CanWest's control of TEN

John Corker reports on the Federal Court's first decision under the *Broadcasting Services Act* 1992 that deals with the concept of control of a broadcasting licence.

In CanWest Global Communications Corporation ("**CanWest**") and Donholken Pty Ltd and Selli Pty Ltd v Australian Broadcasting Authority ("**ABA**"), a judgement of Hill J handed down on 8 August 1997, the Federal Court has given a clear indication that the phrase, "in a position to exercise control" of a licence, company, newspaper or control of votes cast at a meeting of the company is to be interpreted broadly.

Hill J, in determining whether there was a reviewable error made by the ABA in its finding that CanWest, a foreign person, was in a position to exercise control of Ten Group Ltd ("**TGL**") has relied strongly on the judgement of the Full Federal Court in the case of *Re Application of The News Corp Ltd* (1987) 15 FCR 227 (*News Corp* case) and reaffirmed that:

> *"questions of control, whether through voting power or financial interests, are to be determined by practical and commercial considerations rather than highly refined legalistic tests. The relevant provisions of the Act [Broadcasting Act 1942] are not directed to or concerned with subtleties of company law."*

This is entirely appropriate as it is the *News Corp* case upon which the control rules of the BSA were based. Hill J, in adopting the above quote of Lockhart J says that "the same may with **even greater force** be said of the present legislation".

Two companies, Selli and Donholken were established at the behest of CanWest to hold shares in the TEN Group Limited which might otherwise have fallen into the hands of persons described by Mr Izzy Asper, Chairman and Chief Executive of CanWest as "anti-bodies, mischief makers or stupid people". The *News Corp* case approach led Justice Hill to comment on the two companies:

> *"Where a company is established in circumstances that its sole business is the holding of shares in another company where every substantial question which could in that company arise for decision requires the consent of the foreign person, where the foreign person carries substantially all of the financial risk and where the foreign person can act to ensure that both the shareholders and directors can be replaced by persons who might be expected to do the bidding of the foreign person if the existing shareholders and directors do not, **common sense and reality** permits of only one conclusion, namely that the shares held by the special purpose company are under the control of the foreign person."*

This concept of common sense and reality or "commercial and economic reality rather than of legal theory" was endorsed by Hill J in a number of areas of the judgement.

The first of these was in the acceptance of the ABA's finding that CanWest had a 52.5% voting interest by reason of it being in a position to exercise control of votes cast by Selli and Donholken at a general meeting of TGL. The ABA had not found that there was any agreement or understanding between CanWest and the directors of Selli or Donholken as to way votes might be cast. Nor had it found that CanWest had an immediately enforceable right to determine the way that the votes were cast. The ABA had relied on an overall factual matrix of control to make the voting interest finding.

Hill J said:

> *"Normally where control is not direct through trusts or shareholdings, it would be necessary for the Authority to reach a conclusion as to whether an arrangement as to the exercise of votes existed without which a finding of control could not be reached. Certainly it would have been open to the Authority so as to find in the present case, just as it was also open to the Authority to find that there was no necessity for any understandings or arrangements to have been arrived at because of the straightjacket in which the Selli and Donholken directors and shareholders were placed... So tight was the control that there was, in my view, no need in this case to make a finding of arrangement."*

COMPANY INTERESTS

One aspect of this judgement that may cause media lawyers to re-consider how transactions and corporate structures in the media sector might be planned is the confirmation that the concept of de facto rather than legal control applies not only in the area of control of a licence, company or newspaper but also in the area of company interests, particularly in the area of voting interests. Hill J specifically says:

> *"The alternative test of "shareholding interest" must likewise be construed broadly, having regard to the definition of "control" in s.6(1) of the Act."*

It is suggested that he means company rather than shareholding interest as the deemed 15% company interest level is the alternative test of control.

But what seems to follow from this is that the definition of control, which includes legal and equitable rights but also arrangements, understandings and practices, whether or not enforceable, is to be given considerable weight wherever it appears in the Act. It further follows that this de facto control should be borne in mind when assessing whether certain interests are company interests and their quantum. This seems appropriate because measuring company interests is a means of measuring control, not just a technical concept.

QUALIFYING REQUIREMENTS

One of the most difficult aspects for the ABA in assessing the transaction documents was to consider the effectiveness of clauses that seek to stop interests arising, obligations becoming binding or powers to convert being operable unless the interest, obligation or power arises or can be exercised without breaching of foreign control and ownership legislation.

There were a large number of these types of clauses. The ABA took the view that certain of these provisions were not effective in preventing the ABA from

finding that a situation of possible control existed and would therefore not operate in practice to prevent a breach of the control provisions occurring. The judgement sets out a number of these clauses and decides that one such clause does not have the effect intended by its drafter.

Hill J says:

> *"In my view the qualifying requirements clause does not require a contrary conclusion. ... I do not say that it is a sham or that it would be consciously ignored by the parties to the various agreements, but the practical result is that CanWest can, at any stage ensure that options are exercised or debentures converted to ensure that shares in Selli and Donholken are held by persons, who although not controlled by CanWest are known to be sympathetic to that company."*

It seems therefore that the ABA can look behind these "qualifying requirements" and consider the practical and commercial effect of them on the conduct of the parties in determining whether they will prevent a company interest or control arising.

CONCLUSION

The concept of control under the BSA, whether it appears as part of a company interest test or in determining whether a person is in a position to exercise control of a company, licence or newspaper, is to be interpreted broadly. There is no need for an immediately enforceable right to exist nor even any need for any implicit or explicit understanding or arrangement to exist between the person who is in the position and the entity that may be controlled. The primary means by which control questions under the BSA are to be determined is the one elicited by Lockhart J in the *News Corp* case. They are to be determined by practical and commercial considerations, by commercial and economic reality rather than by legal theory.

[Note: An appeal has been lodged against this decision to the Full Federal Court.]

John Corker is Manager, Legal of the ABA. The views contained in this article of those of the author only, not the views of the ABA.

Media Policy and Anti-siphoning

In the first of a 2 part series on anti-siphoning, Brendan Moylan analyzes the current legislative and policy regime and explains why it is unfair on pay TV operators and in need of substantive reform

After the dust of the media ownership debate has settled, it appears that once again nothing is to be done about the anti-siphoning provisions found in section 115 of the *Broadcasting Services Act* 1992 (Cth) ("BSA"). After a brief flurry of interest at the time of the recent Ashes Tour of England, the issue of how to address the problems inherent in the anti-siphoning provisions of the BSA has been side stepped by a Government which has demonstrated a singular inability to act decisively in the area of media policy. Nonetheless, those problems still exist: section 115 continues to operate unfairly in favour of free-to-air broadcasters without providing any consequent benefit for consumers.

SIPHONING DEFINED

According to the Explanatory Memorandum to the BSA, "siphoning" involves the:

> *"obtaining by a subscription television broadcasting licensee of the rights to broadcast events of national importance and cultural significance that have traditionally be televised by free-to-air broadcasters, such that those events could not be received by the public free of charge".*

In other words, siphoning is the migration of programming from free-to-air television exclusively to pay TV. An "event" can only be "siphoned" where:

(a) the *exclusive* rights to televise that event are acquired by a pay TV operator;

(b) the event is one of "national importance and cultural significance"; and

(c) the event is one which is traditionally shown by free-to-air broadcasters at no charge.

Siphoning is characteristic of events with a short "shelf life": ie, events which have high viewer demand over a short time period, most obviously sporting events[1].

LEGISLATIVE INTENT & MEASURING SUCCESS

At the time section 115 was introduced, the then Minister for Communications and the Arts observed that "for at least 5 years, less than 20% of Australians will have access to pay TV". The Australian Broadcasting Authority ("ABA") has noted on a number of occasions that a significant proportion of the viewing public will choose not to subscribe to pay TV at any time, whether for financial or other reasons. Section 115 was introduced on ostensibly equitable grounds to ensure that non-subscribers continued to have access to events of "national importance and cultural significance" which had been traditionally shown on free-to-air television.

In determining whether the anti-siphoning provisions operate effectively the first question to ask is whether the legislation has prevented pay TV operators from obtaining exclusive rights to events of "national importance and cultural significance" which had been traditionally shown on free-to-air television so that those events are no longer seen on free-to-air television. The second question to ask is at what cost this end has been achieved and whether it could be achieved more efficiently.

RELEVANT PROVISIONS

The principal anti-siphoning provision of the BSA is section 115, which provides: