

## CHAPTER 3

### Matters considered by the Committee

3.1 With the exception of the matters referred to below, the Committee has not reconsidered in detail the matters canvassed in the court action relating to 'The Return of Captain Invincible' heard by Justice McGregor. Justice McGregor's judgment, which was not available to Estimates Committee D at the time of its deliberations, deals with these issues in comprehensive and complete detail. The Committee also assumes that the decision taken by the Minister to issue a final certificate for 'The Return of Captain Invincible' in September 1985 reflects the Minister's acceptance of the findings made by Justice McGregor as to the specific circumstances of Mr McVeigh's refusal to grant a final certificate for the film in 1982.

3.2 There are three issues which are raised by the terms of reference on which the Committee believes it can and should comment, bearing in mind the concerns expressed by Estimates Committee D in its report. These issues were not relevant to the action heard by Justice McGregor, but are relevant to the Committee's examination. They are:

- . whether the extremely large sum of legal costs incurred in the action before Justice McGregor could have been foreseen and should have been a relevant consideration in Ministers' decisions;
- . whether the institution of an appeal against Justice McGregor's decision was reasonable; and

. whether any alternative ways of overcoming possible administrative difficulties and uncertainty were investigated.

#### Costs incurred in the original action

3.3 As indicated in Chapter 2, the original court action was commenced by Willarra under the Administrative Decisions (Judicial Review) Act.

3.4 The costs in the hearing of Willarra's application are:

|                       |                |
|-----------------------|----------------|
| Australian Government | \$148 447      |
| Willarra*             | <u>460 000</u> |
| Total                 | \$608 447      |

\*costs claimed but not settled to date

The Committee was concerned to ascertain how such an extremely large sum of costs, for which the Australian Government is now liable, had been incurred and whether the magnitude of the costs could possibly have been foreseen by Mr McVeigh or his advisers prior to his decision not to issue a final certificate for 'The Return of Captain Invincible'. The Minister told the Committee that the costs in the action were high because:

... the Judge (Justice McGregor) chose to admit all evidence, instead of only the evidence which was before the then Minister at the time he made his decision. Consequently, evidence was sought on Commission in the United States, and relevant departmental officers were required to submit affidavits and be cross examined in court.

3.5 The Committee has been provided with the Appeal Books prepared for the appeal from Justice McGregor's decision to the full Federal Court. They contain documents and affidavits that were before Justice McGregor. The Committee accepts that a considerable part of Willarra's costs arose as a result of Willarra providing detailed affidavit evidence prepared in the United States. The Committee does not comment on the reasonableness of the very large amount claimed by Willarra as costs, as the taxation of these costs by the Registrar of the Federal Court is not complete.

3.6 Having regard to the length of the hearing and to the detailed evidence prepared and provided on behalf of the Minister the Committee can understand why the Government's costs were also very high. The Committee nevertheless records its concern that the Government's total liability for costs in this action could be of the order of \$600 000.

3.7 The Committee can understand the conflict which can exist for a Minister between making what he or she believes is the correct decision, and making one which costs the Government less. However, it was always possible - perhaps probable - that Willarra would initiate action for judicial review of a decision not to issue a final certificate for the film, given that it and the other investors stood to lose a very substantial tax benefit if the final certificate was not issued. The Department, in the Committee's view, should have at least raised this and the possible costs of such action as relevant matters in its advice to Mr McVeigh.

3.8 Advice provided by the Department, and the advice to the Department from the Attorney-General's Department provided to Mr McVeigh when he was considering Willarra's application for a final certificate (which was considered by Justice McGregor and which has been read by the Committee), indicate that it could not be positively stated that the film was either an

eligible or an ineligible one. This case was therefore one where the Minister had to exercise the discretion vested in him by the Act to apply the criteria set out in sections 124ZAC and 124ZAD of the Act and to then either grant or refuse a final certificate.

3.9 In answer to a question from Estimates Committee D regarding the advice provided to Mr McVeigh, the Department said that:

... the proper construction of 124ZAD of the Act had not been the subject of judicial consideration before this case. Accordingly, the Department's advice to the Minister (supported in some aspects by advisings from Attorney-General's) was on the basis of the best understanding of the Section's construction.

3.10 Each decision made by a Minister to issue a final certificate not only provides a tax benefit for the filmmaker, but necessarily reduces tax revenue. The Committee accepts that a Minister might tend to decide against those cases which are doubtful or borderline. However, as a matter of administrative prudence, the possibility of judicial review proceedings and the possible liability for the costs of such proceedings compared to the reduction in revenue are relevant considerations in doubtful cases and should be borne in mind by a Minister.

3.11 The extent of the costs involved should also have been raised with the new Minister after the case began and the intent of Justice McGregor became clear as to his conduct of the case. This would have allowed reconsideration of the decision not to grant the final certificate and possible early termination of the case.

3.12 As a general point, Departments and Counsel should review the wisdom of allowing expensive court cases to continue when other simpler and less expensive options, including legislative amendment, are available. If legislative weaknesses are exposed at the commencement of a case, it is usually preferable that the Parliament's intention be clarified for future cases by Parliament rather than by the courts.

#### The appeal from Justice McGregor's decision

3.13 In agreeing that an appeal should be brought, the then Acting Minister was informed of Senior Counsel's belief that the appeal would fail on the natural justice question. However, Senior Counsel considered that the appeal should proceed to enable the Full Bench to address the legal principles laid down by Justice McGregor's judgment on 'significant Australian content'.

The Acting Minister was also advised that:

- the Australian Film Commission had received the opinion of Sir Maurice Byers which stated, in part, - 'If it is desired in this case and on this film, to correct his (Justice McGregor's) error on the authorship point, an appeal must be brought';
- it was likely that other challenges to the Minister's decisions relying on similar grounds were in the offing - indeed one such challenge for the film 'On the Run' was already before the Federal Court; and
- there was continued uncertainty in the administration of the scheme in respect of 'authors', 'origin of the idea' for a film and

most importantly the determination of 'significant Australian content' if the primary judgment was not appealed.

3.14 Several of the matters decided by Justice McGregor cast uncertainty on the administration of Division 10BA. Having read the opinions written by Counsel for the Department and for the Australian Film Commission the Committee accepts that, in view of the fact that the original case had been allowed to proceed to a conclusion and, in the absence of a decision to clarify the issues by amending legislation, an appeal (while it could have been avoided) was a way of resolving the scope of the Minister's administrative powers. The Committee also notes that the costs of the appeal, while substantial, were low compared with the costs of the primary case. Estimates Committee D appeared to be under the impression that it was the appeal which was the cause of most of the costs.

3.15 The legal costs on the appeal for which the Government is liable were:

|                       |               |
|-----------------------|---------------|
| Australian Government | \$15 215      |
| Willarra*             | <u>40 000</u> |
| Total                 | \$55 215      |

\*costs claimed but not settled to date

The Committee regrets that liability for further costs was incurred, but reluctantly accepts the Government's liability for the inevitable costs. The Committee has no comment to make on the reasonableness of Willarra's costs for the reasons set out in paragraph 3.5.

### Alternative remedies

3.16 In its second letter to the Minister, the Committee asked whether any consideration had been given to amending the relevant provisions of Division 10BA of the Act so as to clarify the Minister's powers for future cases.

3.17 The Committee wanted to know whether at any time this alternative was contemplated, bearing in mind the Minister's advice that the hearing of the action by Justice McGregor took a course which was not expected by the Department or its legal advisers. It also appeared relevant to the Committee whether any consideration had been given to reversing Mr McVeigh's original decision to refuse a final certificate for 'The Return of Captain Invincible' when the legal costs in the action began to escalate.

3.18 The Minister told the Committee that:

- . no consideration had been given to amending the section prior to or during the hearing of the case, as Counsel engaged by the Minister were confident Willarra's action could be successfully defended;
- . after receiving a departmental report on the status of the case in January 1984 (before delivery of Justice McGregor's decision), the Minister had asked whether consideration had been given to amending Division 10BA to make it more certain.

The Minister advised:

My Department advised me in February 1984 that a possible review of the scheme was under consideration for late

1984 but that the Court decision may highlight some deficiencies in the legislation and precipitate some immediate changes.

It is noted that in the event that it had been decided that amendments to S124ZAD of the Act were necessary, either at the time at which it was decided to defend the case or during the hearing, any such amendments would not have operated retrospectively and would not therefore have affected the outcome of the case in question.

- . consideration was also given at a later date (July 1984) to possible changes to the legislation.

The Minister advised:

A meeting between officers of my Department and the Australian Film Commission held on 9 July 1984 considered this option in the context of:-

- Sir Maurice Byers' advice to the Australian Film Commission that there were grounds for an Appeal (on some important matters in Mr Justice McGregor's decision);
- that the prospect of changes in the legislation affecting the determination of "significant Australian content" would almost certainly seriously undermine stability in the film production industry given the succession of taxation related changes to the assistance scheme which had taken place;
- the existence of a second action seeking an order of review of the Minister's decision in relation to another film. It was presumed that the action would rely on Mr Justice McGregor's findings which had introduced uncertainty into the determination of "significant Australian content"; and



- the fact that overwhelmingly the film industry was supportive of the manner in which the legislation had been applied by Ministers in the determination of "significant Australian content".

A meeting between officers of my Department, the Attorney-General's Department and Counsel (Messrs Bennett and Katz) was held on 10 August 1984 when Counsel's advice on grounds and prospects of an Appeal were available.

The option of possible changes to the legislation was discussed. There was consensus that it should be recommended to the Minister that an Appeal should proceed to clarify the basis on which "significant Australian content" is to be determined.

3.20 The Committee has made a brief comment relevant to the option of legislative amendment in paragraph 3.12, and provides a more extensive discussion in the next chapter.