(1)(d) of Schedule 1 of the Act. Mr Gyles concluded however that:

Whilst entering into the Agreement in itself is not sufficient to establish the facts necessary to bring clause 2(1)(e) [of Schedule 1 of the Act] into play, in my view it is an important part of a wider matrix of facts and circumstances which might well establish the necessary facts.

On 10 November 1993 the ABA wrote to TGL requesting further information about the Consultancy Agreement. The ABA sought:

- details of all advice and recommendations made pursuant to the Consultancy Agreement;
- details of the consultants, when and to whom the advice or recommendations were given, the extent to which the advice or recommendations were in writing and the outcome if any of the advice or recommendations, particularly whether the advice was accepted or rejected, and acted on;
- details of all remuneration paid to CGS pursuant to the Consultancy Agreement; and
- details of Ten staff involvement in the preparation of advice or recommendations.

On 17 November 1993 at a meeting with Messrs Studdy and Viner, the ABA indicated that it had concerns about the potential for control by CanWest under the Consultancy Agreement. Mr Studdy responded that the ABA concerns carried weight with him. Mr Viner indicated that if there was anything Ten could do to rectify the difficulties the ABA had with the Consultancy Agreement, Ten would want to do it. He added further, that if there were any irritants and it was not commercially crazy to remove them, then Ten would do it.

On 1 December 1993 TGL responded to the ABA's letter of 10 November 1993. Information contained within the response included the following:

- specific matters were raised with the consultants by either the TGL Board or management;
- after considering the issue the consultants discussed their recommendations with management and sometimes, prepared Board papers on the issue;
- recommendations were at times accepted, at times rejected. Most often discussions with management resulted in a further alternative being generated;
- with regard to operations and management organisational review, oral recommendations and some correspondence with Mr Viner (CEO) was entered into. Some recommendations such as the non renewal of some contracts were accepted, others such as the disposal of helicopters were not. Management was intricately involved in the process;
- with regard to budget review, oral recommendations were provided to Mr Viner with some of the recommendations being followed or taken into account. Management was extensively involved;
- with regard to program acquisitions, oral recommendations were provided by Mr Gross to Mr Viner and to Mr Lattin. Some recommendations such as the entry into the program supply agreement with Columbia TriStar Television Pty Limited (Columbia TriStar) were accepted, others such as the non-renewal of certain programs were not. Management was involved in all advice provided; and
- corporate development advice was provided to the Board both orally and in writing. Some recommendations were followed, some were not. Advice provided related to the acquisition of an interest in Capital Television Group Ltd (Capital), the joining of the PMT consortium and the possible acquisition of Northern Rivers Television Pty Limited (NRTV). Management was involved in providing this advice.

On 21 December 1993 the ABA wrote to TGL requesting further information relating to the Consultancy Agreement. The requested information included: the provision of any further documentation demonstrating how the Consultancy Agreement worked; further detail of how recommendations were made to the TGL Board; and any comments TGL

might have relating to comments made by Mr Viner in the meeting with the ABA on 17 November 1993 in which Mr Viner indicated a readiness on the part of Ten to consider the termination of the Consultancy Agreement.

On 13 January 1994 TGL responded. Information contained within the response included the following:

- the operation of the consultancy was somewhat informal;
- recommendations made to the Board were made either orally by Messrs Gross and Asper or by formal report to the Board; and
- Ten would address any specific problems the ABA had with the Consultancy Agreement but the advice provided under the agreement was of significant commercial value to Ten and the value would not be given up lightly.

The ABA contracted Price Waterhouse to review the Consultancy Agreement, requesting that Price Waterhouse assess it in light of current industry practice and the level of economic benefit gained by Ten. On 13 January 1994 Price Waterhouse provided its advice to the ABA, concluding that the Consultancy Agreement was ‘not uncommercial in itself’. Their principal reservation concerned the lack of nexus between certain ‘bonus payments’ available to the consultants and the contribution of the consultant's advice to EBIT. However, Price Waterhouse considered that this was mitigated by the ability of the Ten Group to terminate the Consultancy Agreement upon 3 months notice.

On 3 March 1994 the ABA wrote to TGL requesting further information relating to the Consultancy Agreement. The requested information included: documentation, as set down in the Consultancy Agreement, that had been provided by CGS to the TGL Board on the services provided since the last Board meeting; whether CanWest directors on the TGL Board vote on recommendations made by the consultants, and what proportion of recommendations made by the consultants require a Board decision.

On 18 March 1994 TGL responded. Information contained within the response included the following:

- there were no other reports provided under the Consultancy Agreement other than those previously provided to the ABA. Despite the terms of the Consultancy Agreement it had not been the practice for reports to be given on what had been done pursuant to the Consultancy Agreement in the period before each board meeting;
- CanWest directors did vote on such recommendations; and
- any recommendation made was voted on by the Board.

4.2.2 CANWEST MANAGEMENT AGREEMENT WITH TV3 NEW ZEALAND

On 28 March 1994 CanWest responded to a request from the ABA for the provision of a copy of the CanWest management agreement with TV3 New Zealand, along with a copy of the TV3 Shareholders Agreement.

The purpose of the request was to compare the TV3 management agreement with the Consultancy Agreement between CanWest and NTL. Examination of the TV3 documents revealed a number of differences with the CanWest-NTL Consultancy Agreement. CanWest clearly have a management role at TV3 and manage day-to-day affairs. The agreements relating to TV3 give CanWest formal control over substantial issues affecting the management or affairs of the company.

In the case of NTL, CanWest had no right to appoint executives or give instructions to executives or control the Board (CanWest only had two Board members out of the minimum ten directors).

Based on the above the ABA formed the view that CanWest's responsibilities for TV3 and the Ten licences differed significantly.

4.2.3 ABA CONCERNS EXPRESSED TO TEN

On 29 March 1994 at a meeting between Messrs Studdy and Viner and the ABA, the ABA reiterated its concerns previously conveyed to TGL about the informal nature of the Consultancy Agreement and the potential for CanWest to be placed in a position to exercise control. Mr Studdy indicated that TGL would dispense with the Consultancy Agreement if the ABA had serious problems with it. The ABA was particularly concerned that the provision within the Consultancy Agreement (Clause 7) requiring CanWest to report to each Board meeting on the services provided since the preceding Board meeting, along with information about the executives involved and the scope of the services, was not being followed.

On 12 April 1994 at a meeting between Messrs Gross and Liba⁵ and the ABA, the ABA again expressed its concerns about the potential of the Consultancy Agreement. On 20 May 1994 at a meeting between Messrs Studdy and Viner and the ABA, Mr Studdy informed the ABA that the Consultancy Agreement would be terminated by 30 June 1994.

On 20 June 1994 at a meeting between Mr Asper and the ABA, Mr Asper informed the ABA that: the Consultancy Agreement was about to be discontinued; CanWest never sought the Consultancy Agreement but that the other TGL shareholders had sought the agreement; and CanWest would continue to provide TGL assistance with the purchase of international programs, the international sale of locally made programs and with the development of corporate opportunities.

On 28 June 1994 NTL advised the ABA that at the TGL Board meeting on 22 June 1994 it was resolved to terminate the Consultancy Agreement on 30 June

⁵ Mr Liba at that stage was the alternate director for Messrs Asper and Gross and was subsequently appointed a TGL and NTL director on 28 October 1994 following the resignation of Mr Gross from those boards.

1994. On 21 September 1994 NTL confirmed in writing that the Consultancy Agreement was terminated in June 1994.

4.2.4 WHY WAS THE CONSULTANCY AGREEMENT ENTERED INTO?

As referred to earlier, Allens on behalf of TGL indicated to the ABA that: consultancy services were viewed by the Consortium and subsequently by the board of Ten as being necessary to assist in the turnaround and improvement of Ten's operations; Ten perceived that having access to CanWest's expertise in operations, program acquisition, financial analysis and sales could only be of benefit to it; and the comprehensive range of services to be provided by CGS reflected the TGL Board's perception that every aspect of the operation of Ten needed to be looked at.

Evidence of Mr Asper

Mr Asper testified that within the TGL Board the push for the consultancy services in the early period was utterly mutual, that is both by CanWest and the other shareholders and that later it became at the insistence of the other shareholders.

Evidence of Mr Gross

Mr Gross testified that the process of review of budgets and operations was actually by the demand and request of the Board of directors. Ten desperately needed assistance and advice and in his opinion this view was unanimously held by the Board.

Evidence of Mr Whyte

Mr Whyte testified that when the Original Shareholders entered into the Share Subscription Agreement they were going to have to rely on certain expertise that CanWest could bring to the table. That is why NTL entered into the Consultancy Agreement.

Evidence of Mr Harris

Mr Harris testified that the Original Shareholders were keen to see that the Canadians were held to doing everything that they could do to see that the operational cost reductions identified in the due diligence process were achieved. He had welcomed CanWest's involvement because it helped achieve the goals set in the investment.

Evidence of Mr Viner

Mr Viner testified that the Consultancy Agreement was entered into primarily to reassure the new Australian media investors and it was a way of codifying what CanWest was prepared to do.

Asked if there was any opposition within the TGL Board to CanWest providing the consultancy services, Mr Harris indicated that he would tend to take the view that it was the other way around, that the Australian directors on the TGL Board regarded it as essential, as a part of a service that CanWest had undertaken to provide.

Mr Cowin, when asked his thoughts on the provision of consultancy services by CanWest, indicated that he thought CanWest's involvement was essential and that such a view was held unanimously by members of the Board.

When Mr Whyte was asked what advantages he saw for TGL by entering into the formal Consultancy Agreement in July 1993, he indicated that the TGL Board anticipated that there would be input about budget matters to effect the cost cutting and that there was a perception that CanWest had a better understanding of program supply agreements with overseas suppliers and that their technical know-how would be superior on the purchase of capital equipment.

When Mr Harris was asked who was mainly interested in entering into the formal Consultancy Agreement, he indicated that the Canadians were quite happy to either have a Consultancy Agreement or not have one, that he didn't think they felt they were getting any undue benefit out of it and that from time to time it probably was a considerable impost on CanWest.

When asked whether CanWest would rather have kept the consultancy informal Mr Gross indicated that CanWest wanted the arrangement formalised because they were devoting a tremendous amount of time and energy and people to providing the consultancy service and CanWest's attitude was that they should get paid for it.

FINDINGS

On the basis of the evidence before it the ABA finds that:

40. *TGL and NTL directors anticipated benefits would accrue to Ten by entering into the Consultancy Agreement with CanWest.*
41. *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.*

4.2.5 OPERATION OF THE CONSULTANCY AGREEMENT

The ABA is of the view, based on advice from external counsel cited at part 4.2.1 of this report, that the mere entry into the Consultancy Agreement was in itself insufficient to establish that CanWest was in a position to exercise control of Ten. However, the ABA decided to examine how the Consultancy Agreement was actually put into effect during the period of its operation to determine whether in fact CanWest was in a position to exercise control of a substantial issue affecting the management or affairs of Ten.

As listed in clause 3 of the Consultancy Agreement, key operational activities were to be the focus of CanWest's advice provided under the Consultancy Agreement. For the purposes of this report consideration of the provision of advice under the Consultancy Agreement has been grouped under three main areas, considered later in this report. These areas are budget matters (considered at part 4.3), programming (considered at part 4.4) and corporate development (considered at part 4.5).

4.2.6 WHY WAS THE CONSULTANCY AGREEMENT TERMINATED?

As indicated earlier, from as early as November 1993 the ABA had expressed to TGL, both orally and in writing, that it had concerns with the potential of the Consultancy Agreement. The ABA's concerns were that the Consultancy Agreement primarily operated on an informal basis despite the express provisions of the Consultancy Agreement, and that it had the potential to confer upon CanWest control of TGL.

Evidence of Mr Studdy

Mr Studdy testified that the Consultancy Agreement was terminated because he had given an undertaking to the ABA to terminate it if the ABA was not comfortable with the agreement and the ABA indicated its discomfort. He honoured his word by having the Consultancy Agreement terminated by 30 June 1994.

Evidence of Mr Gross

Mr Gross testified that the ABA had essentially instructed TGL to terminate the Consultancy Agreement. The TGL Board felt that the business was profitable and that it was probably appropriate for the level of consulting to be reduced.

Evidence of Mr Asper

Mr Asper testified that as he understood the matter, it was the ABA that initiated the termination of the Consultancy Agreement. It was not a direction by the ABA but the ABA held the opinion that the Consultancy Agreement was a potential problem.

Evidence of Mr Whyte

Mr Whyte testified that Mr Studdy had spoken to the ABA and said that the ABA wanted to see the Consultancy Agreement terminated. Mr Studdy reported this to the TGL Board and it decided that in the spirit of cooperation the Consultancy Agreement should be terminated.

Evidence of Mr Harris

Mr Harris testified that TGL wanted to cooperate as far as possible with the ABA. The ABA was concerned about the Consultancy Agreement and TGL could live without the Consultancy Agreement, so the decision was made to terminate it.

Evidence of Mr Cowin

Mr Cowin testified that Mr Studdy had had a meeting with the ABA and the ABA requested that the Consultancy Agreement be terminated and TGL acted upon the ABA's wishes.

Evidence of Mr Liba

Mr Liba gave evidence to the ABA on 9 December 1994.

Mr Liba testified that he was aware of the Consultancy Agreement and that it was terminated but that he was appointed to the TGL Board after the termination of the Consultancy Agreement. He was not present in his then alternate director capacity when the decision to terminate the agreement was taken by the TGL Board at the Board meeting on 22 June 1994.

Evidence of Mr Viner

Mr Viner testified that he expressed his personal views on whether the Consultancy Agreement should be terminated to either Mr Whyte or Mr Cowin or both. His view was that the Consultancy Agreement should be terminated as Ten had completed the first stage of its reorganisation and the company was on a proper footing and because the ABA found the Consultancy Agreement to be an irritant.

Mr Viner's view that the first stage of the reorganisation at Ten was completed is supported by Mr Asper's comments at the TGL Board meeting of 22 June 1994 when the Board was considering the termination of the Consultancy Agreement (the relevant extract of the Board minutes appears at part 4.2.7 of this report).

The ABA had not at any stage throughout the operation of the Consultancy Agreement formed the view that there was sufficient evidence to support a finding that the Consultancy Agreement resulted in CanWest being in a position to exercise control of the Ten licences.

FINDINGS

On the basis of the evidence before it the ABA finds that:

42. *The decision of the TGL and NTL Boards to terminate the Consultancy Agreement was directly related to the ABA's expressed concerns about the potential operation of the Consultancy Agreement.*

4.2.7 PAYMENT TO CANWEST ON TERMINATION OF THE CONSULTANCY AGREEMENT

On 28 June 1994 TGL advised the ABA that at the TGL Board meeting on 22 June 1994 it was resolved to terminate the Consultancy Agreement on 30 June 1994. On 28 November 1994 the ABA was supplied with signed minutes of the TGL Board meeting of 22 June

1994.

These minutes record that:

Mr Asper, speaking on behalf of CGS, stated that at the conclusion of the present fiscal year, CGS will have fulfilled its role in assisting the achievement of the milestones in the Advisory Agreement and advising the Network on its recovery plan and commercial positioning. In those circumstances he felt that it was in the best interests of all parties to terminate the said Advisory contract.

The minutes then record that Messrs Asper and Gross left the room and that a committee of the Board had considered whether or not Ten should terminate the Consultancy Agreement and what compensation it was appropriate to pay CGS (the CanWest subsidiary) for its services. The minutes further record that the Board resolved to terminate the Consultancy Agreement as at 30 June 1994 and that in consideration of the termination \$3.4 million had been negotiated to be paid to CGS. It was recorded that the \$3.4 million was negotiated rather than \$4 million that would have been payable had the agreement run to its full term of 30 June 1996.

The minutes went on to record that:

Although Clause 8(c) of the CGS agreement states:-‘Either party may at any time terminate the consultancy by giving three months written notice of the termination to the other’, the termination payment to CGS of \$3.4 million was negotiated for the following reasons:-

- (a) as it was understood between Network Ten and CGS that clause 8(c) would only have application where the services to be provided by CGS under Clause 3 of the agreement were not achieving the intention of enhancing the earnings and profitability of the group;
- (b) the group’s profitability forecast for the balance of the agreement to 30 June 1996 is well in excess of the maximum EBIT contemplated in the agreement;
- (c) to reduce future costs which would be incurred by the group given the group’s EBIT forecasts;
- (d) to ensure that the group’s future international program selection and acquisition arrangements are not adversely affected by a less than amicable termination of the CGS agreement;
- (e) the desire to ensure that Clause 9 of the agreement remains in force until 30 June 1996.

Clause 9 of the Consultancy Agreement provided that neither CanWest, CGS nor any of its officers could provide consultancy services to any competitor of NTL and its subsidiaries.

The payment of the \$3.4 million on termination of the Consultancy Agreement could only be said to be an instance of the exercise of control if it can be demonstrated that the payment was made through pressure, whether express or implied, being applied to the TGL Board.

Legal advice was provided to the ABA on this matter. Mr Bret Walker SC advised that:

So far as concerns the payment for termination of the Consultancy Agreement, I confirm my advice in conference that it was consistent with, but not unequivocally so, a breach of their fiduciary and statutory duties by the directors of Ten. That is, gratuitous payments of money to the major shareholder can of course be part of an improper scheme by which directors pay insufficient regard to the best interests of the company as a whole. **However, this observation is remote from a conclusion that there has been such a departure in this case.** There are perfectly good reasons why a company (empowered by its constitution to do so) may make gratuitous payments. So-called moral

obligations are one form in which those reasons may be expressed.

[emphasis added]

Evidence of Mr Studdy

Mr Studdy testified that he set up an ad hoc committee of the Board to make recommendations to the Board in relation to the termination of the Consultancy Agreement. Mr Cowin was the chairman of that committee and Messrs Whyte and Harris were the other members. The decision taken by the TGL Board to pay the \$3.4 million to CanWest was recommended to the TGL Board by that committee and the committee conducted the negotiations with CanWest.

The ABA examined Messrs Asper and Gross. The ABA also examined Messrs Cowin, Harris and Whyte who comprised the TGL Board committee. The ABA was particularly interested in a number of specific matters. The first matter related to the reason listed as (a) in the TGL Board minutes of 22 June 1994 (referred to above). That is, that although the Consultancy Agreement provides in clause 8(c) that it could be terminated by either CGS or NTL on the giving of three months notice, this clause would only have application where the services to be provided by CGS were not achieving the intention of enhancing the earnings and profitability of Ten.

The ABA wanted to ascertain whether, despite the express terms of clause 8(c) of the Consultancy Agreement, TGL was of the view that it was legally obliged to pay compensation to CanWest for the termination of the Consultancy Agreement. If TGL was of the view that it was not legally obliged to make such a payment, the ABA wanted to ascertain what the circumstances were that led TGL to make the payment. In particular the ABA was keen to ascertain whether any pressure was applied by CanWest to TGL or any person associated with TGL to make a termination payment.

The second matter of interest to the ABA was the reason for payment listed as (d) in the TGL minutes (and referred to above), that is to ensure that TGL's future programming arrangements were not affected by a less than amicable termination of the Consultancy Agreement. The ABA was particularly interested in ascertaining whether there had been any threat by CanWest concerning Ten's programming.

Evidence of Mr Gross

Mr Gross testified that there was no negotiation—negotiation implies some power on CanWest's part. CanWest was told what the committee was deciding. Mr Cowin rang him in Canada and said the committee was going to recommend X dollars which was effectively the present value of two more years and did he think that that would be something that Mr Asper would be happy about? He indicated he thought that the committee's recommendation was very generous. That was the only conversation that he recalled having about the money involved. It was completely within their power to do anything they wanted; they didn't have to give CanWest one penny.

Evidence of Mr Asper

Mr Asper testified that if there were any negotiations over the payment of the \$3.4 million then they would have been with Mr Gross. Mr Asper did not know of any such negotiations, there may have been discussions but they were not with him. The committee reported to the TGL Board that it had decided that an ex gratia voluntary payment to CanWest should be paid. The Chairman, Mr Studdy advised him that the payment was voluntary. The payment was an act of generosity and an act of propriety.

Evidence of Mr Whyte

Mr Whyte testified that Mr Cowin and Mr Whyte negotiated with Mr Gross and Mr Asper on a suitable termination arrangement. They probably met six times with the CanWest representatives, maybe three over the table and three by telephone. The committee was unanimous that TGL had an obligation to pay CanWest in full, subject to discounting for receiving a cash payment now instead of the future.

There was discussion with CanWest and the committee about paying the \$4 million and the discount factor for present payment. Both Mr Gross and Mr Asper were expressing the view that CanWest should be paid \$4 million. There was a meeting between the committee and Messrs Asper and Gross and there were several meetings with Mr Gross.

TGL had no legal obligation to make the payment. Neither Messrs Asper or Gross ever indicated there would be retribution if there was no payment made and that such action would have been counter-productive. CanWest did not apply pressure for a payment. With regard to factor (d) (*see above*) there was no suggestion of ill will on CanWest's part if they did not receive payment for the termination of the Consultancy Agreement.

Evidence of Mr Cowin

Mr Cowin testified that the committee wanted to make sure that the Consultancy Agreement was terminated on an amicable basis. The members of the committee (Messrs Cowin, Whyte and Harris) agreed in discussion that TGL would pay CanWest an amount of money upfront as to what they would have earned for the balance of the agreement. That amount was discounted to a present day value. Mr Cowin had conversations individually with Messrs Gross and Asper as to what the committee's conclusions were and they were pleased.

He did not think there was a legal obligation. It was a matter of honouring what the committee felt was an obligation in spirit of a contract that was entered into by two willing parties. The committee's concern was being able to maintain a positive relationship more than a commercial benefit.

He recalled discussing the termination of the Consultancy Agreement with Mr Asper by telephone but could not recall any discussions with Mr Gross. With regard to factor (d), Ten's relationship with CanWest enhanced Ten's ability to purchase

programs; this could have been adversely affected if you had an adverse relationship grow out of the termination of the Consultancy Agreement.

Evidence of Mr Harris

Mr Harris testified that the function of the committee was to determine the grounds on which the Consultancy Agreement could be terminated. There was a debate about whether the agreement should be terminated, as legally NTL were entitled to do on three months notice, or whether CanWest were entitled to be paid as if the Consultancy Agreement had run its full term. The committee debated the matter and decided what it wanted to do before it got CanWest involved.

Somebody was delegated from the committee to relay to CanWest that the committee proposed making a discounted payment for the termination of the Consultancy Agreement. There would have been discussion with CanWest about the figure but he did not think there was any enormous sort of debate over the figure.

Mr Harris testified he was a director of a public company in the shape of TNQ. He had to be able to justify the decisions that he made in a situation like this to TNQ and he thought the TNQ directors fully supported this arrangement and he felt no disability in justifying it to the TNQ shareholders.

With regard to the group's future international program selection and acquisition arrangements, CanWest made no threat to Ten should there be no payment for the termination of the Consultancy Agreement.

Analysis of evidence about the discussions/negotiations which took place between TGL and CanWest

There are a number of contradictions in the different recollections of the process adopted to determine whether to make a compensation payment to CanWest for the termination of the Consultancy Agreement. Mr Asper was not aware of any negotiations and stated that if there had been any discussions, those discussions were not with him. Mr Gross said that no negotiations took place but that Mr Cowin did ring him to indicate what the committee was going to recommend to the TGL .

Mr Whyte recalled six meetings with either Mr Gross or Mr Asper and that there were discussions with Messrs Gross and Asper about the discounting factor to arrive at the figure of \$3.4 million. Mr Cowin recalled conversations with Messrs Gross and Asper individually concerning the committee's conclusions. Mr Harris recalled that somebody from the committee was delegated to relay to CanWest the committee's proposal to make a discounted payment and there would have been discussion with CanWest over the figure.

FINDINGS

On the basis of the evidence before it the ABA finds that:

43. *After a decision in principle had been made to terminate the Consultancy Agreement, the TGL Board Chairman constituted a Committee to recommend a course of action to the Board.*
44. *The Committee first resolved on an initial approach before broaching the matter with CanWest.*
45. *There is confused and conflicting evidence about the nature and extent of discussions between Committee representatives and CanWest, but this appears to be due to faulty recall and is not indicative of anything untoward.*
46. *There was no legal obligation for TGL to pay CanWest, and TGL and CanWest acknowledged there was no such obligation.*
47. *The committee and ultimately the TGL Board made the decision to make the termination payment to CGS on the basis of what they regarded as an 'obligation in spirit', in Mr Cowin's words, so as to maintain a positive relationship with CanWest. This 'obligation in spirit' was based on the fact that CanWest had assisted Ten in achieving the progress envisaged by the Consultancy Agreement as a whole. This progress was shown by the forecasts of TGL's EBIT figures that were well in excess of the maximum EBIT contemplated in the Consultancy Agreement.*
48. *There was no understanding between Network Ten and CGS that clause 8(c) of the Consultancy Agreement would only have application where the services provided by CGS were not achieving the intention of enhancing the earnings and profitability of Network Ten.*
49. *The TGL Board's interest in ensuring 'that the group's future international program selection and acquisition arrangements are not adversely affected by a less than amicable termination of the CGS agreement' reflected a wish on the part of the Committee and the Board to maintain a positive relationship with CanWest.*
50. *The TGL Board's interest in maintaining a positive relationship with CanWest was not the product of pressure from CanWest to receive payment on termination of the Consultancy Agreement.*

CONCLUSION

On the basis of its findings relating to matters addressed in part 4.2 of this report, namely:

the entry by NTL into the Consultancy Agreement with CanWest;

the termination of the Consultancy Agreement with CanWest by NTL; and

the payment by Ten to CanWest upon the termination of the Consultancy Agreement;

the ABA has considered the evidence and the relevant provisions of Schedule 1 part 2 clause 2 to the Act and concludes that:

CanWest, whether alone or together with an associate, was not in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of any Ten licensee in providing broadcasting services under the licences (clause 2(1)(b)(iii));

CanWest, whether alone or together with an associate, was not in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of TGL or NTL (clause 2(1)(c));

CanWest, whether alone or together with an associate, was not 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 Ten licensees or TGL or NTL (clause 2(1)(d)(iii)); and

neither NTL, TGL nor more than 50% of the directors of each of those companies acted (nor were intended or expected to act under a contract, arrangement or understanding) in accordance with directions, instructions or wishes of CanWest or of CanWest and an associate of CanWest or of the directors of CanWest (clause 2(1)(e)).

4.3 BUDGET ISSUES AND PREPARATION OF THE 1993-94 BUDGET

At the TGL Board meeting on 27 January 1993 the Board ratified interim arrangements with CanWest for the provision by CanWest of personnel for the conduct of consultancy services.

The following day, 28 January 1993, Messrs Asper, Gross and Chapman met with the ABA. Amongst other things, the ABA was informed that the consultancy service would provide advice related to the business plan, management information systems, productivity and other matters as they arose.

The services offered under the Consultancy Agreement covered a comprehensive range of key operational activities, including the following, which are very much related to budgetary issues:

- operational efficiency and effectiveness;
- annual budgeting;
- advertising sales, production and advertising rates, and other aspects of revenue generation and optimisation; and
- equipment and capital acquisition and replacements.

This part of the report examines whether CanWest was in a position to exercise control over the Ten network through its involvement in the budgetary process.

4.3.1 PREPARATION OF THE 1993-94 BUDGET

On 7 September 1993, Ten's legal advisers responded to a letter from the ABA concerning the Consultancy Agreement. The following matters were referred to in that letter relating to budget preparation:

- Ten perceived that having access to CanWest's expertise in operations, program acquisition, financial analysis and sales could only be of benefit to it; and
- the comprehensive range of services to be provided by CanWest reflected the Board's perception that every aspect of the operation of Ten needed to be looked at.

On 10 November 1993, the ABA wrote to TGL requesting the provision of, amongst other things, a list of all directors since 1 January 1993, copies of any agenda papers and minutes created for or by Board meetings, advice as to whether any management committee had been created and if so, provision of its agenda papers and minutes and other records of such meetings.

On 1 December 1993 TGL provided the requested information. Included within the documentation were the minutes of meetings of the Budget Review Committee. Analysis of the minutes of the first Budget Review Committee meeting of 24 February 1993 indicated

that Mr Viner was Chairman of the Committee and present at the meeting were seven senior Ten executives (including Mr Lattin) along with Mr Gerry Noble. Mr Noble was a former CanWest employee and was at the time of the Budget Review Committee meetings, the Chief Financial Officer with the New Zealand television station, TV3, which was managed by CanWest. The minutes record that Mr Viner indicated he expected the discussion at the meeting to be of a directional/philosophical nature, whilst at the next meeting he would like the options spelt out in terms of costs, risks and benefits and for the following meeting, recommendations based on the costs risks and benefits of each alternative.

A further seven meetings of the Budget Review Committee (renamed the Management Committee) were convened prior to 30 June 1993, with Mr Viner chairing all but one of these seven meetings. The Committee continued to meet throughout 1993 with Mr Viner chairing the meetings in his capacity as CEO.

Also included within the documentation were the minutes of the TGL Board meeting of 9 June 1993. The minutes record that:

- the CEO Mr Viner presented the 1993-94 budget papers and that the TGL Board resolved that the budget papers be noted and used on an interim basis;
- the cost side of the budget was unsatisfactory and did not reflect the magnitude of the anticipated changes due to the restructuring operation;
- Mr Viner was to present to the Board a recast of the budget as at 31 December 1993; and
- the original \$20 million cost savings tabled at the TGL Board meeting of 27 January 1993 were to be compared with the current operating position and submitted to the next Board meeting.

The minutes of the next TGL Board meeting of 7 July 1993 record that:

- the Board requested a reconciliation be prepared detailing the cost savings achieved to date and the original \$20 million cost saving plan tabled at the 27 January 1993 TGL meeting; and
- under the terms of the Consultancy Agreement CanWest was to supply to Ten a task force under the direction of Mr Viner to assist in the preparation of the future budgeting and financial structure of the company.

The minutes of the TGL Board meeting of 5 October 1993 record that:

- the CEO's report advised the meeting that the current review of the financial reporting demonstrated that the format and contents of reports were unsatisfactory; and
- the CanWest consultancy team then currently undertaking the accounting and reporting review would make recommendations on a new reporting format.

Also on 1 December 1993 TGL responded to a further request from the ABA for information about the Consultancy Agreement. With regard to budget review, TGL said, oral recommendations were provided to Mr Viner with some of the recommendations being followed or taken into account. Management was extensively involved.

On 13 January 1994 TGL responded to a further request from the ABA for information about the Consultancy Agreement. Information contained within the response relating to budget preparation included a copy of a memo dated 9 December 1993 from Mr Gross (on CanWest letterhead) to the TGL Board.

In this memo Mr Gross made reference to:

- the budget review that was commenced in October 1993 and was undertaken by a group including Ten employees and CanWest employees;
- the budgeting and operating expense reduction process would be ongoing and part of a longer term process with expenditure levels reviewed on a regular basis until there was satisfaction that all of the economies had been gained;
- the budget that was being presented to the TGL Board on 16 December 1993 containing cost reductions and savings from the budgeted operating costs that were prepared by the previous management and presented to the new investors at the time of the acquisition of Ten in late 1992; and
- his recommendation to the TGL Board that it should approve the budget.

The minutes of the TGL Board meeting of 16 December 1993 record that:

- the CEO's report advised the meeting that the revised operating budget contained within the Board papers represents a continuing working document prepared by management and the budget review committee. The review of the organisation continues; and
- a report of the budget working party prepared by Mr Gross together with the revised budget for the year 1993-94 was tabled and discussed. The Board resolved that the budget for the 1993-94 financial year be adopted.

4.3.2 ASSERTIONS BY MR LATTIN RELATING TO BUDGET ISSUES

On 25 October 1994 an article appeared in the *Canberra Times* referring to a statement by Mr Lattin filed and served in the proceedings *Capital Television Group Limited and Anor v Darling Downs TV Limited and Ors*. Capital Television Group Limited (Capital) alleged, amongst other things, that CanWest was in control of Ten. The ABA issued a notice on 25 October 1994 to Mallesons Stephen Jaques, solicitors for Capital, requiring production of all statements made in relation to the action.

In response the ABA received copies of signed statements made by Messrs Michael Lattin, Nicholas Greiner and Charles Curran. The ABA considered these statements, the pleadings and amended pleadings filed by Capital in the context of its investigation. In the course of the proceedings the ABA obtained further information from Capital and Mr Curran on a number of occasions. On 14 August 1995 Capital withdrew the claims.

On 7 November 1994 the ABA examined Mr Lattin about CanWest's involvement in Ten. Mr Lattin had been acting as the General Manager, Programming at Ten when Ten was acquired by the TGL consortium on 30 December 1992. Mr Lattin was subsequently appointed and filled the position from early 1993 until his resignation of 15 October 1994.

Mr Lattin provided evidence from which inferences could be drawn relevant to the question of control of budgetary matters. Control of budgetary matters is relevant to whether CanWest is in a position to exercise restraint over a substantial issue affecting the management of affairs of Ten, as well as other matters identified in clause 2 of Schedule 1 to the Act. Mr Lattin in examination made a number of assertions relating to the involvement of CanWest or CanWest officers in the budgetary process. Mr Lattin's assertions are presented and considered below.

4.3.3 MR VINER'S ROLE AT THE BUDGET REVIEW COMMITTEE MEETINGS

Evidence of Mr Lattin

Mr Lattin gave evidence to the ABA on 7 November 1994.

Mr Lattin testified that at the Budget Review Committee meeting of 24 February 1993, Mr Viner was quite obviously the boss, although Mr Rice was still the CEO and was present at the meeting but clearly Mr Viner had control.

Evidence of Mr Whyte

Mr Whyte testified that Mr Rice would have been responsible for the preparation of the Ten budget in early 1993, but he would get the input of the Budget Review Committee. Ultimately the CEO is responsible for the carriage of the budget. Mr Viner was part of the review process, the cost cutting, and to that extent as Chairman of the Executive Committee he could call on people to give him advice and recommendations about cost cutting. Even though Mr Viner chaired the Budget Review Committee meeting on 24 February 1993 this did not confer on him a management function. The Ten executives present in the Budget Review Committee meeting would not have been answerable to Mr Viner.

Evidence of Mr Viner

Mr Viner testified that as Chairman of the Budget Review Committee, he established a number of sub-committees in January/February 1993 that were to report back to the Budget Review Committee on what cost reductions could be achieved. He chose the members of the sub-committees, which only had power to recommend. The sub-committees made recommendations to the Budget Review Committee and that Committee discussed the recommendations. As Chairman of the Budget Review Committee, he would put its recommendations to the Executive Committee. The timing of taking recommendations to the Executive Committee would depend upon the magnitude of the decision. If it was a minor decision he would seek ratification of the Executive Committee after the decision; if it was a major decision he would 'pretty much' get the Executive Committee's prior approval. The Executive Committee was very much aware of his thinking and he was very much aware of theirs due to the frequency of the Executive Committee's meetings. He was Chairman of the Executive Committee at the time, around February/March 1993.

Mr Viner also testified that Messrs Noble and Strike went through the Ten budget papers in the first three or four months of 1993. They were assisting him in the preparation of a new business plan and the budget. Messrs Strike and Noble's involvement was pursuant to the informal consultancy agreement between Ten and CanWest.

FINDINGS

On the basis of the evidence before it, (particularly the evidence presented at part 4.1.2 of this report relating to the Executive Committee and the roles of Mr Viner and Mr Rice) the ABA finds that:

51. *In the period February-March 1993 Mr Viner operated as a consultant to Ten on matters such as the preparation of a business plan and budget.*
52. *Due to Mr Viner's participation as a consultant and his involvement with the Executive Committee and the Budget Review Committee he had the responsibility for assisting and directing the preparation of the 1993-94 budget for submission to the TGL Board.*
53. *In his capacity as a consultant Mr Viner was in the position of Chairman of the Budget Review Committee. This Committee only had powers to recommend in relation to operational matters of substance. It reported, through Mr Viner, to the Executive Committee. The Executive Committee was fully apprised of issues determined by the Budget Review Committee. Mr Viner was not put in a position to exercise control of any substantial issue affecting the management or affairs of Ten by virtue of his position as Chairman of the Budget Review Committee.*
54. *In this same period Mr Viner operated as the Chairman of the Executive Committee. The purpose of the Executive Committee was to get consensus on the business plan and budget.*
55. *As demonstrated by the TGL Board's rejection in June 1993 of the cost side of the budget and its request that Mr Viner present to the Board a recast of the budget, Mr Viner was not in a position to determine the outcome of the budgetary process.*

4.3.4 MR NOBLE'S INVOLVEMENT IN THE BUDGET PROCESS

Mr Gerry Noble, a former CanWest executive, is Chief Financial Officer of TV3 New Zealand. CanWest has a 20% shareholding interest (with an option to increase this to 50%) and a management agreement with TV3.

Evidence of Mr Lattin

Mr Lattin testified that Mr Noble was Chairman of the Ten Production Contracts sub-committee. The sub-committee identified four areas requiring review: current affairs; the Gavin Disney contracts; the *Jeopardy* contracts and the drama areas (*Neighbours*

and *E Street*). Mr Lattin took Mr Noble to meet Mr Gavin Disney and Mr Jim Mackay at Nunawading because Mr Noble felt that there were several shows that were expensive in terms of production.

As indicated earlier in this report, on 1 December 1993 TGL provided minutes of meetings of the Budget Review Committee. Analysis of the minutes of the first Budget Review Committee meeting of 24 February 1993 indicates that apart from Mr Viner, Mr Noble was the only other non-Ten executive present. The minutes of this meeting also record that Mr Noble was the Chairman of the Production Contracts Sub-Committee and that he had identified four areas requiring review. These four areas were exactly those raised by Mr Lattin. Mr Noble attended a further four of six meetings of the Budget Review Committee until the end of June 1993.

On 1 December 1993 Ten also provided information to the ABA on the operation of the Consultancy Agreement, the use of consultants under the Consultancy Agreement and what areas they worked on. Mr Noble was listed as having conducted consultancy work on operations and management organisation review; budget review; reporting systems; cost control review and traffic system review.

Evidence of Mr Cowin

Mr Cowin testified that Mr Noble was brought in as part of the Consultancy Agreement to advise on the budgetary aspects of Ten.

Evidence of Mr Whyte

Mr Whyte testified that it was very clear in early 1993 that the financial affairs of Ten were not in a satisfactory state and Ten sought to employ Mr Noble, and failing that have him lent to Ten by TV3 New Zealand. Mr Noble came over three or four times, or maybe six times and gave his input at Budget Review Committee meetings.

Evidence of Mr Viner

Mr Viner testified that Mr Noble was the chief financial officer at TV3 at the time and was involved in the due diligence process that CanWest conducted during the consortium's acquisition of Ten. He is a certified accountant and has a good grasp of financial aspects and of looking into systems and reporting areas. Mr Noble did not play any role in Ten's negotiation of program agreements.

Mr Viner was of the view that the cost of a number of program contracts were too high and so he established a sub-committee of the Budget Review Committee, the Production Contracts sub-committee, with the purpose of negotiating or reducing the costs of a whole series of programs. Mr Noble was the Chairman of the sub-committee. Messrs Carrington, Lewis and Noble would probably have negotiated the contracts with Mr Disney and the sub-committee would have made recommendations to the Budget Review Committee.

Mr Viner testified that he had asked CanWest if he could borrow Mr Noble from TV3 New Zealand because he knew Mr Noble was knowledgeable about the producers in

the area because TV3 dealt with much the same group. Mr Noble was also knowledgeable about local prices and about what a contract should be valued at.

FINDINGS

On the basis of the evidence before it the ABA finds that:

56. *The TGL and NTL directors anticipated benefits to accrue to Ten by entering into the Consultancy Agreement with CanWest. CanWest's areas of expertise included operations, program acquisition and financial analysis.*
57. *Mr Noble was perceived as having expertise in these areas and his participation in the analysis of production costs was pursuant to the Consultancy Agreement.*
58. *The TGL Board was aware of Mr Noble's involvement in the budgetary process. His involvement at Ten had the approval of the TGL Board.*
59. *Mr Lattin's assertion that Mr Noble, in his role of Chairman of the Ten Production Contracts sub-committee, was very much involved in the determination of production costs is correct. However, Mr Noble had no decision making role in the process: he provided assistance and advice only.*

4.3.5 CANWEST PERSONNEL WERE SIGNIFICANTLY INVOLVED IN BUDGET PREPARATION

Evidence of Mr Lattin

Mr Lattin testified that Mr Gross seemed to be chairing a budget meeting (in the later half of 1993). Despite having prepared budgets with Messrs Carrington and Lewis, Messrs Strike and Noble analysed and changed the way the budgets were prepared. Despite the presence of Mr Carrington, Mr Strike was the dominant person and Messrs Strike and Noble were providing the answers.

Evidence of Mr Gross

Mr Gross testified that the process of review of budgets and operations was actually by the demand and request of the TGL Board of directors and not on any recommendation by CanWest. If Mr Gross were to characterise the Board's attitude to cost cutting, he and Mr Asper were probably the softest in terms of what kind of cutting should take place. Some of the Board members were far more adamant about cost cutting and the way Ten should operate than the CanWest nominees were. Messrs Whyte, Cowin, Singleton, Freedman, Sherman and Leibler were the directors applying the most pressure to cut costs. Messrs Chapman, Harris and Gleeson from TNQ were more reasonable as they had experience running a TV network.

Mr Gross testified that during 1993, the TGL Board was of the view that in terms of financial analysis the Finance Department was weak and that Ten needed a new Chief Financial Officer (CFO). Until such an officer was hired, CanWest would fill in as a consultant, assisting in putting together the new budget. Mr Viner was supervising the task and the CanWest consultants were under Mr Gross' supervision. Mr Noble spent a lot of time with Ten in March/April of 1993 trying to come to terms with the budgets because the accounting systems were so impossible to interpret. The meetings between Ten management and CanWest consultants were really information gathering exercises. Subsequent meetings were held with Mr Viner and recommendations put to him. The process was complicated by the fact that Ten's accounting systems were out of date and impossible to manage. It was very hard just to get the basic information. Staff didn't have the analytical capability necessary to produce the information. It wasn't a case of analysing information, the information wasn't available.

Mr Gross also testified that CanWest did not do the job of the CFO, but assisted in producing the information that the Board would find acceptable. Mr Viner and his management team did the majority of the cost cutting. CanWest helped them look at the information in a manner that was understandable but CanWest never actually formulated the answers. CanWest was hired to review the budget procedure and have input into it. This did not put Mr Gross in the position where he could approve the budget. CanWest's involvement in determining a budget was that the budget would be prepared by management, the CanWest consultants would review it and then the CanWest consultants would meet with Ten management and raise questions. CanWest's role was to make sure the budget was realistic. Ten management would take into account what CanWest consultants said and produce the final budget. The Board would generally ask CanWest or Mr Gross, what their view was. He would on occasions have some disagreement with what was being put to the Board. The Board would decide whether to pass it or not pass it.

Evidence of Mr Harris

Mr Harris testified that the TGL Board requested CanWest to provide assistance in achieving the sort of operating costs cuts that CanWest had asserted were possible. The shareholders in Ten viewed CanWest as somebody experienced in the television business and whose expertise ought to be used to the benefit of Ten and all the directors were determined that CanWest would be held to providing assistance. In the first half of 1993 the main issue was the setting of the 1993-94 budget. CanWest provided input into the budget, they were very much involved.

The 1993-94 budget was tabled at the TGL Board meeting in June 1993 and the TGL Board found the cost side of the budget unsatisfactory. It did not reflect the magnitude of the cost cutting that was anticipated. Mr Viner was requested to submit a recast of the budget. Directors such as Messrs Whyte and Cowin wanted to ascertain why the proposed budget had fallen short of what was expected.

Evidence of Mr Whyte

Mr Whyte testified that CanWest had indicated to the consortium (as a result of its due diligence) that cost cuts of around \$20 million were achievable.

Evidence of Mr Cowin

Mr Cowin testified that out of CanWest's due diligence exercise they identified what they felt were excess costs at Ten. CanWest's philosophy was that Ten may not be able to increase its ratings and the revenue line may be static but what does exist is a great opportunity to remove some costs out of the business. They developed a list of excess costs which was in the range of \$20 million.

Evidence of Ms Travers

Ms Travers gave evidence to the ABA on 13 February 1995.

Ms Travers testified that since her appointment to the position of General Manager News and Current Affairs in July 1993, she had written the budgets for her area along with the chief financial controller. Nobody from CanWest was involved in terms of the actual writing of the budgets or the implementing of them. In September or October 1993 there was a meeting where a broad range of budget discussions took place where Messrs Strike, Noble and Gross from CanWest attended.

Ms Travers presented to the meeting her budgets, how much money she had and how she was going to distribute it across the network. Also present were people from the network finance department. There was no reaction from the CanWest people. There were no changes to her bottom line as a consequence of the meeting.

Ms Travers also testified that, approaching the next financial year, there was another budget round in which she dealt with Mr Peter Myers (Ten Group General Manager Finance and Administration). It did not strike her as unusual that the CanWest people were present as their input at the meeting was so limited that their presence actually wasn't terribly significant to her. She mostly referred to the two Ten financial controllers, Messrs Lewis and Carrington. They quizzed her, they appeared to know her budget fairly intimately and were the ones who she thought were going to 'distribute the beans'. The 1994-95 budget process was between Mr Myers, Ms Travers, her assistant unit manager and Mr Myers' assistant.

As a result of CanWest's due diligence of Ten in late 1992, CanWest identified measures that could be taken to achieve a cut in Ten's costs of \$20 million. This was used as a selling point by CanWest to bring together what became the Original Shareholders, that is the consortium that successfully acquired Ten. Following the acquisition, the \$20 million cost reduction became a budget goal for the TGL Board.

Mr Bret Walker SC in his advice to the ABA stated:

In relation to the domestic programming decisions and the cost-cutting plan the acceptance by Ten's Board of the plan and the consequential budgets should not be seen as evidence of control. While it

may be consistent with control, it is just as consistent with the independent decision-making of the individual directors and of the Board as whole to accept the meritorious business suggestions from a proven source.

The ABA accepts this advice.

The ABA notes that Mr Lattin's evidence indicates he had no knowledge of the consultancy agreement during the period it was in place, nor how it worked in practice. Despite the significant involvement of CanWest by way of its consultancy service to TGL in early 1993, the TGL Board in June 1993 rejected the proposed 1993-94 budget when it did not deliver the results that were anticipated by the TGL Board. The TGL Board exercised its 'veto' power over the budget for 1993-94 when it rejected the budget and requested Ten management, with the assistance of the CanWest taskforce, to recast the figures with a view to increasing the expected budget savings in line with the \$20 million forecast by CanWest in its due diligence exercise. This 'veto' power indicates that the TGL Board members as a group, and not CanWest, had ultimate control of the budget and corporate plan for Ten (see part 2 of this report 'Principles used to determine whether control exists'.)

FINDINGS

On the basis of the evidence before it the ABA finds that:

60. *In January 1993, the first month under the new ownership, the TGL Board's perception was that every aspect of Ten's operations needed to be examined.*
61. *The TGL Board acted on this by entering into an informal consultancy agreement with CanWest to ensure CanWest's expertise was available to formulate a business plan and to assess management information systems and productivity.*
62. *The involvement of CanWest in budgetary matters was formalised in July 1993 by NTL entering into the written Consultancy Agreement with CanWest. Under the Consultancy Agreement advice could be sought on operational efficiency and annual budgeting.*
63. *The TGL Board rejected the cost side of the 1993-94 budget in June 1993 when the \$20 million cost cut identified in CanWest's due diligence process was not reflected in the 1993-94 budget.*
64. *As a result of the rejection, TGL sought the provision by CanWest under the Consultancy Agreement of a task force, under the supervision of Mr Viner, to prepare a recast 1993-94 budget by 31 December 1993.*
65. *The TGL Board was briefed throughout the remainder of 1993 on the progress being made in improving the financial reporting.*
67. *Mr Lattin's assertion that around October 1993, CanWest officers, Messrs Gross, Strike and Noble (TV3) were very much involved in the preparation of the 1993-94 budget is correct.*

68. *The participation of Messrs Gross, Strike and Noble was sanctioned by the request for the provision of the budget task force by the TGL Board. They provided advice only and did not control the determination of the figures in the final budget. The figures were determined by management and ultimately the Board of TGL was required to approve the budget.*
69. *The budget presented and accepted by the TGL Board in December 1993 resulted from a budget review that was undertaken by Ten and CanWest employees, the CanWest employees being provided under the Consultancy Agreement.*

CONCLUSION

On the basis of its findings relating to matters addressed in part 4.3 of this report, namely:

Mr Viner's role in the preparation of the 1993-94 Budget;

Mr Noble's role in the preparation of the 1993-94 Budget; and

the involvement of CanWest officers in the preparation of the 1993-94 Budget;

the ABA has considered the evidence and the relevant provisions of Schedule 1 part 2 clause 2 to the Act and concludes that on the evidence available in relation to those matters:

CanWest, whether alone or together with an associate, was not in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of any Ten licensee in providing broadcasting services under the licences (clause 2(1)(b)(iii));

CanWest, whether alone or together with an associate, was not in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of TGL or NTL (clause 2(1)(c));

CanWest, whether alone or together with an associate, was not 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 Ten licensees or TGL or NTL (clause 2(1)(d)(iii)); and

neither NTL, TGL nor more than 50% of the directors of each of those companies acted (nor were intended or expected to act under a contract, arrangement or understanding) in accordance with directions, instructions or wishes of CanWest or of CanWest and an associate of CanWest or of the directors of CanWest (clause 2(1)(e)).

4.4 SELECTION AND PROVISION OF PROGRAMMING

Relevant to the question of control of programming matters is the question of who has ultimate control, eg can instruct, direct or restrain (in relation to direction or restraint see below), or has veto power over any of the following decisions:

- the purchase of programs from a particular program producer, supplier or distributor;
- the choice of programs to be purchased from that program producer, supplier or distributor;
- the terms of an agreement with any such producer, supplier or distributor;
- the decision to axe a particular program;
- the decision to broadcast a particular program;
- scheduling decisions;
- the decisions which set budgeting limits on the purchase of programming; and
- the decision to exceed a budgeting limit relating to programming.

Control of any of those decisions may be relevant to the question of whether a person controls the selection or provision of a significant proportion of the programs broadcast by a licensee in terms of clause 2(1)(b)(ii) of Schedule 1 of the Act.

In the course of the ABA's investigation, Ten made a number of significant decisions relating to programming.

On 7 November 1994, the ABA examined Mr Lattin about CanWest's involvement in Ten. Mr Lattin provided evidence from which inferences could be drawn relevant to the question of the control of programming matters.

In addressing the inferences made by Mr Lattin the ABA examined the roles of the TGL Board, the Executive Committee of NTL, Mr Lattin (General Manager Programming of NTL), Mr Viner (CEO of TGL), Mr Gross (at the time a director of TGL and CanWest) and CanWest in the programming decision-making process at Ten.

The ABA obtained copies of program agreements from Ten and examined directors and senior management of TGL and NTL about the programming decision-making process at Ten. The Managing Directors of Worldvision Australia and MCA Australia, who were involved in negotiations of program agreements with Ten, were also examined by the ABA.

This part of the report examines the evidence obtained by the ABA relating to programming matters at Ten.

4.4.1 TGL BOARD AND EXECUTIVE COMMITTEE INVOLVEMENT IN PROGRAMMING MATTERS

On 14 October 1993 the ABA wrote to NTL noting media reports that Ten had signed a programming arrangement with Columbia TriStar Television Pty Limited (Columbia TriStar) and requesting details of the arrangement. On 18 October 1993 NTL responded to the ABA's letter, confirming that NTL had entered a programming agreement with Columbia TriStar. NTL indicated that the negotiations had been conducted on behalf of Ten by the CEO, Mr Peter Viner, and the General Manager Programming, Mr Mike Lattin. NTL indicated that the agreement covered Australian rights only.

On 10 November 1993 the ABA wrote to TGL requesting information about, amongst other things, programming. The requested information ranged from minutes of board meetings to a list of all suppliers of programs since 1 January 1993 (including when and for what period they were contracted to provide product to the network and details of who negotiated the contracts). On 1 December 1993 TGL responded to the ABA's letter, providing the required information.

The Board Reports of January 1993, February 1993 and April 1993 (which were provided to the TGL Board respectively for each of the first, second and third meetings of the TGL Board) contained reports on programming issues. Analysis of the information indicated regular Board and Executive Committee attention to programming matters. Minutes of meetings of the TGL Board in March, April and June of 1993 record the presentation of the Executive Committee report by Mr Viner. The minutes of the TGL Board meeting of June 1993 record that recommendations of the Executive Committee relating to production costs were discussed along with critical success factor/issues for 1993-94 prepared by each senior executive.

The TGL Board minutes of July 1993 record that in his CEO report, Mr Viner advised the meeting of the status of the Twentieth Century-Fox Film Corporation (Fox) program agreement. Also discussed were the proposed changes to the weekend news arrangements and the production budgets relating to the Commonwealth Games coverage.

The TGL Board minutes of October 1993 record that in his CEO report, Mr Viner advised the meeting of the status of the Fox program agreement. Also tabled and discussed at the meeting were the General Manager reports of Ms Travers (Network News and Current Affairs), Mr Lattin (Network Programming) and Ms Hardy (Network Production). Mr Viner's October 1993 report to the TGL Board also covered the issue of programming for the 6 p.m.-7.30 p.m. timeslot for 1994. Mr Lattin's report covered ratings results and referred to Executive Committee discussions of the format for the early evening timeslot for 1994 along with a number of other matters. A further report for the October 1993 TGL Board meeting was the 'Key Management Activity Summary.' This report listed the initiatives over the last quarter to reduce the cost base. It listed program contracts that had been renegotiated, new programs commissioned, programs cancelled or program changes.

The TGL Board minutes of December 1993 record that in his CEO report, Mr Viner tabled the proposed 1994 program format. The TGL Board minutes of December 1993 also record that the Board discussed the general principles in relation to the approval process for the acquisition of programs and that the Board resolved that the Executive Committee was to

review any acquisition which was out of the ordinary in relation to the established strategic programming policy. Further, Mr Lattin was to prepare a paper outlining the programming strategy for the 1995 calendar year. Finally the TGL Board minutes of December 1993 record that Ms Travers addressed the meeting on the *Alan Jones Live* show scheduled to commence in January 1994.

Analysis of the Executive Committee agenda papers and minutes indicates regular discussion of programming matters. Analysis of the list of all suppliers of programs supplied since 1 January 1993 indicates that the negotiation of these agreements was undertaken solely by Ten executives and that the selection of individual programs was in almost all cases performed by either Mr Alan Bateman (the former General Manager Network Productions and Operations), Mr Gary Rice (the former CEO), Mr Lattin (General Manager Programming), occasionally by Mr John McAlpine (General Manager Network Sales), or by Ms Valerie Hardy (who commenced as General Manager Network Production in June 1993).

On 21 December 1993 the ABA wrote to TGL requesting information relating to, amongst other things, the roles played by Messrs Gross and Viner in the negotiations of the Fox program agreements with Ten and whether services were provided under the Consultancy Agreement in negotiating the contract, and seeking the provision of any documentation relating to the matter. On 13 January 1994 TGL responded to the ABA's letter. TGL indicated that Mr Viner and Mr Lattin requested the assistance of Mr Gross under the Consultancy Agreement. TGL also provided copies of Mr Viner's CEO report to the TGL Board for the June 1993 Board meeting and the October 1993 Board meeting. The October report indicated Mr Gross' involvement in discussions.

On 3 March 1994 the ABA wrote to TGL requesting information relating to, amongst other things, the roles played by Messrs Gross and Asper in the negotiation of the Fox program agreements. The ABA also sought information about CanWest's international connections and how this related to Ten's negotiation of program agreements. Clarification of New Zealand rights for some programs was also sought. On 18 March 1994 TGL responded to the ABA's letter. TGL indicated that:

- as indicated earlier, the negotiations were conducted by Messrs Lattin and Viner, with Mr Gross playing an advisory role in the negotiations. Prior to the negotiations CanWest had raised the Ten-Fox matter with Fox during discussions about CanWest programming. TGL emphasised in its response to the ABA that Ten decided it wanted to retain the programming and CanWest assisted in achieving the result;
- the benefits for Ten from its relationship with CanWest were that Ten got better access to programming on better terms and conditions by using the CanWest connections. Ten emphasised that no programming was acquired unless Ten requested it. Ten also anticipated using CanWest assistance in obtaining foreign distribution of Australian products;
- the acquisition of New Zealand and Asian rights was not standard practice but might become more so in the future, if Ten believed TV3 and other relevant stations might be interested in obtaining those rights; and
- TGL had a point of entry with TV3 through CanWest's relationship. There was no formal relationship between TV3 and Ten but where mutual benefit was identified TGL might approach TV3.

The TGL Board minutes of April 1994 record that Mr Lattin presented an overview of the program strategy commenced in 1993 and the process of developing the structure in the current and future years. On 20 June 1994 at a meeting between Mr Asper and the ABA, Mr Asper informed the ABA that CanWest would continue to provide to TGL assistance with the purchase of international programs and the international sale of locally made programs.

Analysis of minutes of meetings of the TGL Board held throughout 1994 record continued Board attention to programming matters. The minutes record the tabling of reports by Mr Viner and the General Managers, particularly of Network Programming, News and Current Affairs and also of Network Production.

4.4.2 MR LATTIN'S APPOINTMENT AS THE GENERAL MANAGER PROGRAMMING

Evidence of Mr Lattin

Mr Lattin testified that in early 1993 it was Mr Viner who would determine whether he (Mr Lattin) would stay as the General Manager Programming. In January 1993, Mr Viner discussed with him whether he wanted to continue to head up programming at Ten. He found this unusual as Mr Viner held no position at Ten at that stage. Mr Rice was the CEO of NTL at the time but had no involvement in the negotiation of Mr Lattin's job description. However, Mr Rice was the signatory to the job description, not Mr Viner.

Evidence of Mr Viner

Mr Viner testified that he recommended to the Executive Committee that Mr Lattin be confirmed as head of programming at Ten and that this was done as one of his consultancy tasks of evaluating management and senior personnel. He did not find it unusual that Mr Rice and the new shareholders would seek an independent view on an appointment the nature of Mr Lattin's.

Evidence of Mr Rice

Mr Rice testified that he appointed Mr Lattin to act in the General Manager Programming position in December 1992. As it was a senior appointment it was felt that Mr Lattin's appointment should be vetted and finally approved by the new owners. Mr Lattin's appointment was approved but Mr Rice was not involved in the negotiation of the contract. Mr Rice could not remember whether he signed the contract with Mr Lattin but he would certainly have appointed Mr Lattin on a permanent basis.

As discussed earlier in this report (part 4.1.2 refers), on 31 March 1993 TGL provided to the ABA information about the membership and functions of the Executive Committee. Relevant information was as follows:

- the Executive Committee comprised Messrs Harris, Singleton, Gross, Whyte and Viner;
- the Executive Committee dealt with matters which in the normal course would be dealt with by the CEO and one director; and
- the Executive Committee was to review senior staff appointments, with top appointments being determined by the Board.

As discussed earlier in this report, there were no minutes taken of the first eight meetings of the Executive Committee but an agenda was prepared for each of the meetings and has been provided to the ABA. The first meeting of the Executive Committee took place on 5 February 1993. Appearing as Item 6 on this agenda paper is the topic of 'Program Director Position.' Appearing as Item 2 on the agenda paper for the meeting of 18 February 1993 is the topic of 'Mike Lattin Deal.'

Mr Lattin provided to the ABA his copy of his agreement for provision of services. It was addressed to him on 23 February 1993. It sets out Mr Lattin's entitlements and conditions of employment and was signed by Mr Rice as Managing Director and CEO of NTL. It was accepted and signed by Mr Lattin on 8 March 1993.

FINDINGS

On the basis of the evidence before it the ABA finds that:

70. *Mr Rice appointed Mr Lattin to the position of General Manager Programming of NTL, however, Mr Viner was significantly involved with the decision to confirm that appointment.*
71. *As the Executive Committee was not formalised until the TGL Board meeting of 27 January 1993, Mr Viner's discussions with Mr Lattin in early to mid January 1993 concerning Mr Lattin's appointment were conducted either in his capacity as a consultant to Ten or in anticipation of his future role on the NTL Executive Committee.*
72. *Following the creation of the Executive Committee, Mr Viner's involvement in the selection of Mr Lattin is consistent with the functions of a member of Executive Committee to review the appointments of senior executives.*
73. *As decisions of the Executive Committee had to be unanimous or if not, then be referred to the Board, the ABA is satisfied that Mr Viner was not, as asserted by Mr Lattin, the person who would determine whether he (Mr Lattin) would continue to act in the position of General Manager Programming.*

4.4.3 PROPOSED NATIONAL NEWS SERVICE

Evidence of Mr Lattin

Mr Lattin testified that both Messrs Rice and Viner told him that in December 1992, before the completion of the acquisition of Ten, Mr Strike (CanWest executive and alternate director of TGL to Mr Asper) asked Mr Rice to put on hold any plans for a national news service. This was because the prospective new owners did not want to be committed to a national news service as they had fears that it was not the right idea.

Evidence of Mr Rice

Mr Rice testified that Mr Strike told him to stop all plans for a national news service in late 1992, prior to the acquisition of Ten by TGL. Mr Strike could not direct him to stop the possible introduction of the national news service but the then owners, Westpac, did not want this to be an issue in the proposed sale so Westpac requested that Mr Rice not proceed at the time. He did have some input at reorganisation or review committee meetings. At one of these meetings he raised the matter of a network national news at 6 p.m. but that the Canadians (and particularly Mr Gross) did not like the idea.

Evidence of Mr Viner

Mr Viner testified that Mr Rice told him in November or December 1992, during the CanWest due diligence process that he was working on a proposed national news show for the 6 p.m. time slot. Mr Viner's understanding was that Mr Rice had been promoting the idea within Ten for six months to a year but could not find any support. Mr Viner was not aware of any conversation between Mr Strike and Mr Rice in late 1992 concerning any proposed national news service. In early 1993 Mr Rice did raise his idea of a national news service but the matter died for the lack of a champion and a lack of enthusiasm. It was a risky proposition and there was still nobody strongly in favour that wanted to take the risk. Mr Viner could not recall what Mr Gross' views were on any proposed national news service but imagines they would have been similar to his own.

FINDINGS

On the basis of the evidence before it the ABA finds that:

74. *Mr Strike advised Mr Rice to stop all plans for a national news service. However, Mr Rice ceased to pursue the possible introduction of a national news service in late 1992 as a result of the request of the then owners, Westpac, and was not following the advice or instructions of Mr Strike.*
75. *Mr Strike was not in a position to direct Ten or Mr Rice not to put on a national news service.*
76. *After the acquisition of NTL by the new consortium the matter was not pursued due to a lack of any real support for the idea from within Ten.*

4.4.4 MR GROSS' INVOLVEMENT IN PROGRAMMING DECISIONS

The decision to drop the *Hinch* program

Evidence of Mr Lattin

Mr Lattin testified that Ms Travers wanted to drop *Hinch* and replace it with *Alan Jones Live*. She had the support of all the managers to drop *Hinch* but within the management team there were differences of view as to what should replace *Hinch*; *Alan Jones Live* (as proposed by Ms Travers) or an entertainment based program (as recommended by Mr Lattin and others).

Throughout this meeting of senior management, Mr Gross was present by way of telephone from Canada and was therefore involved at the programming conceptualisation stage. He was ever present in programming decisions and Mr Viner was very sensitive to what Mr Gross thought. Mr Gross was opposed to the dropping of *Hinch* and was sceptical about the *Alan Jones Live* exercise. The decision was ultimately made by Mr Viner to take the matter to the Board and have Ms Travers present to the Board the proposal to replace *Hinch* with *Alan Jones Live*.

Evidence of Ms Travers

Ms Travers testified that Mr Gross expressed his view to her that the *Alan Jones Live* show would not work in the early evening time slot. During the meeting referred to by Mr Lattin, Mr Gross was primarily listening on the phone. This was the meeting that confirmed the decision to drop *Hinch*. In response to the question whether Mr Gross appeared to have any veto power over Mr Viner at the meeting, Ms Travers said 'absolutely not, the people with the strongest views at that meeting would've been me, John McAlpine and Mike Lattin.'

Evidence of Mr Gross

Mr Gross testified that he was against dropping *Hinch*.

Evidence of Mr Viner

Mr Viner testified that Mr Gross was very much opposed to the dropping of the *Hinch* program. Mr Gross indicated his opposition to the dropping of the *Hinch* program prior to the management meeting. Mr Viner wanted Mr Gross to hear how implacable management was on the dropping of the program by listening in during the management meeting.

FINDING

On the basis of the evidence before it the ABA finds that:

77. *Mr Gross held an opposing view to that which was adopted by the meeting of management and ultimately, the TGL Board to drop Hinch and replace it with Alan Jones Live.*

Mr Gross' general involvement in programming decisions

Evidence of Mr Lattin

Mr Lattin testified that Mr Viner would make the programming decisions but in most cases not until after discussion with Mr Gross. There was regular and extensive telephone conversation and facsimile transmission between Mr Viner and Mr Gross. Mr Gross was ever present at most negotiations. Mr Gross acted like a senior executive and had to be consulted on programming issues. You had to convince Mr Gross you were right.

Evidence of Mr Viner

When these comments were put to Mr Viner, he testified that he frequently spoke to Mr Gross to get his opinion on a range of matters. Early on it was quite frequent, as much as five or six times a day, but it tapered off after that. Mr Viner would have asked Mr Gross' view on programming issues. He did ask the views of other directors on other matters but would not have sought their views on programming as they were not as knowledgeable on this issue as Mr Gross. He would frequently send faxed information (perhaps a couple of times a day) to Mr Gross: press clippings, information for directors, matters on which he wanted Mr Gross' views or he wanted a second opinion on, for example, pay-TV.

Mr Viner disagreed with Mr Lattin's comments that Mr Gross was ever present at most major negotiations. He acknowledged that Mr Gross was present on the major deals concerning Fox, MCA and Columbia TriStar. Mr Viner denied that Mr Gross was calling the shots or that he would not have the final say unless Mr Gross agreed. Mr Viner denied that he was accountable to Mr Gross in any way. He is accountable to the TGL Board.

Mr Viner testified that programming decisions made by Ten that were counter to advice provided by Mr Gross were the axing of *Hinch* and the broadcasting of *Level 23*.

Evidence of Mr Gross

Mr Gross testified that he often spoke to Mr Viner about a wide ranging number of topics, including programming. He said that 'if we didn't end up in consensus, then it was Mr Viner's decision'. Mr Gross had no authority over staff at Ten. He had never issued instructions to Ten staff. He did not have the power at Ten to direct expenditure, programming or staffing.

Mr Gross was also asked whether there were other examples where his advice relating to programming decisions was not followed. He indicated that he was adamantly

opposed to the broadcast of the program *Level 23* and yet it was broadcast at 6 o'clock. He was opposed to the price paid by Ten for *Neighbours*. With regard to the contract entered into by Ten for *Heartbreak High*, Ten should have made a better deal. Instead of cancelling *Hard Copy*, Ten should have negotiated a better deal.

Evidence of Mr Studdy

Mr Studdy testified that Mr Gross did not have any involvement in the day-to-day running of Ten. It was incorrect to say that Mr Lattin and others were accountable to Mr Gross. Detailed programming matters never got to the Board. Management dealt with programming, unless it was something very special. Mr Viner as the CEO has the final decision on programs. The Board approves the budget and if the programming budget was going to be materially exceeded then it would go to the Board. He could not recall the Board giving directions to change any programming decision that Mr Viner had made.

Evidence of Ms Travers

Ms Travers testified that she was responsible to Mr Viner. No-one else's approval was required. She had never been required to seek the input of Mr Gross and never had on matters of policy or how she was going to run news and current affairs.

FINDINGS

On the basis of the evidence before it the ABA finds that:

78. *There were regular and extensive telephone conversation and facsimile transmissions relating to programming matters between Mr Viner and Mr Gross until June 1994.*
79. *Mr Viner often sought the advice of and consulted with Mr Gross prior to making decisions in relation to programs and Mr Gross expressed his views to Mr Viner.*
80. *Mr Viner was not required and did not regard himself as being required to act in accordance with the instructions, wishes or directions of Mr Gross or of CanWest.*
81. *Mr Gross did not exercise direction or restraint over key programming decisions.*
82. *On occasions (the axing of Hinch and the broadcast of Level 23) Mr Viner acted in a manner contrary to the advice received from Mr Gross. This indicates that Mr Gross did not have the final say and could not veto decisions taken by Mr Viner and that Mr Viner accepted Mr Gross' advice in relation to program matters only when in Mr Viner's view it was appropriate.*
83. *Mr Viner as the CEO was ultimately responsible for programming decisions. However, the TGL Board and the Executive Committee were regularly apprised of developments relating to programming matters.*

84. *The TGL Board's involvement in the programming decision making process included the approval of the overall budget, consideration of the proposed 1994 program format, consideration of the general principles in relation to the approval process for the acquisition of programs, delegation to the Board Executive Committee of the review of any acquisition which was out of the ordinary in respect of the established strategic programming policy, and consideration of the programming strategy for the 1995 calendar year.*

4.4.5 MR VINER HAD REQUESTED THAT NO DIRECTORS WERE TO INTERFERE WITH THE WORK OF GENERAL MANAGER PROGRAMMING

Evidence of Mr Lattin

Mr Lattin testified that Mr Viner had spoken to Mr Studdy, requesting that no directors were to interfere with the work of the General Manager Programming (Mr Lattin) and that Mr Viner did not encourage any Ten executive to talk separately with directors. It was all to go through Mr Viner.

Evidence of Mr Viner

Mr Viner denied that he did not encourage directors raising programming questions with the General Manager Programming. Every director talked to Mr Lattin about his program ideas. Mr Viner did not mind as long as he was informed at some stage.

Evidence of Mr Studdy

Mr Studdy testified that directors spoke to staff directly or went through Mr Viner. There was no formal rigid structure.

FINDINGS

On the basis of the evidence before it the ABA finds that:

85. *As shown by examination of the TGL Board minutes, the Board was regularly apprised of programming developments. This consisted of reports by Mr Viner and by the respective General Managers responsible for the program and production areas.*
86. *Given the provision of this programming information to the Board and the evidence of Messrs Studdy and Viner indicating there was communication between Ten directors and executives, the ABA is not satisfied that Mr Lattin's assertion is correct.*

4.4.6 WORLDVISION PROGRAM AGREEMENT AND THE PROVISION OF *GENERAL HOSPITAL*

Evidence of Mr Lattin

Mr Lattin testified that negotiations for the extension of the Worldvision package commenced between Mr Brian Rhys-Jones, the representative for Worldvision in Australia, and Mr Lattin in early 1993. Mr Lattin explained to Mr Rhys-Jones that there was no place for *General Hospital* in the Ten schedule. Mr Rhys-Jones was not happy with this but he agreed that Ten could probably walk away from taking *General Hospital* although he would have to discuss this matter with Mr Bert Cohen, his boss in USA. In Mr Lattin's opinion it was generally understood that Ten would not have to take *General Hospital*.

At a luncheon meeting in Los Angeles with Mr Cohen (Worldvision), Mr Gross was the major spokesperson, and Messrs Viner and Lattin from Ten and Mr Ken Clarke from TV3 New Zealand were present. Mr Gross wanted a deal that gave Worldvision product to TV3. At this meeting Mr Lattin made it clear that Ten wasn't taking *General Hospital*, that an arrangement had been reached with Mr Rhys-Jones in Australia. Discussions then focussed on CanWest in Canada taking *General Hospital* and the possibility of CanWest not continuing with *General Hospital*. Mr Cohen was not happy with this situation and indicated that he could not very well discuss programming for TV3 New Zealand if he was not going to be selling *General Hospital* in Canada. Subsequently Mr Lattin together with Messrs Gross and Brown (TV3) adjourned to Mr Gross' room where Mr Lattin was told by Mr Gross that Ten would have to pick up *General Hospital* so that TV3 could get the Worldvision programming. Mr Lattin indicated to Mr Gross that Ten did not need *General Hospital* but in order to help the Worldvision program deal to go through, Ten could pick up *General Hospital* instead of *Santa Barbara*. The only reason Ten ever picked up *General Hospital* was to enable TV3 to do a deal with Worldvision. Mr Gross was using the buying power of Ten to leverage the situation for the CanWest TV3 station in New Zealand. Mr Gross wrote a memo to Mr Lattin and Mr Brown thanking them for their assistance in obtaining the Worldvision program agreement for TV3.

In response to a request from the ABA dated 28 October 1994, NTL provided to the ABA on 31 October 1994 a copy of the memo of Mr Gross to Mr Lattin. Mr Lattin confirmed that the memo presented to him in examination was the one he was referring to in his evidence. The memo, of 8 September 1993, is from Mr Gross to Mr Gary Brown (TV3) with copies to Mr Lattin and Mr Viner, along with other officers in TV3 and CanWest. The memo stated as follows:

I was very pleased to receive your fax that the Worldvision deal has been closed. Congratulations!

I want to thank Doug Hoover and Mike Lattin for their great assistance, without them it wouldn't have happened.

Evidence of Mr Gross

Mr Gross testified that he had very little involvement in the TV3 deal; it was not a complicated package, it was a standard kind of deal. *General Hospital* is a very important program for Worldvision and if they could not sell *General Hospital* in the Australian market then there is no way that they would have renewed *Beverly Hills*, *Melrose Place* or the things that Ten really wanted. There was no chance of renewing Worldvision without taking *General Hospital*. Mr Lattin did try and exclude *General Hospital* from the deal, and it is worth trying to exclude it but there was no chance of excluding it. It is not true that he said to Mr Lattin 'that Australia would have to pick up *General Hospital* because it was one way in which the deal with TV3 could go through'. To put *General Hospital* in perspective, the whole of the Worldvision deal in New Zealand was [X dollars]. Mr Lattin is suggesting that in order to get [X dollars] worth of programming for New Zealand he (Mr Gross) forced Mr Lattin to spend [$\frac{1}{2}$ X dollars] more in Australia. Comparing the relative numbers, Mr Lattin's statement is absurd. There was never any suggestion from Mr Cohen or Mr Rhys-Jones in his (Mr Gross's) presence that the only way TV3 would get Worldvision programming in New Zealand was by Ten taking *General Hospital* in Australia. With regard to the memo, the Worldvision program contract was a victory for New Zealand. Mr Lattin had been involved in helping structure the deal because he was in Los Angeles at the time, because TV3 had never done business with Worldvision before and because TV3 had never done business with Mr Rhys-Jones before. Mr Lattin had experience negotiating with Mr Rhys-Jones.

Evidence of Mr Rhys-Jones

The ABA examined Mr Brian Rhys-Jones, Managing Director of Worldvision Enterprises of Australia Pty Ltd (Worldvision Australia) on 1 February 1995. Worldvision Australia is a fully owned subsidiary of Worldvision Enterprises (New York). Worldvision (New York) is a fully owned subsidiary of Spelling Entertainment Inc. Mr Rhys-Jones' area of responsibility includes Worldvision programming for Australia and New Zealand.

Mr Rhys-Jones testified that in May and June 1993 his negotiations with Ten were conducted solely with Mr Lattin. Negotiations with Mr Lattin or with Ms Marlow (General Manager Programming at Ten since Mr Lattin resigned) were done entirely separately from negotiations with TV3. Program managers are always trying to get out of everything they can, but he could not recall whether Mr Lattin had tried to get out of taking *General Hospital*. Ten must take a soap opera. If *General Hospital* was doing terrible ratings, then Worldvision would give Ten the opportunity of taking another soap, but television networks do not shift from one soap to another because they take a long time to establish. No understanding was ever reached that Ten could walk away from taking *General Hospital*. Ten was stuck with *General Hospital* whether they liked it or not and Mr Lattin knew it. Previously Ten had to take *General Hospital*, it was written into the contract. The contract was amended from the previous 5 year contract with Ten where Ten had to take *General Hospital* to one where Ten had to take a soap but it didn't have to be *General Hospital*. There was no connection between Ten taking *General Hospital* and the TV3 deal.

Evidence of Mr Viner

Mr Viner testified that the Worldvision deal was pre-negotiated in Australia and such deals are generally signed off at the June or July screenings in Los Angeles. Mr Gross was an adviser in negotiating program agreements and on two or three occasions was present as part of the negotiating group, but that Mr Viner was in charge of the negotiations.

Mr Viner testified that his involvement with the negotiation of the Worldvision contract was that after discussion with Mr Lattin, he decided to extend the Spelling (the parent company of Worldvision) contract. He and Mr Lattin discussed the possibility of extending or renewing the contract with Mr Rhys-Jones. Mr Rhys-Jones was keen so they negotiated for approximately three months. The deal was essentially done but Mr Rhys-Jones wanted his boss in Los Angeles, Mr Cohen, to officially sign off on the agreement in Los Angeles during the annual screenings in May or June.

Mr Viner testified that Mr Lattin's feeling all through the negotiation, and Mr Viner agreed with him, was that he would have loved to have got out of taking *General Hospital* because it was not performing for Ten and it was one of a number of programs that Ten would have liked to have removed from its package of programs. Programs like *General Hospital* are 'make weight' programs, that is in order to get the hit programs a broadcaster is keen to obtain, the broadcaster has to take a number of hours of a number of programs that are almost useless to the broadcaster. When a studio is as 'hot' as Spelling was at the time with three or four hit shows, the broadcasters have virtually no chance of renegotiating their existing package of programs.

Mr Viner testified that Mr Lattin and Mr Rhys-Jones knew that Mr Rhys-Jones could have sold the contract including all of the make weight to anybody. When Mr Lattin raised with Mr Rhys-Jones the prospect of dropping *General Hospital*, Mr Rhys-Jones said that his boss, Mr Cohen would never go for it. Mr Lattin was optimistic and hopeful Ten could get out of taking *General Hospital* but he (Viner) was not. It was not his understanding that, as put by Mr Lattin, it was generally understood that Ten would not be taking *General Hospital*. It was not his recollection that, as put by Mr Lattin, Mr Rhys-Jones was happy with the prospect of Ten not taking *General Hospital*.

Mr Viner also testified that in the meeting with Mr Cohen in Los Angeles there was no attempt to get out of taking *General Hospital*. Mr Viner was thrilled with the deal. The meeting with Mr Cohen was not a negotiation meeting, it was ceremonial, the negotiations had been done long before the meeting. There was no connection between Mr Gross' negotiations for TV3 New Zealand with Worldvision and Ten's taking of *General Hospital*. Mr Viner was not aware of Mr Gross requesting Mr Lattin to take *General Hospital* to enhance Mr Gross' prospects of obtaining a program agreement for TV3 with Worldvision. Mr Viner was not aware of any assistance provided by Mr Lattin to Mr Gross in obtaining a program agreement between TV3 New Zealand and Worldvision but that it would not surprise him that Mr Lattin would provide assistance.

Summary of evidence about the provision of *General Hospital*

According to Mr Lattin, Mr Gross told him that Ten would have to take *General Hospital* so that TV3 could obtain the Worldvision programming. Mr Gross denied making such a statement. Mr Viner indicated he was not aware of any such attempt by Mr Gross.

Mr Lattin's evidence was that Mr Rhys-Jones agreed that Ten was not required to include *General Hospital* in its program agreement with Worldvision. Mr Lattin stated that Mr Rhys-Jones was not happy with the outcome but he would have to clear it with Mr Cohen in Los Angeles. Mr Lattin further asserted that it was generally understood Ten would not have to take *General Hospital*.

Mr Rhys-Jones provided evidence that it was never understood that Ten could exclude *General Hospital* from its program agreement with Worldvision. According to Mr Viner it was not his recollection that Mr Rhys-Jones was happy with the prospect of Ten not taking *General Hospital* and it was not his understanding that it was generally understood that Ten would not be taking *General Hospital*.

Mr Lattin gave evidence that the only reason Ten ever included *General Hospital* in its contract with Worldvision was to enable TV3 to obtain the Worldvision programming. Mr Rhys-Jones gave evidence that there was no connection between Ten taking *General Hospital* and the TV3 programming contract. Mr Viner's evidence supports this.

According to Mr Viner, Mr Gross, Mr Lattin and Mr Rhys-Jones, Ten had in fact contracted for the licensing rights for *General Hospital*. The agreement itself does not include *General Hospital* in its express terms. Presumably, *General Hospital* came within the 'make weight' as part of an oral agreement between the parties.

FINDINGS

On the basis of the evidence before it the ABA finds that:

87. *The facts in relation to this issue are difficult to ascertain because of contradictory accounts given by Mr Lattin, Mr Rhys-Jones, Mr Viner and Mr Gross. It appears from the evidence of Mr Rhys-Jones, that Ten was expected to include General Hospital in its program agreement with Worldvision. The evidence of Mr Rhys-Jones in relation to whether or not an agreement had been reached between Mr Lattin and himself in relation to General Hospital contradicts that of Mr Lattin. So does the evidence of Mr Viner and Mr Gross on this point. In view of this contradictory evidence, the ABA finds that Mr Gross did not exercise authority or control over Mr Lattin and/or Mr Viner in relation to their negotiations of the Worldvision contract.*
88. *The circumstances surrounding the negotiations of the Worldvision contract do not indicate that Ten was required to take programming at the direction of CanWest or any person associated with CanWest.*

4.4.7 THE ROLE OF MR GROSS IN THE AGREEMENT WITH COLUMBIA TRISTAR

Evidence of Mr Lattin

Mr Lattin testified that Mr Gross was the mastermind behind the negotiations with Columbia TriStar. The Columbia TriStar deal came about because of the Canadian Global association with Columbia TriStar and Mr Gross was the one who raised the opportunity. It did not arise through any approach to Mr Viner or Mr Lattin.

Evidence of Mr Gross

Mr Gross testified that he had very heavy involvement with Columbia TriStar. Ten was facing the prospect of losing its Fox programming which comprised about 40 per cent of its foreign programming. The TGL Board asked management and CanWest to find a solution. The only possibilities were to go to one of the existing distributors who had a relationship with one of the other Australian networks. Through one of his connections with Columbia TriStar, he identified an opportunity of obtaining a program agreement between Ten and Columbia TriStar. He confirmed with Mr Viner and Mr Lattin that Ten would be interested in entering into a program contract with Columbia TriStar. Both Mr Lattin and Mr Viner indicated they were. By way of conference call with Columbia TriStar, Messrs Lattin, Viner and Gross negotiated the framework of a contract. The three of them then met in Los Angeles with Columbia TriStar to finalise an agreement.

At this stage Mr Viner confirmed with two or three of the Ten directors, perhaps Mr Studdy and Mr Harris, their views as to whether they felt this was the right direction in which to go. They said to pursue the contract. The TGL Board debated it at length and decided to do it and so Mr Viner signed the agreement. In response to Mr Lattin's claim that Mr Gross was the mastermind behind the Columbia TriStar agreement, Mr Gross' reaction was that there was no question he initiated the transaction but that was what he was being paid to do under the Consultancy Agreement.

Evidence of Mr Studdy

Mr Studdy testified that the TGL Board came to the conclusion that Ten had to take all possible steps to protect its Fox position and to secure programming from Columbia TriStar. The Board requested all the help it could get from Mr Gross who had very good relationships in Los Angeles with the various suppliers. As a result Messrs Gross, Viner and Lattin went to Los Angeles and negotiated in relation to Fox and Columbia TriStar.

Evidence of Mr Harris

Mr Harris testified that the TGL Board's view was that it wanted to enter into this agreement with Columbia TriStar. It was not as if Mr Gross was recommending one way or the other to the Board, he presented the options.

Evidence of Mr Asper

Mr Asper testified that there was consensus on the TGL Board that Ten should enter into the Columbia TriStar agreement.

Evidence of Mr Viner

Mr Viner testified that Mr Gross was an adviser in negotiating program agreements and on two or three occasions was present as part of the negotiating group. Mr Viner was in charge of negotiations. There was Board approval to enter into negotiations, perhaps formal approval in the case of Columbia TriStar and Fox.

Mr Viner received a phone call from Mr Gross that there was an opportunity for Ten to negotiate a program agreement with Columbia. He spoke to Mr Lattin and both he and Mr Lattin were excited about the prospect of a Columbia program agreement. He and Mr Lattin talked to two or three TGL Board directors about the prospective agreement. The directors were Mr Studdy and perhaps Mr Harris. They gave the go ahead to negotiate the agreement. He and Mr Lattin worked on the price Ten was prepared to pay. He then rang Columbia to arrange the negotiations and called Mr Gross to meet with them in Los Angeles to negotiate the agreement. Neither he nor Messrs Gross and Lattin rang the directors from Los Angeles to advise of the progress in the negotiations.

Messrs Gross, Harris and Asper refer in their evidence to Board debate, a Board view or Board consensus concerning the decision to enter into the program agreement with Columbia TriStar.

In Mr Viner's CEO report to the Board for October 1993, Mr Viner referred to informal discussions with Columbia and the considerable amount of time of Messrs Gross, Lattin and Viner had expended in addressing the problem created by the possible loss of Fox programming.

Mr Lattin in his General Manager Programming report of October 1993 also referred to the Fox programming matter.

On 5 October 1993 Mr Viner as CEO and Director of NTL signed the agreement with Columbia TriStar.

FINDINGS

On the basis of the evidence before it the ABA finds that:

89. *The TGL Board requested the assistance of Mr Gross to secure Columbia TriStar programming.*
90. *In assisting with the Columbia TriStar program agreement, Mr Gross was acting under the Consultancy Agreement in that he was providing advice and assistance.*
91. *Mr Gross was able to provide this assistance through the use of his connections with Columbia TriStar in order to obtain a program agreement between Ten and Columbia TriStar.*
92. *Mr Viner was not required and did not regard himself as being required to act in accordance with the instructions, wishes or directions of Mr Gross.*
93. *Mr Gross did not exercise direction or restraint over entering into, by Ten, of the programming agreement with Columbia TriStar.*
94. *Mr Viner and Mr Lattin were interested in pursuing the opportunity of entering into a program agreement with Columbia TriStar. The TGL board approved of Ten entering the contract before it was signed by Mr Viner.*
95. *Mr Viner, whilst responsible for the negotiation of programming agreements, kept the TGL Board informed of his progress in resolving major issues affecting Ten's programming.*
96. *The circumstances of the Columbia TriStar agreement with Ten do not indicate Ten was required to take programming from Columbia TriStar at the direction of CanWest or any person associated with CanWest.*

4.4.8 UNDERTAKINGS TO COLUMBIA TRISTAR

Evidence of Mr Lattin

Mr Lattin was asked about paragraph 14(c) of his statement filed and served in the proceedings *Capital Television Group Limited and Anor v Darling Downs TV Limited*. The relevant part of paragraph 14(c) is as follows:

Gross was the leader of our delegation, for example, undertaking on behalf of Izzy Asper, that Asper's Canadian companies would give a guarantee on the deal.

In response to the question: 'Was the deal that was actually done backed by an Izzy Asper guarantee or any of his Canadian companies?' Mr Lattin responded: 'No, at the meeting in Los Angeles they gave the guarantee on behalf of Izzy, and said that Izzy would guarantee it through CanWest.'

Further: '... the reason the guarantee was asked for by Columbia was because of the situation which had happened in Australia when the companies went - when television

networks went into receivership and they said ‘based on that history we want some form of guarantee.’

Evidence of Mr Gross

Mr Gross testified that Columbia TriStar offered either a three year contract with no guarantees, or if Ten wanted a five year contract, a guarantee was required. A guarantee from CanWest would be acceptable. Columbia TriStar would take a guarantee from CanWest primarily because they had a long relationship with CanWest and had done a lot of business with them. Mr Gross said to Columbia TriStar that he had no idea whether CanWest would be willing to guarantee it or not due to it being a large amount and he did not have that authority to commit CanWest. Secondly, he knew that Mr Asper would want to know why he should do it.

They agreed to the deal, indicating that they would recommend it to Ten to sign but time would be needed to come up with a guarantee and to find someone who would guarantee it. The signing was in September-October 1993 but Ten had to come up with a guarantor around 1 December 1993. Mr Gross raised the matter of CanWest providing the guarantee but Mr Asper was not interested in CanWest guaranteeing for Ten. The guarantee was subsequently raised at the TGL Board meeting and the TGL Board discussed a number of options.

Six months later Columbia TriStar had been paid on time for the programming, Ten had the programming. It was being run. At that point Mr Viner went back to Columbia TriStar and negotiated with Columbia TriStar that in return for TGL not having to obtain a guarantee, Ten would buy more programming. Columbia TriStar agreed to this.

Mr Gross’ response to Mr Lattin’s allegation that either Mr Gross or Mr Viner or both undertook on behalf of CanWest to provide the guarantee for the Ten-Columbia TriStar deal, was that it was not true. Columbia TriStar requested a guarantee and said that a guarantee from CanWest would be acceptable.

Evidence of Mr Viner

Mr Viner testified that he did not give a guarantee to Columbia on behalf of Mr Asper or CanWest and nor did Mr Gross. It was Columbia that requested the guarantee and it was Columbia that indicated that a guarantee by CanWest would be acceptable. Mr Viner argued that such a request was inappropriate and in the end a compromise was reached. In the end, no bank guarantee was given and Ten just purchased a little more programming and Columbia dropped their claim for a bank guarantee.

As a result of an ABA letter to NTL dated 28 October 1994, the ABA received on 31 October 1994 from NTL a copy of the program supply agreement entered into by NTL and Columbia TriStar on 5 October 1993. Pursuant to this agreement NTL agreed to deliver by 1 December 1993 a binding and enforceable guarantee agreement. The ABA also requested in its letter of 28 October 1994 that NTL provide any guarantee or security documentation

relating to Mr I H Asper, CanWest Global Communications Corp or related companies which guaranteed any programming agreement between Ten and Columbia TriStar.

In its response of 31 October 1994, NTL indicated there were no documents fitting the description within its possession. Further, that NTL had enquired with CanWest and CanWest had informed NTL that there was no guarantee or security documentation of any kind whereby CanWest guaranteed any programming arrangement between Ten and Columbia TriStar.

Mr Viner's evidence that a bank guarantee was not ultimately given and that Ten purchased additional Columbia programming is supported by subsequent TGL Board minutes. The TGL Board minutes of 22 June 1994 recorded that 'Discussions are taking place with Columbia with a view to renegotiating the Bank Guarantee with the objective of obtaining further product in exchange for a guarantee.' The TGL Board minutes of the meeting of 10 August 1994 recorded that 'The Bank Guarantee under the Columbia TriStar Program Supply Agreement was discussed. The meeting was advised that the negotiations were taking place with Columbia TriStar to re-structure the Guarantee on more favourable terms.'

In his October 1994 Board Report the Group General Manager Finance and Administration, Mr Myers reported that:

- the contract negotiated with Columbia in late 1993 included provisions whereby Ten was obliged to provide a bank guarantee to Columbia;
- negotiations with Columbia had been taking place to have the guarantee replaced by Ten contracting to buy additional programming from Columbia;
- Columbia had agreed in principle with such an outcome; and
- Columbia had asked that Ten provide what they have described as a 'corporate guarantee' from the Ten licensee companies in support of the obligation that would have otherwise rested with NTL.

The TGL Board minutes of the meeting of 8 February 1995 recorded that the Group General Manager Finance and Administration, Mr Myers, reported, 'Agreement has been reached with Columbia as to the terms of the guarantee.'

FINDINGS

On the basis of the evidence before it the ABA finds that:

97. *Neither Mr Gross nor Mr Viner gave an undertaking on behalf of Mr Asper that Mr Asper's Canadian companies would give a guarantee to the Columbia TriStar deal. Columbia TriStar sought a guarantee from TGL and indicated that a guarantee from CanWest would suffice. CanWest declined to offer a guarantee and the need for it eventually fell away in the light of Ten's good performance under contract.*
98. *The TGL Board remained in control of the contractual negotiations throughout.*

4.4.9 THE ROLE OF MR GROSS IN EXTENDING THE MCA PROGRAM AGREEMENT

Evidence of Mr Lattin

Mr Lattin testified that negotiation for an extension of the MCA program agreement started between Mr Colin Davis of MCA TV International and Mr Gross at the National Association of Television Program Executives (NATPE) conference in Miami in January 1994. Mr Gross was the trigger and the mastermind behind extending the MCA agreement. The negotiations progressed through a series of meetings between Mr Pal Cleary (the MCA Australia representative) and Messrs Viner, Lattin and Myers for Ten.

Evidence of Mr Gross

Mr Gross testified that he thought that it would be a good move, based on the difficulties with the Fox programming rights and Ten entering a program agreement with Columbia TriStar who had traditionally supplied Nine in Australia, to renegotiate the existing programming contract with MCA even though it still had two years to run. Both Mr Lattin and Mr Viner felt very strongly that that was the right tactic. This proposal was put to MCA at NATPE in January 1994 and it was agreed that Mr Lattin for Ten and Mr Cleary for MCA would negotiate the matter. Messrs Cleary and Lattin worked on a possible agreement and there were further meetings in Los Angeles in May 1994. The MCA offer in May was not acceptable. After these meetings in late May Mr Gross had very little involvement as he left CanWest on 20 June 1994 and did not even know that TGL had signed the MCA programming contract.

Evidence of Mr Studdy

Mr Studdy testified that Mr Gross did not do major program negotiations, he provided help. The negotiations were always done by the Program Director (Mr Lattin) with or without Mr Viner.

Evidence of Mr Pal Cleary

Mr Pal Cleary, Managing Director of MCA Australia Pty Ltd gave evidence to the ABA on 1 February 1995. MCA Australia Pty Ltd acts as the agent for MCA TV International VB.

Mr Cleary testified that he was first approached by Mr Viner about renegotiating the MCA contract towards the end of 1993. Mr Viner approached him again in April 1994 about renegotiating the contract. Mr Cleary did not attend NATPE in January 1994. He had not heard of any discussions at NATPE between Mr Davis and Mr Gross.

In Los Angeles in May-June 1994, Mr Davis and he negotiated on behalf of MCA and Messrs Lattin, Viner and Gross represented Ten but Mr Gross did not participate in the negotiations. Mr Cleary did not get an indication at these negotiations that either Messrs Viner or Lattin were answerable to Mr Gross. Mr Viner was probably going to be making the final decision but Mr Lattin knew the programs and the respective licence fees a lot better than Mr Viner.

Mr Cleary then corresponded with Mr Lattin about the renewals (and their licence fees) and about the new season product to make up the number of hours set down in the contract. The negotiations from July to September 1994 (until the deal was finalised) were with Mr Lattin and occasionally Mr Viner. Mr Cleary did not have any contact with Mr Gross after the June LA meetings. There was no connection between MCA's agreement with Ten and with TV3. Ten has not tried to negotiate for program rights for TV3.

Evidence of Mr Viner

Mr Viner testified that he and Mr Lattin had been involved in negotiations with Mr Cleary about the extension of an existing agreement with MCA and these negotiations extended through until the screenings in Los Angeles in June 1994. Mr Gross was present for much of these negotiations. Mr Viner initiated the negotiations by requesting Mr Lattin to commence negotiations with Mr Cleary.

There was no agreement before Ten went to Los Angeles in June 1994. Both Mr Viner and Mr Gross had known Mr Colin Davis and Mr Peter Hughes of MCA for a number of years so Mr Gross was able to assist Mr Viner and Mr Lattin to negotiate the proposed agreement. After Mr Lattin had further negotiated the proposed agreement with Mr Cleary back in Australia, Mr Viner would have asked Mr Lattin to send a copy of the proposed agreement to Mr Gross for his comments as he is a program expert and knew so much about program negotiation. Mr Gross had no authority or veto power over the agreement but he was looked to for his opinion by the TGL Board so he was influential.

FINDINGS

On the basis of the evidence before it the ABA finds that:

99. *Mr Gross initiated moves to extend the MCA program agreement by suggesting to Mr Viner and Mr Lattin that the contract be extended. This advice was acted upon by Mr Viner and Mr Lattin because in their view it was a good strategy. Mr Lattin conducted much of the negotiations with the Australian representative of MCA and in particular the negotiations about which new season programs would make up the number of hours purchased by Ten, renewals and licence fees.*
100. *Mr Gross, in assisting with the MCA program agreement, was doing no more than providing advice and assistance under the Consultancy Agreement.*
101. *Mr Viner was ultimately responsible for program issues.*

102. *Mr Viner was not required and did not regard himself as being required to act in accordance with the instructions, wishes or directions of Mr Gross when negotiating the MCA program contract.*

4.4.10 TWENTIETH CENTURY FOX CORPORATION AUSTRALIA PTY LIMITED

Mr Lattin made no specific assertions with regard to Mr Gross' role in the negotiations of the program contract between Ten and Fox. However, Mr Gross gave the following evidence on this matter.

Evidence of Mr Gross

Mr Gross testified that Ten was facing the prospect of losing its Fox programming which comprised about forty per cent of its foreign programming. The TGL Board asked management and CanWest to come up with a plan for obtaining international programming. In January 1994 Mr Gross along with Mr Lattin went to the NATPE conference in Miami. At a meeting with Twentieth Century Fox, Mr Gross indicated that CanWest Global (which had significant program contracts with Fox) would reconsider its entire relationship with Fox unless a satisfactory outcome was achieved with Ten in Australia. He had no intention of putting at risk the CanWest programming arrangement with Fox. A satisfactory arrangement was arrived at in which Ten was able to retain its existing Fox programs, however he was not involved in the actual negotiation of the deal.

Evidence of Mr Viner

Mr Viner testified that the Fox negotiations were predominantly conducted by Mr Lattin in Australia with the local Fox representative in Australia, Mr Tom Warne. To ensure the negotiations progressed, Mr Viner asked Mr Gross to talk to the President of Fox in Canada to try and bring about some resolution of the problem in Australia. Mr Gross did raise the matter with Fox.

FINDINGS

On the basis of the evidence before it the ABA finds that:

103. *The TGL Board requested management and CanWest to come up with a plan to obtain international programming.*
104. *In helping to secure the Fox program agreement, Mr Gross was doing no more than providing advice and assistance under the Consultancy Agreement.*
105. *The evidence in relation to the Fox contract does not suggest that as a result of its connections with CanWest, Ten was required to take programming at the direction of CanWest.*

4.4.11 PERCEIVED ADVANTAGES TO TEN AS A RESULT OF THE INTERNATIONAL EXPERTISE OF CANWEST

Evidence of Mr Viner

Mr Viner testified that Ten had assistance from Mr Gross with the Columbia TriStar contract. There was help in mitigating the damage from the Fox deal and there was assistance in extending the MCA deal. Some advice would have been given on virtually all other key international programming deals, including Worldvision and King World. Mr Gross did not actually negotiate the terms of these deals, but he was in the room when they were negotiated and he participated.

There were and are huge benefits for Ten in having the involvement of CanWest. These benefits result from the fact that CanWest deals in the main with the same group of US and to a lesser extent other international studio groups or production groups, the fact that CanWest is a significant client of those groups gives Ten leverage. CanWest is able to provide Ten with some market intelligence (primarily from Messrs Hoover or Gross) and an early lead on some product. Program agreement negotiations are all done at the same time of year (the June and July screenings) for everybody internationally so it would be hard for Ten not to be negotiating agreements concurrently with CanWest negotiating agreements. The deals are a lot of the time with a common vendor but the program and product mix for CanWest, Ten or TV3 New Zealand is very different.

Evidence of Mr Gross

Mr Gross testified that CanWest has tremendous international contacts, it is well respected by all of the foreign distributors and has the power to get Ten's foot in the door. Having CanWest on Ten's side enhances Ten's ability to buy programming and it's part of what CanWest pitched the Australian members of the present consortium that acquired Ten in December 1992: that if they got involved with CanWest they would have better access to programming.

FINDINGS

On the basis of the evidence before it the ABA finds that:

106. *Mr Viner was not required, and did not regard himself as being required, to act in accordance with the instructions, wishes or directions of Mr Gross or of CanWest.*
107. *Despite the evidence of the assistance provided by Mr Gross in relation to the strategy and negotiation of international program contracts, the ABA is of the view that this evidence does not indicate that Mr Gross or CanWest controlled the selection or the provision of programs broadcast by Ten. This is because the assistance of Mr Gross was in the form of advice only and that Mr Viner and the TGL Board had ultimate responsibility and control of those contracts.*

4.4.12 NEGOTIATION OF NEW ZEALAND PROGRAM RIGHTS

Evidence of Mr Lattin

Mr Lattin testified that when he negotiated a deal he would try to obtain program rights for New Zealand to assist TV3 in New Zealand. When re-negotiating the rugby union contract he was asked to negotiate and try to get it for TV3 at the same time. *Healthy Wealthy and Wise* and *Beyond 2000* were negotiated in 1994 to include New Zealand.

On 3 March 1994 the ABA wrote to TGL requesting information on a number of matters, including whether it was standard practice for program acquisition at Ten to obtain New Zealand rights and if so how long had the practice been in place and the relationship if any, between TGL and TV3 New Zealand. On 18 March 1994 TGL responded, indicating that:

- the acquisition of New Zealand and Asian rights was not standard practice but may become more so in the future, if Ten believes TV3 and other relevant stations may be interested in obtaining those rights;
- CanWest effectively controls TV3 and this relationship gives TGL a point of entry with TV3. Whilst there is not a formal relationship, where transactions of mutual benefit are identified, TV3 or TGL may approach and see if the other is interested. All transactions are done on an arm's length commercial basis and there is no exclusivity; and
- by way of example, even though *Neighbours* is a Ten program it is shown on TVNZ in New Zealand. TVNZ is a competitor station for TV3.

Evidence of Mr Viner

Mr Viner testified that it was advantageous for Ten to obtain programming rights for New Zealand in addition to Australian rights. Ten would then try and sell the program to TV3 New Zealand. Ten has sold programming rights to TV3 on two or three occasions. Ten had also tried to sell programs to TVNZ as well. On a number of occasions Ten has obtained New Zealand rights for programs and has been unsuccessful in selling the program. For Ten to acquire programming rights for New Zealand results in little or no extra cost to Ten and has been beneficial to Ten when those rights are sold.

FINDINGS

On the basis of the evidence before it the ABA finds that:

108. *There is no evidence to suggest that the negotiation of program rights by TGL for New Zealand was conducted in any other way than with the intention of benefiting Ten.*
109. *The evidence does not indicate that CanWest ever directed, or purported to direct, Ten to purchase or sell programs.*

4.4.13 SCREENING OF A CANWEST PROGRAM ON TEN

Evidence of Mr Lattin

Mr Lattin testified that Ten had received a memorandum from CanWest's Mr Doug Hoover asking Ten to broadcast the *Toronto Father Christmas Parade* to assist CanWest with a sponsorship arrangement in Canada. Mr Viner could see no harm in running the show (one hour) and he asked Mr Lattin if there was any problem. Mr Lattin indicated there was no problem. The program was screened on Ten at 6 am on Christmas Day. The screening of the program was not really to Ten's advantage but it was not really any disadvantage. Ten would never have run the program if it had not been pushed by CanWest.

Evidence of Mr Viner

Mr Viner testified that his recollection was that the program *Toronto Father Christmas Parade* was offered to Ten on a free basis. There was no obligation to screen the program and the program was free of the Canadian advertisements. The provision of the program was not a request from CanWest but it was an offer, 'This is available, is Ten interested in using it?' CanWest has offered Ten programs from time to time, Ten has also offered CanWest programs. Apart from *Toronto Father Christmas Parade* which may have been screened in 1994 as well as 1993, Mr Viner is not aware of any other programs offered to Ten by CanWest that have been taken up by Ten. He could not recall any program that CanWest would have taken that had been offered to it by Ten.

FINDINGS

On the basis of the evidence before it the ABA finds that:

110. *There is no evidence to suggest that Ten's screening of this program was the result of anything other than the taking up by Ten of an offer by CanWest of a free program.*
111. *The screening of this program amounts to one hour of Ten's continuous transmission on one day of a year and does not constitute a significant proportion of programs broadcast by Ten.*

4.4.14 COPRODUCTION OF PROGRAMS BY TEN AND CANWEST

Evidence of Mr Lattin

Mr Lattin testified that Mr Gross was very keen in pushing for a production that would meet the Canadian television quota requirements whilst at the same time meeting the Australian drama requirement. A number of people were involved in this at Ten. The project was not successful. It was a waste of time.

Evidence of Mr Viner

Mr Viner testified that he shared Mr Gross' interest in pursuing coproductions and he discussed this with two program directors in CanWest, encouraging them to think about Australia in terms of coproductions. Mr Lattin and Ms Hardy were involved but nothing came of it. Mr Viner's expectation of the benefit to Ten from such an exercise was obtaining better programming at a more economical price.

FINDINGS

On the basis of the evidence before it the ABA finds that:

112. *If the coproduction project with CanWest had been successful there could have been benefits to Ten in the form of sharing of production costs or additional revenue in the form of overseas sales.*
113. *There is no evidence to suggest that Ten personnel were pursuing this project for any other reason than the possible advantage of Ten.*

4.4.15 THE DECISION MAKING PROCESS IN THE SELECTION OR PROVISION OF A SIGNIFICANT PROPORTION OF TEN'S PROGRAMS

The TGL Board's involvement in the programming decision making process included:

- approval of the Ten budget;
- consideration of the proposed 1994 program format;
- consideration of the general principles in relation to the approval process for the acquisition of programs;
- delegation to the Board Executive Committee of the review of any acquisition which was out of the ordinary in relation to the established strategic programming policy;
- consideration of the programming strategy for the 1995 calendar year;
- consideration of Executive Committee recommendations relating to production costs;

- regular consideration of General Manager reports of Ms Travers (Network News and Current Affairs), Mr Lattin (Network Programming) and Ms Hardy (Network Production) provided to most TGL Board meetings;
- briefings by the CEO on any problems with international programming agreements and their negotiation (including Fox and Columbia TriStar);
- under the terms of the Consultancy Agreement between Ten and CanWest, the TGL Board requested the assistance of Mr Gross to secure Columbia TriStar programming for Ten; and
- briefings on significant program decisions such as the decision to replace the *Hinch* program with *Alan Jones Live*.

In addition to the TGL Board involvement in programming matters listed above, the Board's Executive Committee regularly discussed programming matters.

Whilst it is clear that Mr Viner often sought the advice of and consulted with Mr Gross prior to making decisions in relation to programs and that Mr Gross expressed his views to Mr Viner, it is equally clear that Mr Viner was not required, and did not regard himself as being required to act in accordance with advice offered by Mr Gross. This is shown by the example of Mr Gross expressing his opposition to Mr Viner of the proposed dropping of the *Hinch* program and its replacement by the *Alan Jones Live* program. A meeting of Ten executives which included Mr Viner, formed the view that *Hinch* should be dropped and replaced by *Alan Jones Live*. *Hinch* was dropped and replaced by *Alan Jones Live*.

Whilst Mr Studdy viewed Mr Viner as being ultimately responsible for programming decisions, the TGL Board and the Executive Committee were regularly apprised of developments relating to programming matters.

CONCLUSION

On the basis of its findings relating to the programming matters addressed in part 4.4 of this report, the ABA has considered the relevant provisions of Schedule 1 part 2 clause 2 to the Act and concludes that:

CanWest, whether alone or together with an associate, was not in a position to exercise (whether directly or indirectly) control of the selection or provision of a significant proportion of the programs broadcast by any of the Ten licensees in providing broadcasting services under the licences (clause 2(1)(b)(ii));

CanWest, whether alone or together with an associate, was not in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of any Ten licensee in providing broadcasting services under the licences (clause 2(1)(b)(iii));

CanWest, whether alone or together with an associate, was not in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of TGL or NTL (clause 2(1)(c));

CanWest, whether alone or together with an associate, was not 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 Ten licensees or TGL or NTL (clause 2(1)(d)(iii)); and

neither NTL, TGL nor more than 50% of the directors of each of those companies has acted (nor were intended or expected to act under a contract, arrangement or understanding) in accordance with the directions, instructions or wishes of CanWest or of CanWest and an associate of CanWest or of the directors of CanWest (clause 2(1)(e)).

4.5 CANWEST'S ROLE IN CORPORATE DEVELOPMENT OPPORTUNITIES

The services offered by CanWest under the Consultancy Agreement covered a comprehensive range of key operational activities (clause 3) undertaken by NTL, including:

- strategic planning;
- acquisitions and start-ups;
- strategic partnerships and mergers; and
- affiliate agreements.

The ABA has examined corporate development at Ten to determine whether Ten was obliged, or felt compelled, to accept advice provided by CanWest under the Consultancy Agreement, until it was terminated on 30 June 1994, and advice provided by CanWest on an informal basis since.

4.5.1 CORPORATE DEVELOPMENT AT TEN

On 1 December 1993 TGL responded to an ABA letter of 10 November requesting, amongst other things, information relating to the development of corporate opportunities for Ten. Information contained within the response included the following:

- corporate development advice was provided to the TGL Board, both orally and in writing, from January 1993 to the present. Some recommendations were followed, some were not;
- advice relating to an acquisition of an interest in Capital Television Group Ltd (Capital) in January 1993 was not followed;
- advice not to join the PMT consortium was not followed;
- advice relating to the possible acquisition of Northern Rivers Television Pty Limited (NRTV) was followed;
- further advice to acquire an interest in Capital was ultimately followed; and
- Ten management was involved in the preparation of this advice.

The ABA wrote to TGL on 21 December 1993 requesting certain information, including the provision of any documents setting out CanWest's role in corporate development in TGL. On 13 January 1994 TGL responded to the ABA's letter, providing documentation relating to CanWest's role in corporate development in TGL. Included in this documentation were the following:

- a memo from Mr Gross to the TGL Board dated 24 September 1993 indicating options for how the corporate development function might proceed. Mr Gross preferred the option of CanWest acting as an adviser or consultant with Ten being free to accept or reject advice given by CanWest;

- a further memo from Mr Gross to the TGL Board dated 24 September 1993 discussing options for corporate development within Australia and internationally;
- the same memo canvassed various possible acquisitions by Ten within Australia. It also discussed various scenarios for investing in possible international ventures; scenarios included Ten investing in partnership with CanWest, Ten investing completely on its own or Ten staying out of ventures with CanWest pursuing them alone but perhaps offering TGL the chance of involvement at a later date;
- memos discussing pay TV options;
- memos about the possible acquisition of NRTV; and
- memos about the possible acquisition of shares in Capital.

On 20 June 1994 Mr Asper informed the ABA that even though the Consultancy Agreement was to be terminated by 30 June 1994 (the termination of the Consultancy Agreement has been discussed earlier at part 4.2.6), CanWest would continue to provide to TGL assistance with the development of corporate opportunities.

Evidence of Mr Studdy

Mr Studdy testified that CanWest would like to do more in the media area in the Asia Pacific region. Mr Asper said that anytime Ten would like to participate in anything CanWest was involved in he would offer it to Ten. Nothing concrete had come up in the Asia Pacific region. The TGL Board does not have any plans for international interests but if something specific arises Ten will look at it.

Evidence of Mr Gross

Mr Gross testified that the general rule was for CanWest to provide advice to the TGL Board with respect to acquisitions of related businesses and to anything that Ten might be interested in outside of day to day operations. Initiation of an investigation into a particular area came from anywhere, from one of the directors, an employee at Ten, or Mr Viner or Mr Lee or Mr Asper. Essentially ideas come from anybody. With regard to the memos of 24 September 1993 to the TGL Board concerning the corporate development function and possible ways of developing in Australia and overseas, the TGL Board's response was quite tentative. Their attitude was 'find something and put it to the Board'. The Board was not committed. Occasionally Mr Gross used to speak directly to the General Manager Network Corporate Development, Mr Lee, and discuss projects he was examining. Mr Lee reported to Mr Viner and sometimes the three would talk about things that they were working on.

Evidence of Mr Asper

Mr Asper testified that he never gave advice to Mr Viner in respect of corporate development. He gave it to Mr Gross. However at Board dinners he would not be reticent about giving his views on development. Mr Asper had no role in the appointment of Mr Lee to the position of General Manager Network Corporate Development: he only dealt with Mr Lee on legal affairs or corporate development matters, not on operational matters. Mr Asper would have spoken to Mr Lee dozens of times concerning Ten's possible involvement in cable television and frequently

during the Capital-Ten litigation, as Mr Lee was a member of the Ten legal committee, along with Mr Whyte.

On 7 November 1994 the ABA examined Mr Lattin about CanWest's involvement in Ten. With regard to corporate development issues, Mr Lattin referred to a number of projects which he thought were CanWest concerns rather than Ten's. Throughout 1993 and 1994 the ABA sought and was provided with documentation from Ten which related to CanWest's significant involvement in the identification and development of opportunities for possible projects for Ten alone or together with CanWest. These possible projects are considered below.

4.5.2 TGL'S ACQUISITION OF AN INTEREST IN CAPITAL

On 17 November 1993 TGL provided to the ABA a copy of a share sale agreement entered into by Westfield Group Ltd (Westfield) and TGL on 16 November 1993. The agreement was for TGL to acquire Westfield's 50% shareholding investment in Capital. Capital owned and controlled the Ten affiliated commercial television licensees in the Perth, Adelaide and Southern NSW licence areas.

On 1 December 1993 TGL responded to an ABA letter of 10 November requesting further information about a number of matters and the provision of TGL Board minutes. Within TGL's response were the minutes of the TGL Board meeting of 9 June 1993. These minutes record that the Board resolved that the matter of Capital Television be deferred and that no approach be made to Messrs Curran (of Capital) and Lowy (of Westfield) and that this strategy would be reviewed at subsequent meetings. The minutes of the TGL Board meeting of 11 August 1993 record that the Board asked Mr Gross to prepare a paper outlining the corporate development responsibilities of CanWest.

In response to the acquisition by TGL of its 50% interest into Capital and information provided to the ABA by TGL in November and December 1993, the ABA wrote to TGL on 21 December 1993 requesting information about:

- the respective roles of Messrs Asper and Gross in the acquisition of the Capital interest; and
- the provision of any documents setting out CanWest's role in corporate development in TGL.

On 13 January 1994 TGL responded to the ABA's letter. With regard to the Capital acquisition, TGL:

- provided a copy of a report dated 24 September 1993 from Mr Gross to the TGL Board in which he identified the acquisition of Capital as the highest corporate development priority of Ten and recommended pursuing a purchase of Westfield's 50% interest in Capital;
- indicated that the TGL Board minutes of the October 1993 meeting document the authorisation of Messrs Gross and Whyte to commence negotiations with a view to acquiring shares in Capital;

- indicated that Mr Gross progressed these negotiations, referring to the directors and executives of Ten as and when appropriate; and
- approved the acquisition.

The minutes of the TGL Board meeting of 5 October 1993 record that the TGL Board resolved that Messrs Whyte and Gross were authorised to commence negotiations with Mr Frank Lowy. These negotiations were to be conducted with a view to purchasing the shares (50%) controlled by Mr Lowy in Capital with Mr Viner to be advised of progress of any negotiations.

Evidence of Mr Gross

Mr Gross testified that he and Mr Asper wanted to purchase Westfield's 50% share in Capital TV in January 1993 however the TGL Board decided against the acquisition then.

Evidence of Mr Asper

Mr Asper testified that early in 1993 he and Messrs Gross and Cowin agreed amongst themselves that Ten should acquire the Westfield interest in Capital but the TGL Board turned it down. Subsequently, the TGL Board decided to acquire the interest.

Evidence of Mr Harris

Mr Harris testified that Mr Gross had recommended investing in Capital some time before TGL actually invested in Capital and the TGL Board rejected that recommendation.

Evidence of Mr Cowin

Mr Cowin testified that Mr Gross had put forward a proposal to acquire the Westfield holding in Capital but the TGL Board turned down the proposal.

Evidence of Mr Whyte

Mr Whyte testified that Mr Gross' proposal to purchase the Capital investment the first time round was unsuccessful. Mr Whyte's view prevailed and TGL did not do it.

FINDINGS

On the basis of the evidence before it the ABA finds that:

114. *As early as January 1993 Mr Gross had advised the TGL Board that Ten should acquire the Westfield interest in Capital. Mr Asper supported this advice.*

115. *The TGL Board rejected this advice from CanWest.*
116. *The TGL Board continued to be interested in the possible acquisition of the Capital interest throughout 1993.*
117. *In August 1993 the TGL Board requested under the Consultancy Agreement that Mr Gross prepare a report relating to corporate development opportunities for Ten.*
118. *In September 1993 Mr Gross reported to the TGL Board, recommending that TGL acquire the 50% Capital interest.*
119. *On this occasion the TGL Board accepted the advice of Mr Gross to acquire the Capital interest and authorised Messrs Gross and Whyte to commence negotiations with a view to purchase.*
120. *The advice to purchase an interest in Capital was only accepted and acted upon when it was regarded by the Board itself as being meritorious advice. This incident shows that the TGL Board did not regard itself as being required to accept, and in fact did not always accept, advice provided to it by CanWest under the Consultancy Agreement.*

4.5.3 TGL'S POSSIBLE ACQUISITION OF NRTV

On 10 November 1993 the ABA wrote to TGL requesting information including minutes of board meetings, minutes of the Executive Committee and any other board or management meetings as well as information provided under the Consultancy Agreement. On 1 December 1993 TGL responded to the ABA's letter. The possible acquisition of NRTV was on the Executive Committee agenda for the meeting of 5 March 1993. TGL advised the ABA that there were no minutes of this meeting or of the first eight meetings of the Executive Committee.

NRTV was discussed at the Executive Committee meeting of 24 May 1993. Minutes of this meeting were taken. The minutes record that Mr Gross expressed the view that the acquisition of NRTV may be of interest to Ten. TNQ also indicated its interest. It was resolved that Messrs Gross, Harris, Viner and Studdy reach some accord on how to proceed.

The minutes of the TGL Board meeting of 9 June 1993 note the discussion of the possible acquisition of NRTV and the interest of TNQ in the matter. It was resolved that Messrs Gross, Cowin and Harris prepare a strategy paper advising the Chairman and CEO of the feasibility of an acquisition of NRTV.

The minutes of the TGL Board meeting of 7 July 1993 record that a report prepared by Mr Gross about the possible acquisition of NRTV was discussed and noted. A copy of the report indicates that Mr Gross discussed a number of matters of significance in any

decision to pursue the acquisition and that, subject to the outcome of the due diligence process, Mr Gross recommended that the acquisition should be pursued.

The minutes of the TGL Board meeting of 11 August 1993 record that a report prepared by Mr Gross about the possible acquisition of NRTV was tabled and discussed. A copy of the report indicates that a due diligence team consisting of Messrs Viner, Dunstan, Thorley and Lewis (Ten executives) and Messrs Noble (TV3) and Gross (CanWest) had begun analysing the possible acquisition of NRTV.

The latest developments concerning NRTV were discussed at the Executive Committee meeting of 14 September 1993. Mr Gross wrote to the TGL Board on 27 September 1993, providing a complete due diligence report on NRTV. Mr Gross recommended that Ten should proceed with the acquisition and that the acquisition should be approved at the October 1993 Board meeting but that there were some matters that could affect the desire to enter into any deal to acquire.

The minutes of the TGL Board meeting of 5 October 1993 record that progress of negotiations was discussed and that it was resolved that the CEO be authorised on the basis of a previously prepared letter of intent to continue the negotiations and to call upon the Executive Committee as required.

The minutes of the Executive Committee meeting of 31 October 1993 record the latest developments discussed at the meeting, including the status of negotiations and alternatives concerning possible sale outcomes. The minutes of the Executive Committee meeting of 16 November 1993 record the fact of the impending sale and discussed the desirability of an arm's length program supply agreement being reached with the ultimate owner of NRTV. This document seems to be premised on the basis that TGL had decided not to proceed with the acquisition of NRTV. There is no record of such a decision being taken in any Ten documents provided to the ABA.

The minutes of the TGL Board meeting of 16 December 1993 record that a report about the acquisition of NRTV was tabled and noted.

Evidence of Mr Harris

Mr Harris testified that Mr Gross was keen that TGL buy NRTV but Ten management were definitely not keen on that particular development. The TNQ directors on the TGL Board were of the view that if TGL wanted to buy NRTV then it should buy it, but if not TNQ would certainly be interested, within the limits under the Broadcasting Services Act. The TNQ directors left the room when the decision was taken by the rest of the TGL Board and the Board was swayed by the fact that Ten management did not want to acquire NRTV.

Evidence of Mr Gross

Mr Gross testified that he was strongly in favour of the acquisition of NRTV but Mr Viner was basically negative about it.

Evidence of Mr Viner

Mr Viner testified that he was opposed to Ten's possible acquisition of NRTV from the beginning because he was of the view that Ten is a capital city television network and NRTV was a small market. Mr Gross thought it was a good deal and thought Ten should enter into the deal. Mr Viner discussed his opposition with the TGL Board on a number of occasions. He would not be surprised that the reason the TGL Board decided not to go ahead with the acquisition of NRTV was the fact that he was so adamantly opposed to it. His view is that the TGL Board rejected Mr Gross' advice to acquire NRTV because of his (Viner's) opposition.

Evidence of Mr Whyte

Mr Whyte testified that Mr Gross thought NRTV was a valuable asset, one that Ten couldn't acquire because of audience reach considerations and that ideally it should be acquired by somebody with whom Ten could work.

Evidence of Mr Cowin

Mr Cowin testified that the debate about the NRTV situation resolved itself for TGL. When TGL acquired the Capital interest it could not acquire the interest in NRTV.

Evidence of Mr Asper

Mr Asper testified that he felt very strongly that TGL should buy NRTV but he lost that issue.

From the evidence, TGL's reasons for not pursuing the acquisition of NRTV are not clear. Mr Harris suggests that the reason was the strong opposition from Ten's own management. Mr Gross also referred to Mr Viner's opposition to TGL acquiring NRTV. Mr Cowin indicated that the NRTV situation resolved itself for TGL: due to TGL's acquisition of Capital it could not then acquire NRTV.

FINDINGS

On the basis of the evidence before it the ABA finds that:

121. *From as early as March 1993, and throughout 1993, TGL had been considering the possible acquisition of NRTV.*
122. *Mr Gross supported the acquisition of NRTV by TGL and made a number of reports throughout 1993 recommending such an acquisition.*

123. *The participation of Messrs Gross and Noble in the due diligence of NRTV was in accordance with the provision of consultancy services under the Consultancy Agreement between CanWest and NTL.*
124. *CanWest, through Mr Gross, had considerable involvement in TGL considering whether to acquire NRTV.*
125. *Ultimately Mr Gross' recommendation was not adopted by the TGL Board.*
126. *This incident shows that the TGL Board did not always accept the advice or suggestions made by Mr Gross or Mr Asper and is consistent with a finding that the Board members of TGL were not bound by, nor felt obliged to follow, such advice or suggestions.*

4.5.4 PURSUIT OF PAY TV OPTIONS

TGL Board briefings on pay TV

Pay TV updates appeared as an agenda item at the Executive Committee meetings of 11 February 1993, 1 April 1993, 8 April 1993, 15 April 1993 and 29 April 1993. There were no minutes of these meetings. The minutes of the TGL Board meeting of 11 March 1993 record that Mr Gross reported to the Board on strategies for MDS and pay TV. The Board resolved that ongoing monitoring of pay TV was to be administered by Mr Gross and that Mr Viner be requested to collect information about developments of pay TV and MDS in Australia and to report to the Board on a regular basis.

The minutes of the TGL Board meeting of 23 April 1993 record that a pay TV report prepared by Mr Gross was tabled and discussed. The Board resolved that:

- Messrs Gross, Viner and Dunstan continue negotiations with various consortia with regard to pay TV and MDS licences;
- approval of the Executive Committee be obtained (requiring unanimous Committee approval as for all decisions) prior to entering into any consortium arrangements;
- CanWest be approved to act as trustee for TGL and in that capacity authorised to bid for pay TV or MDS licences and hold the licences on behalf of TGL; and
- Mr Gross continue negotiations with Australis Media Pty Ltd (Australis) in respect of MDS delivery.

With regard to the matter of CanWest acting as a trustee for TGL in the bidding for pay TV or MDS licences, the ABA wrote to TGL on 21 December 1993 seeking clarification from TGL on the effect of such approval. TGL responded on 13 January 1994 indicating that:

- CanWest was not bound by the exclusivity provision of the PMT consortium agreement and as a result it was thought at one stage CanWest could bid for the licences; and
- the TGL Board effectively had to approve any bid.

The minutes of the TGL Board meetings of June, August, September and October 1993 record that pay TV reports were tabled and discussed. These reports were often prepared by Mr Gross. The minutes of the TGL Board meetings during 1994 also record Board discussion of possible pay TV opportunities. Documentation provided to the ABA by Ten indicates that there were a number of exchanges between Mr Gross and Mr Lee concerning pay TV matters. This documentation clearly demonstrates CanWest's involvement in Ten's strategies with regard to pay TV.

Possible acquisition by TGL of an interest in Australis

The minutes of the TGL Board meeting of 23 April 1993 recorded that the Board resolved that Mr Gross was to continue negotiations with Australis in respect of MDS delivery. The minutes of the Executive Committee meeting of 24 May 1993 recorded a decision that a possible approach to Australis be discussed at the next Board meeting. Mr Gross recommended an aggressive approach to MDS licences which he felt would ensure Ten's ultimate participation in pay TV.

Evidence of Mr Gross

Mr Gross testified that CanWest advised the TGL Board that Ten should be involved with Australis and the Board turned it down.

Evidence of Mr Harris

Mr Harris testified that Mr Gross did make a suggestion that if TGL wanted to be in the pay TV business it should just take Australis over. The TGL Board was of the view that it was just too expensive.

Evidence of Mr Cowin

Mr Cowin testified that CanWest advised TGL that it should be involved with Australis and the Board turned it down. Mr Gross wanted to buy a significant portion in Australis as Ten's entry into the pay TV market. That was defeated by the TGL Board on the basis that the Board was not clear on the future of Australis.

FINDINGS

On the basis of the evidence before it the ABA finds that:

127. *The TGL Board minutes of April 1993 record Mr Gross' involvement in negotiations with Australis. The Executive Committee minutes of May 1993 record Mr Gross' desire for TGL to enter the pay TV industry in Australia by way of MDS delivered services.*

128. *On the basis of this documentary evidence, along with the statements by Messrs Gross Harris and Cowin, the ABA accepts that Mr Gross and CanWest advised the TGL Board to acquire an interest in Australis.*
129. *This advice was rejected by the TGL Board.*
130. *This incident indicates that the TGL Board did not always accept the advice provided by CanWest and were not required to accept such advice.*

TGL's entry into the PMT consortium agreement

On 30 March 1993 Mr Gross sent a memo to the TGL Board providing the latest version of the PMT consortium agreement. Mr Gross referred to pressure on Ten to join the consortium by other consortium members but his recommendation was that Ten should not join the consortium unless changes to the consortium agreement could be achieved. Mr Gross then listed what he saw as the shortcomings of the agreement and the risks involved for Ten in joining the consortium under the proposed arrangements. He concluded that he would rather not be in a deal than be in a bad deal.

The minutes of two informal meetings of certain directors of TGL on 26 April 1993 record that at the first of these meetings, Mr Gross advised that Mr Asper wished to be satisfied that it was in the interests of Ten to enter into the PMT consortium and that he had reservations about the documentation in its present form. Legal advice was sought and provided and a further meeting was convened on the afternoon of 26 April 1993. At this meeting Mr Gross advised that Mr Asper had withdrawn his reservations. It was resolved that TGL would enter into a pay TV consortium with Channel 9, News Corporation and Telecom (the PMT consortium).

The minutes of the TGL Board meeting of 13 April 1994 recorded that Mr Lee advised the meeting of the status of developments within the PMT consortium and that it was resolved that TGL would maintain its involvement with the consortium until further details of future development proposals were available at which time TGL would re-assess its involvement.

The minutes of the TGL Board meeting of 22 June 1994 recorded that Mr Lee advised the meeting of the tendering process being entered into by the PMT consortium for the MDS licences and that it was resolved that:

- Mr Gross establish a mechanism for Ten to assess its position in the bidding process for the MDS licences as a PMT member;
- Mr Viner act as the local coordinator for Ten's participation in the process; and
- an information memo be prepared by 1 July 1994 incorporating the business plan and other material to enable directors to familiarise themselves with PMT's business strategy so that directors could assess Ten's ongoing commitment to the syndicate's activities.

Evidence of Mr Asper

Mr Asper testified that he felt very strongly that TGL should not enter the PMT consortium.

Evidence of Mr Gross

Mr Gross testified that both he and Mr Asper were against joining PMT as they felt the consortium would go nowhere.

Evidence of Mr Whyte

Mr Whyte testified that Mr Gross formed the view that TGL would not get a fair deal out of the PMT consortium. Mr Gross' view was that TGL would not be treated as an equal partner by the other consortium members and on that basis he was of the view that TGL should not go into the PMT arrangement.

Evidence of Mr Viner

Mr Viner testified that both he and Mr Gross were of the view that Ten should enter into the PMT consortium as a defensive measure. Neither of them were happy about the decision, they did not think that PMT would survive or that it knew what it was doing. Mr Asper was negative about entering into the PMT consortium because he did not think the consortium knew what it was doing and a 10% interest by Ten gave Ten no influence.

FINDINGS

On the basis of the evidence before it the ABA finds that:

- 131. Mr Gross' opposition to TGL joining the PMT consortium was shown by his memo to the TGL Board on 30 March 1993.*
- 132. Mr Gross' opposition is reflected in Mr Asper's reservations expressed to the TGL Board meeting on 26 April 1993.*
- 133. On the basis of this documentary evidence, along with the statements by Messrs Gross, Asper, Cowin and Whyte, the ABA accepts that Mr Gross and CanWest advised the TGL Board not to enter into the PMT consortium.*
- 134. This advice was rejected by the TGL Board.*
- 135. In this case, the TGL Board did not accept the views or advice of Mr Gross and Mr Asper. As such this incident provides evidence that the TGL Board were not subject to direction or restraint or veto power by CanWest or any associate of CanWest.*

Pursuit of other pay TV opportunities - assertions by Mr Lattin

Evidence of Mr Lattin

Mr Lattin testified that Mr Asper was pursuing pay TV opportunities in Australia in 1994. This was a CanWest exercise not a Ten exercise. Mr Viner indicated (to Mr Lattin) that he thought that the operation would be run from within Ten and that he had identified Mr Lattin as not only being the programmer for Ten but also for the pay TV network. Mr Viner had told Mr Asper that, if CanWest was going into pay TV in Australia, Mr Lattin would be programming and formatting for the pay TV networks.

Evidence of Mr Asper

Mr Asper testified that after the termination of the Consultancy Agreement in June 1994, CanWest had a team of people in Australia working on pay TV opportunities for Ten. Ten did not have to pay for this work. If Ten did not want to pursue the opportunities then CanWest would look at the opportunities for itself. Ten personnel were modestly involved whereas the CanWest people worked on the opportunities for weeks both in Australia and in Canada. Messrs Lee and Myers from Ten did some work on the project but neither Ten nor CanWest claimed any reimbursement. The TGL Board approved research in relation to the project. CanWest's President of Corporate Development in Canada, Joanne McKenna, made at least one or two appearances before the TGL Board concerning pay TV opportunities.

Evidence of Mr Lee

Mr Lee testified that CanWest was interested in investing in cable television services. He looked at the pay TV project on behalf of Ten and decided that it was not worth pursuing. CanWest wished to look at the project for themselves and sent to Australia a due diligence team, including one CanWest employee, Ms McKenna. For two weeks he acted effectively as a local guide to that due diligence team, introducing them to the players, giving them some level of regulatory background. Apart from his work with the due diligence team, he had never acted for or on behalf of CanWest or Messrs Gross or Asper in his employment at Ten.

Evidence of Mr Viner

Mr Viner testified that there were advantages to Ten in running any kind of second service in that it gives more leverage with program suppliers. If there were any consistent services provided by Ten in this exercise then Mr Viner's expectation was that Ten would have been recompensed for that service but things never developed to that stage. He did not say that Mr Lattin was available to do the programming and formatting for any proposed pay TV network. He had indicated that Mr Lattin was available to advise but beyond that it would have been too big a job for Mr Lattin to be the General Manager Programming for Ten and also be a programmer for a pay TV operation. Ten was not reimbursed for Mr Lattin's service as only a general opinion was sought, but if the service did proceed and there was commercial

advantage in being associated with Ten, then there would have been a charge for the services provided.

FINDINGS

On the basis of the evidence before it the ABA finds that:

136. *From as early as March 1993 and throughout 1993 and 1994 the TGL Board had demonstrated a strong commitment to identifying and pursuing pay TV opportunities in Australia. TGL requested and was provided with considerable assistance by CanWest.*
137. *Mr Gross in his capacity as a CanWest consultant was to report regularly to the TGL Board and to the Executive Committee on developments.*
138. *Pay TV was a standing item for consideration by the Executive Committee.*
139. *Mr Viner and subsequently Mr Lee were to report and did report to the TGL Board on a regular basis about strategies in relation to MDS and pay TV.*
140. *Mr Lattin's assertion that Mr Asper and or CanWest were pursuing pay TV opportunities in Australia in 1994 is corroborated.*
141. *The pursuit of pay TV opportunities in Australia by Ten executives and staff was intended to be and was in fact undertaken in the interests of Ten.*
142. *Very little assistance was provided by Ten employees, Messrs Lee, Myers and Lattin, in research undertaken by CanWest in relation to pay TV opportunities. Such work was done in relation to possible investments which were potentially for the benefit of Ten.*

4.5.5 MR LATTIN'S PROVISION OF PROGRAMMING MATERIAL TO CANWEST FOR THE UKTV CHANNEL 5 PROJECT

Evidence of Mr Lattin

Mr Lattin testified that there was a facsimile from Mr David Asper, a CanWest officer, requesting Mr Lattin to provide CanWest with programming information to assist CanWest in its attempt to acquire Channel 5 in the UK and that Mr Viner told Mr Lattin to get the information. Mr Viner said to Mr Lattin that the two of them (Viner and Lattin) might be going to England next to fix up the Channel 5 situation.

Evidence of Mr Asper

Mr Asper testified that Ten will be offered the opportunity of participating with CanWest in the possible acquisition of Channel 5 in the UK. A CanWest employee,

Mr David Asper may have called Mr Lattin to see if there was any advantage to Ten in providing programming, if the possible acquisition of Channel 5 in the UK goes ahead.

Evidence of Mr Viner

Mr Viner testified that he thought that Mr Lattin did not ask his permission to provide the information for Mr David Asper. Mr Lattin saw himself as a program guru and he would have been flattered to be asked. Mr Viner did not think that Mr Lattin would have spent more than two to three hours on coming up with the information. Mr Viner did not recall saying words to Mr Lattin about going to England to fix up Channel 5. It would have been odd for him to have said such a thing given that the Channel 5 licence would not be allocated before October 1995 so his comments would have been more than one year prior to the awarding of the Channel 5 licence.

FINDINGS

On the basis of the evidence before it the ABA finds that:

- 143. Mr Lattin was requested to provide information for the CanWest UKTV venture by Mr David Asper. Mr Lattin provided the requested information.*
- 144. Mr Lattin's involvement in this project would appear minimal and of little or no consequence in the performance of his duties as the General Manager Programming at Ten.*

4.5.6 PROVISION OF PROGRAMMING TO THE VOX TELEVISION NETWORK IN GERMANY

Evidence of Mr Lattin

Mr Lattin testified that, whilst in the early days of 1993 his focus was on Australia, the emphasis later shifted to assisting CanWest in its endeavours to expand its global holdings. CanWest was interested in acquiring the Vox television network in Germany. Mr Lattin was involved in listing possible Australian programs for supply to Vox and participated in a phone conference with Mr Asper and others concerning the possible provision of programming for the Vox project.

Evidence of Mr Asper

Mr Asper testified that he did recall a telephone conversation with Mr Lattin about the provision of low cost programming to the Vox network in Germany. CanWest was approached to take over Vox. CanWest wondered if there might be an opportunity to acquire the network and sell programming to it. There was a telephone conference call between Mr Asper in North America, Mr Lattin in Australia, Mr Hoover in Toronto, Ms Shelly Stewart in Winnipeg and perhaps others with the purpose of determining what if any programming they might want to sell to Vox. Nobody was interested so the project was dropped.

Evidence of Mr Viner

Mr Viner testified that CanWest had an opportunity of buying into the Vox network in Germany. One of the problems identified was a difficulty in program supply. Mr Asper asked either him (Mr Viner) or perhaps Mr Lattin directly, whether Mr Lattin knew of programs that might have been available and suitable for Europe. This was a CanWest exercise: he did not recall that it had been offered to Ten. If CanWest had succeeded in the acquisition then there may have been benefit for Ten in supplying programming and selling it on a commercial basis.

FINDINGS

On the basis of the evidence before it the ABA finds that:

- 145. Mr Asper and/or CanWest were pursuing pay TV opportunities. Mr Asper and Mr Lattin did participate in a telephone hook-up to discuss possible programming for the Vox project.*
- 146. Mr Asper indicated that he wished to purchase programming from Ten which was suitable for Europe. As no-one at Ten could identify such programs the matter was dropped.*
- 147. Mr Lattin's involvement in this project would appear minimal and of little or no consequence in the performance of his duties as the General Manager Programming at Ten.*
- 148. Had CanWest been successful in obtaining an interest in the Vox network there may have been a benefit for Ten if it could supply programs to the Vox network on a commercial basis.*

4.5.7 POSSIBLE VENTURE IN INDONESIA

Evidence of Mr Lattin

Mr Lattin testified that, whilst in the early days of 1993 his focus was on Australia, the emphasis later shifted to the CanWest interest in expanding globally, such as a possible Indonesian project. Ten sent two of its executives, Messrs Thorley and Lee, to Indonesia.

On 8 April 1994 Mr Asper sent to Mr Studdy a memo headed 'Television Opportunities in Indonesia.' Mr Asper referred to CanWest's activities in developing a possible investment in Indonesian television. Mr Asper offered the opportunity of TGL involvement in the project but indicated if TGL was not interested, CanWest would pursue the project alone.

On 13 April 1994 Ms Asper sent to Messrs Gross and Liba a memo concerning the Indonesian venture and any possible interest by TGL. Messrs Gross and Liba were in Australia for the TGL meeting on 13 April 1994. The minutes of the TGL Board meeting of 13 April 1994 record that a proposal was tabled relating to investment particulars in the Indonesian broadcasting industry. The Board resolved that further information about the Indonesian proposal was to be obtained and that enquiries were to be made to CanWest as to what resources would be available to assist in the evaluation and possible involvement of TGL. The minutes of the TGL Board meeting of 22 June 1994 record that Mr Asper tabled a report on the possible Indonesian venture. The report was noted.

Evidence of Mr Asper

Mr Asper testified that CanWest had encouraged Ten to get involved in television in the region, notably in Indonesia. CanWest has at its own expense sent two delegations to Indonesia to explore opportunities and reported on those opportunities to TGL and perhaps TGL sent a delegation to Indonesia to follow up on those.

Evidence of Mr Gross

Mr Gross testified that CanWest had discussions with the TGL Board, indicating to the Board that if it was interested then CanWest would be willing, as part of its consulting arrangement, to examine opportunities in Indonesia on behalf of TGL. CanWest sent someone to Indonesia.

Evidence of Mr Lee

Mr Lee testified that CanWest had been pursuing an investment in Indonesia and had presented the opportunity of that investment to the TGL Board. The TGL Board formed a view that a possible investment should be pursued. As a result Mr Lee reviewed all of CanWest's due diligence material and went to Indonesia with two other Ten officers to examine this opportunity and form a view on whether it was a good one for Ten. He formed a view that there were no opportunities appropriate to Ten, reported this to the TGL Board and the matter went no further.

Evidence of Mr Viner

Mr Viner testified that CanWest had referred to the TGL Board the possibility of a venture in Indonesia. The Board was interested so Messrs Lee and Thorley went to Indonesia. These officers returned and advised that the venture was not fit for Ten.

FINDINGS

On the basis of the evidence before it the ABA finds that:

- 149. Ten sent Ten executives to Indonesia to consider a possible Indonesian project.*
- 150. As documented in the TGL Board minutes and Mr Lee's evidence, this was a TGL exercise and was ultimately not pursued by TGL.*
- 151. Despite CanWest's interest in pursuing the Indonesian venture with TGL, TGL ultimately did not proceed.*
- 152. The TGL Board did not pursue the Indonesian opportunities identified to it by CanWest, Mr Gross and Mr Asper, as the Board itself was of the view that pursuing the matter was not in the interests of Ten. This incident is consistent with a finding that the TGL Board did not act at the direction or wishes of CanWest, Mr Gross or Mr Asper.*

4.5.8 DEVELOPMENT OF PARAMOUNT PAY TV CHANNEL

Evidence of Mr Lattin

Mr Lattin testified that when a Columbia TriStar-Paramount-MCA pay TV channel idea was proffered, Mr Lee and Mr Gross wanted Mr Lattin to go to America to investigate the pay TV channel operation and this project was a CanWest exercise, it had nothing to do with Ten.

Evidence of Mr Lee

Mr Lee testified that Columbia TriStar wished to form a general entertainment channel with Paramount and with MCA and wanted an Australian partner. They approached Ten and Mr Lee was involved in extensive negotiations with them. Nothing ended up coming of the deal because no commercial agreement could be reached. The whole exercise was conducted on behalf of Ten.

Evidence of Mr Viner

Mr Viner testified that the idea was offered to Ten by Columbia through a relationship Mr Viner had with Mr Grindon, the head of Columbia TriStar. Mr Lattin indicated he

either did not want to go or could not go to the US so he (Mr Viner) and Mr Lee went.

FINDINGS

On the basis of the evidence before it the ABA finds that:

153. *The assertion that there was a possible venture involving the creation of a Columbia TriStar-Paramount-MCA pay TV channel is substantiated.*
154. *This possible venture was a TGL exercise undertaken in the interests of Ten. The venture was ultimately not pursued by TGL.*

CONCLUSION

On the basis of its findings relating to the matter of development of corporate opportunities addressed in part 4.5 of this report, the ABA has considered the relevant provisions of Schedule 1 part 2 clause 2 to the Act and concludes that:

CanWest, whether alone or together with an associate, was not in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of any Ten licensee in providing broadcasting services under the licences (clause 2(1)(b)(iii));

CanWest, whether alone or together with an associate, was not in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of TGL or NTL (clause 2(1)(c));

CanWest, whether alone or together with an associate, was not 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 Ten licensees or TGL or NTL (clause 2(1)(d)(iii)); and

neither NTL, TGL nor more than 50% of the directors of each of those companies acted (nor were intended or expected to act under a contract, arrangement or understanding) in accordance with directions, instructions or wishes of CanWest or of CanWest and an associate of CanWest or of the directors of CanWest (clause 2(1)(e)).

4.6 PROVISION OF ADVICE SINCE THE TERMINATION OF THE CONSULTANCY AGREEMENT

The ABA has examined the circumstances in which CanWest has provided advice to Ten since the termination of the Consultancy Agreement to determine whether CanWest is in a position to exercise control of Ten through the provision of such advice.

4.6.1 PROVISION OF ADVICE SINCE THE CONSULTANCY AGREEMENT WAS TERMINATED

Evidence of Mr Asper

Mr Asper testified that he said to the TGL Board that by terminating the Consultancy Agreement the way it did, CanWest felt obliged to continue to make its expertise available at no cost to Ten and that is exactly what the situation is today.

Evidence of Mr Harris

Mr Harris testified that CanWest is useful all the time. They know about things that are happening in the international market and it's critical intelligence as far as Ten's concerned. The whole international media business is in a state of very rapid change and it's very important for the TGL Board to be aware of what those changes are and where Ten should be positioned, so Ten has cause to talk to CanWest about all sorts of things from time to time. There are discussions going on all the time about what the various studios are doing and there was quite a lot of discussion with CanWest about what sort of pay TV deals are taking place in Hollywood. The TGL directors are interested in Hollywood deals with pay TV. CanWest's intelligence in Hollywood is pretty good and was fairly useful in being able to advise on who was doing what in the pay TV area in Hollywood in relation to movies.

Evidence of Mr Whyte

Mr Whyte testified that, since the termination of the Consultancy Agreement, Ten has obtained free of charge information on pay TV. He was not aware of CanWest expending any resources with regard to programming agreements for Ten.

Evidence of Mr Studdy

Mr Studdy testified that, since the termination of the Consultancy Agreement, Ten didn't really need to obtain advice in anything to the same extent as it had in the early days. As for programming, Ten has got Columbia TriStar set up and has been able to do the best out of the Fox deal, so that the need for that consultancy has certainly reduced considerably.

Evidence of Mr Liba

Mr Liba testified that during the time in which Mr Gross was with CanWest and a TGL director and a TV3 director, Mr Gross was responsible for CanWest interests in the South Pacific. The position has changed although he (Mr Liba) has responsibility for monitoring operations overall for CanWest and has for the last several months monitored Australia/New Zealand but not exclusively. Mr Gross spent his full time in the early days on Ten because CanWest had just made the investment, it was his full-time preoccupation, whereas in Mr Liba's case, it's one of many interests that he monitors.

Since the termination of the Consultancy Agreement nobody from CanWest provides consultancy services to Ten except as TGL directors. CanWest appointees to the TGL Board may be asked to do something in their normal role as directors and are interested in growing the company. His perception would be that CanWest may have had a very significant involvement in the early days of having pulled together the plans for Ten, whereas today it has less of a role to play.

Evidence of Mr Viner

Mr Viner testified that, since the termination of the Consultancy Agreement, CanWest has provided opinion more than advice. This related to general programming trends and pay TV trends.

FINDING

On the basis of the evidence before it the ABA finds that:

158. *After Mr Gross resigned from CanWest companies and terminated his appointment as a director of TGL and the Consultancy Agreement had been terminated, TGL no longer received advice from Mr Gross about corporate development or international programming agreements. TGL however continued to receive from CanWest limited information and advice about pay TV and general programming trends. Some advice or suggestions provided by Mr Asper, ie. Indonesia and CTS, have not been pursued. The UKTV venture was pursued on a provisional basis only.*

4.6.2 PROGRAMMING SINCE THE CONSULTANCY AGREEMENT WAS TERMINATED

The TGL Board minutes of the meeting in December 1994 record that Mr Viner reported that Ms Kristin Marlow had been promoted to the General Manager Programming position vacated by Mr Lattin in October 1994. Mr Viner also reported

that Mr John McCready would consult to Ten advising on European acquisitions and overall program strategy. Mr McCready had formerly worked with TVNZ but was now freelance.

Evidence of Ms Kristin Marlow

Ms Marlow, General Manager Network Programming of NTL, gave evidence to the ABA on 9 February 1995.

Ms Marlow testified that she had worked at Ten since January 1992. She had performed as the Network Program Schedule Manager and was answerable to Mr Lattin when he was at Ten. She was now answerable to Mr Viner. Mr Viner appointed her to the position. Mr McCready was a consultant to Ten assisting in program advice and was operating out of Auckland. No one from CanWest has been involved in any of the contracts she has negotiated, both international and domestic, in the time she has been General Manager Programming, (since late September 1994).

The minutes of the meetings of the TGL Board indicate that the Board continued to be briefed by the respective General Managers and by Mr Viner on programming matters.

FINDING

On the basis of the evidence before it the ABA finds that:

159. *Since September 1994 no one from CanWest has been involved in any of the contracts negotiated by the General Manager Programming of NTL.*

4.6.3 DEVELOPMENT OF CORPORATE OPPORTUNITIES SINCE THE CONSULTANCY AGREEMENT WAS TERMINATED

The TGL Board minutes of the meeting of February 1995 indicate that the TGL Board resolved that a Corporate Development Committee be established with Mr Asper as Chairman and Messrs Cowin, Harris and Studdy (ex officio) as members with Mr Viner to attend the meetings of the Committee.

The TGL Board minutes of the meeting of June 1995 indicate that under the title of 'Corporate Governance' the TGL Board resolved that the four standing committees of the Board be confirmed with formalisation of their respective constitution, composition, powers and terms of reference.

The composition of the Corporate Development Committee was confirmed and it was resolved that the Committee does not have the power to bind the Board and that any recommendations from the Committee must be submitted to the Board in the form of a proposal. The minutes of the meetings of the TGL Board indicate that the Board continued to be briefed on Corporate Development matters. These briefings were provided by Mr Viner or Mr Lee.

FINDING

On the basis of the evidence before it the ABA finds that:

160. *Decisions relating to corporate development or external investments continue to be made by the full TGL Board.*

4.6.4 APPOINTMENT OF A CANWEST REPRESENTATIVE IN AUSTRALIA

Evidence of Mr Viner

Mr Viner testified that CanWest had in early August 1995 announced the appointment of Mr Anthony Hollis to be the CanWest representative in Australia. Mr Hollis is an Australian citizen and was formerly Group Manager of the Time Warner group of companies in Australia and New Zealand. Mr Viner understands that Mr Hollis will be looking to identify media and unrelated opportunities in Australia and Asia and New Zealand. Mr Asper has given an undertaking to the TGL Board that any media related opportunities identified would be offered to Ten and Ten would have the right of first refusal.

4.6.5 THE EXECUTIVE COMMITTEE

As recorded in the TGL Board minutes of June 1995, one of the Board's standing committees, the Executive Committee, was to be comprised of Messrs Studdy (Chairman), Cowin, Asper, Harris and Viner (non voting). It was also resolved that the Executive Committee be able to exercise all Board powers (but with some exceptions) and that an Executive Committee decision, to be effective must be unanimous or be referred to the Board. The Committee must report to the Board in relation to any substantive decision of the Committee.

CONCLUSION

On the basis of the evidence before it relating to the involvement of CanWest in Ten, the ABA has considered the relevant provisions of Schedule 1 part 2 clause 2 to the Act and concludes that:

CanWest, whether alone or together with an associate, is not in a position to exercise (whether directly or indirectly) control of the selection or provision of a significant proportion of the programs broadcast by any of the Ten licensees in providing broadcasting services under the licences (clause 2(1)(b)(ii));

CanWest, whether alone or together with an associate, is not in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of any Ten licensee in providing broadcasting services under the licences (clause 2(1)(b)(iii));

CanWest, whether alone or together with an associate, is not in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of TGL or NTL (clause 2(1)(c));

CanWest, whether alone or together with an associate, is not in a position to veto any action taken by the board of directors of the Ten licensee companies or NTL or TGL (clause 2(1)(d)(i));

CanWest, whether alone or together with an associate, is not in a position to appoint or secure the appointment of, or veto the appointment of, at least half of the board of directors of any of the Ten licensee companies or of NTL or TGL (clause 2(1)(d)(ii));

CanWest, whether alone or together with an associate, is not 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 Ten licensees or TGL or NTL (clause 2(1)(d)(iii)); and

neither NTL, TGL nor more than 50% of the directors of each of those companies act (nor are intended or expected to act under a contract, arrangement or understanding) in accordance with directions, instructions or wishes of CanWest or of CanWest and an associate of CanWest or of the directors of CanWest (clause 2(1)(e)).

5.

The Role Of Mr Viner

At least until 31 March 1993 Mr Peter Viner was still an employee of CanWest or its associated companies. The ABA finds that by virtue of that continuing employment contract, Mr Viner was an associate of CanWest.

Accordingly it is important to determine his role in Ten during the early part of 1993 and the extent of his influence in the management and operations of TGL, to determine whether he 'controlled' any of the Ten licences or companies.

If the ABA was to find that Mr Viner 'controlled' any of the Ten licences or companies during this period, it would be open to it to conclude that CanWest, as an associate of Mr Viner, was also in a position to exercise control of those licences and companies, or that CanWest, through one of its officers, controlled Ten.

On 27 January 1993, the TGL board resolved that Mr Peter Viner would be appointed a director of NTL and its wholly owned subsidiaries (and as Chairman of the NTL Executive Committee) on condition that he resign from any position held with CanWest and its affiliates and that he relinquish any shareholdings or other benefits that he held in that organisation.

A day later, Messrs Chapman, Asper and Gross informed the ABA that:

- Mr Viner (who had been in Australia for the previous two months as part of CanWest's due diligence team) would remain in Australia to make initial recommendations to the Board of TGL on how they should proceed with the consortium business plan;
- the TGL board was keen for Mr Viner to work permanently for TGL; and
- CanWest was agreeable to letting Mr Viner leave CanWest.

On 31 March 1993 TGL advised the ABA that Mr Viner had received a permit for temporary residency, that he intended applying for permanent residency and citizenship and that consideration was being given to Mr Viner becoming the CEO of TGL. Mr Viner had 'formally severed all ties with CanWest on 31 March 1993'.

A news release of 14 April 1993 issued by CanWest indicated that Mr Viner had resigned as President and CEO of CanWest Broadcasting Ltd, U.TV Vancouver and from all other Boards and Offices of CanWest Global's operating companies in Canada.

On 7 June 1993 Mr Studdy advised the ABA that he would be recommending to the TGL board the appointment of Mr Viner to the CEO position at TGL and its subsidiaries.

On 9 June 1993 TGL announced the appointment of Mr Viner as CEO of TGL.

5.1 THE CEO'S POWERS, DUTIES AND CONTROL

At a meeting on 27 January 1993 Mr Rice was appointed as the CEO of NTL. In relation to the role of Mr Rice and the power or control of the Executive Committee and its members the ABA found at 4.1.2:

Mr Rice was not appointed to the Executive Committee and, notwithstanding his appointment as CEO (on a month by month basis only), he did not thereafter function as a CEO with fully delegated Board authority.

The TGL Board made Mr Viner's resignation and relinquishing of positions and shareholdings with CanWest, a condition of his appointment. Despite the TGL Board's condition, Mr Viner was operating as the Chairman of the Executive Committee prior to his resignation of all positions with CanWest.

The Executive Committee assumed the responsibility of the management of the Ten companies and effectively undertook 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. The Executive Committee reported to the Board of TGL on a regular basis.

Given NTL's establishment of the Executive Committee and of the limitations on its charter, CanWest, through the participation of Messrs Gross and Viner on the Executive Committee, and notwithstanding Mr Viner's presence on that Committee before he formally resigned his positions with CanWest, was not in a position to exercise control of TGL, NTL or the licensee companies TTL (Sydney), TTL (Melbourne) and TTL (Brisbane).

Accordingly it is the ABA's view that in the first three months of 1993 Mr Rice did not carry out a CEO's ordinary management responsibilities and control. In the first three months of 1993 most of the duties, powers and control which ordinarily vest in a CEO were with the Executive Committee considered at 4.1.2 above.

5.1.1. POWERS OF A CONSULTANT WITH THE POWER TO GIVE ADVICE

The ABA also found in part 4.3 that advice given by CanWest employees to the Board of TGL did not confer control. This would include advice given by Mr Viner. Mr Viner's activities as a consultant to Ten are considered within the ABA's examination of the Consultancy Agreement between CanWest and Ten, specifically at parts 4.2 and 4.3, 4.4 and 4.5.

Chairman of the Executive Committee

Mr Viner's role on the Executive Committee is also considered at 4.1.2 above.

Chairman of the Budget Review Committee

Evidence of Mr Whyte

Mr Whyte testified that even though Mr Viner chaired a Budget Review Committee meeting on 24 February 1993 he did not have a management function. The executives present in the Budget Review Committee meeting would not have been answerable to Mr Viner.

Evidence of Mr Cowin

Mr Cowin testified that in January 1993 Mr Viner became associated with TGL as a consultant to put together a plan of direction that the TGL Board would implement in regard to the \$20 million cost reduction. His job was to get in and understand what the local costs and conditions were and put a proposal or advice back to the TGL Board where the action was going to take place.⁶

Evidence of Mr Gross

Mr Gross testified that the executive committee had asked Peter Viner to carry on the duty of Chairman of the Budget Review Committee. Mr Viner at that point was appointed by the Board to represent them in this procedure but there would be no decisions made at this committee.

FINDINGS

On the basis of the evidence before it the ABA finds that:

161. *Mr Viner was Chairman of the Budget Review Committee because the Board of TGL wanted him to oversee as a consultant the putting together of a business plan and budget to be put to the Board in relation to the \$20 million cost reduction (see also part 4.3).*
162. *Even though Mr Viner chaired a Budget Review Committee meeting on 24 February 1993 he did not have a management function and the executives present in the Budget Review Committee meeting would not have been answerable to Mr Viner. As discussed in part 4.3 the strategic decisions about cost cutting were made by the TGL Board.*

⁶ Mr Viner's activities as a consultant to Ten are considered within the ABA's examination of a Consultancy Agreement between Ten and CanWest, specifically at Parts 4.2 Provision of Consultancy Services By CanWest To Ten, Part 4.3 Budget Issues and Preparation of The 1993-1994 Budget, at Part 4.4 Selection and Provision of Programming, and also at Part 4.5 CanWest's Role in Development of Corporate Development Opportunities.

5.1.2 CONTROL OVER DECISIONS RELATING TO PROGRAMMING

Clause 2(1)(b)(ii) of Schedule 1 provides that a person is in a position to exercise control of a licence or a company if, in the case of a licence, 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.

On the basis of the evidence before it, it is the view of the ABA that Mr Viner made the decision to drop *E Street*. Evidence was given by Mr Rice that axing of programs was the kind of decision which a CEO might make. In addition Mr Viner and Mr Rice stated that the Board did not make these kinds of decisions. There is no evidence that the Executive Committee made the decision. Accordingly it appears that Mr Viner effectively made the decision to cancel that program.

The question then is whether the cancellation of *E Street* by Mr Viner is evidence that he was in a position to control the selection or provision of a significant proportion of programs broadcast by the Ten licensees.

It would be difficult to conclude that the decision to axe one program alone indicated that Mr Viner could control what programs were broadcast on the Ten licences (or the selection of a significant proportion of those programs).

The evidence of Mr Viner however suggests that other programs may have been axed in that period in much the same way or that he at least was in a position to exercise that kind of decision-making power. In terms of this decision the following passage of transcript is important because it could reflect on the way decisions were made generally:

ABA: *If it did not go to the board to axe E Street and it did not go to the CEO then could it be anybody else that decided to axe the show other than Mr Lattin?*---**Mr Viner:** No, certainly not. I would assume that Mr Lattin axed the show because I urged him to.

ABA: *So on your instruction he decided to axe it?*---**Mr Viner:** Well no, it doesn't work that way. I mean, he didn't have any support for the show, Mike didn't like it, so I mean, I think he was clear about my view on it. It had no support inside. I think, you know, there's not a written or a direct order to anybody; I'm sure I said to Mike let's get rid of this thing or what's the contract terms, how can we get out of this, how can we extricate ourselves from this mess?

The following portions of the transcript of examination of Mr Viner are also instructive in this sense:

Mr Viner: The show [*E Street*] was obviously, you know like a number of decisions it was an obvious decision to make and I'm sure that in many ways I made the decision by making the recommendation. Who actually informed *E Street* I'm not sure but there's no question this was a decision like several others that were just kind of lying about pregnant, that decisions had to be made on it so I may well have made that decision but there's no one I would be very surprised if anybody acts surprised or was not in accord with it because it was clearly not working.

ABA: *When you say you may have made the decision, if Mr Noble's reporting to the Budget Review Committee on 24 March, if you made the decision prior to 24 March you were still just the consultant with Ten?*---**Mr Viner:** Yes, but I'm a consultant charged with reviewing the operations, with trying to improve the operations. The making of overdue decisions about shows that don't work

is clearly improving the operation.

ABA: Would you say that you would have had the authority to axe *E Street* at that stage?---

Mr Viner: I think I would have - I think probably, but, you know, I don't know that I did, in fact.

The above evidence could be regarded as being consistent with Mr Viner having the power to control the selection of a significant proportion of programs broadcast. However, the evidence above is at best ambiguous. Mr Viner appears to be saying that the Board had delegated to him the power to make 'overdue' decisions, such as the cancellation of *E Street*. If that 'delegation' was restricted in that way then it is unlikely that it could be used to control the selection of a significant proportion of programs broadcast. In addition Mr Viner's answer to the last question is particularly ambiguous and could be seen as contradictory, ie that no such authority was conferred or was exercisable. Accordingly the evidence cannot be used to demonstrate control.

The circumstances of the *E Street* decision itself must be examined to determine whether in fact Mr Viner had control over a significant proportion of the programs broadcast. It is necessary to consider whether Mr Viner's influence in the dropping of *E Street* is indicative of a more pervasive power to make decisions about the selection or provision of programming, even in the face of opposition.

Both documentary and oral evidence provided to the ABA suggests that at that time, ie: 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. Mr Lattin was of the view that the program would have to be axed eventually, and testified:

I was certainly looking at the ratings and I must say that there was plenty of ratings evidence as to why *E Street* should have been dropped and I wasn't at all proud of the show and as I'd inherited this problem which in some ways I think should have been probably dropped 12 months earlier but I'd inherited the problem. ... I remember being in the office with Gross and Viner on one of the occasions I would have been upstairs and Gross's attitude was... 'Just get rid of it as quick as possible because it's costing us 270,000 a week or something to produce.' ... I was making the point that you just couldn't go dropping things like that because we had a certain commitment to drama quota and *E Street* was the only programme, plus *Neighbours*, which was ... helping us achieve our minimum of 750 points per annum so I just pointed that out to them and their attitude was to get it off air as quick as possible and I was explaining simply that life didn't work quite like that, that you had regulation guidelines to meet.But the instruction was to get it off as quick as possible.

I would have eventually axed *E Street*. ... my reasoning was that *E Street* had certainly run its race in my opinion a year earlier, but it was to go at a period of time which fitted in with broadcasting regulations... I felt we could get out of it in a less dramatic way than probably ended up happening anyway.

It also appears that either the Board or the Executive Committee had debated the question of *E Street*.

Evidence of Mr Harris

Mr Harris testified that *E Street* was certainly debated at Ten, possibly at Board level or at the Executive Committee. At an operating level TNQ liked *E Street*, it was quite popular in the country, but as a director of TEN, he was put in a position where quite clearly it was uneconomic from TEN's point of view to continue with producing a

program that cost that much and rated the way it did. So they had to agree that it didn't make economic sense.

Mr Harris testified that it was costing much more to produce programs like *E Street* than was being earned in revenue and where there was not any reason for believing that they could change the program sufficiently to get those numbers to work then they had no alternative but to remove them. There was quite some debate with the people producing *E Street* about whether it could be produced more cheaply and in fact turned out not to be possible.

Evidence of Mr Rice

Mr Rice testified that *E Street* was not destined to have a long life at that stage. They had been trying to revive it. *E Street* was known to be in trouble, it wasn't rating well and then he'd had a lot of difficulty with the program. He had tried very hard with the executive producer to get it back on track. Gerald Carrington advised him that he understood Mr Lattin had been directed by Mr Gross to make the decision to axe *E Street* but not that Mr Lattin wasn't compliant. Mr Rice thinks that Mr Lattin agreed with it too. Mr Rice was not suggesting he did it under duress.

Evidence of Ms Marlow

Ms Marlow testified that *E Street* was a terribly produced program that wasn't rating. She said it was her schedule, she didn't want it rating like that. As far as she was concerned it lasted longer than it ever should have. She had had discussions with the 'people in the department' when the ratings came out on a Thursday morning or a Friday morning in which the following exchange took place, 'How long do we have to suffer this?' She believed the decision was made in the following way: That it was not working, that it was completely off the rails in terms of its production and providing that they could cover off drama points for the rest of the year and content ...

Evidence of Mr Carrington

Mr Carrington testified that *E Street* was cancelled but this had been talked about well before the new consortium took over. It just wasn't rating and there had been a lot of talk about *E Street* and *E Street* was a very expensive program.

In the view of the ABA, Mr Viner was in a position to make a recommendation which was acted upon by Mr Lattin because of the consensus within TGL about the program and not because Mr Viner exerted any ostensible or actual authority over Mr Lattin. There is no evidence of a documentary nature that suggests that the axing of *E Street* came as a surprise to anyone within Ten, including the Executive Committee, or the directors of TGL, nor that anyone fundamentally disagreed with it.

The forward planning to replace *E Street* with other drama programs that would satisfy the ABA's Australian content requirements had also obviously been undertaken.

FINDINGS

On the basis of the evidence before it the ABA finds that:

163. *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 the management of Ten or the Executive Committee.*
164. *Mr Viner did not have the power to direct or to veto choices or decisions made by Management of Ten which conflicted with his own.*
165. *Mr Viner was not in a position at the time of axing of E Street to control the selection or provision of a significant proportion of broadcast by the licensee.*

5.1.3 MR VINER'S ROLE IN RESTRUCTURING DECISIONS

Clause 2(1)(b)(iii) of Schedule 1 provides that a person is in a position to exercise control of a licence or a company if, in the case of a licence, 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.

Evidence of Mr Lattin

Mr Lattin testified that it would have been Mr Viner's decision that Ten ran with reduced staff levels in Brisbane and Melbourne. This resulted in the dropping of Program Managers in Brisbane and Melbourne. Everything was to be centralised in Sydney and this was under the jurisdiction of Mr Gerry Thorley who became equivalent to the Group General Manager in Sydney of the Sydney, Brisbane and Melbourne stations.

Analysis of the minutes of the first Budget Review Committee meeting of 24 February 1993 indicates that Mr Viner chaired this meeting and present were seven senior Ten executives (including Mr Lattin) and Mr Gerry Noble (the then CFO of TV3 New Zealand). The minutes record that Mr Viner advised the meeting that the expectations of the meeting were of a directional/philosophical nature, whilst at the next meeting he would like the options spelt out in terms of costs, risks and benefits and for the following meeting, recommendations based on the costs risks and benefits of each alternative.

Mr Gerry Thorley was one of the Ten executives present at the meeting. He was employed by NTL as the General Manager Sydney. He was present at the meeting in his capacity as Chairman of the News Sport and Station Overheads Sub-Committee. He reported to the Budget Review Committee meeting that:

- the focus of the sub-committee was to review the current operations; and
- the principal areas of review included the pooling of resources both across the network and within the station; to review production and operational methodology for potential inefficiencies; and to review employment methods.

Mr Thorley reported to all but one of a further seven meetings of the Budget Review Committee (renamed the Management Committee) prior to 30 June 1993 on developments in the on-going review of operations. Mr Viner chaired all but one of these seven meetings and was absent for the other. The minutes of these meetings record that there was discussion of a number of options as to how Sydney, Melbourne and Brisbane would operate. Ten management structure charts record that from 30 December 1992, the respective General Managers of Sydney, Melbourne and Brisbane were responsible to and reported to the CEO whereas as at 15 November 1993 the General Managers of Melbourne and Brisbane were responsible to and reported through the General Manager Sydney (Mr Thorley) to the CEO.

Analysis of the agenda papers for the first two meetings of the Executive Committee (5 and 11 February 1993) indicates that item one for discussion was the re-organisation activity and procedure. The agenda paper of the meeting of 5 March 1993 listed re-organisation activity as an item for discussion, the agenda paper of the meeting of 1 April 1993 listed re-organisation status (Executive Committee Reporting) as an item for discussion and the agenda paper of the meeting of 8 April 1993 listed re-organisation recommendations as an item for discussion.

The minutes of the Executive Committee Meeting of 24 May 1993 record Mr Viner as reporting that not all re-organisation recommendations had been taken into account in the budget but that EBIT figures to be presented to the TGL Board at its June meeting would take into account further reductions and the impact of any anticipated reorganisation.

Reference has been made earlier in the report to the role played by Mr Viner in February and March of 1993 (part 4.1.2 of this report). The ABA found that:

- in the period February-March 1993 Mr Viner operated as a consultant to Ten on matters such as the preparation of a business plan;
- in this same period Mr Viner operated as a member of the Executive Committee and the purpose of the Committee was to get consensus on the business plan; and
- due to Mr Viner's participation as a consultant and his involvement with the Executive Committee on the preparation of a business plan he had the responsibility for the preparation of the 1993-94 budget.

FINDINGS

On the basis of the evidence before it the ABA finds that:

166. *Mr Viner was significantly involved as a consultant in the reorganisation at Ten, in the decisions to centralise functions in Sydney and to run with lower staffing levels.*
167. *Mr Viner's role as Chairman of the Budget Review Committee was a result of being a consultant provided under the Consultancy Agreement and a member of the Executive Committee.*
168. *Mr Viner was not in a position to make decisions about the re-organisation of the Ten network.*

169. *The TGL Board's delegated committee, the Executive Committee, was actively examining re-organisation options as part of its budgetary process and it was this Committee that determined how to proceed with the re-organisation.*
170. *CanWest, through the participation of Messrs Gross and Viner on the Executive Committee, was not in a position to determine the outcome of decisions relating to a significant proportion of the operations, or of the management or affairs of TGL or NTL as decisions of the Executive Committee had to be unanimous or if not unanimous, referred to the TGL Board.*
171. *Ultimately it was the TGL Board that would determine the re-organisation outcomes by way of its decision to accept or reject the proposed budget for 1993-94.*

5.2 MR VINER'S ROLE AFTER BECOMING CEO OF TGL

June 1993 to the present

Mr Viner was appointed CEO of TGL on 9 June 1993 with effect from 1 April, 1993. Although Mr Rice had indicated his wish to resign in late March 1993, he did not formally resign as CEO until 7 May 1993. Mr Viner effectively took over the role of CEO in early April 1993.

Mr Lattin in his examination gave evidence from which inferences could be drawn relevant to the question of whether Mr Viner was an associate of CanWest in terms of the Act. The evidence which the ABA regarded as possibly raising an inference relevant to the question of association is set out below:

The ABA has assessed the totality of the evidence provided in relation to the ten items listed below to determine whether the assertions of Mr Lattin could be accepted and also to determine whether inferences relevant to the 'associate question' could properly be drawn from the evidence.

The relevant allegations of Mr Lattin in relation to this issue are as follows:

- Mr Lattin always felt that Mr Viner was part of the CanWest team and that Mr Viner's boss was Mr Asper. Mr Lattin gave no evidence to substantiate this allegation except for the evidence referred to below.
- Mr Lattin stated that there were extensive and regular phone calls from Mr Viner to Mr Gross in Canada. There was considerable fax correspondence between Mr Gross and Mr Viner. See also part 4.4 re Programming.
- Mr Lattin stated that Mr Viner reported to Mr Gross on most issues and that Mr Viner did not have a final say until he had conversed with Mr Gross. Mr Gross was like a de facto senior executive and Mr Viner reported to him. Mr Lattin felt that he didn't have to convince Mr Viner as much as he had to convince Mr Gross. See also part 4.4 re Programming.
- In 1993 in Los Angeles in program contract negotiations with Columbia TriStar on behalf of Ten, Mr Gross and/or Mr Viner gave a guarantee on behalf of Mr Asper and/or CanWest.
- In October 1993 at a meeting in New Zealand attended by Messrs Lattin, Viner and Noble, Mr Viner advised Mr Lattin that Mr Ken Clark (CEO of TV3 NZ) would get the sack. TV3 NZ is a company which is managed by CanWest.
- In December 1993 Mr Doug Hoover, a CanWest employee, sent a facsimile transmission to Mr Lattin advising him that CanWest was trying to create a new sponsorship arrangement with McDonalds and that it would enhance their bidding if Ten would promise to run the program *The Toronto Father Christmas Parade*. Mr Lattin took the matter to Mr Viner and Mr Viner said: 'I don't see any harm in running it, there's nothing wrong with it is there?' Mr Lattin said: 'No.'
- In late 1994 Mr Viner met with Mr Asper in Toronto. When he returned he advised Mr Lattin of the meeting and said: 'There will be some reorganisation but I can't tell you anything yet'.

- Around late 1994 Mr Viner said to Mr Lattin: ‘You never know you and I might be going to England next to fix up the channel 5 situation.’ CanWest was at that stage researching the question of a bid for Channel 5 in the United Kingdom.
- In September/October 1994 at a meeting in relation to a pay-TV venture of interest to CanWest, Mr Asper discussed pay TV issues. At that meeting Mr Viner advised Ten executives that he thought the operation would be run from within Ten and they would be using resources or people in Ten. Mr Viner said: ‘I’ve told Izzy that you’d be doing it if we’re doing anything in Australia - that I want you doing the programming and formatting for the pay-TV networks.’
- Mr Lattin received a facsimile transmission from Mr David Asper advising Mr Lattin that CanWest wished to bid for Channel 5 in the UK and requesting Mr Lattin to address program matters. Mr Lattin took the matter up with Mr Viner who said, ‘Get some information on it.’

5.2.1 MR VINER’S ASSOCIATION WITH CANWEST AND HIS INDEPENDENCE FROM MR ASPER

Mr Lattin always felt that Mr Viner was part of the CanWest team and that his boss was Mr Asper.

Connections with CanWest

Evidence of Mr Viner

Mr Viner testified that his employment contract with CanWest was entered into in 1990 and provided for the option of taking up CanWest shares as part of an incentive scheme. Mr Viner was awarded options in CanWest, and he handed up those options in the autumn of 1993. Mr Viner still owns shares in his superannuation plan that he purchased when CanWest went public.

Mr Viner testified that he probably severed all ties with CanWest in the month of February 1993. He went back to Canada and resigned. It was publicly known in Canada that Mr Viner had resigned. He left CanWest because he thought there was a very interesting project in Australia and he wanted to become more involved in international broadcasting.

Mr Viner testified that CanWest’s feelings regarding his resignation were mixed. CanWest were disappointed on the one hand and on the other hand they felt there was an executive that they were familiar with going to be involved in a company that they had a significant economic interest in.

Mr Viner testified that he never sought Australian citizenship even though it was originally stated by Freehills that he would.

Relationship between Mr Viner and Mr Gross

In November 1994 an article appeared in the *Financial Post*, a Canadian publication, in which it was reported that Mr Asper said: 'When you buy a company that's 14,000 kilometres away you'd better be sure you send someone you trust to run it.'

The ABA sought comments from Mr Asper regarding the article. Landerer and Company, solicitors for Mr Asper, responded that the [above] quotation must be taken in context of the subject matter of the interview. They also maintained that Mr Asper's use of the phrase was colloquial usage consistent with the evidence that the appointment of Mr Viner [as CEO of TGL] was a decision of the whole Board of TGL, and that Mr Asper reluctantly agreed to it in his capacity as Mr Viner's employer at the time but welcomed it in his capacity as a Director of Ten. They added that Mr Asper continues to trust Mr Viner to act in the interests of Ten and that all this evidence has been given on oath. The ABA accepts this response.

Evidence of Mr Gross

Mr Gross testified that Mr Viner was the President of CanWest Broadcasting which was a subsidiary of CanWest and reported to Mr Gross during the due diligence period. When Mr Viner came to Australia in January the nature of the relationship changed. Mr Gross and Mr Viner worked as colleagues.

Relationship between Mr Asper and Mr Viner

In response to the question: 'Did he [Mr Asper] ever put pressure on you to act in a certain way in relation to Ten?' Mr Viner testified as follows:

No. No, he doesn't do that. He's not a - doesn't - his whole interest is in really corporate development issues and so forth, not really in operational issues. He's just - he doesn't do that, that's just not his style. He's not an operator himself, I am an operator. He'd be more interested to know things like should Ten invest in FM television, should Ten invest in Grundy, should Ten invest in - what's the cinema chain that was available, not Hoyt's but the other one? Maybe it was Hoyt's, you know, should Ten have an interest in that? Did I think there would be any - I don't even remember - these are the kinds of conversations, you know. Did I think we'd have more leverage with the studios if we were in the cinema business? Those are the kinds of issues that Mr Asper is interested in. Really not interested in what runs at 7.30 or who's head of news.

Evidence of Mr Asper

Mr Asper testified that Mr Viner may have consulted Mr Asper on issues relating to Ten during the period January to June 1993 but it would be rare that he would consult or discuss with Mr Asper the affairs of Ten per se during that period - that's the business of Ten.

Mr Viner did not indicate to Mr Asper what plans he had for Network Ten when he severed ties with CanWest. There was no game plan for Ten except conceptually at that point. Mr Viner would have to get inside on an intimate hour to hour basis before he could put forward a strategic plan.

Mr Asper testified that he discussed his conceptual views of where he thought Ten could go, with Mr Viner. When asked: 'Did you make any suggestions to Mr Viner as

to how he should be performing these duties at Ten?’ Mr Asper answered, ‘You don’t do that, no.’

He testified that Mr Viner may have consulted with him before he determined major issues. But he also added: ‘He consults probably with everybody. For example, we’re in the middle of something right now of significant commercial importance to Ten. I think I’ve talked to three or four directors, consulted them all. I think he probably consults on a lot of things, so yes, but not on a father confessor basis or pater familias or anything, no. Mr Viner is his own man. He does not brook interference with his job. He’s a professional. But on the other hand he’s smart enough to consult broadly.’

In response to the question: ‘Did Mr Viner ever perform any task for CanWest after July 1993?’ Mr Asper testified, ‘I can’t think of any. Hard to imagine that he could have. He was physically out of the country. It’s conceivable he might have done something that I don’t know about but it would not be material.’

Mr Asper testified that he never instructed Mr Viner, advised Mr Viner or requested Mr Viner to do anything with regard to TV3 or any other CanWest property. Mr Asper was assured these people talk to each other all the time, not just CanWest with Ten people but CanWest people with Nine people, and Seven people and Fox people and with all kinds of broadcasters all over the world. Mr Viner was under no instructions to do anything involving TV3 or Ten.

Mr Asper testified that over the three years or so he probably talked to Mr Viner several times but not in the carrying out of the consulting arrangement. Mr Asper was certainly available to Mr Gross and made his views known on everything to Mr Gross when asked or when Mr Asper felt moved to express himself, but the contact between CanWest and Network Ten was Stephen Gross and anything else would have been an exception.

Mr Asper also testified that he never gave advice to Mr Viner in respect of corporate development. He gave it to Mr Gross, but if he ran into Mr Viner or attended a board meeting with him and sat around with him having drinks or dinner Mr Asper would not be reticent about his views on development, anything facing the company. He like all other directors never was restricted in access to Mr Viner.

Consulting with the Ten Board and Executive Committee

Evidence of Mr Gross

Mr Gross testified that Mr Viner consulted with Mr Robert Whyte quite a lot and probably with Messrs Harris and Studdy regularly but not as much as he spoke to Mr Gross. Mr Viner probably would have told them what deal he had in mind and what he was going to do. Mr Gross was sure Mr Viner would have tried it out with a number of the executive committee members. Mr Gross was not certain that they would have come back to him and said, ‘That’s too much’, or ‘Did you cut this deal?’, or ‘Did you do this?’ in the detail that Mr Gross did, but he would have passed that stuff by them.

Evidence of Mr Harris

Mr Harris testified that before the transaction was completed, Mr Viner's name had been put forward as a potential chief executive by the Canadians. The reaction of the rest of the Board was 'yes he could be a candidate.' The board was concerned that if Mr Viner was given that role that he would act as a chief executive and not as some sort of Canadian proxy but they satisfied themselves over a period that that would not be the case. Mr Viner must come in as a Ten person and therefore not be considered or consider himself as a part of the CanWest team.

Mr Harris testified that in February 1993, he would have put Mr Viner as a Ten person and it'd been made clear to Mr Viner right from the start that if he was to take this role he was going to be a Ten person and the Board would hold him accountable to the Board and that he should not view himself in any way as responsible to the Canadians.

Mr Harris also testified that Mr Viner knew that he had to sever his connections and he had to be prepared to sever his connections with the Canadians at a very early point otherwise he could not be of any use to them.

Mr Harris testified that the Ten Board were quite concerned that from the point of view of their investment in Ten that Mr Viner understand that he would be reporting to the Ten Board and his responsibilities were to Ten. That was absolutely fundamental to the job. Nobody was anxious for Ten to become some sort of outpost of CanWest. The Ten Board simply did not want to see that happen. Mr Harris did not think the Canadians did either but the Ten Board were very insistent that they own the company and they would run the Board and Mr Viner would run a company on their behalf.

FINDINGS

Based on the evidence before it the ABA finds that:

172. *Mr Asper was not involved with the day to day running of Ten, which was Mr Viner's domain.*
173. *Mr Asper discussed with Mr Viner his broad conceptual views of where he thought Ten could go but did not direct Mr Viner as to how he should be performing his duties at Ten.*
174. *Mr Viner consulted broadly before making some decisions, including the directors of TGL such as Mr Harris, Mr Studdy and Mr Whyte and the executive committee generally. His consultations with Mr Asper were no different, in effect, to similar consultations with other directors of TGL.*
175. *TNQ, a shareholder in TGL, had directors on the Board, such as Mr Harris, who were interested in ensuring that Mr Viner act in the interests of TGL as a whole and that he not act on the directions, instructions or wishes of CanWest.*

5.2.2 COMMUNICATIONS BETWEEN MR VINER AND MR GROSS

Mr Lattin stated that there was extensive and regular phone calls from Mr Viner to Mr Gross in Canada. There was substantial fax correspondence between Mr Gross and Mr Viner. See part 4.4 re: Programming.

Evidence from Mr Viner corroborates Mr Lattin's evidence about the degree of communication but also explains the reasons for such communication.

Evidence of Mr Viner

Mr Viner testified that, during the period of July 1993 to July 1994, he would have spoken to Mr Gross some weeks every day, some weeks not at all, some weeks a couple of times. Early on Mr Viner contacted Mr Gross quite frequently, it tapered off after that. It could have been as much as five or six times a day if Mr Viner was real anxious. Mr Viner would try to get Mr Gross' opinion.

Mr Viner testified that he was a newly appointed CEO who had to learn the company, prepare a new business plan, try to inculcate a new philosophy, a new culture with people he didn't know well, with shareholders he didn't know well, with directors he didn't know well. Mr Viner sought Mr Gross' advice less and less as he became more confident and as he got to know the senior managers better or as he made better appointments. Mr Gross was also a personal friend of Mr Viner whom he had known for a very long time.

Mr Viner also testified that in relation to programming, including domestic programming issues, Mr Viner would have asked Mr Gross' opinion or said: 'Here's what I think. Here's what the management's recommending. What do you think? What's your point of view?' Mr Viner also sought the views of other directors. Mr Viner asked Mr Gross for his views because he was a director who was very knowledgeable in programming. Mr Viner would not have sought the other directors' views to the same extent on programming because they not as knowledgeable. Mr Viner had experience in programming but Mr Gross had more in international experience in relation to multi-million dollar deals: 'You ask everybody you think would have an intelligent point of view or help you make a better decision.'

Mr Viner's evidence is supported by Mr Gross.

Evidence of Mr Gross

Mr Gross testified that he and Mr Viner spoke two to three times a week, maybe more during the period of July 1993 to July 1994. They talked about a wide ranging number of topics that were concerning Mr Viner at the time or Mr Gross might raise matters, including news, programming, operations, staffing and financial results. They spent a fair amount of time talking about the programming schedule because there were a lot of issues involved in the schedule both in terms of Australian and foreign programming. They discussed strategies for how to program the station. Mr Lattin was involved in a lot of those conversations too.

Mr Gross testified that his expertise was much greater than Mr Viner's in terms of the international stuff. Mr Viner's background was sales. Mr Viner was originally head of sales for Global Television in the 70s and then became general manager of CKBU Television in Vancouver in the early 80s. Mr Viner had never negotiated major output deals on his own, whereas Mr Gross had been involved in that since 1986 on behalf of Global. Mr Gross oversaw the purchase of programs at Global and was involved in the negotiations of those programs: the financial negotiations and the legal negotiations. Mr Gross had a lot of experience in dealing with the distributors and knew all of the distributors personally. Mr Viner did not understand finance and that is a lot of Mr Gross' background. Mr Viner was getting fed a lot of stuff that just wasn't accurate. Mr Viner needed to have someone to discuss this kind of thing.

FINDINGS

On the basis of the evidence before it the ABA finds that:

- 176. *There was regular telephone and fax contact between Mr Gross and Mr Viner, particularly in the early part of 1993.*
- 177. *Mr Viner sought the opinion of Mr Gross on various issues.*
- 178. *Mr Viner also sought the views of other directors.*
- 179. *Mr Gross' views were not sought because Mr Viner was compelled to seek or to follow those views.*
- 180. *Mr Viner came to his own conclusion about matters.*
- 181. *When Mr Viner accepted Mr Gross' advice, he did so on the merits of the issue.*
- 182. *Mr Lattin was involved in some of the conversations.*

5.2.3 RELATIONSHIP BETWEEN MR VINER AND MR GROSS

Mr Lattin stated that Mr Viner reported to Mr Gross on most issues and that Mr Viner did not have a final say until he had conversed with Mr Gross. Mr Gross was like a de facto senior executive and Mr Viner reported to him. Mr Lattin felt that he didn't have to convince Mr Viner as much as we had to convince Mr Gross. See also part 4.4 re Programming.

Authority of Mr Gross over Mr Viner

Evidence of Mr Gross

In his testimony Mr Gross denied that Mr Viner would defer to him in the sense that Mr Viner would not make a decision unless Mr Viner had Mr Gross' opinion or advice. Peter Viner is a person with his own mind when it came to matters of Ten, Mr Gross said. When Mr Gross and Mr Viner didn't agree, Mr Viner did what he wanted to do, not what Mr Gross wanted to do. Sometimes Mr Viner would call to say: 'This is what is going on', other times he would advise, 'This is what I did'. Other times he'd say 'I'm troubled about this, I can't make up my mind' and they would kick it around and Mr Gross would say, 'Did you think of this, or did you think of that?'

Mr Gross testified that most of the time they ended in consensus as to what the appropriate behaviour was. If they didn't end in consensus, then it was Mr Viner's decision. Mr Gross never said to Mr Viner, 'Do this'. Mr Gross (a) didn't have power to do that and (b) Mr Gross wouldn't have done it anyway. Mr Viner had the final say. There were one or two matters that went to the board where they disagreed and the board decided. During, January/February/March, whilst Mr Viner and Mr Gross were consultants, if it was an operational matter Mr Viner would have the final say as to what their representation to the board should be. As they were consultants the only way that they could operate or do anything was through the board. Mr Viner was supervising the budget review task. In that process the CanWest people made recommendations to Mr Viner.

Evidence of Mr Viner

In response to the question: 'Did you expect to be independent of both Mr Asper and Mr Gross?' Mr Viner testified: 'Yes, I did.' In response to the question: 'Were you in fact independent of Mr Asper and Mr Gross?' Mr Viner answered: 'Yes I was.'

In response to the question: 'What conversations did you have with either Mr Asper or Mr Gross when you severed your ties with CanWest and started up with Ten?' Mr Viner testified: 'I mean I can't recall any, you know, specific - you know, we had conversations about the opportunity in Australia, we had conversations about opportunities in Canada, opportunities internationally.'

When asked: 'Were you given any directions by Mr Asper or Mr Gross regarding operations in Ten?' Mr Viner testified: 'Make a success of it, the similar directions I was given by other directors.'

Assistance provided by Mr Gross

Evidence of Mr Viner

Mr Gross met Mike Lattin and Mr Viner in Los Angeles to help structure a long term agreement with Columbia TriStar to replace the Fox agreement Ten had and thought they were about to lose. Mr Gross helped in mitigating the damage of the possible Fox deal. Mr Gross would have provided some advice on virtually all other key international programming deals including MCA, World Vision, and assisted in

relation to King World at Mr Viner's request. Mr Gross provided advice in relation to domestic program producers.

Mr Gross' assistance was not by way of actually negotiating the terms of these deals but rather he was in the room when they were negotiated and he participated. Mr Viner did most of the talking. Mr Gross' role in negotiating agreements was as an adviser and occasionally - on two or three occasions was present as part of the negotiating group. Mr Viner was in charge of the negotiations.

Areas of dispute between Mr Viner and Mr Gross

The evidence from Mr Gross' examination below supports the proposition that Mr Gross did not have the final say and accordingly did not exert authority over Mr Viner.

Evidence of Mr Gross

Mr Gross testified that Mr Viner was very lukewarm on buying NRTV which Mr Gross was very strong for. They disagreed on that and ultimately that went to the board. Mr Gross opposed the axing of the *Hinch* program and the decision to schedule the program *Level 23* at 6 o'clock. *Hinch* was subsequently axed and *Level 23* was scheduled at 6 o'clock

Mr Gross testified that he and Mr Asper were against joining PMT. There was a board meeting held to endorse or reject the idea of joining PMT. Mr Gross and Mr Asper were told that if they voted against it they would be out-voted.

Mr Gross testified that he had been promoting buying Frank Lowy's 50 per cent share of Capital. Mr Gross put it up to the board in January 1993 and again in March 1993 and they turned it down and it did not go to a vote. It was probably not even minuted. They went round the room and three or four people spoke against it and it was clear that if it went to a vote it would be lost so it never went to a vote.

Mr Gross testified that he and Mr Viner had a strong disagreement on the pricing of *Neighbours* which was being renewed. Mr Gross felt that Ten should have got it cheaper. Mr Gross' advice was that Ten should go to Grundy's and either get the price reduced significantly or alternatively tell them that Ten wanted a piece of the overseas sales, of the overseas revenue. The program was renewed; there was a bit of a price cut, but not very substantial.

Mr Gross testified that both he and Mr Viner liked *Heartbreak High* but in Mr Gross' view it was a similar argument to *Neighbours*. Mr Gross advised that Mr Viner should make a deal where Ten got 50 per cent of the overseas revenue. Ultimately Ten agreed to 25 per cent or something like that.

Mr Gross testified that in neither the *Neighbours* case nor the *Heartbreak High* case did he know what the deal was until the deal was done. He gave Mr Viner his suggestion. Mr Viner did a different deal and after he'd done it Mr Gross found out about it.

Mr Gross also testified that *E Street* was a very expensive program that didn't rate very well. 'When we arrived there they were having trouble with it already. Gary Rice was very upset with *E Street* and I think that he didn't think that it had much future.' There was an attempt by Messrs Lattin and Viner to reduce the price, to move it to one hour a week instead of two hours a week or to try and change the program which was unsuccessful. The director or the producer was not interested so the decision was made to axe it. Mr Gross was told by Mr Viner that they were considering axing it. Mr Gross' advice was that he didn't think the program was great. Mr Gross said, 'If you think that's the right thing to do then that's fine with me'. Mr Gross was told that it had been axed after it had happened.

FINDINGS

On the basis of the evidence before it the ABA finds that:

183. *Mr Viner formed his own judgements on matters relating to Ten.*
184. *When Mr Gross and Mr Viner disagreed, Mr Viner acted according to his own judgement.*
185. *The friendship between Mr Viner and Mr Gross did not enable Mr Gross to direct Mr Viner.*

5.2.4 NEGOTIATION OF COLUMBIA TRISTAR CONTRACT

In 1993 in Los Angeles in program contract negotiations with Columbia TriStar on behalf of Ten, Mr Gross and/or Mr Viner gave a guarantee on behalf of Mr Asper and/or CanWest.

Guarantee for Columbia TriStar

This matter is dealt with at 4.4.8.

5.2.5 SACKING OF CEO OF TV3 NEW ZEALAND

In October 1993 at a meeting in NZ attended by Messrs Lattin, Viner and Noble, Mr Viner advised Mr Lattin that Ken Clarke (CEO of TV3 NZ) would get the sack. TV3 NZ is a company which is managed by CanWest.

Evidence of Mr Viner

Mr Viner testified that he had a meeting with Mr Lattin and Mr Noble in New Zealand around that time but could not recall the conversation. Mr Viner knew that Ken Clarke was to leave TV3 in New Zealand. Mr Gross had told him. In addition Mr Viner had been involved with TV3 prior to being involved with Ten so he knew the players quite well. (Mr Noble had been at TV3 since CanWest was involved in TV3 as a shareholder.)

Mr Viner testified that he was in New Zealand because Mr Noble had interviewed two or three candidates for the position of Marketing Manager at TV3 but he couldn't decide and asked Mr Viner if he would help him. Mr Noble requested Mr Viner's opinion because Mr Noble respected Mr Viner's opinion. Mr Noble had worked with Mr Viner in CanWest as his number two. They had known each other for 10 years. Mr Noble was trying to select a Marketing Manager and that's Mr Viner's background. At that meeting Mr Viner and Mr Noble may have spoken about things the two might do together better.

FINDINGS

On the basis of the evidence before it the ABA finds that:

- 186. Mr Viner was not performing duties in New Zealand on behalf of Mr Asper or CanWest.*
- 187. Mr Viner was in New Zealand to assist a colleague, Mr Noble, in recruiting a marketing manager for TV3.*
- 188. This assistance was given on an informal and voluntary basis and was not done at the direction or instruction of Mr Asper, or CanWest.*
- 189. Mr Viner was aware of Mr Clarke's removal from his post of CEO of TV3 through conversations with Mr Gross and not through any employment for or on behalf of Mr Asper or CanWest.*

5.2.6 THE TORONTO FATHER CHRISTMAS PARADE

In December 1993 Mr Doug Hoover, a CanWest employee, sent a facsimile transmission to Mr Lattin advising him that CanWest were trying to create a new sponsorship arrangement with McDonalds and that it would enhance their bidding if Ten would promise to run The Toronto Father Christmas Parade. Mr Lattin took the matter to Mr Viner and Mr Viner said, 'I don't see any harm in running it, there's nothing wrong with it is there?' Mr Lattin said, 'No.'

This matter has been dealt with at 4.4.13.

5.2.7 TORONTO MEETING BETWEEN MR VINER AND MR ASPER

In late 1994 Mr Viner met with Mr Asper in Toronto. When Mr Viner returned he advised Mr Lattin of the meeting and said, 'There will be some reorganisation but I can't tell you anything yet.'

Evidence of Mr Asper

Mr Asper testified that he could not recall any discussions he had with Mr Viner around August 1994 about the re-organisation of Ten. Mr Asper did not even remember seeing Mr Viner. Mr Asper had never discussed the re-organisation of Ten with Mr Viner. He had no idea when Mr Viner would have talked to Mike Lattin about it.

Evidence of Mr Viner

Mr Viner testified that he was in Toronto in August 1994, on holiday with his daughter. He did not recall stating to Mr Lattin upon his return to Australia that Mr Asper had said that there would be some reorganisation of Ten. There was no subsequent reorganisation of Ten in any case.

Mr Viner testified that he met with Mr Asper among others at the offices of Global for the afternoon very reluctantly. Mr Asper requested that he come into the offices and meet with Mr Asper and somebody else. He did not recall who that person was and was not sure what the subject matter was. Mr Viner felt it might have been just that Mr Asper wanted a general update because he came out to Australia less frequently than he had in the past. Mr Viner could not recall the meeting being about anything momentous.

Mr Viner testified that he was in the general vicinity and Mr Asper invited him to come in and talk for a couple of hours. It was likely that there was no specific reason for meeting other than Mr Asper knew he was available. Mr Asper hadn't seen Mr Viner in a while and wanted to talk to him about Ten issues. When Mr Asper comes to Australia he's generally very busy and comes for three or four days. There's often not a chance, other than on the hop or in a meeting, to sit down and say how's it going. It may well have been he just simply wanted to talk to Mr Viner, to find out how he felt it was going and some issues that Mr Asper may not have had a chance to discuss with Mr Viner.

Mr Viner also testified that over the past year he met with Mr Asper overseas twice. Once was on a trip in January 1995 at a party for the television executives.

FINDINGS

On the basis of the evidence before it the ABA finds:

190. *It is not clear what was discussed between Mr Viner and Mr Asper during the few occasions on which they met in Canada.*
191. *There was no reorganisation at Ten subsequent to those meetings.*
192. *There is no evidence beyond Mr Lattin's assertion to support a conclusion that Mr Asper had instructed Mr Viner to reorganise the Ten network.*

5.2.8 BID FOR CHANNEL 5 IN THE UK

Around late 1994 Mr Viner said to Mr Lattin, 'You never know, you and I might be going to England next to fix up Channel 5 situation.' CanWest was at that stage researching the question of a bid for Channel 5 in the United Kingdom.

This allegation was put to Mr Viner who responded as follows:

ABA: *Did you ever make such a statement or words to that effect?---***Mr Viner:** No, I don't think so. Channel 5 was not and will not be awarded until the end of 1995 so it seems odd that I would have speculated on that a year ago.

FINDINGS

On the basis of the evidence before it the ABA finds:

193. *If the statement, 'You never know, you and I might be going to England next to fix up the Channel 5 situation,' was in fact made, it would not suggest that Mr Viner was acting under the direction or instruction of Mr Asper or CanWest.*
194. *Mr Lattin did not go to the United Kingdom to assess the Channel 5 situation.*

5.2.9 PAY TV ISSUES

In September or October 1994, at a meeting in relation to a pay TV venture of interest to CanWest, Mr Asper discussed pay TV issues. At that meeting Mr Viner advised Ten executives that he thought the operation would be run from within Ten and they would be using resources or people in Ten. Mr Viner said, 'I've told Izzy that you'd be doing it if we're doing anything in Australia - that I want you doing the programming and formatting for pay TV networks.'

Evidence of Mr Asper

Mr Asper testified that CanWest had a team of people in Australia on Australian pay television. Ten didn't pay five cents for it. The team worked for weeks on pay television opportunities for Ten.

The way it was explained to Ten was, 'We're going to do this work, it's for you. Nobody says you have to pay for it. If you don't want it then we'll look at it for ourselves.'

There may have been proscriptions on whether Ten could do it and there were also non-competition clauses in their divorce from PMT.

Mr Asper testified that the project was to be with CTS and Lynton Taylor's company and Telecom. Ten personnel were involved very modestly. Warren Lee and Peter Myers and others did some work on it. Warren Lee was peripherally involved for a few days. Some of the Ten financial people did some numbers in order to evaluate the investment. CanWest weren't reimbursed, Ten weren't reimbursed. The board of Ten approved it. They said, 'Yes, we endorse this project and you do the work on it, we'll work with you and you'll present it to us and if we like it we'll do it.'

Mr Asper testified that that was a project that CanWest was interested in for Ten, not for CanWest, but if Ten didn't want to do it or if Ten couldn't do it then CanWest would have looked at the idea of doing it for CanWest.

Mr Asper provided written reports to the board and to the shareholders of Ten discussing the project at least once or twice during the process. CanWest's President of Corporate Development in Canada, Joanne McKenna, made at least one or two appearances before the Ten board. Mr Asper made one. They brought along to the Ten board at least one Cable Television engineer to advise them how the thing worked.

Evidence of Mr Viner

Mr Viner further was read the following portion of Mr Lattin's transcript: 'Viner enlightened us more on that in that he thought that the operation would be run from within Ten and that we would be using resources of people in Ten and he particularly focussed on me as one of the resources being in a position of not only programming for Ten but also programming for the pay networks.'

Mr Viner was asked: 'Did you make such a suggestion?' and in response he testified: 'No, I didn't but ... one of the advantages of that or any kind of second service is that it simply gives you more leverage with the program suppliers in that it would have been very much to Mike's advantage and to Ten's advantage to be in that position.'

He was asked: 'If Ten was in that position would Ten have been recompensed for those services, was that your expectation?' and he responded: 'Yes, certainly, if there had been any consistent or hard services from Ten, ie the distribution or anything else came out of Ten, absolutely. But it would have never gone anywhere near that. The deal was ugly initially, became moderately less ugly but ended up being ugly.'

As to the use of Ten resources Mr Viner testified: 'In CanWest's examination of that pay TV venture, executives' opinions were sought free of charge. There were a number of meetings at which the executives' opinions were sought in terms of the

media landscape, the possibilities for pay. Similar meetings were held with other non-CanWest related parties.'

Mr Viner testified that: 'Ten initially was a little bit of interested in that pay TV venture. At the time it was clear that PMT was going to implode and the directors were anxious and nervous about Ten not participating in pay TV in any form. When Lynton Taylor (CTS) was looking for financing it was put to Ten. I didn't like that particular idea because it was a version of an idea that Telecom had presented to PMT. But there was some pressure from the directors saying: we should be in pay TV, that's the next frontier and examine every possibility diligently. Mr Asper was recommending that Ten be involved if the proposal could be radically altered it was worthy of a second consideration.

In response to the suggestion by Mr Lattin that Mr Viner had told Mr Asper that Mr Lattin would be doing the programming and formatting for the pay TV networks, Mr Viner said: 'No, but I said, certainly said that Mike was capable of advising on it and could make a contribution but it's too big a job, Mike could not have done both and you're talking about in terms of scope of businesses ... one that is quite huge and one that's kind of very, very small but labour intensive. No way I would encourage an executive to spend any time, if I could use this analogy, programming Bendigo when he's supposed to be programming a national network. If the deal had gone forward CanWest would have only owned 50 per cent. If there was a commercial advantage to this group to be associated with Ten, they would have been charged.'

FINDINGS

On the basis of the evidence before it the ABA finds that:

195. *CanWest examined a pay TV venture for its own purposes but with the intention of offering Ten an option, if it so desired, of becoming involved in the investment.*
196. *The Ten Board were initially interested in the venture at least in terms of exploring it as a possible option for Ten.*
197. *The Board approved of the involvement of Ten staff in assisting the CanWest personnel in their attempt to analyse the investment and structure an appropriate arrangement. Mr Asper provided written reports to the board and to the shareholders of Network Ten discussing the project at least once or twice during the process, as did CanWest's President of Corporate Development in Canada, Joanne McKenna.*
198. *The assistance of Ten executives was minimal.*
199. *Even if Mr Viner suggested that the pay TV venture would be run from within Ten, this would not indicate that he was under the direction or instruction of Mr Asper or CanWest. It is clear that to the limited extent that such resources were used, the Board of Ten were aware of and approved their use. This knowledge and approval would probably not have been known to Mr Lattin.*

200. *Mr Viner admitted that he had suggested that Mr Lattin was capable of advising on the pay TV venture and could make a contribution but that suggestion did not amount to a promise that he would do the programming for the pay TV network as well as doing the programming for the Ten licences. This evidence does not indicate that Mr Viner was acting under the direction or instruction of Mr Asper but indicates that he was quite willing to offer or suggest limited advice or assistance to CanWest or Mr Asper.*

5.2.10 PROGRAMMING FOR CHANNEL 5 IN THE U.K.

Mr Lattin received a facsimile transmission from David Asper advising Mr Lattin that CanWest wish to bid for Channel 5 in the UK and would Mr Lattin address program matters. Mr Lattin took the matter up with Mr Viner who said, 'Get some information on it.'

In response to that allegation Mr Viner said words to the following effect:

Mr Lattin was asked to give his opinion on programming available or programming direction. I don't think Michael would have asked my permission. I think what's more likely he said David called and asked me and blah, blah, blah. I'm going to think about it.

FINDING

On the basis of the evidence before it the ABA finds that:

201. *Mr Lattin was not directed by Mr Viner to provide the information to David Asper. As such it could not be said that Mr Viner in directing Mr Lattin to provide the information was acting under the direction or instruction of Mr Asper, CanWest or any officer of CanWest.*

5.3 IS MR VINER A FOREIGN PERSON FOR THE PURPOSES OF THE ACT?

The definition of a foreign person in the Act includes a natural person who is not an Australian citizen. In its inquiry the ABA found that Mr Viner was not an Australian citizen despite assurances given by Freehill Hollingdale and Page Solicitors (Ten's legal advisers) to the ABA that he would become an Australian citizen in the early part of 1993. The ABA found in its inquiries that Mr Viner had significant influence, as CEO, over the affairs of TGL.

Section 57 prohibits a foreign person from being in a position to exercise control of a commercial television broadcasting licence. However, clause 2(3) of Schedule 1 provides:

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.

Evidence of Mr Viner

Mr Viner testified that he was not an Australian citizen and he has not taken any steps to become an Australian citizen. He is the CEO for NTL and the Ten subsidiaries.

Mr Viner is an employee of a holding company of those licensee companies. Advice was sought from Mr Bret Walker SC in this regard and the following advice was received:

In my opinion these provisions [clause 2(3)] should be read as a statutory reminder that the mere fact of employment should not be treated as constituting a person being in a position to exercise control etc. That is, the legislature recognised that certain very senior employees are, by dint of their important positions, in practical charge of many corporate operations but that nevertheless the reality of the delegation by which such employees exercise that measure of 'control' prevents them from exercising the kind of control proscribed by the Act by reason of their employment alone. It is important to emphasise the last word viz, 'alone' in that last sentence.

The material [collected by the ABA] does not support a view that Mr Viner exceeded his delegation, or exercised any kind of control beyond that appropriate to his position as an employee, albeit a very senior and responsible employee.

Based on clause 2(3) of Schedule 1 and this advice, the ABA concludes that Mr Viner, a foreign person for the purposes of the Act, is not in a position to exercise control of TGL or the licensee companies merely by virtue of his position as CEO of TGL.

CONCLUSION

The ABA concludes that:

Mr Viner did not follow the directions, instructions or wishes of Mr Gross, Mr Asper or any other person associated with CanWest;

Mr Viner was not an associate of CanWest or Mr Asper, or Mr Gross; and

the regular contact of Mr Viner and Gross does not indicate that Mr Gross controlled Ten through Mr Viner. There is no evidence to suggest that Mr Gross used this contact to give Mr Viner directions or instructions or exercise any restraint over Mr Viner with regard to any substantial issue affecting the management or affairs of TGL or the licensee companies

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Appendices

APPENDIX A

EXTRACTS FROM SCHEDULE 1 OF THE BROADCASTING SERVICES ACT 1992

PART 2 - WHEN PERSON IS IN A POSITION TO EXERCISE CONTROL

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.

APPENDIX B

DIRECTORS OF TGL, NTL AND THE LICENSEE COMPANIES: SINCE 30 DECEMBER 1992

Director	Date Appointed (Resigned)				
	TGL	NTL	TTL (Brisbane)	TTL (Sydney)	TTL (Melbourne)
Mr I Asper	16.11.92	30.12.92	1.2.93	1.2.93	1.2.93
Mr G Chapman	30.12.92	30.12.92	1.2.93	1.2.93	1.2.93
Mr J Cowin	30.12.92	30.12.92	1.2.93	1.2.93	1.2.93
Mr L Freedman	10.3.94	13.4.94	13.4.94	13.4.94	13.4.95
Mr P Gleeson	30.12.92 (10.3.94)	30.12.92 (13.4.94)	1.2.93 (13.4.94)	1.2.93 (13.4.94)	1.2.93 (13.4.94)
Mr S Gross	30.12.94 (7.9.94)	30.12.94 (7.9.94)	1.2.93 (27.4.93)	1.2.93 (27.4.93)	1.2.93 (27.4.93)
Mr P Harris	30.12.94	30.12.94	1.2.93	1.2.93	1.2.93
Mr P Liba	28.10.94	28.10.94	-	-	-
Mr I Leibler	30.12.92	30.12.92	1.2.93	1.2.93	1.2.93
Mr G Levy	8.2.95	8.2.95	8.2.95	8.2.95	8.2.95
Mr M Lloyd-Jones	-	-	19.7.91 (1.2.93)	19.7.91 (1.2.93)	19.7.91 (1.2.93)
Mr D Manor	27.1.93 (10.3.94)	30.12.92 (13.4.94)	1.2.93 (13.4.94)	1.2.93 (13.4.94)	1.2.93 (13.4.94)
Mr B Sherman	10.3.94	13.4.94	13.4.94	13.4.94	13.4.94
Mr J Singleton	30.12.92 (5.10.93) 9.2.94 (20.4.94)	30.12.92 (5.10.93) 9.2.94 (20.4.94)	1.2.93 (5.10.93) 13.4.94 (20.4.94)	1.2.93 (5.10.93) 13.4.94 (20.4.94)	1.2.93 (5.10.93) 13.4.94 (20.4.94)
Mr J Studdy	4.5.93	4.5.93	4.5.93	4.5.93	4.5.93
Mr P Viner	-	23.4.93	23.4.93	23.4.93	23.4.93
Mr R Whyte	30.12.92	30.12.92	1.2.93	1.2.93	1.2.93

