



COMMONWEALTH OF AUSTRALIA  
PARLIAMENTARY DEBATES

# SENATE

## Official Committee Hansard

LEGAL AND CONSTITUTIONAL LEGISLATION  
COMMITTEE

**Reference: Copyright Amendment Bill 1997**

TUESDAY, 2 SEPTEMBER 1997

BY AUTHORITY OF THE SENATE  
CANBERRA 1997

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Tuesday, 2 September 1997

## LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**Portfolios:** Attorney-General; Immigration and Multicultural Affairs

**Members:** Senator Abetz (*Chair*), Senator McKiernan (*Deputy Chair*), Senators Bolkus, Coonan, Murray and O'Chee

**Senators in attendance:** Senators Brown, Childs, Bob Collins, Colston, Cooney, Ferris, Gibbs, Harradine, Lundy, Mackay, Margetts, McGauran, Minchin, Murphy, Neal and Tambling

**The committee met at 4.05 p.m.**

Matter referred by the Senate:

Copyright Amendment Bill 1997

**CRESWELL, Mr Christopher Colin, Assistant Secretary, Intellectual Property Branch, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory**

**DANIELS, Ms Helen Elizabeth, Senior Government Lawyer, Intellectual Property Branch, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory**

**FOX, Mr Stephen William, Senior Government Lawyer, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory**

**HAWKINS, Ms Catherine Marea, Senior Government Lawyer, Copyright Convergence Section, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory**

**CHAIR**—I welcome officers from the Attorney-General's Department. Officers should note that they will not be asked questions relating to policy or advice they may have tendered in the formulation of policy. With the concurrence of the committee, I propose to deal with the three major schedules separately. Therefore, the committee will ask questions on moral rights, followed by questions on journalists copyright, followed by questions on parallel importing.

I now invite you, Mr Creswell, to make an opening statement and, if you would like, to respond to any evidence heard in the first two days of hearing. I invite you—I assume you will do so in your opening comments—to cover those three areas that I have mentioned. At the conclusion of your remarks, I will invite senators to ask questions.

**Mr Creswell**—Thank you, Mr Chairman. With your concurrence, I propose to make quite a short general opening statement. We thought that the most appropriate thing to do would be to then face the questions.

Mr Chairman, further to your invitation to the department to appear again before the committee, you provided us with questions to indicate the areas of the bill which the committee would look to us for clarification or comment. We have reviewed the transcript of the last hearings of the committee, bearing in mind the questions you have provided to us.

We have carefully considered the submissions made to the committee and the evidence given by witnesses who appeared at those hearings. We thought that it would be of help to the committee to know that the views in the submissions and evidence were to a large extent the same as those already conveyed to the department and the government through the consultations undertaken prior to the introduction of the bill in parliament.

This is not to discount the weight and strength of objections expressed in submissions seeking changes to the bill. However, the various changes that have been sought could not be made without giving rise to opposition from other interests, assuming that the government was disposed to agree to the changes.

Copyright reform is a balancing exercise, and any change that is decided on will almost certainly be regarded as going either too far or not far enough by the various interests. The changes urged in some of the submissions included changes to the Copyright Act independent of changes being made by the various provisions in the bill. For example, I refer to the proposal for giving first ownership of copyright in commissioned photographs to the photographers and the proposal to give performers moral rights.

I simply want to reaffirm that the government is still in the course of considering these proposals, or proposals in this category, and that some or all of them will be addressed in the next instalment of copyright reforms that are proposed a little further down the track. I am happy to provide more detailed information about progress with further copyright reforms if the committee wishes.

**CHAIR**—Could you indicate the sort of timetable that is being looked at for those further reforms?

**Mr Creswell**—I suppose the most substantial project that is in prospect is the government's consideration of submissions on the discussion paper that was publicly released on copyright reform and the digital agenda, which was dated July 1997. It was released at the beginning of last month. Submissions have been invited by the government to be in by the middle of this month, or a little later—19 September.

That is dealing with a new transmission right and a new right of making available on-line the copyright face, if you like, of the very broad digital agenda that the government is considering. That is not the only reform that is being considered. I have mentioned the matter of additional performers rights and photographers copyright but there are some others as well.

The questions about this bill which you provided to us include ones about the extent of consultations with affected interests, particularly with regard to the amendments on copyright packaging and labelling. We acknowledge that submissions have been made by a number of interests with whom we have not previously been in contact regarding those amendments. However, I might note in a general way at this stage that the packaging and labelling amendments have been largely carried over from legislation proposed but not enacted under the former government.

We were given to understand that specialist lawyers in the main firms were following the progress of the evolution of that legislation and we were made aware that at least some of them were keeping their clients briefed. The press release announcing the government's decision approving preparation of the present bill included reference to these amendments. Perhaps I will leave further comment on that until asked by the committee.

The department would have taken it up with the minister if we had concluded that the submissions and evidence had exposed any conspicuous gaps or other major defects in the

bill, judged against the government's policy which the bill implements. However, our review of the material before the committee has not led us to such a conclusion.

This is not, of course, intended in any way to pre-empt the findings or recommendations that may be made by the committee. We are now ready and willing to respond to questions such as you have foreshadowed and any others that you may wish to ask of us. In making this short statement, I simply wanted to indicate at the outset the general result of our consideration of all the submissions and evidence.

**CHAIR**—Thank you. We will move on to the issue of moral rights first and go through some of the evidence on matters put to us. In their evidence the screen producers and the Australian Film Commission stated that there is confusion in the legislation relating to the term 'producer' as an individual and 'production company' and have made redrafting suggestions. Have you seen those suggestions and do you agree with them?

**Ms Daniels**—The views of SPAA and the Film Commission on how director and producer are defined under section 190 of the act were made known to the department prior to submissions made to the committee. It is essentially a relationship between section 190(2) and section 190(3). The department assessed the views at the time but we thought the bill was clear in ensuring that where a producer is a body corporate there are no moral rights, the only moral rights that reside are with the director.

**CHAIR**—Would you run the last few sentences by me again.

**Ms Daniels**—I understand the film producers and the Film Commission think there is an inconsistency between section 190(2), which talks about:

. . . the individual who was the producer of the film;

and section 190(3), which says:

If the producer of a cinematograph film was a body corporate, the only moral rights in respect of the film are those of the director.

They think there is some confusion in section 190(3) in referring to a producer being a body corporate, but we think the intention of the bill is to say that if there is no producer who is an individual, the moral rights only reside with the director; they can only reside with a natural person.

**CHAIR**—The Australian Children's Television Foundation told the committee that the inability to obtain a waiver in relation to commissioned works which are not yet in existence is a fundamental flaw. What is your response to that assertion?

**Mr Creswell**—As we have indicated in a general way previously, and I will remind the committee again, the provisions on waiver are a compromise. I am sure the committee is well aware by now of the fundamental opposition between the desires of, on the one hand, individual creators, notably the screenwriters and others of a like mind who are opposed to any statutory provision for waiver and, on the other hand, the producers, the large-scale users of copyright who want very extensive waiver provisions. The government, after carefully considering all the weight and detail of these very sharply opposed views, decided that a fair compromise was to make some statutory provision for waiver. But, in deference to the individual creators so that they were not too easily able to be overborne, as it were, in their contracts with producer organisations, the decision was taken not to make the statutory waiver extend to unspecified future works.

**Senator COONEY**—The way you are describing compromise it sounds more like a decision by government using a Solomon like mind. If it is not that, who is it a compromise between?

**Mr Creswell**—The creative contributors—in the case of film, on the one hand, screenwriters—

**Senator COONEY**—They agreed with the others? They agreed with this?

**Mr Creswell**—No, their submission is that there should not be any statutory waiver at all.

**Senator COONEY**—I am confused with the use of the word ‘compromise’. I might compromise with Senator Allison, I am just wondering who the compromise was between.

**Mr Creswell**—It is a decision which we believe steers a course somewhat between the ultimate aspirations of the creators on the one hand and the producers on the other.

**CHAIR**—The Federation of Australian Commercial Television Stations was also concerned that, in relation to a series of programs, separate waivers would have to be obtained for each episode of that series. Is that correct or not? Just following on from what you have said, what happens with something that is not in production yet? Would you need it for each separate episode?

**Mr Creswell**—Yes. Where a work has not yet come into existence, as the work is completed, yes, that is right.

**CHAIR**—Yes, but can you contract somebody to be involved in a 30-part series or whatever, then for each segment they would have to sign a separate waiver?

**Mr Creswell**—Yes.

**Ms Daniels**—I think yes because it is a separate work or film.

**CHAIR**—Although it was always in the minds of all the parties right from the beginning that they would be contracted for 30 separate segments of the one unit, if you like.

**Mr Creswell**—Yes, well, if I may say so, it is not fundamentally different from perhaps an author of a literary work being commissioned, if he is a successful author, to write another novel in the genre for which he has become famous. Under the legislation, he will not be asked to waive his rights if that is what the publisher or whoever else wants until such time as the work has come into existence.

**CHAIR**—What about a film that is produced not all in one go but with 20, 30, 40 even 100 different filming sessions?

**Ms Daniels**—Under the provisions, a film in which moral rights exist is only the final version and not earlier editions; it is only the one that is intended for public release.

**Mr Creswell**—Under the act now it is the first release. A film is not a film until it is ready for first release.

**Senator McKIERNAN**—If I can just take that a bit further. We have been given some evidence of experiences on release. Mr Bisley, I think it was, related his experience in starring or playing a part in one film which was released in Australia but then later released in the United States. His voice had been dubbed over in that later release. What would you reply about scenarios such as that if you indicate that it only applies to first release? Would that first release only count in Australia?

**Mr Creswell**—I do not want to confuse the situation, but Mr Bisley was arguing in support of performers having moral rights. I am happy to address that question if the committee would like. If it is not in this bill it is a separate issue—performers’ rights, including performers’ moral rights. If the film is released in America we are beholden to those who want to agitate moral rights in America such as there are in films. There is no legislation about moral rights

in films in America, but you are really thrown back on American law to agitate one's concerns about the use of a film in America.

**Senator McKIERNAN**—I do not want to labour the discussion at the moment if we are not on it but, in talking about moral rights, what particular parameters are we putting around the discussion at this point?

**Mr Creswell**—We are not seeking to constrain the discussion. All I was seeking was to inform the committee that performers' moral rights are not provided for here. The bill is intended to implement the moral rights obligations under the Berne convention. The Berne convention does not include any protection for performers. Performers' rights derive at the moment from other conventions in operation such as the Rome convention and the TRIPS agreement. They make no provision for moral rights.

**Senator McKIERNAN**—So at this juncture in this third hearing of the committee on this bill, whose moral rights are we effectively talking about? Who will be given or granted or have, at the passage of the bill, moral rights under the legislation?

**Mr Creswell**—The producer and the director.

**Senator McKIERNAN**—Thank you. That is in films, of course?

**Ms Daniels**—Yes, and in relation to works, authors of literary, artistic, musical and dramatic works.

**Mr Creswell**—The other contributors to films, for example, the screenwriter will have moral rights in his film script and the composer of the music, which is almost invariably used in a film, will have moral rights in the musical score for the film.

**Senator ALLISON**—Can I have some expansion on that point? As I understand it, this is not the case under the bill. Could you tell us how it is that screenwriters and performers have moral rights?

**Mr Creswell**—A film script is, under the act, a dramatic work. There are four categories of works in part 3 of the act. There are literary works, which can be anything from works of high literature to railway timetables and computer programs; dramatic works, which are exhaustively defined and do include film scripts; musical works, which are not defined but fairly self evident—that means composing the notes, sheet music; and artistic works, which comprise quite a variety of things from paintings to drawings, engravings, sculpture and works of artistic craftsmanship such as craft jewellery, furniture and so on.

To get back to your question about how they relate to films, when the script writer writes a script he has moral rights to that script. For instance, if somebody took a script and perhaps acquired the copyright in the script but published it without naming the author—likewise, if the music is used or misused in a way that injures the reputation of the composer—that would trigger a right of action in respect of the right of attribution.

**Senator ALLISON**—But as a part of the whole product—the product being the film—there are no moral rights for screenwriters? It is a subtle point. You are saying that the document that is the script is itself protected because it is a separate work from the film, but once it becomes the film it has no status in terms of moral rights.

**Mr Creswell**—No, that is not quite right. It is a rather difficult concept to explain. It was in fact referred to in a couple of submissions made to the committee. Among the rights that comprise the copyright in dramatic and musical works is the right to reproduce it. That is probably the most well-known copyright right. Under a section of the act, a reproduction of a musical or dramatic work includes a recording or film of that work. So the film of the book

or the script is counted as a reproduction of the book or the script. If something is done to the film which prejudices or results in a distortion of the script, which makes people think ill of the writer of the script, then that could offend the moral rights of the owner of the script.

I will give an example. If the film script is realised in the film in a way that upsets the reputation of the writer—the script writer may have a reputation for having written a certain sort of script, say with a serious theme, and if the film satirises or ridicules that theme it may injure his reputation; I do not want to get into the subject of parody—that film could be an infringement of the script writer's moral rights. Or, further on, a TV station might want to cram the film into a certain program timeslot and might cut a bit out of the film to reduce its duration. That may injure the reputation of the writer of the script because he is known to have written the script with a certain storyline and the truncation makes it look silly or ridiculous. So if it injures his reputation as the writer of a script, then what has been done to the film could be an infringement of his moral rights.

I have a converse example to illustrate that point. You might ask: when is mishandling of a film not a mistreatment of the script? An example, which is based on an actual occurrence, is when a film called *Blackboard Jungle*, by a well-known American director called John Huston, was colourised. It was shot in black and white, at a time when the director wanted to use black and white because it contributed to his artistic creation, although colour technology was readily available. Recently the copyright owner—the producer—colourised it and then sought to release it in France in its colourised version. John Huston had died, but his heirs managed to bring an action in France to restrain the circulation of the film there, because they said that colourising it was an infringement of his moral rights under French law.

But if the script on which it was based had not been altered, I would say that that would be an example where the script writer would not be able to say his moral rights were infringed by the colourising of the film, because he did not write about the colour. He did not make the choice of colour or not colour for the film, and the script that he wrote for the dialogue was unaffected.

**Senator ALLISON**—Are you saying that the moral rights of a screenwriter would not be advanced by being identified in the bill as being one of the creators of a film?

**Mr Creswell**—No, they would be advanced; because they would then become the creator of the film, as opposed to the writer of the script on which the film was based.

**Senator ALLISON**—What are the differences? If you could spell out the differences it would be useful.

**Mr Creswell**—I have suggested that the choice of colour or not colour and perhaps the camera angles in realising a film script is a creative act by the director, which would not necessarily be based on the directions in the script.

**Senator ALLISON**—And nor would they for a producer. Would it not be fair to say that?

**Mr Creswell**—That is so. That may not be his creative contribution, but he may have advised on the choice of scenes, perhaps the choice of ending, the—

**Senator ALLISON**—And if he or she didn't? I am just trying to get the distinction.

**Mr Creswell**—I would say the creative input would vary. But what I would say as an overall proposition is that the producer has no other creative product than the film—the resulting output of his productive endeavour—to show for what he has done, whereas the script writer has a script. Then, somewhat removed from his script, is a film which is derived from or based on the script; but it is the film that is the producer's product.

**Senator COONEY**—In one case you are trying to protect the script, are you not, and the protection of the script might include protection of the film in a particular fact situation, whereas in the other case what you are doing is protecting the film. You might say that is the same thing in any particular instance, but the difficulty in explaining it is that the fact situation might change. But if you say as a general proposition, ‘I’m protecting the film,’ in one case, and, ‘I’m protecting the script,’ in the other, that would be a distinction.

**Mr Creswell**—That sums it up very succinctly, if I may say so, Senator.

**CHAIR**—Thank you for that, Senator Cooney. Let us move on. Did the department investigate the possibility of a consent regime instead of a waiver?

**Mr Creswell**—We have been aware of submissions that have queried the distinction between consent and waiver. Perhaps I can put it this way. Waiver applies to all acts, known or unknown, in the future in respect of all one’s moral rights or a particular moral right. You might confine your waiver to the right of attribution; you may be able to reach agreement that you want to maintain your right of integrity but you are prepared to give up the exercise of your right of attribution. Consent relates to one particular thing—one isolated, particular act. It is to cover a one-off situation, whereas a waiver is a standing acceptance. A waiver is a standing indication in respect of anything that might happen in the future with regard to all, one or some of your rights. You will not assert them; you have bound yourself not to take action.

**CHAIR**—Is it a contradiction in terms, then, to talk about a partial waiver?

**Mr Creswell**—No, not if that is referring to the fact that you have waived only some of your right. I think the bill also allows waiver for the benefit of everybody or for the benefit of a particular person or persons. That would be another partial waiver. You would be prepared, for instance, to let a particular producer do whatever he likes with something, but you are not waiving your right for people further down the track.

**CHAIR**—The Australian Copyright Council made recommendations to the committee concerning the author of a film. I refer in particular to page 43 of the *Hansard* of Monday, 18 August. Their recommendation was in essence to keep the definition vague and make no attempt to define the authors of cinematograph films. What is your comment on that? What is your response?

**Mr Creswell**—We are aware of the fact such definitions are often vague. Indeed, it seems to me from the research that we have conducted since the last hearing that vagueness as to the identity of the holders of moral rights in films in other countries is almost deliberately done. I can only say that the government took the view, and we have not been persuaded to advise the government otherwise, that there is on balance a benefit in identifying definitively the holders of moral rights in film as against leaving some uncertainty. I acknowledge that that is the case in some other countries, but despite what may have been asserted in some submissions, the allocation of moral rights in other countries is all over the place. It is very variable.

**CHAIR**—So with the definition you get certainty, but does that also mean that with that degree of certainty you might lock out unwittingly some people who may have got a benefit with a wider or vaguer definition? I suppose that is the other side of the coin. How did you people balance that up?

**Mr Creswell**—As I hope I brought out a moment ago, at least in the case of screen writers and musical composers, for example, they do have a work for which they have immediate

authorship: the script and the musical work respectively. Although I understand that, and the department does not for a moment challenge assertions, assertions in some instances screen writers and maybe musical composers have made a very decisive contribution to films, it is not as if they are without recognition under the moral rights legislation. Identifying definitively the holders of moral rights in the film can seem a little arbitrary, in that it may under-recognise a very strong contribution by one of these other creative contributors; but at least to offset that there is the fact that these contributors do have moral rights, unquestionably, in their work on which the film is based.

**CHAIR**—The ACC also recommended that the provisions relating to waiver should be deleted, as the section that allows consent as a defence is sufficient. Have you any comments or suggestions as to that assertion?

**Mr Creswell**—I have to hark back to what we said before: that the choice of the scope of the waiver provision is a compromise. The further you go towards one end, the aspirations of the creators, the more concerned will be the producers—the film producers, the broadcasters, the advertisers—that they cannot get the certainty they need in dealing with creative contributors to their products.

**Senator McKIERNAN**—You seem to be saying on this that producers are getting everything and that others that may have a claim are getting very little. If that is the case, where do the words ‘compromise’ or ‘accommodation’ come into it?

**Mr Creswell**—The producers are not getting everything and some of the submissions to the committee make that very clear. As one of your colleagues mentioned a little earlier—or maybe it was the chairman who quoted from a submission—one producer group wanted the waiver provision to apply to commissioned works and all unspecified future works. They say that not being able to get advance waiver for a television series is inconvenient to them. So that is something that falls considerably short, so it seems, from what they want.

The requirement for waiver to be in writing is a form of protection for the creator. There have been submissions by producers that they find the fact that the waiver has to be in writing obstructive to the conduct of their business, but it is another form of protection. The specification in the legislation that waiver could be confined to certain people, or to only some of the rights, or to only one of the moral rights, could be seen as another form of protection.

**CHAIR**—Let us move from the area of pure art to what might be commercialised art and the advertising industry. The advertising industry recommended to the committee that advertising material should be excluded from moral rights legislation. How do you respond to that suggestion? Is it possible to amend the bill to achieve such an objective? What would the legal implications be of such an amendment? Generally, what is your view or commentary on that suggestion?

**Ms Daniels**—The scheme under the bill is to provide no exceptions for any particular industry or creators. The government opted for more the test of reasonableness in the circumstances to decide whether a moral right has been infringed or not. There were some industries early on in the process of developing this legislation that sought exemption—the advertisers being one of them. But from the point of view of saying what is fair to a creator who creates something for an advertising campaign and whose work is later used, in principle there does not seem to be any reason that that creator should not have access to the moral rights provisions, as any creator of, as it is called, pure art. The Copyright Act normally does not make any distinctions in relation to aesthetic quality of a work. The level of protection is the same whether the work is mundane, or a work of high art.

**Mr Creswell**—I will supplement that anecdotally. I happened to be in Sydney on the weekend and noticed that there was an exhibition of the photography of Max Dupain. A lot of the photos in the exhibition, I understood—I did not get to see it, unfortunately—were, in fact, commissioned by advertising agencies but were now regarded as a matter of art. So, apart from anything else, the distinction between art and commercial art would be a difficult one to draw.

**CHAIR**—What about the definition of ‘advertisement’ used by the Broadcasting Authority? Did you turn your mind at all to the possibility of creating such a differential?

**Ms Daniels**—Again, no. The decision was made fairly early on that there would be no exceptions for the computer industry, the advertising industry, and publishers, because if you exempt one industry, then you have to look at others, as well.

**Mr Creswell**—It would also be inconsistent with the Berne convention to make total carve-outs of any particular category of works that do fall within the Berne convention definition of literary and artistic works.

**CHAIR**—The advertising industry also suggested a simplified waiver, one which they described as ‘up-front’, rather than one made retrospectively after each piece of work—I suppose that is, to a certain extent, the same situation we covered before. Do you have any additional comments relating to the advertising industry, or do the comments you made earlier apply equally to the advertising sphere?

**Ms Daniels**—The only other comment I would make is that maybe it is not every incidence of the use of work that will need a waiver. I think that there is an assumption that a waiver is going to be needed every time. Moral rights are not supposed to be like economic rights where you have to get permission from the copyright owner. If you attribute a work when it is your normal industry practice to do so, or if you do not distort a work in such a way that it does the equivalent to defaming the creator, then a waiver will not always be necessary.

**CHAIR**—Is the advertising industry covered by moral rights legislation in overseas jurisdictions?

**Ms Daniels**—To the extent to which I have been able to look at it—and I have also had the chance to look at the Copyright Council’s supplementary submission that they have sent to you—there does not seem to be any reference to exemptions for advertisers. However, I did look at the New Zealand bill and I have noticed that in relation to the use of ads that are films there are some exceptions under their moral rights provisions.

**CHAIR**—There are exceptions?

**Ms Daniels**—There seem to be in the New Zealand bill in relation to ads that are films, not advertising as a whole industry.

**CHAIR**—Was that the only example?

**Ms Daniels**—The only one I came across.

**CHAIR**—How is that working, do we know?

**Ms Daniels**—No.

**Mr Creswell**—I can indicate to the committee that, to my understanding, based on chance conversations with people from New Zealand, in the short time that the New Zealand moral rights legislation has been in operation I do not think there have been any cases.

**CHAIR**—Several witnesses have told us about the retrospective effect of the moral rights legislation, yet I think you said in your opening submission the first time around that there

was no retrospectivity. Have the witnesses got it wrong? Have you reconsidered your position? What are we supposed to believe? Is it retrospective or not?

**Mr Creswell**—I guess it is a matter of semantics or your definition. Our definition may be at cross purposes with the definition or the understanding of retrospectivity of some of the witnesses.

To restate our position, the legislation is not retrospective in that it does not attach liability to something done now which is not at present liable. If the legislation were truly retrospective, it would attach liability to something which, when it was done, did not attract liability. This legislation will only attach liability to acts done after the legislation commences.

To address the concern expressed in submissions—and I will ask Ms Daniels to give more details—as a general proposition I think they are concerned that they may have made a commercial undertaking with respect to a work now, in September 1997, when there are no moral rights. They are concerned that, because the moral rights regime will apply to existing works when the legislation comes into operation, this will upset the basis on which they went into the contractual arrangements in 1997. Our response to that would be that that applies to a whole range of activities that might be affected by government legislation which attaches new rights or liabilities to undertakings in the future. But this legislation will not make illegal, or infringing, actions that are being taken now before the legislation comes into operation.

**CHAIR**—Are there any other questions on moral rights from the committee members?

**Senator COONEY**—You are always in a difficult position on the compromise. Are we talking about waivers? I might be jumping in here.

**CHAIR**—Yes, waivers is part of all this.

**Senator COONEY**—I know it is difficult. You would have read that because of the difference in economic power and, even further than that, the difference in commercial power and of getting stuff disseminated, the people who are against having the waiver clause in say that in effect it is pointless having this whole regime. What do you say about that? I understand that you say we are between a rock and a hard place and we have to come to a decision on this that leaves the people who want moral rights better off than they were before. We have had a very strong series of submissions saying, 'This really isn't a deal that we can live with.' Are you locked in? Is it a matter of policy that you have come to this conclusion or is it a matter of trying to do the best you can? If it is the second, I will keep asking; if it is the first question of policy, I will get out.

**Mr Creswell**—It is a decision of policy in so far as the government is persuaded that the considerable producer interests are not unreasonable in insisting on a certain amount of predictability about moral rights in regard to the prosecution of their enterprises. There would have to be some provision for waiver. It is more a question of how easy or how difficult the opportunity for securing a waiver is. Obviously, having any provision at all on waiver is being done because the government is satisfied that the users of copyright material do have a need for some sort of opportunity to secure a waiver and it is a question of how easy it should be made. As you have already heard from the evidence, they would like it wider, but the government feels that there should be some protection or acknowledgment of the possibility of imbalance between the individual author and the producer or publisher. I remind you, Senator, of the mention I made of the requirement to be in writing: the fact that, except in employment situations, the author cannot be asked to waive moral rights for unspecified future works.

**Senator COONEY**—How much weight was given to the imbalance in bargaining power between the producer and the author—the people using the material and the people that produced it?

**Mr Creswell**—Yes. That was an influential thing. If there was complete equality of bargaining, then I venture to suggest that there would not be any problem with having a complete unlimited waiver provision. Then we could say that, if the author has no difficulty in stating the extent to which he wants to waive, it should be as open as possible. But the requirement for writing and the limit on waiving unspecified future works is an acknowledgment of—

**Senator COONEY**—Do you have any evidence of how it has worked overseas? We have had some evidence, but I was wondering whether you had any.

**CHAIR**—I think we have canvassed this area at previous hearings.

**Senator COONEY**—I know we have, but I was just wondering if they have any material on which they made their decision.

**Ms Daniels**—It is only anecdotal evidence from the United Kingdom, Senator. The waiver of the law over there is much more general. It is called a blanket waiver. I do not know how good the example really is.

**Senator COONEY**—But you have gone on anecdotal evidence. I mean, you couldn't go on anything else.

**Ms Daniels**—Yes, a lot of works tend to be waived. There tends to be a blanket waiver given.

**Senator McKIERNAN**—We did hear argument from some of the witnesses last week that if the waiver provision was to be put in that that would become the norm and that even in the case of actors—big stars—they would not be able to stand up and refuse to sign in order to protect some of their rights. They would be asked, when the contract was signed, to sign away all their future moral rights to the performance that they were involved in. Were you aware of that evidence? I know the department was monitoring the hearing as we went through.

**Mr Creswell**—I will pass that to Ms Daniels but, in so doing, I will note again, and I do not want to be evasive on this, that actors are in a different position because we are not intending or attempting to extend moral rights to actors in this. It is significant because one rarely hears of script writers that have a higher profile than actors. You usually hear of big name actors or big name producers or directors. One is aware that a film is often based on a well-known book—for example, *Schindler's List* was based on Thomas Keneally's *Schindler's Ark*. But, with a pure script writer, one does not generally hear of the same order of importance in relation to a particular film.

**Ms Daniels**—I did hear Mr Bisley's evidence in relation to the problems he foresaw in having to give blanket waiver. There was also, I think, someone from the Screen Producers Association who thought that producers would not always be able to get waiver in all circumstances from all people, and that there would be some people with sufficient clout who would not waive all or some of their moral rights. So there was argument on the other side as well.

**Senator COONEY**—Except that Mr Bisley only had evidence from an artist as to how that might happen.

**Ms Daniels**—That is true.

**CHAIR**—This regime that is being suggested would not affect him, in any event.

**Mr Creswell**—Not as an actor, unless he became a script writer, a musician or a director. As we know, there are plenty of actor/directors who direct the films that they star in.

**CHAIR**—Under the Berne convention, should we be looking after actors?

**Mr Creswell**—No. I wanted to reaffirm that the Berne convention does not afford any protection for actors.

**CHAIR**—I think it was page 12 of Monday's *Hansard* last week when you took on notice the very important area of the trustee in bankruptcy exercising moral rights. Do you have a response to that? If you have not, we are happy to take the answer in due course. It is just a reminder to you.

**Mr Creswell**—Could we give a written supplementary answer?

**CHAIR**—Yes, thank you. We did not want that aspect to be overlooked by either side.

**Senator ALLISON**—There is one other thing that I wanted to expand upon. Since the last days of the inquiry quite a lot has been written about other countries. You said that the experience overseas was mixed, but the article in the *Australian* a couple of weeks ago says that 67 countries around the world have moral rights legislation, that in every one of them the screenwriter is recognised, along with the director, as the author of the film. Australia would be the only country proposing to take authorship away from screenwriters and give it to producers. What do you say to that? You are suggesting that this is not so clear-cut? This is a major criticism of the bill, it seems to me, and I think it is probably worth a few more minutes to explore that.

**Mr Creswell**—I will ask Ms Daniels to report on our research. There are a couple of initial comments that I will make there. Firstly, it was never a case of giving moral rights to producers at the expense of screenwriters. There was never a trade-off. I do not know where this has come from. It has never come from the department. It was not a case of, 'We're only going to give them to two people, we're going to give it to the director and we're going to give it to either the producer or screenwriters.' That just was not the equation at all.

Secondly, the research that we have got just does not support that assertion that there is such a uniformity of practice in other countries. As a general proposition, there is quite a different approach in continental countries which do have moral rights from the approach in common law countries. Even within the common law countries it is variable. For instance, in India, which is one of the world's largest film producers—if not the largest, in terms of some measure of output—the Australian Copyright Council's research shows that the producer alone has moral rights. The screenwriter does not get a look in at all. But I will ask Ms Daniels to elaborate.

**CHAIR**—Are they signatories to the Berne convention?

**Mr Creswell**—Indeed, yes.

**Ms Daniels**—Drawing on a lot of the Copyright Council's research, I think it shows that, for example, in the United Kingdom and New Zealand—and our own follow-up has confirmed this—it is the director that has moral rights in the film and not the screenwriter. In their list of countries—Chris has referred to India, but we also understand that in South Africa the position is the same—the person who has moral rights is the maker of the film. Under our law, that would generally be the producer.

**Senator ALLISON**—With respect, India and South Africa are probably not good parallels, I think, with Australia. Are you saying that there are not 67 countries that afford moral rights to—

**Ms Daniels**—I do not know if there are 67 countries.

**Senator ALLISON**—Is it half that or a fraction?

**Ms Daniels**—We have not done that extent of research to be able to say yes or no to that.

**Mr Creswell**—Mr Chairman, if I can add to that, I think that we could safely question the assertion about other countries apart from Australia uniformly taking one approach. What Ms Daniels has quoted sufficiently shows that. Perhaps I can add to that because I arranged this myself through contacts. I have had feedback from an authoritative source in Canada, which would be very close to our approach to the law, with the possible complication of having Quebec, which follows the continental system. The answer from Canada is that it is completely unclear as to who has the moral rights in film. They follow Berne very closely in leaving the question quite open. That is from an authoritative source within the Canadian heritage department.

In the United States, they rely on the old common law system. They have moral rights legislation that is confined to visual artists, that is, still photographers and painters. I am not even sure if sculptors are covered.

**Ms Daniels**—Yes, they are.

**Mr Creswell**—That moral rights legislation does not apply to films. All that one is left with is the common law in the US, to our understanding.

**Senator COONEY**—In those countries where the screenwriters—

**CHAIR**—I just ask, Senator Cooney, that we wind this section up. The motion that was carried by the Senate allowed us to sit only between 4 p.m. and 6 p.m. We have got one hour to do the other two issues. Ask your question, Senator Cooney, but just keep in mind that we may have to curtail it.

**Senator COONEY**—The countries that do give the screenwriters some moral rights in the film do not derive that law from the Berne convention. That is clear, isn't it? That is what you have said?

**Mr Creswell**—Moral rights are to be conferred uniformly on authors by the Berne convention. But the question which Berne does not answer is: who is an author of a film?

**Senator COONEY**—I see. I thought what you were saying is that the Berne convention specifically named directors and producers.

**Mr Creswell**—No.

**Senator COONEY**—It names authors. It is up to separate countries to define what 'author' means.

**Mr Creswell**—Yes, in relation to a film.

**Senator COONEY**—In relation to a film, yes. Do those countries that do give the screenwriters moral rights over a film get that from any other treaty, or is that just their own domestic choice?

**Mr Creswell**—No. They are mostly continental European countries, but there are also, I would imagine, some Latin American countries. There may possibly be some European Union directive, although I do not think so.

**Senator COONEY**—But we do not have to worry about any convention other than the Berne convention?

**Mr Creswell**—No, except in the case of performers, and this is looking to the future. At the moment, in regard to operative conventions, the Berne convention is the only one we have to worry about for moral rights.

**Senator COONEY**—And the policy question we have got to wrestle with is who we put into the category of authors?

**Mr Creswell**—Yes.

**CHAIR**—We will move on to the area of journalists' copyright now. If we do finish early, we can visit all three areas again. The Copyright Agency told this committee that, if the newspaper publishers are to have the digital rights and journalists the paper based rights, there is an anomaly in the drafting of the bill because paper copying for facsimiles goes to the newspaper publishers. Do you have any comment to make on that?

**Mr Creswell**—I will ask Ms Hawkins to reply.

**Ms Hawkins**—In relation to that statement from CAL, I would reiterate to the committee what the bill actually does in terms of the journalists' copyright provisions. As you would probably be well aware from both the written and oral submissions to the committee, journalists are to retain their traditional rights over photocopying and publishers are to acquire rights in relation to digital/electronic uses. The government's decision was that publishers would acquire these electronic rights, and that includes facsimiles.

**Mr Creswell**—On the basis that the act of faxing something involves a transmission.

**CHAIR**—Yes, but the paper copying for the facsimiles would go to the journalists and, although it might be seen as somewhat anomalous that they just get it for the one paper copy, you are saying that that is a deal that has been struck and journalists and publishers seem to be happy with that.

**Mr Creswell**—I think it would be overstating it to say that either side is happy. What the government determined was an appropriate outcome is a solution that both the protagonists—if I can put it that way—are prepared to live with to a greater or lesser degree.

**Ms Hawkins**—I might add on that part that, in evidence last week, Chris Warren from the MEAA actually commenced his evidence to the committee by saying that the MEAA does not oppose these amendments but in fact sees them as the fruits of quite significant negotiations and as an acceptable settlement.

**CHAIR**—Thank you for that. The Copyright Agency also stated, in relation to the 15 per cent limitations on copying, that there have been no consultations with the various interests and there has been no demonstrated need for putting in this 15 per cent limitation. What is your response to that? Has this matter been the subject of any comment by the Copyright Law Review Committee?

**Mr Creswell**—I will ask Ms Hawkins to provide details of the consultations but, as regards the assertion that there is no need, I would just recall to the committee that the Attorney-General said in his second reading speech that there had been no evidence provided up to now that the activities of press cutting services had made an impact on the circulation of newspapers, and that is indeed the case.

**CHAIR**—But if that is the case and that is accepted, one wonders about the reason for the limitation of 15 per cent. Is there a suggestion that, if it got up to 40 per cent or 50 per cent,

that somehow would affect newspaper circulation? How did we strike upon 15 per cent if it is a given that there is no demonstrated link between the media monitoring services and the circulation of newspapers?

**Mr Creswell**—Perhaps I can answer it this way, Mr Chairman: I think that there was a bit of hard bargaining over 15 per cent—it was not the opening bid by the publishers—and there was an informal, almost anecdotal, survey of press cutting services as used by the department to see to what extent this 15 per cent measurement would impact. It seemed to be a reasonable limit, a limit within the press cutting services of an organisation. I do not say that it was in any way a scientific survey; it was a random sample, shall we say.

**CHAIR**—What about the evidence that we have heard of some media monitoring groups? Let us say that they are dealing with a major corporate client that has many divisions—possibly environmental, legal and native title, and the list may well go on. To service that company's various divisions, they might send all the native title ones to one section of the company and environmental clippings to another section, et cetera. But overall it is to that one company, and they may in fact be in breach of that 15 per cent. Did the department go outside itself in determining that 15 per cent?

**Mr Creswell**—No, Mr Chairman. But further on this point I just reiterate that this 15 per cent was more than the publishers would have been happy to settle for.

**CHAIR**—From a publisher's point of view, clearly it is the less the better, in the hope that they might sell another newspaper or, more importantly—from the evidence of the media monitoring groups—because they want to set up their own and therefore it will make it easier for them to establish the competitive outlets for media monitoring.

**Mr Creswell**—There are a number of assumptions that the media monitors have invited us to make. I think that this does have a real practical impact, Mr Chairman. To repeat the explanation of the 15 per cent rule: it does not give copyright to the publishers. So it is not an infringement of copyright for a media monitor or anybody else to photocopy in excess of the 15 per cent, for as long as and until the proprietor of a particular newspaper comes along and says, 'Hey, you've been copying more than 15 per cent.' Then presumably they might get into negotiations about how copying of that order might be permitted or facilitated from there on.

**CHAIR**—But if you tell us, as you have done, that this 15 per cent limit is a lot higher than the publishers wanted in the first place, would it not stand to reason that the publishers will be watching this very, very carefully and, as soon as they find the first media monitor going beyond the 15 per cent, they will go snap and say, 'We want to negotiate or else'—and negotiate on the publisher's terms? That is basically the fear of the media monitoring groups, is it not?

**Mr Creswell**—Yes. That is their asserted concern, absolutely. But I think it is still a matter of speculation concerning the individual publishers. Let us not forget that it is not as if they are all acting in concert here; this is a right that is exercised by an individual publisher, not a monolithic collecting society such as there is on behalf of the media alliance journalists.

**Ms Hawkins**—I wonder if I could add a little bit in relation to the concerns that you were raising about the fact that it was a fairly ad hoc examination that the department went through in terms of looking at the impact of this 15 per cent right of restraint. What I would like to add is the fact that media monitoring organisations have been asserting that the operation of the 15 per cent right of restraint will stop them from providing news clipping briefs to large

clients. Other than that assertion, we have not seen calculations of how the 15 per cent would actually stop them from providing clips.

**CHAIR**—Right; but that is on both sides of the argument, isn't it?

**Ms Hawkins**—Indeed.

**CHAIR**—It has not happened as yet, so we do not really know what is likely to happen. But what would happen to the regime that we are setting up if the 15 per cent were deleted from the bill? What right would publishers then have under the bill?

**Mr Creswell**—The only limit was put to the test in the Nationwide News case—and this, I understand, has been very prominent in actuating their concerns here. They sought to rely on their copyright in published edition, although even there the Nationwide case was actually not about their concern about excessive photocopying of individual publications. I think their concern was about who had the true right to the royalty income that had been collected from educational institutions for photocopying of news cuttings. But I think that in no case were they concerned about the impact of that educational photocopying on the circulation of newspapers.

**CHAIR**—Can I just tease that out a bit further. The 15 per cent limit seems to have been put in because neither side at this stage can prove its assertions as to what impact or effect it might have on its relevant businesses. Is that so?

**Mr Creswell**—To rehearse it again, Mr Chairman, it has been put in because, as has been noted by the Attorney, the newspaper proprietors—particularly proprietors of magazines, I understand—professed concern that wide-scale photocopying could have an impact on sales which they would like to put the lid on.

**CHAIR**—If it is magazines, would that be an appropriate differential for the legislation to talk about 15 per cent of magazines as opposed to daily publications? I think that is the main focus of the media monitoring groups which get up before all of us, read all the newspapers and clip the sections so that when most of us get to our offices there is a selection of the news from around Australia and the regionals sitting on our desk. I do not think they are interested in photocopying *New Idea* or *Woman's Day* or, indeed, the *Bulletin*, albeit they do photocopy or circulate some of those articles.

**Mr Creswell**—I would not like to attribute any lesser concern to the newspaper proprietors about magazines. I perhaps should more accurately state that their concern was initially at the behest of magazine proprietors, but I would not be prepared to say that they were now less concerned about the impact on newspapers.

**Ms Hawkins**—Mr Chair, I think what you are driving at is that it is obviously a policy decision that has been made and is not reflected in the way the right of restraint operates in the bill at the moment—that is, that it applies to photocopying of both magazines and newspapers. But if I hear you ask, 'Is there actually a legal impediment to just have the right of restraint apply to magazines?' the answer would be no.

**Senator ALLISON**—I am interested in the onus of providing evidence. You are suggesting that there is some evidence that photocopying more than 15 per cent could have an impact on sales of magazines, which I think we have already identified is likely to be a bit doubtful. It is also clear in the documentation that we have had in the submissions that there has been no demonstration that that is the case. Yet you are saying, 'The media monitoring people have not managed to demonstrate that they need more than 15 per cent.' It seems to me that we

are making assumptions on one part and not on the other. I do not get the sense that your department has adequately researched this in order to give us a balanced view.

**Ms Hawkins**—The way I would respond to that is that, if we go back to the genesis of this exercise, it is a 1994 report from the Copyright Law Review Committee, looking at this very issue of amending journalists' copyright provisions. Indeed, the recommendation of the majority of the Copyright Law Review Committee was that we repeal entirely section 35(4) in the act which deals with journalists' copyright. That would mean, in fact, that publishers had all rights over the copyright material created by their employees. To get back to this discussion about balancing rights of different interests: the fact that journalists retain certain rights over photocopying and independent book publication in the proposed provisions in the bill is a compromise on the majority CLRC recommendation.

In the negotiations that the government engaged in in working out how it would respond to the CLRC recommendation, it was thought that these two residual rights would remain for journalists. The publishers did express a concern that, in the future, widespread photocopying could impact on the circulation of their newspapers. That is where the right of restraint has come from. Had the government responded to the majority report, it would have been even more favourable to the publishers. That maybe puts it in a slightly different context.

**Senator ALLISON**—Except that we are not dealing with the CLRC report or study. Did that report or study demonstrate that there was likely to be an impact? The same question remains. Did the CLRC investigate this question about whether 15 per cent is or is not adequate?

**Mr Creswell**—The answer is no, but I should add that the idea of giving the newspaper proprietors less than all the copyright was not in contemplation by the CLRC majority. The CLRC majority was not concerned to talk about a right of restraint of more than 15 per cent of publication because their recommendation was that all the copyright in their employees' articles should go to the proprietors, on the basis that every other employer owns the copyright in their employees' works made in the course of employment.

As Ms Hawkins said, what the government has really done, in consultation with the affected interests, is to reallocate rights on the basis of watering down the CLRC majority recommendations. It is working back from that.

**Senator ALLISON**—Did you explore any mechanisms by which perhaps the publishers might be brought to the table in a more effective way when it came to reaching agreement with the media monitors and the like?

**Mr Creswell**—I do not quite understand the question.

**Senator ALLISON**—The evidence that has been put to the committee would suggest that, if the publishers decided not to reach agreement over and above 15 per cent, they could simply not reach agreement. There would be nothing which would bring them to the table to assist in reaching a decision.

**Mr Creswell**—It is a right of restraint. It is not a copyright and there is no provision to do that.

**Senator ALLISON**—You did not consider that, and that was not part of your deliberations?

**Mr Creswell**—No. There is an express provision for negotiation but 35A talks about an agreement on varying the operation of that right of restraint. It expressly provides for that.

**Senator ALLISON**—You do not accept that publishers now have much more incentive not to reach agreement, given that they are now moving into the electronic transfer of information to, in a sense, provide a similar service?

**Mr Creswell**—If we are now talking about electronic access, then they are getting the copyright in respect of that and a copyright owner's right is a right to say yes or to refuse.

**Senator COONEY**—In a certain sense, you had to pluck all of this out of the air. It is trying to balance what in the end cannot be balanced, because you are not going to get agreement across the board. Did a lot of the act come out as a result of that?

**Mr Creswell**—The Copyright Act or this bill?

**Senator COONEY**—This bill and the Copyright Act itself, for that matter. If you take that 15 per cent, it is a matter of trying to judge what is fair or appropriate, or whatever the proper word is. There is no hard scientific evidence, is there, that 15 per cent is the proper figure?

**Ms Hawkins**—No, indeed there is not, in many respects. In terms of our being a bit clear about where the 15 per cent came from, the publishers were at great pains to express to the committee last week that the 15 per cent did not come from nowhere. It came from the publishers being concerned. In fact, their first round request to the government was that there be a 10 per cent right of restraint, that that right of restraint operate only on editorial content and that all advertisements be excluded from the calculation of that right of restraint.

It would not be entirely correct to say that it came from nowhere. It actually came from one of the major affected interests, and then the government looked at that and consulted with media monitors. That will take me back to the first question asked by the chairman in relation to who was consulted. Obviously, the publishers were consulted. The idea of the right of restraint came from them. Media monitors were also consulted on the matter. CAL was quite right the other day in saying that it was not consulted. That was correct. Indeed, journalists were not consulted either, but I refer you to the statement they made at the start of their evidence, which was that they did not oppose the amendments.

**CHAIR**—Without sounding too cynical, I remember that back in 1993, when a certain proposed tax was being floated, certain people were saying that the thought of a tax or extra charge or whatever on the dissemination of information was horrendous and against the democratic ethic. Now some of these same publishers are wanting an absolute right of restraint—should they so exercise it—on the very dissemination of that sort of information. One cannot help thinking that they see some very real commercial advantage in that for themselves. One wonders how one ought to treat that alleged concern by the publishers. I suppose that is more by way of comment rather than for people at the table to answer.

**Senator McKIERNAN**—It would be interesting to get a response to your comment. I suppose then the witnesses could all claim it was a matter of policy. I am seeking clarification on the 15 per cent as well. Did the case before the courts give any guidance as to a percentage amount that might be applicable at all? I recognise that it did give a definition on a magazine being a separate publication to a newspaper, even though the magazine was a supplement to the newspaper.

**Mr Creswell**—It was really dealing with a different issue. It was dealing with the question of what was a substantial part of a published edition, where the newspaper proprietors were seeking to assert that their copyright—that is, the copyright in the layout and set-up of the newspaper—had been infringed by the unlicensed copying of articles by educational institutions.

I think the decision of the court was that in no case was there a sufficiently substantial copying of the edition—that is, the edition constituted by the totality of the newspaper, the bringing together of the articles, the masthead, the layout, the placing of the advertisements and so on. The defence—I think successful—was, ‘Look, we took an article from here and from there, pages 36, 24, 19 and 16, and even if you took them all together it did not look like a substantial part of the edition of the newspaper as a whole.’

**Senator McKIERNAN**—The examples that were put to the committee last week were essentially those dealing with magazines, rather than newspapers as such. I recall somebody making mention of the fact that, if a client was a large government department or even the government itself, there might be a time when the 15 per cent limit might be exceeded in the case of a newspaper because the client had a broad ranging interest. The question is: are we, effectively, looking just at magazines in terms of this 15 per cent, or can you see it applying across the board to newspapers?

I have a supplementary question. What is the impact of this legislation? We are talking about media monitoring. It occurred to me only after the last round of hearings that I had not addressed any questions about electronic news and current affairs programs. Indeed, I have been the recipient of some media monitoring advice on them. Where does the legislation impact on the electronic media? That is a number of questions in one, but it will save time down the line.

**Ms Hawkins**—As I understand it, the first question you are asking really is: is the 15 per cent right of restraint designed to operate against excessive photocopying of magazines rather than newspapers? In answer to that question, the government’s decision is that indeed it is designed to operate against—for want of a better way of describing it—both newspapers and magazines. If in fact it could be the case down the track that media monitoring businesses were photocopying more than 15 per cent of our newspaper for a client, that would be precisely the kind of widespread copying that publishers would be entitled to restrain. Indeed, the government is intending that publishers should be able to restrain, because it could, down the track, lead to losses of circulation. I do not think really we can add anything much to this distinction that you are trying to set up between newspapers and magazines.

**Mr Creswell**—I agree.

**Ms Hawkins**—In relation to electronic media, I am not sure exactly where you are coming from with this question. Are you talking more about television programs?

**Senator McKIERNAN**—Also radio and current affairs programs, such as news bulletins where a media monitoring organisation would take an excerpt from those programs and publish it together with other information that they do publish. Does it have any impact on that type of media monitoring activity?

**Mr Creswell**—I hope I am answering the question. Section 35(4) is the special deal for the allocation of copyright as between proprietors of newspapers and magazines and their employees. But in the case of television or radio broadcasters, section 35(6) is their provision which says that the employer is the owner of all the copyright in the materials produced by the employee. A media monitor specialising in monitoring the electronic media deals just with the TV stations and radio stations and has been for some time, as far as I am aware.

**Senator ALLISON**—I go back to a question I raised earlier, about the means by which we might facilitate agreements where publishers were reluctant to do so. I notice that, in one of our submissions from the press and electronic monitoring company Quick Clips, the suggestion was made that we should set up a copyright tribunal so that an independent umpire could be

the arbiter of what constituted a fair arrangement. I wonder whether you have had time to consider that suggestion and whether this tribunal might simply assist by agreeing about what is an appropriate percentage or whether it might come into play perhaps for individual instances.

**Ms Hawkins**—Senator, in answer to your question: we are well aware that media monitoring organisations have sought a statutory licence, in effect, to permit them to both photocopy and fax material in newspapers and magazines. The way that we understand media monitoring organisations to be asking the statutory licence to operate is that they would not be infringing the copyright in newspapers and magazines if they copied, as long as they paid adequate remuneration to the copyright owners. In the event that there was not an agreement between media monitoring organisations who wanted to copy and the copyright owners, in terms of what is reasonable remuneration, that dispute would be referred off to the copyright tribunal for arbitration.

It is not anything new that media monitoring organisations are making this request; they have been requesting this kind of statutory licence for some time. The point that we did not really get a chance to make in the previous public hearings and that we would be quite keen to make now is that, on the basis of the evidence before both the government and the committee now, it seems that it would be inconsistent with Australia's international copyright obligations under the Berne convention and also the agreement on trade related aspects of intellectual copyright, the TRIPS agreement, for Australia to introduce a qualification to exclusive rights in the way that media monitoring organisations are asking. I could go into a little bit more detail about this point if that would assist the committee.

Article 9 of the Berne convention—which, as you have heard, is the major international copyright convention—provides that the right of reproduction is to be an exclusive right to copyright owners. The convention does permit contracting parties to make exceptions to that, but there is quite a strict test in the Berne convention, the so-called three-step test. The three-step test provides that exceptions are only permitted, first, in certain special cases; secondly, in cases that do not conflict with the normal exploitation of the work; and, thirdly, in circumstances that do not unreasonably prejudice the legitimate interests of the author.

On the current evidence before the committee and, indeed, before the government when it was making this decision, it is questionable whether a statutory licence for media monitoring organisations to copy and to fax articles from newspapers and magazines to their clients would actually satisfy that three-step test. Indeed, to go another round of detail: in media monitoring organisations' submissions to the committee they point to the fact that there are a number of—

**CHAIR**—Excuse me, the Senate bells are ringing. Senator McKiernan and I are paired, so we can continue, but the other senators might need to leave. It is no rudeness to the witnesses.

**Ms Hawkins**—I will continue to answer this question, because obviously it is an important point. The Australian print monitors organisation, in their submission, state to the committee that there are existing statutory licences in the Copyright Act. They point to those existing statutory licences as precedents for a statutory licence for media monitoring organisations to be able to fax and copy material to their clients. The point that we would like to emphasise in relation to those existing statutory licences is that the reasons for them is much more compelling than the reasons that are put forward by media monitoring organisations for a statutory licence for them to photocopy and fax newspaper and magazine articles.

The first licence that media monitoring organisations point to is the statutory licence relating to government use. We do not need to go into too much detail tonight, but obviously it is in

the national interest that private rights do not impede government's work in the public interest. Hence the government use statutory licence in the Copyright Act is supported by more compelling reasons than the statutory licence that media monitoring organisations are seeking.

Secondly, the media monitoring organisations refer to a statutory licence in the Copyright Act which is the so-called mechanical licence. That is a licence to make sound recordings of musical works. However, we note in relation to that statutory licence that that is actually expressly provided for in Australia's international copyright obligations in the Berne convention. Likewise, another statutory licence that media monitoring organisations point to as a precedent for their being able to have a statutory licence, the statutory licence in relation to making ephemeral copies of works for certain broadcasting purposes, is another exception that is expressly provided for in the Berne convention.

In summary, I have provided you with quite a bit of detail there but I think it is necessary to see that Australia does have international obligations to afford copyright owners exclusive rights. If we are to derogate from those exclusive rights, there need to be quite compelling reasons that satisfy the three-step test for exceptions in the Berne convention.

**CHAIR**—Can I just take you up on that three-step test. One was certain special cases which I assume are not defined—

**Ms Hawkins**—Indeed.

**CHAIR**—So it basically leaves it open to Australia to determine what it believes is a special case. Possibly, keeping the government informed might be a special case. Also, keeping people informed as to what is happening around the nation might be considered to be within the overall public good and therefore fitting into that case. That aside, we only have to protect the author, don't we, under the convention? Was that the third of the three steps?

**Ms Hawkins**—Are you getting to how this applies to the right of restraint?

**CHAIR**—And who is the author for the Berne convention. The journalists would get paid on this, but the publishers would not.

**Mr Creswell**—What Ms Hawkins has been talking about has been addressing the broader claim by the media monitoring organisations to be given a general statutory licence to copy now and agree and pay later—without having to get permission, without having to get a licence from Copyright Agency Ltd on behalf of the journalist authors, yes.

**CHAIR**—We could justify such a regime, couldn't we, under the Berne convention, wide as it is—as is the wont of so many of these conventions. They seem to be so wide that you can do with them as you will.

**Mr Creswell**—Mr Chairman, if I can take up your suggestion that a licence could be justified on the basis of keeping the Australian public informed, I think that we would have to reflect seriously on whether that was not so broad, particularly as the very public that we are seeking to keep informed are in effect an entire market for the newspapers that were being copied under the licence. I think that the authors might argue that we are just giving an across-the-board licence to copy for the very people that are our public.

**CHAIR**—But who are the authors under the three-step test? Are they the journalists writing it, or the publishers?

**Mr Creswell**—If it is for electronic use it will be the newspaper proprietors, by right of first ownership as employers. In the case of photocopying it will be the journalists.

**CHAIR**—What about the statutory bar with the 15 per cent? How does that fit into the Berne convention and regime?

**Mr Creswell**—That is not something that is required by the Berne convention. This is a local gloss.

**CHAIR**—Is it contrary to it?

**Mr Creswell**—No, we do not believe it is contrary to it.

**CHAIR**—If the 15 per cent was not in the legislation, how would that impact on the publishers?

**Mr Creswell**—In so far as photocopying is concerned, the employed journalists whose articles were being copied could, effectively, via Copyright Agency Ltd, license without limit the photocopying of those articles. It is only in aggregate that the copying of a number of articles could exceed 15 per cent and therefore become of concern to the proprietors, but because, as we understand it, all the members of the media alliance have authorised Copyright Agency Ltd to license media monitors and other people to photocopy, then I suppose in aggregate you could have a situation where as a result of this licence Copyright Agency Ltd has given to a media monitor they could end up photocopying more than 15 per cent.

You ask how that would affect the proprietors. This is what they are concerned about, but legally they are not the copyright owners. The only possibility, bearing in mind Nationwide News, is that if there was virtually a copying of the whole of an issue of a newspaper then they could possibly found an action based on infringement of their published edition copyright.

**CHAIR**—But if it did not get to that sort of gross level of copying, then—

**Mr Creswell**—No, in the particular case of photocopying, because we are leaving there ‘employed journalists’. May I add that freelance journalists retain their copyright unless, by contractual arrangement with the newspaper, they have assigned it to the newspaper. However, they will have their copyright, just as they have it now.

**CHAIR**—The Copyright Agency expressed concerns that the bill will cause them administrative difficulties when determining copyright and royalties. Are you aware of those difficulties? Is there anything that could be done to alleviate them?

**Ms Hawkins**—We are aware of CAL’s concerns. Indeed, as you noted, we did monitor the evidence that was put before the committee at the public hearing. So we are aware that CAL has put forward this concern that it will be administratively difficult. But the provisions in the bill, as they stand, reflect the government’s decision on how employed journalists’ copyright should be divided between journalists and publishers. It would actually be going to a policy issue for us to respond in any greater detail to CAL’s concerns about the administrative difficulties.

**CHAIR**—A witness on the last occasion, Ms O’Connell, expressed reservations about Mr Creswell’s evidence that the Trade Practices Act would apply to prevent collusive activity among publishers. Did you pick that up in the transcript? If so, what are your comments or response in relation to those assertions?

**Ms Hawkins**—Yes, we did pick that up in the transcript. The only thing that we could add to that is the fact that in the policy development phase of this bill, obviously a range of government departments were involved in the decision making process and Treasury did not raise any concerns about the interaction of the Trade Practices Act with these proposed amendments to the Copyright Act. As the Trade Practices Act is within the purview of Treasury, we would not make any more comments on that.

**CHAIR**—Yes, but that was on the way through. Since those comments, have you bounced it back to Treasury to say, ‘This is what has been said. Do you have any views, given this evidence?’ If not, I invite you to take that on notice. Possibly we can follow that through.

**Ms Hawkins**—Certainly.

**CHAIR**—Thank you. Ms O’Connell also made comments, which you will find on page 65 of the *Hansard*, in relation to section 183 and how it treats government differently from the private sector. Do you have any comments or response to that?

**Ms Hawkins**—I guess that goes to the point that I was making before in discussing the issue of the statutory licence. It is actually section 183. It is the statutory licence in the act for government use of copyright material. As I was trying to get across before, obviously there are more compelling reasons for that statutory licence so that, in the national interest, the government can use copyright material and the government is not convinced, at the moment, that the concerns of media monitors are such that a statutory licence should be introduced.

**CHAIR**—In the last 10 minutes, let us move on to parallel imports. What is the evil that this legislation is trying to address? What are we trying to overcome?

**Mr Creswell**—Is this in relation to copyright packaging and labelling?

**CHAIR**—Yes.

**Mr Fox**—The evil that is being addressed in this set of amendments is the use of copyright to control the marketing and distribution of imported goods that are not themselves the subject of the Copyright Act. In other words, it is the use of copyright, or of a number of the rights contained within the range of rights the Copyright Act grants, to control the marketing of goods that would not otherwise attract the kind of protection from competition that would be the case. The evil is the use of the Copyright Act for a purpose for which the act was not intended.

**CHAIR**—I understand that. It seems a freak of a court decision 10 years ago or so has allowed the Copyright Act to be used in this way. But it seems to have been used for small businesses in particular to protect themselves against certain possibly undesirable practices. We were given a lot of evidence—from Guylian chocolates to toys, soft drinks and videos, and the list goes on. Do we have any examples of where the copyright has been used basically to abuse the market power of the party involved? We were given a lot of evidence suggesting, albeit as somewhat of an anomaly, that you could use the Copyright Act in this way. It had done a lot of good. Can the department point us to any bad effect this interpretation of the legislation has had on the market?

**Mr Creswell**—I will ask Mr Fox to elaborate. As a general principle, I want to confirm that the government was not motivated to do this just to tidy up the Copyright Act or for idle amusement. The genesis of the amendments began with a report by the Copyright Law Review Committee, after a systematic examination of the importation provisions of the Copyright Act, which admittedly now is nine years ago.

They picked up the Bailey’s Irish Cream case, which I am sure the committee has heard quite a lot about now. There the consumer was denied the benefit of getting the genuine item at a cheaper price than via the appointed, exclusive distributor because the enterprising person, who may well have been a small business, was aware of the existence of a job lot of Bailey’s Irish Cream from a certain source overseas. That person was able to bring it in and benefit the public by selling it at a considerably cheaper price than via the appointed distributor. Mr Fox may want to elaborate.

**CHAIR**—I think we were given evidence that, if a job lot comes in, the public benefits. But sometimes, in the meantime, the company that has developed the market, done all the advertising and incurred all the expense suffers consequentially as a result of that. Ultimately, the public is not better off. What sort of micro-macro approach have we taken to these schedule 3 amendments?

**Mr Fox**—Mr Chairman, with your leave, I can just respond a little to the first part of your question. You talked about small businesses. I am sure there are a number of small businesses involved, but I also feel that Proctor & Gamble would not be described as a small business, nor Stuart Alexander doing \$160 million worth of business. I think the toy association said that they represent people such as Lego, Sega, Nintendo, K-Mart, Toys 'R' Us, Grace Bros. None of these are small businesses. I am sure a number of people who are engaged in this activity are small businesses, but I do not think those I mentioned would be described in that way.

In relation to the macro—

**CHAIR**—But the chances are that a big business could sustain the loss of this copyright more easily than a small business, which might be wiped out. That expresses, in a nutshell, the submissions or the thrust of the evidence as I understood it.

**Mr Fox**—I think the government's view on this is that, if you are going to do surgery in order to deal with a problem, you ought to cut out the problem and not cut off a whole range of other matters that are carried along with it, for no good reason. The government's view in relation to the copyright legislation is that it has been used as a convenient vehicle for exclusive distributors who have imported product and are able to protect their brand that they are importing by use of the copyright legislation, but that that is not the appropriate means by which those organisations or businesses ought to be protecting their brands.

If there are inferior products, if there are problems with labelling, if there are problems with product safety, then there is specific legislation to deal with those matters. If indeed they are importing trademarked goods, then, if they are the owner for Australia and the goods that are being imported are owned by a trademark owner other than themselves, they can take action using trademark legislation.

The government's view is that the appropriate mechanisms are available to such businesses if they wish to avail themselves of them. If they have no problem with labelling, quality or consumer safety, then the government's view of competition in the market ought to be able to sort out who would be the most effective supplier of those goods, as it is the case with a large range of other goods.

**CHAIR**—I hear what you are saying. The example we were given was Guylian chocolates. Witnesses said that they had developed the market but somebody came in with a consignment that was all melted and that got on to the shelves, and as a result Guylian chocolates suffered a loss of reputation. People no longer want to buy Guylian chocolates. Small business has developed the market; somebody has wrecked it for them. How can they protect themselves? People are not all that interested in Guylian chocolates distributed by Senator McKiernan, as opposed to Guylian chocolates distributed by Senator Cooney. People do not look at who distributed the product to determine if they are going to buy it; they look at the product, Guylian, and say either, 'I will buy it,' or, 'I will not buy it.'

**Senator McKIERNAN**—I will supplement the chair's comments by another question. Would the Trade Mark Act protect the people in that instance? If not, what provisions under

other Australian legislation are available—Mr Fox went through a few of them—to protect a company in those circumstances so described in that instance by the chair?

**Mr Creswell**—Mr Chairman, I will defer to Mr Fox's knowledge from his past Public Service experience, but just as a general comment I query the assumptions that we have been invited to make by attributing the sole protection of the public against melted chocolates to the Copyright Act and the possibility of controlling the distribution by reason of the picture on the box or the literary work on the box. There is other legislation.

Furthermore—and Mr Fox will elaborate—it occurs to me that the present protection afforded to distribution by the Copyright Act would not guarantee that some negligent distributor within Australia of these chocolates might not leave them out in the sun. In other words, how do we know that it was only the Copyright Act that prevented a box of melted chocolates from reaching the shelf and calling into question the—

**CHAIR**—What other mechanism would be available? That is what we would want to satisfy ourselves about, I think.

**Mr Creswell**—I will pass it to Mr Fox, but certainly from my days at law school I would say that there were such things as the Sale of Goods Act. If you were the recipient of goods that did not conform to description, there were remedies available.

**CHAIR**—Yes, but that is for the customer to sue. In the meantime, the name of Guylian chocolates has got a bad name, with a loss of market reputation. People do not buy the product, and an innocent importer or a third party suffers a huge consequence as a result. That is what the comment was. Mr Fox, can you indicate to us what protection there would be under the Trade Marks Act or any other legislation to cover those circumstances?

**Mr Fox**—In relation to trademarks, Mr Chairman, it is our view that control over the Guylian chocolates would be available, say, to Stuart Alexander if they were the registered trademark owner or the authorised user of the mark in Australia, if the Guylian chocolates that were imported by the third party had been imported from a place where that mark had been applied by an owner other than Stuart Alexander or other than the owner that was registered in Australia—in other words, if it was an owner other than the owner registered in Australia. If Guylian is the registered owner in Australia and they were imported from Holland, where Guylian is the registered trademark owner, the Trade Marks Act does not assist. But if, in fact, Stuart Alexander were the registered owner of the trademark in Australia, then they could take action under the Trade Marks Act. That is our understanding of the way in which the legislation works.

As far as the question of the quality of the goods not meeting the description goes, provided that those—

**CHAIR**—I do not think the topic was the quality of the goods so much as the damage to market reputation. Would you take that issue on notice and provide us with a written response. We are obliged to conclude by 6 o'clock. I thank very much the members of the Attorney-General's Department, Hansard and the secretariat.

**Committee adjourned at 6.00 p.m.**