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Commonwealth of Australia

SENATE STANDING COMMITTEE ON FINANCE AND GOVERNMENT OPERATIONS

The circumstances surrounding the various court actions relating to the film 'The Return of Captain Invincible'

1987

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CHAPTER 1

Introduction

1.1 On 21 May 1985 the following matter was referred to the Committee by the Senate on the recommendation of Senate Estimates Committee D for investigation and report:

> The circumstances surrounding advice given, decisions taken and procedures involved with the various court actions relating to the film 'The Return of Captain Invincible'.[1]

During its deliberations on additional estimates for the Department of Arts, Heritage and the Environment for 1984-85, Estimates Committee D had expressed concern about the substantial cost to the Commonwealth of these court actions.

1.2 After reading the evidence given to Estimates Committee D by officers of the Department of Arts, Heritage and Environment (the Department)[2], the further information sought by the Estimates Committee and provided by the Department, and the report of the Estimates Committee tabled on 21 May 1985[3], the Committee sought a submission on the reference from the Minister for Arts, Heritage and Environment, Barry Cohen MP (the Minister).

1.3 The Committee received a submission from the Minister dated 2 July 1985. Following consideration of issues raised by the Minister, the Committee sought a further submission from him. The Committee received a further submission from the Minister dated 13 November 1985.

1.4 The Committee has considered these documents, and the judgments delivered in the court actions mentioned in the terms of reference.

1.5 The Committee thanks the Minister and officers of the Department for their assistance in this inquiry.

ENDNOTES

1. Australia, Senate, Journals No. 30, 21 May 1985, p. 284.

2. Australia, Senate, Debate - Estimates Committees A,B,C,D,E and F, 15 April to 23 May 1985, pp. 204-5.

3. Australia, Senate, Journals No. 30, op. cit.

CHAPTER 2

The Ministerial Decisions and the Court Actions

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

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

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

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

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

- 10 September 1981: Provisional certificate issued by the then Minister, Ian Wilson MP, to the applicant, Mr Andrew Gaty.

- 23 June 1982: Mr Gaty applied for a final certificate.

- 17 November 1982: Mr McVeigh informed Mr Gaty that he was unable to satisfy himself that the film was a qualifying Australian film for two reasons:

  1) doubt whether the film for which a certificate was issued was an eligible film as defined in the Act, i.e. a film produced wholly or principally for exhibition to the public. This conclusion was reached because the film viewed by departmental officers appeared incomplete and information was available that the film was undergoing extensive re-editing in the United States.

  2) doubt whether the film was an "Australian" film due to perceived increases in non-Australian elements since the issue of the provisional certificate.

- 18 November 1982: Mr Gaty supplied further information in response to Mr McVeigh's 17 November letter. He also met with officers of the Department on 19 November.

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

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

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

- 13 January 1983: Willarra lodged the application for an order of review under the AD(JR) Act.

- 24 May 1983: A Federal Court hearing commenced before Justice McGregor.

- 10 November 1983: The hearing concluded.

- 17 May 1984: Justice McGregor delivered his judgment.

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

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

(ii) exercised his power unreasonably in respect of the determination of eligibility and 'significant Australian content';*

(iii) erred in his interpretation of the word 'significant';*

(iv) erred in his interpretation of the word 'authors';* and

* (i.e. when these words are used in Section 124ZAD)

(v) breached natural justice in that the applicants were not given an opportunity to be heard before he made his decisions.

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

(vi) he was in breach of the rules of natural justice in failing to give the applicants any opportunity to defend their investment by explaining why the material before the Minister should not be accepted as factually correct nor be a basis for rejecting the application for a final certificate; and

(vii) he was in breach of the rules of natural justice in not informing the applicants that published procedures involving the Australian Film Commission would not be followed, and that a favourable opinion of the Commission on the film would not be taken into account.

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

2.11 The Appeal took the following course:

- 14 August 1984: The Acting Minister (Chris Hurford MP) authorised the appeal.

- 22 to 25 October 1984: Appeal proceedings came before a full bench of the Federal Court (Justices Toohey, Wilcox and Spender).

- 11 December 1984: The Full Court dismissed the appeal unanimously and the Court directed that the application for a final certificate be reconsidered by the Minister as he had denied 'natural justice' to the applicant. The judgement provided guidance on the approach the Minister should take in the determination of 'significant Australian content' and other matters relevant to the Minister's discretion.

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

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

CHAPTER 3

Matters considered by the Committee

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

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

- whether the extremely large sum of legal costs incurred in the action before Justice McGregor could have been foreseen and should have been a relevant consideration in Ministers' decisions;

- whether the institution of an appeal against Justice McGregor's decision was reasonable; and

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

Costs incurred in the original action

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

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

Australian Government	$148 447
Willarra*	460 000
Total	$608 447

*costs claimed but not settled to date

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

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

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

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

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

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

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

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

> ... the proper construction of S124ZAD of the Act had not been the subject of judicial consideration before this case. Accordingly, the Department's advice to the Minister (supported in some aspects by advisings from Attorney-General's) was on the basis of the best understanding of the Section's construction.

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

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

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

The appeal from Justice McGregor's decision

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

The Acting Minister was also advised that:

- the Australian Film Commission had received the opinion of Sir Maurice Byers which stated, in part, - 'If it is desired in this case and on this film, to correct his (Justice McGregor's) error on the authorship point, an appeal must be brought';

- it was likely that other challenges to the Minister's decisions relying on similar grounds were in the offing - indeed one such challenge for the film 'On the Run' was already before the Federal Court; and

- there was continued uncertainty in the administration of the scheme in respect of 'authors', 'origin of the idea' for a film and

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

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

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

Australian Government	$15 215
Willarra*	40 000
Total	$55 215

*costs claimed but not settled to date

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

Alternative remedies

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

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

3.18 The Minister told the Committee that:

- no consideration had been given to amending the section prior to or during the hearing of the case, as Counsel engaged by the Minister were confident Willarra's action could be successfully defended;

- after receiving a departmental report on the status of the case in January 1984 (before delivery of Justice McGregor's decision), the Minister had asked whether consideration had been given to amending Division 10BA to make it more certain.

The Minister advised:

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

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

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

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

The Minister advised:

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

- Sir Maurice Byers' advice to the Australian Film Commission that there were grounds for an Appeal (on some important matters in Mr Justice McGregor's decision);

- that the prospect of changes in the legislation affecting the determination of "significant Australian content" would almost certainly seriously undermine stability in the film production industry given the succession of taxation related changes to the assistance scheme which had taken place;

- the existence of a second action seeking an order of review of the Minister's decision in relation to another film. It was presumed that the action would rely on Mr Justice McGregor's findings which had introduced uncertainty into the determination of "significant Australian content"; and

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

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

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

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

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

Appendix

AUSTRALIAN SENATE
CANBERRA, A.C.T.

STANDING COMMITTEE ON FINANCE AND GOVERNMENT OPERATIONS

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600
TEL. 72 6822

7 June 1985

Barry Cohen, M.P.,
Minister for Arts, Heritage and
the Environment,
Parliament House,
CANBERRA ACT 2600

As you know the following matter was referred to the Standing Committee on 21 May 1985 on the motion of Senator Margaret Reynolds, the Chairperson of Senate Estimates Committee D, for investigation and report:

> The circumstances surrounding advice given, decisions taken and procedures involved with the various court actions relating to the film "The Return of Captain Invincible".

In order that the Committee may deal with this reference expeditiously but fully, I would appreciate it if you could provide the Committee as soon as possible with a submission which will enable the Committee to report on all relevant matters.

(JOHN COATES)
CHAIRMAN

MINISTER FOR ARTS, HERITAGE AND ENVIRONMENT

Senator J. Coates
Chairman
Standing Committee on Finance
and Government Operations
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Coates

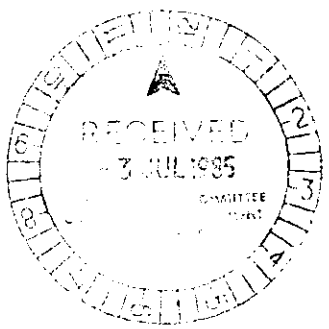
I refer to your letter of 7 June 1985 concerning court actions associated with the film "The Return of Captain Invincible".

Attached as requested, is a submission prepared by my Department on the court actions for the consideration of your Committee. Also attached are copies of both Judgements in the case and a full set of Appeal papers. All Departmental papers associated with the film, except for a later Departmental minute recommending that an Appeal be brought, are incorporated in the Appeal papers.

If you require further information my Department would be happy to supply you with it.

Yours sincerely

BARRY COHEN
2-7-85



PARLIAMENT HOUSE, CANBERRA, A.C.T. 2600

"THE RETURN OF CAPTAIN INVINCIBLE" COURT ACTIONS:
SUBMISSION FOR STANDING COMMITTEE ON FINANCE AND
GOVERNMENT OPERATIONS - AUSTRALIAN SENATE

BACKGROUND

Early History

. On 10 September 1981 provisional certificate No. 122 was issued to Mr Andrew Gaty stating that the film was a qualifying Australian film under the taxation incentives for films scheme.

. Under Division 10BA of the Income Tax Assessment Act (copy attached at A) the Minister for Arts, Heritage and Environment issues certificates which allow taxation concessions for private investors in qualifying Australian films.

. The determination is on the basis of the information provided by the applicant. In determining a qualifying Australian film the Minister must be satisfied that the film is both:

- 'an eligible film' i.e. a feature film, a film of a like nature to a feature film for television broadcasting, a documentary or a mini-series of television drama, produced principally for exhibition to the public in cinemas or on television; and an

- 'Australian film' being substantially made in Australia and having a significant Australian content.

. 'Significant Australian content' is determined by the Minister having regard to subject matter, places made, nationality/residency of persons making the film, ownership of the company making the film and the film's copyright, source of investment funds, production expenditure and any other matters the Minister considers relevant.

. The Minister's decision is not based on a judgement of quality or commercial viability.

. If the information supplied in the application changes after the Minister has issued a provisional certificate, he is required to reassess whether the film remains a qualifying Australian film.

. A provisional certificate is issued for a film yet to be made and a final certificate when the film is completed. A separate determination is required at each juncture by the Minister

. On 23 June 1982, the applicant, Mr Andrew Gaty, applied for a final certificate.

- On 17 November 1982, Mr McVeigh, the then Minister, informed Mr Gaty that he was unable to satisfy himself that the film was a qualifying Australian film for two reasons:

  1) doubt whether the film for which a certificate was issued was an eligible film as defined in the Act, i.e. a film produced wholly or principally for exhibition to the public. This conclusion was reached because the film viewed by departmental officers appeared incomplete and information was available that the film was undergoing extensive re-editing in the United States.

  2) doubt whether the film was an "Australian" film due to perceived increases in non-Australian elements since the issue of the provisional certificate.

- On 18 November 1982 Mr Gaty supplied further information in response to Mr McVeigh's 17 November letter. He also met with officers of the Department on 19 November.

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

Federal Court Hearing

- On 13 January 1983 the investors in the film (Willara Pty Ltd and Others) lodged an application for an order of review under the AD(JR) Act.

- On 24 May 1983 a Federal Court hearing commenced before Mr Justice McGregor.

- Mr David Bennett, Q.C., was the Senior Counsel retained on the Government's behalf.

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

- The hearing concluded on 10 November 1983.

- On 17 May 1984 Mr Justice McGregor handed down his reasons for Judgement that the Minister's decisions to revoke the provisional certificate and not to grant a final certificate be set aside and the application for a final certificate be referred back to the Minister for further consideration.

- In reaching his conclusion, in brief, the Judge found that the then Minister had

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

  - exercised his power unreasonably in respect of the determination of eligibility and significant Australian content;

  - erred in his interpretation of the word "significant";

  - erred in his interpretation of the word "authors" and;

  - breached natural justice in that the applicants were not given an opportunity to be heard before making his decisions.

- In addition to these findings Mr Justice McGregor's Judgement included views on the approach to be adopted by the Minister in determining 'significant Australian content'. These views were at odds with the approach previously taken by Ministers. The primary Judgement, therefore, introduced uncertainty as to whether S124ZAD of the Income Tax Assessment Act required the Minister to apply a simple quantitative test when considering the contributing elements to a film, or whether the Minister could exercise discretion as to their relative importance;

- It should be noted that many films submitted for certification contain both Australian and non-Australian elements;

- The notion that the Minister could give a greater or lesser weighting to one or more of these elements in a film rather than applying a simple quantitative test was considered to be essential to achieving the objective of developing an Australian film industry with creative control of film projects in Australian hands;

Appeal

. An Appeal against Mr Justice McGregor's decisions was agreed to by Acting Minister Hurford on 14 August 1984.

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

. The Acting Minister was also advised that:

- the AFC had received the opinion of Sir Maurice Byers which stated, in part, - "If it is desired in this case and on this film, to correct his (J. McGregor's) error on the authorship point, an Appeal must be brought";

- it was likely that other challenges to the Minister's decisions relying on similar grounds were in the offing - indeed one such challenge for the film "On the Run" was already before the Federal Court; and

- there was continued uncertainty in the administration of the Scheme in respect of "authors", "origin of the idea" for a film and most importantly the determination of "significant Australian content" if the primary Judgement was not appealed.

. Indeed general opinion was that only through an Appeal or a subsequent court case could the fundamental matter of significant Australian content be clarified.

. The Appeal proceedings came before the Full Bench of the Federal Court (Mr Justice Toohey, Mr Justice Wilcox and Mr Justice Spender) from 22 to 25 October 1984.

. The Full Court dismissed the Appeal unanimously on 11 December 1984 and the Court directed that the application for a final certificate be reconsidered by the Minister. As expected, a primary finding was that the then Minister denied 'natural justice' to the applicant. However, the Appeal has provided the essential guidance on the approach the Minister should take in the determination of "significant Australian content".

. A Departmental submission has now been prepared to assist the Minister in reconsidering the "The Return of Captain Invincible" final certificate application and a decision on certification is expected soon.

THE FILM

Synopsis

. The film deals with a superhero in the Superman mould, disgraced in the McCarthy era, whose rehabilitation is caused by the President of the U.S.A.. The superhero begins his adventure in Australia as a derelict and he returns to the USA to face and defeat the evil Mr Midnight. The film is not serious drama but employs comedy, fantasy, music and dancing. It was released in Australian cinemas and had a short run.

Australian Content

. Attachment B is a list of the Australian content of the film.

COSTS

Budget

. The budget for the film was $4.9M and substantial tax payments are involved; estimated by Willarra at $4M.

Court Costs

. The Government's legal costs to date for the primary hearing and the Appeal are as follows:-

primary hearing	$148,447
Appeal	$ 15,215

. The bill for Willarra's costs have now been given to the Australian Government Solicitor. These have been stated to be of the order of:-

primary hearing	$460,000
Appeal	$ 40,000

. It should be noted that the costs of the Appeal are significantly less than the primary hearing - approximately only 10%.

. The bill presented by Willarra has been examined by officers of the Australian Government Solicitor who have advised the bill is to be disputed. The matter will in the end rest with the Registrar of the Federal Court who is to tax the bill and arrive at a final cost.

"(7) For the purposes of the application of sub-section (3) or (6) in respect of a change in the ownership of, or in the interests of persons in, a unit of industrial property being a copyright, or an interest in a copyright, subsisting in a film, a reference to the cost of the unit is a reference to the cost (if any) of the unit, ascertained in accordance with section 124R, to the person or persons who owned the unit before the change increased by so much of the expenditure incurred in relation to the film in respect of which a deduction or deductions has or have been allowed or is or are allowable under section 124ZAF to the person or any of the persons who owned the unit before the change as is attributable to so much of the unit as, immediately before the change occurred, was owned by the person or persons to whom that deduction or those deductions has or have been allowed or is or are allowable.".

13. After Division 10B of Part III of the Principal Act the following Division is inserted:

"Division 10BA—Australian films

"Subdivision A—Preliminary

Interpretation

"124ZAA. (1) In this Division, unless the contrary intention appears

'Australian film' means a film that

(a) has been made wholly or substantially in Australia or in an external Territory and has a significant Australian content; or

(b) has been made in pursuance of an agreement or arrangement entered into between the Government of Australia or an authority of the Government of Australia and the Government of another country or an authority of the Government of another country;

'copyright', in relation to a film, means copyright subsisting in the film by virtue of Part IV of the *Copyright Act* 1968 and includes copyright subsisting in, or in relation to, the film or in any work comprised in the film, under the law of a country other than Australia;

'feature film' includes animated feature film;

'film' means an aggregate of images, or of images and sounds, embodied in any material;

'final certificate' means a certificate issued under section 124ZAC;

'future copyright' means copyright to come into existence at a future time or upon the happening of a future event;

'Minister' means the Minister for Home Affairs and Environment;

'provisional certificate' means a certificate issued under section 124ZAB;

'public event' includes—

(a) a sporting activity;

(b) a theatrical performance;

(c) an artistic performance; or

(d) any other activity, performance or event,

to which the public is normally admitted (whether free of charge or on payment of a charge);

'qualifying Australian film' means a film that is

(a) an eligible film; and

(b) an Australian film;

'television broadcasting' includes transmission by means of cables.

"(2) A reference in this Division to a film shall, unless the contrary intention appears, be read as including a reference to a proposed film.

"(3) In this Division, a reference to the expenditure of capital moneys is a reference to the expenditure of moneys that is expenditure of a capital nature.

"(4) Subject to sub-section (5), a reference in this Division to an eligible film is a reference to a film produced wholly or principally for exhibition to the public in cinemas or by way of television broadcasting, being a feature film or a film of a like nature produced for exhibition by way of television broadcasting, a documentary or a mini-series of television drama.

"(5) Without extending by implication the generality of sub-section (4), a reference in this Division to an eligible film does not include a reference to a film that is, or is to a substantial extent

(a) a film for exhibition as an advertising program or a commercial;

(b) a film for exhibition as a discussion program, a quiz program, a panel program, a variety program or a program of a like nature;

(c) a film of a public event;

(d) a film forming part of a drama program series that is, or is intended to be, of a continuing nature; or

(e) a training film.

"(6) A reference in this Division to moneys expended in producing a film is a reference to moneys expended to the extent to which those moneys are expended directly in producing a film.

Provisional certificates

"124ZAB. (1) A person (in this section referred to as the 'applicant') may apply to the Minister for a certificate stating that a proposed film will, when completed, be a qualifying Australian film for the purposes of this Division.

"(2) An application under sub-section (1)

(a) shall be in writing;

(b) shall be signed by or on behalf of the applicant; and

(c) shall be accompanied by such information as the Minister requires.

"(3) Where an application is made to the Minister under sub-section (1) and the Minister is satisfied that

(a) the proposed film, when completed, will be a qualifying Australian film; and

(b) having regard to the role of the applicant in the proposed production of the film, the applicant is an appropriate person to whom to issue a certificate under this section in respect of the proposed film,

the Minister shall issue to the applicant a certificate under this section in respect of the proposed film.

"(4) A person to whom a certificate in respect of a proposed film has been issued under sub-section (3) shall furnish to the Minister, within a period specified by the Minister, such information in relation to the proposed film as the Minister requests.

"(5) Where a person to whom a certificate in respect of a proposed film has been issued under sub-section (3) fails to comply with sub-section (4) in respect of the proposed film, the Minister may, by writing under his hand, revoke the certificate and thereupon the certificate shall, for the purposes of this Act, be deemed never to have been in force.

"(6) Where

(a) the Minister has issued a certificate under this section stating that a proposed film will, when completed, be a qualifying Australian film for the purposes of this Division; and

(b) at any time after the issue of the certificate, the Minister becomes satisfied that

(i) the proposed film, when completed, will not be a qualifying Australian film for the purposes of this Division; or

(ii) if the proposed film has been completed — the completed film is not a qualifying film for the purposes of this Division,

the Minister shall, by writing under his hand, revoke the certificate and thereupon the certificate shall, for the purposes of this Act, be deemed never to have been in force.

"(7) Where the Minister, under sub-section (5) or (6), revokes a certificate, the Minister shall, as soon as practicable, give notice in writing of the revocation to the person to whom the certificate was issued.

"(8) The revocation of a certificate issued under this section in respect of a proposed film does not prevent the issue of a further certificate under this section in respect of that proposed film.

"(9) Subject to sub-sections (5), (6) and (10), a certificate issued under this section shall be deemed to have been in force at all times before the time when it was issued.

"(10) If an application for a final certificate in respect of a film is not made in accordance with section 124ZAC before the expiration of 6 months after the time when the film is completed, any certificate issued under this section in respect of the film shall be deemed never to have been in force.

Final certificates

"124ZAC. (1) A person (in this section referred to as the 'applicant') may apply to the Minister for a certificate stating that a film that has been completed is a qualifying Australian film for the purposes of this Division.

"(2) An application under sub-section (1)

(a) shall be in writing;

(b) shall be signed by or on behalf of the applicant; and

(c) shall be accompanied by such information as the Minister requires.

"(3) Where an application is made to the Minister under sub-section (1) and the Minister is satisfied that

(a) the film is a qualifying Australian film; and

(b) having regard to the role of the applicant in the production of the film, the applicant is an appropriate person to whom to grant a certificate under this section in respect of the film,

the Minister shall issue to the applicant a certificate under this section in respect of the film.

"(4) A certificate issued under this section shall be deemed to have been in force at all times before the time when it was issued.

Determination of Australian content

"124ZAD. Where, in considering for the purposes of section 124ZAB or 124ZAC whether a film is, or when completed will be, a qualifying Australian film, the Minister is required by virtue of paragraph (a) of the definition of 'Australian film' in sub-section 124ZAA (1) to determine whether the film has, or the proposed film when completed will have, a significant Australian content, the Minister shall, in determining whether the film has, or the proposed film will have, a significant Australian content, have regard to

(a) the subject matter of the film or proposed film;

(b) the place or places where the film was, or the proposed film will be, made;

(c) the nationalities and places of residence of

(i) the persons who took part, or who will take part, in the making of the film or proposed film (including authors, composers, actors, scriptwriters, editors, producers, directors and technicians);

(ii) the persons who are, or who will be, the beneficial owners of shares in any company concerned in the making of the film or proposed film; and

(iii) the persons who are, or who will be, the beneficial owners of the copyright in the film or proposed film;

(d) the source from which moneys that were used in the making of the film were, or that are to be used in the making of the proposed film will be, derived;

(e) the details of the production expenditure incurred in respect of the film or of the budgeted production expenditure to be incurred in respect of the proposed film; and

(f) any other matters that the Minister considers to be relevant.

Election that Division not apply

"124ZAE. (1) Where a taxpayer has expended capital moneys in producing, or by way of contribution to the cost of producing, a film, the taxpayer may elect that this Division shall not apply in relation to the taxpayer in relation to that film and, where such an election is made, this Division does not apply in relation to the taxpayer in relation to that film.

"(2) An election under sub-section (1) in relation to a film

(a) shall be exercised by notice in writing to the Commissioner signed by or on behalf of the taxpayer; and

(b) shall be lodged with the Commissioner on or before the date of lodgment of the return of income of the taxpayer of the first year of income in respect of which a deduction would, but for this section and the provisions of Subdivision B other than section 124ZAF, be allowable to the taxpayer in relation to that film.

"Subdivision B—Deductions for capital expenditure

Deductions for capital expenditure

"124ZAF. (1) Subject to this Subdivision, where

(a) a taxpayer has, under a contract entered into on or after 28 May 1981, expended capital moneys in producing, or by way of contribution to the cost of producing, a film;

(b) at the time when the moneys were expended

(i) the taxpayer was a resident; and

(ii) a provisional certificate or a final certificate was in force in relation to the film;

(c) the Commissioner is satisfied that, at the time when the moneys were expended

(i) the taxpayer expected to become the first owner, or one of the first owners, of the copyright in the film when that copyright came into existence; and

(ii) the taxpayer intended to use that copyright, or the taxpayer's interest in that copyright, as the case may be, for the purpose of producing assessable income from the exhibition of the film to the public in cinemas or by way of television broadcasting or from granting rights to exhibit the film to the public in cinemas or by way of television broadcasting;

(d) by reason of the moneys being expended, the taxpayer became the first owner, or one of the first owners, of the copyright in the film; and

ATTACHMENT

AUSTRALIAN CONTENT UNDER

S.124ZAD(a) to (f) of the ITAA 1936

Subject Matter S124ZAD(a)

- The film does not purport to tell a story about Australians although one of the principal characters, the policewoman Patty, is Australian. A major support, the chief detective, and a number of minor characters are also Australian.

- The setting of the film is both in Australia and overseas. Approximately 40% of the action takes place in Australia.

- Apart from the abovementioned characters and 40% of the setting, there is no particular quality that marks this film out as an Australian film.

Places Made S124ZAD(b)

- the script was written in Australia and overseas by the joint scriptwriters

- the majority of pre-production took place in Australia

- 94.5% of the running time of the film was shot in Australia

- 3.5% of the running time of the film was stock footage of which an undisclosed portion was purchased in Australia

- 42 hours of film footage was shot in Australia

- All post production took place in Australia

Persons who took part in making the film S124ZAD(c) (i)

Author - none

Composer - Orchestration by Australian resident of 10 years (William Motzing)

Actors - of the total 61 actors in the film:

  - . 59 are Australian residents and
  - . 51 are Australian nationals

- of the 3 principal actors (Alan Arkin, Christopher Lee and Kate Fitzpatrick) one is an Australian citizen and resident

- 558 out of 560 actors, dancers and extras used in the film are Australian or residents of Australia.

Scriptwriters - Australian co-scriptwriter (Andrew Gaty) and script-editor (Peter Smalley)

Editor - Australian (John Scott)

Producer - Australian (Andrew Gaty)

Director - Australian citizen, resident in America (Philippe Mora)

Technicians - Of the 80 technicians in the film:
- 74 are Australian citizens or residents
- 65 are Australian citizens
- 1 is an Australian citizen resident overseas

- All of the technical positions are taken by Australian citizens or residents except for the 6 positions of:
  - consultant (Michael Nolan)
  - unit runner (Meryl Cronin)
  - art director (Ron Highfield)
  - assistant accountant (Kate Highfield)
  - wardrobes (Mike Kane)
  - stuntman (Alan Oberhauser)

Musicians - 98 Australian Musicians

Persons who are the beneficial owners of shares in the Company making film S124ZAD(c) (ii)

- Australian

Persons who are the beneficial owners of the copyright in the film S124ZAD (c) (iii)

- Australian

Source from which moneys that were used in making the film were derived S124ZAD (d)

- Australian

Production Expenditure S124ZAD (e)

. Approximately 78% of production expenditure was incurred in Australia. (see breakdown)

Other Relevant Matters S124 ZAD (f)

Songs	-	1 out of 9 used in the film composed by Australian residents
Profits	-	the majority of the profits to remain in Australia

AUSTRALIAN SENATE

CANBERRA A.C.T.

13 September 1985

Barry Cohen, MP
Minister for Arts, Heritage and Environment
Parliament House
CANBERRA ACT 2600

Thank you for your letter of 2 July 1985 and submission on the reference currently before the Standing Committee on 'The Return of Captain Invincible'.

Having considered the matters set out in the submission, there are several further questions that the Committee wishes to put to you.

They are as follows:

(1) Did the Government give consideration to amending Section 124ZAD of the Income Tax Assessment Act
(a) instead of defending the legal action,
(b) during the case before the costs mounted, or
(c) after the McGregor decision so as to overcome the apparent effect of the decision?
If not, what was the reason? If so, why was such an amendment not proceeded with?

(2) On page 4 of the submission, you referred to Senior Counsel's opinion on the advisability of proceeding with an appeal. Could the Committee be provided with a copy of this opinion?

(3) You also referred to an opinion received by the Australia Film Commission from Sir Maurice Byers on the case. Could the Committee be provided with a copy of this opinion?

(4) You mentioned one other court challenge to a decision on Australian content relying on similar grounds to those in the 'Captain Invincible' case. Were any challenges, other than the one you refer to, proposed following the McGregor decision?

(5) Has any decision been made regarding the application for a final certificate for 'The Return of Captain Invincible'? If so, what is that decision? If not, when is that decision expected?

(6) Do you believe Mr McVeigh's decision was wrong in that he should have approved the film in the first place?

(7) On page 5 of the submission you advised that, at the insistence of the Australian Government Solicitor, costs claimed by Willara Pty Ltd in both cases are to be taxed by the Registrar of the Federal Court. Has Willara's bill of costs been taxed as yet? If it has, what sums were allowed as costs by the Registrar?

I would be grateful for your reply to my letter at the earliest convenient time in order that the Committee can conclude its consideration of the reference as soon as possible.

(John Coates)
Chairman

MINISTER FOR ARTS, HERITAGE AND ENVIRONMENT

15 NOV 1985

Senator J. Coates
Chairman
Senate Standing Committee on
Finance and Government Operations
Parliament House
CANBERRA ACT 2600

Dear Senator Coates

I refer to your letter of 13 September 1985 seeking information additional to my submission to your Committee on court actions associated with the film "The Return of Captain Invincible".

The answers to your further questions and copies of various legal opinions are attached.

I trust that this information assists the Committee in its deliberations.

Yours sincerely

BARRY COHEN

Enclosure

ANSWERS TO QUESTIONS ASKED BY THE SENATE STANDING COMMITTEE ON FINANCE AND GOVERNMENT OPERATIONS - "THE RETURN OF CAPTAIN INVINCIBLE".

(1)(a) and (b) No. Neither my Department nor I gave consideration to amending section 124ZAD of the Income Tax Assessment Act before the case came on for hearing before Mr Justice McGregor on 24 May 1983. I am advised that my predecessor the Hon. D.T. McVeigh, M.P., also did not consider taking such action.

My Department and Counsel were confident that the action brought by Willarra Pty. Ltd. could be successfully defended.

The primary Court hearing extended from 24 May 1983 to 10 November 1983 with Mr Justice McGregor's Judgement being handed down on 17 May 1984.

In January 1984, on receiving a Departmental report on the status of the case, I asked whether consideration had been given to amending the legislation to make it tougher in the future.

My Department advised me in February 1984 that a possible review of the scheme was under consideration for late 1984 but that the Court decision may highlight some deficiencies in the legislation and precipitate some immediate changes.

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

Of course, in seeking a review of the Minister's decision under the Administrative Decisions (Judicial Review) Act the applicants were exercising a right open to a person aggrieved by a decision of Government. It is normal practice where decisions are sought to be reviewed under the AD(JR) Act to defend those decisions.

(c) Yes. I was advised on 15 June 1984 that possible changes in the legislation were under consideration by my Department.

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

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

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

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

The reasons for proceeding with the Appeal were

canvassed on page 4 of my previous submission to the Committee and in paragraphs 2 and 3 of the additional written information provided earlier to Senate Estimates Committee "D" by my Department (copy at Attachment B).

(2) A copy of Senior Counsel's opinion is at attachment C.

(3) A copy of the Sir Maurice Byers' opinion is at attachment D.

(4) At that time, I had no knowledge of any other proposed court challenges other than the one earlier referred to.

Since the scheme was established a number of film projects had been refused certification on similar grounds to "The Return of Captain Invincible" and further challenges could have eventuated following the McGregor decision.

(5) Section 16 (2) of the Income Tax Assessment Act provides that:
"Subject to this section, an officer shall not either directly or indirectly, except in the performance of any duty as an officer, and either, while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any information respecting the affairs of another person so acquired by the officer... "

As I have been advised that I am an officer for the purposes of this section, I am, therefore, unable to provide the information requested on whether a decision has been made on final certification.

You may wish to contact the other party to the Court action, Willarra Pty. Ltd., C/- Dare Reed (solicitors, Level 7, 25 Bligh Street, Sydney, or GPO Box 4302 Sydney (telephone 2338574 in this regard.

(6) It would be inappropriate for me to comment on a discretionary determination made by my predecessor, Mr. McVeigh.

(7) The solicitors for Willarra Pty. Ltd. have obtained an appointment on 30 October 1985 to have the bill of costs taxed by a Registrar of the Federal Court, NSW Division.

Information Sought by Senate Estimates Committee "D"

Senator Puplick asked

"In the first case before Mr Justice McGregor, in the Australian Law Reports dealing with this matter (certification of the Return of Captain Invincible) .... who was responsible for giving the Minister advice which was clearly contrary to law? Who was responsible for not checking the validity of the third-hand statements on which the Minister, in part, relied in coming to his decision?

(Senate Hansard, 18 April 1985, Page 205)

The answers to the Honourable Senator's questions are as follows:

"On 16 November 1982 the then Department of Home Affairs and Environment advised the then Minister that it considered the film "The Return of Captain Invincible" was not a qualifying Australian film in terms of Division 10BA of the Income Tax Assessment Act 1936 (the Act) and recommended that the Minister reject the application for a final certificate.

That advice was prepared, in consultation with the Attorney-General's Department, by officers of the Department who were mentioned in the court case at first instance (ALR 54.83).

The advice was based on two doubts held by the Department:

- that the film for which a final certificate was sought was an 'eligible film' i.e. (in part) 'a film produced wholly or principally for exhibition to the public'; and

- whether the 'completed film', in view of its Australian content, could be regarded as an 'Australian film' i.e. one being substantially made in Australia and having a significant Australian content.

Under the Act the Minister must be satisfied as to both aspects if he is to determine a film to be a qualifying Australian film.

The doubt held by the Department as to whether the film was an eligible film was partly based on a statement by the Australian Feature Film Directors Association which Justice McGregor, in upholding 6 of the 25 grounds for the order of review of the Minister's decision, held was 'a third hand statement by a body who might well have been thought to be biased' and that it should have been checked.

On appeal, the Full Federal Court held that the relevance of the 16 November 982 minute lay not so much in its contents but in whether the Minister failed to bring the contents including unfavourable opinions to the attention of the applicant before he made his decision. The Court found that there was such a failure and thus the applicant had not been accorded natural justice.

As to the question of providing advice contrary to law the proper construction of s124ZAD of the Act had not been the subject of judicial consideration before this case. Accordingly, the Department's advice to the Minister (supported in some aspects by advisings from Attorney-General's) was on the basis of the best understanding of the Section's construction.

As to the question of who advised that the case ought to be taken on appeal, the position is as set out hereunder. It is emphasised however that no-one gave legal advice that the appeal was likely to succeed. The then Department of Home Affairs and Environment, in recommending as it did, had available to it advice provided by Mr D.M.J. Bennett, Q.C., and Mr L. Katz of Counsel and by the Australian Government Solicitor. It was also aware of the terms of advice given to the Australian Film Commission by Sir Maurice Byers, Q.C.

It was never expected that the decision of Mr Justice McGregor, insofar as it rested on non-observance of natural justice, would be overturned. It was however hoped, with reasonable assurance from the legal advisers involved, that some aspects of the judgment which left room for doubt on how to apply the relevant legislation might be clarified and that other aspects, wherein the legislation had been given an interpretation other than that which, as a matter of policy, was intended might be overturned. To some extent these hopes were realised.

The Senate Estimates Committee was also advised that, except for payment of costs, the matter of the 'Return of Captain Invincible' has been entirely finalised. While the Court proceedings are complete the decision on final certification of the film is still to be taken.

On 6 June 1984 Mr Justice McGregor ordered that previous decisions on the certification taken by the then Minister be set aside and the matter including the application for a final certificate be referred back to the Minister for consideration according to law.

The appeal against Mr Justice McGregor's Judgement was dismissed on 11 December 1984.

The major investor in the film, acting for the film's production company and all investors wrote to the Minister on 4 April 1985 setting out what they considered to be the principal matters which the Minister should take into account when determining whether a final certificate should be issued for the film.

The Minister has not yet made a decision in this matter.

In accordance with standard practice for handling all applications for certification, a departmental report on the application will be submitted to the Minister. This report is currently in preparation.

The Full Federal Court has in its Judgement, provided important guidance as to the correct application of the law in the determination of 'significant Australian content'.

THE MINISTER FOR HOME AFFAIRS & ENVIRONMENT
ATS, WILLARA PTY. LIMITED & ORS.

OPINION

T.A. SHERMAN,
Crown Solicitor for the Commonwealth
111 Elizabeth Street
SYDNEY

THE MINISTER FOR HOME AFFAIRS AND ENVIRONMENT
ATS. WILLARA PTY. LIMITED & ORS.

OPINION

Our instructing solicitor acts for Daniel Thomas McVeigh, the former Minister for Home Affairs and Environment and Barry Cohen, the present Minister for Home Affairs and Environment. Mr. McVeigh and Mr. Cohen were the respondents to certain proceedings brought by Willara Pty. Limited and others challenging two decisions pursuant to the provisions of the Administrative Decisions (Judicial Review) Act ("the Act "). The decisions were to revoke a provisional certificate and to refuse to issue a final certificate to the effect that "The Return of Captain Invincible" was a qualifying Australian film.

After a lengthy hearing, McGregor J., ordered that the decisions be set aside and referred the matter back to the Minister for further consideration in accordance with law.

We are asked to advise as to the prospects of success of an appeal by the respondents against the decision.

The draft notice to advise as to the prospects of success of an appeal by the respondents against the decision.

The draft notice of appeal settled by ourselves contains six grounds of appeal as follows:-

(a) the first respondent's letter dated 17th November 1982 to the twelfth applicant recorded the terms of a decision within the meaning of the Administrative Decisions (Judicial Review) Act 1977 made by the first respondent.

(b) the first respondent had misconstrued the meaning of sub-paragraphs 124ZAD(c)(i) and (f) of the Income

Tax Assessment Act, 1936 (Commonwealth)("the I.T. Act").

(c) the formation of a belief by the first respondent as to whether or not "The Return of Captain Invincible" ("the film") was a qualifying Australian film within the meaning of the I.T. Act was an exercise of a power and furthermore was an exercise of a power that was so unreasonable that no reasonable person could have so exercised the power.

(d) the first respondent had misconstrued the meaning of the word "significant" in the phrase "significant Australian content" wherever appearing in Division 10BA of the I.T. Act.

(e) breaches of the rules of natural justice had occurred in connection with the making of the first respondent's decisions:-

(i) to refuse to grant a final certificate under s. 124ZAC of the I.T. Act in respect of the film; and

(ii) to revoke under sub-section 124ZAB(6) of the I.T. Act the provisional certificate in respect of the film; and

(f) the first respondent had not been satisfied of the matters of which sub-section 124ZAB(6) of the I.T. Act res him to be satisfied before revoking the provisional certificate in respect of the film.

It is convenient to deal with each ground of appeal separately.

(a) That His Honour erred in holding that the first respondent's letter dated 17th November 1982 to the twelfth applicant recorded the terms of a decision within the meaning of the Administrative Decisions (Judicial Review) Act 1977 made by the first respondent.

This is not a ground of appeal which would, on its own, be decisive of the case whether it succeeds of fails. What occurred was that on 17th November, 1982, without having

put to Mr. Gaty the matters which were causing him concern, the Minister informed him that he was unable to satisfy himself that the film was a qualifying Australian film. The letter, in our view, impliedly suggested that it would be open to Mr. Gaty to make further submissions and in fact, further submissions were received. Subject to one matter with which we will deal later, the matters of concern were fairly put to Mr. Gaty and he was given ample opportunity to deal with them as, indeed, he did. In the second letter, that of 9th December, 1982, the previous decision was affirmed.

In our view, if the decision of 17th November, 1982 was a decision within the meaning of the Act, it was a decision which was void for failure to comply with the rules of natural justice. In such a situation it is open to the Minister to deal with the matter afresh, either because the first decision was void or because it constituted an interim rather than a final decision. See Bremner v. New Normanby Quartz Mining Co. (N.L.), (1910) 'V.L.R. 72; Lnuckey v. Peirce, (1964) W.A.R. 200.

Even if the first ground of appeal were to fail, the setting aside of the first decision would have no relevant operative effect if the second decision o stand.

For these reasons, although we do not regard it as decisive of the appeal whichever way it is decided, we are of the ground that the first ground of appeal ought to succeed.

(b) That His Honour erred in holding that the first respondent had misconstrued the meaning of sub-paragraph 124ZAD(c)(i) and (f) of the Income Tax Assessment Act 1936 (Commonwealth) ("the Act")

Section 124ZAD of the Income Tax Assessment Act, 1936 provides that the Minister, in considering whether the film has a significant Australian content, shall have regard to:-

(a) the subject matter of the film....

(c) the nationalities and places of residence of:-

(i) the persons who took part, or who will take part, in the making of the film or proposed film (including authors, composers, actors, scriptwriters, editors, producers, directors and technicians)

....

(f) any other matters that the Minister considers to be relevant.

His Honour came to the view that the Minister took into account irrelevant matters insofar she had regard to the residence and the nationality of Messrs. Inkpen and Macauley who were, it was said, the originators of the idea behind the script.

The argument accepted by His Honour relied upon copyright concepts in relation to the word "author" and upon the fact that the Minister's reasons dealt with the matters taken into account by him in the same order as the paragraphs of Section 124ZAD yet dealt with the question of origin of the script under sub-paragraph (c)(i). Accordingly, it was said, he had not indicated reliance on paragraph (f).

His Honour's decision is supported by the remarks of Waller L.J. in Marshall v. B.C.C., (1979) 1 W.L.R. 1071 at 1073:

> .... prima facie te part in something does indicate actively doing something and not merely being a part of (it) ....

It is true that the section uses the words "took part (as) .... authors". However, the meaning of English words is a question of fact for the Minister (see p.6 infra) and His Honour was not, in our view, entitled to impose a different opinion. the view is open that the word "authors" is not used in a technical sense but that it includes every person who contributed to the script. while it is true that there may be questions of degree as to the extent to which a person who writes a script which is later used as the basis for a totally different script may be described as an "author" of the later script, in our view

the word has a meaning which is capable of extending to such a person and the Minister was entitled to give weight to the degree of contribution in determining its significance.

When one comes to paragraph (f), it is our view that the Minister was clearly entitled to consider the origin of the script in the sense which we have described and to give it such weight as he thought was appropriate. One of the purposes of the legislation was to encourage Australian enterprise including the enterprise of writers. It would be open to the Minister to determine that a film whose script was based upon the work of a foreign writer should be treated as having a lower Australian content than a film where the idea was originated by an Australian. the importance of this factor is a question of degree in each case and, in our view, His Honour was in error in holding that the Minister was bound to ignore it as a factor.

For these reasons we are of the view that the second ground of appeal ought to succeed.

(c) That His Honour erred in holding that the formation of a belief by the first respondent as to whether or not "The Return of Captain Invincible" ("the film") was a qualifying Australian film within the meaning e Act was an exercise of a power that was so unreasonable that no reasonable person could have so exercised the power.

This ground relates purely to a question of degree. Whether a decision is so unreasonable that no reasonable person could have made it is a question of law. In our view it is strongly arguable that, whatever view one may take of the Minister's decision, it was not a decision which fell into this category.

The two aspects of the Minister's decision which were found to be unreasonable (ignoring decisions on ultimate questions of fact) were the weight he gave to the origin of the script and the factual conclusions to which he came that the film produced in June 1982 was not intended for exhibition to the public. The fist was, in our view, a decision to which the Minister could legitimately come for

the reasons given in our answer to the previous question. The second depended upon the Minister having concluded, contrary to Mr. Gaty's assertions, that he always intended to do what he ultimately did, namely to re-cut the film in New York. His Honour, having heard all the evidence, reached the opposite conclusion. That evidence was not before the Minister and the Minister was, in our view, entitled to reach the conclusion he did on the evidence before him. The fact that a person subsequently does something is some evidence (although, by no means conclusive evidence) that he previously intended to take that course. See In re Grove, (1888) 40 Ch.D. 216 at 242; Nash v. Commissioner for Railways, (1963) 63 S.R. (N.S.W.) 357. For these reasons we are of the view that the third ground of appeal has significant prospects of success.

(d) That His Honour erred in holding that the first respondent had misconstrued the meaning of the word "significant" in the phrase "significant Australian content" wherever appearing in Division 10BA of the Act.

The problem in relation to this ground of appeal is that the word "significant" has an ambulatory meaning. If the word is taken to mean "not insigant", the Minister's decision was clearly not justifiable in the present case. If, on the other hand, the word means "important" or "major", then clearly the Minister was entitled to take the view that a very high percentage of Australian content was necessary to satisfy himself. The meaning of ordinary English words in this type of context is substantially a question of fact for the Minister. See Brutus v. Cozens, (1973) A.C. 845; Hope v. Bathurst City Council, (1980) 144 C.L.R.1.

In our view the second meaning of the word "significant" is the more appropriate in the present case. It follows that His Honour was not entitled to interfere with the Minister's decision as to whether or not the film had a significant Australian content. We are accordingly

of the view that this ground of appeal has reasonable prospects of success.

(e) That His Honour erred in holding that breaches of the rules of natural justice had occurred in connection with the making of the first respondent's decisions:-
(i) to refuse to grant a final certificate under s.124ZAC of the act in respect of the film; and (ii) to revoke under sub-section 124ZAB (6) of the Act the provisional certificate in respect of the film.

We have already expressed the view that the decision of 9th December complied with the rules of natural justice insofar as the two matters which were concerning the Minister were put to Mr. Gaty and he was given an opportunity to deal with them. It is sufficient for this purpose to disclose to a party the substance of the case against him' it is not necessary for the decision-maker to quote "chapter and verse". See Ansell v. Wells, (1982) 43 A.L.R. 41 at 54-5 and 62; Herring v. Templeman, (1973) 3 All E.R. 569: R. v. Secretary of State for the Home Department, ex parte Mughal. (1974) Q.B. 313; In re Pergamon Press Ltd., (1971) Ch. 388.

His Honour placed considerable reliancthe failure to acquaint Mr. Gaty with the detail of the departmental reports and the submissions which had been made to it by the Actors and Announcers Equity Association of Australia and the Australian Feature Film Directors' Association ("A.F.F.D.A."). In our view, for the reason set out above, it was sufficient with out qualification to provide the general information which was provided. The submissions by the industrial organisations in the entertainment industry did not really put any factual material which could usefully have been answered by Mr. Gaty.

The one qualification relates to the allegation made by the A.F.D.A., no doubt at the instigation of Mr. Mora, the director of the film, to the effect that the film was "rushed to completion" in order to satisfy the

requirements of the I.T. Act. This allegation, which was never put to Mr. Gaty, might well have been used by the Minister to support his view that Mr. Gaty intended at all times prior to 30 June, 1982 to re-cut the film in New York. In these circumstances, the failure to bring this allegation to Mr. Gaty's attention may well have caused him prejudice.

The ultimate question is whether the material brought to Mr. Gaty's attention by the letter of 17 November and on 19 November was sufficient to alert him to the matters as to which he was entitled to be alerted. McGregor J. held that they were not. In our view, there are some prospects of persuading the Full Court that this conclusion was incorrect but we are not able to express this view with optimism. Overall, we are of the view that it is more probable than not that the appeal on the ground of failure to comply with natural justice will fail.

There is one other aspect of His Honour's finding which requires separate consideration.

Mr. Gaty had been informed some time prior to November 1982 that the Australian Film Commission supported his application for a final certificate and was of the view that it ought to be granted. Mr. Gaty was also inforthat the Australian Film Commission had passed this view on to the Minister. Acting on advice from the Department of the Attorney-General, the Minister took the view that he was not entitled to have regard to the views of the Australian Film Commission. Subsequently the Solicitor-General, Mr. M.H.Byers, delivered an opinion expressing the view that the Minister was entitled to have regard to the views of the Commission. The decisions in the present case were made after the advice of the Attorney-General's Department and before the obtaining of the opinion from Mr. Byers. Accordingly, the Minister declined to have any regard to the views of the Australian Film Commission.

His Honour held that the failure to inform Mr. Gaty of the view being taken by the Minister constituted a denial of natural justice because it deprived Mr. Gaty of the opportunity to put before the Minister arguments as to why he should have regard to the views of the Australian Film Commission. This was a matter of importance, particularly as it ultimately turned out that the advice of the Attorney-General's Department was incorrect.

The respondent's answer to this contention at the hearing was that the question whether or not the Minister had regard to the advice of the Commission was not of such significance as to make it a denial of natural justice to fail to disclose the Minister's view to Mr. Gaty. The difficulty is that there was no evidence as to the importance which the Film Commission's view might have played in the Minister's mind and Mr. Gaty was entitled to assume, and indeed led to believe, that the Minister would be taking into account the advice the Film Commission had given him.

In our view the question whether the subject was one of such importance that the omission to advise Mr. Gaty of it constituted a denial of natural justice is a borderline one but His Honour did not rely on this aspect and accordingly, e absence of a notice of contention, it is not necessary for us to express a concluded view upon it.

In the result, we are of the view that it is more probable than not that the fifth ground of appeal will fail.

(f) That His Honour erred in holding that the first respondent had not been satisfied of the matters of which sub-section 124ZAB(6) of the act requires him to be satisfied before revoking the provisional certificate in respect of the film.

This ground is merely consequential upon the earlier grounds.

Conclusions

In our view all the grounds of appeal except one

are grounds upon which the Minister is more likely than not to succeed. The one ground of appeal on which he is more likely than not to fail is that the Minister denied natural justice by failing to make Mr. Gaty aware of the C.F.F.D.A. representation and of his view that he was not entitled to have regard to the opinion of the Australian Film Commission so as to enable Mr. Gaty to make submissions on these matters.

We should add that there is a serious question whether, if all grounds of appeal but this succeed, the order made by His Honour should be affirmed since the making of orders under the act is discretionary and the Court may well consider the breach to have been a minor one.

It is, of course, possible that the Full Court would decide the appeal on the natural justice question without finding it necessary to consider any other grounds. In our view, however, bearing in mind the importance of the matters involved, it is more likely than not that the Full Court would be prepared to consider all the grounds and decide them rather than leave an erroneous decision to stand. The overall result of our advice, however, is that the appeal is more likely than not to fail.

Chambers,
6th August, 1984.

(sgd.)
DAVID BENNETT

LESLIE KATZ

RE: WILLARRA PTY. LIMITED AND ORS.
AND THE HON. D. T. McVEIGH
AND THE HON. B. COHEN

OPINION

PHILLIP LUCA ESQ.,
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8 West Street,
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RE: WILLARRA PTY. LIMITED & ORS. AND THE HON. D. T. McVEIGH AND THE HON. B. COHEN

OPINION

As a result of the decision of McGregor J. in the litigation concerning the film "The Return of Captain Invincible", a number of questions of interpretation of Section 124ZAD of the Income Tax Act have arisen.

The Australian Film Commission asks my opinion upon the question whether grounds exist for appealing the decision of McGregor J. and, if so, the prospects of their being successful.

I shall deal first with the respects in which I think the judge was mistaken in his view of the Section.

Sections 124ZAB(6) and 124ZAC(3) empower the Minister to issue provisional and final certificates if satisfied that a film or proposed film is or will be a qualifying Australian film. To be such it must have a significant Australian content. The function of Section 124ZAD is to require the Minister in determining this question to have regard to a number of stated matters. The Section does not require that the Minister be satisfied that the film possess all or a majority of these

enumerated characteristis nor does it indicate that any one or more factors is weightier than others, that is, no order of preference is required by the Statute.

Those matters include the subject matter of the film, the nationalities and places of residence of the persons who took part in the making of the film (including authoris, actors, scriptwriters, editors and so on) and "any other matters that the Minister considers relevant ": paragraphs (a)(c)(i) and (f). I have omitted the immaterial.

The film's subject matter had no connection with Australia in the sense that its theme was purely fanciful, indeed a fantastical. A disputed question was the genesis of this theme. Those advising the then Minister considered that it lay in a work by two Englishmen. The judge held the entire question irrelevant for, he said, par. c(i) was confined to those authors who participated in the making of the film and the Minister had disclaimed reliance on this respect and indeed in every respect upon par. (f) which I have quoted above. See pp. 74-76, 81, 97-99 of his judgment.

But it can hardly be doubted that an author's Australian nationality may afford a link with Australia when his plot does not. It may reinforce it when his plot is also Australian. One issue was whether Mr. Gaty and his co-scriptwriters were in truth the authors of this script. If Mr. Gaty was, that fact, since he was Australian, was a relevant express consideration under paragraph (c)(i). It refers after all to authors and scriptwriters.

It is a matter, in any event, which the Minister may consider to be relevant under paragraph (f). It is difficult to

exclude any consideration honestly arrived at to which that paragraph does not extend. The function of the provisions of Division 10BA is the encouragement of a local film industry at the expense of the Revenue. Many years ago goldmining was encouraged by the same means and pastoral pursuits and so on. Whether a film is in truth a local production is clearly the target of the express paragraphs (a) to (e) of the Section. Paragraph (f) widens them.

I think therefore the origin of the idea was a matter to which the Section extends. In this case both under paragraph (c)(i) and paragraph (f). Where the author is dead, the question whether he was Australian may be considered under paragraph (f). For the earlier paragraph is I think, confined to those concerned with the making of the film. Perhaps I should add that no constitutional reason exists to read the paragraph down: Herald and Weekly Times -v- Commonwealth (1966) 115 C.L.R. 418 at pp. 433-434; Murphy Ores Incorp. -v- Commonwealth (1976) 136 C.L.R. 1 at pp. 22-23.

The Minister in the litigation did not rely upon paragraph (f). It is not clear why not. But if the consideration he entertained was one the Section allowed, his mistake as to which paragraph applied merely shows a mistake as to the ambit of the paragraphs inter se, not one in applying the Section as a whole. It is the latter which alone is legally relevant.

I think therefore the judge on these questions of authorship, of the genesis of the idea, was wrong in law and that they were open for consideration.

The judge has decided that the Statute does not exclude the application of the rules of natural justice and that they

were not complied with. If those rules do apply, natural justice was clearly not extended. If, however, the judge's decision as to natural justice is correct in both its aspects, the Minister's decision was void, whether or not he correctly considered the authorship question. Therefore an Appeal Court may dispose of the case on the natural justice point without more, if that is, they agree with the judge. If the Minister concedes that natural justice was not given and was applicable an appeal is fruitless.

The question therefore is, are these rules applicable. It is not usual for one of the conditions precedent to the existence of an income tax deduction to be so subject. Yet it seems reasonably clear that neither the Commissioner nor the taxpayer could call in question provisional or final certificates by the Act's objection mechanisms. The certificates either exist or they do not. Whether they should or should not is committed to the Minister's determination alone.

In the result I think the Court would decide these two questions as the judge did.

Nonetheless unless an appeal is brought the judgment in these proceedings will determine between the Minister and the applicants as to this film, the questions as to authorship which I have mentioned, for those matters of law and fact were the basis of some of the grounds of decision: see Blair -v- Curran (1939) 66 C.L.R. 464 at 532; Queensland Trustees -v- Commissioner of Stamp Duties (Q) (1956) 96 C.L.R. 131 at 151-2. Whether one calls this res judicata or issue estoppel, the result is the same.

That however, does not operate in relation to other films. In such cases the judgment is merely an expression of the judge's interpretation of the Section.

In the result the judge was, in my view, wrong in treating the Minister's decision as vitiated by his consideration of the identity of the original author, that is, whether or not it was Gaty. He is likely to be upheld on the natural justice point. If it is desired in this case and on this film, to correct his error on the authorship point, an appeal must be brought. However, it cannot be said that such an appeal will decide the point, for the appeal court may determine only the natural justice point. The Minister may in relation to other films disregard the judge's interpretation of the Section. He must, if so, be prepared to appeal, for other judge's may apply the decision of McGregor J.

Lastly I should say, it is beyond doubt that the film was an eligible film.

I answer the questions as above.

Chambers,
June 28, 1984

MAURICE BYERS