

CHAPTER 2

The Ministerial Decisions and the Court Actions

2.1 The matters before the Committee were raised by court actions which followed a decision taken in 1982 by the then Minister for Home Affairs, Tom McVeigh MP, in exercise of certain powers he held under Division 10BA of the Income Tax Assessment Act (the Act). (Division 10BA is reproduced in the Minister's submission in Appendix 1.)

2.2 Briefly, Division 10BA of the Act provides the Minister with the power to approve films which satisfy criteria laid down in the Division and which provide taxation benefits to investors in them.

2.3 Two requirements must be fulfilled before taxation benefits allowed under the Division may be claimed. The first requirement is the issue to a filmmaker by the Minister of a provisional certificate stating that the film is a qualifying Australian film under the scheme (Section 124ZAB). The provisional certificate is usually issued for a film which is yet to be made.

2.4 The second requirement is the issue of a final certificate which is not issued until the film is completed and ready for release and exhibition (Section 124ZAC). The Minister has to be satisfied that (inter alia) the film is a 'qualifying Australian film' applying criteria set out in section 124ZAD of the Act.

2.5 In the case of the film 'The Return of Captain Invincible', Mr McVeigh decided not to issue a final certificate following consideration of advice from his Department. The chronology of events relevant to his decision is:

- . 10 September 1981: Provisional certificate issued by the then Minister, Ian Wilson MP, to the applicant, Mr Andrew Gaty.
- . 23 June 1982: Mr Gaty applied for a final certificate.
- . 17 November 1982: Mr McVeigh informed Mr Gaty that he was unable to satisfy himself that the film was a qualifying Australian film for two reasons:
 - 1) doubt whether the film for which a certificate was issued was an eligible film as defined in the Act, i.e. a film produced wholly or principally for exhibition to the public. This conclusion was reached because the film viewed by departmental officers appeared incomplete and information was available that the film was undergoing extensive re-editing in the United States.
 - 2) doubt whether the film was an "Australian" film due to perceived increases in non-Australian elements since the issue of the provisional certificate.
- . 18 November 1982: Mr Gaty supplied further information in response to Mr McVeigh's 17 November letter. He also met with officers of the Department on 19 November.

- . 9 December 1982: The then Minister informed Mr Gaty that after careful consideration of extra information supplied he remained of the opinion that the film was not a qualifying Australian film and, accordingly, was obliged to revoke the provisional certificate.

2.6 Following Mr McVeigh's decision not to grant a final certificate for 'The Return of Captain Invincible', the investors in the film, Willarra Pty. Ltd. and a number of other individuals and companies (Willarra), lodged an application for an order of review of the Minister's decision under the Administrative Decisions (Judicial Review) Act 1977.

2.7 The course of the hearing of this application was as follows:

- . 13 January 1983: Willarra lodged the application for an order of review under the AD(JR) Act.
- . 24 May 1983: A Federal Court hearing commenced before Justice McGregor.
- . 10 November 1983: The hearing concluded.
- . 17 May 1984: Justice McGregor delivered his judgment.

2.8 The judgment (recorded at 54 Australian Law Reports, 65) decided that Mr McVeigh had:

- (i) taken into account irrelevant matters viz, the idea of the film, the original authors of the play "Whatever happened to Captain Incredible" and that the idea behind the script for the film was the same as that for the play;

- (ii) exercised his power unreasonably in respect of the determination of eligibility and 'significant Australian content';*
- (iii) erred in his interpretation of the word 'significant';*
- (iv) erred in his interpretation of the word 'authors';* and
 - * (i.e. when these words are used in Section 124ZAD)
- (v) breached natural justice in that the applicants were not given an opportunity to be heard before he made his decisions.

2.9 Justice McGregor also made the following specific findings regarding the failure by the Minister to observe the rules of natural justice:

- (vi) he was in breach of the rules of natural justice in failing to give the applicants any opportunity to defend their investment by explaining why the material before the Minister should not be accepted as factually correct nor be a basis for rejecting the application for a final certificate; and
- (vii) he was in breach of the rules of natural justice in not informing the applicants that published procedures involving the Australian Film Commission would not be followed, and that a favourable opinion of the Commission on the film would not be taken into account.

2.10 Following discussions on the import of the decision between the then Acting Minister (Chris Hurford MP), officers of the Department and Counsel advising the Department, it was decided that an appeal would be lodged against Justice McGregor's decision to test grounds (i) to (iv) (set out in paragraph 2.8 above) to overcome the possibility of uncertainty in the administration of the film incentive scheme, particularly with regard to interpretation by Mr McVeigh of the terms 'author', 'origin of the idea' for a film and what constituted 'significant Australian content' in a film under Section 124ZAD of the Act. Counsel advising the Department and the Australian Film Commission both believed that an appeal against the decisions reached by Justice McGregor in favour of Willarra on the denial of natural justice would fail.

2.11 The Appeal took the following course:

- . 14 August 1984: The Acting Minister (Chris Hurford MP) authorised the appeal.
- . 22 to 25 October 1984: Appeal proceedings came before a full bench of the Federal Court (Justices Toohey, Wilcox and Spender).
- . 11 December 1984: The Full Court dismissed the appeal unanimously and the Court directed that the application for a final certificate be reconsidered by the Minister as he had denied 'natural justice' to the applicant. The judgement provided guidance on the approach the Minister should take in the determination of 'significant Australian content' and other matters relevant to the Minister's discretion.

2.12 Willarra wrote to the Minister on 4 April 1985 on behalf of all investors in the film requesting a final certificate be issued for 'The Return of Captain Invincible'. The Committee has been advised by Solicitors representing Willarra that a final certificate for the film was issued to Willarra in September 1985.

2.13 The Committee has ascertained the present position regarding payment of costs in the action. The Australian Government Solicitor disputed the original bill of costs submitted by Willara's solicitors. Following taxation of the bill, the Sydney Registrar of the Federal Court allowed Willara's solicitors \$182 473.40 as costs payable by the Commonwealth. Willara's solicitors have raised a number of objections and requested the Registrar to review the decision. The Registrar has agreed and will decide further on the claim after considering written submissions. Should the Registrar's decision not be acceptable to Willara's solicitors, an appeal may be made to the Federal Court. Resolution of the claim for costs is unlikely before the end of the financial year.