

INVESTIGATION INTO CONTROL

CanWest Global Communications Corporation/
The Ten Group Ltd

Second investigation

A report on the Australian Broadcasting Authority's
investigation into a possible breach of
part 5 of the *Broadcasting Services Act 1992*,
by CanWest Global Communications Corporation

Australian Broadcasting Authority
Sydney, NSW
April 1997

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CONTENTS

COMMON ABBREVIATIONS	5
ALPHABETICAL LISTING OF PERSONS REFERRED TO IN REPORT	6
LIST OF PERSONS EXAMINED BY THE ABA	7
CHRONOLOGY	8
1. BACKGROUND	11
2. COMPANY INTERESTS OF CANWEST IN TGL	19
2.1 VOTING INTERESTS OF CANWEST IN TGL	20
2.2 DIVIDEND INTERESTS OF CANWEST IN TGL	104
2.3 SHAREHOLDING INTERESTS OF DSK IN SELLI, DONHOLKEN, NUMERATION OR TURNAND	107
3. FOREIGN CONTROL OF THE TEN LICENCES	109
3.1 IS CANWEST A FOREIGN PERSON?	110
3.2 DEEMED CONTROL - CANWEST'S COMPANY INTERESTS IN TGL	113
3.3 OTHER MEANS OF CONTROL	114
4. CONCLUSION	169

COMMON ABBREVIATIONS USED IN THIS REPORT

ABA	Australian Broadcasting Authority
the BSA	<i>Broadcasting Services Act 1992</i>
Audant	Audant Communications Pty Ltd
Belshaw	Belshaw Pty Ltd
CanWest	CanWest Global Communications Corp.
CGS Shareholding	CGS Shareholdings (Netherlands) B.V.
Copplemere	Copplemere Pty Ltd
Corom	Corom Pty Ltd
Donholken	Donholken Pty Ltd
DSK	Drie Sterren Kapitaal (Nederland) B.V.
FATA	<i>Foreign Acquisition and Takeovers Act 1975</i>
Leibler Media Holdings	Leibler Media Holdings Pty Ltd
Jacomo	Jacomo Pty Ltd
Murdon	Murdon Business Pty Ltd
Numeration	Numeration Pty Ltd
Pacific Communications	Pacific Communications Pty Ltd
Rosendale	Rosendale Investments Pty Ltd
Rusalka	Rusalka Pty Ltd
Selli	Selli Pty Ltd
TGL	The Ten Group Limited
TNQ	Telecasters North Queensland Limited
Turnand	Turnand Pty Ltd
Winston	Winston Capital Inc

ALPHABETICAL LISTING OF PERSONS REFERRED TO IN THIS REPORT

Arnold Bloch Leibler	Solicitors for Selli
Arthur Robinson & Hedderwicks	Solicitors for Donholken
Atanaskovic Hartnell	Solicitors for TNQ
Israel Asper	Deputy Chairman and Director of TGL, Chief Executive Officer and Chairman of CanWest
David Asper	Son of Mr Israel Asper and Vice-President, Programming, CanWest
Jack Cowin	Former Director of TGL and Chairman of Corom
Clayton Utz	Solicitors for CanWest
Melda Donnelly	Director of Murdon, Chairperson of Donholken and Director of TGL
Joan Fogarty	Director of DSK
Anthony Hollis	Director of Rusalka and Director of Donholken
Richard Kennett	Director of Jacomo, Director of Donholken and Director of TGL
Isi Leibler	Director of Leibler Media Holdings, Director of Turnand, Director of Selli and Director of TGL
Yale Lerner	Legal adviser to and Chief Executive Officer of CanWest International Communications Inc.
Geoffrey Levy	Former Director of TGL and Director of Singleton Group Limited
Minter Ellison	Solicitors for Mr Anthony Hollis
John Moutsopoulos	Solicitor at Clayton Utz
Mervyn Peacock	Director and Head of Marketable Securities, AMP Investments Australia Ltd
Andrew Robson	Solicitor at Arthur Robinson & Hedderwicks
John Singleton	Former Director of TGL and Chairman of Belshaw
Steven Skala	Director of Numeration, Director of Copplemere, Director of Selli and Director of TGL
Thomas Strike	Executive Vice-President of CanWest and Managing Director of DSK
Brad Unsworth	Director of DSK
Robert Whyte	Former Director of TGL and Chairman of Audant

LIST OF PERSONS EXAMINED BY THE ABA

The following persons have been examined:

18 December 1996	Mr Steven Skala
18 December 1996	Mr Isi Leibler
19 December 1996	Mr Israel Asper
20 December 1996	Mr Mervyn Peacock
23 December 1996	Mr Geoffrey Levy
17 January 1997	Mr Steven Skala
22 January 1997	Mr Tom Strike
23 January 1997	Ms Melda Donnelly
24 January 1997	Mr Yale Lerner
20 February 1997	Mr Anthony Hollis
24 February 1997	Mr Richard Kennett

CHRONOLOGY

- 5 October 1996 CanWest put forward a proposal to Leibler Media Holdings and Copplemere under which shares in TGL held by those companies could be disposed of. This was the outline of the arrangement which was put into place in November 1996. Draft documents were provided to lawyers acting for Leibler Media Holdings and Copplemere.
- 10 October 1996 Belshaw gave notice to TGL shareholders that it sought to dispose of its 4,550,001 shares in TGL.
- 29 October 1996 Selli, Numeration and Turnand were incorporated in the Australian Capital Territory.
- Selli entered into an agreement with DSK under which DSK would be issued participating and convertible debentures in Selli.
- Leibler Media Holdings and Copplemere granted DSK a call option over the voting shares held by them in Selli.
- 1 November 1996 Copplemere and Leibler Media Holdings granted DSK a call option over their voting shares in Turnand and Numeration.
- 6 November 1996 Selli, Turnand, Numeration and Lintondale Pty Limited (Trustee) entered into an agreement - Debenture Stock Trust Deed- under which DSK was granted a charge over the assets of Selli, Turnand and Numeration.
- 8 November 1996 Leibler Media Holdings exercised its pre-emptive rights under the TGL Share Subscription Agreement and acquired 189,583 of Belshaw's TGL shares.
- CanWest nominated Selli as the purchaser of the TGL shares offered for sale by Belshaw. Selli acquired 4,360,418 of those TGL shares.
- Leibler Media Holdings and Copplemere assigned their rights and obligations arising under the TGL Share Subscription Agreement to Turnand and Numeration respectively.
- Leibler Media Holdings transferred to Turnand the 189,583 TGL shares acquired from Belshaw. Leibler Media Holdings transferred to Turnand its existing 2,275,000 TGL shares.
- Copplemere transferred to Numeration 375,000 TGL shares.

	Selli issued to DSK 908,293 convertible debentures and 90,829,240 participating debentures
26 November 1996	Corom and Audant gave notice to TGL shareholders that they sought to dispose of their shares in TGL. Audant held 4,574,999 and Corom held 4,550,000 shares in TGL.
11 December 1996	CanWest nominated Selli as the purchaser of the shares in TGL offered for sale by Audant and Corom.
9 January 1997	Donholken was incorporated.
10 January 1997	Donholken and DSK entered into an agreement under which DSK would be issued participating and convertible debentures in Donholken.
	Donholken and DSK entered into an agreement - Debenture Stock Trust Deed - under which DSK was granted a charge over the assets of Donholken.
	Donholken acquired the TGL shares held by Corom and Audant.

1.



Background

THE INVESTIGATION

The Australian Broadcasting Authority (the ABA) has conducted an investigation into whether the provisions of Part 5 of the *Broadcasting Services Act 1992* (the BSA) are being complied with in relation to the following commercial television broadcasting licences:

Television and Telecasters (Sydney) Pty Ltd (TEN)
Television and Telecasters (Melbourne) Pty Ltd (ATV)
Television and Telecasters (Brisbane) Pty Ltd (TVQ)
Network Ten (Adelaide) Ltd (ADS)
Network Ten (Perth) Ltd (NEW) (The Ten licences)

In particular, the ABA has been investigating whether there has been a breach of s57 of the BSA.

Section 57 of the BSA provides:

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

On 8 November 1996 three shareholders in The Ten Group Limited (TGL), Copplemere Pty Ltd (Copplemere), Leibler Media Holdings Pty Ltd (Leibler Media Holdings) and Belshaw Pty Ltd (Belshaw) sold TGL shares into a new group of companies established for the purpose of holding the shares. The main company in the group was Selli Pty Ltd (Selli).

On 8 November, Selli and its two subsidiaries, Numeration Pty Ltd (Numeration) and Turnand Pty Ltd (Turnand) acquired TGL shares from Copplemere, Leibler Media Holdings and Belshaw. Each of the purchases was financed by Drie Sterren Kapitaal (Nederland) B.V. (DSK), a subsidiary of CanWest Global Communications Corp. (CanWest).

On 27 November 1996 Selli purchased TGL shares from Winston Capital Inc (Winston). This purchase was funded by DSK.

On 10 January 1997, a new company called Donholken Pty Ltd (Donholken) purchased TGL shares from Audant Communications Pty Ltd (Audant) and Corom Pty Ltd (Corom). This purchase was funded by DSK.

These transactions are the subject of this investigation.

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

A draft report was provided to the legal advisers of CanWest, Selli, Donholken and Mr Anthony Hollis for comment on March 7 1997. Submissions on the draft report were requested by March 22 1997 and were received by that date. Requests by some parties for an extension beyond that date were refused, in light of the public interest in expeditiously resolving the questions raised.

Selli Transaction Documents

1. Convertible Debentures Deed between Drie Sterren Kapitaal (Nederland) B.V. and Selli Pty Ltd dated 29 October 1996 (Selli Convertible Debentures Deed).
2. Participating Debentures Deed between Drie Sterren Kapitaal (Nederland) B.V. and Selli Pty Ltd dated 9 October 1996 (Selli Participating Debentures Deed).
3. Call Option Deed (Selli Pty Ltd Shares) between Copplemere Pty Ltd and Drie Sterren Kapitaal (Nederland) B.V. dated 29 October 1996.
Call Option Deed (Selli Pty Ltd Shares) between Leibler Media Holdings Pty Ltd and Drie Sterren Kapitaal (Nederland) B.V. dated 29 October 1996.
(The Selli Call Option Deeds)
4. Call Option Deed (Copplemere Pty Ltd Shares) between Copplemere Pty Ltd and Selli Pty Ltd dated 1 November 1996 (Copplemere Call Option Deed).
5. Call Option Deed (Leibler Media Holdings Pty Ltd) between Leibler Media Holdings Pty Ltd and Selli Pty Ltd dated 1 November 1996 (Leibler Media Holdings Call Option Deed).
6. Debenture Stock Trust Deed entered into between Selli Pty Ltd, Turnand Pty Ltd, Numeration Pty Ltd and Lintondale Pty Limited [now Security Holdings Corporation of Australia Pty Limited] as Trustee, dated 6 November 1996 (Selli Trust Deed).

Donholken Transaction Documents

1. Convertible Debentures Deed between Drie Sterren Kapitaal (Nederland) B.V. and Donholken Pty Ltd dated 10 January 1997 (Donholken Convertible Debentures Deed).
2. Participating Debentures Deed between Drie Sterren Kapitaal (Nederland) B.V. and Donholken Pty Ltd dated 10 January 1997 (Donholken Convertible Debentures Deed).
3. Call Option Deed between Murdon Business Pty Ltd and CGS Shareholding (Netherlands) B.V. dated 10 January 1997 (Donholken Call Option Deed).
4. Debenture Stock Trust Deed between Drie Sterren Kapitaal (Nederland) B.V. and Donholken Pty Ltd dated 10 January 1997 (Donholken Trust Deed).

The *Broadcasting Services Act 1992* (the BSA)

The BSA 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 the most influential of the services regulated by the BSA.

Foreign ownership and control under the BSA

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

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 BSA

In recognition of the increasing complexity of corporate structures, the rules in the BSA 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 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 BSA (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 BSA. 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 BSA 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 BSA (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 BSA 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 BSA 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)).

Section 6 of the BSA provides that:

‘control’ 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 having legal or equitable force and whether or not based on legal or equitable rights;

Schedule 1 of the BSA ‘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 BSA (paragraph 7(a) of the BSA). It also sets out the mechanisms that are to be used in tracing company interests (paragraph 7(b) of the BSA). 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, subscription television 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.

Deemed Control

Under Clause 6 of Schedule 1 of the BSA, if a person has company interests in a company exceeding 15%, the person is to be regarded as being in a position to exercise control of the company.

Prior opinions in relation to issues of control

In order to provide certainty in the broadcasting industry section 74 of the BSA 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 any action against the person under the BSA on the basis of 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 BSA 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 (section 72).

The transaction documents and structure examined by the ABA during the investigation have some common elements with the documents and structure examined by the ABA in 1995 in the *Investigation into Control: CanWest/The Ten Group Ltd*. There are also very significant differences.

The ABA has reached its conclusion based upon the different facts which the ABA has found, and the differences in the structures when taken as a whole.

The role of the ABA in conducting an investigation into a possible breach of section 57 of the BSA is to consider all the relevant facts and circumstances and apply the law to these facts and circumstances.

The ABA does not view this Report as embodying any departure from the principles which it has previously applied. However, it should also be noted that the ABA has in any event a duty to apply the law. Although it will always endeavour to be consistent in doing so, it would be an abdication of its statutory functions to regard itself as bound by the observations or approach contained in a previous report. See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 17.

2.

Company interests of
CanWest in TGL

2.1 VOTING INTERESTS OF CANWEST IN TGL

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

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.

Under section 6 of the BSA, 'control' 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'.

The *Macquarie Dictionary*, Second Revised Edition, gives the primary meaning of 'control' as 'to exercise restraint or direction over; dominate; command'.

In a similar context to s8(2)(a), the phrase 'to exercise restraint or direction' was quoted with approval from the Oxford English Dictionary definition of 'control' by Bowen CJ, with whom Lockhart J agreed, in *Re News Corporation* (1987) 70 ALR 419 at 435. Bowen CJ construed the phrase 'in a position to exercise control of a company' in s92D(a) of the *Broadcasting and Television Act 1942* to mean 'the power to direct or restrain what the company may do on any substantial issue' (at 433).

In considering the power to exercise control of votes cast on a poll at a meeting of a company, the ABA adopts the view that the power to control must be immediately exercisable, in the sense of not being subject to any requirement for external approval, or other external condition precedent: see *Equiticorp Industries v ACI International* [1987] VR 485, especially at 491-2, and the cases there cited. The definition of 'control' in the BSA requires that the ABA take account of control arising 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'. However, as the definition of 'control' is inclusive, the ABA is not restricted to considering control arising as a result of, or by means of, 'trusts, agreements, arrangements, understandings and practices'. This is reflected in the Explanatory Memorandum to the Broadcasting Services Bill:

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.

The ABA must consider whether there is an immediate factual power to control the votes, as a result of, or by means of, trusts, agreements, arrangements, understandings or practices, as well as matters of legal entitlement. A legal entitlement which carries the

potentiality to obtain control of the votes in the future may be relevant to the question of whether there is an immediate factual control (see *National Companies and Securities Commission v Brierley Investments* (1988) 14 NSWLR 273 at 287, per Hodgson J).

Accordingly, the ABA will consider whether DSK has a power to control, in the sense of directing, restraining, dominating or commanding the exercise by Selli or Donholken of the votes which Selli or Donholken hold in TGL on a poll at a meeting of TGL.

In doing so the ABA must consider not only the legal agreements between the parties, but also any commercial or other arrangement or understanding underlying those agreements. The parties' understanding of the agreements and arrangements, as well as the relationships between the parties, are potentially also of relevance to the question of control.

2.1.1 VOTING INTERESTS THROUGH CGS SHAREHOLDING (NETHERLANDS) BV

CanWest owns 100 per cent of CanVideo Television Sales (1983) Ltd. CanVideo Television Sales (1983) Ltd owns 100 per cent of CanWest International Communications Inc (Barbados). CanWest International Communications Inc (Barbados) owns 100 per cent of CanWest International Holdings (Luxembourg) SA. CanWest International Holdings (Luxembourg) SA owns 100 per cent of CGS International Holdings (Luxembourg) SA. CGS International Holdings (Luxembourg) SA owns 100 per cent of CGS International Holdings (Netherlands) BV. CGS International Holdings (Netherlands) BV owns 100 per cent of CGS Shareholding (Netherlands) BV. See Diagram 3.

The issued capital of The Ten Group Limited (TGL) is 45,500,000 ordinary \$1.00 shares. CGS Shareholding holds 6,824,999 of the ordinary shares in TGL. This represents 14.99% 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.

CanWest has a chain of company interests greater than 50 per cent between it and CGS Shareholding. CanWest is in a position to control the casting of more than half of the maximum number of votes in each company between it and CGS Shareholding.

CanWest is therefore in a position to exercise control of the votes cast by CGS Shareholding on a poll at a meeting of TGL.

2.1.2 VOTING INTERESTS HELD BY CANWEST THROUGH SELLI PTY LTD

2.1.2.1 MATERIAL FINDINGS OF FACT

2.1.2.1.1 DEVELOPMENT OF SELLI

ESTABLISHING SELLI AND PURCHASING THE TGL SHARES

Background - Shareholders' Subscription Agreement

CanWest, Belshaw, Copplemere and Leibler Media Holdings were each among the parties to a Shareholders' Subscription Agreement (Share Subscription Agreement) entered into by the original shareholders of TGL in 1992.

On 11 October 1996 Belshaw gave written notice to all other parties to the Share Subscription Agreement that it sought to dispose of its shares in TGL. At that time Belshaw held 10 per cent of the voting shares in TGL. The notice of an intention to dispose of shares is required by clause 6.1(k) of the Share Subscription Agreement:

Each shareholder has 30 days from receipt of such a notice within which to exercise its right to purchase those shares.

In the event that more than one shareholder indicates its intention to purchase those shares, the shares are to be purchased by the shareholders who had exercised their 'pre-emptive rights' in the proportion to their existing financial interests in TGL.

Under clause 6.1(k) of the Share Subscription Agreement, a shareholder who is entitled to exercise pre-emptive rights under the Share Subscription Agreement, and who is a foreign person within the meaning of the BSA, may nominate a non-foreign person to acquire shares offered for sale. Accordingly, on 8 November 1996, CanWest, a party to the Share Subscription Agreement, nominated Selli to acquire the TGL shares from Belshaw.

8 November Transactions

On 8 November 1996 three shareholders in TGL sold TGL shares into a new group of companies established for the purpose of holding the shares.

Leibler Media Holdings, which is a company controlled by Mr Isi Leibler, held 5 per cent of the issued shares in TGL. Copplemere, a company controlled by Mr Steven Skala, held 1.11 per cent of the issued shares in TGL.

Leibler Media Holdings sold its entire TGL shareholding to its newly incorporated subsidiary company, Turnand. Copplemere sold 75 per cent of its TGL shares to its newly

incorporated subsidiary company, Numeration. Both Numeration and Turnand were incorporated in the Australian Capital Territory on 29 October 1996.

The shares held by Leibler Media Holdings and Copplemere were assigned to Numeration and Turnand pursuant to the terms of the Share Subscription Agreement. Clause 8.8(b) of that agreement allows an original shareholder to assign and transfer its rights and obligations under the agreement and the associated shares to another member of its group. Prior to the assignment taking place the transferee must execute a deed of undertaking to be bound by the Share Subscription Agreement. The relevant documents were executed on 8 November 1996.

Leibler Media Holdings also exercised its pre-emptive rights in relation to the TGL shares held by Belshaw pursuant to clause 6.1(k) of the Share Subscription Agreement. Accordingly, Selli, nominated by CanWest under the Share Subscription Agreement, and Leibler Media Holdings acquired the proportion of TGL shares they were entitled to on the basis of their relevant pre-existing TGL interests. Selli and Leibler Media Holdings acquired 4,360,118 and 189,583 TGL shares from Belshaw respectively.

Leibler Media Holdings then on-sold to Turnand the TGL shares it acquired from Belshaw. This transaction took place on the same day but prior to Leibler Media Holdings selling its original TGL shareholding to Turnand.

The purchase of the TGL shares by Selli, Numeration and Turnand was financed by the issuing of debentures in Selli to DSK, a related body corporate of CanWest. The money raised by the debenture issue was used by Selli to directly acquire TGL shares from Belshaw as CanWest's nominee and also to acquire Class B shares in Numeration and Turnand. The money received by Numeration and Turnand for the sale of the Class B shares to Selli was used by those companies to purchase the TGL shares from Copplemere and Leibler Media Holdings respectively. These Class B shares held by Selli are convertible into voting participatory Class C shares in Numeration and Turnand.

ORIGIN OF THE STRUCTURE

Mr Skala indicated to Mr Israel Asper, Chairman and Chief Executive Officer, CanWest, in August 1996 that he and Mr Leibler were considering selling some or all of their shares in TGL¹. He testified that 'Asper took it on board and he said, well, look, if you want to sell let me think about it, see if we can find some sort of way we can structure something so that you can pass an economic interest [to CanWest] if they're [CanWest] going to buy it, or let them think about it'².

Mr Strike, Executive Vice-President of CanWest, testified that 'the purpose of designing the structure for Selli was not to acquire Leibler and Skala's shares, per se'³. He testified that 'it was really a response to Singleton [a controller of Belshaw] saying over the course of the previous few months that he was going to put his shares up and we wanted to be in a position to respond to the sale of Belshaw if we thought it was appropriate and in doing so design a structure that would accommodate other share acquisitions'⁴.

Mr Skala said 'I don't know whether I suggested it [the concept of Selli] to them

[CanWest] or they suggested it to me'⁵. Mr Asper stated that the authors of the structure were 'the Australian lawyers, Clayton Utz, aided or advised or instructed by...Lerner and Strike'⁶. Mr Lerner, legal adviser to, and Chief Executive Officer of CanWest International Communications Inc., testified that he and Mr Strike were 'the source of the fundamental idea for the structure' used to acquire TGL shares from Belshaw Pty Limited.⁷

Mr Skala testified that Mr Asper 'got his guys, I think Tom Strike, to look at how one could go about structuring a transaction...Strike came out to Australia and started working out some kind of structure'⁸. Mr Strike testified that the fundamental features of the Selli structure (ie the call option, the charge and the participating and convertible debentures) were in place at an early stage, before his visit to Australia in late September⁹.

Mr Skala testified that his understanding of the arrangement with CanWest was 'that CanWest would put up a structure which - I mean I didn't want to incur, you know, all the expense of running around trying to put this together - absolutely no financial position to be able to do that. They undertook to come up with proposals which, you know, we would then have a look at to make sure that we were satisfied with the proposals'¹⁰.

On October 5 1996, Clayton Utz, solicitors on behalf of CanWest, wrote to Leibler Media Holdings through Arnold Bloch Leibler, solicitors. The letter stated that 'enclosed are a number of draft documents which together constitute a proposal which our client would like to put to your client as a way in which its shares may be disposed of should it so desire'.

Mr Skala testified that as far as he was aware all of the transaction documents originated in Clayton Utz¹¹, solicitors acting for CanWest.

Mr Skala could not recall whose suggestion it was to establish Numeration as a subsidiary of Copplemere. He testified that he thought 'we would have received a set of articles (for Numeration) from Clayton Utz...I think that's where it would come from'¹².

CHANGES NEGOTIATED BY MR SKALA

Mr Leibler testified that he has only a limited knowledge of the transactions relating to Selli and that he relied on Mr Skala's advice¹³.

Mr Strike testified that Mr Skala and Mr Leibler 'negotiated for themselves the preferential dividend payment of \$300,000'¹⁴. Mr Skala also negotiated the 'escalator' provision in the sale agreements between Copplemere and Numeration and Leibler Media Holdings and Turnand respectively¹⁵. The escalator provision provided that although the companies of Mr Skala and Mr Leibler had sold their TGL shares for \$11.75, if CanWest subsequently financed the acquisition of other TGL shares at a higher price, they would pay the companies of Mr Skala and Mr Leibler the difference between the two prices (for the first subsequent acquisition of TGL shares). Mr Skala described the higher price as a benefit he had negotiated as compensation for retaining the voting rights in the companies involved in the transaction¹⁶.

Mr Skala successfully negotiated for directors' fees to be payable (although the permission of debenture holders is required), for costs of inquiries or litigation to be met by Selli and for expenses to be met out of cash flow.

Mr Strike testified that his view prevailed in negotiations on call options¹⁷. Mr Skala testified that he unsuccessfully sought more flexibility in the transaction documents¹⁸.

OTHER MATTERS

Mr Skala said ‘the only concern [about possible control of Selli], I suppose, in the broad sense that I expressed was that the deal had to not be controlled, otherwise there was a problem, because I wasn’t doing a deal where there was control’¹⁹.

Mr Skala testified that Selli paid for its legal expenses through the issue of debentures to DSK²⁰.

The ABA noted the statements by Messrs Asper, Strike and Lerner of CanWest²¹ and Mr Skala of Selli²² that the structure of Selli had been created in order to comply with the BSA. The ABA noted the evidence of Mr Leibler and Mr Skala that they would only enter into an agreement with CanWest on the basis that it complied with the BSA and that there was no control over Selli’s actions²³. The ABA noted the evidence of Mr Strike that he had made clear to Mr Skala that Selli must act completely independently of CanWest²⁴. Mr Strike testified that there was an understanding between himself and Mr Skala and Mr Leibler that Mr Skala and Mr Leibler could vote the TGL shares held by Selli, Numeration and Turnand in any way they thought fit²⁵. The ABA notes that CanWest and the directors of Selli sought legal advice before participating in the Selli structure²⁶.

FINDINGS OF FACT

The idea for setting up the structure which became Selli originated in CanWest.

Most of the development of the structure, up to and including the preparation of all the major documents, was done by CanWest and its solicitors and paid for by CanWest.

The structure proposed by CanWest was adopted by Mr Skala on behalf of Selli without substantial change.

Mr Skala accepted the structure proposed by CanWest on behalf of Selli because the transaction produced benefits for himself and Mr Skala.

Mr Leibler played a limited role in the negotiations with CanWest.

Mr Skala acted with the authority of Mr Leibler in his dealings with CanWest in relation to the Selli transactions.

The structure of Selli was established to create a vehicle which could acquire parcels of

TGL shares if they were offered for sale by existing TGL shareholders by the exercise of pre-emptive rights or otherwise.

2.1.2.1.2 STRUCTURE OF SELLI

Leibler Media Holdings holds two Class A voting shares in Turnand. No other voting shares have been issued. Turnand also has provision in its Articles of Association for the issue of Class B non-voting participating shares and Class C voting and participating shares available for subscription as part of its authorised capital. As at 4 December 1996, Selli held all the 32,247,825 Class B shares in Turnand.

Similarly, Copplemere holds two Class A voting shares in Numeration. No other voting shares have been issued. Numeration also has provision in its Articles of Association for the issue of Class B non-voting participating shares and Class C voting and participating shares available for subscription as part of its authorised capital. As at 4 December 1996 Selli held all the 4,904,534 Class B shares in Numeration.

Selli was also incorporated on 29 October 1996. The authorised capital of Selli consists of:

- (a) 2 Class A voting, non-participating shares, one of which is held by Leibler Media Holdings and the other by Copplemere;
- (b) 4 Class B limited voting participating shares, one of which is held by Leibler Media Holdings and one of which is held by Copplemere;
- (c) 200,000,000 Class C voting participating shares, none of which have been issued;
- (d) 200,000,000 Class D limited voting participating shares none of which have been issued; and
- (e) 2 Class E non-voting non-participating shares to which Leibler Media Holdings and Copplemere have subscribed to the amount of \$1 each plus a premium of \$24,999 each. These shares are redeemable to their par value plus any premium paid.

The holders of the Class A shares are not entitled to any dividends in Selli (Article 3.2 of the Articles of Association of Selli). The holders of the Class B shares are only entitled to vote on matters relating to the Class B shares and are entitled to a preferential dividend of \$300,000 (Article 3.3 of the Articles of Association of Selli). They are also entitled to 5 per cent of the net distributable income of Selli after payment of expenses and interest to convertible and participating debenture holders (Article 3.3(a)(iii) of the Articles of Association of Selli).

In order to capitalise Selli so that it may be regarded as a party of substance, for the purposes of being a qualified nominee of CanWest under clause 8.8 of the Share Subscription Agreement, Leibler Media Holdings and Copplemere also subscribed for Class E Shares to the amount of \$50,000. The Class E shares are non-voting and non-participating shares which are redeemable for their par-value and the premium paid (Article 3.6(a) of the Articles of Association of Selli).

The purchase of the TGL shares by Selli, Numeration and Turnand was financed by the issue of debentures in Selli to DSK. DSK is a related body corporate of CanWest and is a wholly owned subsidiary of CGS International Holdings (Netherlands) BV, which in turn is an indirectly wholly owned subsidiary of CanWest (see Diagram 3).

The money raised by the debenture issue to DSK was used by Selli to directly acquire TGL shares from Belshaw as CanWest's nominee and also to subscribe for Class B shares in

Numeration and Turnand as indicated above. The money received by Numeration and Turnand for the sale of the Class B shares to Selli was then used by each of these companies to purchase the TGL shares from Copplemere and Leibler Media Holdings respectively.

The Class B shares held by Selli in Numeration and Turnand are convertible into voting participating Class C shares in Numeration and Turnand (Article 3.11(b) of Articles of Association of each of Turnand and Numeration). If the shares are converted by Selli, it will control these companies because it will control a majority of voting shares in those companies. Conversion is subject to a qualifying requirement. For discussion of the qualifying requirements in the transaction documents see part 2.1.2.3.6 below.

BELSHAW TRANSACTION

On 10 October 1996 Belshaw gave notice to TGL shareholders that it sought to dispose of its 10 per cent shareholding interest in TGL.

Mr Strike testified that CanWest had sought a nominee to acquire TGL shares who would not have required CanWest funding²⁷. However, because of the short period available to make a decision (the thirty days in the pre-emptive rights clause of the Shareholders' Subscription Agreement²⁸), CanWest had not pursued the idea²⁹. Mr Strike testified that the involvement of institutions had also proved 'too complicated' so it became logical to discuss the possibility of Mr Skala and Mr Leibler 'becoming nominees'³⁰.

Mr Strike testified that a decision was made during his visit to Australia (in late September/early October 1996) that Messrs Skala and Leibler would be the nominee for CanWest to acquire Belshaw's TGL shares, following negotiations about the sale of Mr Skala's and Mr Leibler's interests in TGL³¹. Mr Skala testified that Mr Strike contacted him to ask him and Mr Leibler to be CanWest's nominee for the purchase of the Belshaw shares and, after consulting Mr Leibler, they agreed to do so³².

WINSTON CAPITAL TRANSACTION

Mr Strike contacted Winston Capital, a Canadian shareholder in TGL, to indicate that the Belshaw shares had been sold at \$13 a share, and said that 'if you're interested in selling, you should talk to the principals of Selli'. Mr Strike testified that he called Mr Ashton of Winston Capital 'because I thought it was a transaction that he should know about; that's all', and that 'it was really just a courtesy call just to inform him because he doesn't see the Australian press like every other shareholder does'³³. He then phoned Mr Skala and told him about his conversation with Mr Ashton of Winston Capital.

After contacting Mr Ashton himself, Mr Skala then contacted Mr Strike to ask if he was interested in financing the transaction. Mr Strike conferred with Mr Asper and agreed to finance the transaction³⁴. Mr Strike also testified that a motivation for having Selli acquire Winston's TGL shares was to give Selli an entitlement to a seat on the TGL board³⁵. Mr Strike stated that 'it's not [an advantage for CanWest]; it's an advantage to Selli...that's the reason Selli was recommending that to us'³⁶.

THE COROM/AUDANT TRANSACTION

On 26 November 1996, two shareholders in TGL, Corom (a company controlled by Mr Jack Cowin) and Audant (a company controlled by Mr Robert Whyte), gave notice of their intention to sell their TGL shares. On 11 December 1996, CanWest nominated Selli to acquire TGL shares from Corom and Audant³⁷. Selli accepted the nomination on 11 December 1996 and entered into an agreement with Corom and Audant to acquire the relevant TGL shares, which had to be completed before 10 January 1997.

Mr Strike and Mr Skala contacted each other following the issue of pre-emptive notices by Corom, a company controlled by Mr Cowin and Audant, a company controlled by Mr Whyte. Mr Strike next contacted Mr Skala soon before the day the nomination and acceptance notices were delivered to Mr Whyte and Mr Cowin, to indicate that CanWest would 'finance the acquisition if Selli so desired to accept the nomination for those shares'³⁸. Mr Skala then 'agreed with [Mr Strike] that it probably was worth doing'³⁹.

Mr Strike testified that '\$13 [the price paid for the Copplemere, Leibler Media Holdings, Winston and Belshaw shares] was a full price but not an unreasonable price'⁴⁰. Mr Asper 'thought \$13 was too high' and said that his initial valuation of \$11.40 was on the record⁴¹. He also testified that \$15 was a fair market price on the basis of there being a willing buyer and a willing seller.⁴²

Mr Strike testified that he thought 'the price of \$15 a share [for the Corom and Audant shares] was outrageous commercially' because 'there was an element of them [Messrs Whyte and Cowin] putting a rail on the fence with a price to make sure that no-one could jump over'⁴³. He testified that he 'wasn't terribly excited about that price as a financier, and [he was] sure that Skala wasn't excited about that price as the buyer' but that they agreed that 'the additional price was worthwhile to acquire certainty'⁴⁴. Mr Strike also testified that the additional price was worth while paying to acquire the certainty that if Selli and CanWest combined their two interests into a single float vehicle they would have a control block of shares (52% TGL shares) to float.⁴⁵

Mr Leibler expressed concerns to Mr Skala about the price of \$15⁴⁶. He testified that the main reason he supported purchasing the shares at that price was that there was no risk involved to him⁴⁷.

Although Mr Skala testified that his business judgement was that the price of \$15 seemed reasonable in the circumstances he said that he regarded \$15 as a 'substantial price'⁴⁸. The judgement was based on valuations by BZW which were provided to promote a separate unit trust proposal in relation to the Belshaw shares⁴⁹. Mr Skala testified that 'it is a price which you would hope that the company will perform better in the future to be prepared to pay that kind of a price'⁵⁰. Mr Skala was aware that CanWest's initial view was that the 'price [was] pretty top-ish'⁵¹. Mr Skala testified that Selli had not taken any advice on whether \$15 was a fair market price.

Another TGL shareholder, Telecasters North Queensland Limited (TNQ), raised legal objections to this proposed acquisition alleging that Copplemere, Turnand, Leibler Media Holdings and Numeration would be in breach of clause 6.2(a) of the Share Subscription Agreement in that each of them would be entitled to more than 40 per cent of the issued

shares in TGL if the transaction were completed. Ultimately there was a mutual agreement for Selli to be released from its obligation to close and CanWest, through DSK, was released from its obligation to fund Selli⁵².

OTHER MATTERS

Mr Skala liaised with Mr Strike about TNQ's objection to the purchase of the Corom and Audant shares by Selli⁵³. Mr Skala assisted CanWest in finding a trustee⁵⁴. Mr Skala acknowledged that CanWest was the only possible source of funding for Selli⁵⁵. Mr Skala said that as a director of Selli he, Mr Skala, would take into account the interests of the lender in accordance with the documents and that he would listen to their views, but would not be obliged to take their views into account⁵⁶. Mr Leibler stated that his 'view of CanWest in this context [was], if they expected me to perform in this manner then they'd be very, very foolish because if they had to throw me off because I was not toeing the line or something, it would be a pretty terrible indictment of them'. Mr Leibler stated that he thought 'it's quite clear in their mind that I've got a standing and a status in this community and that I'm not going to go in and be someone's representative for the sort of financial consideration that is involved there having regard to my reputation and everything else that goes with it'⁵⁷.

FINDINGS OF FACT

Selli:

- accepted CanWest's nomination to acquire TGL shares from Belshaw;
- acquired shares in Numeration and Turnand;
- acquired TGL shares from Winston Capital;
- accepted CanWest's nomination to acquire TGL shares from Corom;
- accepted CanWest's nomination to acquire TGL shares from Audant;
- entered into agreements to acquire the TGL shares of Corom and Audant.

CanWest funded, through DSK, each purchase of TGL shares by Selli, Numeration and Turnand.

The above business operations undertaken by Selli have been at CanWest's suggestion and initiative.

CanWest, through DSK, decided to fund the acquisition of the Corom and Audant shares although senior executives of CanWest responsible for making the decision to fund the acquisition considered the price to be high.

The directors of Selli agreed to purchase the Corom and Audant shares although they acknowledged that the price was high.

2.1.2.1.3 EFFECTS OF THE LEGAL AGREEMENTS BETWEEN THE PARTIES

CONVERTIBLE DEBENTURES.

Evidence

Selli has issued two types of debentures to DSK: Convertible Debentures and Participating Debentures.

A Convertible Debentures Deed was entered into between DSK and Selli on 29 October 1996 (Selli Convertible Debentures Deed). Under the Selli Convertible Debentures Deed the convertible debentures issued by Selli to DSK are partly paid to one cent (clause 8 of the Selli Convertible Debentures Deed) and attract a ten per cent per annum interest payment (clauses 6 and 1 of the Selli Convertible Debentures Deed). Class C shares are voting and participating (Article 3.4 of the Articles of Association of Selli) whilst the Class D shares have very limited voting rights and are participating shares (Article 3.5 of the Articles of Association of Selli).

Clause 10 of the Selli Convertible Debentures Deed confers a conditional right upon a noteholder to convert notes into fully paid Class C or D conversion shares⁵⁸.

‘Noteholder’ is defined in clause 1 of the Selli Convertible Debentures Deed as the holder of convertible notes. The Noteholder can convert its notes into shares or nominate another person to hold the shares. Relevant sub-clauses of the Selli Convertible Debentures Deed provide:

- 10 (a) Subject to the Qualifying Requirement having been satisfied and subject to clause 10(g), a Noteholder may from time to time at its option by way of redemption of the Notes convert all or some of its Notes into fully paid Conversion Shares subscribed for at the Subscription Price by:
 - (i) delivering to the Issuer the Certificate or Certificates in respect of that Note or Notes; and
 - (ii) delivering to the Issuer a duly completed Conversion Notice relating to that Note or those Notes; and
 - (iii) paying the Issuer the balance of the unpaid amounts payable on such Notes in accordance with clause 8(b).
- (b) On the conversion Date the issuer must subject to clause 10(g):
 - (ii) subject to clause 10(e) issue to the Noteholder or its Nominee ...conversion shares ...
- ...
- (g) Notwithstanding anything to the contrary in these Conditions, the rights of a Noteholder under clause 10 to have any Conversion Shares issued to it or to its Nominee shall not arise and the Issuer’s obligations under clause 10 to issue any Conversion Shares to a Noteholder or its Nominee do not become binding on it, in each case unless and until the exercise of such rights by the Noteholder would not constitute a breach of Foreign Control and Ownership Legislation or any mandatory directive given thereunder.

The ‘Qualifying Requirement’ means that the noteholder or its nominee is an Australian resident and that conversion of the convertible debentures would not result in a breach of the *Foreign Acquisitions and Takeovers Act 1975* or the *Broadcasting Services Act 1992* (clause 1 of the Selli Convertible Debentures Deed)⁵⁹.

In addition, there is a conversion right between C and D class shares which is also subject to a 'qualifying requirement'. Article 3.12(a) and (b) of the Articles of Association of Selli provides:

- (a) A member may at any time and from time to time convert a Class C Share to a Class D Share by delivering to the Company:
 - (i) a Conversion Notice; and
 - (ii) the certificates to Class C Shares being converted.
- (b) Subject to the Qualifying Requirement being satisfied, a Member may at any time and from time to time convert a Class D Share to a Class C Share by delivering to the Company:
 - (i) a Conversion Notice; and
 - (ii) the certificates to Class D Shares being converted.

A Participating Debentures Deed was entered into between Selli and DSK on 29 October 1996 (Selli Participating Debentures Deed). Under the Selli Participating Debentures Deed, the participating debentures are fully paid to \$1.00 and attract an interest payment linked to the distribution which Selli is paid on its TGL shares (clause 6 of the Selli Participating Debentures Deed). The interest payment is effectively 95% of the TGL dividends and other distributions (excluding a distribution which constitutes a 'winding-up interest' as that term is defined in the BSA) left in Selli after taking out expenses, Class B dividend payments and interest on the convertible debentures.

Clause 7 of each of the Selli Convertible and Participating Debentures Deeds contains another 'Qualifying Requirement'. They provide that notwithstanding any condition in the Deeds, no entitlement or benefit in relation to the debentures shall arise or be permitted beyond that which would be permitted without contravention of the *Foreign Acquisitions and Takeovers Act 1975* and the BSA in the case of the Selli Convertible Debentures Deed and the BSA in the case of the Selli Participating Debentures Deed, with the opinion of the debenture-holder's lawyers to be conclusive of this issue.

Mr Strike testified that CanWest could 'superimpose a new Selli on top of Selli and have Selli owned by different Australians exercising the debentures'⁶⁰.

Q. If in the event that Mr Leibler and Mr Skala started exhibiting what you call hysteria, what would the options be for DSK or for CanWest in those circumstances?

A: Well, we're talking hypothetically here, obviously.

Q: Was thought given to that when the documents were drafted?

A. I don't think so, I don't think so, but hypothetically, speaking hypothetically, I mean, the structure could be replicated. You just superimpose a new Selli on top of Selli and have Selli owned by different Australians exercising the debentures and so on.

Q. Would that be by removing Copplemere and Leibler Media Holdings as the shareholders?

A. Yes.

Q. How would that be achieved?

A. Through the transfer of DSK to an Australian and the Australian exercising the debentures and call options.

Q. And then the same structure on top of that with CanWest involved financially?

A. It could be or it could be a different structure. I mean, it could just be an outright sale.

Mr Lerner testified similarly, that CanWest could in some way dispose of the TGL shares held by Selli and Donholken without consulting Selli and Donholken⁶¹:

Q. But you're anticipating that Selli and Donholken will join with CanWest in the float proposal?

A. Yes. We haven't discussed it with them yet, but we could compel it through DSK as a float. DSK can't do it on its own because we're from the wrong country, but I think that as part of a float, if Australia owned DSK, it could be done, yes.

Mr Asper also gave similar evidence⁶²:

Q. Do you have any contingency plan if it turns out in future you have made a wrong judgment about the shareholders in Selli, in the sense that they turn out to be hostile to your interests.... Do you have a contingency plan to handle that sort of situation?

A. I don't have a plan, no. I have presumably some rights somewhere, but I have no plan.

Q. Do you know what those rights are?

A. No, I know that they are, I am advised that we have some rights. As you know I don't anticipate, I hope, that this arrangement is interim, and that this will be a thing of the past, although I quite openly concede that I am going to go back to all those people and say, and try and persuade a lot of them to just stop the silliness and stay in the company and let's go on to greater things. But the mechanics are there, and whatever they are they are. And they have been fashioned in a manner to give CanWest the maximum protection that the law permits, but not to step over the line between what the law doesn't permit and what it does.

Mr Strike agreed that CanWest could sell DSK or the debentures held by DSK without advising Donholken or Selli⁶³.

Mr Strike testified that in the event of Selli's directors on the TGL board being hostile to CanWest's interests, CanWest's only options were 'the disposition in some fashion of DSK or the instruments, the financial instruments held by DSK', although he also stated that 'there's no rights embedded within those instruments that would allow us to exert any influence'⁶⁴.

Mr Skala has acknowledged that the question of whether Selli has a long or a short life is to some extent in the hands of the debenture holders, in that DSK could sell its debentures to an Australian nominee⁶⁵.

FINDINGS OF FACT

Subject to the operation of the Qualifying Requirement in the Selli Convertible Debentures Deed, the provisions of the Deed allow DSK to enable a nominee to acquire a majority of the voting shares in Selli.

CanWest is entitled to sell DSK or the financial instruments held by DSK. Mr Strike acknowledges this.

Mr Strike acknowledges that Copplemere and Leibler Media Holdings could be removed as shareholders of Selli through the transfer of DSK to an Australian and the Australian exercising the debentures and call options.

Mr Strike acknowledges that in the event of Selli's directors being hostile, CanWest has the option of disposing in some fashion of DSK or the financial instruments held by DSK.

Mr Skala acknowledges that the issue of whether Selli continues in the present arrangements is, to some extent, in the hands of the debenture holders.

By nominating a qualified nominee to acquire a majority of the voting shares of Selli, DSK can effect the removal of the directors of Selli.

CALL OPTIONS.

As part of this series of transactions Call Option Deeds have been entered into between Copplemere and DSK and between Leibler Media Holdings and DSK, both dated 29 October 1996 (collectively, Selli Call Option Deeds). Leibler Media Holdings and Copplemere have each granted a call option over their A Class voting share in Selli to DSK or its nominee (clause 2.1 of the Selli Call Option Deeds)⁶⁶.

Pursuant to the Selli Call Option Deeds the call options may be exercised at any time by delivery of a Notice of Exercise and all necessary transfers and documents, subject to certain conditions being satisfied⁶⁷. The conditions are that the 'Qualifying Requirement' is satisfied and the exercise would not constitute a breach of foreign ownership and control legislation⁶⁸.

Leibler Media Holdings has granted a similar option to Selli over its A Class voting shares in Turnand under a Call Option Deed dated 1 November 1996 (Leibler Media Holdings Call Option Deed). Copplemere has also granted a similar option to Selli over its A Class shares in Numeration under a Call Option deed dated 1 November 1996 (Copplemere Call Option Deed). Clauses 2.2 and 2.7 and the definition of 'Qualifying Requirement' are identical to the provisions in the Selli Call Option Deeds set out above.

Mr Skala regarded the call option as part of the security arrangements for the whole transaction⁶⁹.

Mr Strike testified that the call option was 'really just for the sake of tidiness more than anything else'⁷⁰. He said the call options might be called 'where we might want to sell our debentures to someone and we would probably sell the call options with the debentures', but that doing so had not been contemplated.⁷¹

FINDINGS OF FACT

Subject to the operation of the Qualifying Requirement, the provisions of the Call Option allow DSK to have the voting shares in Selli acquired by its nominee.

DSK can sell its Call Options to another party who can, subject to the operation of the Qualifying Requirement, exercise the options and acquire the voting shares of Copplemere and Leibler Media Holdings.

PROVISIONS OF MEMORANDUM AND ARTICLES, DEBENTURE STOCK TRUST DEED, CALL OPTIONS

Constraints in the Memorandum Of Association.

The Memorandum of Association of Selli limit its activities in such a way as to make it a special purpose company. Selli's function, briefly summarised, is to acquire and hold shares and other securities in TGL, to hold income from any distribution on those shares or securities in an 'at call account' and to pay dividends in accordance with the Articles⁷².

The Memorandum of Association of Selli prevents it borrowing money, issuing shares options or securities, giving security, guaranteeing obligations and providing financial accommodation, except in very limited circumstances⁷³. The Articles of Association of Selli cannot be altered without the agreement of the debenture holders except where the requirement for the giving of consent will result in a breach of the BSA⁷⁴. DSK is the only current holder of debenture stock in Selli.

Mr Skala testified that he could not 'think of any reason why Selli, as a company, commercially would need the right to go out and borrow money, in the sense of obtaining financing from a bank⁷⁵'.

Constraints in Articles - limitations and matters requiring permission of participating debenture holders

The Articles of Association of Selli impose constraints on Selli altering its share capital without the consent of the debenture holders. The directors of Selli may not issue any more of the existing classes of shares to any person except on conversion of the convertible debentures⁷⁶. Options cannot be issued without the consent of the debenture holders⁷⁷. There are restrictions on the issue of redeemable preference shares⁷⁸.

A and B class shares (the shares held by Copplemere and Leibler Media Holdings) may not be transferred⁷⁹. The B class shareholder may elect that the company (Selli) redeem some or all of the B class shares he or she holds, on 12 months notice, provided that there is at least one B, C or D class share on issue following redemption⁸⁰. The company (Selli) may elect to redeem all of the B class shares provided there is at least one C or D class member.

Any resolution by Selli to alter its capital must be approved by debenture holders⁸¹. The accidental omission to give notice of a meeting or the non-receipt of the notice by a debenture holder will invalidate any resolution passed at a meeting⁸². Debenture holders are entitled to attend general meetings⁸³.

The debenture holders are entitled to appoint one director of Selli (on a board of three)⁸⁴. A director who has an interest in a matter that is being considered at a directors' meeting may vote unless prohibited by the Corporations Law⁸⁵. The powers of the directors of Selli are limited by reference to the Memorandum of Association of Selli⁸⁶. Payment of the directors is subject to the consent of the debenture holders⁸⁷. The director appointed by the debenture holders must be present for a quorum⁸⁸.

The debenture holders are entitled to nominate the auditors. No other person can be appointed, unless the debenture holders fail to nominate anyone⁸⁹. The auditors have an important role in determining financial benefits for shareholders⁹⁰. It is noted that an auditor has a duty to act independently irrespective of who she/he is appointed by.

Selli cannot be wound up without the consent of the debenture holders. The vesting of property in trustees for contributories requires the consent of the debenture holders⁹¹.

Article 1.5(c) provides that:

Notwithstanding anything contained in these Articles, where the requirement for the written consent of the Participating Debenture Holders expressed to be required pursuant to these Articles will give rise to a breach of the Broadcasting Services Act, the expressed requirement for such written consent will be deemed to be severed from these Articles.

Article 1.6 provides that:

Each of these Articles shall be construed so as:

- (a) not to result in a breach of the Shareholders Agreement;
- (b) not to result in a contravention of the Broadcasting Services Act; and
- (c) to render the Article or part of a Article enforceable.

Mr Skala testified that he did not really regard Copplemere's inability to dispose of its shares in Selli as a constraint. He said that the benefits which he had negotiated were the benefits which Copplemere or Leibler Media Holdings were seeking. He acknowledged that it was a restraint in the sense he could not sell, but said it did not trouble him⁹².

It is theoretically possible if the TGL dividends are high enough that some money will be left in Selli. According to Mr Skala, the directors of Selli only have a limited range of options to use such money, without the permission of the debenture holders⁹³.

The only concern that Mr Skala could recall raising in relation to control was that he was not doing a deal where there was control of Selli by CanWest⁹⁴. He testified that it was possible that he had raised the degree of control in the documents as a concern, but suggested that this would have been a negotiating ploy to secure commercial advantages⁹⁵.

FINDING OF FACT

The Memorandum and Articles of Association of Selli impose significant constraints on the activities in which Selli can engage in unless authorised by DSK.

Constraints in Debenture Stock Trust Deed - matters requiring permission of stockholders or trustee.

As part of this transaction a Debenture Stock Trust Deed has been entered into between Selli, Turnand, Numeration and Lintondale Pty Ltd (as Trustee) dated 6 November 1996 (Selli Trust Deed). The obligations of Selli arising under the debenture deeds are secured by the Selli Trust Deed. The Selli Trust Deed creates a charge over the assets of Selli, Numeration and Turnand in favour of DSK, held by the Trustee. In the event of default, for example, non-payment of the interest under the debenture deeds, the Trustee may become the registered holder of the TGL shares.

Pursuant to the Selli Trust Deed a trustee is appointed by a majority of stockholders (holders of participating and/or convertible debentures in Selli) to hold the benefit of the charge. The Trustee acts in accordance with the instructions of a majority of the stockholders.⁹⁶ DSK is the only current holder of debenture stock in Selli.

Selli may not create or issue debenture stock without the Trustee's consent⁹⁷. Supplemental Trust Deeds can only be executed with the consent of the stockholders⁹⁸. The chargors (Selli, Numeration and Turnand) can only amend their respective Memoranda and Articles of Association with the consent of the trustee⁹⁹.

The chargors must not lease or hire any asset¹⁰⁰. The chargors cannot create encumbrances or sell or lease the property subject to the charge without the consent of the trustee¹⁰¹. The chargors cannot change the general character of or discontinue their businesses without the consent of the Trustee¹⁰².

On an event of default, the Trustee can procure itself to be the registered holder of shares and would have significant powers over the chargors. Events of default include the making of an application to wind up a company, a chargor ceasing to carry on its business or threatening to do so, changes in the shareholding of a chargor without the consent of the trustee and a reduction in capital without the consent of the stockholders¹⁰³. Some events of default appear to rely on subjective judgements by the Trustee acting on the instructions of the stockholders, ie when the Trustee forms the opinion that the continued carrying on of any relevant business would endanger the value of the Trustee's security interest¹⁰⁴. However, the exercise of the powers of the Trustee is subject to a qualifying requirement¹⁰⁵.

Clause 12.6 of the Selli Trust Deed specifies that:

Notwithstanding any other provision of this Deed, the Trustee, a Receiver or any agent appointed under clause 12.1(c) may not exercise any Power if the Qualifying Requirement is not satisfied in respect of that Power.

Clause 1.1 of the Selli Trust Deed provides that:

'Qualifying Requirement' means, in respect of any Power, that either:

- (a) the exercise of the relevant Power is not in breach of and does not cause the Trustee, any Stockholder or its affiliates, or TGL or any of its shareholders to be in breach of the Foreign Control and Ownership Legislation (FATA and Broadcasting Services Act) or any mandatory directives 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 the exercise of the relevant Power in favour of the Trustee notwithstanding that any Stockholder is not an Australian resident.

‘Power’ is also defined by clause 1.1 of the Selli Trust Deed, and means ‘any right, power, authority, discretion, remedy or privilege conferred on the Trustee, Receiver or any attorney or agent appointed under the Selli Trust Deed, by any Transaction Document, by Statute or by law or equity’. The term ‘Transaction Document’ includes the Selli Trust Deed, and the Selli Convertible and Participating Debenture Deeds.

Clause 27.6 of the Selli Trust Deed provides that:

Any provision of this Deed which is illegal, void or unenforceable will be ineffective to the extent only of that illegality, voidness or unenforceability without invalidating the remaining provisions of this Deed.

Mr Skala testified that ‘my view of the security was I was indifferent to it’. He also said that ‘I had absolutely no problem in regard to provision of securities so it made no - it was irrelevant’¹⁰⁶.

Restrictions through Call Options

The grantors of the Selli Call Options (Coplemere and Numeration) covenant not to grant any other option in relation to the voting shares. They covenant not to sell, assign, transfer or otherwise dispose of the shares¹⁰⁷. The Selli Call Options may be assigned by DSK without the consent of Coplemere or Numeration. The Call Option may only be exercised subject to a Qualifying Requirement being satisfied.

FINDINGS OF FACT

The Selli Debenture Stock Trust Deed imposes significant constraints on the activities in which Selli, Numeration and Turnand can engage unless authorised by DSK.

2.1.2.1.4 FINANCIAL AND OTHER BENEFITS FOR SHAREHOLDERS OF SELLI ARISING FROM COMMERCIAL ARRANGEMENTS WITH DSK

Evidence

Under the Articles of Association of TGL, shareholders are generally entitled to appoint a board member for every tranche of 10 per cent of the shares held by the shareholder. For so long as CanWest holds more than 14 per cent of the issued capital of TGL it has the right to appoint what amounts to 20 per cent of the directors of TGL¹⁰⁸. Clause 6.1(h)(8) of the Share Subscription Agreement also provides that:

The total number of directors shall be not less than 10 nor more than 15 and subject to the preceding paragraphs of this clause, may, but need not include a number of additional directors including independent directors and without limiting the foregoing shall include Mr Issy Liebler of Melbourne subject to interests associated with him subscribing to approximately 5 per cent of the issued capital and becoming an Original Shareholder.

Mr Strike testified that the ‘genesis of that particular idea [setting up Numeration and Turnand] was in the preservation of Liebler’s seat on the board’¹⁰⁹. Mr Liebler believed that retaining a seat on the board was part of the package of his involvement in the Selli structure¹¹⁰. Mr Liebler believed it was likely he would retain a TGL Board seat if the company was floated¹¹¹.

Mr Strike gave evidence that he thought Mr Liebler and Mr Skala ‘got some additional things out of the Selli structure which they wouldn’t have received if they just had simply entered into a sale transaction with Selli... I think they got board representation’¹¹². He stated that he thought ‘Skala got a board seat as opposed to being an alternate’¹¹³. Mr Skala stated that he regarded the sale price of the TGL shares as in part providing compensation for the responsibilities which flowed from retaining voting rights¹¹⁴.

Mr Strike gave evidence that the motivation for funding the purchase by Selli of the TGL shares held by Winston Capital was to ensure that Selli achieved a seat on the TGL board¹¹⁵. He stated that, although there was some commercial value in the purchase from CanWest’s point of view, that there was no ‘overwhelming commercial motivation or strategic motivation’ on CanWest’s part¹¹⁶.

Mr Skala testified that a significant benefit for him and Mr Liebler from participating in the Selli structure was the \$13 price given for the TGL shares they sold to Numeration and Turnand¹¹⁷. Mr Strike said it was not put to Mr Liebler and Mr Skala that the extra money was compensation for holding the voting rights¹¹⁸. Mr Skala testified that other benefits were ‘the cream’, and while he was not indifferent to them, he did not regard them as significant compared to the \$13 price he had received for his shares¹¹⁹.

Copplemere and Liebler Media Holdings between them receive a preferential dividend from Selli of \$300,000 per year. If any funds remain after the payment of that dividend, expenses and interest on debentures, they are entitled to 5 per cent of what remains. They are also entitled to 5 per cent of the capital appreciation of the value of the TGL shares, which can be realised on redemption of the shares, on a winding up or through a reduction of capital¹²⁰.

Mr Skala has also identified potential tax benefits in Selli¹²¹.

Mr Skala stated that ‘my interest in being involved in this made sense... I mean you’ve actually got a substantial vote, a substantial responsibility and substantial interest in the business so something which I regarded as being quite attractive’¹²².

Mr Strike testified that the structure of Selli was designed to give CanWest flexibility to retain a long term investment or not, as suited their interests¹²³. Mr Strike has testified that the future of Selli is subordinate to CanWest’s assessment of the best use of its capital¹²⁴. Mr Skala has acknowledged that the future of Selli is not within his control¹²⁵.

Mr Lerner has testified that DSK would not need to involve Selli or Donholken in a decision as to whether to include the TGL shares held by Selli in a float¹²⁶. Mr Lerner also testified that CanWest could compel Selli and Donholken to join it in a float through DSK, although he noted that it would be necessary for an Australian to own DSK¹²⁷.

Mr Strike testified that CanWest could ‘superimpose a new Selli on top of Selli and have Selli owned by different Australians exercising the debentures’¹²⁸. Mr Strike testified that in the event of the shareholders in Selli being hostile to CanWest’s interests, CanWest’s only options were ‘the disposition in some fashion of DSK or the instruments, the financial instruments held by DSK’, although he also stated that ‘there’s no rights embedded within whose instruments that would allow us to exert any influence’¹²⁹.

Mr Skala was not concerned about his lack of control over the future of Selli because he felt that even on the worst case scenario, he would have got a major financial benefit (a price of \$13) from his participation in the transactions¹³⁰.

FINDING OF FACT

The commercial arrangements entered into between Copplemere, Leibler Media Holdings, Numeration, Turnand, Selli and DSK, when considered as a whole confer a number of financial and other benefits on Copplemere and Leibler Media Holdings.

Mr Skala and Mr Leibler owe their positions on the TGL Board to DSK’s funding of the acquisition of TGL shares by Selli and Turnand.

The continuation of the receipt of ongoing benefits could be jeopardised by DSK/CanWest.

2.1.2.1.5 PREVIOUS RELATIONSHIP BETWEEN CANWEST AND MESSRS SKALA AND LEIBLER

Mr Asper and Mr Leibler testified that they have had minimal contact in the past 12 months¹³¹.

Mr Skala testified that he considered CanWest's advice valuable¹³². Mr Skala denied he generally agreed with suggestions made or approaches taken by CanWest¹³³. Mr Skala testified that CanWest had expressed a view that 'we [TGL] need to think about corporate development' and said that his views would accord with that view, as would those of every other director of TGL¹³⁴.

Mr Leibler stated that he did not know whether CanWest considered that he had similar views on the future of TGL, but said he thought they would not 'see him as a great enemy'¹³⁵.

Mr Asper testified that his view of Mr Skala and Mr Leibler was that they were both good directors of TGL¹³⁶.

Mr Strike stated that Mr Skala and Mr Leibler 'shared a similar vision of Network Ten that we did'¹³⁷. He also stated that he thought that 'Leibler and Skala just as individuals see the operation of Ten more or less the way we do'¹³⁸.

Evidence was given that Mr Skala had, while an alternate director on the TGL Board, demonstrated an independent stance in the past. Mr Strike and Mr Skala testified that Mr Skala had demonstrated independence from the TGL Board in not disclosing to it that Capital Television intended to sell one of its stations to Southern Cross Broadcasting Ltd¹³⁹. At the time of this incident, Capital Television was a company in which TGL had a financial stake. Mr Skala was a representative of TGL on the Capital board.

Mr Strike also testified that CanWest representatives 'had proposed an investigation into the fairly frequent leaks of confidential [TGL] board matters to the press and certainly we got support from no other director [of TGL] at that point. I believe Mr Skala was at that meeting and he did not support that'¹⁴⁰.

Mr Leibler testified that he would be 'exercising my interest as a director in what I consider to be the best interest of the company as a whole and the best interests of Channel Ten'. He stated that 'if you're saying, do I have an allegiance to anybody, no, so if that's your definition of independent, I'm independent, very independent'¹⁴¹. Mr Leibler also stated that 'I certainly have not been seen as an extension of CanWest at board meetings, if that's the implication' and that he 'wouldn't be very flattered if they [CanWest] felt that I was a stooge'¹⁴².

FINDING OF FACT

Selli is presently controlled by parties, Mr Skala and Mr Leibler, who have a pre-existing business relationship with CanWest.

Selli is presently controlled by parties who Mr Strike believes share similar views on The Ten Group Limited to CanWest's.

2.1.2.1.6 MOTIVES OF CANWEST IN FUNDING THE ACQUISITION OF THE TGL SHARES

Mr Strike indicated that preventing anyone else taking control of TGL ‘whose interests were opposed to the interests of Ten’ was a consideration in financing the acquisition of the TGL shares put up for sale by Belshaw. Mr Strike testified that the Selli structure was partially a way of defending CanWest’s existing shareholder rights¹⁴³.

Mr Asper stated that it was important that CanWest had a voice in the successors to existing shareholders in TGL ‘because antibodies can come into a company, mischief makers, stupid people...Diabolical, fiendish, cunning fronts for competitors’ He denied that this meant ‘people that [had] very differing views from [his] own in terms of how [TGL] should be run’¹⁴⁴.

Mr Strike cited the possibility of hostile shareholders acquiring shares, directly or indirectly, in TGL as a factor in developing the Selli structure and in nominating Selli to acquire the TGL shares from Belshaw, Corom and Audant¹⁴⁵.

Mr Strike stated this concern was on behalf of TGL’s interests and not CanWest’s but agreed that the two interests might be similar¹⁴⁶. Mr Lerner testified that his understanding of CanWest’s intention in nominating purchasers of the TGL shares was to stop the uncertainty created by a multiplicity of float options¹⁴⁷. Mr Lerner acknowledged that he does not set the policy for CanWest¹⁴⁸.

Mr Asper stated that one of CanWest’s motives in funding acquisitions of TGL shares was to assemble a ‘critical mass’ of TGL shares for a float of TGL shares¹⁴⁹. Mr Strike indicated that this was a strategic consideration in agreeing to nominate Selli to acquire the Corom and Audant shares at a price of \$15 even though he thought the price was ‘outrageous commercially’¹⁵⁰.

When asked whether there was ‘any point over the course of the negotiations where it crystallised for you that you were potentially assembling a float vehicle in Ten rather than just increasing your economic interest’, Mr Strike replied that ‘that concept, I think, first presented itself when Whyte and Cowin put their shares up for sale’¹⁵¹. Mr Lerner testified that he was first asked to come up with a float ‘probably around the time that DSK advanced the funds...to Selli to purchase Belshaw’¹⁵².

FINDING OF FACT

CanWest’s motives in setting up the Selli structure included a wish to provide liquidity to shareholders and a wish to avoid financial damage to CanWest from having more than one float vehicle for TGL shares.

CanWest’s participation in the transactions was intended in part to forestall the acquisition of TGL shares by persons potentially hostile to CanWest’s interests.

CanWest’s wish to prevent competitors or other parties potentially hostile to CanWest’s

interests being represented on the TGL board was a factor in its participation in the transactions.

At some point between the Belshaw transaction and the Corom and Audant transactions, CanWest became motivated by a wish to assemble a sufficiently large parcel of shares to float a controlling interest in TGL, should it choose to do so.

2.1.2.1.7 IS CANWEST IN A POSITION TO EXERCISE CONTROL OVER DSK?

Evidence

CanWest owns 100 per cent of CanVideo Television Sales (1983) Ltd. CanVideo Television Sales (1983) Ltd owns 100 per cent of CanWest International Communications Inc (Barbados). CanWest International Communications Inc (Barbados) owns 100 per cent of CanWest International Holdings (Luxembourg) SA. CanWest International Holdings (Luxembourg) SA owns 100 per cent of CGS International Holdings (Luxembourg) SA. CGS International Holdings (Luxembourg) SA owns 100 per cent of CGS International Holdings (Netherlands) BV. CGS International Holdings (Netherlands) BV owns 100 per cent of DSK.

Discussion

CanWest has a chain of company interests greater than 15 per cent between it and DSK. Under Clause 7 of Schedule 1 of the BSA, CanWest is therefore in a position to exercise control of DSK.

FINDING OF FACT

CanWest is in a position to exercise control of DSK.
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2.1.2.2 SUMMARY OF FINDINGS OF FACT

1. The idea for setting up the structure which became Selli originated in CanWest.
2. Most of the development of the structure, up to and including the preparation of all the major documents, was done by CanWest and its solicitors and paid for by CanWest.
3. The structure proposed by CanWest was adopted by Mr Skala on behalf of Selli without substantial change.
4. Mr Skala accepted the structure proposed by CanWest on behalf of Selli because the transaction produced benefits for himself and Mr Skala.
5. Mr Leibler played a limited role in the negotiations with CanWest.
6. Mr Skala acted with the authority of Mr Leibler in his dealings with CanWest in relation to the Selli transactions.
7. The structure of Selli was established to create a vehicle which could acquire parcels of TGL shares if they were offered for sale by existing TGL shareholders by the exercise of pre-emptive rights or otherwise.
8. Selli:
 - accepted CanWest's nomination to acquire TGL shares from Belshaw;
 - acquired shares in Numeration and Turnand;
 - acquired TGL shares from Winston Capital;
 - accepted CanWest's nomination to acquire TGL shares from Corom;
 - accepted CanWest's nomination to acquire TGL shares from Audant;
 - entered into agreements to acquire the TGL shares of Corom and Audant.
9. CanWest funded, through DSK, each purchase of TGL shares by Selli, Numeration and Turnand.
10. The above business operations undertaken by Selli have been at CanWest's suggestion and initiative.
11. CanWest, through DSK, decided to fund the acquisition of the Corom and Audant shares although senior executives of CanWest responsible for making the decision to fund the acquisition considered the price to be high.
12. The directors of Selli agreed to purchase the Corom and Audant shares although they acknowledged that the price was high.

13. Subject to the operation of the Qualifying Requirement in the Selli Convertible Debentures Deed, the provisions of the Deed allow DSK to enable a nominee to acquire a majority of the voting shares in Selli.
14. CanWest is entitled to sell DSK or the financial instruments held by DSK. Mr Strike acknowledges this.
15. Mr Strike acknowledges that Copplemere and Leibler Media Holdings could be removed as shareholders of Selli through the transfer of DSK to an Australian and the Australian exercising the debentures and call options.
16. Mr Strike acknowledges that in the event of Selli's directors being hostile, CanWest has the option of disposing in some fashion of DSK or the financial instruments held by DSK.
17. Mr Skala acknowledges that the issue of whether Selli continues in the present arrangements is, to some extent, in the hands of the debenture holders.
18. By nominating a qualified nominee to acquire a majority of the voting shares of Selli, DSK can effect the removal of the directors of Selli.
19. Subject to the operation of the Qualifying Requirement, the provisions of the Call Option allow DSK to have the voting shares in Selli acquired by its nominee.
20. DSK can sell its Call Options to another party who can, subject to the operation of the Qualifying Requirement, exercise the options and acquire the voting shares of Copplemere and Leibler Media Holdings.
21. The Memorandum and Articles of Association of Selli impose significant constraints on the activities in which Selli can engage in unless authorised by DSK.
22. The Selli Debenture Stock Trust Deed imposes significant constraints on the activities in which Selli, Numeration and Turnand can engage unless authorised by DSK.
23. The commercial arrangements entered into between Copplemere, Leibler Media Holdings, Numeration, Turnand, Selli and DSK, when considered as a whole confer a number of financial and other benefits on Copplemere and Leibler Media Holdings.
24. Mr Skala and Mr Leibler owe their positions on the TGL Board to DSK's funding of the acquisition of TGL shares by Selli and Turnand.
25. The continuation of the receipt of ongoing benefits could be jeopardised by DSK/CanWest.
26. Selli is presently controlled by parties, Mr Skala and Mr Leibler, who have a pre-existing business relationship with CanWest.
27. Selli is presently controlled by parties who Mr Strike believes share similar views on The Ten Group Limited to CanWest's.

28. CanWest's motives in setting up the Selli structure included a wish to provide liquidity to shareholders and a wish to avoid financial damage to CanWest from having more than one float vehicle for TGL shares.
29. CanWest's participation in the transactions was intended in part to forestall the acquisition of TGL shares by persons potentially hostile to CanWest's interests.
30. CanWest's wish to prevent competitors or other parties potentially hostile to CanWest's interests being represented on the TGL board was a factor in its participation in the transactions.
31. At some point between the Belshaw transaction and the Corom and Audant transactions, CanWest became motivated by a wish to assemble a sufficiently large parcel of shares to float a controlling interest in TGL, should it choose to do so.
32. CanWest is in a position to exercise control of DSK.

2.1.2.3 REASONING

2.1.2.3.1 ORIGINS OF THE STRUCTURE

Under s6 of the BSA, trusts, agreements, arrangements and understandings between the parties are relevant to a consideration of control. The way in which the structure was developed is in turn relevant to the approach of the parties to the agreements, and to any arrangements or understanding which may underpin those agreements.

CanWest conceived of the Selli structure in order to realise financial and strategic ends in relation to TGL. CanWest played the major role in devising the structure, including drafting (through its solicitors) all the transaction documents. CanWest approached Mr Skala and Mr Leibler to participate in the structure (while at the same time financing the acquisition of their TGL shares) on the basis of their existing relationship as fellow shareholders and directors of TGL. CanWest agreed to pay a premium on the Copplemere and Leibler Media Holdings shares in return for Messrs Leibler and Skala retaining voting rights.

CanWest financed all of the subsequent acquisitions of TGL shares by Selli and its subsidiaries.

Selli's involvement in these transactions has largely been at CanWest's suggestion and initiative, and largely in agreement with the terms and conditions proposed. There is some uncertainty in the evidence about whether Mr Skala prompted CanWest to design the Selli structure. However, the ABA accepts Mr Strike's testimony that the purpose of designing the Selli structure was not to acquire Mr Leibler and Mr Skala's shares, as such, and that it was really a response to the possibility of the sale of the Belshaw shares. Mr Leibler has had little involvement in the activities of Selli, but has relied substantially upon Mr Skala.

These transactions resulted in substantial benefits flowing to the members of Selli, which Mr Skala acknowledges. Mr Skala has given evidence that he assessed each transaction on its merits and participated primarily on the basis of the financial advantage each would bring to him and Mr Leibler. There is no evidence of disagreement between Messrs Leibler and Skala on the one hand and CanWest on the other on issues of substance since the agreements were entered into.

Mr Skala testified that he had rejected a suggestion from CanWest that undertakings be given about how to vote at a general meeting of shareholders. However, Mr Skala did not in any event want to vote for the requisition in question, which CanWest opposed¹⁵³. Given that Mr Skala did not intend to vote in favour of the requisition, his refusal to give an undertaking to vote against it is not a significant indicator of his independence and the ABA gives it little weight.

2.1.2.3.2 BENEFITS

The Selli Transaction Documents when considered as a whole confer a number of benefits on the current members of Selli which may act as incentives to ensure that the present arrangements continue.

Financial benefits were provided to help secure the participation of Mr Leibler and Mr Skala in the structure through DSK's agreement to pay an amount additional to the original sale price of their TGL shares. Continuing benefits, which DSK can place in jeopardy, are available on an annual basis in the form of preferential dividends of \$300,000 (\$150,000 each) for as long as Copplemere and Leibler Media Holdings have participating shares in Selli. Mr Skala's understanding is that taxation benefits are also available.

Mr Skala and Mr Leibler anticipate receiving benefits if the TGL shares held by Selli and its subsidiaries are included in a float. Because of DSK's charge over the assets held by Selli and its subsidiaries, the circumstances and timing of any float of these shares would be in the control of CanWest.

They have also gained the benefit of TGL board seats or continued board representation. The understanding of the parties was that board representation was one of the advantages or compensations which would accrue to Mr Skala and Mr Leibler for participating in the transaction.

The shareholders in Selli can realise their entitlement to 5% of the capital appreciation of the value of the TGL shares held by Selli and its subsidiaries without the consent of CanWest by redeeming their shares in Selli (it can also be realised on a winding-up or through a reduction of capital). However, they must give DSK one year's notice to do so, and there must be at least one remaining B class shareholder (if no C or D class shares have been issued) for redemption to be an option. At this stage no Class C or D shares have been issued. In other words, if one of the current B class shareholders redeems, then the remaining shareholder cannot do so. While this provision reflects Corporations Law requirements, it effectively limits the remaining B class shareholder's ability to realise some of the benefits of the agreement without CanWest's cooperation.

The current members of Selli have a strong interest in the continuation of the arrangements, which could be jeopardised without the continuing goodwill of DSK and CanWest. While Mr Skala has indicated that he does not consider the benefits of ongoing participation substantial compared to the initial benefits of the transaction, the ABA is of the view that the benefits nevertheless are significant.

2.1.2.3.3 CAPACITY TO JEOPARDISE BENEFITS

The transaction documents provide at least two mechanisms by which the arrangements between DSK and Selli could be altered at will by DSK so as to place in jeopardy the benefits which the members of Selli currently receive.

The Selli Call Option Deeds DSK has entered into with Leibler Media Holdings and Copplemere confer a conditional right on DSK to acquire the voting shares in Selli held by Leibler Media Holdings and Copplemere. By the terms of the Selli Call Option Deeds, the options may be exercised in favour of a nominee of DSK.

While the call option cannot, in theory, be exercised so as to bring about a breach of the BSA or the FATA, the powers could be exercised to compel the transfer of the voting shares to a different Australian resident nominee, should the directors of Selli propose to exercise any of the powers of office (including the power to exercise the TGL votes) in a manner inconsistent with the wishes of DSK, and to compel the acquisition of Leibler Media Holdings' and Copplemere's voting shares by an Australian nominee.

The provisions of the Selli Convertible Debentures Deed allow DSK at will to enable a 'qualified' nominee to acquire a majority of the voting shares in Selli. The holder of those shares would then be likely to call for the redemption of the Class B shares, remove the current directors from the Selli Board, and appoint new directors. That nominee could replace directors at a general meeting on 30 days' notice.

The powers to effect the removal of the directors of Selli for any reason or for none through the conversion of the debentures in favour of a nominee, and to enable the acquisition of Leibler Media and Copplemere's voting shares, are substantial commercial sanctions available to DSK to exercise as it sees fit.

In addition, if CanWest chooses to float DSK or sell its debenture interest in Selli or its interest in DSK, the entitlement to the \$300,000 payment and TGL board representation would be jeopardised.

Mr Strike acknowledged that Copplemere and Leibler Media Holdings could also be removed as shareholders of Selli through the transfer of DSK to an Australian and the Australian exercising the debentures and call options. Mr Strike acknowledged that in the event of Selli's directors being hostile, CanWest had the option of disposing in some fashion of DSK or the financial instruments held by DSK¹⁵⁴. Mr Strike acknowledged that the Australian in such a scenario could be a 'new Selli' superimposed 'on top of Selli'.

While these mechanisms could not practicably be used to control each and every exercise of the TGL votes held by Selli, they could be used on particular issues (such as the form of a proposed float) to ensure that the votes are cast by members whose views on the issue are known to coincide with those of DSK/CanWest. The existence of these powers is relevant to the degree of independence from CanWest which those directors might be expected to exercise on such an issue.

It can be argued that the power to convert notes to shares held by a nominee, and the power to call for the transfer of the voting shares in Selli to a nominee, cannot be exercised in favour of a nominee which DSK in fact controls, and therefore cannot lead to DSK securing control. While this supports a conclusion that DSK cannot obtain a legally enforceable and immediately exercisable 'right to exercise control of the requisite voting power', it does not overcome the wider test of control which the BSA poses. On any particular TGL issue of importance to DSK/CanWest, the powers could be used to effect the replacement of Messrs Leibler and Skala as directors of Selli with a person whose views on the issue are known to coincide with those of DSK/CanWest.

2.1.2.3.4 CONSTRAINTS

The business arrangements between Selli and its subsidiaries and DSK effectively prevent Selli borrowing (on any significant scale), issuing shares or securities except to DSK or its nominee, or selling its shares in TGL, Numeration or Turnand. They prevent the holders of voting rights in Selli, Numeration and Turnand from transferring those rights. These rights, taken together, give DSK and CanWest the strategic initiative in relation to the future disposition of Selli's TGL shares. This is a matter of considerable financial importance for the shareholders in Selli. For example, the shareholders in Selli have no independent capacity to float the TGL shares that Selli and its subsidiaries hold.

Even though they do not give DSK any direct legal power to control the way in which Selli exercises voting rights attached to TGL shares, the provisions of these agreements, taken together, constitute thoroughgoing constraints on the activities in which Selli can engage unless authorised by DSK.

Submissions to the ABA on its draft report suggest that the powers given to DSK are not such as to enable it to actively direct or restrain the conduct of Selli's business and thus can not put DSK in a position to exercise control of Selli. A passage from the case of *Techcom - the Acquisition of Southern Cross* (1984) 1BR 182 at 185 is reproduced which says:

But they do make a useful and relevant distinction between: on the one hand the kind of 'negative' control commonly reserved in the ordinary course of business to a creditor in order to protect the creditor's business; and on the other hand the power of initiative which more naturally falls within the primary meaning of the word 'control'. A creditor will not automatically be deemed to control a licence because that creditor has reserved the power to approve certain changes in relation to the conduct of the licensee as opposed to a power to actively **direct** the conduct of the business. Of course there can be situations where the negative powers of a creditor are so far reaching or so unrelated to protecting the interests of the creditor to fall within s.91(1) [of the *Broadcasting and Television Act 1942*]. It is matter of judging the true complexion of the whole arrangement between the licensee and the creditor in the particular case'.

Techcom was a decision of the Australian Broadcasting Tribunal (ABT) and is not binding on the ABA. It was a decision made at a time before the *Re News Corporation Limited* (1987) ALR 419 case where several questions of law were stated to the Federal Court by the ABT pursuant to s.22B of the Broadcasting Act 1942. The judgment in the *News Corp* case forms the basis of the present law. That case makes it clear that all the facts and circumstances must be considered in determining the question of control.

DSK is a wholly owned subsidiary of CanWest. DSK was created by CanWest as part of the overall structure of this transaction and is a single purpose company.¹⁵⁵ CanWest has a direct 14.99% shareholding interest and a 76% economic interest in TGL. CanWest was a founding member of the consortium which purchased Network Ten from Westpac in December 1992. Since then it has had an influential role in the development of TGL and Network Ten. This was achieved by its representation on the Network Ten Executive Committee, provision of consultancy services (now terminated) and advice to the TGL Board and through its two directors on the Board of TGL. Some of these matters are discussed in detail in the ABA's 1995 report, *Investigation into Control: CanWest Global Communications Corporation/The Ten Group Ltd*. The transaction documents confer not only a capacity to enable the acquisition of a majority shareholding in Selli through conversion of the debentures in favour of a qualified nominee, but also a capacity to enable

the acquisition of Leibler Media Holdings' and Copplemere's voting shares through the call options. These factors set Can West quite apart from an arms length lender such as a bank or Techcom in the above case.

It is also relevant that Selli is a limited special purpose company. It exists to hold the TGL shares purchased from Belshaw, Leibler Media Holdings and Copplemere and funded by DSK. Its Memorandum indicates that the company must not carry on any activity other than the acquisition, holding, exercise, enforcement or the disposal of TGL shares or other similar closely related securities (including debentures issued by TGL). It may receive and invest in an 'at call account' any distribution payable in respect of those securities, pay dividends in accordance with its Articles and enforce or defend contracts which relate to the above activities. Its purpose does not extend beyond this.

DSK has a right to nominate a director on the board of Selli. Mr Strike gave evidence that it had nominated a director of DSK to be on the board of Selli.

The powers that the lender has must be seen in this context.

It has been submitted to the ABA that some aspects of these arrangements are among the standard arrangements for the provision of financial accommodation. This is not an answer in itself. The fact that the BSA sets out special exempting provisions for authorised lenders to media companies (such as Selli) indicates that the legislature has recognised such arrangements may well give rise to control¹⁵⁶. Neither DSK nor CanWest is an authorised lender under the BSA.

2.1.2.3.5 DISINCENTIVES

There are disincentives as well against acting in accordance with the wishes of CanWest. These include the possibility of Mr Skala and Mr Leibler breaching their fiduciary duties as directors of Selli, the possibility of a breach of the BSA occurring as a result of such action and the possibility of the reputations of Mr Leibler and Mr Skala being compromised by such action.

It should be noted that the prohibition in the BSA is upon being in a position to exercise control of votes, giving rise to a company interest in excess of the limits provided. The test does not ask whether the control is being or has been exercised.

2.1.2.3.6 QUALIFYING REQUIREMENTS

The qualifying requirements in the agreements are in several forms. They variously purport to prevent entitlements from arising, or powers being exercised, where a breach of the BSA would result.

Debenture Stock Trust Deed

Clause 12.6 of the Selli Trust Deed provides that 'Notwithstanding any other provision of this Deed, the Trustee, a Receiver or any agent appointed under clause 12.1(c) may not

exercise any Power if the Qualifying Requirement is not satisfied in respect of that Power.’ ‘Power’ is defined as any right, power, authority, discretion, remedy or privilege conferred on the Trustee, Receiver or any attorney or agent appointed under the Deed, by any Transaction Document, by Statute or by law or equity.

“Qualifying Requirement” means, in respect of any Power, that either:

- (a) the exercise of the relevant Power is not in breach of and does not cause the Trustee, any Stockholder or its affiliates, or TGL or any of its shareholders to be in breach of the Foreign Control and Ownership Legislation or any mandatory directives 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 the exercise of the relevant Power in favour of the Trustee notwithstanding that any Stockholder is not an Australian resident.

As such the Qualifying Requirement in this form is not directed to a discrete issue or a specific entitlement or power. It is in the form of a general savings provision, and purports to operate whenever, in a given factual situation, a breach of the legislation would result were the power to be exercised.

Memorandum and Articles of Association

The Memorandum and Articles of Association of Selli contain the following ‘Qualifying Requirements’.

Clauses 9 and 10 of Memorandum of Association of Selli provide:

- 9 A special resolution purporting to alter or add to or omit any provision of the Articles of Association of the Company does not have any effect unless and until the written consent of:
 - a) the registered holders of the Limited Class Shares;
 - b) the Convertible Debenture Holders; and
 - c) the Participating Debenture Holders,is obtained, except where the requirement for the giving of consent will result in a breach of the BSA.
- 10 A special resolution purporting to alter or add to or omit paragraphs 5, 6, 7, 8 or 9, or this paragraph 10 does not have any effect unless and until the written consent of:
 - a) the registered holders of the Limited Class Shares;
 - b) the Convertible Debenture Holders; and
 - c) the Participating Debenture Holders,is obtained, except where the requirement for the giving of consent will result in a breach of the BSA.

Article 1.5(c) provides that:

Notwithstanding anything contained in these Articles, where the requirement for the written consent of the Participating Debenture Holders expressed to be required pursuant to these Articles will give rise to a breach of the Broadcasting Services Act, the expressed requirement for such written consent will be deemed to be severed from these Articles.

Convertible Debentures Deed and Call Option Deed

Sub-clause 10(a) of the Convertible Debentures Deed provides that a right to convert the Notes arises subject to the Qualifying Requirement being satisfied and subject to clause 10(g). Clause 10(g) purports to prevent the conversion unless and until the exercise of the right to convert would not constitute a breach of Foreign Control and Ownership Legislation or any mandatory directive given thereunder.

“Qualifying Requirement” means that either:

- (a) (i) the Noteholder or its Nominee is an Australian Resident;
and
- (ii) the conversion of the Notes under clause 10 is not in breach of and does not cause TGL, a shareholder of TGL, any Noteholder or any affiliate of a Noteholder to be in breach of Foreign Control and Ownership Legislation or any mandatory directive 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 some or all of the Notes under clause 10 in favour of the Noteholder or its Nominee notwithstanding that such Noteholder or its Nominee is not an Australian Resident.

The Qualifying Requirement in the Selli Call Option Deed is expressed to apply to the exercise of the call.

Participating Debentures Deed

Clause 7 of the Participating Debentures Deed also contains a provision which purports to prevent a breach of the Act occurring. It is in a different form to the other provisions as referred to below.

Analysis

These provisions are different both in form and in substance from severance clauses in contracts. Such provisions are sometimes used to provide in the contract itself for the contingency that some parts of the agreement are found by a court to be illegal by reason of, for example, restraint of trade or breach of taxation legislation. However, the qualifying requirements are not severance provisions as such at all.

With the exception of clause 7 of the Participating Debentures Deed, the qualifying requirements do not specify any mechanism (such as a finding by a court or the ABA) by which the operation of the provision is enlivened. They purport to be general savings provisions which prevent an entitlement arising or a power being exercised whenever in a given matrix of fact and law breach of the BSA or the Foreign Acquisitions and Takeovers Act as in force at that time would result. They purport to operate such that the entitlement does not arise or the power cannot be exercised at that time, in those circumstances.

The qualifying requirements are in effect a statement by the parties that they do not by the agreements intend to authorise any breach of the Acts.

However, the provisions could only be effective in preventing “a position to exercise control of votes” arising, if, at the time at which the power is to be exercised, the repository of the power has full knowledge and a correct understanding of all relevant facts and correctly applies the law to those facts. But as noted above, the agreements (with one exception) provide no mechanism by which a determination will be made whether the qualifying requirements have come into effect in relation to any contemplated exercise of power. In relation to the exception, clause 7 of the Participating Debentures Deed, the provision purports to operate only where the parties concur in the view, or the Noteholders’ lawyers express the opinion if there be disagreement, that the contemplated entitlement or benefit would give rise to a breach of the Act.

Submissions were put to the ABA to the effect that because Messrs Leibler and Skala are experienced and reputable businessmen and Mr Skala is a solicitor, the ABA can rely on them to ensure that no breach of the legislation will occur. The ABA does not accept the submissions. To determine whether a “position to exercise control of votes” exists, the Acts must be applied correctly to the whole factual and legal matrix of the agreements and arrangements between the parties. The ABA does not accept that that determination can be left to interested directors, however experienced or reputable.

In the context of factual control over the way in which Selli or Donholken exercises the votes attaching to the TGL shares which it holds, it matters little whether the various powers and entitlements in fact exist if the parties take the view that they do, and act upon that view.

The ABA has therefore concluded as a factual matter that the qualifying requirements will not operate in practice to prevent a breach of the control provisions occurring.

2.1.2.4 CONCLUSION

Under its Memorandum and Articles Selli is a special purpose company. Its function, briefly summarised, is to acquire and hold shares and other securities in TGL, to hold income from any distribution on those shares or securities in an 'at call account' and to pay dividends in accordance with the articles. The articles under which dividends are to be calculated include as schedules the Selli Convertible Debentures Deed, the Selli Participating Debentures Deed and the Selli Trust Deed.

The manner in which distributions from TGL are shared among the shareholders of Selli and DSK is considered in part 2.2, dealing with dividend interests.

The structure of the Memorandum and Articles of Selli, and the Selli Participating Debentures Deed, is such that DSK is the principal beneficiary in the event that TGL makes distributions in excess of \$300,000 plus 'expenses' to Selli, rather than the members of Selli. Conversely, the risk of low TGL distributions is borne primarily by DSK, which will receive its participating debenture interest payments in any given year only if distributions exceed the preferential dividend payable to members of Selli.

The current shareholders in Selli have a commercial interest in ensuring that TGL distributions are sufficient to cover the 'expenses' of Selli, plus the \$300,000 preferential dividend. Beyond that, Leibler Media Holdings and Copplemere receive only 5% of distributions, while DSK receives 95%.

DSK's position is in this respect quite different to that of a typical 'arms length' financier. Most of the commercial risks and advantages of Selli's TGL shareholding are shared, according to the formula discussed above, between DSK and the members of Selli.

DSK is, under the Memorandum and Articles, entitled to be represented on the board of Selli. It is entitled to receive papers and to participate in meetings. It has the capacity to convert its interest to that of a controlling shareholder through either the exercise of the call options or conversion of the debentures should legislative amendment permit that to occur. In the absence of legislative amendment, it can convert its interest to that of a controlling shareholder in Selli in favour of a qualified Australian resident nominee of its own choice.

Substantial commercial benefits accrue to the members of Selli while the present arrangements are allowed by DSK to subsist. Given the nature of Selli as a special purpose company, and the benefits which its members receive from the continuation of the present arrangements, the ABA has concluded that the best interests of the members of Selli will usually be served by exercising its TGL votes in accordance with the wishes and interests of DSK and CanWest.

The provisions of the Memorandum and Articles of Selli in many crucial respects assimilate the position of DSK to that of a shareholder. The provisions of the agreements allow DSK to become a shareholder itself if the law permits or to enable the acquisition of the dominant shareholding in Selli for a qualified nominee of DSK.

In light of these matters, the reasoning set out above and the facts found above, the ABA has reached the conclusion that the directors of Selli would pay particular regard to the wishes and interests of DSK in exercising the TGL votes which Selli holds. The ABA finds that those directors would follow those wishes and interests unless of the view that to do so would be a breach of their duties as directors.

Directors have a duty to have regard to the interests of shareholders as a whole, which normally includes the collective interests of both present and prospective shareholders. However, this does not mean that directors cannot have particular regard to the interest of outsiders (such as debenture holders), unless in doing so the director disregards the interests of the shareholders as a whole. As Bowen CJ stated in *Re News Corporation Limited* (1987) ALR 419 at 437, referring to nominee or representative directors:

It is both realistic and not improper to accept that such directors will follow the interests of the company which appointed them subject to the qualification that they will not so act if of the view that their acts would not be in the interests of the company as a whole.

The principle is not restricted to nominee or representative directors. See PD Finn, *Fiduciary Obligations*, paras 111-116; *Levins v Clark* [1962] NSW 686 at 700-701. See also, generally, *Pennington's Company Law*, 6th Edition, Butterworths, London 1990, p591; JF Corkery, *Directors' Powers and Duties*, Longman Cheshire, Melbourne, 1987, pp 62-63, *Butterworths Australian Corporation Law Service*, Volume 1, para [3.2.0050]; Ford and Austin's *Principles of Corporation Law*, 7th Edition, Butterworths, Sydney, 1995, paras [9.440] - [9.450]; *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 at 165-6.

It is consistent with a director's duty for the director to follow the wishes of a particular interest which has brought about his/her appointment, without a close personal analysis of the issues, unless the director is of the view that in doing so he or she is not acting in the best interest of the company as a whole. See *Re Broadcasting Station 2GB Pty Limited* [1964-5] NSW 1648 at 1663.

These statements of legal principle accord with the Members' own knowledge and experience. Directors usually act in accordance with the wishes and interests of a party that has brought about their appointment and on whose goodwill their continuation in office depends unless that places them in breach of their duties. The ABA is satisfied that all of the current Selli directors, including Messrs Leibler and Skala (albeit that they were formally appointed as a result of Leibler Media and Copplemere's shareholding in Selli), would follow the wishes and interests of DSK/CanWest to that extent in exercising Selli's TGL votes.

The ABA accepts that Messrs Leibler and Skala would act in accordance with their duties as directors of Selli. However, the Authority places very little weight on their evidence that they would act independently of DSK/CanWest in exercising Selli's TGL votes. The ABA does not accept that they would so act on any matter of substance on which CanWest sought to influence their vote unless satisfied that a breach of their duties would otherwise result. The ABA has concluded that these statements of general intention would give way to commercial reality on any particular TGL issue of importance to CanWest.

In light of the above findings of fact, and the reasons given above, the ABA finds that CanWest is in a position to exercise control of votes cast by Selli on a poll at a meeting of The Ten Group Limited.

Copplemere and Leibler Media Holdings, the only shareholders in Selli, each hold all of the voting shares in Numeration and Turnand respectively. Mr Leibler and Mr Skala are also the directors of Turnand and Numeration. Numeration and Turnand are part of a larger structure which includes Selli. The ABA is satisfied that all of the current directors of Turnand and Numeration, including Messrs Leibler and Skala (albeit that they were formally appointed as a result of Leibler Media Holdings' and Copplemere's shareholdings in Turnand and Numeration respectively), would follow the wishes and interests of DSK/CanWest in exercising the TGL votes of Turnand and Numeration unless satisfied that a breach of their duties would otherwise result.

In voting on a poll at a meeting of TGL on behalf of Numeration and Turnand, Mr Leibler and Mr Skala would be considering the same arrangements as they would in the case of Selli.

Given the above findings, the ABA is satisfied that CanWest is in a position to exercise control over the casting of votes by Selli, Numeration and Turnand on a poll at a meeting of The Ten Group Limited.

FINDING

CanWest is in a position to exercise control of votes cast by Selli Pty Ltd on a poll at a meeting of The Ten Group Limited.

CanWest is in a position to exercise control of votes cast by Numeration Pty Ltd on a poll at a meeting of The Ten Group Limited.

CanWest is in a position to exercise control of votes cast by Turnand Pty Ltd on a poll at a meeting of The Ten Group Limited.

2.1.3 VOTING INTERESTS HELD BY CANWEST THROUGH DONHOLKEN PTY LTD

2.1.3.1 MATERIAL FINDINGS OF FACT

2.1.3.1.1 DEVELOPMENT OF DONHOLKEN

ESTABLISHING DONHOLKEN AND PURCHASING THE TGL SHARES

Background

On 26 November 1996 two shareholders in TGL, Corom, a company controlled by Mr Jack Cowin, and Audant, a company controlled by Mr Robert Whyte, gave notice of their intention to sell their TGL shares. The notice of an intention to dispose of shares is required by clause 6.1(k) of the Share Subscription Agreement:

- Each shareholder has 30 days from receipt of such a notice within which to exercise its right to purchase those shares.
- In the event that more than one shareholder indicates its intention to purchase those shares, the shares are to be purchased by the shareholders who had exercised their 'pre-emptive rights' in the proportion to their existing financial interests in TGL.

Under clause 6.1(k) of the Share Subscription Agreement a shareholder who is entitled to exercise pre-emptive rights under the Share Subscription Agreement and who is a foreign person within the meaning of the BSA may nominate a non-foreign person to acquire shares offered for sale. Accordingly, on 11 December 1996, CanWest, a party to the Share Subscription Agreement, nominated Selli to acquire the TGL shares from Corom and Audant. Selli accepted the nomination on 11 December 1996 and entered into an agreement with Corom and Audant to acquire the relevant TGL shares, which had to be completed before 10 January 1997.

Another TGL shareholder, TNQ, raised legal objections to this proposed acquisition alleging that Copplemere, Turnand, Leibler Media Holdings and Numeration would be in breach of clause 6.2(a) of the Share Subscription Agreement in that each of them would be entitled to more than 40 per cent of the issued shares in TGL if the transaction were completed. As a result, the parties decided not to finalise the share sale. TNQ further alleged that Corom and Audant might also breach that clause to the extent they entered into an arrangement, transaction or dealing whereby Selli became entitled to more than 40 per cent of the issued shares in TGL.

In early January 1997, CanWest executives and Mr Skala, a director of Selli, began to seek alternative purchasers for the TGL shares held by Corom and Audant.

Establishing Donholken

Mr Strike testified that the idea of another company, other than Selli, acquiring the TGL shares from Corom and Audant came from CanWest (including their solicitors, Clayton Utz)¹⁵⁷.

Mr Skala testified that CanWest asked him, around 2-4 January 1996, whether he knew anybody not associated with him who might own the shares and exercise the voting rights in the TGL shares to be purchased from Corom and Audant.¹⁵⁸

Mr Lerner testified that he had a conversation with Mr Strike about locating another purchaser, after which he contacted Mr Skala who suggested he contact Ms Melda Donnelly.¹⁵⁹

On the evening of Sunday 5 January 1996 Mr Skala contacted Ms Donnelly. He explained to Ms Donnelly that Selli wished to acquire the TGL shares from Corom and Audant but that there was a potential problem. Mr Skala asked Ms Donnelly whether she would be interested in acquiring the shares and whether she was willing for her name to be put forward to CanWest as an interested person. Mr Skala contacted CanWest and told them he had spoken to Ms Donnelly¹⁶⁰.

Mr Lerner testified that he contacted Clayton Utz to 'get going on the documentation...so they did that and then we spoke (to the Donholken principals) of the terms, the negotiations'.¹⁶¹

Mr Lerner stated that he then spoke to Ms Donnelly 'to explain that shares were available if she was interested in purchasing them'.¹⁶² This was on Monday 6 January 1997. Ms Donnelly contacted lawyers and received draft transaction documents from Clayton Utz on Monday afternoon.

Mr Richard Kennett was first approached about the transaction by Mr David Asper, son of Mr Israel Asper and Vice-president, Programming, CanWest, on 7 January 1997 in the morning. Mr David Asper referred to an expression of interest made by Mr Kennett to acquire TGL shares in September 1996¹⁶³. In September 1996 Mr Kennett had contacted Mr David Asper, having read about shareholder difficulties in a newspaper, and told him that if a block of TGL shares came up for sale he would be interested in purchasing them. Mr Kennett followed this up with a letter and a CV¹⁶⁴. In answer to the question of whether it occurred to him that, as an Australian citizen, in purchasing some of those (TGL) shares, that might have assisted CanWest with its problems, Mr Kennett confirmed that this was the case¹⁶⁵.

Mr Lerner approached Mr Kennett on the afternoon of 7 January 1997 with the same offer put to Ms Donnelly, that is, that he purchase the TGL shares held by Corom and Audant.¹⁶⁶

Mr Lerner also testified that he ‘then spoke with one of the few ones I knew, who was a fellow who had worked at some time for CanWest, which was Anthony Hollis to see what his interest was.’¹⁶⁷

Mr Anthony Hollis testified that he was approached by Mr Lerner on 7 January 1997 and asked whether he would like to participate in the acquisition of TGL shares by Donholken¹⁶⁸. Mr Hollis stated that he told Mr Lerner he would go to Melbourne to meet the other two participants and seek legal advice¹⁶⁹. Mr Hollis testified that on Wednesday 8 January 1997 he went to the offices of Clayton Utz to resign his directorship of Pacific Communications Pty Ltd (Pacific Communications) and to extract himself as a shareholder in trust and as a signatory to the bank account of Pacific Communications¹⁷⁰.

On the morning of Tuesday 7 January 1997 Ms Donnelly went to the offices of Arthur Robinson and Hedderwicks, solicitors¹⁷¹. On Tuesday afternoon Mr Lerner advised Ms Donnelly the names of the other two potential nominees ‘who were to take up the opportunity of purchasing shares under the pre-emptive rights’¹⁷².

On Tuesday afternoon/evening introductory conversations took place between Messrs Kennett and Hollis and Ms Donnelly¹⁷³.

On Wednesday 8 January 1997 Ms Donnelly and Mr Kennett met at the offices of Arthur Robinson and Hedderwicks¹⁷⁴. Also on Wednesday Messrs Kennett and Hollis and Ms Donnelly decided to set up a company, Donholken¹⁷⁵. Arthur Robinson and Hedderwicks agreed to act for Donholken.

Mr Hollis flew to Melbourne and met the other Donholken shareholders on Thursday 9 January 1997¹⁷⁶. Further negotiations over the transaction documents, with all three Donholken shareholders present, took place from 10:00am Thursday until 3:00am on Friday¹⁷⁷. On Thursday night there was an attempt to settle the transaction with Donholken but the transaction documents were not ready¹⁷⁸. Ms Donnelly testified that she was aware that Selli might complete the purchase of the TGL shares¹⁷⁹. Mr Skala testified that he attended the Clayton Utz offices on Thursday night ready to complete the purchase if Donholken was unable to buy the TGL shares¹⁸⁰. Ultimately there was a mutual agreement for Selli to be released from its obligation to close and CanWest, through DSK, was released from its obligation to fund Selli¹⁸¹.

Donholken purchased the TGL shares on Friday 10 January 1997.

Mr Lerner testified that it was his intention to negotiate a deal for CanWest similar to that of Selli. He stated that ‘that’s what we were prepared to finance’.¹⁸²

When asked who she understood to have prepared the bulk of the transaction documents, Ms Donnelly replied, ‘I imagine Clayton Utz...It’s an assumption I made. They gave them to us’.¹⁸³

Mr Strike testified that he thought ‘the price of \$15 a share [for the Corom and Audant shares] was outrageous commercially’ because ‘there was an element of them [Messrs

Whyte and Cowin] putting a rail on the fence with a price to make sure that no-one could jump over'¹⁸⁴. He testified that he 'wasn't terribly excited about that price as a financier', but that 'the additional price was worthwhile to acquire certainty'¹⁸⁵. Mr Strike also testified that the additional price was worth while paying to acquire the certainty that, if Selli [CanWest's original nominee to acquire the Corom and Audant shares] and CanWest combined their two interests into a single float vehicle, they would have a control block of shares to float (52% TGL shares).¹⁸⁶

Ms Donnelly testified that the \$15 was a good price for the sellers but that she had not discussed whether it was a good price for buyers in her initial conversation with Mr Lerner¹⁸⁷. Ms Donnelly further testified that her consideration of the price was influenced by the knowledge that CanWest, with an economic interest in TGL, was financing the acquisition and 'saw that the company had good long term value'¹⁸⁸.

Mr Hollis testified that the Donholken principals never discussed share price and that he had not thought price was negotiable¹⁸⁹. Mr Hollis testified that he thought the price was not unreasonable¹⁹⁰.

Mr Kennett testified that he did not think the price was negotiable¹⁹¹. He considered the price to be 'pretty full'¹⁹². Mr Kennett stated that 'if CanWest is steering towards a float, that's not necessarily what would be good for us because, you know, if they floated it in six months at \$15 that's not so - that's not always our goal. Our goal is maybe to wait three years until it's \$20 and make some money'¹⁹³.

Negotiation over the Transaction Documents

Role of Mr Lerner

Mr Lerner testified that during negotiations with the Donholken principals, and Ms Donnelly in particular, protections were sought by Donholken. Specifically, Mr Lerner recalled that the idea of DSK having a call option over the voting shares in Donholken was rejected by Donholken. However, Mr Lerner testified that this did not overly concern him¹⁹⁴. Mr Lerner also testified that Donholken wanted expenses covered by DSK.¹⁹⁵

Mr Lerner testified that Donholken was successful in negotiating outcomes that they wanted in the transaction¹⁹⁶, though there were some points which CanWest would not concede because of their lack of commercial viability from CanWest's viewpoint¹⁹⁷.

However, Mr Lerner also testified that it was CanWest's objective to establish a structure similar to that of Selli¹⁹⁸. The Selli structure involved the setting up of a company to hold the voting interest in TGL shares the purchase of which was financed by a CanWest subsidiary and the majority economic interest of which is held by the CanWest subsidiary.

Changes negotiated by Ms Donnelly

Ms Donnelly testified that the Donholken shareholders negotiated a number of changes to the transaction documents including the removal of the call option. Ms Donnelly said 'the

call option we didn't proceed with; we changed that. We weren't happy with that. We changed various bits and pieces on legal advice and, you know, over a series of days negotiated different points, so that what we received and what we got were all under negotiation¹⁹⁹ ... I think if I were to describe what we wanted changed, from a commercial and regulatory perspective we wanted a different method for us to operate under other than a call option²⁰⁰ ... We didn't find that commercially or from a legal perspective something we wanted to proceed with ... I wanted to have rights as a shareholder that were rights that were real'.²⁰¹

Q. And why did you see that the call option would make them not real?

A. "Not real" is probably not the right description, but the control for me to know what time frames I was personally investing in that company was, I suppose, something that interested me. So commercially, you know, if the capacity for me to be removed as a shareholder, I think - yes, shareholder - wasn't protected under Australian law, then I thought we could do it better.²⁰²

Changes in the transaction documents between first and last drafts

The ABA has been supplied by Arthur Robinson and Hedderwicks (solicitors for Donholken) with copies of the first draft of the transaction documents prepared by Clayton Utz and sent to Donholken on 6 January 1997. Those documents include a Debenture Stock Trust Deed, Memorandum and Articles of Association, Call Option Deed, Participating Debentures Deed and Convertible Debentures Deed.

Changes producing positive outcomes for Donholken and its members

- Articles of Association of Donholken

Article 1.7 - This article was not included in the first draft but is contained in the final document. It provides that rights and privileges attaching to a class of shares cannot be varied without the approval of the holders of that class of shares and that alteration of capital of the company requires the consent of the Class A, C and D Members and the Participating Debenture Holders. This provision was inserted at the request of Donholken.

Article 3 - Class A shares were made redeemable (though one A Class Share or, if there are C Class members, one C Class share must remain issued).

Article 6 - Article 6 of the first draft stated that Class A and B Members may not transfer any shares held by them. Clause 6 of the final document provide for limited rights of transfer of shares held by Class A, B and E Members with consent of the Participating Debenture Holders (such consent not to be unreasonably withheld).

Article 23.2(b) - the first draft stated that the Directors will only declare one dividend in respect of each fiscal year. The final document states that the Directors may declare one or more dividends in respect of each fiscal year (provided it does not exceed any limit in the Articles on the rights and profits of the Participating Members in the profits of the company).

- Donholken Debenture Stock Trust Deed

Clause 4.8(a) was varied from the first draft so that the Chargee (DSK), in the 'event of an enforcement', may not apply for the winding up of Donholken (this provision is the same in the first draft). However, the Chargee may also not appoint an administrator to Donholken or obtain a judgment for the payment of money or damages by Donholken, issue any demand under s.459E(1) of the Corporations Law against Donholken; levy or enforce any distress or other execution to, or against any asset of Donholken; or take any proceedings for any of those things.

Clause 2.1(c) of the final document was an addition on the first draft. It states that the Charged Property does not include any asset or property which existed before this deed and which at that time, were located outside the Australian Capital Territory.

Clause 4.8(e) is an addition on the first draft to the effect that in exercising any right or remedy of enforcement DSK cannot incur any liability on behalf of or on account of Donholken except a liability which is itself subject to the limitation in clause 4.8.

However, Clause 4.8A was added to the final document. It states that clause 4.8 does not limit DSK making a claim or enforcing an action against Donholken for payments in relation to exercising its rights in respect of the FATA Property (assets of Donholken in respect of which it is necessary to obtain a FATA consent before the asset can become subject to the charge).

Clause 8.4(c)(ii) of the first draft (clause 7.4 of final document) is omitted from the final document. This clause stated that Donholken had to give DSK, when requested, a copy of its balance sheet and trading and profit and loss account for that half-year.

Clause 9.2 of the first draft is varied (clause 8.2 of final document). The clause states that Donholken is to open a bank account approved by DSK in which to deposit money received by DSK under the debenture deeds. DSK may prohibit Donholken from dealing with the account (*other than a dealing which is in accordance with its Memorandum and Articles of Association*). The italicised words were added to the final document.

Clause 11 of the first draft (clause 9 of the final document) - *Events of Default*- was changed. Clause 9.1(m) states that if any change in the shareholding of Donholken (*other than in accordance with the Articles*) occurs (or any change in the beneficial entitlement to shares in Donholken occurs *other than in accordance with the Articles*) without the prior written consent of DSK, *or all of the Class A and Class B1 Shares (as defined in the Articles) have been redeemed* (that is an event of default). The italicised words were added to the final document.

Clause 12.1 of the first draft (clause 10.1 of the final document) is slightly varied so that a receiver may be appointed to Donholken only after an event of default and not also 'after any of the secured money becomes due and payable under the provisions of any transaction document' as the first draft stated.

Clause 13.3 of the first draft (clause 11.3 of final document) is varied so that in the final document Donholken appoints DSK etc as its attorney with power to do the things specified only *on or after the occurrence of an event of default*.

Changes reflecting positive outcomes for CanWest/DSK

- Memorandum of Association

Clause 7 states that the company must not *sell, dispose, alienate or* charge any property or business of the Company or all or any of its unpaid capital. The first draft of the Memorandum of Association did not include the italicised words.

- Articles of Association

Clause 1.7 - The clause also provides that Donholken shall not, among other things, vary or amend etc any agreement to which it is a party or binding on it. This amendment appears to have been made at the request of Donholken.

Financing the transaction

DSK financed the purchase of the TGL shares by Donholken. CanWest provided DSK with the finance for the subscriptions for debentures in Donholken.

Other Matters

The ABA noted that Messrs Kennett and Hollis and Ms Donnelly sought independent legal advice before entering the transaction. In particular, Mr Kennett testified that most of the legal advice given was to do with control in terms of the BSA²⁰³.

The ABA also noted the evidence of Mr Kennett that Mr Lerner communicated to him the importance of the independence of the new company that was to be established (Donholken)²⁰⁴. The ABA noted the statement by Ms Donnelly that it is her intention 'to act independently and to look as if I'm acting independently'²⁰⁵. The ABA noted that Mr Hollis testified that he does not feel obliged to take into account CanWest's views in how the TGL shares held by Donholken are voted or in the decision making of Donholken²⁰⁶.

The ABA noted the statements by Messrs Asper, Strike and Lerner of CanWest that the structure of Selli had been created in order to comply with the BSA²⁰⁷. The ABA notes that the Donholken structure is very similar to the Selli structure and that it was the intention of CanWest to set up a similar structure.

FINDINGS OF FACT

The establishment of Donholken and the purchase of the TGL shares was initiated by CanWest which brought the future shareholders together, organised the drafting of the transaction documents and financed the purchase of the TGL shares.

The transaction structure proposed by CanWest, was adopted by Ms Donnelly and Messrs Kennett and Hollis with a number of amendments.

The substantive elements, including Donholken being a single purpose company, a charge over assets of Donholken and the issue of convertible and participating debentures (with the

exception of the call option over a voting share) were accepted by Ms Donnelly and Messrs Kennett and Hollis.

The Directors of Donholken accepted the substantive elements of the transaction because the transaction produced benefits for them.

STRUCTURE OF DONHOLKEN

As a result of the negotiations outlined above Donholken was incorporated on 9 January 1997 for the purpose of holding TGL shares to be sold by Corom and Audant. On 10 January 1997 Corom and Audant sold their shares in TGL to Donholken.

The authorised capital of Donholken consists of:

- a) 100 Class A voting, non-participating shares of \$1.00 each, 17 of which are held by each of Murdon Business Pty Ltd, Jacomo Pty Ltd and Rusalka Pty Ltd (no other shares in this class have been issued);
- b) 51 Class B1 limited voting participating shares of \$1.00 each; 17 of which are held by each of Murdon Business Pty Ltd, Jacomo Pty Ltd and Rusalka Pty Ltd;
- c) 49 Class B2 limited voting participating shares of \$1.00 each, none of which have been issued;
- d) 200,000,000 Class C voting shares of \$1.00 each, none of which have been issued
- e) 200,000,000 Class D limited voting non-participating shares of \$1.00 each; none of which have been issued
- f) 1 Class E non-voting, non-participating share of \$1.00, held by Murdon Business Pty Ltd.

Murdon Business Pty Ltd (Murdon) is a company controlled by Ms Donnelly. Jacomo Pty Ltd (Jacomo) is a company controlled by Mr Kennett. Rusalka Pty Ltd (Rusalka) is a company controlled by Mr Hollis.

The holders of the Class A shares are not entitled to any dividends in Donholken (Article 3.2 of the Articles of Association of Donholken). The holders of the Class B1 shares are only entitled to vote on matters relating to the Class B1 shares. The holders of the Class B1 shares are also entitled to the pro-rata proportion of the difference between \$300,000 and the remuneration paid by Donholken to its Directors (Article 3.3(a)(iii) of the Articles of Association of Donholken). The Class B1 shares can be redeemed, at which time the holder is entitled to their pro-rata proportion of approximately 5 per cent of the net value of the assets held by Donholken (Article 3.3(b)(iv) of the Articles of Association of Donholken).

The purchase of the TGL shares by Donholken was financed by the issue of debentures in Donholken to DSK. Donholken has entered into a Convertible Debentures Deed with DSK dated 19 January 1997 (Donholken Convertible Debentures Deed). Donholken has also entered into a Participating Debentures Deed with DSK dated 10 January 1997 (Donholken Participating Debentures Deed).

The obligations of Donholken arising under the debenture deeds are secured by the Debenture Stock Trust Deed entered into between Donholken as chargor and DSK as Chargee on 10 January 1997 (Donholken Trust Deed). The Donholken Trust Deed creates a charge over the assets of Donholken in favour of DSK.

In the event of default, for example, non-payment of the interest under the debenture deeds, the Chargee may become the registered holder of the TGL shares (clause 4.7 of the Donholken Trust Deed).

As part of this transaction a Call Option Deed was entered into between Murdon and CGS Shareholding (Netherlands) BV (CGS Shareholding) dated 10 January 1997 (Donholken Call Option Deed). Murdon has granted a call option over its E Class share in Donholken to CGS Shareholding (clause 2.1 of the Donholken Call Option Deed). The Class E share is non-voting and non-participating.

2.1.3.1.3 EFFECTS OF THE LEGAL AGREEMENTS BETWEEN THE PARTIES

CONVERTIBLE DEBENTURES

Donholken has issued two types of debentures to DSK: Convertible Debentures and Participating Debentures.

The Convertible Debentures are partly paid to one cent (clause 8 of the Donholken Convertible Debentures Deed) and attract a ten per cent per annum interest payment (clause 6 and clause 1 of the Donholken Convertible Debentures Deed). These debentures can be converted into fully paid conversion shares (clause 10 of the Donholken Convertible Debentures Deed). Conversion Shares are defined as meaning Class C or Class D Shares or any combination at the election of the Noteholder²⁰⁸. Class C shares carry a right to vote²⁰⁹, while Class D shares carry a right to vote only on resolutions affecting the rights, privileges and conditions attaching to Class D shares²¹⁰.

The Donholken Convertible Debentures Deed confers a conditional right upon a holder of notes or its nominee to convert notes into fully paid conversion shares which include Class C voting shares.²¹¹ Noteholder is defined in clause 1 as the holder of convertible notes. Sub-clauses 10(a), (b) and (g) of the Donholken Convertible Debentures Deed provide:

- 10 (a) Subject to the Qualifying Requirement having been satisfied and subject to clause 10(g), a Noteholder may from time to time at its option by way of redemption of the Notes convert all or some of its Notes into fully paid Conversion Shares subscribed for at the Subscription Price by:
 - (i) delivering to the Issuer the Certificate or Certificates in respect of that Note or Notes; and
 - (ii) delivering to the Issuer a duly completed Conversion Notice relating to that Note or those Notes; and
 - (iii) paying the Issuer the balance of the unpaid amounts payable on such Notes in accordance with clause 8(b).
- (b) On the conversion Date the issuer must subject to clause 10(g):

...

(ii) subject to clause 10(e) issue to the Noteholder or its Nominee ...conversion shares ...

...

(g) Notwithstanding anything to the contrary in these Conditions, the rights of a Noteholder under clause 10 to have any Conversion Shares issued to it or to its Nominee shall not arise and the Issuer's obligations under clause 10 to issue any Conversion Shares to a Noteholder or its Nominee do not become binding on it, in each case unless and until the exercise of such rights by the Noteholder would not constitute a breach of Foreign Control and Ownership Legislation or any mandatory directive given thereunder.

The 'Qualifying Requirement' means that the noteholder or its nominee is an Australian resident and that conversion of the convertible debentures would not result in a breach of the FATA or the BSA.

In addition, there is a conversion right between C and D class shares which is also subject to a 'qualifying requirement'²¹².

Pursuant to the Donholken Participating Debentures Deed the participating debentures are fully paid to \$1.00 and attract an interest payment linked to the distribution from dividends which Donholken is paid on its TGL shares (clause 6 of the Donholken Participating Debentures Deed). The interest payment is effectively all of the TGL dividends or other distributions (excluding a distribution which constitutes a 'winding-up interest' as that term is defined in the BSA) left in Donholken after taking out expenses, interest on the convertible debentures and after the \$300,000 payment is made.

Clause 7 of the Donholken Convertible and Participating Debentures Deeds contains another 'Qualifying Requirement'. They provide that notwithstanding any condition in the Deeds, no entitlement or benefit in relation to the debentures shall arise or be permitted beyond that which would be permitted without contravention of the *Foreign Acquisitions and Takeovers Act 1975* and the *Broadcasting Services Act 1992* in the case of the Donholken Convertible Debentures Deed and the *Broadcasting Services Act 1992* in the case of the Donholken Participating Debentures Deed, with the opinion of the debentureholder's lawyers to be conclusive of this issue.

In relation to the Selli structure Mr Strike testified that CanWest could 'superimpose a new Selli on top of Selli and have Selli owned by different Australians exercising the debentures'²¹³:

Q. If in the event that Mr Leibler and Mr Skala started exhibiting what you call hysteria ... what would the options be for DSK or for CanWest in those circumstances?

A: Well, we're talking hypothetically here, obviously.

Q: Was thought given to that when the documents were drafted?

A. I don't think so, I don't think so, but hypothetically, speaking hypothetically, I mean, the structure could be replicated. You just superimpose a new Selli on top of Selli and have Selli owned by different Australians exercising the debentures and so on.

Q. Would that be by removing Copplemere and Leibler Media Holdings as the shareholders?

A. Yes.

Q. How would that be achieved?

A. Through the transfer of DSK to an Australian and the Australian exercising the debentures and call options.

Q. And then the same structure on top of that with CanWest involved financially?

A. It could be or it could be a different structure. I mean, it could just be an outright sale.

Mr Lerner testified similarly, that CanWest could in some way dispose of the TGL shares held by Donholken without consulting Donholken or its shareholders:

Q. But you're anticipating that Selli and Donholken will join with CanWest in the float proposal?

A. Yes. We haven't discussed it with them yet, but we could compel it through DSK as a float. DSK can't do it on its own because we're from the wrong country, but I think that as part of a float, if Australia owned DSK, it could be done, yes.

Mr Asper also gave similar evidence:

Q. Do you have any contingency plan if it turns out in future you have made a wrong judgment about the shareholders in Selli, in the sense that they turn out to be hostile to your interests Do you have a contingency plan to handle that sort of situation?

A. I don't have a plan, no. I have presumably some rights somewhere, but I have no plan.

Q. Do you know what those rights are?

A. No, I know that they are, I am advised that we have some rights. As you know I don't anticipate, I hope, that this arrangement is interim, and that this will be a thing of the past, although I quite openly concede that I am going to go back to all those people and say, and try and persuade a lot of them to just stop the silliness and stay in the company and let's go on to greater things. But the mechanics are there, and whatever they are they are. And they have been fashioned in a manner to give CanWest the maximum protection that the law permits, but not to step over the line between what the law doesn't permit and what it does.

The evidence of the CanWest principals indicates that they recognise the capacity for CanWest to change the control of companies in which DSK holds financial instruments.

Although DSK does not hold a call option in relation to the voting shares of Donholken, CanWest is in a similar position in relation to Donholken as it is in relation to Selli because of the debentures it holds in Donholken.

Mr Strike also testified that in the event of the shareholders in Selli being hostile to CanWest's interests, CanWest's only options were 'the disposition in some fashion of DSK or the instruments, the financial instruments held by DSK', although he stated that 'there's no rights embedded within those instruments that would allow us to exert any influence'.²¹⁴ Similar recourse would be open to CanWest should the shareholders in Donholken be adverse to CanWest's interests.

Mr Kennett testified that he recognised that CanWest could convert the debentures so as to have a majority voting interest in Donholken and thereby remove the Donholken nominees to the TGL Board. Mr Kennett stated that this 'hammer' would not mean that they would do everything that CanWest says²¹⁵.

FINDINGS OF FACT

Subject to the operation of the Qualifying Requirement in the Donholken Convertible Debentures Deed, the provisions of the Deed allow DSK to enable a nominee to acquire a majority of the voting shares in Donholken.

By nominating a qualified nominee to acquire a majority of the voting shares of Donholken, DSK can effect the removal of the directors of Donholken.

CanWest is entitled to sell DSK or the financial instruments held by DSK. Mr Strike acknowledged this.

The CanWest principals recognised the capacity for CanWest to change the control of companies in which DSK holds financial instruments by selling those instruments.

CONSTRAINTS ON THE ACTIVITIES OF DONHOLKEN

DSK as the only current debenture holder exercises restraint over the following issues relating to Donholken.

(a) Ability to raise capital

The Memorandum of Association of Donholken prevents it borrowing money, issuing shares, options or securities, giving security, guaranteeing obligations and providing financial accommodation, except in very limited circumstances and often only with the consent of DSK.²¹⁶ It is the understanding of the ABA that Donholken may not issue debenture stock except to DSK²¹⁷. This is because clause 6 of the Memorandum of Donholken states that the company must not, among other things, borrow or raise money, other than the issue of Participating or Convertible Debentures to DSK or pursuant to the Donholken Trust Deed (see above). The Donholken Trust Deed does not make provision for the issue of Participating or Convertible Debentures to any person other than DSK.

The Articles of Association of Donholken impose constraints on Donholken altering its share capital without DSK consent²¹⁸. Without DSK consent, the Directors of Donholken may not issue any more shares to any person except on conversion of the convertible debentures²¹⁹. There are restrictions on the issue of preference shares, including redeemable preference shares²²⁰.

Donholken must not, without DSK consent, lease or hire any asset²²¹. Donholken cannot create encumbrances or sell, lease or otherwise dispose of the property subject to the charge without the consent of DSK²²².

The Memorandum and Articles of Association of Donholken effectively limit the capacity of the company to raise money except through the issue of debentures to DSK²²³. Under the Donholken Trust Deed, the TGL shares held by Donholken cannot be sold except with the consent of DSK.²²⁴

Ms Donnelly testified that if Donholken required money to pay for media expertise it would have to either borrow from DSK or the principal(s) would have to give the money to Donholken as a gift.²²⁵

(b) Nomination of the auditor

DSK, as the only Participating Debenture Holder, is entitled to nominate the auditors of Donholken. No other person can be appointed, unless the Participating Debenture Holders fail to nominate anyone²²⁶. The auditor has an important role in calculating financial benefits for shareholders (on redemption of Class B1 and B2 shares and in determining profits available for dividends)²²⁷. The auditor also determines the precise interest entitlements of DSK²²⁸. The auditor appears to have a final say in the distributions of Donholken, be it expenses by way of Participating Debenture Interest or appropriations from profits by way of distributions to shareholders. The appointment of the auditor will ultimately have an effect on the precise level of distributions of Donholken to the shareholders and to DSK. It is noted that an auditor has a duty to act independently irrespective of who she/he is

appointed by.

(c) Changing the business or constitution of Donholken

The Memorandum of Association of Donholken limits its activities in such a way as to make it a special purpose company. Donholken's function, briefly summarised, is to acquire and hold shares and other securities in TGL, to hold income from any distribution on those shares or securities in an 'at call account' and to pay dividends in accordance with the Articles²²⁹.

Donholken cannot change the general character of or discontinue its business without the consent of DSK²³⁰. The Articles of Association of Donholken cannot be altered without the agreement of the debenture holders.²³¹ Any resolution by Donholken to alter its share capital must be approved by the Participating Debenture Holders.²³² Donholken can only amend its Memorandum and Articles of Association with the consent of DSK, as the only Participating Debenture Holder²³³.

The directors of Donholken may not issue any more of the existing issued classes of shares to any person except on conversion of the convertible debentures²³⁴. Options cannot be issued without the consent of the debenture holders²³⁵. There are restrictions on the issue of preference shares, including redeemable preference shares²³⁶.

Class A and B shares (the shares held by Rusalka, Murdon and Jacomo) and the Class E share (held by Murdon) can only be transferred in limited circumstances and with the prior written consent of the Participating Debenture Holders so long as DSK is the majority Participating Debenture Holder.²³⁷ Such consent cannot be unreasonably withheld.²³⁸ Despite the fact that the Articles of Association of Donholken state that such consent cannot be unreasonably withheld the ABA has considered the effect of this provision on the conduct of the parties. The ABA is of the view, discussed in more detail in section 3.3.5.1, that the effect of such a provision is that DSK will effectively still retain a substantial veto power over the transfer of the voting shares.

The company may redeem the Class A shares so long as there is at least one Class A or C member and provided that it redeems the equal amount of Class B1 and/or B2 shares held by that member.²³⁹ The effect of this appears to be that full redemption by all Class A shareholders cannot take place until the right by DSK in the convertible debentures to convert its debentures to Class C voting shares has been exercised²⁴⁰.

The company may redeem the Class B1 or B2 shares so long as there is at least one Class B1, C or D member provided it redeems an equal number of Class A shares held by that member.²⁴¹ A member may redeem Class B1 or B2 shares on 12 months notice to the company and the Participating Debenture Holders, provided there is at least one Class B1, B2 and C or D share on issue following redemption.²⁴²

(d) Ability to generate profits

The Memorandum and Articles of Association of Donholken limit its business to the purchase and sale of TGL shares. The TGL shares held by Donholken cannot be transferred without the prior written consent of DSK because there is a fixed charge in relation to those shares²⁴³ and Donholken has covenanted that it will not, without DSK's consent, transfer the charged property.²⁴⁴ This means that without DSK's consent Donholken cannot realise a profit on the sale of TGL shares because it cannot sell its TGL shares without the consent of DSK.

In addition, practically, it cannot purchase more TGL shares because of the restrictions on its ability to raise capital except with the consent of DSK, discussed at paragraph (a) above.

(e) Other rights held by DSK and constraints on Donholken

Participating Debenture Holders are entitled to attend general meetings of Donholken²⁴⁵. The accidental omission to give notice of a meeting or the non-receipt of the notice by a Participating Debenture Holder will invalidate any resolution passed at a general meeting.²⁴⁶

The Participating Debenture Holders are entitled to appoint a director of Donholken (on a board of four)²⁴⁷. A director who has an interest in a matter that is being considered at a directors' meeting may vote unless prohibited by the Corporations Law²⁴⁸. The powers of the directors of Donholken are limited by reference to the Memorandum of Association of Donholken²⁴⁹. If a director is appointed by the Participating Debenture Holders that director must be present for a quorum²⁵⁰.

Donholken cannot be wound up without the consent of the Participating Debenture Holders²⁵¹. The vesting of property in trustees for contributories requires the consent of the Participating Debenture Holders²⁵².

On an event of default DSK can procure itself to be the registered holder of the TGL shares²⁵³. Also on the event of default DSK would have significant powers over Donholken, including the power to appoint a receiver²⁵⁴. Exercise of these powers would be subject to the Qualifying Requirement (set out below). Events of default include making of an application to wind up Donholken, Donholken ceasing to carry on its business or threatening to do so, changes in the shareholding of Donholken (other than in accordance with the Articles) without the consent of DSK and a reduction in capital without the consent of DSK²⁵⁵. Some events of default appear to rely on subjective judgements by DSK, eg when DSK forms the opinion that the continued carrying on of any relevant business would endanger the value of the DSK's security interest²⁵⁶.

Qualifying Requirements and Severance Provisions

Article 1.5(c) of the Articles of Association of Donholken provides that:

Notwithstanding anything contained in these Articles, where the requirement for the written consent of the Participating Debenture Holders expressed to be required pursuant to these Articles will give rise to a breach of the Broadcasting Services Act, the expressed requirement for such written consent will be deemed to be severed from these Articles.

Article 1.6 of the Articles of Association of Donholken provides that:

Each of these Articles shall be construed so as:

- (a) not to result in a breach of the Shareholders Agreement;
- (b) not to result in a contravention of the Broadcasting Services Act; and
- (c) to render the Article or part of a Article enforceable.

The ABA also notes that the exercise of the powers of the Chargee (DSK) under the Donholken Trust Deed is subject to a qualifying requirement. Clause 11.6 of the Donholken Trust Deed specifies that:

Notwithstanding any other provision of this Deed, the Chargee, a Receiver or any agent appointed under clause 11.1(c) may not exercise any Power if the Qualifying Requirement is not satisfied in respect of that Power.

Clause 1.1 of the Donholken Trust Deed provides that:

‘Qualifying Requirement’ means, in respect of any Power, that either:

- (a) the exercise of the relevant Power is not in breach of and does not cause the Chargee, or its affiliates, or TGL or any of its shareholders to be in breach of the Foreign Control and Ownership Legislation (FATA and Broadcasting Services Act) or any mandatory directives 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 the exercise of the relevant Power in favour of the Chargee.

‘Power’ is defined by clause 1.1 also, and means ‘any right, power, authority, discretion, remedy or privilege conferred on the Chargee, Receiver or any attorney or agent appointed under the Deed, by any Transaction Document, by Statute or by law or equity’. The term ‘Transaction Document’ includes the Donholken Trust Deed, and the Donholken Convertible and Participating Debenture Deeds.

Clause 19.6 of the Donholken Trust Deed provides that:

Any provision of this Deed which is illegal, void or unenforceable will be ineffective to the extent only of that illegality, voidness or unenforceability without invalidating the remaining provisions of this Deed.

FINDINGS OF FACT

The provisions in the Memorandum and Articles of Association of Donholken and the Donholken Stock Trust Deed impose significant constraints on the activities in which Donholken can engage unless authorised by DSK.

2.1.3.1.4 FINANCIAL AND OTHER BENEFITS FOR SHAREHOLDERS OF DONHOLKEN ARISING FROM COMMERCIAL ARRANGEMENTS WITH DSK

Evidence

Under the Articles of Association of TGL, shareholders are generally entitled to appoint a board member for every tranche of 10 per cent of the shares held by the shareholder. For so long as CanWest holds more than 14 per cent of the issued capital of TGL it has the right to appoint what amounts to 20 per cent of the directors of TGL²⁵⁷.

Ms Donnelly testified that entering into the Donholken transaction had commercial advantages as well as a 'business fit from a company directorship perspective and a media learning curve'.²⁵⁸

Mr Hollis testified that the \$100,000 to be paid to him as either a dividend on the Class B1 shares or as a director's payment (or a combination of both) was an important incentive to him agreeing to be a party to the Donholken transaction. In addition, Mr Hollis has recently established a business as a media consultant and entering into the transaction was perceived by Mr Hollis as a potential benefit to this enterprise.²⁵⁹ Mr Hollis was asked about any downside in relation to the transaction²⁶⁰:

Q: What about the down side?

A: I wanted to make sure that I would be protected in the sense that outgoings would be reimbursed because I realised there would obviously be costs associated with legal representation, setting up a corporate entity. I never had a personal corporate entity, I just always worked without anything, and that what we were doing was totally signed off by a QC and lawyers, so that my reputation would never---

Mr Kennett testified that there were three incentives for him to enter into the transaction, the \$100,000 dividend or director's fee, the 5 per cent of the increase of net assets of Donholken on redemption of the Class B1 shares and the seat on the TGL Board of Directors²⁶¹.

Messrs Hollis, Kennett and Ms Donnelly have the understanding that if their involvement in Donholken ceases within the first year of the company and the sum of \$100,000 is not paid as a dividend, they will be entitled to that sum by way of directors' fees. Ms Donnelly gave evidence that her understanding was that her payment of the \$100,000 would depend upon her involvement as a director of Donholken²⁶². Mr Kennett understood that as a director of Donholken, he is entitled to a payment of \$100,000 by way of director's fees²⁶³. Mr Hollis also understood that, as a director of Donholken, he is entitled to a payment of \$100,000 by way of director's fees²⁶⁴.

Murdon, Rusalka and Jacomo between them have a right to receive a dividend payment from Donholken of \$300,000 on a year by year basis (alternatively this may be paid in full or in part as director's remuneration to Ms Donnelly and Messrs Kennett and Hollis). They are also entitled to 5 per cent of the net increase in value of the assets of Donholken (the assets being the TGL shares), which can be realised on redemption of the shares, on a winding up or through a reduction in capital.²⁶⁵

Donholken holds 20 per cent of the issued capital of TGL and is therefore entitled to appoint two directors to the TGL Board.

Mr Lerner has testified that DSK would not need to involve Selli or Donholken in a decision as to whether to include the TGL shares held by Selli or Donholken in a float²⁶⁶. Mr Lerner also testified that CanWest could compel Selli and Donholken to join it in a float through DSK, although he noted that it would be necessary for an Australian to own DSK²⁶⁷.

Mr Strike testified that CanWest could 'superimpose a new Selli on top of Selli and have Selli owned by different Australians exercising the debentures'²⁶⁸. Mr Strike testified that in the event of the shareholders in Selli being hostile to CanWest's interests, CanWest's only options were 'the disposition in some fashion of DSK or the instruments, the financial instruments held by DSK', although he also stated that 'there's no rights embedded within whose instruments that would allow us to exert any influence'²⁶⁹. CanWest is in a similar position in relation to Donholken.

FINDINGS OF FACT

The commercial arrangements entered into between Donholken, Murdon, Rusalka, Jacomo and DSK, when considered as a whole confer a number of benefits on the shareholders of Donholken.

The continuation of receipt of ongoing benefits could be jeopardised by DSK/CanWest.

2.1.3.1.5 PREVIOUS RELATIONSHIPS BETWEEN CANWEST AND MESSRS KENNETT AND HOLLIS

Mr Anthony Hollis was the secretary and a director of Pacific Communications, a wholly owned subsidiary of CanWest, from 23 August 1995 until 9 January 1997²⁷⁰. Mr Hollis testified that in September 1996 he ceased to be President of Pacific Communications, after which time, until December 1996, Mr Hollis spent his time looking for other employment and putting Pacific Communications into a 'dormant state'²⁷¹. Whilst Mr Hollis was the secretary and director of Pacific Communications he was an alternate director for CanWest on the TGL Board and had attended about eight TGL board meetings²⁷². Mr Hollis ceased being an alternate director of TGL in October/November 1996²⁷³.

Mr Hollis was approached by Mr Lerner on 7 January 1997 in relation to the purchase of TGL shares²⁷⁴. During that initial conversation Mr Hollis agreed to go to Melbourne to meet the other people whom CanWest had approached about the same transaction²⁷⁵. The next day, Wednesday 8 January 1997, Mr Hollis attended the offices of CanWest's Australian solicitors, Clayton Utz, to resign his directorship of Pacific Communications and removed himself as a shareholder in trust and as signatory to the bank account of Pacific Communications²⁷⁶.

Mr Richard Kennett went to school with Mr David Asper in the 1970s²⁷⁷. Mr Kennett has had only occasional contact with Mr David Asper since leaving university²⁷⁸. In September 1996 Mr Kennett contacted Mr David Asper, having read about shareholder difficulties in a newspaper, and told him that if a block of TGL shares came up for sale he would be interested in purchasing them. Mr Kennett followed this up with a letter and a CV²⁷⁹. In answer to the question of whether it occurred to him that, as an Australian citizen, in purchasing some of those (TGL) shares, that might have assisted CanWest with its problems, Mr Kennett confirmed that this was the case²⁸⁰.

Mr Kennett was known to Mr Israel Asper. Mr Lerner stated that when he asked Mr Israel Asper about Mr Kennett, Mr Asper had told him that he had not seen Mr Kennett for many years but that he was a 'nice kid'.²⁸¹

Mr David Asper contacted Mr Kennett on 7 January 1997 to ascertain whether Mr Kennett would be interested in acquiring a parcel of TGL shares. Mr David Asper referred to Mr Kennett's previous offer to acquire TGL shares²⁸².

CanWest approached Mr Hollis to become involved in the transaction when he was still officially a director of a CanWest subsidiary (7 January 1997). In this capacity he had been involved in TGL corporate development matters and had been an alternative TGL board member. In order to participate in the transaction Mr Hollis resigned from his official functions in the CanWest subsidiary. The evidence suggests that a reason in CanWest's approach to Mr Hollis was that he was someone CanWest knew and who understood CanWest's involvement in TGL.

Mr Kennett stated that in his first conversation with Ms Donnelly that Ms Donnelly had told him that she had already discussed with Mr Lerner that she wanted Mr Kennett and herself to be the TGL directors²⁸³. Mr Kennett stated that he contacted Mr Lerner on 8 January

1997 and that Mr Lerner told him that he understood that Ms Donnelly intended to vote for Mr Kennett and herself to be the directors of TGL. Ms Donnelly and Mr Kennett were nominated by Donholken to be the TGL directors.

In considering which two Donholken principals would be nominated by Donholken to the Board of Directors of TGL, one of the factors was a desire to avoid a negative perception which might have arisen had Mr Hollis been appointed to the TGL board as Donholken's nominee so soon after being CanWest's alternate on the board²⁸⁴. Mr Hollis also acknowledged that the adverse consequence of such a perception arising lies with CanWest (and the possibility of a breach of the BSA by CanWest) and not with Donholken²⁸⁵. However, Mr Kennett testified that the perception which may be created if Mr Hollis was nominated by Donholken to sit on the TGL board may have an adverse impact on the business reputation of the Donholken principals²⁸⁶.

Mr Hollis acknowledged that he was the only member of Donholken with media expertise²⁸⁷.

FINDINGS OF FACT

Two of the three principals of Donholken have a pre-existing relationship with principals of CanWest.

The decision not to appoint Mr Hollis as the Donholken nominee to the TGL board reflected concern for CanWest's interests as well as Donholken's.

2.1.3.1.6 MOTIVES OF CANWEST IN FUNDING THE ACQUISITION OF THE TGL SHARES

Mr Strike testified that the reason for developing the Selli structure²⁸⁸ in order to buy available TGL shares was in part a way of defending CanWest's existing shareholder rights²⁸⁹. Although CanWest did not nominate Donholken to acquire the TGL shares from Corom and Audant it arranged for its subsidiary, DSK, to finance the transaction on similar terms to the Selli transaction when Selli agreed with Corom and Audant not to complete the acquisition of the Corom and Audant TGL shares.

Mr Strike cited the possibility of hostile shareholders acquiring shares, directly or indirectly, in TGL as a factor in developing the Selli structure and in nominating Selli to acquire the TGL shares from Belshaw, Corom and Audant²⁹⁰. Mr Strike stated this concern was on behalf of TGL's interests and not CanWest's but that the two interests might be similar²⁹¹. Mr Lerner testified that his understanding of CanWest's intention in nominating purchasers of the TGL shares was to stop the uncertainty created by a multiplicity of float options²⁹². Mr Lerner acknowledged that he does not set the policy for CanWest²⁹³. Although this evidence was given in relation to nominating Selli, given the similarities in the Selli and Donholken structures, the ABA is of the view that this aspect of CanWest's motivation in financing the acquisition of TGL shares was the same in both cases.

Mr Strike indicated that the possibility of floating the TGL shares held by Selli and Donholken was a strategic consideration²⁹⁴ in agreeing to nominate Selli to acquire the Corom and Audant shares at a price of \$15 even though he thought the price was 'outrageous commercially'²⁹⁵. DSK financed the purchase of the TGL shares by Donholken at \$15 a share.

Mr Asper stated that it was important that CanWest had a voice in the successors to existing shareholders in TGL 'because antibodies can come into a company, mischief makers, stupid people...Diabolical, fiendish, cunning fronts for competitors'. He denied that this meant 'people that [had] very differing views from [his] own in terms of how [TGL] should be run'²⁹⁶.

When asked whether there was 'any point over the course of the negotiations where it crystallised for you that you were potentially assembling a float vehicle in Ten rather than just increasing your economic interest', Mr Strike replied that 'that concept, I think, first presented itself when Whyte and Cowin put their shares up for sale'²⁹⁷. Mr Lerner testified that he first asked to come up with a float 'probably around the time that DSK advanced the funds...to Selli to purchase Belshaw'²⁹⁸.

FINDING OF FACT

CanWest's motives in setting up the Selli and Donholken structures included a wish to provide liquidity to shareholders of TGL and a wish to avoid financial damage to CanWest from having more than one float vehicle for TGL shares.

CanWest's participation in the Donholken transactions was intended in part to forestall the

acquisition of TGL shares by persons potentially hostile to CanWest's interests.

CanWest's wish to prevent competitors or other parties potentially hostile to CanWest's interests being represented on the TGL board was a factor in its participation in the transactions.

At some point between the Belshaw transaction and the initial Corom and Audant transactions, CanWest became motivated by a wish to assemble a sufficiently large parcel of shares to float a controlling interest in TGL, should it choose to do so.

2.1.3.2. SUMMARY OF FINDINGS OF FACT

1. The establishment of Donholken and the purchase of the TGL shares was initiated by CanWest which brought the future shareholders together, organised the drafting of the transaction documents and financed the purchase of the TGL shares.
2. The transaction structure proposed by CanWest was adopted by Ms Donnelly and Messrs Kennett and Hollis with a number of amendments.
3. The substantive elements, including Donholken being a single purpose company, a charge over assets of Donholken and the issue of convertible and participating debentures (with the exception of the call option over a voting share) were accepted by Ms Donnelly and Messrs Kennett and Hollis.
4. The Directors of Donholken accepted the substantive elements of the transaction because the transaction produced benefits for them.
5. Subject to the operation of the Qualifying Requirement in the Donholken Convertible Debentures Deed, the provisions of the Deed allow DSK to enable a nominee to acquire a majority of the voting shares in Donholken.
6. By nominating a qualified nominee to acquire a majority of the voting shares of Donholken, DSK can effect the removal of the directors of Donholken.
7. CanWest is entitled to sell DSK or the financial instruments held by DSK. Mr Strike acknowledged this.
8. The CanWest principals recognised the capacity for CanWest to change the control of companies in which DSK holds financial instruments by selling those instruments.
9. The provisions in the Memorandum and Articles of Association of Donholken and the Donholken Stock Trust Deed impose significant constraints on the activities in which Donholken can engage unless authorised by DSK.
10. The commercial arrangements entered into between Donholken, Murdon, Rusalka , Jacomo and DSK, when considered as a whole confer a number of benefits on the shareholders of Donholken.
11. The continuation of receipt of ongoing benefits could be jeopardised by DSK/CanWest.
12. Two of the three principals of Donholken have a pre-existing relationship with principals of CanWest.
13. The decision not to appoint Mr Hollis as the Donholken nominee to the TGL board reflected concern for CanWest's interests as well as Donholken's.
14. CanWest's motives in setting up the Selli and Donholken structures included a wish to

provide liquidity to shareholders of TGL and a wish to avoid financial damage to CanWest from having more than one float vehicle for TGL shares.

15. CanWest's participation in the Donholken transactions was intended in part to forestall the acquisition of TGL shares by persons potentially hostile to CanWest's interests.
16. CanWest's wish to prevent competitors or other parties potentially hostile to CanWest's interests being represented on the TGL board was a factor in its participation in the transactions.
17. At some point between the Belshaw transaction and the initial Corom and Audant transactions, CanWest became motivated by a wish to assemble a sufficiently large parcel of shares to float a controlling interest in TGL, should it choose to do so.

2.1.3.3 REASONING

2.1.3.3.1 ORIGINS OF THE STRUCTURE

Under s6 of the BSA, trusts, agreements, arrangements and understandings between the parties are relevant to a consideration of control. The way in which the structure was developed is in turn relevant to the approach of the parties to the agreements, and to any arrangements or understanding which may underpin those agreements.

CanWest conceived of establishing another company, Donholken, when concerns were raised about Selli purchasing the TGL shares from Corom and Audant. CanWest did this in order to realise financial and strategic ends in relation to TGL. CanWest brought together the three shareholders of Donholken, previously unknown to each other. CanWest modelled the Donholken structure and the elements of the transaction on a previous structure [Selli, discussed above at pp 19-25] it had recently used to finance the purchase of TGL shares. CanWest approached two of the participants, Messrs Hollis and Kennett, on the basis of an existing relationship. CanWest approached Mr Kennett because he had approached CanWest in September 1996 with an offer to assist CanWest by acquiring TGL shares. The third participant, Ms Donnelly, was introduced to CanWest by Mr Skala. CanWest prepared the transaction documents (through its solicitors) and financed the acquisition of the TGL shares by Donholken.

The shareholders of Donholken did not know of each other prior to Tuesday 7 January 1997. The next day they decided to form a company together, which was incorporated on Thursday 9 January 1997 and the day after that they purchased 20.05 per cent of the issued capital of TGL. These shares were to be acquired by Selli at \$15 a share. Selli had accepted CanWest's nomination of the shares pursuant to the pre-emptive rights clauses of the shareholder's agreement. The Donholken shareholders had little if any conversation about the price of the shares they were to purchase.

The substantive elements of the transaction proposed by CanWest were accepted by the principals of Donholken.

It is clear that the transaction has produced substantial benefits for Donholken's shareholders. Messrs Kennett and Hollis and Ms Donnelly each testified as to the importance of the financial benefits to them in agreeing to becoming involved in Donholken. Mr Kennett and Ms Donnelly also testified that the prospect of a seat on the TGL Board of Directors was an important factor in entering into the transaction. There is no evidence of disagreement between Messrs Kennett and Hollis and Ms Donnelly on the one hand and CanWest on the other on issues of substance since the agreements were entered into.

2.1.3.3.2 BENEFITS

The Donholken Transaction Documents when considered as a whole confer a number of benefits on the current members of Donholken which may act as incentives to ensure that the present arrangements continue.

They will each receive \$100,000 paid either as a dividend on the Class B1 shares or as directors' remuneration (or a combination thereof). The circumstances and timing of any float of the TGL shares held by Donholken and its subsidiaries would be in the control of CanWest²⁹⁹. Two of the shareholders, Mr Kennett and Ms Donnelly, through Jacomo and Murdon, have also received the benefit of a board seat at TGL. The ABA considers that these benefits are significant.

The entitlement to the dividend payment or director's fee of up to \$300,000 (\$100,000 each) on an annual basis continues for so long as Murdon, Jacomo and Rusalka have participating shares and Ms Donnelly and Messrs Kennett and Hollis are on Donholken's Board of Directors.

The shareholders in Donholken can realise their entitlement to 5 per cent of the capital appreciation of the value of the TGL shares held by Donholken (it can also be realised on a winding-up or through a reduction of capital), without the consent of CanWest by redeeming their shares³⁰⁰. However, they must give DSK one year's notice to do so, and there must be at least one Class B1 share, one Class B2 share, one Class C share or one Class D share remaining, for redemption to be an option.³⁰¹ At this stage no Class C or D shares have been issued. The Class A and B1 shares can only be transferred if they are unable to be redeemed and another Class A shareholder has not accepted an offer to purchase them. The consent of DSK is required for transfer, though consent cannot be unreasonably withheld (see comments above)³⁰².

The current members of Donholken have a strong interest in the continuation of the arrangements, which could be jeopardised without the continuing goodwill of DSK and CanWest.

2.1.3.3.3 CAPACITY TO JEOPARDISE BENEFITS

The Donholken Convertible Debentures Deed provides a mechanism by which the arrangements between Donholken and DSK could be altered at will by DSK so as to place in jeopardy the benefits which the members of Donholken currently receive.

The length of time for which the ongoing entitlements continue are matters which are, in effect, within the control of DSK. This is because DSK can exercise its conversion right contained in the Donholken Convertible Debentures Deed by nominating a 'qualified' person to acquire Class C voting shares. The holder of those shares would then have a majority voting interest and would be likely to call for the redemption of the Class B1 shares, remove the current directors from the Donholken Board, and appoint new directors³⁰³.

In addition, if CanWest chooses to float DSK or sell its debenture interest in Donholken or its interest in DSK, the entitlement to the \$300,000 payment and TGL board representation would be jeopardised.

The CanWest principals recognised the capacity for CanWest to change the control of companies in which DSK holds financial instruments by selling those instruments when, for example, the directors of those companies were hostile. Mr Strike acknowledged that the Australian buyer in such a scenario could be a 'new Selli' superimposed on such a company.

While these mechanisms could not practicably be used to control each and every exercise of the TGL votes held by Donholken, they could be used on particular issues (such as the form of a proposed float) to ensure that the votes are cast by directors whose views on the issue are known to coincide with those of DSK/CanWest. The existence of these powers is relevant to the degree of independence from CanWest which those directors might be expected to exercise on such an issue.

It has been submitted that the power to convert notes to shares held by a nominee cannot be exercised in favour of a nominee which DSK in fact controls, and therefore cannot lead to DSK securing control. While this supports a conclusion that DSK cannot obtain a legally enforceable and immediately exercisable 'right to exercise control of the requisite voting power', it does not overcome the wider test of control which the BSA poses. On any particular TGL issue of importance to DSK/CanWest, the powers could be used to effect the replacement of the directors of Donholken with people whose views on the issue are known to coincide with those of DSK/CanWest.

2.1.3.3.4 CONSTRAINTS

The business arrangements between Donholken and DSK effectively prevent Donholken borrowing money, issuing shares or securities except to DSK or its nominee (except in very limited circumstances and often only with the consent of DSK). Donholken is prevented from selling its shares in TGL without the consent of DSK. The voting shares in Donholken can only be transferred in limited circumstances and with the prior written consent of DSK. These rights, taken together, give DSK and CanWest the strategic initiative in relation to the future disposition of Donholken's TGL shares. This is a matter of considerable financial importance for the shareholders in Donholken.

Even though they do not give DSK any direct legal power to control the way in which Donholken exercises voting rights attached to TGL shares, the provisions of these arrangements, taken together, constitute significant constraints on the activities in which Donholken can engage unless authorised by DSK.

Submissions to the ABA on its draft report suggest that the powers given to DSK are not such as to enable it to actively direct or restrain the conduct of Donholken's business and thus can not put DSK in a position to exercise control of Donholken. A passage from the case of *Techcom - the Acquisition of Southern Cross* (1984) 1BR 182 at 185 is reproduced which says:

But they do make a useful and relevant distinction between: on the one hand the kind of 'negative' control commonly reserved in the ordinary course of business to a creditor in

order to protect the creditor's business; and on the other hand the power of initiative which more naturally falls within the primary meaning of the word 'control'. A creditor will not automatically be deemed to control a licence because that creditor has reserved the power to approve certain changes in relation to the conduct of the licensee as opposed to a power to actively **direct** the conduct of the business. Of course there can be situations where the negative powers of a creditor are so far reaching or so unrelated to protecting the interests of the creditor to fall within s.91(1) [of the *Broadcasting and Television Act 1942*]. It is a matter of judging the true complexion of the whole arrangement between the licensee and the creditor in the particular case'.

Techcom was a decision of the Australian Broadcasting Tribunal (ABT) and is not binding on the ABA. It was a decision made at a time before the *Re News Corporation Limited* (1987) ALR 419 case where several questions of law were stated to the Federal Court by the ABT pursuant to s.22B of the Broadcasting Act 1942. The judgment in the *News Corp* case forms the basis of the present law. That case makes it clear that all the facts and circumstances must be considered in determining the question of control.

DSK is a wholly owned subsidiary of CanWest. DSK was created by CanWest as part of the overall structure of this transaction and is a single purpose company.³⁰⁴ CanWest has a direct 14.99% shareholding interest and a 76% economic interest in TGL. CanWest was a founding member of the consortium which purchased Network Ten from Westpac in December 1992. Since then it has had an influential role in the development of TGL and Network Ten. This was achieved by its representation on the Network Ten Executive Committee, provision of consultancy services (now terminated) and advice to the TGL Board and through its two directors on the Board of TGL. Some of these matters are discussed in detail in the ABA's 1995 report, *Investigation into Control: CanWest Global Communications Corporation/The Ten Group Ltd*. The transaction documents confer a capacity to enable the acquisition of a majority shareholding in Donholken through conversion of the debentures in favour of a qualified nominee. These factors set Can West quite apart from an arms length lender such as a bank or Techcom in the above case.

It is also relevant that Donholken is a limited special purpose company. It exists to hold the TGL shares purchased from Corom and Audant and funded by DSK. Its Memorandum indicates that the company must not carry on any activity other than the acquisition, holding, exercise, enforcement or the disposal of TGL shares or other similar closely related securities (including debentures issued by TGL). It may receive and invest in an 'at call account' any distribution payable in respect of those securities, pay dividends in accordance with its Articles and enforce or defend contracts which relate to the above activities. Its purpose does not extend beyond this.

DSK has a right to nominate a director on the board of Donholken.

The powers that the lender has must be seen in this context.

It may be argued that these arrangements are among the standard arrangements for the provision of financial accommodation. However, the fact that the BSA sets out special exempting provisions for authorised lenders to media companies (such as Donholken)

indicates that the legislature has recognised such arrangements may well give rise to control³⁰⁵. Neither DSK nor CanWest is an authorised lender under the BSA.

2.1.3.3.5 DISINCENTIVES

There are disincentives as well against acting in accordance with the wishes of CanWest. These included the possibility of Ms Donnelly and Mr Kennett breaching their fiduciary duties as directors of TGL, the possibility of a breach of the BSA occurring as a result of such action and the possibility of the reputations of Ms Donnelly and Mr Kennett being compromised by such action.

It should be noted that the prohibition in the BSA is upon being in a position to exercise control of votes, giving rise to a company interest in excess of the limits provided. The test does not ask whether the control is being or has been exercised.

2.1.3.3.4 QUALIFYING REQUIREMENT

The Qualifying Requirements in the agreements are in several forms. They variously purport to prevent entitlements from arising, or powers being exercised, where a breach of the BSA would result.

Debenture Stock Trust Deed

Clause 11.6 of the Donholken Debenture Stock Trust Deed provides that “Notwithstanding any other provision of this Deed, the Chargee, a Receiver or any agent appointed under clause 11.1(c) may not exercise any Power if the Qualifying Requirement is not satisfied in respect of that Power.” “Power” is defined as any right, power, ABA, discretion, remedy or privilege conferred on the Chargee, Receiver or any attorney or agent appointed under the Deed, by any Transaction Document, by Statute or by law or equity.

“Qualifying Requirement” means, in respect of any Power, that either:

- (a) the exercise of the relevant Power is not in breach of and does not cause the Chargee or its affiliates, or TGL or any of its shareholders to be in breach of the Foreign Control and Ownership Legislation or any mandatory directives 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 the exercise of the relevant Power in favour of the Chargee.

As such the Qualifying Requirement in this form is not directed to a discrete issue or a specific entitlement or power. It is in the form of a general savings provision, and purports to operate whenever, in a given factual situation, a breach of the legislation would result were the power to be exercised.

Memorandum and Articles

The Memorandum and Articles of Association, and Debenture Stock Trust Deeds of Donholken contain the following ‘Qualifying Requirements’.

Clauses 10 and 11 of the Memorandum of Association of Donholken provide:

10 A special resolution purporting to alter or add to or omit any provision of the Articles of Association of the Company does not have any effect unless and until the written consent of:

- a) the registered holders of the Limited Class Shares;
- b) the Convertible Debenture Holders; and
- c) the Participating Debenture Holders,

is obtained, except where the requirement for the giving of consent will result in a breach of the BSA.

11 A special resolution purporting to alter or add to or omit paragraphs 5, 6, 7, 8 or 9, or this paragraph 10 does not have any effect unless and until the written consent of:

- a) the registered holders of the Limited Class Shares;
- b) the Convertible Debenture Holders; and
- c) the Participating Debenture Holders,

is obtained, except where the requirement for the giving of consent will result in a breach of the BSA.

In addition, the Articles of Association Donholken provide at Article 1.5 as follows:

1.5 Participating Debenture Holders...

- (c) Notwithstanding anything contained in these Articles, where the requirement for the written consent of the Participating Debenture Holders expressed to be required pursuant to these Articles will give rise to a breach of the BSA, the expressed requirement for such written consent will be deemed to be severed from these Articles.

Convertible Debentures Deed

Sub-clause 10(a) of the Donholken Convertible Debentures Deed provides that a right to convert the Notes arises subject to the Qualifying Requirement being satisfied and subject to clause 10(g). Clause 10(g) purports to prevent the conversion unless and until the exercise of the right to convert would not constitute a breach of Foreign Control and Ownership Legislation or any mandatory directive given thereunder.

“Qualifying Requirement” means that either:

(a)(i) the Noteholder or its Nominee is an Australian Resident;
and

- (ii) the conversion of the Notes under clause 10 is not in breach of and does not cause TGL, a shareholder of TGL, any Noteholder or any affiliate of a Noteholder to be in breach of Foreign Control and Ownership Legislation or any mandatory directive 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 some or all of the Notes under

clause 10 in favour of the Noteholder or its Nominee notwithstanding that such Noteholder or its Nominee is not an Australian Resident.

Analysis

These provisions are different both in form and in substance from severance clauses in contracts. Such provisions are sometimes used to provide in the contract itself for the contingency that some parts of the agreement are found by a court to be illegal by reason of, for example, restraint of trade or breach of taxation legislation. However, the qualifying requirements are not severance provisions as such at all.

With the exception of clause 7 of the Participating Debentures Deed, the qualifying requirements do not specify any mechanism (such as a finding by a court or the ABA) by which the operation of the provision is enlivened. They purport to be general savings provisions which prevent an entitlement arising or a power being exercised whenever in a given matrix of fact and law breach of the BSA or the Foreign Acquisitions and Takeovers Act as in force at that time would result. They purport to operate such that the entitlement does not arise or the power cannot be exercised at that time, in those circumstances.

The qualifying requirements are in effect a statement by the parties that they do not by the agreements intend to authorise any breach of the Acts.

However, the provisions could only be effective in preventing “a position to exercise control of votes” arising, if, at the time at which the power is to be exercised, the repository of the power has full knowledge and a correct understanding of all relevant facts and correctly applies the law to those facts. But as noted above, the agreements (with one exception) provide no mechanism by which a determination will be made whether the qualifying requirements have come into effect in relation to any contemplated exercise of power. In relation to the exception, clause 7 of the Participating Debentures Deed, the provision purports to operate only where the parties concur in the view, or the Noteholders’ lawyers express the opinion if there be disagreement, that the contemplated entitlement or benefit would give rise to a breach of the Act.

To determine whether a “position to exercise control of votes” exists, the Acts must be applied correctly to the whole factual and legal matrix of the agreements and arrangements between the parties. The ABA does not accept that that determination can be left to interested directors, however experienced or reputable.

In the context of factual control over the way in which Donholken exercises the votes attaching to the TGL shares which it holds, it matters little whether the various powers and entitlements in fact exist if the parties take the view that they do, and act upon that view.

The ABA has therefore concluded as a factual matter that the qualifying requirements will not operate in practice to prevent a breach of the control provisions occurring.

2.1.3.4 CONCLUSION

Under its memorandum and articles Donholken is a special purpose company. Its function, briefly summarised, is to acquire and hold shares and other securities in TGL, to hold income from any distribution on those shares or securities in an 'at call account' and to pay dividends in accordance with the articles.

The structure of the Memorandum and Articles of Donholken, and the Participating Debentures Deed, is such that the beneficiary in the event that TGL makes distributions in excess of \$300,000 plus 'expenses' to Donholken is DSK, rather than the members of Donholken. Conversely, the risk of low TGL distributions is borne primarily by DSK, which will receive its participating debenture interest payments in any given year only if distributions exceed the preferential dividend/Directors remuneration payable to members.

The current shareholders in Donholken have a commercial interest in ensuring that TGL distributions are sufficient to cover the 'expenses' of Donholken, plus the \$300,000 preferential dividend/Directors Remuneration.

DSK's position is in this respect quite different to that of a typical 'arms length' financier. Most of the commercial risks and advantages of Donholken's TGL shareholding are shared, according to the formula discussed above, between DSK and the members of Donholken.

DSK is, under the Memorandum and Articles, entitled to be represented on the board of Donholken. It is entitled to receive papers and to participate in meetings. It has the capacity to convert its interest to that of a controlling shareholder through the conversion of the debentures should legislative amendment permit that to occur. In the absence of legislative amendment, it can convert its interest to that of a controlling shareholder in Donholken in favour of a qualified Australian resident nominee.

Substantial commercial benefits accrue to the members of Donholken while the present arrangements are allowed by DSK to subsist. Given the nature of Donholken as a special purpose company under its Memorandum and Articles, and the benefits which its members receive from the continuation of the present arrangements, the ABA has concluded that the best interests of the members of Donholken will usually be served by exercising its TGL votes in accordance with the wishes and interests of DSK and CanWest.

The provisions of the Memorandum and Articles of Donholken in many crucial respects assimilate the position of DSK to that of a shareholder. The provisions of the agreements allow DSK to become a shareholder itself if the law permits or to enable the acquisition of the dominant shareholding in Donholken for a qualified nominee of DSK.

In light of these matters, the reasoning set out above and the facts found above, the ABA has reached the conclusion that the directors of Donholken would pay particular regard to the wishes and interests of DSK in exercising the TGL votes which Donholken holds. The ABA finds that those directors would follow those wishes and interests unless of the view that to do so would be a breach of their duties as directors.

Directors have a duty to have regard to the interests of shareholders as a whole, which normally includes the collective interests of both present and prospective shareholders. However, this does not mean that directors cannot have particular regard to the interest of outsiders (such as debenture holders), unless in doing so the director disregards the interests of the shareholders as a whole. As Bowen CJ stated in *Re News Corporation Limited* (1987) ALR 419 at 437, referring to nominee or representative directors:

It is both realistic and not improper to accept that such directors will follow the interests of the company which appointed them subject to the qualification that they will not so act if of the view that their acts would not be in the interests of the company as a whole.

The principle is not restricted to nominee or representative directors. See PD Finn, *Fiduciary Obligations*, paras 111-116; *Levins v Clark* [1962] NSW 686 at 700-701. See also, generally, *Pennington's Company Law*, 6th Edition, Butterworths, London 1990, p591; JF Corkery, *Directors' Powers and Duties*, Longman Cheshire, Melbourne, 1987, pp 62-63, *Butterworths Australian Corporation Law Service*, Volume 1, para [3.2.0050]; *Ford and Austin's Principles of Corporation Law*, 7th Edition, Butterworths, Sydney, 1995, paras [9.440] - [9.450]; *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 at 165-6.

It is consistent with a director's duty for the director to follow the wishes of a particular interest which has brought about their appointment, without a close personal analysis of the issues, unless the director is of the view that in doing so he or she is not acting in the best interest of the company as a whole. See *Re Broadcasting Station 2GB Pty Limited* [1964-5] NSW 1648 at 1663.

These statements of legal principle accord with the Members' own knowledge and experience. Directors usually act in accordance with the wishes and interests of a party that has brought about their appointment and on whose goodwill their continuation in office depends unless that places them in breach of their duties. The ABA is satisfied that all of the current Donholken directors, including Ms Donnelly and Messrs Kennett and Hollis (albeit that they were formally appointed as a result of Murdon, Rusalka and Jacomo's shareholding in Donholken), would follow the wishes and interests of DSK/CanWest to that extent in exercising Donholken's TGL votes.

The ABA accepts that Ms Donnelly and Messrs Kennett and Hollis would act in accordance with their duties as directors of Donholken. However, the ABA places very little weight on their evidence that they would act independently of DSK/CanWest in exercising Donholken's TGL votes. The ABA does not accept that they would so act on any matter of substance on which CanWest sought to influence their vote unless satisfied that a breach of their duties would otherwise result. The ABA has concluded that these statements of general intention would give way to commercial reality on any particular TGL issue of importance to CanWest.

In light of the above findings of fact, and the reasons given above, the ABA finds that CanWest is in a position to exercise control of votes cast by Donholken on a poll at a meeting of The Ten Group Limited.

Given the above findings, the ABA is satisfied that CanWest is in a position to exercise control over the casting of votes by Donholken on a poll at a meeting of TGL.

FINDING

CanWest is in a position to exercise control of votes cast by Donholken Pty Ltd on a poll at a meeting of The Ten Group Limited.

2.1.4 TOTAL VOTING INTERESTS OF CANWEST IN TGL

2.1.4.1 VOTING INTEREST OF CANWEST THROUGH CGS SHAREHOLDING

CanWest owns 100 per cent of CanVideo Television Sales (1983) Ltd. CanVideo Television Sales (1983) Ltd owns 100 per cent of CanWest International Communications Inc (Barbados). CanWest International Communications Inc (Barbados) owns 100 per cent of CanWest International Holdings (Luxembourg) SA. CanWest International Holdings (Luxembourg) SA owns 100 per cent of CGS International Holdings (Luxembourg) SA. CGS International Holdings (Luxembourg) SA owns 100 per cent of CGS International Holdings (Netherlands) BV. CGS International Holdings (Netherlands) BV owns 100 per cent of CGS Shareholding (Netherlands) BV.

CGS Shareholding holds of 6,824,999 the ordinary shares in TGL. The issued capital of The Ten Group Limited is 45,500,000 ordinary \$1.00 shares.

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.

CanWest has a chain of company interests greater than 50 per cent between it and CGS Shareholding. CanWest is in a position to control the casting of more than half of the maximum number of votes in each company between it and CGS Shareholding.

CanWest is therefore in a position to exercise control of the votes cast by CGS Shareholding on a poll at a meeting of TGL.

FINDING OF FACT

CanWest has a 14.99 per cent voting interest in TGL through CGS Shareholding.

2.1.4.2 VOTING INTEREST OF DONHOLKEN IN TGL

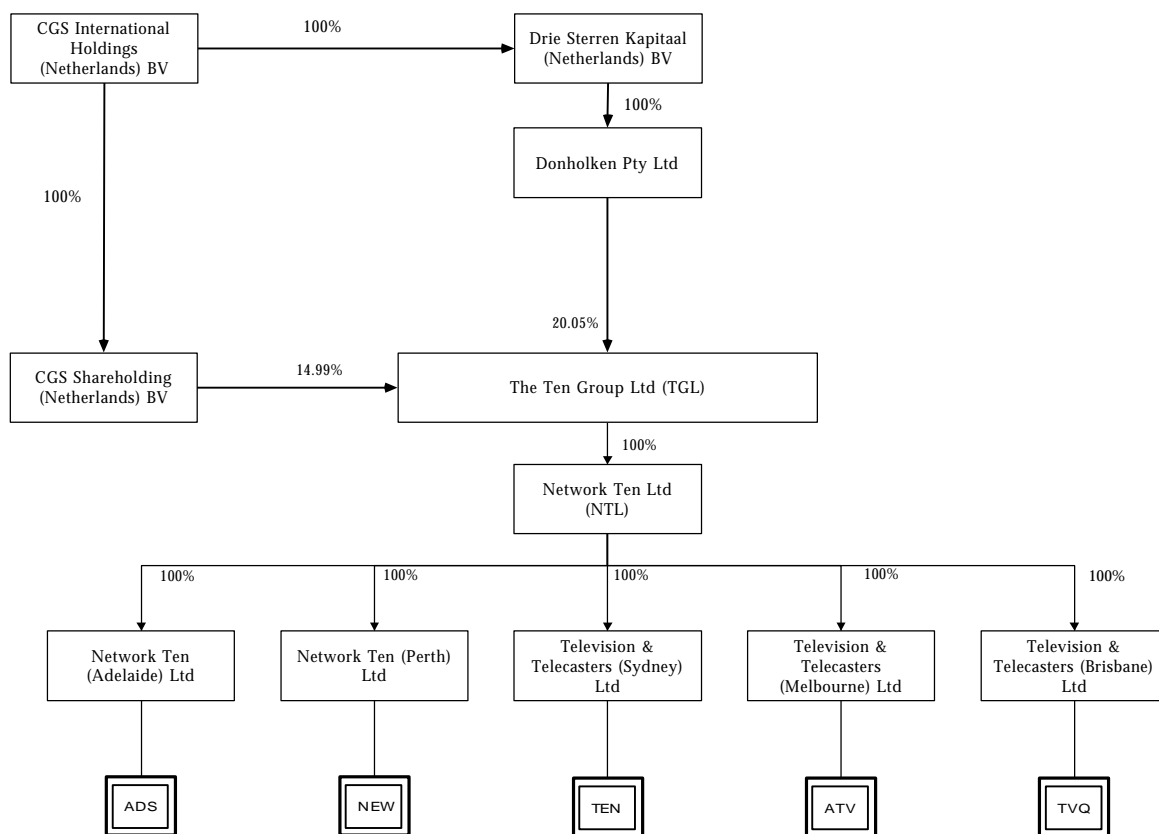
Donholken holds 9,124,999 ordinary shares in TGL. The issued capital of The Ten Group Limited is 45,500,000 ordinary \$1.00 shares. This equates to a 20.05 per cent of the issued capital of TGL.

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.

In the diagram below, illustrating Donholken's interests in TGL, percentages refer to company interests.

Diagram 1

Donholken Pty Ltd and The Ten Group Limited



Finding of Fact

Donholken has a company interest (including a shareholding and voting interest) of 20.05 per cent in TGL.

2.1.4.3 VOTING INTERESTS OF SELLI, NUMERATION AND TURNAND IN TGL

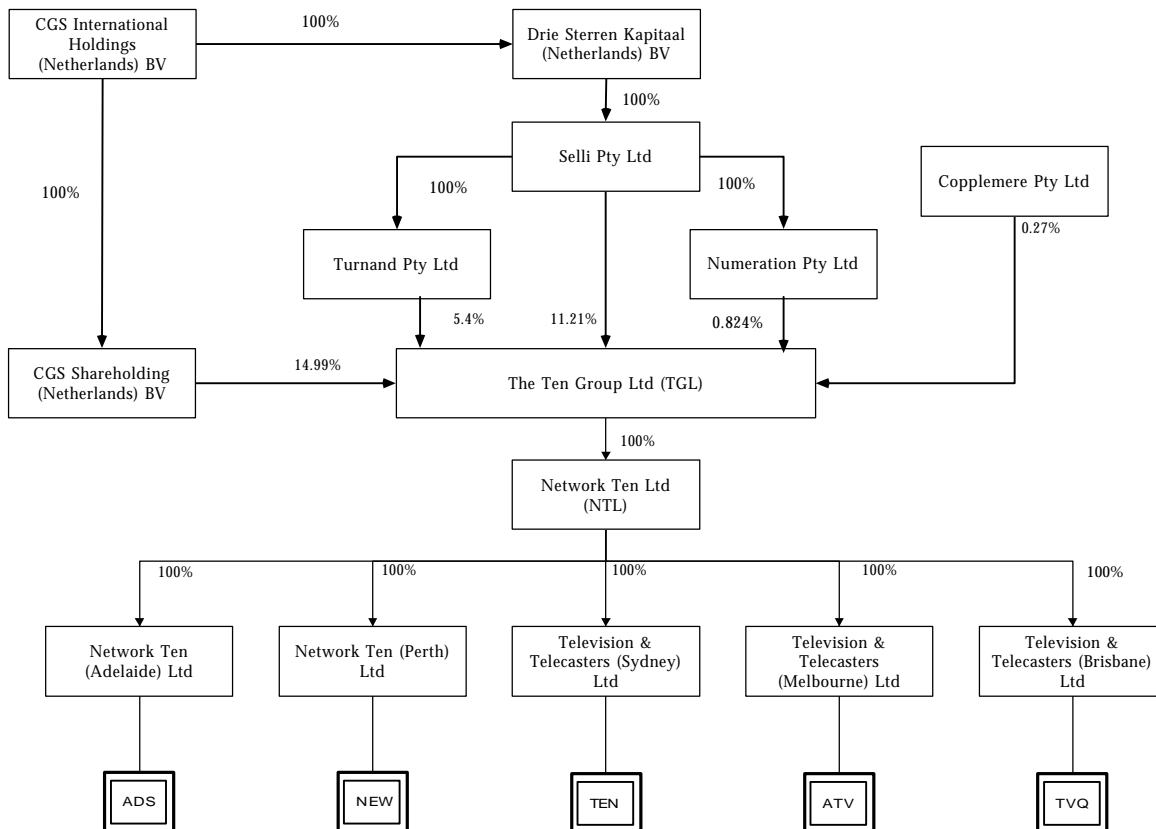
Selli holds 5,092,919 ordinary shares in TGL. Numeration holds 375,000 ordinary shares in TGL. Turnand holds 2,464,583 ordinary shares in TGL. The issued capital of The Ten Group Limited is 45,500,000 ordinary \$1.00 shares.

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.

In the diagram below, illustrating the interests of Selli, Numeration and Turnand in TGL, percentages refer to company interests.

Diagram 2

Selli Pty Ltd and The Ten Group Limited



FINDINGS OF FACT

Selli has a voting interest of 11.2 per cent in TGL.

Numeration has a voting interest of 0.8 per cent in TGL.

Turnand has a voting interest of 5.4 per cent in TGL.

2.1.4.4 TOTAL VOTING INTERESTS OF CANWEST IN TGL

As CanWest is in a position to exercise control of the votes cast in TGL by Selli, Donholken, Numeration, Turnand and CGS Shareholding, the percentage of the voting interests held by those companies in TGL can be added together to establish CanWest's total voting interests in TGL.

CanWest has a voting interest of 14.99 per cent in TGL through CGS Shareholding.

CanWest has a voting interest of 20.05 per cent in TGL through Donholken.

CanWest has a voting interest of 11.19 per cent in TGL through Selli.

CanWest has a voting interest of 0.82 per cent in TGL through Numeration.

CanWest has a voting interest of 5.42 per cent in TGL through Turnand.

Under Clause 8 of Schedule 1 of the BSA , CanWest has a total voting interest of 52.49 per cent in The Ten Group Limited.

2.2 DIVIDEND INTERESTS OF CANWEST IN TGL

Section 8(3) of the BSA provides:

- (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.

Schedules 1-3 of the Articles of Association of Selli are the Selli Convertible Debentures Deed, the Selli Participating Debentures Deed and the Selli Trust Deed respectively.

Clause 1.2(g) of the Articles of Association of Selli provides that any schedule is part of the Articles.

The Memorandum of Association of Selli provides that the Company must not advance money other than pursuant to the Selli Trust Deed, the payment of Expenses and taxes and the payment of dividends in accordance with the Articles of Association of the Company.

‘Expenses’ is defined in Clause 1 of the Selli Participating Debentures Deed (and Article 1.1 of the Articles of Association of Selli) (summarising) as all costs, expenses, fees and outgoings paid by the Company including all interest on indebtedness of the company (*except Participating Debenture Interest and Convertible Debenture Interest*). [*Emphasis added*].

Interest on the Participating Debentures is dealt with in Clause 6 of the Selli Participating Debentures Deed. It provides that interest is payable quarterly in arrears at the rate of 15 per cent per annum accruing daily and compounding quarterly and otherwise as adjusted by the Auditor as provided in the succeeding sub-clauses (‘the Maximum Rate’); provided that the interest required actually to be paid in a fiscal year shall not exceed that Noteholder’s Pro Rata Proportion of the Relevant Percentage of the Distributions (‘the Limit Amount’).

‘Distributions’ are defined in Clause 1 of the Selli Participating Debentures Deed as any dividend, interest and/or other distribution made available by TGL to the Issuer, for which certain payments are to be subtracted. ‘Relevant Percentage’ is defined in Clause 1 of the

Selli Participating Debentures Deed to mean, in circumstances where no Convertible Notes have been issued or converted, 95 per cent. 'Pro-Rata Proportion' means the fraction equal to the aggregate Note Face Value of all Notes held by that Noteholder divided by the aggregate Note Face Value of all Notes held by all Noteholders.

Clause 6(e) of the Selli Participating Debentures Deed provides that:

Nothing in this clause shall constitute the Interest to be a distribution of profits or require same to be paid out of profits, it being intended that the Interest obligation is and remains a secured debt obligation limited by reference to the Limit Amount, the Maximum Rate and the distribution each as defined and adjusted as hereinbefore provided.

EVIDENCE

Mr Skala testified that he thought 'Leibler and I take out the first \$300,000. Let me rephrase that - it goes expenses first; then \$300,000. I think that the way that mechanism works is that debenture interest is paid such that there will be \$300,000 left and it's capped and the debenture interest is also capped in whatever amount produces that result or 15 per cent. If, after all of that, there's still money left over, that stays in the company and Leibler and I get 5 per cent of the net increase in value of the company and there's a complicated formula for working out the net increase in value of the company, but it's there in the documents'³⁰⁶.

Mr Strike testified that 'the way it works is the first \$300,000 of income goes to Skala and Leibler as a preference. Then interest is paid and then there's a 95/5 split of anything over the interest payment'³⁰⁷.

REASONING

Subsection 8(3)(a)(ii) of the BSA provides that a dividend interest is held if under the Memorandum and Articles of Association, a share of the profits is to be or may be paid to the person otherwise than as dividends on shares.

The interest payable on the Participating Debentures is calculated by reference to the formula described above.

The effect of Article 1.2(g) of the Articles of Association of Selli, (which provides that any schedule is part of the Articles) is that any payment flowing to DSK under any of the schedules of the Articles may be considered to be 'under the Memorandum and Articles of Association'.

'Profits' is a term which the courts have been reluctant to define comprehensively, preferring instead to retain a degree of flexibility and interpreting according to the whole context.

Lockhart J in *QBE Insurance Group Ltd v Australian Securities Commission* (1992) 38 FCR 270 at 285 held:

Profit refers to a comparison between the state of a business at the beginning and end of the relevant financial period. It is the amount of gain made by the business during the year or the net balance of all gains earned and losses incurred during a relevant accounting year.

This variable nature of the interest payable on the Participating Debentures points toward the moneys received by DSK under the Selli Participating Debentures Deed being a share of the profits. The definitions of 'Distributions' and 'Expenses' demonstrate that the interest payments are distinct from all true 'expenses' of the company. However, interest on convertible debentures is not variable in nature. It is treated more like expenses, in terms of the effective priority it receives over dividends when distributions to Selli are low (see definition of Class B First Payment).

Whether payments made to DSK are 'a share of the profits' also depends on the manner of distribution and the priority of payments made. It is noteworthy that this task is performed by the auditor, appointed by DSK.

Clause 6(e) of the Selli Participating Debentures Deed attempts to circumvent the operation of the provisions of the BSA which define profit sharing as a dividend interest. However, a description such as that which clause 6(e) purports to impose is not conclusive of the proper characterisation of the payments.

The ABA is satisfied that, as a whole, the terms of the Deed read in light of the Memorandum and Articles of Selli to which it is a schedule, provide for DSK to receive what is in reality a share of profits of Selli. As such this share is a company interest which can be traced to TGL through Schedule 1.

The ABA stated its 1995 report, *Investigation into Control: CanWest Global Communications Corporation/The Ten Group Limited* that:

'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 BSA as set out above.'

However, in this case the distribution is provided for under the Memorandum and Articles of Association of Selli.

FINDINGS

DSK's entitlements to interest payments on the Participating Debentures are a share of the profits of Selli.

DSK has a dividend interest in Selli of 95 per cent.

2.3 SHAREHOLDING INTERESTS OF DSK IN SELLI, DONHOLKEN, NUMERATION OR TURNAND

Company interests are defined in Section 6 of the BSA 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.

The issued capital of The Ten Group Limited is 45,500,000 ordinary \$1.00 shares. For the purposes of the BSA, subsection 8(1) of the BSA 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.

The Selli Trust Deed creates a charge over the TGL shares to the trustee for the benefit of the stockholders, which property includes shares and rights in TGL. The only stockholder at present is DSK, a subsidiary of CanWest Global Communications Corp. (CanWest).

However, rights arising in respect of that charge may only be exercised after an event of default (clause 10 of the Selli Trust Deed), and powers conferred upon the Trustee or a receiver may only be exercised in such a way as not to bring about a breach of the BSA or the *Foreign Acquisitions and Takeovers Act 1975* (‘FATA’)(clause 12.6 of the Selli Trust Deed). The question is whether the charge created by the deed creates a beneficial entitlement to the shares, or to an interest in the shares, for the stockholders, when the conditions of exercise of powers arising in respect of the charge do not permit the powers to be exercised so as to breach the BSA, including the restrictions on beneficial entitlement.

In *Chan v Cresdon Pty Limited* (1989) 168 CLR 242 the High Court has found that a ‘beneficial entitlement’ exists at least where there is a right to legal ownership of the shares which a court of equity would protect by specific performance. This principle has in the past been treated as subject to a limitation which no longer applies.

Chan v Cresdon, and the decisions leading up to it, have been read as establishing that an ‘interest’ which is subject to a contingency such that it cannot presently be converted by an action for specific performance into the corresponding legal interest is nevertheless an equitable interest which can, for example, be protected by caveat. In *Bevan v Smith* [1994] 3 NZLR 648 at 665, the Full Court stressed that whether the equitable interest has passed must always depend on the terms of the contract: ‘There will be some conditional contracts, particularly those subject to true conditions precedent, where the parties cannot be regarded as intending that equitable title will pass to the purchaser until the condition is waived or fulfilled’ (per Richardson, Gault and Ellis JJ at 665).

It is clearly arguable that the charge to the Trustee for the benefit of DSK amounts to a 'beneficial entitlement to ... an interest in shares' for DSK within s 8 of the BSA. However, the nature of the contingencies upon which the right to register the shares in the name of the trustee depend, being both the occurrence of the event of default and the absence of a breach of the BSA and FATA in so registering the shares, are sufficient to distinguish the interest from that considered in *Kuper v Keywest Constructions Pty Limited* (1990) 3 WAR 419, *Bevan v Smith* and *Jessica Holdings Pty Limited v Anglican Property Trust Diocese of Sydney* (1992) 27 NSWLR 140. The contingencies may be construed as true conditions precedent, as referred to in *Bevan v Smith*.

FINDING

DSK has no shareholding interest in Selli, Donholken, Numeration or Turnand.

3.

Foreign control of the Ten
licences

3.1 IS CANWEST A FOREIGN PERSON?

Section 6 of the BSA defines ‘foreign person’ as:

- (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 per cent; 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 per cent.

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

CGS Shareholding (Netherlands) BV (‘CGS Shareholding’) holds 6,824,999 shares in TGL. This gives it a shareholding interest of 14.99 per cent in TGL. CGS Shareholding is linked to CanWest through a chain of companies (see Diagram 3).

In the case of CGS Shareholding, the first company in the chain, CGS International Holdings (Netherlands) BV (CGS) has a 100 per cent company interest in CGS Shareholding. It is therefore necessary to establish whether CGS is a foreign person for the purposes of the BSA. 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 per cent.

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 per cent. The first company where a natural person holds company interests in the company exceeding 50 per cent is The Asper Corporation.

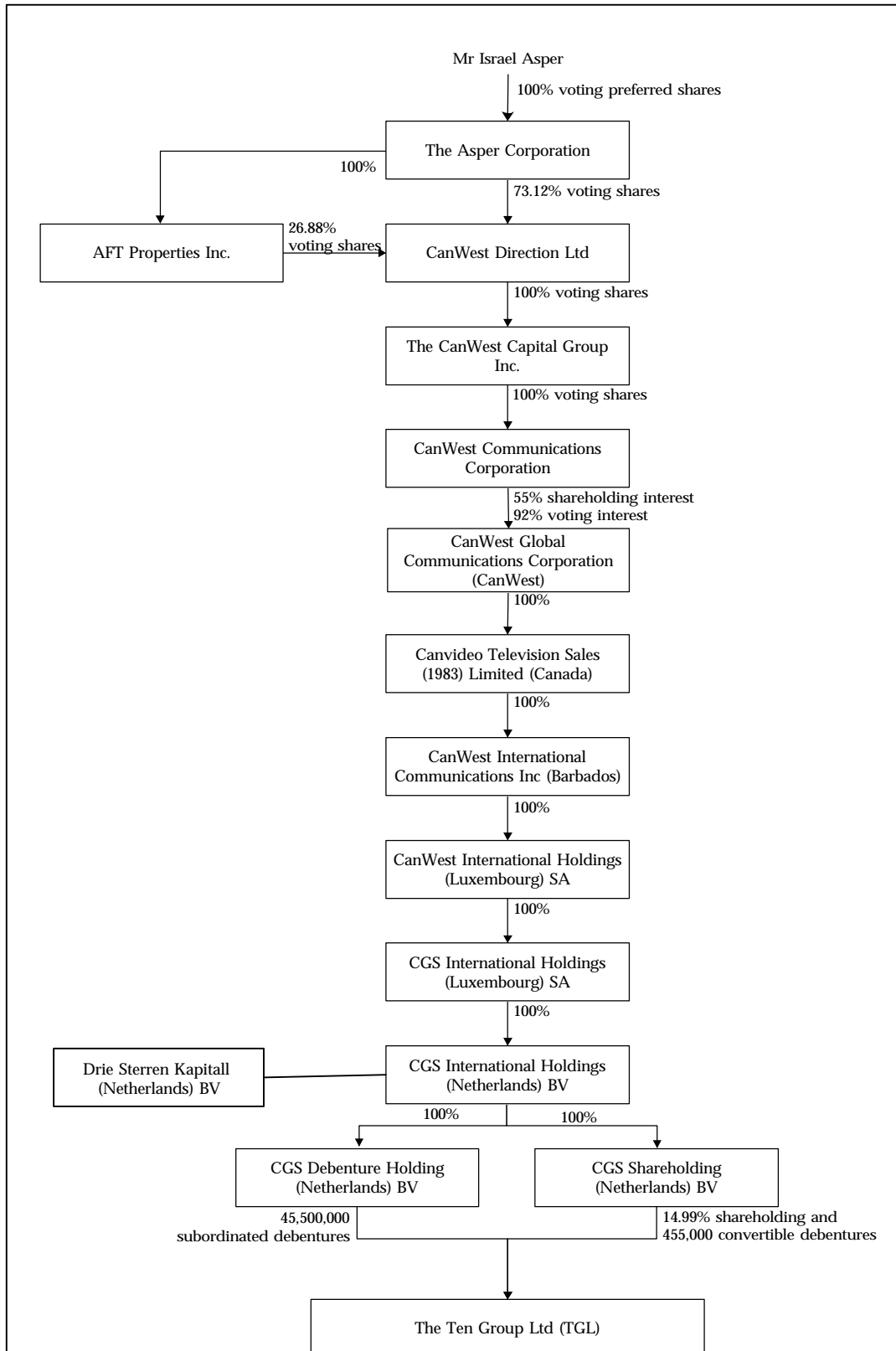
Mr Asper has a 100 per cent company interest, being a voting interest, in The Asper Corporation. Mr Asper, being a natural person who is not an Australian citizen, is a ‘foreign person’ under paragraph (a) of the definition. The Asper Corporation is therefore a ‘foreign person’ under paragraph (b) of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

Using the fractional tracing method Mr Asper, being a non-Australian natural person, holds company interests of 73.12 per cent in CanWest Direction Ltd. As this exceeds 50 per cent 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 per cent in every company in the chain down to and including CGS Shareholding (see Diagram 3). Accordingly, each of these companies is a ‘foreign person’ under paragraph (b) of the definition.

FINDING OF FACT

CanWest is a foreign person as defined in s.6 of the BSA.

Diagram 3



3.2 DEEMED CONTROL - CANWEST'S COMPANY INTERESTS IN TGL

FINDINGS OF FACT

CanWest has a voting interest of 52.5 per cent in TGL.

CanWest's dividend and shareholding interests in TGL are substantially less than this.

Company interests means '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 two or more of those interests, whichever of those interests has the greater or greatest percentage' (section 6 of the BSA).

FINDING OF FACT

CanWest has a company interest of 52.5 per cent in The Ten Group Limited.

3.3 OTHER MEANS OF CONTROL

What follows is an analysis of a number of different ways in which CanWest could be in a position to exercise control of TGL. Not all possibilities arising from the evidence gathered from the ABA or arising under the BSA have been examined. However, each way is intended to stand on its own, independently of the others.

3.3.1 LEGAL FRAMEWORK

Control

Section 6 of the BSA defines in an inclusive way the methods by which control of a company or licence 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 BSA 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 BSA 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.

The relevant tests for control are set out in clause 2(1) of Schedule 1 of the BSA which provides:

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;

- (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:
 - (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. [emphasis added]

The circumstances of a particular case are important when determining whether a person ‘is in a position to exercise control’: *Re The News Corporation Ltd* (1986) 70 ALR 419 at 428, per Bowen CJ and at 438, per Lockhart J. Furthermore, whether a person is ‘in a position to exercise control’ should be determined by ‘practical and commercial considerations rather than highly refined legal tests’: *Re The News Corporation Ltd* (1986) 70 ALR 419 at 438, per Lockhart J.

Significant proportion

The expression ‘proportion’ has been defined in the Macquarie Dictionary as ‘comparative relation between things or magnitudes as to size, quantity, number, etc.; ratio’.

The ABA has determined that the word ‘significant’ in clause 2(1)(c) of Schedule 1 of the BSA 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’ relevant or material in terms of determining whether there is control generally over the operations of a company.

The question of whether control over operations of a company is control over a significant proportion of the operations of a company will differ from case to case. Control over particular operations of a company may take on a greater significance where the range of operations of that company is limited, for example, in the case of a special purpose company.

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 BSA, 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.

Affairs of a company

In the ABA's report *Investigation into Control: CanWest Global Communications Corporation/The Ten Group Ltd* (November 1995), the ABA noted that 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, in the context of the predecessor to the *Corporations Law* (ie: the *Companies Code*) 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.'

Substantial issue

The ABA accepted in the November 1995 report mentioned above the view that the expression 'a substantial issue' in clause 2(1) of Schedule 1 of the BSA 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*, to include 'of or pertaining to the essence of a thing; essential, material, or important'.

Associate includes associates

The reference, in clause 2(1) of Schedule 1 of the BSA, to 'associate' includes 'associates'. Section 23(b) of *Acts Interpretation Act 1901* provides that:

In any Act, unless the contrary intention appears:

- (b) words in the singular number include the plural and words in the plural number include the singular.

There does not appear to be any contrary intention in the BSA.

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. As stated by the ABA in its report *Investigation into Control: CanWest Global Communications Corporation/The Ten Group Limited* (November 1995) 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)

The ABA noted in its November 1995 Report that it was 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. However, where the facts and circumstances indicate such a position exists, the ABA must take this into account.

What amounts to being in 'a position to exercise control' is a matter of fact and degree and may depend on changes in practices in a company from time to time as well as from case to case. The ABA is obliged to consider the circumstances in each case and is required to take into account any changes in circumstances over time in forming its view as to whether a person is in a position to exercise control.

Associates

Related company test for associates

Under section 6 of the BSA an associate includes a related company:

'associate', in relation to a person in relation to control of a ... company ... means:

(e) if the person is a company - another company if:

(i) the other company is a related body corporate of the person for the purposes of the Corporations Act 1990; ...

but 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.

Section 50 of the *Corporations Law* provides that a subsidiary and a holding company are related bodies corporate. Section 46 of the *Corporations Law* defines a 'subsidiary'. A body corporate is a subsidiary of a company if the company 'is in a position to ... control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body': s46.

'Controlled company' test for associates

A company can be an associate of another company where it is controlled by the first mentioned company as provided for in paragraph 6(e)(ii) of the BSA. That paragraph provides as follows:

s6 'Associate', in relation to a person in relation to control ... of a company ... means:

(e) if the person is a company - another company if:

(ii) the person, or the person and **another person who is an associate** of the person under another paragraph, **are in a position to exercise control of the other company**;

but 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.
[Emphasis added]

It should be noted that the paragraph specifies that ‘persons are not associates if the ABA is satisfied that they do not act together in any relevant dealings relating to that company ... and neither of them is in a position to exert influence over the business dealings of the other in relation to that company...’.

3.3.2 IS CANWEST TOGETHER WITH ASSOCIATES IN A POSITION TO EXERCISE CONTROL OF TGL?

Why are associate relationships relevant?

This part considers the relationships between DSK, Selli, Donholken and CanWest. These relationships are considered because CanWest is in a position to exercise control of TGL if CanWest either alone or together with its associates is in a position to exercise control of TGL using the formula in clause 2(1)(a) of Schedule 1 of the BSA. That clause provides:

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;

Are DSK, Selli and Donholken associates of CanWest?

Certain issues have been identified for analysis.

- 1. Is DSK an associate of CanWest?*
- 2. Is Selli an associate of CanWest?*
- 3. Is Donholken an associate of CanWest?*
- 4. Is CanWest together with its associates in a position to exercise control of TGL?*

3.3.2.1 IS DSK AN ASSOCIATE OF CANWEST?

It is important to determine whether DSK is an associate of CanWest because DSK fits into the associate formula relevant for Donholken and Selli as indicated in bold below:

s6 'Associate', in relation to a person in relation to control ... of a company ... means:

(e) if the person is a company - another company if:

(ii) the person, or the person and **another person who is an associate** of the person under another paragraph, are in a position to exercise control of the other company;

but 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.
[Emphasis added]

The legal test to determine whether DSK is an associate of CanWest

The relevant legal test used to determine whether DSK is an associate of CanWest is set out below. Under section 6 of the BSA an associate includes a related company:

'associate', in relation to a person in relation to control of a ... company ... means:

(e) if the person is a company - another company if:

(i) the other company is a related body corporate of the person for the purposes of the Corporations Act 1990; ...

Is DSK a related company of CanWest?

Section 50 of the *Corporations Law* provides that a subsidiary and a holding company are related bodies corporate. Section 46 of the *Corporations Law* defines a 'subsidiary'. That section provides that a body corporate is a subsidiary of a company if the company [CanWest] 'is in a position to ... control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body' [ie DSK].

Discussion

CanWest owns 100 per cent of CanVideo Television Sales (1983) Ltd. CanVideo Television Sales (1983) Ltd owns 100 per cent of CanWest International Communications Inc (Barbados). CanWest International Communications Inc (Barbados) owns 100 per cent of CanWest International Holdings (Luxembourg) SA. CanWest International Holdings (Luxembourg) SA owns 100 per cent of CGS International Holdings (Luxembourg) SA. CGS International Holdings (Luxembourg) SA owns 100 per cent of CGS International Holdings (Netherlands) BV. CGS International Holdings (Netherlands) BV owns 100 per cent of DSK.

CanWest has a chain of company interests greater than 15 per cent between it and DSK. Under Clause 7 of Schedule 1 of the BSA, CanWest is therefore in a position to exercise control of DSK.

In addition, the chain of company interests from CanWest to DSK exceeds 50 per cent. This indicates that CanWest is in a position to control the casting of more than one-half of the maximum number of votes that might be cast at a general meeting of DSK. As CanWest is in a position to control the casting of more than one-half of the maximum number of votes that might be cast at a general meeting of DSK, DSK is a subsidiary of CanWest. DSK is therefore a related body corporate of CanWest in terms of paragraph 6(e)(i) of the definition of associate in section 6 of the BSA.

FINDINGS

CanWest is in a position to exercise control of DSK.

DSK is a related company of CanWest for the purposes of the Corporations Law.

DSK IS AN ASSOCIATE OF CANWEST UNLESS THE QUALIFICATION APPLIES

As DSK is a related company of CanWest, applying paragraph (e)(i) of the definition of 'associate' in section 6 of the BSA, DSK is an associate of CanWest subject to the qualification in that definition.

The effect of the qualification in the definition of 'associate' is as follows: [DSK] 'is not an associate if the ABA is satisfied that [CanWest and DSK] do not act together in any relevant dealings relating to [TGL] ... and neither [CanWest nor DSK] is in a position to exert influence over the business dealings of the other in relation to [TGL]...'.

The ABA must be satisfied of both of the matters set out below before it can be said that Selli and CanWest are not associates:

1. CanWest and DSK do not act together in any relevant dealings relating to TGL; and
2. CanWest does not exert influence over the business dealings of DSK in relation to TGL.

Can the ABA be satisfied that CanWest and DSK do not act together in any relevant dealings relating to TGL?

DSK and CanWest acted together in relevant dealings relating to TGL when Selli purchased the TGL shares held by Belshaw and Winston Capital and when Selli purchased the Class B Shares in Turnand and Numeration. DSK financed those purchases by Selli. CanWest funded DSK's subscription of debentures in Selli.

The ABA is of the view that dealings in shares in TGL are 'relevant dealings' in terms of the definition of associate in section 6 of the BSA.

The ABA is also of the view that those relevant dealings relate to TGL.

Accordingly the ABA is not satisfied that CanWest and DSK do not act together in any relevant dealings relating to TGL.

Can the ABA be satisfied that CanWest is not in a position to exert influence over the business dealings of DSK in relation to TGL?

DSK has convertible debentures in companies, Selli and Donholken, which own shares in TGL and has financed the purchase of shares in TGL. The financing of the purchase of shares in TGL is a business dealing of DSK that relates to TGL.

CanWest has a chain of company interests greater than 15 per cent between it and DSK. Under Clause 7 of Schedule 1 of the BSA, CanWest is therefore in a position to exercise control of DSK. In addition the chain of company interests from CanWest to DSK exceeds 50 per cent. This indicates that CanWest is in a position to exert influence over the business dealings of DSK in relation to TGL.

Mr Strike, a director of DSK, reports directly to Mr Asper³⁰⁸. Mr Strike is a director of DSK and makes decisions for DSK after consulting Mr Asper. CanWest 'created' DSK for the sole purpose of funding acquisitions of TGL shares.³⁰⁹ The evidence indicates that Mr Asper as Chief Executive Officer of CanWest Global Communications Corp³¹⁰ exerts influence over Mr Lerner and Mr Strike³¹¹. From this it is inferred that CanWest may exert influence over DSK in its business dealings in relation to TGL.

Accordingly the ABA is not satisfied that neither CanWest nor DSK is in a position to exert influence over the business dealings of the other in relation to TGL.

FINDING

DSK is an associate of CanWest in relation to the control of TGL.

3.3.3.2 IS SELLI AN ASSOCIATE OF CANWEST?

Need for ‘control’ by DSK for associate test

Under the test in paragraph (e)(ii) of the definition of associate in section 6 of the BSA, in order to determine whether Selli is an associate of CanWest it is necessary to determine whether DSK and CanWest control Selli.

The tests used to determine whether DSK is in a position to exercise control of Selli for the purposes of paragraph (e)(ii) of the ‘associate’ test in section 6 of the BSA are as follows:

For the purposes of this Schedule, a person is in a position to exercise control of a licence or a company if:

- (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:
 - (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.

Selli is an associate of DSK in relation to the control of TGL if DSK and CanWest are in a position to exercise control of Selli. DSK can be said to be in a position to exercise control of Selli if:

- (applying the formula in clause 2(1)(c) of Schedule 1 of the BSA) DSK is in a position to exercise control of a significant proportion of the operations of Selli; or
- (applying the formula in clause 2(1)(d)(iii) of Schedule 1 of the BSA) DSK is in a position to exercise direction or restraint over a substantial issue affecting the management or affairs of Selli.

The test for associate in section 6(e)(ii) of the BSA refers to a person [in this case, CanWest] **or** a person **and** its associate [DSK] being in a position to control another person [in this case, Selli].

Given that CanWest is in a position to exercise control of DSK (through a chain of company interests that exceed 50 per cent) where DSK is in a position to exercise control of an entity (say Selli) it does so **with** CanWest.

That is, if DSK is in a position to exercise control of Selli **then** CanWest **and** DSK are in a position to exercise control of Selli in terms of the definition of ‘associate’ in section 6(e)(ii) of the BSA.

IS DSK IN A POSITION TO EXERCISE DIRECTION OR RESTRAINT OVER A SUBSTANTIAL ISSUE AFFECTING THE MANAGEMENT OR AFFAIRS OF SELLI?

DSK as the sole debentureholder in Selli is in a position to exercise direction or restraint over the following issues relating to Selli.

(a) The raising of capital

The contractual and constituting documents indicate that DSK is in a position to exercise restraint over the capacity of Selli to raise funds whether through the issue of shares, debentures, or the sale or lease of assets.

The Memorandum of Association of Selli prevents it borrowing money except in very limited circumstances³¹². Selli cannot alter its share capital without DSK's consent³¹³. The directors of Selli may not issue any more of the existing classes of shares to any person except on conversion of the convertible debentures³¹⁴.

Selli may not create or issue debenture stock without the trustee's consent³¹⁵ and the trustee must not consent to the creation or issue of new stock unless directed by a unanimous resolution of all the stockholders, ie DSK.³¹⁶ DSK is the only current holder of stock.

Under the Selli Trust Deed, Selli, must not lease or hire any asset without the trustee's consent³¹⁷. Selli cannot create encumbrances or sell or lease the property subject to the charge (eg the TGL shares) without the consent of the trustee³¹⁸.

The ABA considers, on the basis of the knowledge and experience of its members, that the raising of capital, either through the issue of shares, borrowing or the sale of assets is a substantial issue which affects the affairs of Selli. It affects its capacity to do business (eg to buy or sell TGL shares) and earn profits.

DSK is in a position to exercise restraint over a substantial issue affecting the affairs of Selli.

(b) appointment of auditors

DSK is entitled to nominate the auditors of Selli. No other person can be appointed, unless DSK fails to nominate anyone³¹⁹.

The auditors have a significant role in the determination of the interest entitlements of DSK³²⁰. Under clause 6 of the Selli Participating Debentures Deed the auditors have the power in certain circumstances to adjust the 'Maximum Rate' of interest from 15 per cent to a level above that and this in turn affects the interest actually paid to the Participating Debentureholders by Selli³²¹. The auditors' power to adjust the 'Maximum Rate' requires the auditors to exercise a degree of discretion which is not insignificant. The adjustments required are not the mere application of a formula with predetermined constants but require the auditors to exercise judgement, in some cases about future events.

The auditors have an important role in determining financial benefits for shareholders³²². They must determine the 'Value of Net Assets' for the purposes of determining how much money Copplere and Leibler Media Holdings (the Class B shareholders of Selli) get on redemption of their Class B shares. In determining the Value of Net Assets the auditors are required to assume that Selli is being wound up and estimate 'costs the Company would incur in the assumed disposal and realisation of its assets' as well as determine the value of Selli's assets, the TGL shares, using the valuation principles set out in Article 3.3(c)(iii) of the Articles of Association of Selli.

As the auditors appear to have an important role in the determination in the distributions of Selli, be it expenses by way of Participating Debenture Interest or appropriations from profits by way of distributions to shareholders, the appointment of the auditors of Selli is a substantial issue affecting the affairs of Selli. The appointment of the auditors will ultimately have an effect on the distributions of Selli to its shareholders and to DSK. It is noted that an auditor has a duty to act independently irrespective of who she/he is appointed by.

The contractual and constituting documents indicate that DSK is in a position to exercise restraint over that issue.

The ABA considers, on the basis of the knowledge and experience of its members, that the appointment of the auditors is a substantial issue which affects the affairs of Selli.

DSK is in a position to exercise direction over a substantial issue affecting the affairs of Selli.

(c) change in Articles or general character of business

Under the Selli Trust Deed, Selli, cannot change the general character of or discontinue its business without the consent of the trustee³²³. Any resolution by Selli to alter its capital must be approved by DSK³²⁴. Selli can only amend its Memorandum and Articles of Association with the prior written consent of the trustee³²⁵ acting on the instructions of the stock holders, ie DSK.

The contractual and constituting documents indicate that DSK is in a position to exercise restraint over any change in the Memorandum and Articles of Association of Selli or in the general character of its business.

The ABA considers, on the basis of the knowledge and experience of its members, that the capacity to change the general character of a company's business and alterations in a company's constituting documents are substantial issues which affect the affairs of a company, in this instance Selli.

DSK is in a position to exercise restraint over a substantial issue affecting the affairs of Selli.

(d) Ability to generate profits

The Memorandum of Association of Selli effectively limits its business to the purchase and sale of TGL shares or interests associated with the TGL shares³²⁶. The TGL shares held by Selli cannot be transferred because there is a fixed charge in relation to those shares³²⁷ and Selli has covenanted that it will not, without the trustee's consent, transfer the charged property.³²⁸ For the purposes of this analysis it should be noted that the trustee must act in accordance with the instructions of the stockholders. At present DSK is the only stockholder. In any case where new stock is created the trustee must act in accordance with the unanimous resolution of all stockholders.³²⁹ This effectively gives DSK veto power in relation to the trustee even where new stock is issued to a party other than DSK. This means that without DSK's consent Selli cannot realise a profit on the sale of TGL shares because it cannot sell its TGL shares without the consent of DSK.

In addition, practically, it cannot purchase more TGL shares because of the restrictions on its ability to raise capital except with the consent of DSK, discussed at paragraph (a) above. Thus DSK is in a position to exercise restraint over the ability of Selli to generate profits.

The ABA considers, on the basis of the knowledge and experience of its members, that the ability of Selli to generate profits is a substantial issue which affects the affairs of Selli.

DSK is in a position to exercise restraint over a substantial issue affecting the affairs of Selli.

Discussion

DSK is in a position to exercise direction or restraint over a number of substantial issues affecting the affairs of Selli.

DSK is thereby in a position to exercise control of Selli.

As CanWest is in a position to exercise control of DSK, it can be said that DSK and CanWest are in a position to exercise control of Selli within the terms of paragraph (e)(ii) of the 'associate' definition in section 6 of the BSA.

FINDINGS

DSK is in a position to exercise direction or restraint over substantial issues affecting the affairs of Selli.

CanWest and DSK, as associates, are in a position to exercise control of Selli.

IS DSK IN A POSITION TO EXERCISE CONTROL OF A SIGNIFICANT PROPORTION OF THE OPERATIONS OF SELLI?

The test for control in clause 2 of Schedule 1 of the BSA is also relevant in these circumstances. That clause provides:

- (1) For the purposes of this Schedule, a person is in a position to exercise control of a licence or a company if:
 - (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;

Evidence

The operations of Selli are limited by clause 5 of its Memorandum of Association. That clause provides:

- The Company must not carry on any business or activity other than:
 - (a) the acquisition, holding, exercise, enforcement or disposal of:
 - (i) TGL Shares;

- (ii) options or rights to acquire TGL Shares;
 - (iii) other securities with rights of exercise, or rights of conversion, to the TGL Shares;
 - (iv) debentures issued by TGL, whether or not those debentures are convertible to TGL Shares;
 - (v) shares or other equity interests in an entity whose principal asset is securities referred to in sub-paragraphs (i) to (iv) above inclusive;
- (b)
- (i) the receipt and investment in an at call account of a bank or other financial institution of any distribution payable in respect of the securities referred to in sub-paragraphs (a)(i) to (a)(v) above inclusive;
 - (ii) the payment of dividends in accordance with the Articles of Association of the Company;
 - (c) enforcement or defending the enforcement (including by instructing legal advisers) of a contract to which the Company is a party and which relates to an activity permitted by paragraph 5 or 6; and
 - (d) an activity permitted by paragraph 6.

Clause 6 of the Memorandum of Association of Selli provides:

The company must not:

- (a) borrow or raise money;
- (b) charge any property or business of the Company or all or any or its unpaid capital;
- (c) issue shares, options over unissued shares, equity securities, securities with rights of conversion or exercise to shares or equity securities, debentures or other securities;
- (d) give any other security for a debt, liability or obligation of the Company or of any other person;
- (e) guarantee or become liable for the payment of money or the performance of any obligations by any other person; or
- (f) lend or advance any money or funds or provide any other form of financial accommodation to any person,

other than:

- (g) the issue of the Limited Class Shares in accordance with the Articles of Association of the Company;
- (h) the issue of Convertible Debentures to Drie Sterren Kapitaal (Nederland) B.V.;
- (i) the issue of Participating Debentures to Drie Sterren Kapitaal (Nederland) B.V.;
- (j) pursuant to the Debenture Stock Trust Deed;
- (k) the payment of Expenses and Taxes; and
- (l) the payment of dividends in accordance with the Articles of Association of the Company.

Selli cannot sell the TGL shares that it holds without the consent of the trustee who acts on the instructions of DSK.³³⁰

Selli cannot purchase TGL shares unless it can finance such a purchase. DSK is in a position to exert restraint over the ability of Selli to raise capital (see paragraph (a) above). DSK is also in a position to exercise restraint over the ability of Selli to generate profits as discussed at paragraph (d) above.

Accordingly DSK is in a position to exercise control over the sale or purchase of TGL shares or interests associated with TGL shares.

As a significant proportion of the operations of Selli is the buying and selling of TGL shares or interests in TGL shares, DSK is in a position to exercise control over a significant proportion of the operations of the Selli.

Accordingly DSK is in a position to exercise control of Selli.

As CanWest is in a position to exercise control of DSK, it can be said that DSK and CanWest are in a position to exercise control of Selli within the terms of paragraph (e)(ii) of the 'associate' definition in section 6 of the BSA.

FINDINGS

DSK is in a position to exercise control of a significant proportion of the operations of Selli.

DSK and CanWest are, as associates, in a position to exercise control of Selli.

SELLI IS AN ASSOCIATE OF CANWEST UNLESS THE QUALIFICATION APPLIES

In considering whether Selli is an associate of CanWest it is necessary to consider the application of the qualification in the definition of 'associate' in section 6 of the BSA: [Selli] 'is not an associate if the ABA is satisfied that [CanWest and Selli] do not act together in any relevant dealings relating to [TGL] ... and neither [CanWest or Selli] is in a position to exert influence over the business dealings of the other in relation to [TGL]...'.

The ABA must be satisfied of both the matters set out below before it can be said that Selli and CanWest are not associates:

1. CanWest and Selli do not act together in any relevant dealings relating to TGL; and
2. CanWest does not exert influence over the business dealings of Selli in relation to TGL.

Can the ABA be satisfied that CanWest and Selli do not act together in any relevant dealings relating to TGL?

Selli and CanWest (through DSK) have acted together in relevant dealings relating to TGL when Selli purchased the TGL shares held by Belshaw and Winston Capital and when it purchased the Class B Shares in Turnand and Numeration. DSK financed those purchases by Selli³³¹. CanWest provided DSK with that finance³³².

The ABA is of the view that dealings in shares in TGL are 'relevant dealings' in terms of the definition of 'associate' in section 6 of the BSA.

The ABA is also of the view that those relevant dealings relate to TGL.

Accordingly the ABA is not satisfied that CanWest and Selli do not act together in any relevant dealings relating to TGL.

Can the ABA be satisfied that CanWest is not in a position to exert influence over the business dealings of Selli in relation to TGL?

The Memorandum of Association of Selli prevents it borrowing money except in very limited circumstances³³³. Apart from a further issue of 2 Class B Shares to the existing holders of those shares, the directors of Selli may not issue any more of the existing classes of shares to any person except on conversion of the convertible debentures³³⁴. Selli may not create or issue debenture stock without the trustee's consent³³⁵. The Trustee must not consent to the creation or issue of any stock unless directed by a unanimous resolution of all stockholders³³⁶. DSK is the only current holder of debenture stock. Selli cannot lease or hire any asset³³⁷. Selli cannot create encumbrances or sell or lease the property subject to the charge without the consent of the trustee³³⁸.

By virtue of the restrictions on Selli in obtaining finance, either through the issue of shares, debenture stock or the sale of assets, DSK consent is effectively required before Selli can purchase TGL shares.

DSK is in a position to exert influence over the ability of Selli to finance a purchase of shares in TGL. This is a business dealing that relates to TGL and DSK is in a position to exert influence over that business dealing. As CanWest is in a position to exercise control of DSK, CanWest is thereby in a position to exert influence over that business dealing.

Accordingly the ABA is not satisfied that neither CanWest nor Selli is in a position to exert influence over the business dealings of the other in relation to TGL.

As the ABA is not satisfied 'that [CanWest and Selli] do not act together in any relevant dealings relating to [TGL] ... and neither [CanWest nor Selli] is in a position to exert influence over the business dealings of the other in relation to [TGL]...', Selli is an associate of CanWest.

FINDING

Selli is an Associate of CanWest in relation to the control of TGL

3.3.2.3 IS DONHOLKEN AN ASSOCIATE OF CANWEST?

Need for ‘control’ by DSK for associate test

Under the test in paragraph (e)(ii) of the definition of associate in section 6 of the BSA, in order to determine whether Donholken is an associate of CanWest it is necessary to determine whether DSK and CanWest control Donholken.

The tests used to determine whether DSK is in a position to exercise control of Donholken for the purposes of paragraph (e)(ii) of the ‘associate’ test in section 6 of the BSA is as follows:

- cl 2.(1) For the purposes of this Schedule, a person is in a position to exercise control of a licence or a company if:
- (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:
 - (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.

Donholken is an associate of DSK in relation to the control of TGL if DSK and CanWest are in a position to exercise control of Donholken. Given that CanWest is in a position to exercise control of DSK, where DSK is in a position to control Donholken it does so with CanWest.

DSK can be said to be in a position to exercise control of Donholken if:

- (applying the formula in clause 2(1)(c) of Schedule 1 of the BSA) DSK is in a position to exercise control of a significant proportion of the operations of Donholken; or
- (applying the formula in clause 2(1)(d)(iii) of Schedule 1 of the BSA) DSK is in a position to exercise direction or restraint over a substantial issue affecting the management or affairs of Donholken.

IS DSK IN A POSITION TO EXERCISE DIRECTION OR RESTRAINT OVER A SUBSTANTIAL ISSUE AFFECTING THE MANAGEMENT OR AFFAIRS OF DONHOLKEN?

DSK as the sole debenture holder in Donholken is in a position to exercise direction or restraint over the following issues relating to Donholken.

Evidence

(a) Ability to raise capital

The Memorandum of Association of Donholken prevents it borrowing money, issuing shares, options or securities, giving security, guaranteeing obligations and providing

financial accommodation, except in very limited circumstances and often only with the consent of DSK.³³⁹ It is the understanding of the ABA that Donholken may not issue debenture stock except to DSK³⁴⁰. This is because clause 6 of the Memorandum of Donholken states that the company must not, among other things, borrow or raise money, other than the issue of Participating or Convertible Debentures to DSK or pursuant to the Donholken Trust Deed (see above). The Donholken Trust Deed does not make provision for the issue of Participating or Convertible Debentures to any person other than DSK.

Donholken cannot alter its share capital without DSK consent³⁴¹. Without DSK consent, the Directors of Donholken may not issue any more shares to any person except on conversion of the convertible debentures³⁴². There are restrictions on the issue of preference shares, including redeemable preference shares³⁴³.

Donholken must not, without DSK consent, lease or hire any asset³⁴⁴. Donholken cannot create encumbrances or sell or lease the property subject to the charge without the consent of DSK³⁴⁵.

The Memorandum and Articles of Association of Donholken effectively limit the capacity of the company to raise money except through the issue of debentures to DSK³⁴⁶. Under the Donholken Trust Deed, the TGL shares held by Donholken cannot be sold except with the consent of DSK.³⁴⁷

Under the arrangements DSK is in a position to exercise restraint over the capacity of Donholken to raise funds whether through the issue of shares, debentures, or the sale or lease of assets. Thus DSK is in a position to exercise restraint over the ability of Donholken to raise capital.

The ABA considers, on the basis of the knowledge and experience of its members, that the raising of capital, either through the issue of shares, borrowing or the sale of assets is a substantial issue which affects the affairs of Donholken. It affects its capacity to do business (eg to buy and sell TGL shares) and earn profits.

DSK is in a position to exercise restraint over a substantial issue affecting the affairs of Donholken.

(b) Nomination of the auditors

DSK is entitled to nominate the auditors of Donholken. No other person can be appointed, unless DSK fails to nominate anyone³⁴⁸. Like the auditors of Selli, the auditors of Donholken have an important role in determining financial benefits for shareholders (on redemption of Class B1 and B2 shares and in determining profits available for dividends)³⁴⁹.

In certain circumstances the auditors of Donholken also have a role in determining the interest entitlements of DSK³⁵⁰ in much the same way as the auditors of Selli have a role in the determining interest entitlements.

As the auditors appear to have an important role in the determination of the distributions of Donholken, be it expenses by way of Participating Debenture Interest or appropriations

from profits by way of distributions to shareholders, the appointment of the auditors is a substantial issue affecting the affairs of Donholken. The appointment of the auditors will ultimately have an effect on the distributions of Donholken to the shareholders and to DSK. It is noted that an auditor has a duty to act independently irrespective of who she/he is appointed by.

The contractual and constituting documents indicate that DSK is in a position to exercise restraint over that issue.

The ABA considers, on the basis of the knowledge and experience of its members, that the appointment of the auditor is a substantial issue which affects the management and affairs of Donholken.

DSK is in a position to exercise direction over a substantial issue affecting the affairs of Donholken.

(c) Changing the business or constitution of Donholken

Donholken cannot change the general character of or discontinue its business without the consent of DSK³⁵¹. The Articles of Association of Donholken cannot be altered without the agreement of DSK.³⁵² Any resolution by Donholken to alter its share capital must be approved by DSK.³⁵³ Donholken can only amend its Memorandum and Articles of Association with the consent of DSK³⁵⁴.

The contractual and constituting documents indicate that DSK is in a position to exercise restraint over that issue.

The ABA considers, on the basis of the knowledge and experience of its members, that the capacity to change the general character of a company's business and alterations in a company's constituting documents are substantial issues which affect the affairs of a company, in this instance Donholken.

DSK is in a position to exercise restraint over a substantial issue affecting the affairs of Donholken.

(d) Ability to generate profits

The Memorandum and Articles of Association of Donholken limit its business to the purchase and sale of TGL shares. The TGL shares held by Donholken cannot be transferred because there is a fixed charge in relation to those shares³⁵⁵ and Donholken has covenanted that it will not, without DSK's consent, transfer the charged property.³⁵⁶ This means that without DSK's consent Donholken cannot realise a profit on the sale of TGL shares because it cannot sell its TGL shares without the consent of DSK.

In addition, practically, it cannot purchase more TGL shares because of the restrictions on its ability to raise capital except with the consent of DSK, discussed at paragraph (a) above.

The contractual and constituting documents indicate that DSK is in a position to exercise restraint over the ability to generate profits.

While there are differences between the Articles of Association of Donholken and Selli, the important point is that DSK retains a right of veto.

The ABA considers, on the basis of the knowledge and experience of its members, that the ability to generate profits is a substantial issue which affects the affairs of Donholken.

DSK is in a position to exercise restraint over a substantial issue affecting the affairs of Donholken.

Discussion

DSK is in a position to exercise direction or restraint over a number of substantial issues affecting the affairs of Donholken.

DSK is thereby in a position to exercise control of Donholken.

As CanWest is in a position to exercise control of DSK, it can be said that DSK and CanWest are in a position to exercise control of Donholken within the terms of paragraph (e)(ii) of the 'associate' definition in section 6 of the BSA.

FINDINGS

DSK is in a position to exercise direction or restraint over substantial issues affecting the affairs of Donholken.

DSK and CanWest are, as associates, in a position to exercise control of Donholken.

IS DSK IN A POSITION TO EXERCISE CONTROL OF A SIGNIFICANT PROPORTION OF THE OPERATIONS OF DONHOLKEN?

The test for control in clause 2 of Schedule 1 of the BSA is also relevant in these circumstances. That clause provides:

- cl 2.(1) For the purposes of this Schedule, a person is in a position to exercise control of a licence or a company if:
- (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

Evidence

The operations of Donholken are limited by clause 6 of its Memorandum of Association. Clause 6 of the Memorandum of Association of Donholken provides:

The Company must not carry on any business or activity other than:

- (a) the acquisition, holding, exercise, enforcement or disposal of:
 - (i) TGL Shares;
 - (ii) options or rights to acquire TGL Shares;
 - (iii) other securities with rights of exercise, or rights of conversion, to the TGL Shares;
 - (iv) debentures issued by TGL, whether or not those debentures are convertible to TGL Shares;
 - (v) shares or other equity interests in an entity whose principal asset is securities referred to in sub-paragraphs (i) to (iv) above inclusive;
- (b)
 - (i) the receipt and investment in an at call account of a bank or other financial institution of any distribution payable in respect of the securities referred to in sub-paragraphs (a)(i) to (a)(v) above inclusive;
 - (ii) the payment of dividends in accordance with the Articles of Association of the Company;
- (c) enforcement of a contract to which the Company is a party and which relates to an activity permitted by paragraph 6 or 7; and
- (d) an activity permitted by paragraph 7.

Clause 7 of the Memorandum of Association of Donholken provides:

The company must not:

- (a) borrow or raise money;
- (b) sell, dispose, alienate or charge any property or business of the Company or all or any or its unpaid capital;
- (c) issue shares, options over unissued shares, equity securities, securities with rights of conversion or exercise to shares or equity securities, debentures or other securities;
- (d) give any other security for a debt, liability or obligation of the Company or of any other person;
- (e) guarantee or become liable for the payment of money or the performance of any obligations by any other person; or

(f) lend or advance any money or funds or provide any other form of financial accommodation to any person,

other than:

(g) the issue of the Limited Class Shares in accordance with the Articles of Association of the Company;

(h) the issue of Convertible Debentures to Drie Sterren Kapitaal (Nederland) B.V.;

(i) the issue of Participating Debentures to Drie Sterren Kapitaal (Nederland) B.V.;

(j) pursuant to the Debenture Stock Trust Deed;

(k) the payment of Expenses and Taxes; and

(l) the payment of dividends in accordance with the Articles of Association of the Company.

Donholken cannot sell the TGL shares that it holds without the consent of DSK.³⁵⁷

Donholken cannot purchase TGL shares unless it can finance such a purchase. DSK is in a position to exert restraint over the ability of Donholken to raise capital, see paragraph (a). DSK is also in a position to exercise restraint over the ability of Donholken to generate profits as discussed at paragraph (d).

Accordingly DSK is in a position to exercise control over the sale or purchase of TGL shares or interests associated with TGL shares.

Discussion

As a significant proportion of the operations of Donholken is the buying and selling of TGL shares or interests in TGL shares, DSK is in a position to exercise control of a significant proportion of the operations of the Donholken.

Accordingly DSK is in a position to exercise control of Donholken.

As CanWest is in a position to exercise control of DSK, it can be said that DSK and CanWest are in a position to exercise control of Donholken within the terms of paragraph (e)(ii) of the 'associate' definition in section 6 of the BSA.

FINDINGS

DSK is in a position to exercise control of a significant proportion of the operations of Donholken.

DSK and CanWest are, as associates, in a position to exercise control of Donholken.

DONHOLKEN IS AN ASSOCIATE OF CANWEST UNLESS THE QUALIFICATION APPLIES

In considering whether Donholken is an associate of CanWest it is necessary to consider the application of the qualification in the definition of 'associate' in section 6 of the BSA: [Donholken] 'is not an associate if the ABA is satisfied that [CanWest and Donholken] do not act together in any relevant dealings relating to [TGL] ... and neither [CanWest nor Donholken] is in a position to exert influence over the business dealings of the other in relation to that company...'.³⁵⁸

Can the ABA be satisfied that CanWest and Donholken do not act together in any relevant dealings relating to TGL?

Donholken and CanWest, through DSK, acted together in relevant dealings relating to TGL when Donholken purchased the TGL shares held by Corom and Audant. DSK financed those purchases by Donholken³⁵⁸. CanWest provided DSK with the finance for the subscriptions for debentures in Donholken to finance the purchase by it of TGL shares.³⁵⁹

The ABA is of the view that dealings in shares in TGL are ‘relevant dealings’ in terms of the definition of associate in section 6 of the BSA.

The ABA is also of the view that those relevant dealings relate to TGL.

Accordingly the ABA is not satisfied that CanWest and Donholken do not act together in any relevant dealings relating to TGL.

Can the ABA be satisfied that CanWest is not in a position to exert influence over the business dealings of Donholken in relation to TGL?

The Memorandum of Association of Donholken prevents it borrowing money, issuing shares, options or securities, giving security, guaranteeing obligations and providing financial accommodation, except in very limited circumstances.³⁶⁰ Donholken may not issue debenture stock except to DSK³⁶¹.

Donholken cannot alter its share capital without DSK consent³⁶². Without DSK consent, the Directors of Donholken may not issue any more shares to any person except on conversion of the convertible debentures³⁶³. There are restrictions on the issue of preference shares, including redeemable preference shares³⁶⁴.

Without DSK consent, Donholken must not lease or hire any asset³⁶⁵. Donholken cannot create encumbrances or sell or lease the property subject to the charge without the consent of DSK³⁶⁶.

Under the Donholken Trust Deed, Donholken cannot sell assets except with the consent of DSK.³⁶⁷

By virtue of the restrictions on Donholken obtaining finance, either through the issue of shares, debenture stock, or the sale of assets, DSK assistance is effectively required before Donholken can purchase TGL shares.

DSK is in a position to exert influence over the ability of Donholken to finance a purchase of shares in TGL. This is a business dealing that relates to TGL and DSK is in a position to exert influence over that business dealing. As CanWest is in a position to exercise control of DSK, CanWest is in a position to exert influence over that business dealing.

Accordingly the ABA is not satisfied that neither CanWest nor Donholken is in a position to exert influence over the business dealings of the other in relation to TGL.

Accordingly as the ABA cannot be satisfied 'that [CanWest and Donholken] do not act together in any relevant dealings relating to [TGL] ... and neither [CanWest nor Donholken] is in a position to exert influence over the business dealings of the other in relation to [TGL]...' Donholken is an associate of CanWest.

FINDING

Donholken is an associate of CanWest in relation to the control of TGL.

3.3.2.4 IS CANWEST, TOGETHER WITH ASSOCIATES, IN A POSITION TO EXERCISE CONTROL OF TGL?

Clause 2(1)(a) of Schedule 1 of the BSA provides that:

For the purposes of this Schedule, a person is in a position to exercise control of 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 ... company;

Using the formula in clause 2(1)(a), if CanWest is taken to be the ‘person’ and Selli and Donholken are taken to be its associates, then CanWest, together with its associates, Selli and Donholken, have a 52.44 per cent company interest in TGL. Where parties together hold company interests in excess of half the capital of a company, those parties together, are likely to be in a position to exercise control of the company.

As discussed above the ABA has found that Selli and Donholken are associates of CanWest because, under paragraph (e)(ii) of the definition of ‘associates’ in section 6 of the BSA, CanWest and DSK, are in a position to exercise control of Selli and Donholken and the ABA is not satisfied that the ‘qualifications’ in the definition of ‘associate’ in section 6 of the BSA apply.

As discussed above the ABA has found that the company interest of Selli is 17.4 per cent. The company interest of Donholken is 20.05 per cent.

CGS Shareholding (Netherlands) BV

CGS Shareholding (Netherlands) BV owns 14.99 per cent of the shares in TGL. Between CanWest and CGS Shareholding (Netherlands) BV is a chain of company interests greater than 15 per cent. In fact, the chain of company interests exceeds 50 per cent. Under Clause 7 of Schedule 1 of the BSA, CanWest is therefore in a position to exercise control of CGS Shareholding (Netherlands) BV. CanWest is therefore in a position to exercise control of CGS Shareholding (Netherlands) BV and the 14.99 per cent TGL shares held by CGS Shareholding (Netherlands) BV. CanWest has a company interest of 14.99 per cent in TGL.

The company interests of all of Selli, Donholken and CanWest total 52.44 per cent.

Accordingly, applying the test in clause 2(1)(a) of Schedule 1 of the BSA, CanWest is in a position to exercise control of TGL because it, together with its associates, is in a position to exercise control of TGL.

FINDINGS

CanWest together with its associates is in a position to exercise control of TGL.

CanWest is in a position to exercise control of TGL.

EFFECT OF THE QUALIFYING REQUIREMENTS IN THE MEMORANDA AND ARTICLES OF ASSOCIATION OF SELLI AND DONHOLKEN AND IN THE SELLI AND DONHOLKEN DEBENTURE STOCK TRUST DEEDS RELATING TO THOSE COMPANIES

The Memorandum and Articles of Association, and Debenture Stock Trust Deeds of Selli and Donholken contain the following ‘Qualifying Requirements’.

Clauses 9 and 10 of Memorandum of Association of Selli provide:

- 9 A special resolution purporting to alter or add to or omit any provision of the Articles of Association of the Company does not have any effect unless and until the written consent of:
- a) the registered holders of the Limited Class Shares;
 - b) the Convertible Debenture Holders; and
 - c) the Participating Debenture Holders,
- is obtained, except where the requirement for the giving of consent will result in a breach of the BSA.
- 10 A special resolution purporting to alter or add to or omit paragraphs 5, 6, 7, 8 or 9, or this paragraph 10 does not have any effect unless and until the written consent of:
- a) the registered holders of the Limited Class Shares;
 - b) the Convertible Debenture Holders; and
 - c) the Participating Debenture Holders,
- is obtained, except where the requirement for the giving of consent will result in a breach of the BSA.

Clauses 10 and 11 of the Memorandum of Association of Donholken are in the same terms.

In addition the Articles of Association Selli and Donholken provide at Article 1.5 as follows:

1.5 Participating Debenture Holders...

- (c) Notwithstanding anything contained in these Articles, where the requirement for the written consent of the Participating Debenture Holders expressed to be required pursuant to these Articles will give rise to a breach of the BSA, the expressed requirement for such written consent will be deemed to be severed from these Articles.

In addition the powers exercisable by the Trustee for DSK in respect of the debentures issued by Selli to DSK and the powers exercisable by DSK in respect of the debentures issued by Donholken to DSK are subject to a Qualifying Requirement defined in clause 1 of the Selli and Donholken Trust Deeds in the following terms:

‘Qualifying Requirement’ means, in respect of any Power, that either:

- (a) the exercise of the relevant Power is not in breach of and does not cause the Trustee, any Stockholder (read Chargee in the Donholken Trust Deed)³⁶⁸, or its affiliates, or TGL or any of its shareholders to be in breach of the Foreign Control and Ownership Legislation or any mandatory directives 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 the exercise of the relevant Power in favour of the Trustee (read Chargee in the Donholken Trust Deed) notwithstanding that any Stockholder is not an Australian resident³⁶⁹.

Clause 12.6 of the Selli Trust Deed provides that ‘Notwithstanding any other provision of this Deed, the Trustee, a Receiver or any agent appointed under clause 12.1(c) may not exercise any Power if the Qualifying Requirement is not satisfied in respect of that Power.’ ‘Power’ is defined as any right, power, authority, discretion, remedy or privilege conferred on the Trustee, Receiver or any attorney or agent appointed under the Deed, by any Transaction Document, by Statute or by law or equity.

Clause 11.6 of the Donholken Trust Deed is similarly worded but also refers to the Chargee (DSK).

Analysis

The provisions purport to be global savings provisions which prevent entitlement arising or a power being exercised whenever in a given matrix of fact and law breach of the BSA or the Foreign Acquisitions and Takeovers Act as in force at that time would result. They purport to operate such that the power does not arise or cannot be exercised at that time, in those circumstances.

The qualifying requirements are in effect a statement by the parties that they do not by the agreements intend to authorise any breach of the law.

However, the provisions could only be effective in preventing “a position to exercise control” arising, if, at the time at which the power is to be exercised the repository of the power has a full knowledge and a correct understanding of all relevant facts and correctly applies the law to those facts. But as noted above, the Memorandum and Articles of Association and Trust Deeds provide no mechanism by which a determination will be made whether the qualifying requirements have come into effect in relation to any contemplated exercise of power. In relation to the exception, clause 7 of the Participating Debentures Deed, the provision purports to operate only where the parties concur in the view, or the Noteholders’ lawyers express the opinion if there be disagreement, that the contemplated entitlement or benefit would give rise to a breach of the Act.

Submissions were put to the ABA to the effect that because the parties are experienced and reputable businesspeople and/or solicitors, the ABA can rely on them to ensure that no breach of the legislation will occur. The ABA does not accept the submissions. To determine whether a “position to exercise control” exists, the Acts must be applied correctly to the whole factual and legal matrix of the agreements and arrangements between the parties. The ABA does not accept that that determination can be left to interested directors, however experienced or reputable.

In this context, it matters little whether the various powers and entitlements in fact exist if the parties take the view that they do, and act upon that view.

The ABA has therefore concluded as a factual matter that the qualifying requirements will not operate in practice to prevent a breach of the control provisions occurring.

3.3.3 DEEMED CONTROL OF TGL WITH ASSOCIATES

3.3.3.1 IS CANWEST IN A POSITION TO EXERCISE CONTROL OF TGL THROUGH SELLI'S CONTROL OF TGL?

If Selli has a company interest in TGL which exceeds 15 per cent it can, by virtue of the deeming provision in clause 6 of Schedule 1 of the BSA, be said to be in a position to exercise control of TGL. If that is the case, then CanWest, with its associate, Selli, can be said to be in a position to exercise control of TGL pursuant to clause 2(1) of Schedule 1 of the BSA. Clause 2(1) of Schedule 1 of the BSA provides:

- cl 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;

In relation to this issue the ABA has considered whether Selli is an associate of CanWest, see finding above. The ABA has also considered whether Selli is in a position to exercise control of TGL, see finding below.

Is Selli in a position to exercise control of TGL?

Selli has a direct company interest in TGL of 11.2 per cent, see finding above. Selli also owns all the Class B Shares in Numeration and Turnand. The Class B Shares in Turnand and Numeration entitle Selli to 100 per cent of the dividends of Numeration³⁷⁰ and Turnand³⁷¹ in terms of subsection 8(3) of the BSA.

Dividend interests are defined in subsection 8(3) 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.

Selli thereby has a 100 per cent dividend interest in Turnand and Numeration. Selli further has a 100 per cent company interest in Turnand and Numeration. Applying clause 8 of

Schedule 1 of the BSA Selli has a traced company interest in the TGL shares of Turnand and Numeration of 6.2 per cent. Clause 8 of Schedule 1 to the BSA provides:

Company interests can be traced through a chain of companies using a method known as the fractional tracing method. This method applies a formula to decide what company interest a person has.

This method is best demonstrated by an example.

Example:

30 per cent *10 per cent*
Person → **Co. A** → **Co. B**

The person's company interest in Company B is worked out using the formula:

$$\text{Company Interest 1} \times \text{Company Interest 2}$$

where:

'**Company Interest 1**' is the company interest of the person, expressed as a fraction, in Company A;

'**Company Interest 2**' is the company interest of Company A, expressed as a fraction, in Company B.

In this case, the formula produces: 3/10 X 1/10, which means that the person has a 3 per cent company interest in Company B.

Interests traced in this way can be added. If Company B is a licensee and the person had, through other chains of companies, a further 12.5 per cent company interest in Company B, the person would be regarded as being in a position to exercise control of Company B under Part 3 of this Schedule because the person would have company interests exceeding 15 per cent in Company B.

Using this formula:

Selli Turnand Company interest

$$100 \times 5.4 = 5.4 \text{ per cent}$$

Selli Numeration

$$100 \times .08 = 0.8 \text{ per cent}$$

Total 6.2 per cent

With its direct holding of 11.2 per cent of the shares in TGL and the traced holding of 6.2 per cent Selli has a 17.4 per cent company interest in TGL.

Selli is thereby deemed to control TGL by virtue of clause 6(1) of Schedule 1 the BSA which provides:

If a person has company interests in a company exceeding 15 per cent, the person is to be regarded as being in a position to exercise control of the company.

Notifications provided under s.63 and s.64 of the BSA.

In addition, on 8 January 1997, the licensees Television and Telecasters (Sydney) Ltd (TEN), Television and Telecasters (Melbourne) Ltd (ATV), Television and Telecasters (Brisbane) Ltd (TVQ), Network Ten (Adelaide) Ltd (ADS) and Network Ten (Perth) Ltd (NEW) notified the ABA under s63 of the BSA that each of Mr Skala, Mr Leibler, Copplemere Pty Ltd, Leibler Media Holdings Pty Ltd and Selli Pty Ltd had become in a position to exercise control of each of the commercial television broadcasting licences held by those licensees.

On 13 January 1997, each of Mr Skala, Mr Leibler, Copplemere Pty Ltd, Leibler Media Holdings Pty Ltd and Selli Pty Ltd notified the ABA under s64 of the BSA that they were in a position to exercise control of the commercial television broadcasting licences held by Television and Telecasters (Sydney) Ltd (TEN), Television and Telecasters (Melbourne) Ltd (ATV), Television and Telecasters (Brisbane) Ltd (TVQ), Network Ten (Adelaide) Ltd (ADS) and Network Ten (Perth) Ltd (NEW).

Selli is an associate of CanWest, because CanWest and DSK are in a position to exercise control of Selli, see finding above.

As Selli is deemed to control TGL if it can be said that CanWest together with its associate, Selli, is in a position to exercise control of TGL.

FINDING

CanWest is in a position to exercise control of TGL as its associate, Selli, is in a position to exercise control of TGL.

3.3.3.2 IS CANWEST IN A POSITION TO EXERCISE CONTROL OF TGL THROUGH DONHOLKEN?

If Donholken has a company interest in TGL which exceeds 15 per cent it can by virtue of the deeming provision in clause 6 of Schedule 1 of the BSA, be said to be in a position to exercise control of TGL. If that is the case, then CanWest, with its associate, Donholken, can be said to be in a position to exercise control of TGL using clause 2(1) of Schedule 1 of the BSA. Clause 2(1) of Schedule 1 of the BSA provides:

cl 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;

In relation to this issue the ABA has considered whether Donholken is an associate of CanWest, see finding above. The ABA has also considered whether Donholken is in a position to exercise control of TGL, see finding below.

Is Donholken in a position to exercise control of TGL?

Donholken has a direct company interest in TGL of 20.05 per cent, see finding above.

Donholken is thereby deemed to be in a position to exercise control of TGL by clause 6(1) of Schedule 1 of the BSA which provides:

If a person has company interests in a company exceeding 15 per cent, the person is to be regarded as being in a position to exercise control of the company.

Notifications provided under s.63 and s.64 of the BSA.

In addition, on 16 January 1997, each of Mr Kennett, Mr Hollis, Ms Donnelly, Jacomo Pty Ltd, Murdon Business Pty Ltd, Rusalka Pty Ltd and Donholken Pty notified the ABA under s64 of the BSA that they were in a position to exercise control of the commercial television broadcasting licences held by Television and Telecasters (Sydney) Ltd (TEN), Television and Telecasters (Melbourne) Ltd (ATV), Television and Telecasters (Brisbane) Ltd (TVQ), Network Ten (Adelaide) Ltd (ADS) and Network Ten (Perth) Ltd (NEW).

On 29 January 1997, the licensees Television and Telecasters (Sydney) Ltd (TEN), Television and Telecasters (Melbourne) Ltd (ATV), Television and Telecasters (Brisbane) Ltd (TVQ), Network Ten (Adelaide) Ltd (ADS) and Network Ten (Perth) Ltd (NEW) notified the ABA under s63 of the BSA that each of Mr Kennett, Mr Hollis, Ms Donnelly, Jacomo Pty Ltd, Murdon Business Pty Ltd, Rusalka Pty Ltd and Donholken Pty had become in a position to exercise control of each of the commercial television broadcasting licences held by those licensees.

Donholken is an associate of CanWest, because CanWest, through DSK, is in a position to exercise control of Donholken.

As Donholken is deemed to control TGL if it can be said that CanWest together with its associate, Donholken, is in a position to exercise control of TGL.

FINDING

CanWest is in a position to exercise control of TGL as its associate, Donholken, is in a position to exercise control of TGL.

3.3.4 DEEMED CONTROL WITHOUT ASSOCIATES

CanWest is in a position to exercise control of TGL if it, together with DSK, is in a position to exercise control of Selli which is in a position to exercise control of TGL. This argument equally applies to Donholken.

CanWest and DSK are in a position to exercise control of Selli. DSK is an associate of CanWest.

Therefore applying clause 2(1)(a) of Schedule 1 of the BSA CanWest is in a position to exercise control of Selli because CanWest and its associate (DSK) are in a position to exercise control of Selli.

Diagrammatically

CanWest

actual control (Schedule 1 Clause 2) see above.

Selli

deemed control (Schedule 1 Clause 6)

TGL

FINDING

CanWest is thereby in a position to exercise control of TGL through its control of Selli.

3.3.5 IS CANWEST IN A POSITION TO EXERCISE CONTROL OF TGL WITHOUT REFERENCE TO ANY ASSOCIATE RELATIONSHIP?

3.3.5.1 IS CANWEST IN A POSITION TO EXERCISE DIRECTION OR RESTRAINT OVER A SUBSTANTIAL ISSUE AFFECTING THE MANAGEMENT OR AFFAIRS OF TGL?

The following analysis of control by CanWest of TGL does not rely on the findings that Selli and Donholken are associates of TGL.

Is CanWest in a position to exercise direction or restraint over the disposition of the ownership and control of over half of the shares of TGL?

This issue is examined because CanWest, by itself, and through its control of DSK has certain powers which may be said to restrain the change in ownership and or control of the TGL shares held by Selli, Numeration, Turnand, Donholken and CGS Shareholding (Netherlands) BV, which together constitute 52.44 per cent of the shares in TGL.

The legal test is set out in clause 2(1)(d)(iii) of Schedule 1 of the BSA which provides:

For the purposes of this Schedule, a person is in a position to exercise control of ... a company if:

- (d) the person, either alone or together with an associate of the person, is in a position to:
 - (iii) exercise, in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the ... company; [Emphasis added]

IS CANWEST IN A POSITION TO EXERCISE RESTRAINT OVER THE DISPOSITION OF THE OWNERSHIP AND CONTROL OF OVER HALF OF THE SHARES OF TGL?

Evidence

Evidence which indicates that CanWest, through its control of DSK, can restrain the transfer of, or the transfer of the control of, the TGL shares held by Selli, Donholken, Numeration and Turnand is set out below.

Selli: restraint over transfer of TGL shares

The TGL shares held by Selli cannot be transferred because there is a fixed charge in relation to those shares³⁷² and Selli has covenanted that it will not, without the Trustee's consent, transfer the charged property.³⁷³ For the purposes of this analysis it should be noted that the Trustee must act in accordance with the instructions of the stockholders. At present DSK is the only stockholder. In the case of the creation or issue of new stock, for example to a person other than DSK, the trustee must act in accordance with the unanimous

resolution of all stockholders.³⁷⁴ This effectively gives DSK veto power in relation to the Trustee even where new stock is issued to a party other than DSK.

Selli: restraint over change in control of Selli

The Selli Call Option Deeds provide that Copplemere and Leibler Media Holdings cannot sell their Class A shares in Selli.³⁷⁵ The Class A shares in Selli held by Copplemere and Leibler Media Holdings are the only ordinary voting shares in Selli which are currently issued.³⁷⁶ No further voting shares in Selli can be issued other than as a consequence of conversion of the convertible debentures held by DSK³⁷⁷. The shareholders of Selli cannot alter this position through a change in the Memorandum or Articles of Association of Selli without the consent of DSK³⁷⁸.

In addition it is an event of default for Selli to be voluntarily wound up without the written consent of DSK.³⁷⁹

Accordingly, DSK is in a position to exercise restraint over any change in control of Selli and is in a position to restrain the transfer of the ownership of the TGL shares held by Selli.

Numeration: restraint over transfer of TGL shares held by Numeration

The TGL shares held by Numeration cannot be sold without DSK's consent because Numeration as a chargor under the Selli Trust Deed has covenanted that it will not without the trustee's consent sell the Charged Property.³⁸⁰ The Charged Property includes the TGL shares³⁸¹ and as discussed above, the trustee acts on the instructions of the stockholders, ie DSK.

Numeration: restraint over change in control of Numeration

The Class A share in Numeration is held by Copplemere. The Class A share carries the right to vote.³⁸² No other issued shares in Numeration carry full voting rights. The owner of the Class A share of Numeration is thereby in a position to exercise control of Numeration. This cannot be changed by an alteration of the Articles of Association of Numeration without DSK consent.

Under the Articles of Association of Numeration, other than the initial issue of a Class A share in Numeration to Copplemere and the issue of Class B Shares to Selli, the directors of Numeration cannot issue any further shares without the consent of Selli³⁸³. The Articles of Association of Numeration cannot be altered without the consent of the Class B Members of Numeration³⁸⁴. Selli is the only Class B member of Numeration. Pursuant to the Selli Trust Deed Numeration has agreed that it will not amend its Memorandum or Articles of Association without the written consent of the trustee, acting on instructions of a Stockholders Resolution.³⁸⁵ Accordingly even if Selli, as B Class Shareholder, agreed to an amendment of the Articles of Association of Numeration so as to enable an alteration of capital with the effect of permitting an issue of voting shares to a person to effect a change in control of Numeration, the trustee and thereby DSK could restrain such action by withholding its consent to a change in the Memorandum and Articles of Association of Numeration.

Copplemere has granted a call option to Selli in respect of its Class A voting share in Numeration (Copplemere Call Option). Under the Copplemere Call Option Copplemere cannot sell its voting share in Numeration³⁸⁶. Selli can exercise the Copplemere Call Option to obtain control of the TGL shares. This means that a change in the control of the TGL shares held by Numeration could occur without DSK consent. Though Selli could exercise the Call Option in respect of the voting Class A Shares in Numeration, or alternatively exercise the conversion right attached to its Class B non-voting shares so as to convert its Class B non-voting shares in Numeration to Class C voting shares in Numeration, the ultimate control of the TGL shares held by Numeration is (subject to DSK consent) still tied to interests associated with Messrs Leibler and Skala even where Selli exercises its call option and B Class conversion rights in Numeration.

Under the Selli Trust Deed it is an event of default for the ownership of the Class A share in Numeration to be changed without the consent of the trustee³⁸⁷. The trustee must act in accordance with the instructions of the stockholders (DSK). In the case of the creation or issue of new stock, for example to a person other than DSK, the trustee must act in accordance with the unanimous resolution of all stockholders.³⁸⁸ This effectively gives DSK veto power in relation to the trustee even where new stock is issued to a party other than DSK.

Accordingly DSK is in a position to exercise restraint over any change in control of Numeration to interests not associated with Mr Leibler and Skala and is in a position to exercise restraint over any transfer of the ownership of the TGL shares held by Numeration.

Turnand: restraint over transfer of TGL shares held by Turnand

Turnand as a Chargor under the Selli Trust Deed has covenanted that it will not without the Trustee's consent sell the Charged Property.³⁸⁹ The Charged Property includes the TGL shares³⁹⁰ and as discussed above, the trustee acts on the instructions of the stockholders, ie DSK. Accordingly the TGL shares held by Turnand cannot be sold without DSK's consent.

Turnand: restraint over change in control of Turnand

The Class A share in Turnand is held by Leibler Media Holdings. The Class A share carries the right to vote.³⁹¹ No other issued shares in Turnand carry full voting rights. The owner of the Class A share in Turnand is thereby in a position to exercise control of Turnand. This cannot be changed by an alteration of the Articles without DSK consent (see paragraph below).

Under the Articles of Association of Turnand, other than the initial issue of a Class A share in Turnand to Leibler Media Holdings and the issue of Class B Shares to Selli, the directors of Turnand cannot issue any further shares without the consent of the Class B members³⁹². As Selli is the only Class B member, no further shares can be issued without the consent of Selli. The Articles of Association of Turnand cannot be altered without the consent of the Class B Members.³⁹³ Pursuant to the Selli Trust Deed, Turnand has agreed that it will not amend its Memorandum or Articles of Association without the written consent of the trustee, acting on instructions of a Stockholders Resolution.³⁹⁴ Accordingly even if Selli, as B Class Shareholder, agreed to an amendment of the Articles so as to enable an alteration of capital with the effect of permitting an issue of voting shares to a person to effect a change

in control of Turnand, the trustee and thereby DSK could restrain such action by withholding its consent to a change in the Memorandum and Articles of Association of Turnand.

Leibler Media Holdings has granted a call option to Selli in respect of its Class A voting share in Turnand (Leibler Media Holdings Call Option). Under the Leibler Media Holdings Call Option Leibler Media Holdings cannot sell its Class A voting share in Turnand³⁹⁵. Selli can exercise the Leibler Media Holdings Call Option to obtain control of the TGL shares. This means that a change in the control of the TGL shares held by Turnand could occur without DSK consent. Though Selli could exercise the Leibler Media Holdings Call Option in respect of the voting Class A Shares in Turnand, or alternatively exercise the conversion right attached to its Class B non-voting shares so as to convert its Class B non-voting shares in Turnand to Class C voting shares in Turnand, the ultimate control of the TGL shares held by Turnand is (subject to DSK consent) still tied to interests associated with Messrs Leibler and Skala even where Selli exercises its Call Option and B Class conversion rights in Turnand.

Under the Selli Trust Deed it is an event of default for the ownership of the Class A share in Turnand to be changed without the consent of the Trustee³⁹⁶. The Trustee must act in accordance with the instructions of the stockholders (DSK) or in the case of the creation or issue of new stock- in accordance with the unanimous resolution of all stockholders.³⁹⁷ This effectively gives DSK veto power in relation to the Trustee even where new stock is issued to a party other than DSK.

Accordingly DSK is in a position to exercise restraint over any change in control of Turnand and is in a position to exercise restraint over any transfer of the ownership of the TGL shares held by Turnand.

Donholken: restraint over transfer of TGL shares

The TGL shares held by Donholken cannot be transferred because there is a fixed charge in relation to those shares³⁹⁸ and Donholken as 'Chargor' has covenanted that it will not, without DSK's consent, transfer the charged property, ie the TGL shares.³⁹⁹

Donholken: restraint over change in control of Donholken

The Donholken Trust Deed provides that it is an event of default if any change in the shareholding, or the beneficial entitlement to shares, of Donholken occurs without the consent of DSK unless it is in accordance with the Articles of Association of Donholken or where all Class A and Class B1 Shares are redeemed.⁴⁰⁰

Redemption of all Class A shares can only take place where there is at least one Class A or Class C member.⁴⁰¹ At present the only voting shares in Donholken are Class A voting shares held by Murdon, Jacomo and Rusalka. These three companies are controlled by Ms Melda Donnelly and her partner, Mr Ian Murdoch, Mr Richard Kennett and Mr Anthony Hollis respectively. No other voting shares have been issued. Nor can any new voting shares be issued, unless and until DSK decides to exercise its right to convert its convertible shares to Class C voting shares.⁴⁰²

Therefore as redemption of all Class A shares can only take place where there is at least one Class A or Class C member, full redemption cannot take place until the right by DSK in the convertible debentures to convert its debentures to Class C voting shares has been exercised⁴⁰³.

Prior to the conversion of the Donholken Convertible Debentures to a voting C Class Share, at least one holder of the Class A shares, ie: one of Murdon, Jacomo or Rusalka must retain a Class A Share. Accordingly one of those companies will continue to hold the only Class A voting Share in Donholken and be in a position to exercise control of Donholken in circumstances where all three of those companies seek to redeem all of their voting shares in Donholken.⁴⁰⁴

The Articles of Association of Donholken provide that no Class A voting shares in Donholken can be transferred without the **prior** written consent of DSK, though such consent cannot be unreasonably withheld.⁴⁰⁵ Despite the fact that the Articles of Association of Donholken state that such consent cannot be unreasonably withheld the ABA has considered the effect of this provision on the conduct of the parties. The ABA is of the view that the effect of such a provision is that DSK will effectively still retain a substantial veto power over the transfer of the voting shares.

In addition, the courts have considered what constitutes an unreasonable refusal to consent. Such cases have typically occurred in a real property context, such as, refusal by a landlord to a request by a lessee to assign a lease. In that context it has been held by Lord Denning MR in *Bickel v Duke of Westminster* (1976) 3 All ER 801 at 804 that:

...I do not think that the court can, or should, determine by strict rules the grounds on which a landlord may, or may not, reasonably refuse his consent. He is not limited by the contract to any particular grounds. Nor should the courts limit him. Not even under the guise of construing the words. The landlord has to exercise his judgement in all sorts of circumstances. It is impossible for him, or for the courts, to envisage them all. ...Seeing that the circumstances are infinitely various, it is impossible to formulate strict rules as to how a landlord should exercise his power of refusal. The utmost that the courts can do is to give guidance to those who have to consider the problem. As one decision follows another, people will get to know the likely result in any given set of circumstances.

It has been held by Roskill LJ in *West Layton Ltd v Ford* (1979) 2 All ER 657, at p 663 that in those circumstances the landlord need not consider anybody else's interests except his own:

The landlord has not got to consider anybody else's interests except his own. He is the person who has in all the circumstances to decide whether or not he will grant consent.

In this context though the courts have refused to lay down rules as to what constitutes an unreasonable refusal to consent the cases do show guidelines as to how the problem should be approached.

The authors of the *Conveyancing Service (NSW)* state at page 1274 that:

The landlord cannot reasonably refuse to consent if his main aim is to obtain some advantage to which he is not entitled ... A refusal will be reasonable if the landlord considers with some basis, that the proposed sublease or assignment might damage his own property interests, including other property held by him or the goodwill value of the premises may be affected.

Though the context of the leasing cases is obviously different from that considered here, the ABA is of the view that it is unlikely that a court would find that a refusal was unreasonable merely because such refusal was based on considerations relating to DSK's own interests. On this basis it could be said that DSK retains a veto power in some circumstances.

The Class A shares in Donholken are the only ordinary voting shares in Donholken which are currently issued.⁴⁰⁶ No further voting shares in Donholken can be issued other than as a consequence of conversion of the convertible debentures held by DSK⁴⁰⁷. The controllers of Donholken cannot alter this position through a change in the Memorandum or Articles of Association of Donholken without DSK consent⁴⁰⁸.

In addition it is an event of default for Donholken to be voluntarily wound up without the written consent of DSK.⁴⁰⁹

Accordingly DSK is in a position to exercise restraint over a change in control of Donholken to outside interests and is effectively in a position to exercise restraint over any transfer of the ownership of the TGL shares held by Donholken.

No change in beneficial ownership of shares in Selli, Numeration and Turnand

The beneficial ownership of the shares in Selli and Numeration held by Copplemere is held by Mr Skala and his family because Copplemere is the trustee of the Skala Media Trust. The Donholken Trust Deed effectively makes any change in the beneficial entitlement to the shares in Selli and Numeration without the prior consent of the trustee, or through the exercise of the Selli, Leibler Media Holdings or Copplemere Call Options, an event of default.⁴¹⁰ Upon default the secured moneys become due and payable on demand; subject to the Qualifying Requirement the trustee can exercise its powers under the Selli Trust Deed and the right of the chargor to deal with the charged property ceases.⁴¹¹ This means that DSK can effectively restrain Mr Skala from vesting his family's beneficial entitlement (through Copplemere) to the shares in Numeration and Selli, to any other person.

The beneficial ownership of the shares in Selli and Turnand held by Leibler Media Holdings is held by Mr Leibler and his family because Leibler Media Holdings is the trustee of the Leibler Media Trust. The Donholken Trust Deed effectively makes any change in the beneficial entitlement to the shares in Selli and Turnand without the prior consent of the trustee, or through the exercise of the Selli, Leibler Media Holdings or Copplemere Call Options, an event of default.⁴¹² This means that DSK can effectively restrain Mr Leibler from vesting his beneficial entitlement (through Leibler Media Holdings) to the shares in Turnand and Selli, in any other person.

No change in beneficial ownership of shares in Donholken

The beneficial ownership of the shares in Donholken held by Murdon are held by Ms Donnelly and her family because Murdon is the trustee of the Murdon Business Trust. The specified beneficiaries under that Trust are Ms Donnelly, her spouse Mr Murdoch and their children. The Donholken Trust Deed effectively makes any change in the beneficial entitlement to the shares in Donholken without the prior consent of DSK except in circumstances discussed above, an event of default.⁴¹³ Upon default the secured moneys

become due and payable on demand, subject to the Qualifying Requirement the Trustee can exercise its powers under the Donholken Trust Deed and the right of the chargor to deal with the charged property ceases.⁴¹⁴ This means that practically DSK can effectively restrain Ms Donnelly from vesting her beneficial entitlement (through Murdon) to the shares in Donholken, in any other person.

Similarly the shares in Donholken held by Jacomo are held by Jacomo as trustee of the Arken Trust. The beneficiaries of that trust are the children of Mr and Mrs Kennett.

Similarly the shares in Donholken held by Rusalka are held by Rusalka as trustee of the Hollis Investment Trust. The beneficiaries of that trust are the children of Mr and Mrs Hollis.

CGS Shareholding (Netherlands) BV

CGS Shareholding (Netherlands) BV holds 14.99 per cent of the shares in TGL. Between CanWest and CGS Shareholding (Netherlands) BV is a chain of company interests greater than 15 per cent. Under Clause 7 of Schedule 1 of the BSA, CanWest is therefore in a position to exercise control of CGS Shareholding (Netherlands) BV. CanWest is therefore in a position to exercise restraint over the disposition of the TGL shares held by CGS Shareholding (Netherlands) BV.

Discussion

The shares in TGL owned by Selli, Donholken, Numeration, Turnand and CGS Shareholding (Netherlands) BV in TGL constitute a majority (52.44 per cent) of the shares in TGL:

- Selli holds 11.2 per cent of the shares in TGL;
- Numeration holds 0.8 per cent of the shares in TGL;
- Turnand holds 5.4 per cent of the shares in TGL;
- Donholken holds 20.05 per cent of the shares in TGL; and
- CGS Shareholding (Netherlands) BV holds 14.99 per cent of the shares in TGL.

DSK is in a position to restrain any change in the ownership and/or control of the TGL shares held by the first four companies referred to above, ie Selli, Numeration, Turnand and Donholken. CanWest is in a position to exercise control of DSK. Accordingly CanWest is in a position to restrain any change in the ownership and/or control of the TGL shares held by those companies.

CanWest is in a position to exercise restraint over the change in ownership or control of the TGL shares held by the last company referred to above, CGS Shareholding.

Accordingly CanWest is in a position to exercise restraint over the disposition of the control of more than half the shares in TGL.

As a result, no person, other than the present controllers of those shares, can obtain control of more than 50 per cent of the shares in TGL without the consent of DSK. As a result, no person, other than the present controllers of those shares, can control or hold a sufficient

number of TGL shares to be in a position to control an issue which is dealt with by ordinary resolution of the members of TGL, without the consent of DSK.

The discussion at section 3.3.2.4 of this report concerning Qualifying Requirements contained in the Memoranda and Articles of Association of Selli and Donholken and in the Debenture Stock Trust Deeds is also applicable to the issues considered here.

FINDING

CanWest is in a position to exercise restraint over the disposition of the ownership and/or control of more than half of the shares of TGL.

IS CANWEST IN A POSITION TO EXERCISE DIRECTION OVER THE DISPOSITION OF THE CONTROL OF OVER HALF OF THE SHARES OF TGL?

Evidence

Selli

Mr Strike indicated that the means by which CanWest could remove Messrs Skala and Leibler as the current controllers of Selli, would be by superimposing 'a new Selli on top of Selli and have Selli owned by different Australians'⁴¹⁵:

Mr Lerner testified⁴¹⁶:

Q. But you're anticipating that Selli and Donholken will join with CanWest in the float proposal?

A. Yes. We haven't discussed it with them yet, but we could compel it through DSK as a float. DSK can't do it on its own because we're from the wrong country, but I think that as part of a float, if Australia owned DSK, it could be done, yes.

Mr Asper also gave evidence that he was advised that CanWest 'have some rights'⁴¹⁷:

Q. Do you have any contingency plan if it turns out in future you have made a wrong judgment about the shareholders in Selli, in the sense that they turn out to be hostile to your interests ... Do you have a contingency plan to handle that sort of situation?

A. I don't have a plan, no. I have presumably some rights somewhere, but I have no plan.

Q. Do you know what those rights are?

A. No, I know that they are, I am advised that we have some rights. As you know I don't anticipate, I hope, that this arrangement is interim, and that this will be a thing of the past, although I quite openly concede that I am going to go back to all those people and say, and try and persuade a lot of them to just stop the silliness and stay in the company and let's go on to greater things. But the mechanics are there, and whatever they are they are. And they have been fashioned in a manner to give CanWest the maximum protection that the law permits, but not to step over the line between what the law doesn't permit and what it does.

This is supported by the contractual documentation and the Articles of Association of Selli. The Selli Convertible Debentures confers a conditional right upon a noteholder (DSK) to convert notes into fully paid conversion shares.⁴¹⁸ Conversion Shares are defined as meaning Class C or Class D Shares or any combination at the election of the Noteholder.⁴¹⁹ Class C shares carry a right to vote⁴²⁰, while Class D shares carry a right to vote only on resolutions affecting the rights, privileges and conditions attaching to Class D shares.

The Selli Call Option Deeds give DSK the right to acquire, or nominate a third party to acquire, the A Class voting Shares in Selli⁴²¹. This right is subject to it not being in breach of the BSA⁴²². Again, as with the right of conversion in the Selli Convertible Debentures Deed it has no actual effect unless and until the parties take the view that the particular exercise of the conversion right will cause a breach of the BSA.

Mr Strike states that CanWest could 'sell DSK without advising them [Messrs Skala/Leibler interests] or we could sell the debentures without advising them'⁴²³. The implication of this is that the person to whom the convertible debentures or DSK is sold, an Australian, would have the right to convert the convertible debentures into voting shares in Selli. That person

(the Australian) could take control of Selli as it would have in excess of 50 per cent of the voting shares in Selli, even if Messrs Skala and Leibler retain their two Class A voting shares. However by selling DSK to an Australian person, DSK could thereby also exercise the Selli Call Options in relation to the two remaining voting shares in Selli.

Numeration

Selli holds Class B non-voting shares in Numeration. It also holds a Call Option (the Copplemere Call Option) in respect of the only voting share in Numeration⁴²⁴. Once an Australian purchaser of DSK takes control of Selli, through the exercise of the right in the Selli Convertible Debentures Deed to convert the debentures to Class C voting shares in Selli, that person could decide to exercise the Copplemere Call Option over the Class A voting Share in Numeration.⁴²⁵ The exercise of the Copplemere Call Option by the Australian would not cause a breach of the BSA's foreign control limitations. Such an Australian thereby gains control of Numeration and the TGL shares held by Numeration.

In addition Selli's Class B non-voting shares in Numeration can, subject to a Qualifying Requirement, be converted to Class C voting shares⁴²⁶.

Turnand

Selli holds Class B non-voting shares in Turnand. It also holds a Call Option (the Leibler Media Holdings Call Option) in respect of the only voting share in Turnand⁴²⁷. Once the Australian takes control of Selli, by the conversion of the convertible debentures to Class C voting shares in Selli, that person could decide to exercise the Leibler Media Holdings Call Option over the Class A voting Share in Turnand⁴²⁸. The exercise of the Call Option by the Australian would not be a breach of the BSA's foreign control limitations. The Australian thereby gains control of Turnand and the TGL shares held by Turnand.

In addition Selli's Class B non-voting shares in Turnand can, subject to a Qualifying Requirement, be converted to Class C voting shares⁴²⁹.

Donholken

DSK's Convertible Debentures in Donholken could also be sold to an Australian person who could then exercise the conversion right so as to control Donholken.

Alternatively DSK itself could be sold to an Australian who could (through its control of DSK) obtain the benefit of the rights in the Convertible Debentures Deed.

The Donholken Convertible Debentures Deed between DSK and Donholken dated 10 January 1997 confers a conditional right upon a noteholder (DSK) to convert notes into fully paid conversion shares.⁴³⁰ Conversion Shares are defined as meaning Class C or Class D Shares or any combination at the election of the Noteholder.⁴³¹ Class C shares carry a right to vote⁴³², while Class D shares carry a right to vote only on resolutions affecting the rights, privileges and conditions attaching to Class D shares⁴³³.

There is no call option agreement between DSK and Donholken in respect of any voting shares in Donholken. However once an Australian buys DSK from CanWest, it can convert the convertible debentures to Class C voting shares in Donholken and thereby control an

ordinary resolution of Donholken. Once this happens, the Australian, as controller of Donholken, can redeem the Class A voting shares held by Murdon, Jacomo and Rusalka⁴³⁴.

CGS Shareholding (Netherlands) BV

CGS Shareholding (Netherlands) BV owns 14.99 per cent of the shares in TGL. CanWest has a chain of company interests greater than 15 per cent between it and CGS Shareholding. Under Clause 7 of Schedule 1 of the BSA, CanWest is therefore in a position to exercise control of CGS Shareholding. CanWest is therefore in a position to exercise direction over the disposition of the TGL shares held by CGS Shareholding (Netherlands) BV.

Discussion

The convertible debentures are also subject to a Qualifying Requirement⁴³⁵. However the qualifying requirement has no operation in relation to a sale by CanWest of its shares in DSK to an Australian person. It only operates on the exercise of the conversion right.

CanWest is in a position to sell DSK to an Australian. Any sale of all CanWest's interests in DSK to any Australian is effectively a disposition of the control of the TGL shares held by Selli or Donholken because that Australian will be in a position to convert those debentures into voting shares and take control of Selli and Donholken, unless that would necessarily breach the BSA.

This reasoning also applies where the rights in the debentures deeds are assigned by DSK to an Australian person which at some later point in time may decide to exercise the conversion right. However the Selli conversion rights cannot be assigned until 29 October 1997 (see clause 6 Convertible Debentures Deed).

CanWest is in a position to exercise direction over who can control TGL because it can confer control on a person of its own choosing by:

- selling DSK to an Australian who can take control of the companies (Selli and Donholken, Turnand and Numeration) which own TGL shares; and
- selling shares in CGS Shareholding (Netherlands) BV to that Australian.

Accordingly CanWest is in a position to exercise direction over the disposition of the control of more than half the shares in TGL.

FINDING

CanWest is in a position to exercise direction over the disposition of the control of more than half the shares in TGL.

IS THE DISPOSITION OF THE OWNERSHIP OR CONTROL OF MORE THAN HALF OF THE SHARES OF TGL, A SUBSTANTIAL ISSUE AFFECTING THE AFFAIRS OF TGL?

Disposition affects control of an ordinary resolution

The membership and control of TGL are affairs of TGL. The disposition of more than half the shares of TGL or the disposition of the ownership of more than half the shares of TGL, affects these affairs because such a disposition can determine who owns or is in a position to exercise control of TGL. It affects the potential for a person to gain a sufficient number of TGL shares to be in a position to determine the outcome of an issue which is dealt with by an ordinary resolution of the members of TGL⁴³⁶.

The disposition of the ownership or control of more than half of the shares in TGL is a substantial issue affecting the affairs of TGL because the disposition of more than half the shares in TGL can confer control of TGL.

Disposition affects control of Board

Such a disposition also affects the management of TGL.

The management of TGL is governed by the board of directors of TGL. The disposition of more than half of the shares in TGL impacts the constitution of that Board and thereby impacts the management of TGL.

A person with more than half the shares in TGL is entitled to appoint 5 nominee directors out of a potential maximum of fifteen⁴³⁷. (It should be noted that the actual 52.44 per cent of shares in the hands of their current owners entitles those persons to appoint 6 directors). Presently only 11 directors have been appointed. A further four directors may be appointed by resolution of the company or by the directors. If a single person were to own the 52.44 per cent block of shares held by Selli, Numeration, Turnand, Donholken and CGS Shareholding that person would be in a position to obtain a majority vote at an ordinary resolution sufficient to determine the election of any further directors of TGL up to a maximum of four further directors. This would give a person owning more than half the shares in TGL an indirect power to control the Board of directors (9 out of 15) of TGL. The disposition of the ownership of more than half the shares in TGL affects the appointment of any further directors of TGL (ie potentially another four).

Conversely, unless a person can purchase that 52.44 per cent block of shares or gain control of those shares that person cannot by majority resolution determine the election of the majority of directors on the Board of TGL, even if that person successfully acquires the remaining 47.66 per cent of the shares of TGL. The disposition of more than half the shares in TGL or control over more than half the shares in TGL is thereby a substantial issue affecting the affairs of TGL.

Disposition affects control of float

The disposition of the control of more than half the shares in TGL is also a substantial issue affecting the affairs of TGL because of the ability of shares in a company holding a 'Control Position' to be made available to the public by way of a float. For the purpose of this analysis a 'Control Position' is the holding of interests by an entity which gives that entity control of more than half of the shares in TGL. The question of whether and when the shares of a company (Float Vehicle), which controls more than half the shares in TGL, can be made available to the public, will affect the control of TGL.

As CanWest is in a position to exercise direction or restraint over disposition of the control of more than half the shares in TGL CanWest can determine when and if a float of a Control Position occurs.

In addition CanWest is in a position to determine the structure (Memorandum and Articles of Association) and financing of a Float Vehicle by virtue of its current ownership of DSK and CGS Shareholding (Netherlands) BV. This will affect the Float Vehicle's interests and its dealings with TGL as a controlling shareholder of TGL. Accordingly the disposition of the control of more than half the shares in TGL is a substantial issue affecting the affairs of TGL.

Discussion

The 'issue' under clause 2(1)(d)(iii) of Schedule 1 of the BSA is the 'disposition of the ownership and control of over half of the issued shares in TGL'.

The disposition of the ownership and control of over half of the issued shares in TGL is a substantial issue affecting the affairs (membership and control) of TGL, in particular, because the disposition of the ownership and control of over half of the issued shares in TGL can determine who can control TGL and who is prevented from controlling TGL.

CanWest is in a position to exercise restraint over the disposition of the ownership and control of over half the issued shares in TGL because it can prevent Selli, Donholken, Numeration, Turnand and CGS Shareholding (Netherlands) BV selling their TGL shares to another person.

CanWest is in a position to exercise restraint over the disposition of the control of over half of the issued shares in TGL because it can prevent the controllers of Selli, Donholken, Numeration, Turnand and CGS Shareholding (Netherlands) BV selling their shares in these entities.

CanWest is in a position to exercise direction over who can control TGL because it can confer control on a person of its own choosing by:

- selling DSK to an Australian who can take control of the companies (Selli and Donholken, Turnand and Numeration) which own TGL shares; and
- selling shares in CGS Shareholding (Netherlands) BV to that Australian.

FINDINGS

The disposition of the ownership, and/or control, of more than half the shares in TGL is a substantial issue affecting the affairs of TGL.

CanWest is in a position to exercise control of TGL because CanWest is in a position to exercise direction and restraint over a substantial issue affecting the management and affairs of TGL.

3.3.5.2 IS CANWEST IN A POSITION TO SECURE THE APPOINTMENT OF AT LEAST HALF THE BOARD OF TGL?

The relevant test is that contained in clause 2(1)(d)(ii) of Schedule 1 of the BSA which provides as follows:

- 2(1) For the purposes of this Schedule, a person is in a position to exercise control of ... a company if:
- (d) the person, either alone or together with an associate of the person, is in a position to:
 - (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; [Emphasis added].

The word 'secure' is defined by *The Macquarie Dictionary, Second Revised Edition* relevantly as:

- 8. to get hold or possession of; obtain
- 10. to make secure or certain; ensure.

In this part the ABA has taken into account the definition of control in s.6 of the BSA and has considered the understandings and arrangements between the parties.

It should be noted that Schedule 1 distinguishes 'being in a **position to appoint** at least half of the board of directors' from 'being in a **position to secure the appointment** of at least half of the board of directors'. The expression 'being a position to secure the appointment' does not require a legal right to appoint a director.

Section 6 provides:

"control" 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.

Under the Articles of Association of TGL each shareholder with a shareholding of 10 per cent or more in TGL is entitled to appoint one director:

6.1(b):

- (2) Each member who holds 10 per cent or more of the issued capital of the company has the right to appoint one director (who may, but need not, represent that member) for every tranche of shares representing 10 per cent of such issued capital ('10 per cent tranche') held by it.

Four of the directors of TGL are appointed by TNQ which holds 40 per cent of shares in TGL. The Chairman of TGL was appointed by the Original shareholders⁴³⁸.

CanWest, through CGS Shareholding (Netherlands BV), has a shareholding of 14.99 per cent in TGL. Pursuant to the Articles of Association of TGL, for so long as CanWest holds more than 14 per cent of the issued capital of TGL it has the right to appoint what amounts to 20 per cent of the directors of TGL⁴³⁹. As there are currently eleven directors of TGL CanWest has two appointees to the Board of directors of TGL. By itself, CanWest is not in a position to appoint at least half of the board of directors of TGL

CanWest financed the purchase of 37.45 per cent of the shares of TGL by Selli and Donholken, Turnand and Numeration which are controlled by Messrs Skala and Leibler,

and Messrs Kennett, Hollis and Ms Donnelly respectively. Donholken holds 20.05 per cent of the shares in TGL and, pursuant clause 6.1(b) of the Articles of Association of TGL, is entitled to appoint two directors to the TGL board. Selli holds 11.2 per cent of the shares in TGL and, pursuant clause 6.1(b) of the Articles of Association of TGL, is entitled to appoint one director to the TGL board. However, Mr Leibler has a unique position under the Share Subscription Agreement which enables him to be a director of the TGL board where interests associated with him have 5 per cent of the shares in TGL. Clause 6.1(h)(8) of the agreement provides:

The total number of directors shall be not less than 10 nor more than 15 and subject to the preceding paragraphs of this clause, may, but need not include a number of additional directors including independent directors and without limiting the foregoing shall include Mr Isi Leibler of Melbourne subject to interests associated with him subscribing to approximately 5 per cent of the issued capital and becoming an Original Shareholder.

Evidence

Evidence was given by Mr Strike⁴⁴⁰ that CanWest had concerns about the possibility of new directors, particularly directors representing competitors, on the TGL board.

Mr Leibler and Mr Skala

Mr Strike stated that he thought Messrs Leibler and Skala saw the development of Ten more or less the way CanWest does⁴⁴¹. Mr Asper also stated that he was happy with Messrs Leibler and Skala as nominees⁴⁴². This evidence suggests that a primary reason why CanWest approached Messrs Leibler and Skala to take the voting rights attached to the relevant TGL shares was because Messrs Asper and Strike knew them and approved of their continued involvement on the TGL board.

Mr Leibler stated under examination that the offer, communicated to him by Mr Skala included a board seat⁴⁴³. Mr Leibler stated that he understood that he would continue as a TGL director if he accepted the CanWest nomination. He did not question whether his involvement was conditional on continuing as a TGL director because he wanted to continue on the TGL board. He took the view that the offer of directorship was part of the package being offered to him by CanWest⁴⁴⁴. Mr Leibler also understood that it was likely he would remain as a director of TGL after a float⁴⁴⁵. This evidence indicates that Mr Leibler took the view that, under the arrangements whereby CanWest obtained the economic interest associated with the TGL shares held by Leibler Media Holdings, Mr Leibler was expected to act as a director on the TGL board.

Mr Strike stated that by virtue of Mr Leibler's special position under of the Share Subscription Agreement (see Clause 6.1(h)(8) above) Mr Leibler is given a board position on TGL so long as interests associated with Mr Leibler continue to own a percentage of the shares of TGL. Mr Strike gave evidence that 'the genesis of that particular idea [the formation of Numeration and Turnand] was in the preservation of Leibler's seat on the board...at the time that we came to that, we developed that idea, we were in very early discussions'⁴⁴⁶. There was uncertainty in the terms of the Share Subscription Agreement that, if the shares had been traded, Mr Leibler's position under the agreement would be lost. Mr Skala testified that the idea of Numeration and Turnand was likely to have come from

Mr Strike and Clayton Utz, although he could not say so definitively⁴⁴⁷. He stated that the purpose of establishing Numeration and Turnand was to avoid the pre-emptive rights process⁴⁴⁸. Therefore, a primary objective behind CanWest developing the idea of Turnand was the preservation of Mr Leibler's seat on the board.

Mr Strike gave evidence that he considered that a motivating factor in Mr Skala's agreement to accept the CanWest nomination was that Mr Skala would achieve a TGL board position, rather than being only an alternate on the board⁴⁴⁹. Mr Skala stated that he regarded the sale price of the TGL shares as in part providing compensation for exercising voting responsibilities⁴⁵⁰.

Mr Strike was examined in relation to this matter⁴⁵¹:

Q: Was it ever put to Mr Leibler and Mr Skala that the extra money may be some kind of compensation for having the burden of having the voting rights, of having to go to TGL board meetings and exercise the voting rights and take care of the investment?

A: No.

The ABA is of the view that the evidence of Mr Skala is preferable to the extent that Mr Strike testifies only that it was never put to Mr Skala (by him) and because that was, in any event, Mr Skala's understanding.

Mr Skala also testified that he wanted to retain his involvement in TGL even if he sold his shares in the company⁴⁵². This evidence suggests that as part of the arrangements Mr Skala expected to obtain a TGL board seat and that this was known by CanWest.

Mr Strike indicated that he had approached Winston Capital about selling its shares and suggested it contact Selli if it was interested in selling⁴⁵³. He stated that, although there was some commercial value in the purchase from CanWest's point of view, that there was no 'overwhelming commercial motivation or strategic motivation' on CanWest's part⁴⁵⁴. Mr Strike gave evidence that the purpose of funding the purchase by Selli of the TGL shares held by Winston Capital was to give Selli an entitlement to a seat on the TGL board⁴⁵⁵:

Q. Was that your objective at that point?

A. Actually I should say there was a motivation, I suppose, for having Selli acquire Winston. That was that when Belshaw was purchased, it was purchased by Leibler and by Skala pro rata-ed to their existing interests in TGL and Leibler's interest from CanWest. So in a sense there was a strategic value to buy Winston because adding those shares to Selli's shares acquired from Belshaw put Selli over 10 per cent of the shares of TGL and therefore it gave them an entitlement to a board seat. I guess there was a slight strategic reason for doing it.

Q: Did that occur to you at the time or is that just something that occurred to you now?

A: No. It is something that probably occurred to me at the time.

Q.: Why is that an advantage for CanWest?

A: It's not; it's an advantage to Selli. That's the reason Selli was recommending that to us.

This evidence suggests that CanWest decided to finance the purchase of the TGL shares from Winston Capital to ensure that Mr Skala was appointed to the TGL board, as Mr Leibler was already guaranteed a board seat under the Share Subscription Agreement through his TGL holding in Turnand. The purchase of the TGL shares held by Winston Capital held a strategic advantage for Selli because it made Selli's direct holding of shares in TGL rise above 10 per cent. This level, set out in the Articles of TGL, gives a party a right

to appoint a director to the TGL Board. Mr Strike's evidence indicates this was a motivation of the purchase of that bundle of shares.

Mr Strike gave evidence that Selli had attempted to purchase the TGL shares held by Corom and Audant on the last day of the pre-emptive rights period but that Messrs Whyte and Cowin had refused to close the transaction⁴⁵⁶. Had Selli acquired these additional TGL shares, under the clause 6.1(b) of the Share Subscription Agreement, Selli would have been able to appoint another director, in addition to Messrs Skala and Leibler, to the TGL board. Mr Skala gave evidence that he and Mr Leibler had discussed appointing either Mr Leibler's son or Mr Levy if they acquired the shares⁴⁵⁷. Because Selli did not acquire the shares being sold by Corom and Audant no further board appointments were made.

The evidence suggests that Messrs Skala and Leibler intended to continue on as directors as a result of their involvement in the purchase of TGL shares funded by CanWest. The evidence suggests that there was an understanding between Messrs Strike, Skala and Leibler to this effect. By supplying the finance to Selli on this basis, CanWest secured the appointment or continued appointment of Messrs Skala and Leibler to the TGL board.

Messrs Kennett, Hollis and Ms Donnelly

Mr Skala recommended to Mr Strike that he contact Ms Donnelly⁴⁵⁸. Mr Kennett stated that he believed CanWest approached Ms Donnelly because she was credible and stable⁴⁵⁹. Ms Donnelly gave evidence that when she was first approached by Mr Skala about accepting a nomination by CanWest under its pre-emptive rights, Mr Skala had said that she would be on the board making decisions about TGL⁴⁶⁰. Ms Donnelly stated that Mr Skala had said that her board experience was one of the reasons he had approached her to become involved⁴⁶¹. Ms Donnelly stated that her initial reaction to the deal was positive because she wanted to be a TGL director⁴⁶². She stated that she would not have proceeded if there had not been a clear indication that a board seat on TGL was possible⁴⁶³.

This evidence suggests that Ms Donnelly's experience on boards was a key consideration of CanWest executives in their decision to approach her in relation to the acquisition of the 20 per cent parcel of TGL shares held by Corom and Audant. The evidence suggests that CanWest approached Ms Donnelly with the desire and the expectation that she would become a director of TGL. The evidence also suggests that the promise of the TGL board seat was a significant motivation for Ms Donnelly in proceeding with the transaction and had Ms Donnelly not received a 'clear indication' from CanWest that she would receive a board seat she would not have proceeded.

Later on 7 January 1997⁴⁶⁴, Mr Kennett was contacted by Mr Lerner who told him that CanWest was also intending to involve Ms Donnelly and Mr Hollis⁴⁶⁵. Mr Kennett stated that Mr Lerner had stated that it was a matter for Ms Donnelly, Mr Kennett and Mr Hollis to decide who would become the TGL directors⁴⁶⁶. Mr Kennett stated that an opportunity to become a TGL board member was the primary motivation for his involvement in accepting CanWest's offer⁴⁶⁷.

Mr Kennett testified that in his first conversation with Ms Donnelly that Ms Donnelly had told him that she had already discussed with Mr Lerner that she wanted Mr Kennett and

herself to be the TGL directors⁴⁶⁸. Mr Kennett testified that he and Ms Donnelly discussed the pros and cons of Mr Hollis' involvement⁴⁶⁹.

Mr Kennett stated that he contacted Mr Lerner on 8 January 1997 and raised the question of Mr Hollis' involvement in the transaction with Mr Lerner⁴⁷⁰. Mr Kennett stated that in his first conversation with Ms Donnelly she had told him that she understood that Mr Hollis would not have voting rights in Donholken. Mr Kennett asked Mr Lerner about whether CanWest was planning for Mr Hollis not to have a voting role in Donholken. Mr Kennett was given the impression that CanWest had decided to abandon this approach and suggested that this may have been on the basis of legal advice⁴⁷¹. Mr Lerner told him that he understood that Ms Donnelly intended to vote for Mr Kennett and herself to be the directors. Mr Kennett stated that he did not question whether he may have been in a position to oppose Mr Hollis' involvement as CanWest was 'almost like [a] gifthorse'. Mr Kennett stated that the outcome of that conversation was to seek 'how can we put the deal together so we're all comfortable'⁴⁷².

This evidence suggests that, as of this date, Mr Kennett had concluded that he would be on the TGL board and this was the reason he agreed to proceed. Evidence referred to above indicates that the promise of a TGL board seat was a primary motivation for Mr Kennett in accepting CanWest's offer. The evidence that Mr Kennett had raised his concerns about Mr Hollis with Mr Lerner suggests that CanWest knew that Mr Kennett would not support Mr Hollis as a director of TGL. Ms Donnelly had already indicated to Mr Lerner that she would not support Mr Hollis as a director. Therefore, prior to the conclusion of the acquisition of the TGL shares by Donholken, CanWest had an expectation that Ms Donnelly and Mr Kennett would be appointed to the TGL board.

When first approached by Mr Lerner about becoming involved in the transaction, Mr Hollis understood that the shareholders would be entitled to nominate two persons to the TGL board but could not recall whether Mr Lerner had discussed whether he would be a director. He said 'I don't believe it was'⁴⁷³.

Mr Kennett's evidence was that CanWest had intended Mr Hollis to have a non-voting role in the nominee company and Lerner had discussed this with Ms Donnelly, who then told Mr Kennett. Both Mr Kennett and Ms Donnelly communicated to Mr Lerner that they intended to become directors. The evidence suggests that prior to financing the acquisition of TGL shares by Donholken, which would then be in a position to appoint two TGL Directors, CanWest knew whom Donholken would appoint. This in turn suggests that prior to the conclusion of the transaction CanWest knew that Mr Hollis would not become one of the TGL directors.

Mr Hollis gave evidence in relation to this matter⁴⁷⁴:

Q: Did you understand that CanWest had any views about who should be the TGL directors?

A: None whatsoever, at least not communicated to me.

The evidence indicates that these issues were not discussed between CanWest and Mr Hollis. However, by concluding the transaction between DSK and Donholken on the basis outlined above, CanWest ensured Ms Donnelly and Mr Kennett were appointed to the TGL board.

Appointment of TGL directors

From the evidence it appears that CanWest knew either at the time of CanWest's approach to them or prior to the conclusion of the transactions that Messrs Skala, Leibler, Kennett and Ms Donnelly intended to join the board as directors and would not nominate other parties to the board.

The acquisition of TGL shares by Donholken, financed by DSK, was concluded one day after the close of the pre-emptive rights period. Mr Strike gave evidence that CanWest negotiated with Messrs Cowin and Whyte for a 24 hour extension to enable Donholken to purchase the shares⁴⁷⁵. This action by CanWest enabled Donholken to conclude the purchase of the TGL shares held by Messrs Cowin and Whyte. Through concluding the transactions between DSK and Selli on 8 November 1996 and between DSK and Donholken on 10 January 1997, CanWest ensured the companies controlled by Messrs Skala, Leibler, Kennett, Hollis and Ms Donnelly gained 37.45 per cent of the shares in TGL.

In doing so CanWest secured the appointment of Messrs Skala, Leibler, Kennett and Ms Donnelly to the TGL board. Pursuant to clause 6.1(b) of the Articles of Association of TGL, Selli was able to appoint Mr Skala to the board and Donholken was able to appoint Mr Kennett and Ms Donnelly to the board. Through clause 6.1(h)(8) of the Articles of Association of TGL, Mr Leibler was able to retain his appointment to the TGL board.

As discussed above, CanWest is in a position to appoint 20% of the directors to the board of TGL. In addition the evidence indicates that CanWest secured board positions for Messrs Leibler, Skala, Kennett and Ms Donnelly. From this evidence the ABA concludes that CanWest is in a position to secure the appointment of at least half of the board of directors of the TGL.

FINDINGS

Mr Strike gave evidence that CanWest was concerned about TGL board membership.

CanWest was aware that Messrs Skala, Leibler, Kennett and Ms Donnelly wished to become or remain TGL directors or were willing to become TGL directors.

Messrs Skala, Leibler, Kennett and Ms Donnelly agreed to participate in transactions funded by DSK with the understanding that they would obtain or retain seats on the TGL Board as an outcome of those transactions.

CanWest funded the acquisition of TGL shares by Turnand with the understanding that the effect of the acquisition was that Mr Leibler would remain on the TGL Board.

CanWest funded the acquisition of TGL shares by Selli with the understanding that Mr Skala would be one of the TGL directors appointed by Selli.

One of the reasons CanWest funded the acquisition of TGL shares by Selli from Belshaw and Winston was to secure a TGL board seat for Selli.

CanWest funded the acquisition of TGL shares by Donholken with the understanding that Mr Kennett and Ms Donnelly would be the TGL directors appointed by Donholken.

CanWest, through DSK, enabled Donholken and Selli to appoint Messrs Skala, Leibler, Kennett and Ms Donnelly as TGL directors by financing the acquisition of TGL shares by Selli, Turnand and Donholken.

Selli and Donholken could not have appointed any persons to the TGL board without the funding provided by DSK.

CanWest has secured the appointment of at least half the directors of the TGL board.

CanWest is in a position to secure the appointment of at least half of the board of directors of TGL and is therefore in a position to exercise control of TGL.

4.



Conclusion

CONTROL OF COMMERCIAL TELEVISION BROADCASTING LICENCES

Under clause 2(1)(a) of Schedule 1 of the BSA, a person is in a position to exercise control of a licence if the person is in a position to exercise control of the licensee.

TGL is in a position to exercise control of, and has company interests of 100% in, Television and Telecasters (Sydney) Ltd, Television and Telecasters (Melbourne) Ltd, Television and Telecasters (Brisbane) Ltd, Network Ten (Adelaide) Ltd and Network Ten (Perth) Ltd (the Ten licensees).

Under Clause 6 of Schedule 1, CanWest is to be regarded as being in a position to exercise control of TGL and the Ten licensees as a result of its 52.5% company interest in TGL. CanWest is thereby in a position to exercise control of the licences held by those licensees, applying clause 2(1)(a) of Schedule 1 of the BSA.

Under Clause 2(1)(a),(d)(ii) and (d)(iii) of Schedule 1, CanWest is in a position to exercise control of TGL. TGL is in a position to exercise control of the Ten licensees. CanWest is thereby in a position to exercise control of the licences held by those licensees, applying clause 2(1)(a) of Schedule 1 of the BSA.

Section 57(1) of the BSA provides:

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

The ABA is satisfied that CanWest is thereby in breach of section 57(1) of the BSA because CanWest is in a position to exercise control of commercial television broadcasting licences held by the Ten licensees.

COMPANY INTERESTS OF TWO OR MORE FOREIGN PERSONS

CanWest is a foreign person for the purposes of the BSA. CanWest has company interests of 52.5% in TGL.

Rossendale Investments Pty Ltd (Rossendale) is also a foreign person for the purposes of the BSA. It is a company in which Mr Peter Viner, a natural person who is not an Australian citizen, holds company interests exceeding 50%. Rossendale holds 360,000 shares in TGL, which amounts to a company interest of 0.8%.

CanWest and Rossendale have company interests in each of Television and Telecasters (Sydney) Ltd (TEN), Television and Telecasters (Melbourne) Ltd (ATV), Television and Telecasters (Brisbane) Ltd (TVQ), Network Ten (Adelaide) Ltd (ADS), Network Ten (Perth) Ltd (NEW) that exceed 20%.

Two or more foreign persons thus have company interests in a commercial television broadcasting licensee that exceed 20%.

MAIN FINDINGS

CanWest is in breach of section 57(1) of the BSA.

CanWest is in breach of section 57(3) of the BSA.

ENDNOTES

¹ Asper Transcript p9:

Q. Could I just go back to the conversation that you had with Skala in August?

A. Sure, that I can deal with.

Q. When he said that Leibler was interested in selling his shares, did he indicate whether Skala himself was interested as well?

A: Skala was ambivalent, yes, I certainly remember that, "Maybe I'll sell them."

Q. Did he say that he was interested in selling his shares also?

A: He was ambivalent, as I say. He would on one occasion say, "No," and on another occasion say, "Well, I think I'll go along," and on another occasion he'd say, "Look, I'll sell some of my shares but I really want to stay with this thing," and that I think is what he ultimately did, as far as I know.

² Skala(1) Transcript p.13. Skala (1) Transcript refers to Transcript of examination conducted on 18 December 1996.

³ Strike Transcript p46.

⁴ Strike Transcript p46.

⁵ Skala (1) Transcript p29.

⁶ Asper Transcript p55:

Q: You talked about the authors of the structure, Selli, DSK, etcetera. Who do you see were the actual authors of that structure?

A: The authors? It was a combination of the counsel. I would say the major - - -

Q: Who do you mean by counsel?

A: For the Australian lawyers, Clayton Utz, aided or advised or instructed by the other two chaps, Lerner and Strike.

⁷ Lerner Transcript p4.

⁸ Skala Transcript pp13-14.

⁹ Strike Transcript p24:

Q. Going back to the structure that you were talking about for individuals that you drafted up prior to coming to Australia, it involved convertible and participating debentures?

A. Yes.

Q. Did it involve a charge in relation to securing the loan?

A. Yes.

Q. And did it involve call options?

A. Yes, it did.

¹⁰ Skala Transcript p30.

¹¹ Skala (1) Transcript p41.

Q: Did any of the transaction documents originate in Clayton Utz?

A: Any of them, these transactions? All of them.

Q. All of the transaction documents originated in Clayton Utz?

A. As far as I'm aware.

¹² Skala(1) Transcript p26:

Q: And who drafted the articles for Numeration?

A: Who drafted the articles for Numeration? I think we would have received a set of articles from Clayton Utz at some stage because the articles contained the - I think that's where it would come from, I can't imagine it came from anywhere else. But we wouldn't have used the shelf company articles from Allens and we wouldn't have used our shelf company

articles, because it required the creation of a different class of shares and things, so I think it would have come from Clayton Utz.

¹³ Leibler Transcript pp4-5:

Q: Could you describe to us in more detail the transaction that you have in mind?

A: If I could make a general observation, I have been extraordinarily tied up these last six to seven weeks in major corporate areas affecting my own organisation which have taken up all of my time and I do not want to be considered by the board that I am being evasive when I say that I understand very little of these transactions other than the upside and the risks.

Q: Just to clarify what you said earlier, could you outline what your role has been in these transactions taken as a whole?

A: My role has been marginal in the sense that my adviser, Stephen Skala, knowing that for some time I had been, like most of my co-directors, seeking to realise our investment, came to me with a proposal which sounded extraordinarily enticing and which I assented to and that proposal became even more exciting as time went by and I finally realised the very high valuation of the shares and was given an opportunity of remaining a director and continuing to be involved in various aspects plus an upside, I understand, on those shares if and when they are floated and a return, a financial return while I occupy the role of director. That is my broad understanding of what I achieved but if you were to ask me, or perhaps I should stop. You ask me questions. What I was going to say was if you were to ask me to detail the breakdown of how this worked I would have to say to you that I relied to a very large extent on Stephen not only because he is an adviser but I know that he had a fairly heavy involvement and his professional reputation was at stake as well as mine, and by and large I just said, if you have gone through procedures properly and when I was given all the assurances which you will probably ask me about further about legal - not being in breach of anything and being covered under any eventuality, beyond that I haven't been heavily involved and would find great difficulty in answering any questions about detail.

Leibler Transcript p12:

Q: So you would say that you have relied on Mr Skala- - -?

A: Yes, I - - -

Q: To do with all these TGL matters?

A: I say with some embarrassment, very much so these last few months. Well, I haven't done too badly as a result.

Q: It is fair to say that it follows that you basically acted together in relation to this transaction?---I think it's fair to say that that's an understatement. I've relied pretty blindly on him within the confines of the assurances that I referred to beforehand. I'm sorry. I must be a very frustrating witness when I'm - I just - - -

¹⁴ Strike Transcript p.35.

¹⁵ Skala (1) Transcript p 21:

Q: So were there negotiations that gave an added benefit to you for retaining the voting rights?

A: By the end of the whole negotiation, yes, significant I think, I mean we'd negotiated in the escalator which pushed the sale price of our shares to \$13 which is not unattractive if you think about where we started.

¹⁶ Skala (1) Transcript p21, 22:

Q: So do you think that the retention of your voting right was a factor that influenced the result of a price of \$13 that you achieved?

A: I would think so, I would think that the fact that we'd retained our voting rights was part of what I would say was myself saying, guys we're going to retain voting rights, this will not be uncontroversial I'm sure, we're all aware of the law, we all know exactly what all this will mean, there's going to be much pain and sweat and discussions like this which shall

ensue, that's not something which people take on lightly, in fact it's actually something which people take on in the knowledge that it's going to occur and the attempted publicity, all those things, so it's not like we're going into this naively, quite the opposite, we thought we were going into it very much aware that this would be controversial, it would be a public issue, that the ABA would be making inquiry, that we'd end up sitting here having these conversations, we knew that so this is not a surprise so the answer is that it was perfectly legitimate for me to say, fellows this is something which is worthy of, I want a full price on my shares if I'm about to pick up - when I do I want a full price for my shares but if I'm controlling the voting rights and it is a very responsible job because there are serious things to be done and what could be 37 per cent of the voting rights in this country is actually very serious, we have to find some negatives and be compensated accordingly so again perfectly commercial and perfectly reasonable though perfectly understanding on the other side, it's not like they're foolish people, they understand this is business. Sure we're interested in it, we like the business and like all those things but you have to be paid for it as well.

¹⁷ Strike Transcript p 44:

Q. What about the call options?

A. We had discussions about that. Ultimately I convinced him that those were essential parts of the financial arrangement.

Q. Did he have any reservations about the call options?

A. I'm not sure if he did or not. I would expect that he did have.

Q. What were they?

A. Well, he didn't want to give them - you know.

Q. Do you know why he didn't want to?

A. Well, commercially, he'd have preferred to hold the shares. Commercially, I would have preferred the call option. Ultimately my view prevailed on that point.

Q. Was it a case of Skala would either have had to take it or leave it in terms of those call options?

A. No, there was a complete package in the transaction. You know, you don't do a commercial negotiation by plonking down something and saying, "Take it or leave it; I'm going to someone else." You negotiate with someone to find a means of finding a middle ground which is acceptable to me, on the one part, and to the other party I'm dealing with on the other, you know.

¹⁸ Skala(2) Transcript p21. Skala (2) Transcript refers to Transcript of examination conducted on 17 January 1997.

Q. There seems to be some discussion about the degree of control; isn't that correct?

A. That it's very constricted.

Q. Yes?

A. Yes, that's what it looks like. I have no dispute with you about that.

Q. Is that something which you may have raised as a concern?

A. It's possible. I mean, it's the sort of conversation I would have had with him, because in negotiating one of these things, you try to get yourself covered as best as possible and have as much room to move inside the document, so if the - you would try to seek to have as much flexibility as possible. So it does not seem unreasonable - this conversation or these notes would be consistent with me saying: "There has to be more flexibility in this document. You've gone into legal overkill in the document. Commercially I'm relaxed about the transaction, but what you're doing is preparing documents which are very tight." So that it's just that kind of thing - too tight, so that there's no ability for the owner of the company to actually do anything.

Q. Are you saying that you raised that as a commercial negotiating tactic?

A. I really can't recall what context it was raised in that sense.

Q. Why were you concerned that it was too tight?

A. Well, because there's - this is actually quite commercially sensitive. The cashflows that are going to go into this company, among many things, can be utilised in a whole lot of ways to generate quite a lot of money, so to the extent to which the company was going to be, as it were, constrained, it may have deferred or eliminated the possibility of using franking credits sitting in a franking credit account or the potential tax rebates that would be available to this company post the dividend flow. I mean, I don't know if you're familiar with the tax laws, but a fully franked dividend flowing to this company is a very attractive thing for the owner of the company long after the cash is paid out by way of dividend or by way of interest to a debenture holder, because you still have franking credits sitting in an account. So the extent to which the company is constrained would limit my capacity to actually financially exploit the tax benefits that are sitting inside the company.

Q. This conversation, however, seems to take place in the context of a discussion of the BSA and control?

A. No, that's not fair. That's your suggestion.

Q. That is my suggestion, you're right. I'm saying it seems to. I'm seeking your comment on that suggestion?

A. I disagree. Because if you notice, it goes from BSA to the deed, to 592, to section 205. I mean, to directors being paid money, to - this is wide-ranging.

Q. I should be more specific. I'm talking about point 1 and that particular discussion of limitations on the ability to do things?

A. Yes.

Q. That seems to take place, on the basis of this record...

A. Yes.

Q. In the context of a discussion of the BSA and control?

A. Well, except that if I'm speaking to Mr Moutsopoulos, wanting to preserve flexibility in a commercial negotiation, is it really that sensible for me to talk about the other advantages which I can see from having flexibility or is it better for me to tell him that there are advantages in the BSA context?

Q. So you might have raised concerns about the BSA in the context of getting a greater commercial advantage for yourself; is that what you're saying?

A. No, I might have raised - yes, a BSA concern, but I don't really want to go into the whole question of what Selli - in terms of the potential upside beyond what's being earned by, you know, being paid the 5 per cent upside and all those kinds of things. There's actually more upside in Selli than is visible, if you understand the tax laws. There just is. So if you draw that to the attention of your - the people that you're negotiating with, it may well be that the deal that you finally end up with is not quite as attractive. So my view is that it would be better just simply to say, "Look, these documents are awfully tight. Do you really want them to be that tight? I don't like them being that tight. They should have more flexibility. Commercially the deal's okay, but you guys are indulging in legal overkill and you don't need to. And the tougher you are in these documents, the more concerned someone like the ABA is going to be about these issues of control." It's in my interests to raise that concern there for two reasons: One is just in terms of purely the Broadcasting Act and, secondly, because I have a commercially sound reason why I want more flexibility sitting inside this company - that simple.

Q. Did you get the flexibility you wanted?

A. No. But that doesn't mean that in the long term I won't, because the long life of this company is going to be - assuming that a dividend goes into it, it will become quite a valuable company and I'm kind of hopeful I'll be able to use the benefits of sitting inside the company.

¹⁹ Skala (2) Transcript p.18.

²⁰ Skala(1) Transcript p87:

Q: In terms of setting up these arrangements that we have discussed today relating to Selli and Numeration, Arnold Bloch Leibler acted for you, as part of helping getting the arrangement set up, who paid for your legal expenses?

A: Selli's paid in part and that's about as far as it's gone, I mean, the expenses, I'm just trying to think of where else. I think it's essentially come out of Selli, no, no, that's not right, I've just realised ... Leibler Media Holdings has also received quite substantial bills which have been paid in relation to it - - -

Q: Who pays for those legal costs?

A: Leibler Media Holdings, Mr Leibler.

Q: What about Selli's legal costs?

A: Come out of Selli, so it would have come out of the funds that are in Selli.

Q: What funds are there in Selli?

A: Whatever money has been raised through the issue of debentures, plus \$50,000 that went into the B class shares.

Q: Is it possible the money raised through the debentures would have ultimately gone towards defraying the legal expenses?

A: Yes, remember I mentioned to you about one of the things which we discussed was expenses and all that sort of thing, so are expenses in connection with this whole process which we've billed Selli and that an expense which can be picked out of - I can't give you the exact numbers but I think Leibler's bills have been fairly - - -

²¹ Lerner Transcript p4:

Q. What involvement did have you in devising the structure which was used to acquire TGL shares from Belshaw Pty Limited?

A. I was advising Mr Strike on structure. I dealt with Clayton Utz on structure. I think that's - maybe you could be a bit more specific. I think that's what I did.

Q. That's the kind of thing I'm getting at. Could you describe a bit more fully what you did in terms of that?

A. In setting up that structure, okay. We had meetings and we drew up charts and different, you know, ways that this might be done. It was obviously to make it a compliance with BSA. We had counsel. We met with counsel, QCs as well as with solicitors, in preparing it. Then we refined it and were told that it was fine and that, I guess, was it.

Strike Transcript p27:

Q. Why are they secured? (the debentures)

A. Because we are lending \$100m to another company. We felt that they should be secured. We are financier, you know. In many respects what we were doing was we looked at the TGL debentures as a sort of precedent, if you will, for taking an economic interest, which was not accompanying a company interest, and we tried to design some sort of a structure that was analogous to that because we knew that that didn't attract a company interest under Australian broadcasting law.

However, having said that, I was involved in the design of the TGL debentures and there were a lot of things that I would have much rather had in the TGL debentures that weren't put in place, like security, like a better priority, and I - who knows what the rationale was for having those things the way they were in the TGL debentures, I don't recall, but there were valid reasons at the time.

We explored whether we could improve upon the position and we were advised by counsel that we could, so we thought well, why wouldn't you as a financier to a company, why wouldn't you get the best position you could get. So that meant improving the priority in terms of repayment - do that. If that meant getting security over it in a rational way, then you should do that.

Asper Transcript p20:

Q: So, those companies were all approached to see whether they could - - - ?

A: Sure - and others. We then said, "We're going to run" - "the clock is going to run out", and therefore we'd better look for an alternate of that, and that's when Selli was identified, and some discussions obviously took place between Strike and Skala and Leibler to see whether they would be finished in that transaction, and from there on in my only involvement was to say, "Get Counsel", and you make damn sure that - here we are - but you make damn sure that you've got the Is crossed, the Ts, and have bullet-proof assurance that this is in conformity with the Act - every single - and if you get an opinion, get another one, because obviously we're sensitive, because, as you know - - -

²² Skala Transcript p70:

Q: May I go back to some points that you seemed to be making earlier. Do you think that the economic interest that CanWest has in TGL is a significant factor that you would have to take into account in considering the level of board representation they had?

A: No, it is relevant because they have got serious economic interests. On the other hand I am also very mindful of the law and I am mindful of the fact that the legal ... (indistinct) ... the voting which CanWest could seek to exercise cannot go near control, cannot go to control, it just cannot as a matter of law. So, what I would be prepared to live with, as a director, would have to be absolutely - I have to be absolutely satisfied that you could not put the licences in jeopardy ultimately.

²³ Skala (1) Transcript p21:

Q: In terms of pay in a sense they paid you for you to retain the voting rights, are there any understandings in relation to those voting rights?

A: No, the only understandings were in the documents, that is the whole deal. What is in the documents is everything there is between us.

Q: Have you ever said anything about the voting rights?

A: I've actually never had a conversation about it, about how to vote if that's what you're asking, there's never been a conversation.

Skala(1) Transcript pp36-37:

Q: Did you ever discuss the issue of further acquisitions with Mr Leibler?

A: Yes, when Tom rang and asked whether we were interested in doing it with Selli I would have talked with Isi and he would have said, look, as long as it is legal and it makes sense and we can negotiate a good deal of course go for it. You will see he is that sort of guy. He said if it makes sense go and do it.

Skala(1) Transcript p70:

Q: May I go back to some points that you seemed to be making earlier. Do you think that the economic interest that CanWest has in TGL is a significant factor that you would have to take into account in considering the level of board representation they had?

A: No, it is relevant because they have got serious economic interests. On the other hand I am also very mindful of the law and I am mindful of the fact that the legal ..(indistinct)... the voting which CanWest could seek to exercise cannot go near control, cannot go to control, it just cannot as a matter of law. So, what I would be prepared to live with, as a director, would have to be absolutely - I have to be absolutely satisfied that you could not put the licences in jeopardy ultimately.

Leibler Transcript p.5

A. ... [Steven Skala] came to me and said that I could realise my shareholding and remain a director and gave me a broad outline, very, very sketchy, about CanWest financing, purchasing my shares, financing the operation and at that stage I immediately said, just a second this, I had better have an understanding of what this means and would there be any contradictions or conflicts involving my position and that of CanWest because I know enough about the legislation to realise that it is a sensitive area. He said to me, you haven't spoken to CanWest, which is correct, about this area; you haven't made any deals, which is

correct; and the rest I am going to get legal undertakings to ensure that we are absolutely above and beyond the law and beyond that I must confess I didn't look very much. When a lawyer who happens to have a vested interest in this tells me that and having regard to the other involvements that I was indulging in in relation to my own business I must confess all I did was jump up with a bit of euphoria and say, this is great.

²⁴ Strike Transcript p36.

Q. Was there any understanding about how the voting rights in Selli would be exercised or the voting rights that Selli had in TGL would be exercised as a result of this arrangement?

A. Well, it was quite clear from my perspective that Leibler and Skala were going to exercise those voting rights in their own discretion.

Q. Was there any understanding between CanWest and Leibler and Skala in relation to that issue?

A. Well, the understanding that I had with Skala was that those guys voted those shares; we had no influence. It wasn't just a tacit thing. I was quite clear on that.

Q. Are you saying you had a conversation about this issue?

A. Yes, I spoke to Skala.

Q. When was that?

A. I'm not sure. At some point I spoke to Skala and told him, "Look, you guys are the principals of this company. You vote those shares the way you want to vote. Never think that CanWest will exert any influence on that", and quite clearly the documentation runs that way too. It was very, very clear.

²⁵ Ibid.

²⁶ Leibler Transcript p5:

Q: I think you said a minute ago you expected undertakings to be obtained as part of the transaction. Who did you expect those undertakings to be obtained from?

A: I said to Stephen I wanted undertakings that lawyers had written and guaranteed that there would be no potential conflict in relation to myself and the legislation as it now stands.

Q: So that was undertakings from your own internal advisers rather than undertakings from CanWest, for example, is that what you - - -?

A: No, but he told me that he also assured me that he had made his own inquiries from legal - and got legal opinion on that, that he told me that CanWest had actually had this underwritten by a number of top silks and that I had nothing to be concerned about.

Q: Right. So you understood that they were undertakings in terms of advice that you received and that Stephen Skala had received and advice that CanWest had received. Was that the source of your comfort?

A: Yes. I don't know - the source of my comfort were basically that he said, "We've got nothing to worry about. There are silks that have underwritten this", and the top - - -

Q. Who did you understand those silks were acting for?

A. I believe he said that CanWest looked at that first and he said, "I'm making my own independent inquiries", and I believe he spoke to a silk. I think he spoke to Alan Goldberg about it.

²⁷ Strike Transcript p25:

Q. Did you discuss with anyone the prospect of their acquiring shares from TGL as your nominee but without any financial contribution from CanWest?

A. I think it is probably fair to say that we did except we didn't find anyone that was terribly interested.

²⁸ Clause 6.1(k) of the Share Subscription Agreement.

²⁹ Strike Transcript p16

Q. Did you discuss with anyone the prospect of their acquiring shares from TGL as your nominee but without any financial contribution from CanWest?

A: I think it is probably fair to say that we did except we didn't find anyone that was terribly interested.

Q. You did?

A: Yes.

Q: Who did you speak to about that?

A: I think that was one of the options that we discussed with Macquaries when it became quite clear that they were interested in acting in a nomination capacity.

Q: Were there any other institutions that you approached in that way?

A: No.

Q: Why not?

A: There was an element of time involved. As I said earlier, Singleton's representatives were basically saying - like, every day virtually they were going to launch a pre-emptive rights notice. That gave 30 days to make a decision. You don't raise \$100m in a company that a financial institution doesn't know about in 30 days; it's just not practical. You know, if Macquarie Bank were to say, "I'm interested in taking a \$100m investment in TGL", I'll close my eyes and do it. They are going to want to do due diligence in the company and go through the internal banking process to make these decisions and you are talking probably 60 days minimum.

³⁰ Strike Transcript p19.

³¹ Strike Transcript p23:

Q. I think you said that at this point you had decided a structure for individuals to be nominees and a structure for institutions to be nominees and at that point before you came to Australia, although Leibler and Skala were on option to be a nominee, individual nominee, you hadn't actually - meaning CanWest hadn't actually - decided that they were going to be the nominees; is that right?

A: That's right.

Q. Can I just clarify this a bit more by asking you at what stage in your negotiations with Skala and Leibler did it become clear that they would exercise the voting rights that attached to these shares?

A: Certainly very soon before the rights were actually exercised. I would probably say towards the end of the first week in October, before I left, because it was becoming quite clear that the thing with an institution was not just going to run. It was too complicated. I didn't have time to get it to work.

³² Skala (1) Transcript pp 36-37:

Q: When did it crystallise for you?

A: Some time in October, I think it would have been Tom Strike would have rung and said, look, Belshaw is selling would we be interested in selling being a nominee of the Canadian rights, and I spoke to Leibler and he said yes he would be interested.

Q: Was any decision made at this stage by you or Mr Leibler or both that the company would, as a general policy, acquire further stakes in TGL using this method of financing?

A: No. Mr Leibler and I did not have - it is not the way we operate, he wouldn't do that. A general decision of general policy about how we would operate. I think he and I would have decided that if we can maximise our benefits we would. As to how you would operate the company and what that means depends on the circumstances which would arise.

Q: Did you ever discuss the issue of further acquisitions with Mr Leibler?

A: Yes, when Tom rang and asked whether we were interested in doing it with Selli I would have talked with Isi and he would have said, look, as long as it is legal and it makes sense and we can negotiate a good deal of course go for it. You will see he is that sort of guy. He said if it makes sense go and do it.

³³ Strike Transcript p59.

³⁴ Strike Transcript pp 58-61:

Q. Did you discuss with anyone at Winston Capital the possibility of the sale of their shares in TGL to anyone before the acquisition of those shares by Selli?

A: He - I spoke to one of their representatives in the Bahamas called Peter Ashton. I indicated to him that shares had been sold, the Belshaw shares had been sold to Selli in November, and he indicated to me that that was an interesting - \$13 was an interesting price. I said, "If you're interested in selling, you should talk to the principals of Selli", and I introduced them to Skala and that was the last contact I had with them.

Q: But it was at your initiative that they approached Selli?

A: I wouldn't say it was at my initiative. All I did was basically tell Ashton that there had been a transaction.

Q: And you discussed a price?

A: Well, I told him what the price was. That was public knowledge.

Q: You called him. You initiated the call?

A: That's right.

Q: Why did you call him?

A: Because I thought it was a transaction that he should know about; that's all.

Q: Did you already have in your mind the view that CanWest would finance the acquisition of those shares...

A: No.

Q: ...were Selli willing to purchase them?

A: No, I don't think so. Winston had sold some shares previously, about two years ago, I think to the AMP, so it was really just a courtesy call just to inform him because he doesn't see the Australian press like every other shareholder does.

Q: How long after 8 November was it that you contacted him?

A: Oh, I don't know. It would have been sometime after that, you know, sometime in the next week, probably.

...

Q: Did you discuss with Selli, before they purchased, your conversation with Peter Ashton?

A: Yes. I just phoned Skala and told him that I had a conversation with Ashton, told him about the Selli purchase of the Belshaw shares and Winston had expressed some interest in pursuing the transaction and I said, "Listen, if you hear from Peter Ashton, whom you don't know, that's what the call is about."

Q: Do you know roughly when that conversation took place in relation to the sale of the Belshaw shares?

A: Again it was probably the week after the Belshaw sale closed.

Q: That's a week after 8 November?

A: Yes, it was the following week sometime, I'm not sure exactly when.

Q: Was it after the CanWest board meeting where the \$110m was approved or was it -A. I've no idea.

...

Q: So in terms of the timing, you think the idea of Winston came after this?

A: I really don't recall. All I recall is that I spoke to Ashton. I told him about the transaction. He expressed an interest that maybe Winston might be interested in selling. I put him in contact with Skala. That's the last I talked to either of them about the transaction until there was a transaction that was being finalised.

Q: How did it come to your attention again?

A: Well, Skala phoned me back and said, "It appears that Winston is interested in selling in a tied position at the price of \$13 per share. Would you be interested in financing the transaction?" I conferred with Asper and we said, "Yes, if we buy Belshaw at 13, we would be interested in buying Winston at 13, financing that at 13", so we invested the funds and the transaction closed.

Q: How long was it before the transaction closed that Skala rang you back to seek your attitude to financing?

A: I don't know. It was probably, I would guess a week; maybe, three or four days, I'm not sure exactly. The transaction closed more or less the end of November, as I recall. So within a few days in advance of that, he rang to seek financing.

Q: When you rang Mr Skala initially and told him that he may get a call from someone at Winston, did you indicate to him at that time if that happened that DSK would finance Selli's acquisition?

A: Not precisely, because I didn't know in what terms or conditions Winston wanted to sell. I didn't know if they wanted \$13, if they wanted \$13.50, if they had some crazy terms or conditions they wanted to attach to the sale, you know. So I just said, "Listen, you want to do a transaction. You call Skala and see if it makes any sense and then Skala will call me and see if we would finance it." The price that he finally agreed with Winston, as it turned out, Winston was interested in \$13 with no escalators or top-ups.

³⁵ Strike Transcript p63.

Q: Was that your objective at that point?

A: Actually I should say there was a motivation, I suppose, for having Selli acquire Winston. That was that when Belshaw was purchased, it was purchased by Leibler and by Skala pro rata-ed to their existing interests in TGL and Leibler's interest from CanWest. So in a sense there was a strategic value to buy Winston because adding those shares to Selli's shares acquired from Belshaw put Selli over 10 per cent of the shares of TGL and therefore it gave them an entitlement to a board seat. I guess there was a slight strategic reason for doing it.

Q: Did that occur to you at the time or is that just something that occurred to you now?

A: No. It is something that probably occurred to me at the time.

Q: Why is that an advantage for CanWest?

A: It's not; it's an advantage to Selli. That's the reason Selli was recommending that to us.

³⁶ Ibid.

³⁷ Letter from Clayton Utz to ABA dated 11 December 1996. (File 93/1749 Part 31)

³⁸ Strike Transcript p67:

Q: What discussions did you have with Skala about whether or not to nominate Selli to finance the transaction?

A: I guess the discussions I had with Skala didn't really occur until after we had formed a view at CanWest that we were going to finance that acquisition at those levels. Once we sort of crossed that brink and decided that we would be willing to finance an acquisition at \$15 price which was very late, that was very, very soon before the nomination and acceptance notices were ultimately delivered to Whyte and Cowin which was sometime in the middle of December.

Q: 10 December?

A: It was kind of like a few days before.

Q: Sorry; it was the 11th?

A: Well, the 10th or the 11th. At that point I called Skala and indicated to him that CanWest would finance the acquisition if Selli so desired to accept the nomination for those shares. I articulated to him our rationale for that and --

³⁹ Strike Transcript p68:

Q: When was it in relation to the settlement of the transaction that you made the decision that you would finance the acquisition?

A: It was before the nomination was given.

Q: Sorry, how long before the nomination was given?

A: I don't know, three or four days, probably. It wasn't very long.

Q: And you rang Skala and you outlined your reasons for that decision to him?

A: Mmm.

Q: What was his reaction?

A: As I said previously, I think his reaction ultimately was, after a discussion that we had, that he agreed with me that it probably was worth doing.

⁴⁰ Strike Transcript p.25.

⁴¹ Asper Transcript p48:

Q: Your initial reaction to a \$15 price was that it was too high: is that right?

A: I thought \$13 was too high. I told you, my valuation had been - I think it was 11.40 and it was on the record, everybody knows it.

Q: Who did your evaluation?

A: I beg your pardon? Me.

Q: That was your personal evaluation?

A: Yes. I was trying to advise the Board of Network Ten that I thought we should ask for a quote and I said, "Give them the range" - this is at that August meeting. I'm not a professional valuer.

⁴² Asper Transcript p47.

Q: Do you think that is a fair market price or is that a premium to a fair market price?

A: It's the fair market price because you have a willing seller and you have a willing buyer. That's the definition of a fair market price. Would I like it lower? Yes. Would I pay more? No comment. That's arms-length transaction.

⁴³ Strike p67

A. I thought the price of \$15 a share was outrageous commercially. I thought it was outrageous because I thought there was an element of them putting a rail on the fence with a price to make sure that no-one could jump over.

⁴⁴ Strike p68.

⁴⁵ Strike p67.

Q. What did you say? (to Mr Skala)

A. The same things we just talked about, I just spoke about. I said, "Here is an opportunity here to put together in Selli a block of shares that rivals TNQ's, that's certainly of equal attraction as TNQ's block in terms of floatability. If that ultimately is combined with CanWest's block in some fashion, all of a sudden, it becomes a control block that can be floated to the public and it can probably realise a pretty good premium." I thought the price of \$15 a share was outrageous commercially. I thought it was outrageous because I thought there was an element of them putting a rail on the fence with a price to make sure that no-one could jump over.

I said that CanWest had ultimately come to the conclusion that there was some financial commercial reason for doing that. It lay in the fact that Selli itself had had 37 per cent of the shares. It lay in the fact that if we combined the two interests into a single float vehicle, we would have a control block to float.

⁴⁶ Leibler Transcript p15:

Q: In your understanding was there any relationship between the plan to partially float Ten and accepting these nominations and CanWest paying - effectively paying - \$15 per share?

A: Stephen told me when it took place, if my memory serves me correctly, that having these additional shares in will make the prospects of a float much more feasible, and that's a factor in addition to the other attractions that are directly mine in terms of possible extra money coming through because my - I did express concerns that at \$15 I couldn't see very much although he felt that there's even room for that.

Q: So that was one of the positive factors...(indistinct)...

A: Yes.

Q: ...that aided you to come to your decision to support the \$15 acceptance?

A: Yes. The main reason was that also there was no risk to me at all.

⁴⁷ Ibid

⁴⁸ Skala (1) Transcript p46:

Q. You accepted that offer at \$15 is that correct?

A. Yes.

Q. Do you regard that as a fair price?

A. I regard that as a pretty - as a substantial price, but it is the price which they are offering it there and I must say I wish I had achieved that price for my shares but that's life.

⁴⁹ Skala (1) Transcript p 46-47:

Q: So you and Mr Leibler, just confirming that you had not taken any advice on whether that was a fair market price?

A: Well, I must tell you I have looked at other valuations. Interestingly, I have looked at valuations some up to \$14.86. They were provided to us by BZW. They were provided to us in confidence. Those valuations were the valuations which they were using to try and promote the market to buy the shares at \$13. They were drafts with all the usual disclaimers written all over them and they run in pretty close to \$15.00. So I have seen those and they are again interesting because they are again another professional organisation's view of what the shares are worth. You are selling a Singleton block which is 10 per cent of the votes, 5 per cent of the economic interest, and what they are telling the institutions is 14.86 or something around that price. I cannot remember the exact figure and I am sitting there thinking, if that is that, what is 37 per cent of the votes and what is a 37 per cent block worth. The answer is, if 5 per cent is worth 14.86, this is actually worth something quite substantial. So do we go off and seek independent advice, no, but do we make business judgments, yes. Business judgments based on what I think are - you know, recognising the market place as serious advisers in relation to this, people who know their business. I have subsequently spoken to media analysts who have issued valuations that have kept going up as they have been watching this price and they keep on accepting the fact that there probably is more than they know, so - - -

⁵⁰ Skala (1) Transcript p46.

⁵¹ Skala (1) Transcript p75.

⁵² Strike Transcript p80.

⁵³ Strike Transcript p73.

⁵⁴ Strike Transcript p64.

⁵⁵ Skala (1) Transcript p47:

Q: In your business judgment that you have made, how important is it CanWest have agreed to pay it?

A: Critical, because how else am I going to fund it?

Q: And so would that not really be the primary determinant by which you made that decision?

A: Yes, the answer is you would look at all those things and then you would say this is a sensible thing to do. But CanWest is prepared to fund it. You will find that the financing is on limited recourse basis, but that does not actually get me all that excited because, you know, you are still a director of the company and you have got serious responsibilities to discharge.

⁵⁶ Skala (1) Transcript p90:

Q: Now, given that DSK or CanWest has this financial stake in Selli by way of debentures, do you feel obliged to take its views into account in how the shares in TGL held by Selli are voted?

A: As a director of the company I certainly take into account the interests of the lender, not really so much of the views, I'd only take them into account in the way that I'm obliged to in accordance with those documents. I am not really obliged to take into account their views at all frankly and the documents so I would take into account their interests rather than their views. I would certainly be open to listen to their views because they've got a

very substantial economic interest in the company, there's no question about that but I have no sense of obligation to take into account but I am perfectly happy to listen to what they've got to say if they've got anything to say.

⁵⁷ Leibler Transcript p16.

Q: But do you think there is some temptation to keep on having regard to the fact that really you are in that position primarily only as a result of the transaction?

A. My view of CanWest in this context is, if they expected me to perform in this manner then they'd be very, very foolish because if they had to throw me off because I was not toeing the line or something, it would be a pretty terrible indictment of them. I think it's quite clear in their mind that I've got a standing and a status in this community and that I'm not going to go in and be someone's representative for the sort of financial consideration that is involved there having regard to my reputation and everything else that goes with it and I'm quite relaxed about that.

⁵⁸ 'Conversion Shares' is defined in that deed as follows:

'Conversion Shares' means Class C Shares and Class D Shares or any combination thereof at the election of the Noteholder.

Class C and Class D shares are defined by reference to the articles of Selli. Class C shares carry a right to vote (art 3.4(4)), while Class D shares carry a right to vote only on resolutions affecting the rights, privileges and conditions attaching to Class D shares.

⁵⁹ 'Qualifying Requirement' is defined in the deed as follows:

'Qualifying Requirement' means that either:

(a) (i) the Noteholder or its Nominee is an Australian Resident;
and

(ii) the conversion of the Notes under clause 10 is not in breach of and does not cause TGL, a shareholder of TGL, any Noteholder or any affiliate of a Noteholder to be in breach of Foreign Control and Ownership Legislation or any mandatory directive 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 some or all of the Notes under clause 10 in favour of the Noteholder or its Nominee notwithstanding that such Noteholder or its Nominees is not an Australian Resident.

⁶⁰ Strike Transcript p31.

⁶¹ Lerner Transcript p.25.

⁶² Asper Transcript p.60.

⁶³ Strike Transcript p 88

Q. What about the economic interests that are held through Donholken and Selli, could you sell those down without advising them?

A. Sure, because we could sell - we could actually sell DSK without advising them or we could sell the debentures without advising them.

⁶⁴ Strike Transcript p39:

Q. But if CanWest took the view, as it has done in relation to ..., that Skala and Leibler were similarly inclined, what action would you be likely to take?

A. I think our courses of action are limited. I think they really deal with disposition in some fashion of DSK or the instruments, the financial instruments held by DSK. That's the only option that we would have.

Q. Are there any rights that you would contemplate that exist under those financial instruments, exercising those rights?

A. I don't follow the question.

Q. Sorry. Are you saying that there may be rights under the financial instruments which DSK is a party to?

A. No, no. What I said was the only two choices we have was we either sell DSK or we sell the instruments that DSK own. Those are really the only options we have. There's no rights embedded within those instruments that would allow us to exert any influence.

⁶⁵ Skala (2) Transcript p51:

Q. Is there any way the debenture holders - DSK and CanWest - can actually determine whether Selli has a long or a short life; for example, you've given a scenario wherein TGL could sell its debentures to an Australian nominee. The same thing could presumably happen with Selli?

A. Yes.

Q. So I put my question again: Is the question of whether Selli has a long or a short life to some extent in the hands of the debenture holders?

A. Yes, it is - I agree with that.

⁶⁶ Call Option Deed between Copplemere Pty Ltd and DSK (over voting share in Selli Pty Ltd) dated 29 October 1996.

Call Option Deed between Leibler Media Holdings Pty Ltd and DSK (over voting share in Selli Pty Ltd) dated 29 October 1996.

⁶⁷ Call Option Deeds, Clause 2.2.

⁶⁸ Call Option Deeds between DSK and Copplemere, and between DSK and Leibler Media Holdings

Clause 2.7 reads as follows:

Notwithstanding anything to the contrary in this Deed, the rights of the Grantee under clause 2.2 to exercise the Call Option shall not arise and the Issuer's obligations under clause 2.2 do not become binding on it, in each case unless and until the exercise of such rights by the Grantee would not constitute a breach of Foreign Control and Ownership Legislation or any mandatory directive given thereunder.

Clause 1.1 provides that 'Foreign Control and Ownership Legislation':

means the FATA Act and the Broadcasting Services Act 1992 (Commonwealth) as each may be amended or varied or replaced with another Act dealing with similar subject matter.

Clause 1.1

'Qualifying Requirement' means that either:

- (a) (i) the Grantee or its Nominee is an Australian Resident; and
- (ii) the exercise of the Call Option is not in breach of and does not cause TGL, shareholders of TGL, the Grantee or its affiliates to be in breach of the Foreign Control and Ownership Legislation or any mandatory directive, 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 exercise of the Call Option by the Grantee or its Nominee notwithstanding that the Grantee or its Nominee is not an Australian Resident.

⁶⁹ Skala Transcript p88:

Q. Copplemere's entry into a call option with DSK in relation to its voting share in Selli, why was that contract entered into?

A. As far as I understand it was part of the security arrangements which were requested, so that this whole structure was tight from a security point of view.

⁷⁰ Strike Transcript p28.

⁷¹ Strike Transcript p28:

Q: Other than in a float situation, can you see any other circumstances in which those call options would be called?

A. I could see it in the case where we might want to sell our debentures to someone and we would probably sell the call options with the debentures.

Q. Is that something that has been contemplated?

A. No.

5. The Company must not carry on any business or activity other than:

- (a) the acquisition, holding, exercise, enforcement or disposal of:
 - (i) TGL Shares;
 - (ii) options or rights to acquire TGL Shares;
 - (iii) other securities with rights of exercise, or rights of conversion, to the TGL Shares;
 - (iv) debentures issued by TGL, whether or not those debentures are convertible to TGL Shares;
 - (v) shares or other equity interests in an entity whose principal asset is securities referred to in sub-paragraphs (i) to (iv) above inclusive;
- (b)
 - (i) the receipt and investment in an at call account of a bank or other financial institution of any distribution payable in respect of the securities referred to in sub-paragraphs (a)(i) to (a)(v) above inclusive;
 - (ii) the payment of dividends in accordance with the Articles of Association of the Company;
 - (c) enforcement or defending the enforcement (including by instructing legal advisers) of a contract to which the Company is a party and which relates to an activity permitted by paragraph 5 or 6; and
- (d) an activity permitted by paragraph 6.

6. The company must not:

- (a) borrow or raise money;
- (b) charge any property or business of the Company or all or any or its unpaid capital;
- (c) issue shares, options over unissued shares, equity securities, securities with rights of conversion or exercise to shares or equity securities, debentures or other securities;
- (d) give any other security for a debt, liability or obligation of the Company or of any other person;
- (e) guarantee or become liable for the payment or money or the performance of any obligations by any other person; or
- (f) lend or advance any money or funds or provide any other form of financial accommodation to any person,
other than:
 - (g) the issue of the Limited Class Shares in accordance with the Articles of Association of the Company;
 - (h) the issue of Convertible Debentures to Drie Sterren Kapitaal (Nederland) B.V.;
 - (I) the issue of Participating Debentures to Drie Sterren Kapitaal (Nederland) B.V.;
 - (j) pursuant to the Debenture Stock Trust Deed;
 - (k) the payment of Expenses and Taxes; and
 - (l) the payment of dividends in accordance with the Articles of Association of the Company.

⁷³ Memorandum of Association of Selli, Clause 6

⁷⁴ Memorandum of Association of Selli, Clause 9:

A special resolution purporting to alter or add to or omit any provision of the Articles of Association of the Company does not have any effect unless and until the written consent of:

- (a) the Convertible Debenture Holders and
- (b) the Participating Debenture Holders

is obtained except where the requirement for the giving of consent will result in a breach of the BSA

⁷⁵ Skala (2) Transcript pp7-8:

Q. During the period of time when the documents surrounding the transaction were being discussed and settled, did you ever express any uncertainty about any restraints placed on Selli as a result of drafts of documents that you saw?

A. What do you mean by "restraints on Selli"?

Q. Restraints of any kind, really, in relation to its ability to do anything, that's all?

A. I really can't recall. I'm just trying to think about discussions concerning the memo. We may -I'm just trying to remember. Restraints? I'm just trying to get --

Q. Will you let me give you an example in relation to the ability to - I'm not trying to be deceptive --

A. I understand.

Q. -- not being able to incur any indebtedness, for example, which is a constraint which exists on Selli, I believe; is that right?

A. I think you'll find in documents that Selli can - there are a whole series of - there is a species of indebtedness which you can incur which is in relation to costs incurred in seeking advice, appointing auditors and costs generally, so I'm not sure when you talk about a restraint on incurring indebtedness - do you mean financial indebtedness going to a bank?

Q. I do. I mean apart from incurring indebtedness which may be expenses relating to ordinary business which may be conductable from dividend streams - I mean bank loans, for example, other forms of indebtedness, financial accommodation type indebtedness?

A. I can't specifically recall having arguments about it, but commercially there would be no reason that I can think of now, sitting here, as to why I would want to have - why I would want Selli to have the capacity to go out and borrow money from a bank. So, I mean, just sort of - in answer to your question can I remember having a discussion or debate about it, I can't, but I can actually - but I do recall somewhere in the documents that Selli has the right to incur liabilities, in other words to incur indebtedness, but not of a financial kind. I can't think of any reason why Selli, as a company, commercially would need the right to go out and borrow money, in the sense of obtaining financing from a bank.

⁷⁶ Articles 3.7

⁷⁷ Articles 3.9

The Directors will not issue options over the unissued shares in the capital of the Company without the prior written consent of the Participating Debenture Holders (if any).

⁷⁸ Articles 3.10

⁷⁹ Articles 6.1(b) and (c)

⁸⁰ Articles 3.3(b)(ii)

⁸¹ Articles 8.4

Written Consent of Participating Debenture Holders

Notwithstanding anything contained in this Article 8, for so long as there exists at least one Participating Debenture Holder, any resolution under this Article 8 does not have any effect unless and until the written consent of the Participating Debenture Holders is obtained.

⁸² Articles 9.4

Failure to give notice

Subject to Corporations Law:

- (a) the accidental omission to give notice of any general meeting to or the non-receipt of that by any Notifiable Person (other than the Participating Debenture Holders) will not invalidate any resolution passed at that meeting;
- (b) the accidental omission to give notice of any general meeting to or the non-receipt of that notice by any participating Debenture Holder will invalidate any resolution passed at that meeting.

⁸³ Articles 9.7

Persons entitled to attend general meetings.

All members and all participating Debenture Holders are entitled to attend general meetings of the Company as well as any other persons entitled to attend under the Corporations Law.

⁸⁴ Articles 13.9

Appointment of Directors by Participating Debenture Holders

The Participating Debenture Holders (if any) will from time to time be entitled by notice in writing to the Company from time to time to appoint:

- (a) one Director of the Company; or
 - (b) one person to the board of directors of each Subsidiary of the Company,
- or to do both (a) and (b) (and to remove and replace the appointee from time to time) and the Company shall ensure that such person is appointed to the board of directors of the Company or to such Subsidiary (or both) as the case may be and that there are at all times at least two other directors who are not Foreign Persons on the board of directors of the Company or such Subsidiary (or both) as the case may be.

⁸⁵ Articles 17.3

⁸⁶ Articles 15.1

⁸⁷ Articles 16.1

Remuneration of Directors

- (a) The Directors will be paid out of the funds of the Company by way of remuneration of their services a fixed sum as is determined by a general meeting, subject to the prior written consent of the Participating Debenture Holders.
- (b) Remuneration will be paid to or applied for the benefit of the Directors in such proportions and in such manner as determined by a general meeting, subject to the prior written consent of the Participating Debenture Holders, and will be paid to them equally failing such determination.

⁸⁸ Articles 18.2

Quorum for meetings of Directors

- (a) A quorum for the purpose of considering a matter at a meeting Directors will be 2 person, provided that:
 - (i) each such person is a Director or an Alternate Director and is entitled under the Corporations Law (notwithstanding any interest the Director or Alternate Director may have in the matter for consideration by the Directors) to vote on a motion that may be moved in relation to such matter at that meeting; and
 - (ii) one of those persons is a director appointed by the Participating Debenture Holders unless the Director appointed by the Participating Debenture Holders waives this requirement in relation to that meeting by notice in writing to the Company.
- (b) A meeting of the Directors during which a quorum is present is competent to exercise all or any of the authorities, powers and discretions under these Articles for the time being vested in or exercisable by the Directors generally.
- (c) Where a quorum cannot be established for a meeting of Directors (or consideration of a particular matter) a Director may convene a general meeting of Members to deal with matter or the matters in question.

⁸⁹ Articles 25.1

Appointment and Removal

(a) Subject to Article 25.1(b), the auditors of the Company will be appointed and may be removed as provided in the Corporations Law.

(b) For so long as there exists at least one Participating Debenture Holder:

- (i) the Participating Debenture Holders will be entitled to nominate the person to be put forward to the Members for appointment as auditor of the Company; and
- (ii) the Members will not appoint any auditor of the Company other than an auditor referred to in sub-paragraph (i) of the Article 25.1(b) except if and for so long as the Participating Debenture Holders fail to nominate a person to be put forward to the Members for appointment as auditor of the Company in accordance with this Article 25.1(b).

⁹⁰ Articles 3.3(c), 23(1)(b)

⁹¹ Articles 27.4, 27.5

clause 27.4 - Voluntary Winding Up

The Voting Members will not resolve by special resolution that the Company be wound up voluntarily without the prior written consent of the Participating Debenture Holders.

clause 27.5 - Vesting of property in trustees for contributories

Subject to Article 27.6, the liquidator may with the sanction of a special resolution and the prior written consent of the Participating Debenture Holders vest the whole or any part of the property in trustees on such trusts for the benefit of the contributories of any of them as the liquidator thinks fit.

⁹² Skala (1) Transcript p39:

Q: I meant something slightly beyond the fine print, is it at all significant for you, for example, that your capacity to, or Copplemere's capacity to sell shares in Selli is restrained in some way or to - well, first I will ask the question: is there any restraint in your capacity to sell shares, Copplemere's shares in Selli?

A. I think the articles make provision, the voting shares, the A class shares. They say they're incapable of being sold or not to be sold, something like that, yeah, so that it's meant to be - this is Copplemere's arrangement so that there's no - so do I have a problem with that?

Q. Do you have a view whether that is a good thing, a bad thing, it makes no difference to you?

A. I think it makes the shares not negotiable but not intending to sell the shares. I mean the economic benefit which shares to Copplemere flows up that chain.

Q. Well, you say you are not intending to, but you are not in a position now, even if you were intending to sell? How do you view that constraint?

A. I don't really regard it as a constraint I suppose because the arrangements which we have negotiated are such that that would be seeking to - to seek to sell those shares would be to in a sense to secure an additional benefit beyond the benefits which I think I've negotiated so I don't really regard that as a constraint because the benefits which I've negotiated are the benefits which Copplemere or Leibler Media Holdings are seeking, so that would be, as it were, one more and I think it's not something which we ever sought, contemplated, so I don't regard that as a - it is a restraint in the sense that you can't sell it, there's no question about that, but it's not something which troubles me. It would be seeking to extract an additional thing which is not something which we sell.

⁹³ Skala (2) Transcript p26:

Q. What happens to the money that stays in the company?

A. It's cash, so it's available to meet obligations, liabilities, sits in a bank account, accrues interest, is managed in the usual way that one would manage cash.

Q. So directors can make decisions about how that money is allocated according to the priorities of the company?

A. Yes, absolutely. I mean, I don't know how much spare cash there's going to be, but we'll wait and see. I mean, as I say, I don't know how long this company is going to be in existence. But it will just invest it and sit in a bank account.

Q. Will it be open to you to invest it in securities, for example?

A. It will be subject to the constraints of the articles. I mean, I have to have a look at what I can and can't do.

Q. What's your understanding of what you can invest that in?

A. At best put it into the bank or put it into some sort of secure relatively good investment. That's what I would do with it at this stage, unless there was some opportunity which came up, in which case, if it was consistent with the articles, I'd go and talk to DSK, CanWest, and say, "Excuse me, guys, there's an opportunity sitting here."

⁹⁴ Skala (2) Transcript p18.

⁹⁵ Skala (2) Transcript p21-23:

Q. There seems to be some discussion about the degree of control; isn't that correct?

A. That it's very constricted.

Q. Yes?

A. Yes, that's what it looks like. I have no dispute with you about that.

Q. Is that something which you may have raised as a concern?

A. It's possible. I mean, it's the sort of conversation I would have had with him, because in negotiating one of these things, you try to get yourself covered as best as possible and have as much room to move inside the document, so if the - you would try to seek to have as much flexibility as possible. So it does not seem unreasonable - this conversation or these notes would be consistent with me saying: "There has to be more flexibility in this document. You've gone into legal overkill in the document. Commercially I'm relaxed about the transaction, but what you're doing is preparing documents which are very tight." So that it's just that kind of thing - too tight, so that there's no ability for the owner of the company to actually do anything.

Q. Are you saying that you raised that as a commercial negotiating tactic?

A. I really can't recall what context it was raised in that sense.

Q. Why were you concerned that it was too tight?

A. Well, because there's - this is actually quite commercially sensitive. The cashflows that are going to go into this company, among many things, can be utilised in a whole lot of ways to generate quite a lot of money, so to the extent to which the company was going to be, as it were, constrained, it may have deferred or eliminated the possibility of using franking credits sitting in a franking credit account or the potential tax rebates that would be available to this company post the dividend flow. I mean, I don't know if you're familiar with the tax laws, but a fully franked dividend flowing to this company is a very attractive thing for the owner of the company long after the cash is paid out by way of dividend or by way of interest to a debenture holder, because you still have franking credits sitting in an account. So the extent to which the company is constrained would limit my capacity to actually financially exploit the tax benefits that are sitting inside the company.

Q: What about this reference here, "can't incur any indebtedness whatsoever"; is it possible that that was a concern?

A: Well, you see that section 592 underneath it, my concern always has been - well, I think that is exactly what I said to you before I'd seen this document, which is that as a director of a company you are concerned about incurring a liability and then not being able to meet payment. So I may well have to meet payments - I think under the articles I'm obliged to appoint auditors; it's going to be all the costs associated with such things as inquiries.

Q: So were you concerned about not having any start-up capital, working capital?

A: Yes, I was concerned about that. More by accident than design, but nevertheless I'm comforted by the fact that Leibler and I put a lot of money into this company to make sure

we had more cash than needed. You know that \$50,000 of E-class shares? That actually gives me comfort factor in the company, because there's just that much more money in the company than is strictly absolutely necessary for the purposes of buying those shares.

Q. This conversation, however, seems to take place in the context of a discussion of the BSA and control?

A. No, that's not fair. That's your suggestion.

Q. That is my suggestion, you're right. I'm saying it seems to. I'm seeking your comment on that suggestion?

A. I disagree. Because if you notice, it goes from BSA to the deed, to 592, to section 205. I mean, to directors being paid money, to - this is wide-ranging.

Q. I should be more specific. I'm talking about point 1 and that particular discussion of limitations on the ability to do things?

A. Yes.

Q. That seems to take place on the basis of this record?

A. Yes.

Q. In the context of a discussion of the BSA and control?

A. Well, except that if I'm speaking to Mr Moutsopoulos, wanting to preserve flexibility in a commercial negotiation, is it really that sensible for me to talk about the other advantages which I can see from having flexibility or is it better for me to tell him that there are advantages in the BSA context?

Q. So you might have raised concerns about the BSA in the context of getting a greater commercial advantage for yourself; is that what you're saying?

A. No, I might have raised - yes, a BSA concern, but I don't really want to go into the whole question of what Selli - in terms of the potential upside beyond what's being earned by, you know, being paid the 5 per cent upside and all those kinds of things. There's actually more upside in Selli than is visible, if you understand the tax laws. There just is. So if you draw that to the attention of your - the people that you're negotiating with, it may well be that the deal that you finally end up with is not quite as attractive. So my view is that it would be better just simply to say, "Look, these documents are awfully tight. Do you really want them to be that tight? I don't like them being that tight. They should have more flexibility. Commercially the deal's okay, but you guys are indulging in legal overkill and you don't need to. And the tougher you are in these documents, the more concerned someone like the ABA is going to be about these issues of control." It's in my interests to raise that concern there for two reasons: One is just in terms of purely the Broadcasting Act and, secondly, because I have a commercially sound reason why I want more flexibility sitting inside this company - that simple.

Q. Did you get the flexibility you wanted?

A. No. But that doesn't mean that in the long term I won't, because the long life of this company is going to be - assuming that a dividend goes into it, it will become quite a valuable company and I'm kind of hopeful I'll be able to use the benefits of sitting inside the company.

⁹⁶ DSTD 18.3(d)

⁹⁷ DSTD 5.5

⁹⁸ DSTD 5.8

⁹⁹ DSTD 7.1(a)

Amendment of Constituent Documents

(a) Each Chargor agrees that, except with the prior written consent of the Trustee (acting on the instructions of the Stockholders Resolution), it must not amend its Memorandum and Articles of Association as they exist as at the date of this Deed.

¹⁰⁰ DSTD 7.1(b)

Each Chargor agrees that, except with the prior written consent of the Trustee (acting on the instructions of a Stockholders Resolution) it must not lease or hire any asset (including, without limitation, real property).

¹⁰¹ DSTD 8.1

CLAUSE 8 - COVENANTS CONCERNING THE CHARGED PROPERTY

clause 8.1 - Restrictions in relation to the Charged Property

8.1 Each Chargor will not without the prior written consent of the Trustee or as expressly permitted in any other Transaction Document:

- (a) (No Encumbrances): create, purport or attempt to create or permit to exist any Encumbrance howsoever ranking over any part of the Charged Property;
- (b) (No sale, lease etc.): convey, assign, transfer, lease or otherwise dispose or part with possession of, make any bailment over, grant any option over or create or permit to exist any other interest in any part of the Charged Property whilst such part of the Charged Property is subject to the fixed charge created in this Deed or any Collateral Security;
- (c) (Charged Debts and Proceeds): subject to clause 8.2 assign, transfer or deal with or attempt to assign transfer or deal with or enter into any agreement, arrangement, or course of dealing to hold to the account of or on trust for any person, or permit any set-off or combination or accounts in respect of, any charged Debts or Proceeds;
- (d) (Not to prejudice): do or permit any act, omission or thing whereby the Charged Property becomes or could be liable to surrender, forfeiture or cancellation or becomes prejudiced in any manner or the value of the Charge as a security to the Trustee becomes or could be materially lessened;
- (e) (Ordinary course): subject to this Deed, deal with or attempt to deal with Charged Property other than in the ordinary course of its ordinary business;
- (f) Each of the LMH2 and Copplemere 2 severally covenant not to vary or amend, or agree to the variation or amendment, or terminate, or agree to the termination, of the agreement constituted:
 - (i) in the case of LMH2, by the acceptance by LMH2 of the offer of sale of rights made to it by Leibler Media Holdings Pty Limited, on or about the date of this Deed,
 - (ii) in the case of Copplemere 2, by the acceptance by Copplemere 2 of the offer of sale of rights made to it by Copplemere Pty Limited, on or about the date of this Deed, or waive or agree to the waiver of any rights under such agreements.: or
- (g) (Step): take any step towards doing any of these things.

¹⁰² DSTD 8.8

¹⁰³ DSTD 10.1 (e),(j),(m) and (o)

¹⁰⁴ DSTD 10.1 (k), (l) and (s).

¹⁰⁵ DSTD Clause 12.6

Notwithstanding any other provision of this Deed, the Trustee, a Receiver or any agent appointed under clause 12.1(c) may not exercise any Power if the Qualifying Requirement is not satisfied in respect of that Power.

Clause 1.1

‘Qualifying Requirement’ means, in respect of any Power, that either:

- (a) the exercise of the relevant Power is not in breach of and does not cause the Trustee, any Stockholder or its affiliates, or TGL or any of its shareholders to be in breach of the Foreign Control and Ownership Legislation (FATA and BSA) or any mandatory directives 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 the exercise of the relevant Power in favour of the Trustee notwithstanding that any Stockholder is not an Australian resident.

'Power' is defined by clause 1.1 also, and means 'any right, power, authority, discretion, remedy or privilege conferred on the Trustee, Receiver or any attorney or agent appointed under the Deed, by any Transaction Document, by Statute or by law or equity'. The term 'Transaction Document' includes the Debenture Stock Trust Deed, and the Convertible and Participating Debenture Deeds.

¹⁰⁶ Skala (1) Transcript pp40-41.

¹⁰⁷ Call Option Deed between DSK and LMH and Copplemere
(the text of clause 3.1 is the same for both of the Call Option deeds)
clause 3.1 - Grantor's warranties

The Grantor covenants with and warrants to the Grantee for the benefit of the Grantee and the Nominee, and so covenants and warrants as at the date of this Deed and separately as at a time immediately before Settlement, it being a term of this Deed that each of the covenants and warranties are true and correct in every respect.

(h) the Grantor has not and will not during the currency of the Call Option grant any other option to any other person in relation to the shares; and

(I) the Grantor has not and will not during the currency of the Call Option sell, assign, transfer or otherwise dispose or grant any security or option (other than the Call Option) over, or right of interest in or otherwise Encumber or alienate any or all of the Shares, or offer or seek to do or permit any of the foregoing.

(q) the Grantor is not a foreign person, as defined in the Broadcasting Services Act, 1992 (Commonwealth) ("BSA") and no foreign person (as so defined) has or will acquire any company interest, as defined in the BSA, in the Grantor;

* Note: clause 3.1(g) is missing from the DSK - LMH Call Option deed

¹⁰⁸ Article 6.1(b) of the Articles of Association of TGL.

¹⁰⁹ Strike Transcript p39:

Q. Given the existence of Selli as a vehicle to purchase the TGL shares, why were the companies Numeration and Turnand set up and could you give me a timing for that in terms of the idea of those companies?

A. The genesis of the idea was some time in the first week of October and the genesis of that particular idea was in the preservation of Leibler's seat on the board. At the time that we came to that, we developed that idea, we were in very early discussions with Skala and Skala as Leibler's proxy for them to act as the owners - the shareholders of Selli, and therefore the nominee. And at the time there was also indication that Leibler wanted to sell.

¹¹⁰ Leibler Transcript p17:

Q. That fact that you retained your directorship of TGL, do you understand that to be a condition of the transaction whereby you sold the Leibler Media Holdings shares?

A. No, it was put to me as a package and I certainly didn't query it.

But what was your understanding as to the options?

A. My understanding was that I was to remain as a director.

Q. That that was part of the package?

A. Well, yes.

Q. Did you understand you had any option not to be a director?

A. When Stephen came and explained the overall situation he said: Here's what we get if we move in this direction. And I didn't really push; I wasn't interested in finding out if I could get the same deal without being a director; I was quite pleased to be a director, so the question never arose.

¹¹¹ Leibler Transcript p9:

Q. Why would you remain as a director of Ten in that scenario?

A. I guess if they told me that it could be constructed in such a way, the float, that I could still be, if not it would be bad luck but I can't answer that question really, it's a good question, I

should have asked that question myself but I was told there's a good probability that you will still remain a director, I was not given any guarantee.

Q. And you were told that by?

A. Stephen, I hope I'm not misunderstanding him but that's what he led me to believe, good probability.

¹¹² Strike Transcript p.34 :

Q. What do you think Mr Skala and Mr Leibler actually got out of their sale of the TGL holdings?

A. What do I think they got out of that? I think I want to frame my answer that they got - they obviously got something out of the sale of the TGL holdings. They got money. Ultimately they got \$13 a share. What they got out of the Selli structure, I think they got some additional things out of the Selli structure which they wouldn't have received if they just had simply entered into a sale transaction with Selli. I think they got board representation. One of the motivating factors behind Leibler doing this sort of drop-down from Leibler to Turnand and then a financier was they got two board seats with a 17 per cent interest, whereas, normally the two board seats would have required 20 per cent interest under the share subscription agreement, I think Skala got a board seat as opposed to being an alternate.

¹¹³ Strike Transcript, ibid

¹¹⁴ Skala Transcript (1) p. 22:

Q. So do you think that the retention of your voting right was a factor that influenced the result of a price of \$13 that you achieved?

A. I would think so, I would think that the fact that we'd retained our voting rights was part of what I would say was myself saying, guys we're going to retain voting rights, this will not be uncontroversial I'm sure, we're all aware of the law, we all know exactly what all this will mean, there's going to be much pain and sweat and discussions like this which shall ensue, that's not something which people take on lightly, in fact it's actually something which people take on in the knowledge that it's going to occur and the attempted publicity, all those things, so it's not like we're going into this naively, quite the opposite, we thought we were going into it very much aware that this would be controversial, it would be a public issue, that the ABA would be making inquiry, that we'd end up sitting here having these conversations, we knew that so this is not a surprise so the answer is that it was perfectly legitimate for me to say, fellows this is something which is worthy of, I want a full price on my shares if I'm about to pick up - when I do I want a full price for my shares but if I'm controlling the voting rights and it is a very responsible job because there are serious things to be done and what could be 37 per cent of the voting rights in this country is actually very serious, we have to find some negatives and be compensated accordingly so again perfectly commercial and perfectly reasonable though perfectly understanding on the other side, it's not like they're foolish people, they understand this is business. Sure we're interested in it, we like the business and like all those things but you have to be paid for it as well.

¹¹⁵ Strike Transcript p.62:

Q. Was that your objective at that point?

A. Actually I should say there was a motivation, I suppose, for having Selli acquire Winston. That was that when Belshaw was purchased, it was purchased by Leibler and by Skala pro rata-ed to their existing interests in TGL and Leibler's interest from CanWest. So in a sense there was a strategic value to buy Winston because adding those shares to Selli's shares acquired from Belshaw put Selli over 10 per cent of the shares of TGL and therefore it gave them an entitlement to a board seat. I guess there was a slight strategic reason for doing it.

Q. Did that occur to you at the time or is that just something that occurred to you now?

-
- A. No. It is something that probably occurred to me at the time.
- Q. Why is that an advantage for CanWest?
- A. It's not; it's an advantage to Selli. That's the reason Selli was recommending that to us.
- ¹¹⁶ Strike Transcript p.62:
- Q. I kind of understand your saying "Why not", but I don't really understand your why. The question was asked, "What advantage was it to CanWest?" You have answered by saying "So why not?", but why?
- A. There was no particular advantage to doing it. It's just the shares were available. There was an interested seller.
- Q. The price wasn't too hot, was it?
- A. But the other side of the coin was it wasn't an outrageous price either. It wasn't too bad. It was, you know, eight and a half times 1997 earnings before EBITDA, so it wasn't a crazy price. It made commercial sense to acquire the shares. We had a view that eight and a half times - that earnings number was not an irrational price to pay. Although it didn't deliver any strategic advantage, it certainly delivered a commercial advantage to us in the sense that if we ever packaged this thing together and floated it or otherwise on-sold it, we would make a profit. I see nothing wrong with that; that's why I say, "Why not?" It's not a bad deal. But there was no sort of overwhelming commercial motivation or strategic motivation to make a transaction.
- ¹¹⁷ Skala (1) Transcript p74:
- Q. What advantage would Selli get from a float?
- A. Well, it depends on the prices it has achieved. You have to remember - you have to go for the history of the transaction.
- Q. Let us assume it is about \$15?
- A: No, let us go back before then. What advantages would Selli by itself or are you talking about the Leibler/Skala interests?
- A. Either, both?---Okay, and the reason is that - I think there is - the Leibler/Skala have actually got more purchase price of \$13 by getting involved in that structure. You were selling at \$11.50 or \$11.75, negotiated at Selli's new position of \$13, so it might be historically that that is a significant advantage in working into the Selli structure.
- ¹¹⁸ Strike Transcript p55:
- Q. Was it ever put to Mr Leibler and Mr Skala that the extra money may be some kind of compensation for having the burden of having the voting rights, of having to go to TGL board meetings and exercise the voting rights and take care of the investment?
- A. No, because that escalator was a demand from Skala on his own behalf and on Leibler's, because he didn't want to feel disadvantaged because he had effectively sold under \$11.75, just to find out that he was made a mug because he had sold a week too early, two weeks too early, six months too early. It was purely a protection against him making a deal at a lower price than someone else. That's all it was.
- ¹¹⁹ Skala (2) Transcript p51:
- A. So we are in the area of, I suppose, in a colloquial sense, the cream of the transaction. Naturally I'd prefer more cream than less cream and I'm not indifferent to it, but I really can't complain, because I look at the whole transaction and say, "I start this with \$13 a share and the rest of this is extra", and I'm happy with it and I'm prepared to, you know, perform duties as a director - to vote in good conscience and consider all the issues and whatever is necessary and properly.
- ¹²⁰ Articles of Association of Selli, Clauses 3.3 (a) and (b)
- ¹²¹ Skala (2) Transcript p23:
- Q. So you might have raised concerns about the BSA in the context of getting a greater commercial advantage for yourself; is that what you're saying?

A. No, I might have raised - yes, a BSA concern, but I don't really want to go into the whole question of what Selli - in terms of the potential upside beyond what's being earned by, you know, being paid the 5 per cent upside and all those kinds of things. There's actually more upside in Selli than is visible, if you understand the tax laws.

There just is. So if you draw that to the attention of your - the people that you're negotiating with, it may well be that the deal that you finally end up with is not quite as attractive.

So my view is that it would be better just simply to say, "Look, these documents are awfully tight. Do you really want them to be that tight? I don't like them being that tight. They should have more flexibility. Commercially the deal's okay, but you guys are indulging in legal overkill and you don't need to. And the tougher you are in these documents, the more concerned someone like the ABA is going to be about these issues of control." It's in my interests to raise that concern there for two reasons: One is just in terms of purely the broadcasting Act and, secondly, because I have a commercially sound reason why I want more flexibility sitting inside this company - that simple.

Q. Did you get the flexibility you wanted?

A. No. But that doesn't mean that in the long term I won't, because the long life of this company is going to be - assuming that a dividend goes into it, it will become quite a valuable company and I'm kind of hopeful I'll be able to use the benefits of sitting inside the company.

¹²² Skala (1) Transcript p32.

¹²³ Strike Transcript p19:

A. I think it's fair to say that we were - we thought it necessary to design a structure to allow us to do that if we finally decided to do that; in other words, we were designing a structure without making the final decision as to whether to increase our economic interests or not. We just had a need to know that if we took a decision to do that for whatever reason, that because of the complexities, we couldn't do it directly - like, if we were in Australia we could just buy the shares - we had to design something that would accommodate the nomination of an appropriate party; so we necessarily had to design a structure before we took any final decisions.

Strike Transcript p25:

Q: As the structure developed, was CanWest anticipating that by providing finance it would be increasing its economic interest in the long term or was it just kind of an interim position of some kind?

A. I think we wanted a structure that allowed us to make that decision at some future point.

¹²⁴ Strike Transcript p87:

Q. I'm just trying to get an idea of alternative strategies that CanWest seems to have. On the one hand, there seems to be, as I understand your discussion here today, an expectation that to get value for money out of, for example, the money you paid to finance the purchase of the Corom and Audant shares, you would have to float, have some kind of float to realise, to make a profit on that or at least get your money back?

A. That's certainly something we are exploring. I don't think it's the only - there are lots of ways of selling down whenever an economic interest has been acquired. It could be sold privately or publicly.

Q. Would an alternative strategy be that you would just hold on to that interest as an investment?

A. That's an alternative strategy. I don't know that it's one that will ultimately happen, though.

Q. What are the key factors that would make you decide to go one way as against the other?

A. The outcome of this investigation, for one thing.

Q. How do you expect the outcome to affect that decision?

A. Not at all, I don't think. I think the result of your investigation will find that the acquisition of these additional economic interests is quite legitimate.

Q. Say that is the case, what then would be your options?

A. Then I believe it becomes the question of the commercial issues of deployment of capital, CanWest's capital. We wouldn't have financed these acquisitions had we not thought that the financing was a good use of funds. However, having said that, things change. We are a very aggressive company when it comes to developing our business and we are looking at opportunities all over the world to expand our business. That takes capital and if we, in the absence of any other factors - ultimately, it all becomes a question of how do you deploy your capital most profitably. If we see a means of making a profit on one transaction and taking that capital from that transaction and putting it somewhere else more profitably, that's certainly a consideration.

Q. And that would lead you to favour a float rather than an ongoing investment; is that what you are saying or is --

A. That would result in our making a decision to divest. It's ultimately the question that you have a finite amount of capital in any company and how do you most profitably deploy that capital. We tend to be long-term holders of investment positions. We are not traders in companies, like some other companies are.

We believe that Network Ten has a long way to go yet in terms of realising its full potential. So, on the one hand, clearly we wouldn't have financed these additional acquisitions had we not thought that there was a commercial reason to do that. But having said that, we have deployed a quarter of a billion dollars in this country in the last 90 days, and there are other opportunities that we are pursuing where that capital could be employed as well. So it comes down to a commercial decision, ultimately.

¹²⁵Skala (2) Transcript p51:

Q. Is there any way the debenture holders - DSK and CanWest - can actually determine whether Selli has a long or a short life; for example, you've given a scenario wherein TGL could sell its debentures to an Australian nominee. The same thing could presumably happen with Selli?

A. Yes.

Q. So I put my question again: Is the question of whether Selli has a long or a short life to some extent in the hands of the debenture holders?

A. Yes, it is - I agree with that.

¹²⁶Lerner Transcript p 17:

A. ... DSK, by virtue of its security can do a float. It doesn't need the cooperation of anybody to do it. So DSK at that point has about \$100m or so in this and said, "Hey, we had better start looking at our float."

Lerner Transcript p19:

Q. So what role do you see them having - when I say "them", I mean Donholken and Selli - in the decision as to whether or not to float directly or indirectly?

A. I guess it depends on what form the float takes, and it could take any number of several forms. It could be a float of Ten. It could be a float of Selli and Donholken. It could be a float of DSK. I don't know at this point. Certainly if it is a float of Selli or Donholken, they would obviously be involved in that decision. I would think that as a courtesy, in any event, we would discuss with them a float once we got it formulated regardless of which way it would be done.

Q. But you wouldn't need to discuss it with them?

A. We might not need to, that's correct.

¹²⁷Lerner Transcript p25:

Q. But you're anticipating that Selli and Donholken will join with CanWest in the float proposal?

A. Yes. We haven't discussed it with them yet, but we could compel it through DSK as a float. DSK can't do it on its own because we're from the wrong country, but I think that as part of a float, if Australia owned DSK, it could be done, yes.

¹²⁸ Strike Transcript p31:

Q. Just going back to the call option, I understand that you're talking about instability in TGL, the hysteria, I think you used that word. If in the event that Mr Leibler and Mr Skala started exhibiting what you call hysteria ...what would the options be for DSK or for CanWest in those circumstances?

A. Well, we're talking quite hypothetically here, obviously.

Q. Was thought given to that when the documents were drafted?

A. I don't think so. I don't think so, but hypothetically, speaking hypothetically, I mean, the structure could be replicated. You just superimpose a new Selli on top of Selli and have Selli owned by different Australians exercising the debentures and so on.

Q. Would that be by removing Copplemere and Leibler Media Holdings as the shareholders?

A. Yes.

Q. How would that be achieved?

A. Through the transfer of DSK to an Australian and the Australian exercising the debentures and call options.

Q. And then the same structure on top of that with CanWest involved financially?

A. It could be or it could be a different structure. I mean, it could just be an outright sale.

¹²⁹ Strike Transcript p.39.

¹³⁰ Skala (2) Transcript p51:

Q. Does that cause you any concerns in that if you decided, for example, that your financial interests lie in Selli having a long life, you wouldn't necessarily be able to deliver that?

A: As I said last time when I was here, you can't identify this out of context. The context in which I'm looking at this is, remember, that I've negotiated a sale at \$13 a share and this is extras, and so if I get an outstandingly good result as a result of Selli having a long life, that's a bonus, and if I get an outstandingly good result because Selli has had a short life and there's an upside, that's a bonus; and if financially Selli has a long life and it doesn't make me that much more money, I'm still happy because I got \$13. Finally, I suppose, to complete the four options, if Selli has a short life and I don't make much money out of it, I still got a good deal, because I got \$13 on day one. So we are in the area of, I suppose, in a colloquial sense, the cream of the transaction. Naturally I'd prefer more cream than less cream and I'm not indifferent to it, but I really can't complain, because I look at the whole transaction and say, "I start this with \$13 a share and the rest of this is extra"

¹³¹ Asper Transcript p7:

A. ... Mr Leibler had been hot and cold for about a year, so it's hard to pick the date that he actually - there have been times - there have been times when - when we say - when I say Mr Leibler I talk about his lawyer, Mr Skala, or his partner, because I never talked to Leibler. My connection to them was in the conversations I had at the board with Skala.

Leibler Transcript p4:

A. ... I know that in the last 12 months I have only spoken to Mr Asper once.

¹³² Skala (1) Transcript pp 64-65:

Q. Would you be happy with a proportional representation of CanWest nominees in this sub-committee if you were in that position?

A. You mean on the assumption that there were votes and it was two-fifths of the vote?

Q. Yes?

A. I can't see a reason why not frankly. The CanWest directors are pretty knowledgeable, experienced. So provided that there is a - it makes sense to use the abilities and skills of these people. It doesn't not make any sense from the company's point of view not to use

this. So I don't have a difficulty with that. I think they are very valuable. They are smart and know what they are doing. They are good operators.

Q. So in the main you would agree with the approach they have taken - how do you come to the view that they are good operators?---They are clever people. I mean, you know, sitting in meetings when there are discussions they are intelligent in their approach to business strategy, business decisions. If you ask questions, you get very good responses based upon experience, experience of what has happened not only in this market but experience of what is happening in international markets. I mean, they bring a great deal to the table, frankly, from the perspective of an Australian company. They bring enormous experience of the whole industry and their advice, you listen to their advice. You don't always have to take their advice but you certainly listen because these are people who actually know what they are doing in this business. They have got views you would want to consider.

¹³³ Skala (1) Transcript p64:

Q. So generally when they have expressed their views you have agreed with the suggestions or the approaches taken?

A. No.

¹³⁴ Skala (1) Transcript p92:

Q. Apart from the float has CanWest expressed any view about the future direction of Ten?

A. Only I think in the sense that we need to think about corporate development, seriously think about corporate development which I don't think is anything different.

Q. Your views would accord with that?

A. Absolutely, I think that you will find that every director of the network thinks that we really need to think about it, we really do.

¹³⁵ Leibler Transcript p18:

Q. Do you understand CanWest to believe that you have similar views about the future of the company to themselves?

A. You know, if I'd have spoken to them I could answer that, but I don't really know. I mean I certainly have not been seen as an extension of CanWest at board meetings, if that's the implication. How they see me - you'd have to ask them. I imagine they wouldn't see me as a great enemy. It would be rather absurd if I suggested that, but I'd be very - I wouldn't be very flattered if they felt that I was a stooge.

¹³⁶ Asper Transcript p20:

Q. Were there any special characteristics about Skala and Leibler that you were happy to allow them to take the voting rights?

A. Well, at that time, they were the only game in town, because you had - the only - the only residual shareholders you had were they. TNQ was off, threatening to do this thing, and Whyte and Cowin were off threatening to do something else, and Singleton was going home. There was only one game in town, having been turned down by institutions - that was Leibler and Skala. That's the plain fact of it. Am I happy that they did it? Yes. They've been - to the extent Leibler's been involved, which has been limited - he's a very, very solid guy - good director; tough, and Skala has now become, after four years, because he has always been there - he's become a very solid, you know, steady - because he's a lawyer, he contributes a lot more than a director normally does, and now he also knows the business, so, yes, they're both good directors. In fact, I spoke to Leibler last night for the second time in 12 months, or 13 or 15 months, about really getting involved, and I'm happy to say that I think we'll really get them involved - I'm starting to feel good about it.

¹³⁷ Strike Transcript pp19-20:

Q. In terms of the ultimate structure that did come about for the sale of the TGL holdings held by Copplemere and Leibler Media Holdings, could you describe how that came about?

A. Well, I guess that came about --

Q. -- and your role in it?

A. It came about as the result of us designing the structure. As I said, when I was here in September/October, I approached several people. I approached AMP to be the nominee. I had some discussions with Macquarie Bank to be the nominee. AMP was not interested for their own reasons. Macquarie - we had the opportunity to design a much more attractive structure from our standpoint with Macquarie Bank, but it was just too complicated. So I was running - I had to find some nominees, and it was logical, in my mind, to discuss the possible prospect of becoming a nominee with Leibler and Skala, because they were shareholders of Ten already. They, I think, shared a similar vision of Network Ten that we did. So I initiated discussions with Skala, because Leibler wasn't in the country, he was in Israel, to see if they had an interest in participating as nominee.

¹³⁸ Strike Transcript p36-37:

Q. Was there any understanding about how the voting rights in Selli would be exercised or the voting rights that Selli had in TGL would be exercised as a result of this arrangement?

A. Well, it was quite clear from my perspective that Leibler and Skala were going to exercise those voting rights in their own discretion.

Q. Was there any understanding between CanWest and Leibler and Skala in relation to that issue?

A. Well, the understanding that I had with Skala was that those guys voted those shares; we had no influence. It wasn't just a tacit thing. I was quite clear on that.

Q. Are you saying you had a conversation about this issue?

A. Yes, I spoke to Skala.

Q. When was that?

A. I'm not sure. At some point I spoke to Skala and told him, "Look, you guys are the principals of this company. You vote those shares the way you want to vote. Never think that CanWest will exert any influence on that", and quite clearly the documentation runs that way too. It was very, very clear.

Q. When you said that, would you have been anticipating that if they were free to exercise their voting rights in the way they chose, there wasn't much risk to CanWest from them doing so?

A. I don't know if there was a risk or there wasn't a risk. I think that Leibler and Skala just as individuals see the operation of Ten more or less the way we do. Would they vote their shares in accordance with what we thought or would they look to us before they dealt with their shares? No, I don't think they would ever do that. Was there a risk? Of course, there is a risk.

Q. But you would have evaluated risk as being minimal, is that the case, with Leibler and Skala?

A. Certainly I think the risk with Leibler and Skala is less than with Robert Whyte.

Q. That was a reason for choosing Leibler and Skala and asking them to be nominees?

A. Clearly their conduct and their views of Network Ten would suggest that they see the development of Ten more or less the same as we did. We have a very strong feeling corporately that Network Ten should pursue development opportunities. I think if you talk to Skala and Leibler, they would see it the same way. That's the way to maximise value in Network Ten. Would they necessarily vote the same way as we? I don't know.

¹³⁹ Strike Transcript pp 7-8:

Q. Have there ever been occasions that you can recall where his views have been at odds with your views?

A. Sure, lots of times.

Q. Could you detail any of those?

A. There was one I was at about a year and a half ago when Mr Skala came to the board meeting having reported that as a member of - that - actually, no, it wasn't - he was at the board meeting. The morning of the board meeting in the newspapers the directors had read that Capital Television had just sold its Canberra affiliate to Southern Cross and Mr Skala and Mr Warren Lee were TGL representatives on the Capital board and we'd had no forewarning of the transaction. I might say that all the directors were quite upset with Mr

Skala and Mr Lee at that point. They felt that they had some sort of fiduciary obligation to maintain the transaction as confidential and certainly other members of the board, myself included, took a very different view of the transaction than they did.

¹⁴⁰ Strike Transcript pp7-8:

Q. Are there any other occasions that you recall?

A. Not directly. I understand that at a recent board meeting - I think it was in December - our representatives at that meeting had proposed an investigation into the fairly frequent leaks of confidential board matters to the press and certainly we got support from no other director at that point. I believe Mr Skala was at that meeting and he did not support that. So there were frequent occasions where everyone disagreed on certain matters.

Q. Apart from those two occasions, can you recall any other?

A. Those are specific recollections. I'm sure there were other occasions.

Q. But at this stage you can't --

A. No.

¹⁴¹ Leibler Transcript p10:

Q. ... given that you do have the voting rights associated with the Selli shares, how would you exercise that, those voting rights or your proportion of them given you do not have the same economic incentive that you would have done in the past?

MR MANETTA: I have trouble understanding the question? How would you exercise voting rights if you do not have economic interest.

Q. Do you understand the question, Mr Leibler?

A. I understand that question, there's an ambiguity about it but I'm prepared to tackle it in my own primitive way and I apologise if I'm not going to give you the answer. I am just in the midst of a massive confrontation on my own board with the responsibility of directors to be directors and look after the interests of the company and that's the way I would be exercising my interest as a director in what I consider to be the best interest of the company as a whole and the best interests of Channel Ten. If that's a simplistic answer to what you're seeking I apologise, I'm not trying to be funny but I'm quite serious about that because I'm right in the midst of threatening some of my own directors that if they don't act in the interests of the company they're going to be in very serious trouble by law so, yes, that will apply to me in this context too.

Q. Would you describe your position as in any way analogous to an independent director of a company in this situation?

A. What is the concept of an independent director? What is an independent director? If you're saying, do I have an allegiance to anybody, no, so if that's your definition of independent I'm independent, very independent.

¹⁴² Leibler Transcript p18:

Q. Do you understand CanWest to believe that you have similar views about the future of the company to themselves?

A. You know, if I'd have spoken to them I could answer that, but I don't really know. I mean I certainly have not been seen as an extension of CanWest at board meetings, if that's the implication. How they see me - you'd have to ask them. I imagine they wouldn't see me as a great enemy. It would be rather absurd if I suggested that, but I'd be very - I wouldn't be very flattered if they felt that I was a stooge.

¹⁴³ Strike Transcript p26

¹⁴⁴ Asper Transcript p16

¹⁴⁵ Strike Transcript p66:

Q. What were some of the other major considerations?

A. However, there was still a concern that - you know, strange things happen. You don't know who could buy shares for whatever price, for whatever strategic or mischievous reason. They could be sold to Packer, they could be sold to Stokes, to Seven, to Nine. There is any

combination of possibilities that would cause a fair degree of consternation at the board level of TGL, at the management level of TGL. There's just that uncertainty that surrounds letting new shares go through a pre-emptive process and not knowing where they are going to land, those sorts of considerations.

Strike Transcript p30:

Q. Did you have any concern about any new shareholder coming on board as a result of that process?

A. Well, certainly. One of the concerns would be that there would be shares trading in the public domain that would be easy to take over. I mean, who would do that? Maybe Packer takes control of the trust, maybe Murdoch does, Stokes does - who knows? The worst thing you can do is have one of your competitors show up at your boardroom table one day.

Q. That was a consideration also?

A. Certainly.

Q. To prevent anyone else taking control of TGL?

A. Well, someone whose interests were opposed to the interests of Ten.

Q. What about opposed to the interests of CanWest?

A. I'm not so concerned with --

Q. Does that also follow?

A. I think that follows naturally, you know. I mean, it is a scary thought to have one of your competitors show up at your boardroom table and start discussing the cost of programming with you or the future or your network. I mean, it's terrifying.

¹⁴⁶ Strike Transcript p90-91:

Q. You said before that one of the considerations that you took into account in agreeing to nominate Selli to take the Audant and Corom shares at \$15 was the possibility of a new shareholder coming into the pack. You mentioned the possibility of a Packer or Murdoch or Stokes or that sort of shareholder coming in?

A. Mmm-hmm.

Q. First, would you agree that those shareholders couldn't in fact be involved with Ten because of the cross-media rules?

A. Yes, that's probably right. I just used them as examples as opposed to real --

Q. Is what you are really conveying in that answer that you are concerned about others coming in to CanWest per se and exerting an influence or upsetting the applecart?

A. No, I'm not so sure it's a concern that someone comes - I guess it is a concern that someone could come in and upset the applecart but not necessarily from CanWest's perspective but from Ten's perspective. It is quite conceivable, and I've seen it happen in other cases, where a shareholder arrives on the scene and its interests are completely opposite to the interests of the company. The "company", not being CanWest but Ten. It is a shareholder that once they arrive, I mean, they're there. It is hard - you know, it could be a Packer. It could be a Packer nominee. Who knows who it could be?

Q. But Ten's and CanWest's interests are very closely related to each other, aren't they, in this particular situation?

A. I don't know whether they are closely related. I'd like to think that they similar. We are both broadcasting companies. I mean, what's good for Ten and all of its shareholders is naturally good for CanWest.

¹⁴⁷ Lerner Transcript p 15:

Q: What was your original understanding of CanWest's original intention or purpose in establishing a structure?

A: The Cowin & Whyte shares and the Selli shares were offered on the pre-emptives. If nobody had taken them up, we don't know what would have happened for sure. People were talking about different forums or floats, a multiplicity of floats, and CanWest felt that

it was better for CanWest, TGL and everyone concerned that things be done in a better fashion. We weren't able to do that ourselves, so we had to obtain Australian purchasers to do it.

Q: Why were you concerned about those parcels of shares going off to people other than people that were already existing shareholders of Ten?

A: You mean just to anybody?

Q: Yes.

A: Proposals had been made by various shareholders at various times on various means of floating. There were two trust proposals. TNQ had wanted a float. What we were facing, all of us, were two or three potential floats out there, separate ways by which the market could get into Ten. It was just chaotic. We felt it wasn't in our best interests for the price of Ten's shares on the market in Australia to be depressed or to be undercharged because Ten was obviously a major asset for CanWest and any diminution in value reflected here would probably show up in a price somewhere else.

¹⁴⁸ Lerner Transcript p15:

Q: Were you concerned about new players coming in and the influence they may exert?

A: I don't set the policy for CanWest, but I think it was more the chaos because that's all I ever heard about. I never heard a particular name like, "Let's keep so and so out", or something like that. No, I don't think so.

¹⁴⁹ Asper Transcript p26:

Q: So what was the motivation for cleaning up the bits and pieces?

A: Well the motivation was that all shareholders who wanted to coalesce their shares into a consolidated group for the purpose of, well, from CanWest perspective, for the purpose of creating that critical mass that I referred to earlier, would be given the opportunity to do so.

Q: So was that, at the time of acquiring those shares, was that an intention of CanWest's or to attain that critical mass, to be able to float the company? The critical mass you are talking about is the 52 per cent voting rights?

A: No, it differed. In the case of Singleton as I said, there was no option. In the case of Leibler/Skala, we felt there was no option and once that was done it seemed logical to bring anyone else who was a seller into that group as well and so somebody must have approached the Winston people.

Q: You just talked about a critical mass a moment ago. In that context what were you referring to?

A: No, it is the critical mass I've been referring to for several years, that putting together a sufficient body of shares to be - the critical mass - to be able to make a meaningful offering to the public, has always been a CanWest objective. We thought it had been there five or six times amongst the existing critical mass and it had fallen apart every time, so a new critical mass was being considered which was cornerstones for Singleton and - no one had any idea that Whyte and Cowin were going to put their shares up for sale. That came right out of the blue.

¹⁵⁰ Strike Transcript p 67:

Q: What did you say?

A: The same things we just talked about, I just spoke about. I said, "Here is an opportunity here to put together in Selli a block of shares that rivals TNQ's, that's certainly of equal attraction as TNQ's block in terms of floatability. If that ultimately is combined with CanWest's block in some fashion, all of a sudden, it becomes a control block that can be floated to the public and it can probably realise a pretty good premium." I thought the price of \$15 a share was outrageous commercially. I thought it was outrageous because I thought there was an element of them putting a rail on the fence with a price to make sure that no-one could jump over.

¹⁵¹ Strike p92

¹⁵² Lerner p16

¹⁵³ Skala (1) Transcript p57:

Q. Were there any periods where you disagreed with anything that CanWest suggested?

A. Oh, even recently, sure. I mean, I think - not so much in the board meetings but in other contexts. I mean, I have received letters from CanWest talking about amendments to the articles and saying, you know, requiring shareholders you know, not to vote in favour of them and giving undertakings in connection with voting in particular ways.

Q. Would you be more specific?

A. Sure. I mean, the current thing that is going on now, I think that Clayton Utz has written to the shareholders at TGL seeking undertakings about how we would vote, that would be at a general meeting, sort of asserting that - - -

Q. At the general meeting of TGL?

A. Yes.

Q. Yesterday?

A. Yes, yesterday, for saying - you know - for certain undertakings to vote in favour of the articles to be included in the shareholders agreement. My instructions to Jane to write back was to say that terribly sorry, we won't give undertakings like that, it's absolute nonsense what is being sought.

Q: Did you want to vote in favour of those changes?

A: No, but I certainly was not going to be giving undertakings as to how we were voting one way or the other.

¹⁵⁴ Strike Transcript p31:

Q. Just going back to the call option, I understand that you're talking about instability in TGL, the hysteria, I think you used that word. If in the event that Mr Leibler and Mr Skala started exhibiting what you call hysteria... what would the options be for DSK or for CanWest in those circumstances?

A. Well, we're talking quite hypothetically here, obviously.

Q. Was thought given to that when the documents were drafted?

A. I don't think so. I don't think so, but hypothetically, speaking hypothetically, I mean, the structure could be replicated. You just superimpose a new Selli on top of Selli and have Selli owned by different Australians exercising the debentures and so on.

Q. Would that be by removing Copplemere and Leibler Media Holdings as the shareholders?

A. Yes.

Q. How would that be achieved?

A. Through the transfer of DSK to an Australian and the Australian exercising the debentures and call options.

Q. And then the same structure on top of that with CanWest involved financially?

A. It could be or it could be a different structure. I mean, it could just be an outright sale.

¹⁵⁵ Mr Strike Transcript p.33 (insert lines 38-46)

¹⁵⁶ Clause 4 of Schedule 1

¹⁵⁷ Strike Transcript p74:

Q. So when was it that you first started to discuss the possibility of a company other than Selli acquiring the Audant and Corom shares?

A. I don't know. It was sometime over the Christmas period in December, because a couple of things were becoming clear. One was that a separate company financed by CanWest wouldn't create the same problem of association in the corporate law that was giving rise to this issue. So there was a clear-cut way around it that didn't require some sort of a, you know, debate or negotiation or interpretation of the share subscription agreement - it was just a clear-cut alternative that didn't involve Selli or setting up a new company with new principles.

Q. Where did that idea come from to your knowledge?

A. I think it came from someone at Clayton Utz - I'm not sure who. Anyway, one of the options that was articulated to us from Clayton Utz was that that was available and that that would be a clear-cut unequivocal solution to the issues raised by TNQ's lawyers. So the choice at that point was to decide whether to proceed with the Selli closing or to see if we could set up a different structure similar to Selli with different principles and use that to close and we had numerous discussions, not just with Selli, but also with Whyte and Cowin's lawyers, Gilbert & Tobin, because obviously they have a stake in which transaction was preferable from their standpoint.

Whyte voiced some concern about closing with Selli, and over the course of Christmas and New Year it was decided that the best course of action was that Selli would not close; it would forfeit on closing; Whyte and Cowin's companies would not be held liable for damages for not closing, but would then close with another company, finance buyers.

¹⁵⁸ Skala Transcript (2) pp32-3:

A. CanWest asked me whether I knew of anybody who was not associated with me who was, you know, honest and, you know, of appropriate reputation who was a person who was trustworthy, who understood that there was a potential business opportunity here, but what they had to do was, you know, they can control and own the votes, own shares and have the votes, but the economic interest would sit with CanWest. So did I know of any such person who may be interested in a proposition such as that.

¹⁵⁹ Lerner Transcript p6:

Q. Did Mr Strike ask you to do anything in relation to this problem?

A. I'm not sure if Mr Strike asked me, but certainly we talked about locating another purchaser, yes.

Q. When was this conversation?

A. Again, no later than two weeks prior to closing or no sooner to closing; yes, it was within the two weeks of the closing schedule.

Q. What did you do following that conversation?

A. I had telephone conversations with - it had to be an Australian purchaser. I believe I had conversations with our counsel. I was already in either St Maarten or Toronto, I'm not sure which. At that point I contacted our counsel to see what the parameters were. I then spoke with - I probably spoke with Steven Skala concerning the whole matter of the closing and to see whether he was aware - because I'm not aware of that many people in Australia - whether there was another potential purchaser.

Q. What did Mr Skala say in that conversation with you?

A. I can't remember the particular conversation, but at some point, whether it was that conversation or a different one, he suggested that I might contact a lady named Melda Donnelly to see if she was interested.

¹⁶⁰ Skala Transcript (2) pp 34-35:

Q. What did you say to her [Ms Donnelly] on Sunday, the 5th of January, when you rang her about this matter?

A. I explained that Selli wished to acquire these shares, but that there was a problem in acquiring the shares, a potential problem; that if she were minded to, if she were interested in engaging in that kind of transaction, there might be a pretty interesting commercial benefit, or business connections, all sorts of things for her if she was interested. I basically explained that there was - you know, I took her through the story of Channel 10 and the shareholding and who was where. I explained the complications of the broadcasting Act, as I understood them, and I also explained the complications of the shareholding agreement.

So it was very important - I explained to her that she and I couldn't be associated or have any agreements and that she was absolutely free and independent to make up her own mind

about these things and that if she was interested in engaging in the transaction, then I'd give her name to CanWest and, in a sense, I didn't want to know any more about it, apart from the fact that I would have liked to know if they were going to complete, because otherwise I would, and I did. She was interested so I put her name forward to CanWest and I explained the kind of work that she'd done in the past, that in my view she was eminently well qualified to be a person charged with --

Q. What was her response to that initial conversation?

A. She listened carefully and said she'd be interested in talking further and hearing what it was about.

Q. Well, what happened next in terms of did she contact you again or did you contact CanWest about her?

A. I contacted CanWest and told them that I'd spoken to her and that she was amenable to conversation. I spoke to her during the week between the 5th and the 10th on the odd occasion and she said that she was going out to - she was interested, she was going to instruct lawyers; I think she told me that she was going to see Bob Baxt at Arthur Rob's and she hadn't made up her mind, but it sounded very interesting and very exciting and a challenge.

¹⁶¹ Lerner Transcript p11:

Q. At that conference --

A. No, I don't think so. At that point, I believe I had to contact Clayton Utz to get going on the documentation because we were two or three or four days from closing. So they did that and then we spoke of the terms, the negotiations, probably within the next 12 to 15 hours after that, I would think.

Q. Who did you speak to?

A. Melda for sure, probably all, but Melda for sure, and I believe it was probably all of them. But by that point, Melda had sort of become the spokesman for the group.

¹⁶² Lerner Transcript p6:

Q. What was your next move following that conversation?

A. spoke to Melda Donnelly to explain that shares were available if she was interested in purchasing them. I explained that we would be prepared to finance - when I say "we", I'm referring to CanWest, obviously - and that seemed - that was sort of - it was a very brief discussion at that point because she wanted to think about it and, you know, she had to go off and see counsel, whatever.

¹⁶³ Kennett Transcript p12:

Q. Do you recall whether he referred to your previous expression of interest in acquiring shares of TGL?

A. Yes, he had did. Because remember I sent a CV. At one point he said, fine, send me a CV. So I sent a CV.

¹⁶⁴ Kennett Transcript pp6-7:

Q. Then after that, when was your next contact with him?

A. Well, that sort of went through to about September or October, you know, to the point that I would have said to him, 'When are you coming to visit?' and he always said, 'Next month' but never came. Then my next contact was a telephone call from him just before this transaction, a few days before, saying, 'Am I interested in purchasing a block of shares?'

Q. But prior to that time had you expressed any interest to him about being involved with Ten or in Ten's business?

A. No, in - - -

Q. Sorry, CanWest's business, sorry?

A. No, not in CanWest, CanWest was, I mean, I didn't know a huge amount about CanWest. It was more Channel Ten which we heard about and I think it must have been towards the

end of when I was still trying to push my thing into Canada. I saw an article (and, there was quite a bit of press about it) how the shareholders were getting a bit itchy. Maybe they'd made too much money or whatever but they were getting itchy. So, I actually said to him, if a block comes up I'd be interested in purchasing.

Q. When would that have been?

A. It's a hard question, I'm just going to guess, I think it's probably September.

Q. September 1996?

A. Last year?

Q. Yes?

A. 1996, yes. I might be out a bit but it's about there.

Q. Would that just have been an oral conversation or did you write him a letter about that?

A. He asked me could I send something to him and I sent a copy of my CV and I think I sent him a copy of an article showing - the article was basically a bit tongue in cheek by the press here saying what Izzy Asper wants is for his children to take over so he can lie on a beach, so that's sort of how I prefaced it, 'So, is this true?' But he did ask for a CV and I sent a CV to him and I didn't hear anything back, I didn't even hear back about the CV.

Q. Did you send any more than your CV, was there a letter accompanying it?

A. Probably a covering - actually I don't recall.

Q. Did you express an interest in acquiring shares in writing?

A. In writing? Yes, at the very beginning.

Q. What did you have in mind when you expressed that interest initially?

A. Basically I don't know what I had in mind. I thought, I guess, that the original shareholders had got in, made a fair amount of money and I thought, well, maybe here's an opportunity. I think that's as far as it went at the time. Sometimes you take a bit of a long shot and you think, what the hell. But if I was a betting person I don't know which way it swings, I mean, as I say, now in hindsight, obviously it worked but at the time I was trying to push this product in Canada and it was bloody hard to get any response.

¹⁶⁵ Kennett Transcript pp8-9:

Q. So, at that time in about September 1996 did you perceive that CanWest had any problems in relation to the shareholding mix at Ten?

A. Yes, yes, that was in the newspaper.

Q. So, you were aware of that at that time?

A. Yes. That is what started me thinking of this perhaps pie in the sky idea because I guess that it's a fairly closed shop, if you're invited in, that's very nice. Just like in any of deals, in fact, most of the deals we tend to do today, it tends to be fairly difficult to get in.

Q. Did you understand the nature of their problem at that time? What did you understand the nature of their problem? What did you understand of the nature of their problem at that time?

A. That's a good question, you see, in hindsight I now know what their problems were all about. But at the time, I don't think so, no, I wouldn't have known enough about the transactions and things. But what was my perception?

Q. Yes, what was your perception in very simple terms?

A. In simple terms, I think the shareholders had made extraordinary amounts of money and wanted to get out.

Q. But why was that a problem from CanWest's point of view? That is in the context of what was your understanding at the time?

MR ROBSON: Back when the newspaper articles were published.

A: Yes, in September or whenever it was?

Q. Yes?

A. I'm trying not to cloud it with what we know today.

Q. Was it related to the fact that CanWest were a foreign person?

A. No, no, I didn't really know too much about the foreign - well, that was probably one of the - I think that I would've known, I'm sure I would've known that CanWest wasn't able to buy more. Otherwise, I wouldn't have asked anything I'm not sure, but probably CanWest would have just gone out and bought it themselves. So, it must have been in that context that they were at their limit and - no, I really don't recall what was going through my head.

Q. Are you an Australian citizen?

A. Yes.

Q. At that time did it occur to you that, as an Australian citizen, in purchasing some of those shares, should they become available, that might have assisted CanWest with its problems?

A. Yes, yes, yes - but I'm sure I didn't know all the intricacies of, you know, of what was going on. I must admit that the press actually seemed to be - you know, now thinking back - the press was actually quite accurate, I think, on a lot of this, a lot of what was, you know, written about the sale. Probably my impression was exactly the same as that at the time; hasn't changed.

Q. Who was it from CanWest that contacted you in relation to this recent transaction and the possibility of you purchasing shares?

A. David Asper, that first conversation.

Q. When was that?

A. That was on - can I just grab my diary - - -

Q. Yes, please do?

A. Otherwise I will be completely wrong on that.

Q. Your diary?

A. Exactly - just to get the dates and things. So David Asper gave me a call and that would have been on 7 January; gave me a call, asked me am I interested.

¹⁶⁶ Lerner Transcript p6.

¹⁶⁷ Lerner Transcript p7.

¹⁶⁸ Hollis Transcript pp8-9:

Q. When did CanWest first approach you in relation to their desire to find a purchaser for the TGL shares which Corom and Audant were trying to sell?

A. I think it was Tuesday, 7 January.

Q. Who was it that approached you?

A. Yale Lerner phoned me.

Q. What did he say to you?

A. He said the shares were being - had been put up through the pre-emptive rights, in other words they were on offer, and that there were two other individuals in Melbourne who had expressed interest in purchasing them with a loan from a CanWest subsidiary, and he wanted to know whether I would like to participate in that.

Q. What did you understand your participation would involve?

A. To be a one third shareholder of the company and that was it really.

Q. What was your response to that?

A. I said two things, what is the up side and what is the down side.

¹⁶⁹ Hollis Transcript p10.

¹⁷⁰ Hollis Transcript p11.

¹⁷¹ Donnelly Transcript p21.

¹⁷² Donnelly Transcript p25.

¹⁷³ Donnelly Transcript p26.

Kennett Transcript pp16-17.

¹⁷⁴ Donnelly Transcript p28.

¹⁷⁵ Donnelly Transcript p30.

¹⁷⁶ Hollis Transcript p12

¹⁷⁷ Kennett Transcript p28

¹⁷⁸ Donnelly Transcript p33.

¹⁷⁹ Donnelly Transcript pp32-33:

Q. During the week of the 5th to the 10th of January and particularly later in that week what did you understand as to Selli's position in relation to Audant and Corom?

A. I understood that Selli had - was in a position that it would have to settle the shares by a certain time, whether that's made an offer or I don't know what the right dealings would be for that.

Q. But that was midnight on the Thursday; is that your understanding of that?

A. Yes; that's correct and that time transpired so that our method of buying was no longer under pre-emptive rights but under a three-month clause or something under the TGL agreement.

Q. Did it come to your attention that it was possible that Selli may still complete that transaction?

A. Yes, it did.

Q. When and how did that come to your attention?

A. As Thursday was progressing so fast, and our documents weren't completed, it became clear that there was an obligation on them to settle if we weren't buying.

Q. And what reaction did you have to that? Were you concerned that that might go ahead and that Donholken might not go ahead?

A. Not concerned, no. I realised that could happen, but I - if we couldn't get the documents done and be satisfied they were right, my preference was not to be in it. I wasn't going to be shortcircuiting anything just because of that.

¹⁸⁰ Skala Transcript pp38-40.

¹⁸¹ Strike Transcript p80:

Q. CanWest had an obligation to advance the money to Selli, didn't it, as a result of the nomination and the acceptance of the nomination by Selli?

A. That's right.

Q. How was that set aside?

A. I don't know if it was set aside formally in terms of documents. I'd have to look at documents or ask my lawyers. But certainly it was agreed between us and Selli that - it was agreed between us, Selli, Corom and Audant, ultimately, that - because there were two things happening here. One was that CanWest had nominated Selli and Selli had accepted, so Selli had to be released from its obligation to close and CanWest, through DSK, had to be released from its obligation to fund Selli and through some form of mutual agreement - I'm not sure what form it took; I'm sure it's in writing some place, given the sensitivities amongst the various parties - those obligations were released and concurrently Audant and Corom agreed to sell their shares on the expiry of the pre-emptive process to Donholken and Donholken to CanWest.

¹⁸² Lerner Transcript p 12:

Q. So you entered those negotiations with a view to coming out the other end with something very similar to Selli?

A. That's what we were prepared to finance. Had they come up with something different, we might have entertained it, but it was just a matter of being terribly close to closing and to have to go out and get new opinions and stuff was going to be a problem.

¹⁸³ Donnelly Transcript p35.

¹⁸⁴ Strike p67

I thought the price of \$15 a share was outrageous commercially. I thought it was outrageous because I thought there was an element of them putting a rail on the fence with a price to make sure that no-one could jump over.

¹⁸⁵ Strike Transcript p.68

¹⁸⁶ Strike Transcript p67.

Q. What did you say? (to Mr Skala)

A. The same things we just talked about, I just spoke about. I said, "Here is an opportunity here to put together in Selli a block of shares that rivals TNQ's, that's certainly of equal attraction as TNQ's block in terms of floatability. If that ultimately is combined with CanWest's block in some fashion, all of a sudden, it becomes a control block that can be floated to the public and it can probably realise a pretty good premium." I thought the price of \$15 a share was outrageous commercially. I thought it was outrageous because I thought there was an element of them putting a rail on the fence with a price to make sure that no-one could jump over.

I said that CanWest had ultimately come to the conclusion that there was some financial commercial reason for doing that. It lay in the fact that Selli itself had had 37 per cent of the shares. It lay in the fact that if we combined the two interests into a single float vehicle, we would have a control block to float.

¹⁸⁷ Donnelly Transcript p17:

Q. Were the merits of that price discussed by Mr Skala or Mr Lerner?

A. What do you mean?

Q. Whether the price was a good price or too high?

A. Not that I recall, but at some point, whether it was then or later, I knew that that was a good price, because in factoring in whether we would make money on the upside, we would obviously want to know whether the purchase price related to any future price increase.

Q. How did you come to know that was a good price?

A. Purely from the history that became available that, you know, they'd bought the shares for \$1 and \$15 was the highest price paid to date. It seemed really good. And the last price was \$13, as I recall.

Q. Sorry, when you said a good price before, I thought you meant a good price for the new company to purchase at, rather than a good price for the disposing interests to sell at?

A. I recognise that the purchase price was the sell price, that part of these people selling was that the price was good.

Q. For them as sellers?

A. Yes.

Q. What about the aspect of whether it was good for the new company as a buyer - was that something that was discussed with you or whether there was conversation about that either in the initial conversation with Skala or this initial conversation with Lerner?

A. No, it wasn't discussed with either of them.

¹⁸⁸ Donnelly Transcript pp17-18:

Q. What did you find out and how did you find out about the price history, if I can say that, about TGL shares?

A. I couldn't tell you who told me. But I found out. It might have been Clayton Utz solicitors. It might have been Arthur Rob's after I talked to them. But I did find out that the price had gone from \$1 in four years to \$15.

Q. Become aware of what the actual price for TGL shares had been for transactions completed during 96?

A. Yes.

Q. And what did you become aware of in that regard?

A. That the shares, certainly the last lot of shares, were \$13, that I recall.

Q. When did you become aware of that?

A. I couldn't tell you. I mean, those few days were sort of so non-stop, I can't recall which day was which.

Q. Did you become aware of it before the transaction settled - the Donholken and Corom transaction settled?

A. Yes.

Q. Did that influence you in thinking that \$15 was a good price for Donholken to purchase at?

A. It influenced me in two areas - one, that at that price there was a seller and that that price was a key point in the sale, actually having got to the point of entering into the last 14 days after pre-emptive clause. And it also influenced me from the point of view of seeing that people with an economic interest, CanWest, saw that the company had good long term value.

Q. So is it fair to say that you got a degree of comfort from the fact that CanWest, who had a significant economic interest, were willing to finance the transaction at the price of \$15?

A. "Comfort" wouldn't be the word, no. It was the fact that - I'm very market oriented, so that at that price there's a market, and that certainly leading up to that price, this sell had been escalating.

Q. So what inference did you draw from that?

A. That there's value in the company to precipitate purchase at that price.

Q. Did you ever have any concern about them paying the price of \$15, that it might be too high a price?

A. No, I didn't.

¹⁸⁹ Hollis Transcript p19:

Q. Did you have any discussion about what price might be paid for those TGL shares with your other shareholders?

A. It wasn't really a discussion because the vendor had said it would sell at \$15 and so I didn't think it was negotiable in that sense.

Q. Did you have any view about the reasonableness of that price?

A. Clearly it was the highest price so far paid for the shares, that's fact. I believe that the share price, the inherent value is actually worth more than that and I hope it goes up. I mean, I certainly don't think, I'd hate to feel I'd bought at the top of the market. TENs got a long way to go still and it's got to do a number of things to enhance its share value in my opinion. But I believe the recipe for success is there so even though it might seem at this stage, that that's a lot, the same was said when it was valued at \$8 and then \$10 and then \$12 so I believe it will go up.

Q. I mean, did Donholken have any realistic choice about what price it was going to pay from your understanding of the transaction?

A. We never discussed the share price and maybe because it was a fait accompli that they would only sell it to us at \$15. If I recall, and this again was through the press, they, the vendors believed that if an existing shareholder didn't purchase they would find people outside to purchase, so in other words they felt it was market and therefore if we didn't want it at \$15 they would have said, thank you, we'll go sell it elsewhere. That was what I believed.

¹⁹⁰ Hollis Transcript p20:

Q: Well, did you make any assessment of whether \$15 was a fair market price? I think you have said - - - ?

A: Yes, I had been - it was certainly the top of the market at that time but certainly fair. Brokers' reports that had come out just before and after that kind of, what's the word, supported that, you know, it was not unreasonable. And that's all I could go on. I mean, I don't know the inner workings of the company to be able to do a valuation myself.

Q: Did you - what matters did you take into account at the time? I mean, was it really a consideration? Did you take those matters into account?

A: In terms of valuation?

Q: In terms of valuation?

A: Yes. I think certainly in my own mind I felt that again while \$15 was at the top of the market it was not unreasonable, it should pass that, other brokers and analysts had felt the same. I know that, we know that J.B. Were was looking at it; the share price as I

understand it to them was not an issue, and so I felt quite comfortable that that was reasonable even though everybody would like to pay less. It wasn't a huge premium on what the market would sustain.

Q: If the shares were over-priced, do you know how it would affect Donholken and yourself financially?

A: Mm. Part of protecting the down side was to ensure that the loan was non-recourse. As I understand it if the underlying asset, being the shares in TGL, drop in value our commitment to repaying the original funds lent would also be reduced accordingly. So of course that gave us some comfort.

¹⁹¹ Kennett Transcript pp13-14:

Q. Was there discussion in that conversation about the price that this new company would have to pay for the shares?

A. Yes. It was stated to be \$15. My response back was it was pretty steep and basically that really was not a negotiation, a negotiating issue because under the pre-emptive rights, the price is nominated and CanWest has the right to nominate or choose someone, you know, for the shares but - - -

Q. Did Yale explain that to you or how do you know- - -?

A. No, no, he explained it. Yes, explained it.

Q. I am just trying to clarify what your account is and what he told you, which is what I am after here?

A. No, no, he explained, yes.

¹⁹² Kennett Transcript p15:

Q. So, would you say that the \$15 price would only be a fair price for Donholken if you held onto that asset for some time?

A. That's a leading question, and I can't answer that. I think - you know, if you took a graph as to where it started and where it ended - sorry, where it is now, that the price that has been going up like this so, you know, if you kept along with the graph, want to keep it for five years and it would be worth \$30. So all I knew was that it was a price that was pretty full. In other words, if it floated today it might get there at \$15, might be less, might be more but in a few months from now or few years from now, I don't know. It's hard to -

¹⁹³ Kennett Transcript p14:

Q. Sorry, what did you understand would happen to your interest after six to seven months if it was floated?

A. There was no discussion on that and of course, what went through my mind is that if CanWest is steering towards a float, that's not necessarily what would be good for us because, you know, if they floated it in six months at \$15 that's not necessarily our goal. Our goal is maybe to wait three years until it's \$20 and make some money. So we didn't really talk about the float. Subsequent to that, having sort of learned a bit more about the history - it's been so complicated this float issue, you know, different people wanting to do different things that it's sort of an issue that, you know, when it's presented to us at the Board by management or by one of us in the various committees, how to do it and it looks good, then we'll decide. So it's not such a simple answer, sorry.

¹⁹⁴ Lerner Transcript p13:

Q. Did it concern you that you didn't get the call options with Donholken whereas you did with Selli?

A. Personally? Not terribly.

Q. Or in a corporate sense?

A. It would have been nice. It would just make it easier, once the float proceeds, to know that you have 100 per cent subsidiaries. But, no, I didn't lose any sleep over it, put it that way. Maybe I should have. No, I don't think so.

¹⁹⁵ Lerner Transcript p12:

Q. Do you recall specifically what protections they sought?

A. In the Selli deal, there had been a call option, which their counsel didn't want to give, so that was eliminated. They wanted to be sure that the financing that Drei Sterren Kapitaal gave them was sufficient to cover costs as well as acquisition. So that was a point. That was probably about the most important, as I recall.

¹⁹⁶ Lerner Transcript p12:

Q. Were they successful in negotiating the outcomes they wanted?

A. Yes, yes.

¹⁹⁷ Lerner Transcript p12:

Q. Were there any things that they sought which you wouldn't agree upon?

A. Yes, but you're going to ask me and I can't remember which ones because I only remember some. There were a few points that we felt just weren't commercially viable for us and I can't remember what they were right now.

¹⁹⁸ Lerner Transcript p12:

Q. Did you approach the task of finding a new company or a new purchaser with a view to establishing a structure legally and commercially similar to what the Selli structure had been?

A: Yes

Q: At the end of the day, you ended up with something fairly similar to Selli; is that your understanding?

A: yes

¹⁹⁹ Donnelly Transcript p23.

²⁰⁰ Donnelly Transcript p24.

²⁰¹ Donnelly Transcript p25.

²⁰² Donnelly Transcript p25.

²⁰³ Hollis Transcript p12:

Q: Why was it that you thought it necessary to seek independent legal advice, why did you not just have Arthur Robbs act for you?

A: Arthur Robbs were acting for the company and they have been acting for Melda and Richard in a personal capacity. Arthur Robbs don't exist down in Sydney. My relationship would have to continue with lawyers, unfortunately. I know the office managing partner of Minter Ellison and I felt this is obviously a large transaction both in terms of money and all other ramifications and I felt, in fact, I demanded that I would have my own legal representation. Then since I've come back down here Robert has stepped in where Bart was and you know we will continue talking when necessary.

Donnelly Transcript p21:

Q. What did you do next in relation to this matter?

A. I contacted lawyers to act for me and found that they'd gone on holidays.

Q. And after that?

A. Well, that took all of Monday afternoon, so I talked with Arthur Robinsons and went through the legal process of my receiving the documentation for them to appoint them to act and the documents arrived at their offices, I understand, that night and I met with them at Arthur Rob's the next morning.

Kennett Transcript pp26-27:

Q: So when you went to your meeting with Arthur Robinson's, what outstanding concerns, if any, did you have about the nature of the transaction?

A: I had all concerns because I hadn't seen any documentation at all and the - well now let me just ask - can I just say what the basics were? The basics were really two or three issues: Number 1, commonsense issues. If the thing makes sense from a legal point of view, it was really up to Arthur Robinson to explain the transaction to me from a legal point of view, all the various documents because, I mean, you saw the stack of documents, there were

quite a few and in order to understand them was one thing in itself. Absolutely we talked about - and really at the end of the day most of the advice was given to do with control, who had control, who had a position to control effectively and we retained - Arthur Robinson ... the idea was really to make sure at the end of the day through the documentation - because outside documentation we were controlled but through the documentation, you know, there's stacks of things. We wanted to make absolutely sure that we weren't - so that's where really the - that's where most of the effort went to in all the back and forths. And there were a lot of little changes which, even if you sat down with the lawyer now and went through it, a lot of it is just points of law which didn't make a lot of sense - but we understood the main ones.

²⁰⁴ Kennett Transcript p13:

Q: Was there any discussion with Yale at that time about who those two might be (on the TGL board), those two persons might be?

A: No, that was - he said that was completely up to us to work out. He did explain that - sorry, to just go back - he did explain in that conversation the importance of independence. He said "You know that this is not just a front. Basically we are independent. We have got to be acting as - if we are on the board of Channel Ten, we are on the board of Channel Ten and we are completely independent to do what is best for Channel Ten and forget about any other issues that could happen.

²⁰⁵ Donnelly Transcript p53:

Q: Do you expect to have conversations with him about TGL? (Skala)

A: He'd be the last person I talk to.

Q: He would be the last?

A: Yes.

Q: Why is that?

A: Well, my intent is to act independently and to look as if I'm acting independently. So I would speak with him at the board meetings and if he was the appropriate person to give backgrounds on TGL I would talk with him, but in the full knowledge that the other board members knew.

²⁰⁶ Hollis Transcript p30:

Q. Given CanWest's financial state in Donholken do you feel obliged to take its views into account in how the shares in TGL held by Donholken are voted?

A. Not at all.

Q. Do you feel obliged to take its views into account in Donholken's decisions?

A. What decisions?

Q. Any decisions that it might make?

A. As a board?

Q. As a board?

A. No.

Hollis Transcript pp 31-32:

Q. Having regard to your past associations with CanWest do you feel any loyalty towards their interests in Australia?

A. No.

Q. None at all?

A. Well, what do you mean by loyalty?

Q. Well, if there is a decision to be made, which is in relation to their interests in Australia, CanWest's interests in Australia, having regard to your past association would you perhaps consider their interests more fully than you might someone who you had not been associated with?

A. No, first of all I am not a member of the board of TEN and secondly I'll do and vote and think what's best for me and the company I represent.

Q. You may indirectly be involved in matters that concern CanWest's interests in 10?

A. I wouldn't consider them other than I would do what is best for the company I am in, I have got no - I don't even know what's in their interests.

²⁰⁷ Lerner Transcript p4:

Q. What involvement did you have in devising the structure which was used to acquire TGL shares from Belshaw Pty Limited?

A. I was advising Mr Strike on structure. I dealt with Clayton Utz on structure. I think that's - maybe you could be a bit more specific. I think that's what I did.

Q. That's the kind of thing I'm getting at. Could you describe a bit more fully what you did in terms of that?

A. In setting up that structure, okay. We had meetings and we drew up charts and different, you know, ways that this might be done. It was obviously to make it a compliance with BSA. We had counsel. We met with counsel, QCs as well as with solicitors, in preparing it. Then we refined it and were told that it was fine and that, I guess, was it.

Strike Transcript p27:

Q. Why are they secured? (the debentures)

A. Because we are lending \$100m to another company. We felt that they should be secured. We are financier, you know. In many respects what we were doing was we looked at the TGL debentures as a sort of precedent, if you will, for taking an economic interest, which was not accompanying a company interest, and we tried to design some sort of a structure that was analogous to that because we knew that that didn't attract a company interest under Australian broadcasting law.

However, having said that, I was involved in the design of the TGL debentures and there were a lot of things that I would have much rather had in the TGL debentures that weren't put in place, like security, like a better priority, and I - who knows what the rationale was for having those things the way they were in the TGL debentures, I don't recall, but there were valid reasons at the time.

We explored whether we could improve upon the position and we were advised by counsel that we could, so we thought well, why wouldn't you as a financier to a company, why wouldn't you get the best position you could get. So that meant improving the priority in terms of repayment - do that. If that meant getting security over it in a rational way, then you should do that.

Asper Transcript p20:

Q: So, those companies were all approached to see whether they could - - - ?

A: Sure - and others. We then said, "We're going to run" - "the clock is going to run out", and therefore we'd better look for an alternate of that, and that's when Selli was identified, and some discussions obviously took place between Strike and Skala and Leibler to see whether they would be finished in that transaction, and from there on in my only involvement was to say, "Get Counsel", and you make damn sure that - here we are - but you make damn sure that you've got the Is crossed, the Ts, and have bullet-proof assurance that this is in conformity with the Act - every single - and if you get an opinion, get another one, because obviously we're sensitive, because, as you know - - -

²⁰⁸ Convertible Debentures Deed, Clause 1.

²⁰⁹ Articles of Association of Donholken, Clause 3.4(b).

²¹⁰ Articles of Association of Donholken, Clause 3.5(b).

²¹¹ DSTD:

'Conversion Shares' is defined in clause 1 as follows:

'Conversion Shares' means Class C Shares and Class D Shares or any combination thereof at the election of the Noteholder.

Class C and Class D shares are defined by reference to the Articles of Association of Donholken. Class C shares carry a right to vote [Article 3.4(b)], while Class D shares carry a right to vote

only on resolutions affecting the rights, privileges and conditions attaching to Class D shares [Article 3.5(b)].

'Qualifying Requirement' is defined in the deed at clause 1 as follows:

'Qualifying Requirement' means that either:

- (a) (i) the Noteholder or its Nominee is an Australian Resident; and
(ii) the conversion of the Notes under clause 10 is not in breach of and does not cause TGL, a shareholder of TGL, any Noteholder or any affiliate of a Noteholder to be in breach of Foreign Control and Ownership Legislation or any mandatory directive 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 some or all of the Notes under clause 10 in favour of the Noteholder or its Nominee notwithstanding that such Noteholder or its Nominees is not an Australian Resident.

²¹² Articles of Association of Donholken, Clause 3.11.

²¹³ Strike Transcript p31.

²¹⁴ Strike Transcript p39.

Q. But if CanWest took the view, as it has done in relation to ..., that Skala and Leibler were similarly inclined, what action would you be likely to take?

A. I think our courses of action are limited. I think they really deal with disposition in some fashion of DSK or the instruments, the financial instruments held by DSK. That's the only option that we would have.

Q. Are there any rights that you would contemplate that exist under those financial instruments, exercising those rights?

A. I don't follow the question.

Q. Sorry. Are you saying that there may be rights under the financial instruments which DSK is a party to?

A. No, no. What I said was the only two choices we have was we either sell DSK or we sell the instruments that DSK own. Those are really the only options we have. There's no rights embedded within those instruments that would allow us to exert any influence.

²¹⁵ Kennett Transcript pp50-51:

Q. Has it occurred to you that they have the power to alter the debentures in terms of selling their interest in the debentures to a conforming Australian person?

A. Yes.

Q. Is that something that - - -?

A. Can we just back up a little bit? I think the main point out of this whole thing is that if they weren't happy with us because we didn't do what they would like to see us doing, if we voted - and let me tell you, we're going to vote whichever way we want to - but let's say they said Jesus, why are they voting that way and they did make moves and they assigned their interest to - you don't have to assign very much, just a little bit to an Australian and they got us, they voted us out - number 1, we would have a comeback through the courts if that happened through like unfair dismissal but within the - and number 2, if that's what happened, so be it. So be it. We would say fine, goodbye, because there's no way that we're going to do anything that's going to compromise our views. It might not be the right decision but it's certainly what - if we think it's the right decision and so we're aware of that. And actually I think I mentioned this maybe to Melda but certainly Anthony I said well, if they use some of the legal ways to get rid of us, good luck to them.

Q. What do you mean by that, good luck to them? What action would you take?

A. No, I would fight, as to the way we've been advised that we're able to, in court. Because I don't think - I understand what you're saying that they can actually go through the converting procedure and then vote us out, have more votes than we do. But I think legally

we've been advised that there are ways that we can stop that. We can argue, unless we've done something illegal or something. But certainly, if we acted in the best interests of Channel 10 as directors of Channel 10 or of Donholken - - -

Q. Could they not simply assign the loan that they have to another Australian person for a portion of the debentures?

A. Yes, and what would that do?

Q. That would - - -?

A. No, sorry, but why would they do that?

Q. For an unspecified reason they may do that?

A. Well, but that's the key, why would they do it? That's what we said, why did they do it, why would they do it. That was our risk. Why did they do it? They do it because we're voting the way we want to vote, they don't like that, that's their problem, they do have an avenue of changing our - of our make-up. And we would fight that, if we were voted out, unless there's some valid reasons like breaking the law or somethin. But if we're doing the right thing by Donholken and by Channel 10, there's no reason for that to have happened. And I'm just saying that at the end of the day isn't this all about whether they control us because they've got this big hammer. It's not quite as big as a call option, it's a small hammer, does that mean we're going to do everything they say and the answer's 'No'. The answer is 'Absolutely not'. It's their prerogative to do what they want and it's our prerogative to vote as we want or to act as we wish. That's sort of a roundabout answer.

²¹⁶ Memorandum of Association of Donholken, Clause 7:

The company must not:

- (a) borrow or raise money;
- (b) charge any property or business of the Company or all or any or its unpaid capital;
- (c) issue shares, options over unissued shares, equity securities, securities with rights of conversion or exercise to shares or equity securities, debentures or other securities;
- (d) give any other security for a debt, liability or obligation of the Company or of any other person;
- (e) guarantee or become liable for the payment or money or the performance of any obligations by any other person; or
- (f) lend or advance any money or funds or provide any other form of financial accommodation to any person, other than:
 - (g) the issue of the Limited Class Shares in accordance with the Articles of Association of the Company;
 - (h) the issue of Convertible Debentures to Drie Sterren Kapitaal (Nederland) B.V.;
 - (I) the issue of Participating Debentures to Drie Sterren Kapitaal (Nederland) B.V.;
 - (j) pursuant to the Debenture Stock Trust Deed;
 - (k) the payment of Expenses and Taxes; and
 - (l) the payment of dividends in accordance with the Articles of Association of the Company.

²¹⁷ Memorandum of Association of Donholken, Clause 7.

²¹⁸ Articles of Association of Donholken, Clause 3.6(a).

²¹⁹ Articles of Association of Donholken, Clause 3.6(b).

²²⁰ Articles of Association of Donholken, Clause 3.9.

²²¹ DSTD, Clause 7.1(b):

Each Chargor agrees that, except with the prior written consent of the Chargee it must not lease or hire any asset (including, without limitation, real property).

²²² DSTD, Clause 8.1:

CLAUSE 8 - COVENANTS CONCERNING THE CHARGED PROPERTY

clause 8.1 - Restrictions in relation to the Charged Property

-
- 8.1 Each Chargor will not without the prior written consent of the Chargee or as expressly permitted in any other Transaction Document:
- (a) (No Encumbrances): create, purport or attempt to create or permit to exist any Encumbrance howsoever ranking over any part of the Charged Property;
 - (b)* (No sale, lease etc.): convey, assign, transfer, lease or otherwise dispose or part with possession of, make any bailment over, grant any option over or create or permit to exist any other interest in any part of the Charged Property whilst such part of the Charged Property is subject to the fixed charge created in this Deed or any Collateral Security;
 - (c) (Charged Debts and Proceeds): subject to clause 8.2 assign, transfer or deal with or attempt to assign transfer or deal with or enter into any agreement, arrangement, or course of dealing to hold to the account of or on trust for any person, or permit any set-off or combination or accounts in respect of, any charged Debts or Proceeds;
 - (d)* (Not to prejudice): do or permit any act, omission or thing whereby the Charged Property becomes or could be liable to surrender, forfeiture or cancellation or becomes prejudiced in any manner or the value of the Charge as a security to the Trustee becomes or could be materially lessened;
 - (e) (Ordinary course): subject to this Deed, deal with or attempt to deal with Charged Property other than in the ordinary course of its ordinary business;
 - (f) (Step): take any step towards doing any of these things.

²²³ Memorandum of Association of Donholken, Clause 7 (see above)

²²⁴ DSTD, clause 8.1.

²²⁵ Donnelly Transcript p43:

Q. Where would the money come for to pay for the expertise in Donholken?

A. We would --

Q. Would you need to get finance from DSK?

A. Yes, at the moment we would, unless we put money in ourselves.

Q. So you would lend Donholken the money?

A. We're not allowed to lend under the articles.

Q. So how would your money get into Donholken?

A. We would have to gift it.

Q. Gift it?

A. Mmm-hmm, or borrow from DSK.

²²⁶ Articles of Association of Donholken, Clause 25.1:

Appointment and Removal

(a) Subject to Article 25.1(b), the auditors of the Company will be appointed and may be removed as provided in the Corporations Law.

(b) For so long as there exists at least one Participating Debenture Holder:

(i) the Participating Debenture Holders will be entitled to nominate the person to be put forward to the Members for appointment as auditor of the Company; and

(ii) the Members will not appoint any auditor of the Company other than an auditor referred to in sub-paragraph (i) of the Article 25.1(b) except if and for so long as the Participating Debenture Holders fail to nominate a person to be put forward to the Members for appointment as auditor of the Company in accordance with this Article 25.1(b)..

²²⁷ Articles of Association of Donholken, Clauses 3.3(e) and 23(1)(b).

²²⁸ Clause 6(b)(ii) of the Terms and Conditions of Issue of Participating Debentures Deed for Donholken.

²²⁹ Memorandum of Association of Donholken, Clauses 6 and 7

6. The Company must not carry on any business or activity other than:

(a) the acquisition, holding, exercise, enforcement or disposal of:

-
- (i) TGL Shares;
 - (ii) options or rights to acquire TGL Shares;
 - (iii) other securities with rights of exercise, or rights of conversion, to the TGL Shares;
 - (iv) debentures issued by TGL, whether or not those debentures are convertible to TGL Shares;
 - (v) shares or other equity interests in an entity whose principal asset is securities referred to in sub-paragraphs (i) to (iv) above inclusive;
- (b)
- (i) the receipt and investment in an at call account of a bank or other financial institution of any distribution payable in respect of the securities referred to in sub-paragraphs (a)(i) to (a)(v) above inclusive;
 - (ii) the payment of dividends in accordance with the Articles of Association of the Company;
- (c) enforcement of a contract to which the Company is a party and which relates to an activity permitted by paragraph 6 or 7; and
- (d) an activity permitted by paragraph 7.

7. The company must not:

- (a) borrow or raise money;
- (b) sell, dispose, alienate or charge any property or business of the Company or all or any of its unpaid capital;
- (c) issue shares, options over unissued shares, equity securities, securities with rights of conversion or exercise to shares or equity securities, debentures or other securities;
- (d) give any other security for a debt, liability or obligation of the Company or of any other person;
- (e) guarantee or become liable for the payment of money or the performance of any obligations by any other person; or
- (f) lend or advance any money or funds or provide any other form of financial accommodation to any person,
other than:
 - (g) the issue of the Limited Class Shares in accordance with the Articles of Association of the Company;
 - (h) the issue of Convertible Debentures to Drie Sterren Kapitaal (Nederland) B.V.;
 - (i) the issue of Participating Debentures to Drie Sterren Kapitaal (Nederland) B.V.;
 - (j) pursuant to the Debenture Stock Trust Deed;
 - (k) the payment of Expenses and Taxes; and
 - (l) the payment of dividends in accordance with the Articles of Association of the Company.

²³⁰ DSTD, Clause 8.4.

²³¹ Memorandum of Association of Donholken, Clause 10:

A special resolution purporting to alter or add to or omit any provision of the Articles of Association of the Company does not have any effect unless and until the written consent of:

- (i) the registered holders of the Limited Class Shares;

(ii) the Convertible Debenture Holders; and
(iii) the Participating Debenture Holders,
is obtained, except where the requirement for the giving of consent will result in a breach of the BSA.

²³² Articles of Association of Donholken, Clause 8.4:

Written Consent of Participating Debenture Holders

Notwithstanding anything contained in this Article 8, for so long as there exists at least one Participating Debenture Holder, any resolution under this Article 8 does not have any effect unless and until the written consent of the Participating Debenture Holders is obtained.

²³³ DSTD, Clause 7.1(a):

Amendment of Constituent Documents

(a) Each Chargor agrees that, except with the prior written consent of the Chargee, it must not amend its Memorandum and Articles of Association as they exist as at the date of this Deed.

²³⁴ Articles of Association of Donholken, Clause 3.6(b).

²³⁵ Articles of Association of Donholken, Clause 3.8:

The Directors will not issue options over the unissued shares in the capital of the Company without the prior written consent of the Participating Debenture Holders (if any).

²³⁶ Articles of Association of Donholken, Clause 3.9.

²³⁷ Articles of Association of Donholken, Clause 6.1.

²³⁸ Articles of Association of Donholken, Clause 6.1(d) and (g).

²³⁹ Articles of Association of Donholken, Clause 3.(2)(b).

²⁴⁰ Articles of Association of Donholken, Clause 3.6(b)(iv).

²⁴¹ Articles of Association of Donholken, clause 3.3(b)(i).

²⁴² Articles of Association of Donholken, clause 3.3(b)(iii).

²⁴³ DSTD, Clauses 4.1 and 8.1. See also definition of Charged Property, TGL Securities, TGL Marketable Securities of TGL.

²⁴⁴ DSTD, Clause 8.1(b).

²⁴⁵ Articles of Association of Donholken, Clause 9.6:

Persons entitled to attend general meetings

All members and all participating Debenture Holders are entitled to attend general meetings of the Company as well as any other persons entitled to attend under the Corporations Law.

²⁴⁶ Articles of Association of Donholken, Clause 9.4(b):

Failure to give notice

Subject to Corporations Law:

- (a) the accidental omission to give notice of any general meeting to or the non-receipt of that by any Notifiable Person (other than the Participating Debenture Holders) will not invalidate any resolution passed at that meeting;
- (b) the accidental omission to give notice of any general meeting to or the non-receipt of that notice by any Participating Debenture Holder will invalidate any resolution passed at that meeting.

²⁴⁷ Articles of Association of Donholken, Clause 13.9:

Appointment of Directors by Participating Debenture Holders

The Participating Debenture Holders (if any) will from time to time be entitled by notice in writing to the Company from time to time to appoint:

- (a) one Director of the Company; or
- (b) one person to the board of directors of each Subsidiary of the Company, or to do both (a) and (b) (and to remove and replace the appointee from time to time) and the Company shall ensure that such person is appointed to the board of directors of the Company or to such Subsidiary (or both) as the case may be and that there are at all times at least two other directors who are not Foreign Persons on the board of directors of the Company or such Subsidiary (or both) as the case may be.

²⁴⁸ Articles of Association of Donholken, Clause 17.3.

²⁴⁹ Articles of Association of Donholken, Clause 15.1.

²⁵⁰ Articles of Association of Donholken, Clause 18.2:

Quorum for meetings of Directors

- (a) A quorum for the purpose of considering a matter at a meeting Directors will be 2 person, provided that:
 - (i) each such person is a Director or an Alternate Director and is entitled under the Corporations Law (notwithstanding any interest the Director or Alternate Director may have in the matter for consideration by the Directors) to vote on a motion that may be moved in relation to such matter at that meeting; and
 - (ii) if the Participating Debenture Holders have appointed a Director, one of those persons is a Director appointed by the Participating Debenture Holders unless the Director appointed by the Participating Debenture Holders waives this requirement in relation to that meeting by notice in writing to the Company.
- (b) A meeting of the Directors during which a quorum is present is competent to exercise all or any of the authorities, powers and discretions under these Articles for the time being vested in or exercisable by the Directors generally.
- (c) Where a quorum cannot be established for a meeting of Directors (or consideration of a particular matter) a Director may convene a general meeting of Members to deal with matter or the matters in question.

²⁵¹ Articles of Association of Donholken, Clause 27.4:

Voluntary Winding Up

The Voting Members will not resolve by special resolution that the Company be wound up voluntarily without the prior written consent of the Participating Debenture Holders.

²⁵² Articles of Association of Donholken, Clause 27.5:

Vesting of property in trustees for contributories

Subject to Article 27.6, the liquidator may with the sanction of a special resolution and the prior written consent of the Participating Debenture Holders vest the whole or any part of the property in trustees on such trusts for the benefit of the contributories of any of them as the liquidator thinks fit.

²⁵³ DSTD, Clause 4.7.

²⁵⁴ DSTD, Clauses 10.1 and 10.5.

²⁵⁵ DSTD, Clauses 9.1(e), (j), (m) and (o).

²⁵⁶ DSTD, Clauses 9.1(k), (l) and (r).

²⁵⁷ Articles of Association of TGL, Clause 6.1(b).

²⁵⁸ Donnelly Transcript p23.

Also Donnelly Transcript p19:

Q: In your discussion with Yale, you said that you wanted to find out what happens to your \$100,000, or is it the preferential dividend, if the companies or the shares are floated?

A: Mmm-hmm.

Q. What was his response?

A. His response was that I would be paid \$100,000 per annum and if an annum, a year, hadn't transpired that that would still apply. So if any year the - is that what he said - if in any year other than the first year, it would be pro rated, it would be relative to the services or the income that the company had earned in that period. So that I was satisfied that if I entered into it for the first year, the high amount of time I would put into the acquisition of the shares would earn me sufficient from a commercial perspective.

Also Donnelly Transcript p11:

Q. At the end of that initial conversation with Steven Skala, what was your initial reaction as to whether it was likely you would get involved in this, that it was beneficial and something that you would like to be involved in?

A. My initial reaction was positive because I am interested in directorships and commercial upsides and to me it sounded interesting that I could learn more about the media industry in this way and position myself ultimately for public company directorship. That interest then to me would always have to be matched by the prudence of going through the process.

²⁵⁹ Hollis Transcript p17:

Q. So was the offer of the \$100,000 to you a significant incentive in your mind to join in this transaction?

A. The money is no doubt important but not at the risk of incurring a down side which may be non-financial: my reputation, the ability not to do any other media deals. It's just not worth it for that. So given that the down side I hoped and hope is protected then the money is obviously important.

Q. What was the primary incentive to you agreeing to enter this transaction?

A. Two-fold: one is the money and the potential up side that the share price will increase. But secondly I am setting myself up as a media consultant and since this is in the media it gives me profile and it also keeps me in touch with the television industry, in particular Channel 10 etcetera. So that to me was the secondary benefit.

Hollis Transcript p27:

Q. Would you have been involved in this transaction had the involvement in the media industry not been there?

A. Say this was an oil and gas opportunity, for example or something?

Q. Yes?

A. I can't answer that but it certainly would've played a major role. Personally I do things that I am familiar with, so I would have been doing something that I would be unfamiliar with but I can't say whether I would have done it or not. Certainly it being in the media industry was a major attraction to me, a major attraction.

Q. Would you have been involved had it not been for the financial upside that was involved?

A. In other words, would I have been involved if there was merely the opportunity to be in the media industry?

Q. Yes?

A. I doubt it, I mean, the financial aspect was equally or had a role to play. Since I'm not that altruistic I wouldn't have just done it to say I'm involved in the media industry.

²⁶⁰ Hollis Transcript p.9.

²⁶¹ Kennett Transcript p38:

Q. Could I just ask you what was your primary reason or reasons for entering into this transaction, for agreeing to enter into this transaction?

A. Well, I guess as other things come up - other opportunities come up this was just another opportunity, albeit on a much bigger scale, that came up that looked attractive. Why did it look attractive? Number one is the upside. If we are able to achieve an upside on the shares it should be a decent amount of dollars for us, for Jacomo, for ...(indistinct)... The \$100,000 dividend or directors fees, or income, never hurts. I don't think that was particularly the primary motive - and I think just as important it's a terrific way of actually getting a bit of exposure. It's not very often that you're asked to join a major television station's board. At the end of the day, it is a bit of kudos and certainly for someone like me who's very keen in the investment world. The ball keeps rolling and unless you're on that ball, unless people are throwing things at you, you don't see anything and so hence - I think maybe even that last thing is quite an important consideration.

²⁶² Donnelly Transcript p.19:

Q. Could we just go back. In your discussion with Yale, you said that you wanted to find out what happens to your \$100,000, or is it the preferential dividend, if the companies or the shares are floated?

A. Mmm-hmm.

Q. What was his response?

A. His response was that I would be paid \$100,000 per annum and if an annum, a year, hadn't transpired that that would still apply. So if any year the - is that what he said - if in any year other than the first year, it would be pro rata-ed, it would be relative to the services or the income that the company had earned in that period. So that I was satisfied that if I entered into it for the first year, the high amount of time I would put into the acquisition of the shares would earn me sufficient from a commercial perspective.

Q. And once the shares were sold, you'd no longer be entitled to that - once the TGL shares were sold, you'd no longer be entitled to that preferential dividend.

MR ROBSON: Is that question clear?

Q. So that once a float had occurred or the TGL shares held by Donholken were sold, would it be the case that you would not be entitled to your --

A. I don't know, actually. If I was still a director of that company, I could well still be earning the same fees. So it would depend on what my role was at that point.

²⁶³ Kennett Transcript pp. 38-39:

Q. What is your understanding of the position if a dividend is not declared prior to TGL being floated? In other words there is no dividend payment to Donholken. Would you expect to still receive that \$100,000?

A. We'd like to. We'd like to expect that.

Q. If so, how?

A. Well, that's a good question. It may have to come out of a borrowing, a further borrowing in order to fund our ongoing - part of the documentation allows us to borrow for ongoing operations. Again from DSK, we can't go anywhere else. So it might come from there. It might come from the sale of the shares in a float situation or if - oh well that's the cutoff, isn't it? Or from the - - -

Q. If it was a borrowing would you expect it to have to be repaid or would you expect it to be just assumed - - -?

A. Well, no.

Q. - - - by an issue of further debentures?

A. It would be assumed by the issue of further debentures. Borrowing is not actually the preferred - we sort of see it through dividend stream, not through borrowings.

Q. What I am getting at is what is your understanding or expectation of the obligation of DSK to fund that payment?

A. I'd say that's part of the ongoing payments, the ongoing payments clause which provides for the ongoing running of our company Donholken. So we could borrow if we did ask, you know, to the lender. We could borrow to fund things like our own dividend but then it's not a dividend.

Q. No, it would be a directors fee?

A. Sorry, it's a directors fee.

Q. Is that right, would it be a directors fee?

A. If we did it that way, or an unfranked dividend effectively. Hence the reason we would much prefer (and we've sort of planned it) that it would come out of dividends and that's where we sort of know in our minds it's dividend, it's part of the dividend stream of TEN. In other words we get - because then we get franked dividends as opposed to unfranked borrowing and, you know, borrowings etcetera give us it's certainly in our - for us as owners or directors, it's much more tax effective for us to do it through dividend.

Q. Would DSK, in your view, be obliged to fund that payment if - in the scenario that I have described?

A. I see, would they be obliged? I think so, yes.

²⁶⁴ Hollis Transcript pp.16-17:

Q. What if the company was floated before a dividend was paid. What is your understanding of your entitlement to that \$100,000?

A. That was a question we raised and I understand that if the company does not see out 31 December for a few reasons and I would presume one of the reasons is there is a float or may be wound up or whatever, we would still get the \$100,000 even though it was not a full year to 31 December.

Q. On what basis did you reach that understanding?

A. Why did we insist on that?

Q. No, why is that your understanding?

A. Because I think that's what we negotiated.

Q. You believe that is what the documents say, is that your answer?

A. I hope so; yes.

Q. How would it be that you would receive that money if TGL did not make a dividend payment to Donholken. What would be the nature of that payment?

A. If Donholken had no profits we could only take out \$100,000 by way of directors' fees and that's the way we would pay ourselves.

Q. What is the present bank balance of Donholken?

A. How will that be funded?

Q. Just one step at a time. What is the present bank balance of Donholken?

A. That's difficult to answer because we have requested further funds to pay legal costs and I don't know where the money is. The secretary is Richard Kennett. I have seen the request for the funds, I don't know if they've arrived and if they have arrived I don't know if they have been dispersed. We started off with about \$30,000 in the bank account.

...

Q. Assuming the money that is in there is in there to cover the company's legitimate expenses, how would, in the event no dividend is paid by TGL to Donholken, how would you get that \$100,000?

A. Because the way the agreement is struck is that Donholken can request funding or funds from DSK to cover defined relevant acceptable expenses and one of those expenses is the payment of the \$100,000 to each of the directors. So we would ask them to fund that.

Q. Are they obliged to fund that in your understanding?

A. I hope so, yes. On my understanding, yes, they are.

MR HANLEY: So in that event it would be by way of directors fees that the payment will be made?

A. Yes.

²⁶⁵ Articles of Association of Donholken, Clause 3.3(a)(iv) and (v).

²⁶⁶ Lerner Transcript p 17:

A. ... DSK, by virtue of its security can do a float. It doesn't need the cooperation of anybody to do it. So DSK at that point has about \$100m or so in this and said, "Hey, we had better start looking at our float."

Lerner Transcript p19:

Q. So what role do you see them having - when I say "them", I mean Donholken and Selli - in the decision as to whether or not to float directly or indirectly?

A. I guess it depends on what form the float takes, and it could take any number of several forms. It could be a float of Ten. It could be a float of Selli and Donholken. It could be a float of DSK. I don't know at this point. Certainly if it is a float of Selli or Donholken, they would obviously be involved in that decision. I would think that as a courtesy, in any event, we would discuss with them a float once we got it formulated regardless of which way it would be done.

Q. But you wouldn't need to discuss it with them?

A. We might not need to, that's correct.

²⁶⁷ Lerner Transcript p25:

Q. But you're anticipating that Selli and Donholken will join with CanWest in the float proposal?

A. Yes. We haven't discussed it with them yet, but we could compel it through DSK as a float. DSK can't do it on its own because we're from the wrong country, but I think that as part of a float, if Australia owned DSK, it could be done, yes.

²⁶⁸ Strike Transcript p31:

Q. Just going back to the call option, I understand that you're talking about instability in TGL, the hysteria, I think you used that word. If in the event that Mr Leibler and Mr Skala started exhibiting what you call hysteria ...what would the options be for DSK or for CanWest in those circumstances?

A. Well, we're talking quite hypothetically here, obviously.

Q. Was thought given to that when the documents were drafted?

A. I don't think so. I don't think so, but hypothetically, speaking hypothetically, I mean, the structure could be replicated. You just superimpose a new Selli on top of Selli and have Selli owned by different Australians exercising the debentures and so on.

Q. Would that be by removing Copplemere and Leibler Media Holdings as the shareholders?

A. Yes.

Q. How would that be achieved?

A. Through the transfer of DSK to an Australian and the Australian exercising the debentures and call options.

Q. And then the same structure on top of that with CanWest involved financially?

A. It could be or it could be a different structure. I mean, it could just be an outright sale.

²⁶⁹ Strike Transcript p.39.

²⁷⁰ Extract from Australian Securities Commission records.

²⁷¹ Hollis Transcript p 4:

Q. Could I just clarify. You actually ceased employment though in September?

A. Yes.

Q. So what were you doing between September and December in the office?

A. Two things. I was looking for a job and I found it easier to look for a job while I was in a job. So, when I say I ceased working for them I ceased really doing any work for them other than I was still a director of the local company because I was the sole director. I was also the signatory to their bank account. But - and my only task was to wind up the company - or to put it into a dormant state. So to that end I liaised with the auditors to do the final audit, tax return, FBT return, sale of furniture, equipment, terminate the lease and really just administrative things to - to close the office down and that's really what I did between September and when I went on holiday in December and physically closed the office.

²⁷² Hollis Transcript p7:

Q. During the latter half, let us say the last six months, of 1996 what interest were you taking in CanWest's investment in TGL and the goings-on?

A. Very little. I was an alternate on the board but often I wouldn't even be on - - -

Q. For whom?

A. For both CanWest directors. One of the ideas was that instead of sending two people out from Canada every time I would save an airfare and a tiring journey. So I had very little - from the last six months I had less and less to do with TEN and generally in corporate development for CanWest.

Q. Did you attend any TGL board meetings as an alternate director?---In the last six months or generally?

A Generally?

Q. Yes. From the time I joined the board meetings every two months and I would say I went to at least eight maybe.

²⁷³ Hollis Transcript p7:

Q: What about in the last six months of 1996?

A: I ceased being a director of TEN may be in October/November and TV3 may be October/November. Prior to that there may or may not have been a board meeting, because they happen every two months. So may be one meeting in the last six months.

²⁷⁴ Hollis Transcript p8:

Q. When did CanWest first approach you in relation to their desire to find a purchaser for the TGL shares which Corom and Audant were trying to sell?

A. I think it was Tuesday, 7 January.

Q. Who was it that approached you?

A. Yale Lerner phoned me.

Q. What did he say to you?

A. He said the shares were being - had been put up through the pre-emptive rights, in other words they were on offer, and that there were two other individuals in Melbourne who had expressed interest in purchasing them with a loan from a CanWest subsidiary, and he wanted to know whether I would like to participate in that.

²⁷⁵ Hollis Transcript p10:

Q. So after that initial conversation with Yale Lerner how was that left, what did you say?

A. I said I would go to Melbourne, meet with them, take advice and let him know, not him, but let them know whether I was in or out.

²⁷⁶ Hollis Transcript p11:

Q. What else did you do on the Wednesday?

A. Right, Mr Lerner asked me a question when he phoned me to say, are you in any way connected with CanWest, realising that he and I never had any operational reporting structure. And I said; no, I'm on my own but technically I'm still a director of CanWest Pacific, I'm still a shareholder on trust and I still am a signatory to the bank account and I said I would immediately resign those positions. I went to Clayton Utz, probably when I picked up the documents, and resigned as a director and basically gave everything to one of their lawyers or ex lawyers who does that. That was the intention all along that they would keep the company, CanWest Pacific as a dormant company. I was still in that position to tie up the annual report - sorry, not the annual report, the annual accounts, the tax return and to finalise the lease with MLC, Lend Lease. So this just brought it forward and I went straight away and signed everything and they took it off my hands.

²⁷⁷ Kennett Transcript p5:

Q. I understand that you knew and know David Asper and you knew him from school days, is that correct?

A. Yes, that's true.

Q. Could you tell us about that please?

A. Sure, it's going back a few years. We went to school - we used to live, our family used to live in Canada, in Winnipeg and went to school there and we were in school together, in high school effectively, up to when we graduated. I can't - I think we were in the same school all the way through, I'm not sure, there might have been a gap of a couple of years, but we both graduated in '76 from the same class and then sort of went our separate ways.

²⁷⁸ Kennett Transcript p5:

Q. So, what sort of contact have you maintained with David Asper since school days?

A. Well, in 1976 when we graduated I went to university at - the University of Manitoba which is in Winnipeg and then went to another university outside of Winnipeg. So, I can't recall - we had - I'm sure I saw him quite a bit because we were part of a group of friends. Basically, say about 1980 we lost contact, but, you know, just as friends would be, every

now and then I went back to Winnipeg. Once, I think, with Elders. We had a business there. So, I would have - I may or may not have seen him. He wasn't in Winnipeg a lot of the time. He was working for a law firm in - actually, I'm not even sure where. Anyway, he wasn't in Winnipeg and then in recent years I've probably seen him once. Say in the last 5-6 years I have seen him once in Melbourne and spoke to him, excluding last year, just a handful of times or even less, just a couple of times.

²⁷⁹ Kennett Transcript pp6-7:

Q. Then after that, when was your next contact with him?

A. Well, that sort of went through to about September or October, you know, to the point that I would have said to him, 'When are you coming to visit' and he always said, 'Next month' but never came. Then my next contact was a telephone call from him just before this transaction, a few days before saying, 'Am I interested in purchasing a block of shares?'

Q. But prior to that time had you expressed any interest to him about being involved with Ten or in Ten's business?

A. No, in - - -

Q. Sorry, CanWest's business, sorry?

A. No, not in CanWest, CanWest was, I mean, I didn't know a huge amount about CanWest. It was more Channel Ten which we heard about and I think it must have been towards the end of when I was still trying to push my thing into Canada. I saw an article (and, there was quite a bit of press about it) how the shareholders were getting a bit itchy. Maybe they'd made too much money or whatever but they were getting itchy. So, I actually said to him, if a block comes up I'd be interested in purchasing.

Q. When would that have been?

A. It's a hard question, I'm just going to guess, I think it's probably September.

Q. September 1996?

A. Last year?

Q. Yes?

A. 1996, yes. I might be out a bit but it's about there.

Q. Would that just have been an oral conversation or did you write him a letter about that?

A. He asked me could I send something to him and I sent a copy of my CV and I think I sent him a copy of an article showing - the article was basically a bit tongue in cheek by the press here saying what Izzy Asper wants is for his children to take over so he can lie on a beach, so that's sort of how I prefaced it, 'So, is this true?' But he did ask for a CV and I sent a CV to him and I didn't hear anything back, I didn't even hear back about the CV.

Q. Did you send any more than your CV, was there a letter accompanying it?

A. Probably a covering - actually I don't recall.

Q. Did you express an interest in acquiring shares in writing?

A. In writing? Yes, at the very beginning.

Q. What did you have in mind when you expressed that interest initially?

A. Basically I don't know what I had in mind. I thought, I guess, that the original shareholders had got in, made a fair amount of money and I thought, well, maybe here's an opportunity. I think that's as far as it went at the time. Sometimes you take a bit of a long shot and you think, what the hell. But if I was a betting person I don't know which way it swings, I mean, as I say, now in hindsight, obviously it worked but at the time I was trying to push this product in Canada and it was bloody hard to get any response.

²⁸⁰ Kennett Transcript pp8-9:

Q. So, at that time in about September 1996 did you perceive that CanWest had any problems in relation to the shareholding mix at Ten?

A. Yes, yes, that was in the newspaper.

Q. So, you were aware of that at that time?

-
- A. Yes. That is what started me thinking of this perhaps pie in the sky idea because I guess that it's a fairly closed shop, if you're invited in, that's very nice. Just like in any of deals, in fact, most of the deals we tend to do today, it tends to be fairly difficult to get in.
- Q. Did you understand the nature of their problem at that time? What did you understand the nature of their problem? What did you understand of the nature of their problem at that time?
- A. That's a good question, you see, in hindsight I now know what their problems were all about. But at the time, I don't think so, no, I wouldn't have known enough about the transactions and things. But what was my perception?
- Q. Yes, what was your perception in very simple terms?
- A. In simple terms, I think the shareholders had made extraordinary amounts of money and wanted to get out.
- Q. But why was that a problem from CanWest's point of view? That is in the context of what was your understanding at the time?
- MR ROBSON: Back when the newspaper articles were published.
- A: Yes, in September or whenever it was?
- Q. Yes?
- A. I'm trying not to cloud it with what we know today.
- Q. Was it related to the fact that CanWest were a foreign person?
- A. No, no, I didn't really know too much about the foreign - well, that was probably one of the - I think that I would've known, I'm sure I would've known that CanWest wasn't able to buy more. Otherwise I wouldn't have asked anything I'm not sure, but probably CanWest would have just gone out and bought it themselves.
- Q. So, it must have been in that context that they were at their limit and
- A. no, I really don't recall what was going through my head.
- Q. Are you an Australian citizen?
- A. Yes.
- Q. At that time did it occur to you that, as an Australian citizen, in purchasing some of those shares, should they become available, that might have assisted CanWest with its problems?
- A. Yes, yes, yes - but I'm sure I didn't know all the intricacies of, you know, of what was going on. I must admit that the press actually seemed to be - you know, now thinking back - the press was actually quite accurate, I think, on a lot of this, a lot of what was, you know, written about the sale. Probably my impression was exactly the same as that at the time; hasn't changed.
- Q. Who was it from CanWest that contacted you in relation to this recent transaction and the possibility of you purchasing shares?
- A. David Asper, that first conversation.
- Q. When was that?
- A. That was on - can I just grab my diary - - -
- Q. Yes, please do?
- A. Otherwise I will be completely wrong on that.
- Q. Your diary?
- A. Exactly - just to get the dates and things. So David Asper gave me a call and that would have been on 7 January; gave me a call, asked me am I interested.
- ²⁸¹ Lerner Transcript p.26-27
- Q. Did you discuss the approach to Kennett or Melda Donnelly or Mr Hollis, as to whether or not they were suitable people to be approached?
- A. I phoned Melda Donnelly before I spoke to Asper, I'm pretty sure. I may have spoken to Asper before I spoke to Kennett because it's his son that had known Kennett and I believe I spoke to Hollis on my own. So within ourselves Izzy knew who was involved, but the only

one I discussed with him I think in advance was Kennett, and that was like a one-minute, "Who is this guy?".

Q. What did you say?

A. I asked him who he was.

Q. Okay.

A. His son - they had been school chums.

Q. What did he say? Did he know him other than a friend of his son?

A. He remembered him. He hadn't seen him in many years. "Nice kid", you know. There was nothing --

Q. Nothing adverse?

A. No, no.

²⁸² Kennett Transcript p12:

Q. Do you recall whether he referred to your previous expression of interest in acquiring shares of TGL?

A. Yes, he did. Because remember I sent a CV. At one point he had said, fine, send me a CV. So I sent a CV.

²⁸³ Kennett Transcript p.18.

Q. Did Melda discuss with you at that point who were likely to be the TGL directors?

A. Yes.

Q. What was said?

A. She said that she was more comfortable - she said that she had discussed with Yale. I think she said she'd discussed with Yale that she would be the - she would want to be a director and she would want me to be a director at the time. In other words, we were going to be the two out of the three simply because of Anthony having worked once for CanWest in the past. The last thing that anyone wanted to do was have the perception that we were - that, 'Oh well, here's CanWest who has nominated an ex-employee to be a director of Channel TEN'. So that did come up, but Yale hadn't mentioned that to me at all.

²⁸⁴ Hollis Transcript p15:

Q. How was the decision made by Donholken as to who would be the TGL director nominees?

A. Okay. We obviously discussed that. The three of us came to a conclusion that my former relationship with Can West, me turning up on the board of Ten as a representative of Donholken may be perceived as - or may be badly perceived given my past - so in order to remove any perception that that could arise, we all decided that those two would be the directors.

Q. Is it fair to say that you are the only one with media experience amongst the three directors?

A. As far as I know, yes.

Q. Was that a consideration that was - - -?

A. Absolutely. I brought that up and discussed that at length.

Q. What were your fears about you being a director on the TGL board?

A. They weren't my fears as rather all of us discussing it together, but clearly there could be a perception that I was sitting on the board as an alternate of Can West a few months previously and now changed hats and I am sitting on the board for somebody else, there could be perceived to be any type of connection or whatever and so to head that off I just decided that it made sense just not to sit.

²⁸⁵ Hollis Transcript pp20-21:

Q. When you were discussing Donholken's decision to appoint directors to the TGL board you said it was discussed that it would be a concern of yours if it was perceived outside by various parties that you had a connection with CanWest. Why was that a concern of yours or Donholken's? Why were you concerned that that perception might exist?

-
- A. Well, first of all it wasn't my feeling that that perception would exist; that was a kind of - it came out of a general discussion. Sorry, and what was the question then?
- Q. It is one thing that a perception may exist, but why are you concerned that that perception may exist?---In other words, if there was a perception - - -
- Q. What is the consequence?
- A. Yes, okay, clearly that - I mean I'm well aware of the provisions of the BSA. I'm quite aware of the investigation or whatever it is that Selli brought upon itself, and it seemed quite reasonable and logical that the Donholken situation would also be put under a microscope and not only with the ABA but with the newspapers generally, and so anything to add fuel to the fire, which may be perceived to exist, we thought it was prudent not to do that.
- Q. I am just trying to ascertain where you thought the adverse consequence would lie? Would it lie with you or with Donholken, TGL?
- A. Okay, a good question. In other words, if there's been a breach, let's say, of the BSA as opposed to Corporations Law - - -
- Q. Are you an Australian citizen?
- A. Yes. Now is a fine time to ask.
- Q. I have already asked that one.
- Q. The question stands: where does the adverse consequence lie?
- A. Yes.
- Q. Why is it a concern of - - -?
- A. Again, I'm talking as a layman, a layman in terms of understanding the BSA, but obviously the connection - to create an association between CanWest and let's say, Donholken, could lead CanWest, for example, to have interests greater than its 15 per cent. How would that be - what would be the remedy or the penalty?
- Q. I am not concerned with the penalty, I just was trying to ascertain where you thought the adverse consequence would lie, and is it true to say you think the adverse consequence would lie with CanWest and not with Donholken?
- A. Yes, that's what I - yes, I would hope so, sorry.
- ²⁸⁶ Kennett Transcript pp18-19:
- Q. Was there any further discussion about Mr Hollis' involvement at that stage whether you and Ms Donnelly were having this involvement?
- A. We had a good discussion on that. We had a good discussion as to whether, having Anthony Hollis, there was a positive or a negative and you know it really did weigh both ways because I think from - one thing we didn't want was from the public and, the ABA, certainly, perspective is to think 'Oh well, Anthony is just there because he's been picked by CanWest. As an old CanWest employee he will do the right thing'. The other - which actually I didn't quite think because by the conversation I had with Anthony a couple of hours before that's - you sort of got a tone which wasn't quite like that. The tone was more you know he didn't know - it came out of the blue and provided he could see certain criteria, you know, like all equal etcetera etcetera that he'd be interested. So it wasn't like a pre-planned exercise. It was definitely not a pre-planned exercise but then again I - you know you look at both sides.
- The other side was Melda and I. Although we've had pretty good business experience over the years, neither of us have the media experience and so this could be quite a good balance for us. If you're looking to put together a shareholding it's not bad having someone who in fact knows not only media but seems to know TEN quite well from past experience.
- Kennett Transcript pp49-50:
- Q: You said previously that - this is in relation to the choice by Donholken of yourself and Melda Donnelly as the TGL director nominees that Donholken was concerned about the

perception if Hollis was one of those nominees. Were you concerned about these perceptions affecting Donholken or CanWest?

A: This is CanWest?

Q: Yes, what was the perception problem that you perceived?

A: First of all it was a perception - no, it was actually neither of them. It was more of number one the board, the TEN board itself, the perception, because Anthony Hollis as I understand it was an alternate director at one point of Channel TEN itself. We were going into this transaction as a new purchaser. I know we're funded all the way, as much as possible by CanWest and they clearly have or I don't know if everyone knows around the table but they clearly have an economic interest in our company. The key was for us that we are, despite that, we are an independent company. We didn't want either from TENs point of view, the TEN board, from the press's point of view and from the ABAs point of view to suddenly see an ex-CanWest employee be - change hats and say 'Oh no, I'm actually independent'...

²⁸⁷ Hollis Transcript p15:

Q. How was the decision made by Donholken as to who would be the TGL director nominees?

A. Okay. We obviously discussed that. The three of us came to a conclusion that my former relationship with Can West, me turning up on the board of Ten as a representative of Donholken may be perceived as - or may be badly perceived given my past - so in order to remove any perception that that could arise, we all decided that those two would be the directors.

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A. They weren't my fears as rather all of us discussing it together, but clearly there could be a perception that I was sitting on the board as an alternate of Can West a few months previously and now changed hats and I am sitting on the board for somebody else, there could be perceived to be any type of connection or whatever and so to head that off I just decided that it made sense just not to sit.

Hollis Transcript p33:

Q. You are the member of Donholken with the most media experience; is that right?

A. Yes.

Q. Do you think it is in the best interests of Donholken in terms of dividends and financial upside for the members of Donholken without the media experience to sit on the TGL board?

A. If you are asking am I better qualified to sit on the board than the others that could depend on the issues that the board discusses. They may have very little to do with media. It could be related to funding, to shareholder protection. I might feel I can add more, but that is - maybe an egotistical thing. I don't know if there is an objective answer to that.

Q. What do you think is in the best interests of Donholken?

A. I think it depends what the issue is. I am not - I am sure Melda and Richard have advantages over me in different aspects. It could be financial; it could be many things, but if it was, for instance, a corporate development issue about the direction of Ten in terms of should it go into radio, may be I am on that issue more better qualified.

Q. TGL as a media company, would you not say that media experience is an advantage?

A. I think it depends on - it is obviously an advantage, but it also depends on the issues being discussed. Even in a media company, there are things, for example, to do with finance that I do not think I am the best person to deal with that.

²⁸⁸ For a description of the Selli structure see reasons for decision in relation to the acquisition by Selli of TGL shares.

²⁸⁹ Strike Transcript p26.

Q: Was this a mechanism by which CanWest would retain the status quo in terms of the share subscription agreement?

A: Certainly. We felt as a foreign party extremely exposed.

²⁹⁰ Strike Transcript p66:

Q. What were some of the other major considerations?

A. However, there was still a concern that - you know, strange things happen. You don't know who could buy shares for whatever price, for whatever strategic or mischievous reason. They could be sold to Packer, they could be sold to Stokes, to Seven, to Nine. There is any combination of possibilities that would cause a fair degree of consternation at the board level of TGL, at the management level of TGL. There's just that uncertainty that surrounds letting new shares go through a pre-emptive process and not knowing where they are going to land, those sorts of considerations.

Strike Transcript p30:

Q. Did you have any concern about any new shareholder coming on board as a result of that process?

A. Well, certainly. One of the concerns would be that there would be shares trading in the public domain that would be easy to take over. I mean, who would do that? Maybe Packer takes control of the trust, maybe Murdoch does, Stokes does - who knows? The worst thing you can do is have one of your competitors show up at your boardroom table one day.

Q. That was a consideration also?

A. Certainly.

Q. To prevent anyone else taking control of TGL?

A. Well, someone whose interests were opposed to the interests of Ten.

Q. What about opposed to the interests of CanWest?

A. I'm not so concerned with --

Q. Does that also follow?

A. I think that follows naturally, you know. I mean, it is a scary thought to have one of your competitors show up at your boardroom table and start discussing the cost of programming with you or the future or your network. I mean, it's terrifying.

²⁹¹ Strike Transcript p90-91:

Q. You said before that one of the considerations that you took into account in agreeing to nominate Selli to take the Audant and Corom shares at \$15 was the possibility of a new shareholder coming into the pack. You mentioned the possibility of a Packer or Murdoch or Stokes or that sort of shareholder coming in?

A. Mmm-hmm.

Q. First, would you agree that those shareholders couldn't in fact be involved with Ten because of the cross-media rules?

A. Yes, that's probably right. I just used them as examples as opposed to real --

Q. Is what you are really conveying in that answer that you are concerned about others coming in to CanWest per se and exerting an influence or upsetting the applecart?

A. No, I'm not so sure it's a concern that someone comes - I guess it is a concern that someone could come in and upset the applecart but not necessarily from CanWest's perspective but from Ten's perspective. It is quite conceivable, and I've seen it happen in other cases, where a shareholder arrives on the scene and its interests are completely opposite to the interests of the company. The "company", not being CanWest but Ten. It is a shareholder that once they arrive, I mean, they're there. It is hard - you know, it could be a Packer. It could be a Packer nominee. Who knows who it could be?

Q. But Ten's and CanWest's interests are very closely related to each other, aren't they, in this particular situation?

A. I don't know whether they are closely related. I'd like to think that they similar. We are both broadcasting companies. I mean, what's good for Ten and all of its shareholders is naturally good for CanWest.

²⁹² Lerner Transcript p 15:

Q: What was your original understanding of Canwest's original intention or purpose in establishing a structure?

A: The Cowin & Whyte shares and the Selli shares were offered on the pre-emptives. If nobody had taken them up, we don't know what would have happened for sure. People were talking about different forums or floats, a multiplicity of floats, and Canwest felt that it was better for Canwest, TGL and everyone concerned that things be done in a better fashion. We weren't able to do that ourselves, so we had to obtain Australian purchasers to do it.

Q: Why were you concerned about those parcels of shares going off to people other than people that were already existing shareholders of Ten?

A: You mean just to anybody?

Q: Yes.

A: Proposals had been made by various shareholders at various times on various means of floating. There were two trust proposals. TNQ had wanted a float. What we were facing, all of us, were two or three potential floats out there, separate ways by which the market could get into Ten. It was just chaotic. We felt it wasn't in our best interests for the price of Ten's shares on the market in Australia to be depressed or to be undercharged because Ten was obviously a major asset for Canwest and any diminution in value reflected here would probably show up in a price somewhere else.

²⁹³ Lerner Transcript p15:

Q. Were you concerned about new players coming in and the influence they may exert?

A. don't set the policy for Canwest, but I think it was more the chaos because that's all I ever heard about. I never heard a particular name like, "Let's keep so and so out", or something like that. No, I don't think so.

²⁹⁴ Strike Transcript pp65-66:

Q. So what was the next action that you took in relation to those pre-emptive notices?

A. Well, over the time between when the notices came out and when the notices were accepted, I did some analysis - I had some analysis done for me as to what that price translated into vis-a-vis the most current forecasts of Network Ten's performance in the forthcoming year, trying to get a feel for what the financial deal looked like if we were to nominate someone to acquire it.

The consequence of that was my recollection is that that was - the price of \$15 represented about nine and a half times 1997 EBITDA, which was one times more than the \$13 price that was paid for the Belshaw shares a month earlier. I sat down with Asper and sort of reanalysed the strategic pros and cons, because obviously the price had gone up and the question was: Was that compensated for by the strategic value of financing the acquisition of those two lots of shares?

One of the big things factored into our thinking at that point was that the acquisition of those shares by our nominee would result in the nominee holding 37 per cent of the shares roughly and CanWest holding a little bit less than 15, but together we could put together a floatable vehicle constituting more than 50 per cent of the outstanding shares of TGL which would be the control block and would deliver a float, I think, at a premium. So we looked at it from that standpoint that we had a strategic opportunity here to put together through financing or directly a block that could be floated as the control block of TGL.

Q. So was that a key consideration in nominating Selli on 10 December?

A. That was certainly one of the major considerations.

Strike Transcript p67:

Q. Sorry; it was the 11th?

A. Well, the 10th or the 11th. At that point I called Skala and indicated to him that CanWest would finance the acquisition if Selli so desired to accept the nomination for those shares. I articulated to him our rationale for that and --

Q. What did you say?

A. The same things we just talked about, I just spoke about. I said, "Here is an opportunity here to put together in Selli a block of shares that rivals TNQ's, that's certainly of equal attraction as TNQ's block in terms of floatability. If that ultimately is combined with CanWest's block in some fashion, all of a sudden, it becomes a control block that can be floated to the public and it can probably realise a pretty good premium." I thought the price of \$15 a share was outrageous commercially. I thought it was outrageous because I thought there was an element of them putting a rail on the fence with a price to make sure that no-one could jump over.

I said that CanWest had ultimately come to the conclusion that there was some financial commercial reason for doing that. It lay in the fact that Selli itself had had 37 per cent of the shares. It lay in the fact that if we combined the two interests into a single float vehicle, we would have a control block to float.

Lerner Transcript p22:

Q. Just coming back to an earlier point that you made. If your float did go ahead and TNQ was pursuing the course it's now pursuing, wouldn't you have the same problem with arbitrage that you were talking about earlier?

A. you could have. I'm not any expert on markets, but I think the circumstances might be different. Number one, I think, in the end, we are going to try and accommodate all shareholders in a float. It is much - you know, the market will probably like it better and there's no reason not to, provided we can come to terms. Also, I'm assuming that any fleet that we proceed with will probably be for control position of TGL, which would seem to me to make it more marketable and probably more valuable in the market, unlike two minority floats, you know. I think it will be better.

²⁹⁵ Strike Transcript p 67:

Q: What did you say?

A: The same things we just talked about, I just spoke about. I said, "Here is an opportunity here to put together in Selli a block of shares that rivals TNQ's, that's certainly of equal attraction as TNQ's block in terms of floatability. If that ultimately is combined with CanWest's block in some fashion, all of a sudden, it becomes a control block that can be floated to the public and it can probably realise a pretty good premium." I thought the price of \$15 a share was outrageous commercially. I thought it was outrageous because I thought there was an element of them putting a rail on the fence with a price to make sure that no-one could jump over.

²⁹⁶ Asper Transcript p16:

Q. Why do you think it is important that you have a voice in the successor?

A. Because antibodies can come into a company, mischief makers, stupid people.

Q. People that do not have - - -?

A. Diabolical, fiendish, cunning fronts for competitors, you know.

Q. People that have very differing views from your own in terms of how it should be run?

A. No, people - no, no, you're talking about people of good will, good faith, intelligence. One never minds that, but what one has to protect in a fragile company, remembering Network Ten was bankrupt and there were a lot of sharp shooters out there who would have been very delighted to see it go down but - so when we formed this we said we trust each other or we keep it management - we 11 people or whatever it was said, "We will do this number

together and if you want to go out you can go out but we have the right, when you bring your successor to say - well, we have the right to increase our - to buy you out before he does." That's standard. It's in every - at least it's in every company I've ever been part of ...

²⁹⁷ Strike Transcript p92:

Q. Can I just ask if there's any point over the course of the negotiations where it crystallised for you that you were potentially assembling a float vehicle in Ten rather than just increasing your economic interest?

A. That concept, I think, first presented itself when Whyte and Cowin put their shares up for sale.

²⁹⁸ Lerner p16

²⁹⁹ Lerner Transcript p 25:

Q: But you're anticipating that Selli and Donholken will join with Canwest in the float proposal?

A: Yes. We haven't discussed it with them yet, but DSK can't do it on its own because we're from the wrong country, but I think that as part of a float, if Australia owned DSK, it could be done, yes.

Strike Transcript p84:

Q: Do you know whether any person from CanWest has had any discussions with anyone from Donholken about the float or any aspect of it?

A: I have no idea. I haven't.

Q: When you are talking about a float, are we still talking about 52 per cent as a voting block?

A: That's right.

Q: And that would include then Donholken's holding?

A: That's correct, yes.

Q: Do you know if anyone has spoken to the principals of Donholken about that?

A: I don't know.

Strike Transcript p88:

Q: If you had reached a view that selling down your financial interest was the best course of action, the best use of your capital, could you do that without further consulting Selli or Donholken?

A: Sure, because one of the options we would have is that we could - we've got economic interests in Network Ten that aren't affected by Selli or Donholken. We could sell those down if we so desire. There is no one course of action here. There are lots of options.

Q: What about the economic interests that are held through Donholken and Selli, would you sell those down without advising them?

A: Sure, because we could sell - we could actually sell DSK without advising them or we could sell the debentures without advising them.

³⁰⁰ Articles of Association of Donholken, Clause 3.3(b)(iii), a Class B1 member may elect to redeem their shares. The formula to be used is set out in Clause 3.3(b)(iv).

³⁰¹ Articles of Association of Donholken, Clause 3.3(b)(iii).

³⁰² Articles of Association of Donholken, Clause 6.1(d) and (g).

³⁰³ Articles of Association of Donholken, Clause 3.3(d)(i), the company may elect to redeem the Class B1 shares.

³⁰⁴ Strike Transcript p.33 (insert lines 38-46)

³⁰⁵ see Clause 4 of Schedule 1.

³⁰⁶ Skala Transcript pp24-25

³⁰⁷ Strike Transcript p35

³⁰⁸ Strike Transcript p4:

Q. Could you describe your role at present, what you actually do in the position that you've described?

A. That's an interesting question. I'm waiting for Mr Asper to describe it to me one day. I guess broadly I'm involved in most business decisions that CanWest makes both in Canada and internationally.

Q. By 'involved', what do you mean?

A. I'm one of the final decision takers.

Q. And who do you report to?

A. Mr Asper, the chairman of the board.

³⁰⁹ Strike Transcript p33:

Q. Who are the directors of DSK apart from him?

A. I'm a managing director of DSK. Brad's a managing director of DSK. I believe a third one is Joan Fogarty.

Q. Who is he?

A. It is a she.

Q. I thought you said John?

A. Joan Fogarty and Brad Unsworth. They are residents of Amsterdam and they work for us. They are resident directors at Amsterdam.

Q. Was DSK a company which existed before this structure or was it set up as part of this structure?

A. No, we created it. We needed to create a new company.

Q. Does it carry out any other function apart --

A. At this point, it is a single purpose company.

Q. Did the CanWest Global Corporation board authorise the advancing of moneys to DSK to finance Selli to buy the shares?

A. Yes, they did.

Q. When did that occur?

A. November 14. It was actually more, I guess, of a ratification than an approval. We had a board meeting on November 14, at which time the board ratified the DSK advances to finance the acquisitions.

Strike Transcript p34:

Q. So do you have authority from the board to advance sums of money to that extent without board approval in advance of transactions?

A. Sure. Obviously we did in this case.

Q. Did you authorise that payment?

A. Mmm-hmm.

Q. Did you authorise that by yourself or were there others?

A. No. With Mr Asper; certainly with Mr Asper's knowledge.

³¹⁰ Asper Transcript.p3.

³¹¹ Asper Transcript. p7-8.

³¹² Memorandum of Association of Selli, Clause 6.

³¹³ Articles of Association 3.7 of Selli.

³¹⁴ Articles of Assocation 3.7 of Selli.

³¹⁵ DSTD 5.5.

³¹⁶ DSTD 18.3(d).

³¹⁷ DSTD 7.1(b):

Each Chargor agrees that, except with the prior written consent of the Trustee (acting on the instructions of a Stockholders Resolution) it must not lease or hire any asset (including, without limitation, real property).

³¹⁸ DSTD 8.1:

CLAUSE 8 - COVENANTS CONCERNING THE CHARGED PROPERTY

clause 8.1 - Restrictions in relation to the Charged Property

8.1 Each Chargor will not without the prior written consent of the Trustee or as expressly permitted in any other Transaction Document:

- (a) (No Encumbrances): create, purport or attempt to create or permit to exist any Encumbrance howsoever ranking over any part of the Charged Property;
- (b)* (No sale, lease etc.): convey, assign, transfer, lease or otherwise dispose or part with possession of, make any bailment over, grant any option over or create or permit to exist any other interest in any part of the Charged Property whilst such part of the Charged Property is subject to the fixed charge created in this Deed or any Collateral Security;
- (c) (Charged Debts and Proceeds): subject to clause 8.2 assign, transfer or deal with or attempt to assign transfer or deal with or enter into any agreement, arrangement, or course of dealing to hold to the account of or on trust for any person, or permit any set-off or combination or accounts in respect of, any charged Debts or Proceeds;
- (d)* (Not to prejudice): do or permit any act, omission or thing whereby the Charged Property becomes or could be liable to surrender, forfeiture or cancellation or becomes prejudiced in any manner or the value of the Charge as a security to the Trustee becomes or could be materially lessened;
- (e) (Ordinary course): subject to this Deed, deal with or attempt to deal with Charged Property other than in the ordinary course of its ordinary business;
- (f) Each of the Leibler Media Holdings² and Copplemere 2 severally covenant not to vary or amend, or agree to the variation or amendment, or terminate, or agree to the termination, of the agreement constituted:
 - (I) in the case of Leibler Media Holdings², by the acceptance by Leibler Media Holdings² of the offer of sale of rights made to it by Leibler Media Holdings Pty Limited, on or about the date of this Deed,
 - (ii) in the case of Copplemere 2, by the acceptance by Copplemere 2 of the offer of sale of rights made to it by Copplemere Pty Limited, on or about the date of this Deed, or waive or agree to the waiver of any rights under such agreements.: or
- (g) (Step): take any step towards doing any of these things.

³¹⁹ Article 25.1, Articles of Association of Selli:

Appointment and Removal

- (a) Subject to Article 25.1(b), the auditors of the Company will be appointed and may be removed as provided in the Corporations Law.
- (b) For so long as there exists at least one Participating Debenture Holder:
 - (i) the Participating Debenture Holders will be entitled to nominate the person to be put forward to the Members for appointment as auditor of the Company; and
 - (ii) the Members will not appoint any auditor of the Company other than an auditor referred to in sub-paragraph (i) of the Article 25.1(b) except if and for so long as the Participating Debenture Holders fail to nominate a person to be put forward to the Members for appointment as auditor of the Company in accordance with this Article 25.1(b).

See also clause 9 of the Participating Debentures Deed for Selli.

³²⁰ Clause 6(b) of the Terms and Conditions of the Participating Debentures Deed for Selli.

³²¹ Clause 6 of the Articles of Association of Selli provides:

6(b)(i) the Interest payable ... shall be payable quarterly in arrears at the rate of 15% per annum accruing daily ... and otherwise as adjusted by the Auditor as hereinafter provided (**‘the Maximum Rate’**) ... but so that the Interest required to be actually paid ... shall not exceed that Noteholder’s Pro Rata Proportion of the Relevant Percentage of the **Distributions (as hereinafter adjusted in paragraph (b)(iii)) for that Fiscal Year** (‘the Limit Amount’)

...

6(b)(iii) In the event that in any year, the aggregate amount of all Distributions in respect of the Fiscal Year does exceed the aggregate amount of Interest for that Fiscal Year on all Notes if

paid at the Maximum Rate, or is **anticipated** in the previous Fiscal Year **by the Auditor as likely** to do so, then the **Maximum Rate shall be adjusted by the Auditor** for the ensuing Fiscal Year **to such an amount as the Auditor determines** to cover any actual excess or any **anticipated** future excess, or both if applicable, and the amount of any actual excess shall also be taken into account as an **adjustment by way of addition in determining the interest Distribution** for that ensuing Fiscal Year. **The determination of the Auditor shall, in the absence of manifest error be conclusive.**

6(b)(iv) After each Distribution Date in a Fiscal Year, **the Auditor will adjust the Maximum Rate** and the **amount of Interest** for the entirety of the then current Fiscal Year taking account of the total amount of Distributions received by the Issuer in that Fiscal Year and the **total amount of Distribution which the Auditor determines are likely to be received** by the Issuer during the remainder of that Fiscal Year and such revised Maximum Rate and revised amount of Interest shall be the Maximum Rate and the amount of Interest for the entire Fiscal Year. [Emphasis added].

³²² Articles of Association of Selli 3.3(c), 23(1)(b).

³²³ DSTD 8.8.

³²⁴ Articles 8.4 of Articles of Association of Selli:

Written Consent of Participating Debenture Holders

Notwithstanding anything contained in this Article 8, for so long as there exists at least one Participating Debenture Holder, any resolution under this Article 8 does not have any effect unless and until the written consent of the Participating Debenture Holders is obtained.

³²⁵ DSTD 7.1(a):

Amendment of Constituent Documents

(a) Each Chargor agrees that, except with the prior written consent of the Trustee (acting on the instructions of the Stockholders Resolution), it must not amend its Memorandum and Articles of Association as they exist as at the date of this Deed.

³²⁶ Clause 5 Memorandum of Association of Selli.

³²⁷ See clause 3.1 of the Debenture Stock Trust Deed between Selli, Turnand, Numeration and Lintondale. See also definition of Charged Property, TGL Securities, TGL Marketable Securities of TGL.

³²⁸ See Clause 8.1(b) of the Debenture Stock Trust Deed between Selli, Turnand, Numeration and Lintondale.

³²⁹ Clause 18.3, see also clause 22.2(f) and 22.3 of the Debenture Stock Trust Deed.

³³⁰ Clause 8.1(b) of the Debenture Stock Trust Deed.

³³¹ Direction to Pay of 8 November 1996, and clause 1 of the Participating and Convertible Debentures Deeds.

³³² Exhibit E to Strike transcript, Excerpt from directors resolution of CanWest Global Communications Corp.

³³³ Memorandum of Association of Selli, Clause 6.

³³⁴ Articles of Association 3.7.

³³⁵ DSTD 5.5.

³³⁶ DSTD 18.3(d).

³³⁷ DSTD 7.1(b):

Each Chargor agrees that, except with the prior written consent of the Trustee (acting on the instructions of a Stockholders Resolution) it must not lease or hire any asset (including, without limitation, real property).

³³⁸ DSTD 8.1:

CLAUSE 8 - COVENANTS CONCERNING THE CHARGED PROPERTY

clause 8.1 - Restrictions in relation to the Charged Property

8.1 Each Chargor will not without the prior written consent of the Trustee or as expressly permitted in any other Transaction Document:

-
- (a) (No Encumbrances): create, purport or attempt to create or permit to exist any Encumbrance howsoever ranking over any part of the Charged Property;
 - (b)* (No sale, lease etc.): convey, assign, transfer, lease or otherwise dispose or part with possession of, make any bailment over, grant any option over or create or permit to exist any other interest in any part of the Charged Property whilst such part of the Charged Property is subject to the fixed charge created in this Deed or any Collateral Security;
 - (c) (Charged Debts and Proceeds): subject to clause 8.2 assign, transfer or deal with or attempt to assign transfer or deal with or enter into any agreement, arrangement, or course of dealing to hold to the account of or on trust for any person, or permit any set-off or combination or accounts in respect of, any charged Debts or Proceeds;
 - (d)* (Not to prejudice): do or permit any act, omission or thing whereby the Charged Property becomes or could be liable to surrender, forfeiture or cancellation or becomes prejudiced in any manner or the value of the Charge as a security to the Trustee becomes or could be materially lessened;
 - (e) (Ordinary course): subject to this Deed, deal with or attempt to deal with Charged Property other than in the ordinary course of its ordinary business;
 - (f) Each of the Leibler Media Holdings² and Copplemere 2 severally covenant not to vary or amend, or agree to the variation or amendment, or terminate, or agree to the termination, of the agreement constituted:
 - (i) in the case of Leibler Media Holdings², by the acceptance by Leibler Media Holdings² of the offer of sale of rights made to it by Leibler Media Holdings Pty Limited, on or about the date of this Deed,
 - (ii) in the case of Copplemere 2, by the acceptance by Copplemere 2 of the offer of sale of rights made to it by Copplemere Pty Limited, on or about the date of this Deed, or waive or agree to the waiver of any rights under such agreements.: or
 - (g) (Step): take any step towards doing any of these things.

³³⁹ Memorandum of Association of Donholken, Clause 7.

³⁴⁰ Memorandum of Association of Donholken, Clause 7.

³⁴¹ Articles of Association of Donholken 3.6(a).

³⁴² Articles of Association of Donholken 3.6(b).

³⁴³ Articles of Association of Donholken 3.9.

³⁴⁴ DSTD 7.1(b):

Each Chargor agrees that, except with the prior written consent of the Chargee it must not lease or hire any asset (including, without limitation, real property).

³⁴⁵ DSTD 8.1:

CLAUSE 8 - COVENANTS CONCERNING THE CHARGED PROPERTY

clause 8.1 - Restrictions in relation to the Charged Property

8.1 Each Chargor will not without the prior written consent of the Chargee or as expressly permitted in any other Transaction Document:

- (a) (No Encumbrances): create, purport or attempt to create or permit to exist any Encumbrance howsoever ranking over any part of the Charged Property;
- (b)* (No sale, lease etc.): convey, assign, transfer, lease or otherwise dispose or part with possession of, make any bailment over, grant any option over or create or permit to exist any other interest in any part of the Charged Property whilst such part of the Charged Property is subject to the fixed charge created in this Deed or any Collateral Security;
- (c) (Charged Debts and Proceeds): subject to clause 8.2 assign, transfer or deal with or attempt to assign transfer or deal with or enter into any agreement, arrangement, or course of dealing to hold to the account of or on trust for any person, or permit any set-off or combination or accounts in respect of, any charged Debts or Proceeds;
- (d)* (Not to prejudice): do or permit any act, omission or thing whereby the Charged Property becomes or could be liable to surrender, forfeiture or cancellation or becomes

prejudiced in any manner or the value of the Charge as a security to the Trustee becomes or could be materially lessened;

(e) (Ordinary course): subject to this Deed, deal with or attempt to deal with Charged Property other than in the ordinary course of its ordinary business;

(f) (Step): take any step towards doing any of these things.

³⁴⁶ Memorandum of Association, clause 7 (see above)

³⁴⁷ DSTD, clause 8.1.

³⁴⁸ Articles 25.1:

Appointment and Removal

(a) Subject to Article 25.1(b), the auditors of the Company will be appointed and may be removed as provided in the Corporations Law.

(b) For so long as there exists at least one Participating Debenture Holder:

(i) the Participating Debenture Holders will be entitled to nominate the person to be put forward to the Members for appointment as auditor of the Company; and

(ii) the Members will not appoint any auditor of the Company other than an auditor referred to in sub-paragraph (i) of the Article 25.1(b) except if and for so long as the Participating Debenture Holders fail to nominate a person to be put forward to the Members for appointment as auditor of the Company in accordance with this Article 25.1(b)..

³⁴⁹ Articles of Association of Donholken 3.3(e) and 23(1)(b).

³⁵⁰ Clause 6(b)(ii) of the Terms and Conditions of Issue of Participating Debentures Deed for Donholken.

³⁵¹ DSTD 8.4.

³⁵² Memorandum of Association of Donholken, Clause 10:

A special resolution purporting to alter or add to or omit any provision of the Articles of Association of the Company does not have any effect unless and until the written consent of:

(i) the registered holders of the Limited Class Shares;

(ii) the Convertible Debenture Holders; and

(iii) the Participating Debenture Holders,

is obtained, except where the requirement for the giving of consent will result in a breach of the BSA.

³⁵³ Articles of Association of Donholken 8.4:

Written Consent of Participating Debenture Holders

Notwithstanding anything contained in this Article 8, for so long as there exists at least one Participating Debenture Holder, any resolution under this Article 8 does not have any effect unless and until the written consent of the Participating Debenture Holders is obtained.

³⁵⁴ DSTD 7.1(a):

Amendment of Constituent Documents

(a) Each Chargor agrees that, except with the prior written consent of the Chargee, it must not amend its Memorandum and Articles of Association as they exist as at the date of this Deed.

³⁵⁵ See clause 4.1 of the Debenture Stock Trust Deed between Donholken and DSK. See also definition of Charged Property, TGL Securities, TGL Marketable Securities of TGL.

³⁵⁶ See Clause 8.1(b) of the Debenture Stock Trust Deed between DSK and Donholken

³⁵⁷ Clause 8.1(b) of the Debenture Stock Trust Deed.

³⁵⁸ Participating and Convertible Debentures Deed clause 1, Direction to Pay 10 January 1997.

³⁵⁹ Excerpt from directors resolution of CanWest Global Communications Corp of 28 November 1996

³⁶⁰ Memorandum of Association of Donholken, Clause 7.

³⁶¹ Memorandum of Association of Donholken, Clause 7.

³⁶² Articles 3.6(a).

³⁶³ Articles 3.6(b).

³⁶⁴ Articles 3.9.
³⁶⁵ DSTD 7.1(b):
Each Chargor agrees that, except with the prior written consent of the Chargee it must not lease or hire any asset (including, without limitation, real property)..

³⁶⁶ DSTD 8.1
³⁶⁷ DSTD, clause 8.1.
³⁶⁸ Read ‘Chargee’ in the Debenture Stock Trust Deed for Donholken.
³⁶⁹ Read ‘Chargee’ in the Debenture Stock Trust Deed for Donholken.
³⁷⁰ Articles 3.2(c) and 3.3(c) of the Articles of Numeration.
³⁷¹ Articles 3.2(c) and 3.3(c) of the Articles of Turnand.
³⁷² See clause 3.1 of the Debenture Stock Trust Deed between Selli, Turnand, Numeration and Lintondale. See also definition of Charged Property, TGL Securities, TGL Marketable Securities of TGL.
³⁷³ See Clause 8.1(b) of the Debenture Stock Trust Deed between Selli, Turnand, Numeration and Lintondale.
³⁷⁴ Clause 18.3, see also clause 22.2(f) and 22.3 of the Debenture Stock Trust Deed.
³⁷⁵ Call Option Deed between Leibler Media Holdings and DSK
Clause 3.1 The Grantor covenants with and warrants to the Grantee ...that each of the covenants and warranties are true and correct in every respect:
(i) the Grantor has not and will not during the currency of the Call Option sell, assign or otherwise dispose of ...or alienate any or all of the Shares ...

³⁷⁶ See Article 3 of Articles of Selli and letter of Arnold Block Leibler indicating issued shares.
³⁷⁷ See Article 3.7 of the Articles of Selli.
³⁷⁸ See clauses 9 and 10 of the Memorandum of Association of Selli.
³⁷⁹ Clause 27.4 of the Articles of Association of Selli provides:
27.4 The Voting Members will not resolve by special resolution that the Company be wound up voluntarily without the prior written consent of the Participating Debenture Holders.
³⁸⁰ See clause 8.1 of the Debenture Stock Trust Deed.
³⁸¹ Clause 1.1 of the Debenture Stock Trust Deed.
³⁸² Article 3.2(b) of Numeration’s Articles of Association.
³⁸³ Article 3.6. of Numeration’s Articles of Association.
³⁸⁴ Memorandum of Association of Numeration clauses 9 and 10.
³⁸⁵ Clause 7.1(a) of the Debenture Stock Trust Deed see also definition of Stockholders Resolution, Stockholder, Stock and note clause 5 which prevents the issue of any new stock without the consent of the Trustee based on a unanimous resolution of existing stockholders.
³⁸⁶ Clause 3.1(g) of the Call Option between Copplemere and Selli regarding the voting share in Numeration.
³⁸⁷ Clause 10.1 (m) of the Debenture Stock Trust Deed.
³⁸⁸ Clause 18.3, see also clause 22.2(f) and 22.3 of the Debenture Stock Trust Deed.
³⁸⁹ Clause 8.1 of the Debenture Stock Trust Deed.
³⁹⁰ Clause 1.1 of the Debenture Stock Trust Deed.
³⁹¹ Article 3.2(b) of Turnand’s Articles of Association
³⁹² Article 3.6. of Turnand’s Articles of Association
³⁹³ Memorandum of Association of Turnand clauses 9 and 10.
³⁹⁴ Clause 7.1(a) of the Debenture Stock Trust Deed. See also definition of Stockholders Resolution, Stockholder, Stock and note clause 5 which prevents the issue of any new stock without the consent of the Trustee based on a unanimous resolution of existing stockholders.
³⁹⁵ Clause 3.1(g) of the Call Option between Leibler Media Holdings and Selli regarding the voting share in Turnand.
³⁹⁶ Clause 10.1 (m) of the Debenture Stock Trust Deed.
³⁹⁷ Clauses 18.3, 22.2(f) and 22.3 of the Debenture Stock Trust Deed.

³⁹⁸ Clause 4.1 of the Debenture Stock Trust Deed between Donholken and DSK. See also definition of Charged Property, TGL Securities, TGL Rights and Marketable Securities.

³⁹⁹ Clause 8.1(b) of the Debenture Stock Trust Deed between Donholken and DSK

⁴⁰⁰ Clause 9.1(m) of the Debenture Stock Trust Deed between Donholken and DSK.

⁴⁰¹ Articles 3.2 of the Articles of Association of Donholken.

⁴⁰² Article 3.6 of the Articles of Association of Donholken.

⁴⁰³ Article 3.6(b)(iv) of the Articles of Association of Donholken.

⁴⁰⁴ See also 3.3(b)(iii) of the Articles of Donholken.

⁴⁰⁵ Article 6.1(d) of the Articles of Association of Donholken.

⁴⁰⁶ See Article 3 of of the Articles of Association of Donholken.

⁴⁰⁷ See Article 3.6 of the of the Articles of Association of Donholken.

⁴⁰⁸ See clauses 10 and 11 of the Memorandum of Association of Donholken.

⁴⁰⁹ Article 27.4 of the Articles of Association of Donholken provides:

27.4 The Voting Members will not resolve by special resolution that the Company be wound up voluntarily without the prior written consent of the Participating Debenture Holders

⁴¹⁰ Clause 10.1(m) of the Debenture Stock Trust Deed for Selli.

⁴¹¹ DTSD for Selli clause 10.2.

⁴¹² Clause 10.1(m) of the Debenture Stock Trust Deed for Selli.

⁴¹³ Clause 9.1(m) of the Debenture Stock Trust Deed for Donholken.

⁴¹⁴ clause 9.2. of the Debenture Stock Trust Deed for Donholken

⁴¹⁵ Strike Transcript p31:

Q. If in the event that Mr Leibler and Mr Skala started exhibiting what you call hysteria, what would the options be for DSK or for CanWest in those circumstances?

A: Well, we're talking hypothetically here, obviously.

Q: Was thought given to that when the documents were drafted?

A. I don't think so, I don't think so, but hypothetically, speaking hypothetically, I mean, the structure could be replicated. You just superimpose a new Selli on top of Selli and have Selli owned by different Australians exercising the debentures and so on.

Q. Would that be by removing Copplemere and Leibler Media Holdings as the shareholders?

A. Yes.

Q. How would that be achieved?

A. Through the transfer of DSK to an Australian and the Australian exercising the debentures and call options.

Q. And then the same structure on top of that with CanWest involved financially?

A. It could be or it could be a different structure. I mean, it could just be an outright sale.

⁴¹⁶ Lerner Transcript p.25.

⁴¹⁷ Asper Transcript p.60.

⁴¹⁸ Subclauses 10(a) and (g) of that deed provide:

10(a) Subject to the Qualifying Requirement having been satisfied and subject to clause 10(g), a Noteholder may from time to time at its option by way of redemption of the Notes convert all or some of its Notes into fully paid Conversion Shares subscribed for at the Subscription Price by:

delivering to the Issuer the Certificate or Certificates in respect of that Note or Notes; and delivering to the Issuer a duly completed Conversion Notice relating to that Note or those Notes; and

paying the Issuer the balance of the unpaid amounts payable on such Notes in accordance with clause 8(b).

...

(g) Notwithstanding anything to the contrary in these Conditions, the rights of a Noteholder under clause 10 to have any Conversion Shares issued to it or to its Nominee shall not arise and the Issuer's obligations under clause 10 to issue any Conversion Shares to a Noteholder or its Nominee do not become binding on it, in each case unless and until the exercise of such rights by the Noteholder would not constitute a breach of foreign Control and Ownership Legislation or any mandatory directive given thereunder.

⁴¹⁹ 'Conversion Shares' is defined in the Convertible Debentures Deed of Selli and DSK as follows:

'Conversion Shares' means Class C Shares and Class D Shares or any combination thereof at the election of the Noteholder.

⁴²⁰ Article 3.4(b).

⁴²¹ Clause 2.1 of the Call Option Deeds between Leibler Media Holdings and DSK, and between Copplemere and DSK provide:

2.1 The Grantor hereby grants to the Grantee an irrevocable option for the Grantee or its nominee to acquire the Shares for the Purchase Prices subject to the terms and conditions of this Deed.

2.2 Subject to the Qualifying Requirement being satisfied and subject to clause 2.7, the Call Option may be exercised at any time before 5.00 pm Australian Eastern Standard Time on the Expiry Date by the Grantee delivering to the Grantor:

(a) a Notice of Exercise ...; and

(b) all necessary transfers ...

⁴²² The expression 'qualifying requirement' is defined in clause 1.1 of the Call Option Agreements between DSK and each of Leibler Media Holdings and Copplemere:

The 'qualifying requirement' means that either:

(a) (i) the Grantee or its Nominee is an Australian Resident; and

(b) (ii) the exercise of the Call Option is not in breach of and does not cause TGL, shareholders of TGL, the Grantee or its affiliates to be in breach of the Foreign Control and Ownership Legislation or any mandatory directive, approvals or authorisations given thereunder; or

Clause 2.7 provides:

2.7 Notwithstanding anything to the contrary in this Deed, the rights of the Grantee under clause 2.2 to exercise the Call Option shall not arise and the Issuer's obligations under clause 2.2 do not become binding on it, in each case unless and until the exercise of such rights by the Grantee would not constitute a breach of the Foreign Control and Ownership Legislation or any mandatory directive given thereunder.

⁴²³ Strike transcript p88

⁴²⁴ Call Option Deed dated 1 November 1996 between Copplemere and Selli re the Class A voting Share in Numeration.

⁴²⁵ Clauses 2.1 and 2.2 of the Call Option Deed dated 1 November 1996 between Copplemere and Selli re the Class A voting Share in Numeration.

⁴²⁶ Article 3.11 of the Articles of Association of Numeration

⁴²⁷ Call Option Deed dated 1 November 1996 between Leibler Media Holdings and Selli re the Class A voting Share in Turnand.

⁴²⁸ clause 2.1 and 2.2 of the Call Option Deed dated 1 November 1996 between Leibler Media Holdings and Selli re the Class A voting Share in Turnand.

⁴²⁹ Article 3.11 of the Articles of Association of Turnand.

⁴³⁰ Subclauses 10(a) and (g) of that deed provide:

10(a) Subject to the Qualifying Requirement having been satisfied and subject to clause 10(g), a Noteholder may from time to time at its option by way of redemption of the Notes convert all or some of its Notes into fully paid Conversion Shares subscribed for at the Subscription Price by: delivering to the Issuer the Certificate or Certificates in respect of that Note or Notes; and

delivering to the Issuer a duly completed Conversion Notice relating to that Note or those Notes; and
paying the Issuer the balance of the unpaid amounts payable on such Notes in accordance with clause 8(b).

...

(g) Notwithstanding anything to the contrary in these Conditions, the rights of a Noteholder under clause 10 to have any Conversion Shares issued to it or to its Nominee shall not arise and the Issuer's obligations under clause 10 to issue any Conversion Shares to a Noteholder or its Nominee do not become binding on it, in each case unless and until the exercise of such rights by the Noteholder would not constitute a breach of foreign Control and Ownership Legislation or any mandatory directive given thereunder.

⁴³¹ 'Conversion Shares' is defined in the Convertible Debentures Deed for Donholken as follows: 'Conversion Shares' means Class C Shares and Class D Shares or any combination thereof at the election of the Noteholder.

⁴³² Article 3.4(b) of the Articles of Donholken.

⁴³³ Articles 3.5(b) of the Articles of Donholken.

⁴³⁴ Article 3.2 (b) of the Articles of Association of Donholken.

⁴³⁵ Clause 10 of the Terms and Conditions of the Convertible Debentures between DSK and Donholken.

⁴³⁶ Article 5.6(a) of the Articles of Association of TGL.

⁴³⁷ Article 6.1(a) of the Articles of Association of TGL.

⁴³⁸ Clause 6.1 (h)(7) of the Share Subscription Agreement of the Original Shareholders of TGL of December 1992:

The directors so appointed by the Original Shareholders shall elect a chairman as an additional director who shall act as an independent chairman and such independent chairman shall only have a casting vote where the number of directors in office is an even number.

⁴³⁹ Article 6.1(b) of the Articles of Association of TGL.

⁴⁴⁰ Strike Transcript p.30:

Q. Did you have any concern about any new shareholder coming on board as a result of that process?

A. Well, certainly. One of the concerns would be that there would be shares trading in the public domain that would be easy to take over. I mean, who would do that? Maybe Packer takes control of the trust, maybe Murdoch does, Stokes does - who knows? The worst thing you can do is have one of your competitors show up at your boardroom table one day.

Q. That was a consideration also?

A. Certainly.

Q. To prevent anyone else taking control of TGL?

A. Well, someone whose interests were opposed to the interests of Ten.

Q. What about opposed to the interests of CanWest?

A. I'm not so concerned with --

Q. Does that also follow?

A. I think that follows naturally, you know. I mean, it is a scary thought to have one of your competitors show up at your boardroom table and start discussing the cost of programming with you or the future or your network. I mean, it's terrifying.

⁴⁴¹ Strike Transcript p.37:

Q. That was a reason for choosing Leibler and Skala and asking them to be nominees?

A. Clearly their conduct and their views of Network Ten would suggest that they see the development of Ten more or less the same as we did. We have a very strong feeling corporately that Network Ten should pursue development opportunities. I think if you talk to Skala and Leibler, they would see it the same way. That's the way to maximise value in Network Ten. Would they necessarily vote the same way as we? I don't know.

⁴⁴² Asper Transcript p.21:

Q. Were you consulted about Leibler and Skala taking the voting rights?

A. Yes.

Q. And what was your attitude to that?

A. Since I was willing to do it with a bunch of trustees that I'd never met before, I was quite happy that somebody that I knew was taking title and votes - very happy with it.

Asper Transcript p. 21:

Q. Were there any special characteristics about Skala and Leibler that you were happy to allow them to take the voting rights?

A. Well, at that time, they were the only game in town, because you had - the only - the only residual shareholders you had were they. TNQ was off, threatening to do this thing, and Whyte and Cowin were off threatening to do something else, and Singleton was going home. There was only one game in town, having been turned down by institutions - that was Leibler and Skala. That's the plain fact of it. Am I happy that they did it? Yes. They've been - to the extent Leibler's been involved, which has been limited - he's a very, very solid guy - good director; tough, and Skala has now become, after four years, because he has always been there - he's become a very solid, you know, steady - because he's a lawyer, he contributes a lot more than a director normally does, and now he also knows the business, so, yes, they're both good directors. In fact, I spoke to Leibler last night for the second time in 12 months, or 13 or 15 months, about really getting involved, and I'm happy to say that I think we'll really get them involved - I'm starting to feel good about it.

⁴⁴³ Leibler Transcript p.7:

Q. Was the conflict within the company a factor which caused you to decide that you wanted to divest yourself of your shares?

A. I think the conflict in the company - yes, I would say; because otherwise we would have been moving towards a float earlier, if there wouldn't have been these conflicts and these different interests, very different interests, some of them not even different commercial interests but interests that are broader than commercial. I think there were some - in other words there were certain political interest streams operating within - when I say political I mean - I think you know what I mean.

Q. Between shareholders, you mean?

A. Yes.

Q. Did you find that uncomfortable in your role as director, that political - - -?

A. I found that that was an inhibition towards both the development of the company and above all towards the floating of the company. It was - - -

Q. How did it affect you in your capacity as a director of the company?

A. Oh, because there was quite a lot of sniping in there going on and I had the feeling sometimes that the vested interests were more interested in the vested interests in the people who were supporting or behind them than the company itself on occasions. There were problems within that company.

Q. Did it damage your enjoyment, as we were talking about, in your role as a director?

A. Oh, to an extent, yes. It would certainly be much more enjoyable now because those interests would no longer be operating in that manner.

Q. Was that part of your reason, therefore, to decide to stay on as a director?

A. No. The reason that I stayed on as a director was because I got the offer and I liked being a director. With all the negatives it was still a big plus.

Q. When you say you liked it, for what reasons did you like it?

A. I enjoyed sitting around the board table discussing television, following and being involved in an operation like Channel Ten, and I found, as I said, that it was some considerable benefit to be party to an organisation like that and be a director in other business enterprises. It was a plus to be able to have that on a CV.

Q. To what extent was it that and to what extent was it an economical interest and upside, as you call it?

A. Both. Well, ultimately, if I had to choose between the economic interest and the pure fun, I guess, you know, if I was going to lose a lot of money I wouldn't consider it but I had an opportunity here; but Stephen really made this a terribly attractive thing for me because Stephen me told me, "This is a clean operation; you stay as a director; you maximise your sale and you've got a chance at a later stage of further money".

⁴⁴⁴ Leibler Transcript p.17:

Q. That fact that you retained your directorship of TGL, do you understand that to be a condition of the transaction whereby you sold the Leibler Media Holdings shares?

A. No, it was put to me as a package and I certainly didn't query it. But what was your understanding as to the options?

A. My understanding was that I was to remain as a director.

Q. That that was part of the package?

A. Well, yes.

Q. Did you understand you had any option not to be a director?

A. When Stephen came and explained the overall situation he said: Here's what we get if we move in this direction. And I didn't really push; I wasn't interested in finding out if I could get the same deal without being a director; I was quite pleased to be a director, so the question never arose.

⁴⁴⁵ Leibler Transcript p 9

Q. Why would you remain as a director of Ten in that scenario?

A. I guess if they told me that it could be constructed in such a way, the float, that I could still be, if not it would be bad luck but I can't answer that question really, it's a good question, I should have asked that question myself but I was told there's a good probability that you will still remain a director, I was not given any guarantee.

Q. And you were told that by?

A. Stephen, I hope I'm not misunderstanding him but that's what he led me to believe, good probability.

⁴⁴⁶ Strike Transcript p.39:

Q. Given the existence of Selli as a vehicle to purchase the TGL shares, why were the companies Numeration and Turnand set up and could you give me a timing for that in terms of the idea of those companies?

A. The genesis of the idea was some time in the first week of October and the genesis of that particular idea was in the preservation of Leibler's seat on the board. At the time that we came to that, we developed that idea, we were in very early discussions with Skala and Skala as Leibler's proxy for them to act as the owners - the shareholders of Selli, and therefore the nominee. And at the time there was also indication that Leibler wanted to sell.

Q. What's the timing of this?

A. First week in October. And Leibler has a special position in the share subscription agreement.

Q. The articles of TGL --

A. It's not in the articles. It's in the share subscription agreement. He is given a board position on TGL so long as interests associated with Leibler continue to own a per cent of the shares of TGL. That would have been accomplished because of his ownership of Selli, but the drop down to Turnand was designed as a means of not having to have those shares go through the pre-emptive right and continue to be controlled by Leibler and therefore to allow Leibler to maintain that board position. And Leibler being a principal of Selli --

Q. Sorry, you said he would still have that board position, but through Selli?

A. Through Selli and through Leibler - through Turnand.

Q. But he didn't need Turnand - he could have had it through Selli?

A. Arguably he could have, but arguably he couldn't have.

Q. Why not?

A. Because of the bad drafting of the share subscription agreement; it wasn't clear. If that would have been a sale, that would have traded and lost him his position. The other side of the argument, which is quite ridiculous, is by virtue of his original subscription he had a board seat for perpetuity. I don't know if that's the right interpretation either, but unfortunately the share subscription agreement is not terribly precise. It's in many respects extremely ambiguous. So that was the genesis of the idea. It was to establish, since Leibler was going to be a principal of Selli, to allow Selli and Leibler to preserve the additional board seat.

⁴⁴⁷ Skala Transcript p24

Q. I am just trying to clarify where the idea to set up both Numeration and Turnand - and as you say there is that structure on both sides - came from because you seemed to indicate earlier it came from Strike and Clayton Utz and now - - -?

A:---No, no, it's likely to have but I can't say definitively. But I do recall it was relatively late in the day. What's the date of incorporation of - - - I think it is 30 October?---Yes, that's - it's relatively late in the day, if that's the date of its incorporation.

Q. 29 October?---So that thinking was late thinking, that wasn't early thinking. In other words early thinking was just sort of finding a structure to pass the shares.

⁴⁴⁸ Skala Transcript p 26

Q: What was the purpose of establishing those subsidiary companies of Turnand and Numeration?

A: I think to avoid the pre-emptive rights. In other words just to be able to transfer free of the waiting the 30 day period and the 14 days after the 30 day period and things like that. So it was just once a price had been agreed we can just engage in the transaction.

⁴⁴⁹ Strike Transcript p.34 :

Q. What do you think Mr Skala and Mr Leibler actually got out of their sale of the TGL holdings?

A. What do I think they got out of that? I think I want to frame my answer that they got - they obviously got something out of the sale of the TGL holdings. They got money. Ultimately they got \$13 a share. What they got out of the Selli structure, I think they got some additional things out of the Selli structure which they wouldn't have received if they just had simply entered into a sale transaction with Selli. I think they got board representation. One of the motivating factors behind Leibler doing this sort of drop-down from Leibler to Turnand and then a financier was they got two board seats with a 17 per cent interest, whereas, normally the two board seats would have required 20 per cent interest under the share subscription agreement, I think Skala got a board seat as opposed to being an alternate.

⁴⁵⁰ Skala Transcript (1) p. 22:

Q. So do you think that the retention of your voting right was a factor that influenced the result of a price of \$13 that you achieved?

A. I would think so, I would think that the fact that we'd retained our voting rights was part of what I would say was myself saying, guys we're going to retain voting rights, this will not be uncontroversial I'm sure, we're all aware of the law, we all know exactly what all this will mean, there's going to be much pain and sweat and discussions like this which shall ensue, that's not something which people take on lightly, in fact it's actually something which people take on in the knowledge that it's going to occur and the attempted publicity, all those things, so it's not like we're going into this naively, quite the opposite, we thought we were going into it very much aware that this would be controversial, it would be a public issue, that the ABA would be making inquiry, that we'd end up sitting here having these conversations, we knew that so this is not a surprise so the answer is that it was perfectly legitimate for me to say, fellows this is something which is worthy of, I want a

full price on my shares if I'm about to pick up - when I do I want a full price for my shares but if I'm controlling the voting rights and it is a very responsible job because there are serious things to be done and what could be 37 per cent of the voting rights in this country is actually very serious, we have to find some negatives and be compensated accordingly so again perfectly commercial and perfectly reasonable though perfectly understanding on the other side, it's not like they're foolish people, they understand this is business. Sure we're interested in it, we like the business and like all those things but you have to be paid for it as well.

⁴⁵¹ Strike Transcript p.55.

⁴⁵² Skala p19

Q: What was your attitude at that stage to retaining voting rights while seeing your actual shareholding diminish?

A: I was not against the notion of retaining voting rights. In fact, from my own perspective it would've continued an involvement with the company because it was interesting and gave me the opportunity to probably somewhere down the line, to make some more money somewhere in this transaction, just by retaining involvement in the company, knowing what was going on.

⁴⁵³ Strike Transcript p.58:

Q. Did you discuss with anyone at Winston Capital the possibility of the sale of their shares in TGL to anyone before the acquisition of those shares by Selli?

A. He - I spoke to one of their representatives in the Bahamas called Peter Ashton. I indicated to him that shares had been sold, the Belshaw shares had been sold to Selli in November, and he indicated to me that that was an interesting - \$13 was an interesting price. I said, "If you're interested in selling, you should talk to the principals of Selli", and I introduced them to Skala and that was the last contact I had with them.

Q. But it was at your initiative that they approached Selli?

A. I wouldn't say it was at my initiative. All I did was basically tell Ashton that there had been a transaction.

Q. And you discussed a price?

A. Well, I told him what the price was. That was public knowledge.

Q. You called him. You initiated the call?

A. That's right.

Q. Why did you call him?

A. Because I thought it was a transaction that he should know about; that's all.

Q. Did you already have in your mind the view that CanWest would finance the acquisition of those shares --

A. No.

Q. -- were Selli willing to purchase them?

A. No, I don't think so. Winston had sold some shares previously, about two years ago, I think to the AMP, so it was really just a courtesy call just to inform him because he doesn't see the Australian press like every other shareholder does.

⁴⁵⁴ Strike Transcript p.62:

Q. I kind of understand your saying "Why not", but I don't really understand your why. The question was asked, "What advantage was it to CanWest?" You have answered by saying "So why not?", but why?

A. There was no particular advantage to doing it. It's just the shares were available. There was an interested seller.

Q. The price wasn't too hot, was it?

A. But the other side of the coin was it wasn't an outrageous price either. It wasn't too bad. It was, you know, eight and a half times 1997 earnings before EBITDA, so it wasn't a crazy price. It made commercial sense to acquire the shares. We had a view that eight and a half

times - that earnings number was not an irrational price to pay. Although it didn't deliver any strategic advantage, it certainly delivered a commercial advantage to us in the sense that if we ever packaged this thing together and floated it or otherwise on-sold it, we would make a profit. I see nothing wrong with that; that's why I say, "Why not?" It's not a bad deal. But there was no sort of overwhelming commercial motivation or strategic motivation to make a transaction.

⁴⁵⁵ Strike Transcript p.62.

⁴⁵⁶ Strike Transcript p. 75:

A. ... Mary has just pointed out a good point. In the final event, the lawyers at Clayton Utz were trying to negotiate an extension arrangement for about 24 hours with Whyte and Cowin's companies to allow for closing with Donholken, because the 14 days after the 30-day period had run out, and Donholken wasn't going to be available to accept the shares until the next day and there was a negotiated sort of extension of time - I don't know for whatever; the Donholken transaction was done principally by our lawyers, so I don't know all the ins and outs of that. But my understanding is that there was an issue as to whether the extension would be signed or not and clearly I don't think that we - because I think we were obligated to close as the nominator, there could have been damage to us; we had convinced Skala and Selli that they should attempt to close if we couldn't get the bridge for the extra day. When Selli tried to close very late on the final day, Whyte refused to close -

Q. This is on the 9th of January, is it, Thursday the 9th of January?

A. Whatever the date was when the time ran out - it was the 9th or 10th, something like that.

Q. Thursday the 9th, I think?

A. Thursday the 9th. He ultimately refused to close. So ultimately the 24-hour extension was granted and Donholken closed with him the next day.

⁴⁵⁷ Skala (1) Transcript p. 71:

Q. Would you see that as a reasonable proposal in the circumstances that we anticipate happening shortly, that is when Selli acquires the Cowin/White shares?

A. I think you are making assumptions about what Selli is going to do. Why don't you ask me what Selli would think about doing? I mean I cannot answer that question in that way. I can say would I consider that CanWest should have 5 and Selli should have 3 out of a total board of 11, I mean it is in my view hypothetical, I actually do not think that is, in fact, going to be - it is certainly not what I have in mind within the context of Selli.

Q. What do you have in mind?

A. I have in mind staying on the board, I have in mind Leibler staying on the board, Isi and I have briefly spoken about the possibility of his son who is the other alternative director to him joining the board and leaving it as is which is leaving Geoff Levy on the board because he is a useful board member, useful director, and then four directors from TNQ and - essentially leaving the same group of people sitting around that board table as has sat there since day one. I am not sure what will happen with Whyte and Cowin, I mean my own view is that I would rather see Robert Whyte off the board than on the board but, you know, that is more a personal view than a corporate view.

⁴⁵⁸ Strike Transcript p.76:

Q. Why did you approach Steven Skala to see if he had any ideas about who might be found to form this new company?

A. Well, the reason I asked him was because, you know, we were all in this same boat together. You know, we all had the prospect of legal action looming over us, probably he and his companies and Leibler's companies more than CanWest, because CanWest wasn't bound by the 40 per cent issue, but we were certainly bound to close in some fashion, to find someone to take those shares on our behalf. We'd committed to find someone to buy those shares at that price. So for different reasons we were all in a bit of a jam and Steven's very well regarded, a

well-respected Australian citizen. He knows a lot of people and he knows a lot of people in the financial community and I just asked him for his thoughts.

Q. And what was his response?

A. He recommended Melda Donnelly to us as being someone who had a fair bit of experience who would be very well regarded, quite credible.

⁴⁵⁹ Kennett Transcript p.43:

Q. Or if I could say why was she approached by Yale Lerner?

A. She in her own right has had quite a list of achievements and has a number of directorships and I think she's had a pretty good track record as being, again, stable maybe I use that too often - but stable and an experienced director for boards. Interestingly enough what I'm reading into what's going on there, why Melda, you know, she acts on a lot of boards, so that as a board member of Channel Ten she wouldn't want in any way to compromise, just like myself, wouldn't want to compromise our other businesses and other places where we represent. Also, quite importantly, she would understand, as I do, what it means to be a director of a company. In other words, where does your priority lie or where do your responsibilities lie as directors of a company and I think that's pretty important.

⁴⁶⁰ Donnelly Transcript p. 6:

Q. And what did Steven Skala say to you about what your possible role in that might be?

A. He said only that, "You would be a shareholder in Channel Ten and as such, you would be on the board and make decisions about Channel Ten."

⁴⁶¹ Donnelly Transcript p.6:

Q. Did you ask him why he approached you?

A. Yes. And he said, "Well, you are a professional director and you're a person who's had sound management experience at board level", so both board and management experience on a board.

⁴⁶² Donnelly Transcript p.11:

Q. At the end of that initial conversation with Steven Skala, what was your initial reaction as to whether it was likely you would get involved in this, that it was beneficial and something that you would like to be involved in?

A. My initial reaction was positive because I am interested in directorships and commercial upsides and to me it sounded interesting that I could learn more about the media industry in this way and position myself ultimately for public company directorship. That interest then to me would always have to be matched by the prudence of going through the process.

⁴⁶³ Donnelly Transcript p. 35:

Q. Did you have any concern during that period of time about what you'd got yourself into?

A. At times I felt I didn't ask for enough money for the time this thing could possibly take me - the legal time that it was taking.

Q. Was there negotiation about the \$100,000?

A. There was in a sense for me. I asked at the time what I thought time perspectives would be for directors' meetings of Channel 10; so for me that was important. But negotiation, if I'd wanted more I would have asked for it. There was negotiation in the sense that I wouldn't proceed unless there was a clear indication to me that their board seat, the Channel 10 board seat, was possible.

⁴⁶⁴ Kennett Transcript p.12:

Q. So what happened next?

A. Later that day I received a phone call from Yale Lerner. I think I returned his call actually. He called while I was out. He was in the Caribbean and I went through with him the transaction - or he went through with me the transaction and whether I would be interested and that was where the - more of the explanation came out.

⁴⁶⁵ Kennett Transcript p.16:

Q. So that conversation with Yale Lerner, you say that took place on the Tuesday afternoon, December - - - ?

A. That was Tuesday evening, say 5 o'clock.

Q. And you are certain that he gave you the name of both Anthony Hollis and Melda Donnelly at that time?

A. Absolutely.

⁴⁶⁶ Kennett Transcript p.13:

Q. Was there any discussion about TGL board directors at that point in time, in that conversation?

A. In that particular conversation, yes, there was. But I had a subsequent conversation, I am just trying to remember which was which. I am quite sure it was the beginning one because I drilled him on all these things, just trying to understand. He explained to me that each 10 per cent ownership of Channel 10, TEN group, would gain a Board seat.

Q. So you understood that if you became involved - I am trying not to lead you but if you became involved with these two other persons, the names that were given to you, to purchase this parcel of shares of 20 per cent there would be two- - -?

A. Two out of the three of us would be on the board, exactly.

Q. Okay. Was there any discussion with Yale at that time about who those two might be, those two persons might be?

A. No, that was - he said that was completely up to us to work out. He did explain that - sorry, to just go back - he did explain in that conversation the importance of independence. He said 'You know that this is not just a front'. Basically we are independent. We have got to be acting as - if we are on the board of Channel Ten we are on the board of Channel Ten, and we are completely independent to do what is best for Channel Ten and forget about any other issues that could happen.

Q. At that time did you have any interest in being a Director of TEN Group Limited?

A. When he asked?

Q. Yes?

A. Of course. I didn't sort of say, 'Great, I would love to', but you know, of course, I mean it is a terrific opportunity.

Q. When you say, when he asked, do you think that he may have asked you, did you want to be a Director of TEN?

A. No, No. What he asked what he asked was 'Am I interested in this transaction?'

⁴⁶⁷ Kennett Transcript p.38:

Q. Could I just ask you what was your primary reason or reasons for entering into this transaction, for agreeing to enter into this transaction?

A. Well, I guess as other things come up - other opportunities come up this was just another opportunity, albeit on a much bigger scale, that came up that looked attractive. Why did it look attractive? Number one is the upside. If we are able to achieve an upside on the shares it should be a decent amount of dollars for us, for Giacomo, for ...(indistinct)... The \$100,000 dividend or directors fees, or income, never hurts. I don't think that was particularly the primary motive - and I think just as important it's a terrific way of actually getting a bit of exposure. It's not very often that you're asked to join a major television station's board. At the end of the day it is a bit of kudos and certainly for someone like me who's very keen in the investment world. The ball keeps rolling and unless you're on that ball, unless people are throwing things at you, you don't see anything and so hence - I think maybe even that last thing is quite an important consideration.

⁴⁶⁸ Kennett Transcript p.18.

Q. Did Melda discuss with you at that point who were likely to be the TGL directors?

A. Yes.

Q. What was said?

A. She said that she was more comfortable - she said that she had discussed with Yale. I think she said she'd discussed with Yale that she would be the - she would want to be a director and she would want me to be a director at the time. In other words we were going to be the two out of the three simply because of Anthony having worked once for CanWest in the past. The last thing that anyone wanted to do was have the perception that we were - that 'Oh well, here's CanWest who has nominated an ex-employee to be a director of Channel TEN'. So that did come up, but Yale hadn't mentioned that to me at all.

⁴⁶⁹ Kennett Transcript p.18:

Q: Was there any further discussion about Mr Hollis' involvement at that stage whether you and Ms Donnelly were having this involvement?

A. We had a good discussion on that. We had a good discussion as to whether, having Anthony Hollis, there was a positive or a negative and you know it really did weigh both ways because I think from - one thing we didn't want was from the public and the ABA certainly perspective is to think 'Oh well, Anthony is just there because he's been picked by CanWest. As an old CanWest employee he will do the right thing'. The other - which actually I didn't quite think because by the conversation I had with Anthony a couple of hours before that's - you sort of got a tone which wasn't quite like that. The tone was more you know he didn't know - it came out of the blue and provided he could see certain criteria, you know, like all equal etcetera etcetera that he'd be interested. So it wasn't like a pre-planned exercise. It was definitely not a pre-planned exercise but then again I - you know you look at both sides.

The other side was Melda and I. Although we've had pretty good business experience over the years neither of us have the media experience and so this could be quite a good balance for us. If you're looking to put together a shareholding it's not bad having someone who in fact knows not only media but seems to know TEN quite well from past experience.

⁴⁷⁰ Kennett Transcript p.21:

Q. I think we are at the point where you ring Yale back, still on the Tuesday evening?

A. No, next day.

Q. Next day?

A. Called Yale.

Q. What time of day would that have been?

A. No, I don't recall. It would have to have been morning. It would have to have been morning because the afternoon got busy with meetings and things, yes, so it would have been morning. And that's where I went through my list of questions which I was a little bit more able to ask I thought, you know, important questions like TNQ, like Anthony Hollis, you know, tell me about Anthony Hollis so that I'm comfortable and about the reasons from his words, from his mouth, why Selli couldn't just go through the pre-emptive rights thing again for me so that I could understand why Selli wasn't really excited about, because as it turns out they weren't very excited about completing the transaction on the final date.

⁴⁷¹ Kennett Transcript p.22:

Q. What was the conversation you had with him about Hollis at that time?

A. I again asked - sorry, there was one other thing with Melda. Melda said to me that the discussion that she had had with Yale was that Anthony was going to be a non-voting member of Donholken, all equal in shares, and he would be non-voting in that company. He would own a third but he would be nonvoting. So when I went to Yale and I spoke to Yale, I said 'Yale, you didn't tell me this the day before. Can you explain to me, you know, what is - you know, what is your reasoning?' Basically, he said forget about that. He said that no, that's not right. In the meantime, whether he had had advice or whatever, but basically if we are all equal it is fine but he understands that Melda would vote when the three of us vote, decide who was going to be on the board, Melda has to be on the board and wants me to be on the board. So that the comfort level is - there is nowhere any

question as to whether - sorry, the board of Channel 10 - that there is no way there can be any question as to our - basically our independence, where our mindset lies.

⁴⁷² Kennett Transcript p.19:

Q. Did you feel at that stage that you and Ms Donnelly may have been in a position to oppose Mr Hollis's involvement?

A. Well, the next - just to jump a little bit - the next day I got on the phone to Yale because I had all my questions now that I'd heard about Anthony Hollis and I had a number of questions and I wanted to understand this pre-emptive rights issue, TNQ. I had now my list of informed questions, and one of them was asking exactly that. What Anthony Hollis - sorry, it wasn't exactly. There was never a stage where we asked 'Could we do it ourselves?' They said they would prefer to see three people as shareholders and we didn't really, it was almost like gift horse, you know, say, 'Well can you get rid of him?' It was more how can we put the deal together so we're all comfortable. That was more the flavour of it.

⁴⁷³ Hollis Transcript p.9:

Q. Was there ever any suggestion that you might be a TGL director through that relationship in conversation with Yale Lerner?

A. I don't know if we discussed it there, but I knew that the current, I think it is the Memo or Arts of Ten, which stipulate that that share block would have two directors, would have a right to two directors in TGL and I knew there were three of us who were directors of Donholken, so I expected two of us would be directors of Ten.

Q. But in that initial conversation with Yale Lerner, was that a matter that you discussed?

A. I really don't recall, simply because I think I knew what could happen. I don't know if it was an issue that was discussed at all. I don't believe it was.

⁴⁷⁴ Hollis Transcript p.15.

⁴⁷⁵ Strike Transcript p.75:

A. ... Mary has just pointed out a good point. In the final event, the lawyers at Clayton Utz were trying to negotiate an extension arrangement for about 24 hours with Whyte and Cowin's companies to allow for closing with Donholken, because the 14 days after the 30-day period had run out, and Donholken wasn't going to be available to accept the shares until the next day and there was a negotiated sort of extension of time - I don't know for whatever; the Donholken transaction was done principally by our lawyers, so I don't know all the ins and outs of that. But my understanding is that there was an issue as to whether the extension would be signed or not and clearly I don't think that we - because I think we were obligated to close as the nominator, there could have been damage to us; we had convinced Skala and Selli that they should attempt to close if we couldn't get the bridge for the extra day. When Selli tried to close very late on the final day, Whyte refused to close -

Q. This is on the 9th of January, is it, Thursday the 9th of January?

A. Whatever the date was when the time ran out - it was the 9th or 10th, something like that.

Q. Thursday the 9th, I think?

A. Thursday the 9th. He ultimately refused to close. So ultimately the 24-hour extension was granted and Donholken closed with him the next day.