CHAPTER 4

Conclusions

4.1 The Committee has strong reservations about the advice provided to its Minister by the then Department of Home Affairs and Environment. The appropriate comments were made by Justice McGregor in his judgment. The Committee does not wish to concentrate on apportioning blame in this matter, but on what lessons can be learned for the future in all areas of government concerning the legal defence of administrative decisions.

4.2 The case has been instructive for those in the Department of Arts, Heritage and Environment who must advise the Minister about eligible films. No doubt they will be more careful in future, but it was a particularly expensive lesson. Huge costs were incurred without either successfully protecting the revenue or providing the required clarification of the Minister's powers.

4.3 The Committee considers that, as mentioned in para. 3.11, the Department should have alerted the Minister to the course of the case and the consequent mounting costs. This would have allowed early withdrawal from the case and reconsideration of the decision not to approve a final certificate for this film. An early announcement could then have been made of proposed legislative changes to clarify the Parliament's intentions, quarantining the problem to only those doubtful cases in train prior to the announcement. In a situation such as this the Government should have considered cutting its losses on one case (or perhaps several cases) while ensuring that all future cases would be covered by a clearer

legislative prescription. Such a course would have been preferable to allowing the matter to stay in the courts with the resulting possibility of a series of appeals.

4.4 It is not acceptable that huge legal bills be run up because of lack of intervention. It must always be remembered that legal proceedings can be discontinued. They can be and, perhaps more often, should be. In the case which led to this reference, the Minister stated that his Department and counsel were confident of winning though there is no record of such firm advice.

4.5 The words in an Act represent the best attempt by parliamentary counsel, at the time of drafting a Bill, to provide for what is understood to be government intentions. There is not necessarily anything magical or sacred about those particular words. If the words are later shown - or look like they might be shown - to be capable of an unintended interpretation, Parliament can be asked to amend them. Parliament should more often be involved in clarifying its Acts, rather than the Courts doing so (often at great expense and not always satisfactorily) sometimes followed by legislative amendment anyway.

4.6 The Committee acknowledges the Minister's stated wish to avoid afflicting the film industry with amendments to the Act in addition to the succession of changes already instituted to the rate of deduction allowed. However, the suggestion if implemented would surely have increased stability, rather than undermined it, because it would have provided greater certainty to the rules and less difficulty in their administration, without any real change in their application. The Committee notes that the Government recently introduced legislation, now passed, to allow the Minister to consider significant non-Australian content.

4.7 It ought not to be such a standard practice for ADJR matters to be defended. The Committee is not suggesting that decision makers should be intimidated by the threat or notification of an application. However, commencement of an ADJR application means, prima facie, that an applicant may have sound and acceptable grounds for the application. In that situation, at the very least the original decision should be carefully reconsidered and possibly reversed unless there is a matter of principle or policy to be protected. Adhering rigidly, without review, to a decision which may result only in large legal costs to the Government shows an unnecessarily inflexible approach to administration.

4.8 There should certainly be a review of a decision to defend if it is clear that costs will be high (whoever 'wins') and that there is no absolute certainty of winning. The relative costs of proceeding, compared to the effect on the revenue of changing the original decision, should be weighed. Such an approach may involve a more rigorous 'cost benefit' analysis of ADJR appeals than has occurred in the past. This would also require more extensive monitoring of the course and cost of legal proceedings.

4.9 Of course there is an obligation to comply with the clear terms of the relevant Act, but the preservation of the revenue has to be balanced against the potentially major expenditure on a court case, especially where the decision is a discretionary one. In the example which led to this report, if the Minister had approved the film he could not have been accused of overlooking his duty. The material seen by the Committee suggests that this was not an application which could not be countenanced at all. In fact, the Committee considers the comments made in the McGregor judgment focus in detail on a number of the questions which should have resulted in the Minister reconsidering his decision.

4.10 Departmental officers and ministers should be able to admit they were wrong; or that they might have been wrong (or misled), or that, while right, exercise of discretion is appropriate. In this case, the Department, having initially advised the Minister of costs of the order of $50 000, at no stage advised him that they could be ten times that figure. The departmental officers had a clear duty to do so.

4.11 Proceeding with an appeal without serious hope of succeeding, but merely to clarify the meaning of some words, was ill-advised. The option of legislative change should have been considered. It is acknowledged that the appeal costs in this matter were relatively minor compared to the primary case, but nevertheless substantial. In any case, despite the claim about Counsel advising that an appeal was necessary, a careful reading of the advice shows that it was not particularly strong.

4.12 As it turned out, the appeal judgment did not, in the Committee's opinion, provide much guidance for future interpretation, let alone 'essential guidance' as claimed. The judgment said '... is a matter for the Minister to decide'. That is, the assistance from investment in the appeal was slight indeed. The Act has now been amended in any case, but four years later than it should have been.

John Coates
CHAIR