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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Copyright Amendment (Film Directors' Rights) Bill 2005

FRIDAY, 8 JULY 2005

SYDNEY

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Friday, 8 July 2005

Members: Senator Payne *(Chair)*, Senator Bolkus *(Deputy Chair)*, Senators Greig, Kirk, Mason and Scullion

Participating members: Senators Abetz, Barnett, Bartlett, Mark Bishop, Brandis, Brown, Buckland, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Hogg, Humphries, Knowles, Lightfoot, Ludwig, Lundy, Mackay, McGauran, McLucas, Nettle, Robert Ray, Ridgeway, Sherry, Stephens, Stott Despoja, Tchen and Watson

Senators in attendance: Senators Kirk, Mason and Scullion

Terms of reference for the inquiry:

Copyright Amendment (Film Directors' Rights) Bill 2005

WITNESSES

Committee met at 9.01 am

BROWN, Mr Geoffrey, Executive Director, Screen Producers Association of Australia

MARRIOTT, Mr Stephen Sylvester Charles, Commercial and Industrial Officer, Screen Producers Association of Australia

ACTING CHAIR (Senator Scullion)—Welcome to this hearing of the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Copyright Amendment (Film Directors' Rights) Bill 2005. The inquiry was referred to the committee by the Senate on 11 May 2005, for report by 9 August 2005. The bill proposes to amend the Copyright Act 1968 to provide for film directors to be joint copyright owners of films, along with producers, for the purposes of the retransmission statutory licence in part VC of the Copyright Act. This will allow directors to share in remuneration for the retransmission of films included in free-to-air broadcasts. The committee has received 11 submissions to this inquiry, all of which have been authorised for publication and are available on the committee web site.

Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute contempt of the Senate. The committee prefers all evidence to be given in public but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. Witnesses, you have lodged with the committee a submission, which we have labelled No. 4. Do you wish to make any amendments or alterations to that statement?

Mr Marriott—Yes. Only one alteration needs to be made. On the third page of the submission—that is, including the title page—in the first paragraph we state:

> SPAA was not even formally invited to make submissions to this committee and we only heard of the call for submissions second hand.

We would like to delete that line. It has since transpired that a general email was actually sent to our office. However, that email was not checked. I speculate that it may have been as a result of a change of staff that we had at the time.

ACTING CHAIR—I now invite you to make a brief opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Mr Marriott—Firstly, I would like to thank the Senate for inviting the Screen Producers Association to make comments on this piece of legislation. I would also like to thank the committee for inviting us along to make a submission today. Our general submission with regard to this bill still stands, although I have made that correction. We understand that the bill currently before the committee is extremely limited in its scope and will not immediately affect the vast majority of the industry or the vast majority of our members. We do not believe that we are being reactionary in making the submission that we have made. Certainly in our submission we have been quite clear that we understand the limited scope of this legislation. We are more concerned about the long-term effect that this bill may have on general

perceptions in the industry and where the government may go after this bill is passed into law, if indeed it is passed into law.

In the submission we acknowledge the lack of any substantial rights being given to directors by way of this bill. However, we note that this may become the genesis of much broader claims both by way of copyright claims generally and also industrially. Richard Harris, the executive director of the Screen Directors Association, has acknowledged in articles in *Screentime* that he sees this as being just the start. It is the thin end of the wedge as far as he is concerned. He knows that this is a very limited bill and he intends to go much further than this bill.

We have already said in our submission that we believe that directors are adequately compensated for their contribution to the screen production industry. Certainly when they are in a position of being pretty much on equal footing to producers in making a film they are in a more than advantageous position to negotiate with producers over a fair share of the profit, if any, that comes out of a film. If the general idea of directors' copyright was accepted then it is almost certain that the directors would be further advantaged and would be able to grab an even larger share of any profits that do actually eventuate from any film that is made.

In the government's 2001 election platform, which was called Arts for All, the Liberal-National coalition made an extremely general statement regarding copyright and directors' copyright. They promised to consult key stakeholders on proposals to amend the Copyright Act to grant new rights to film directors so as to address concerns about the level of recognition available to directors in Australia. Such general comments do not generally create confidence amongst producers, who feel that the intention expressed in those words clearly goes well beyond the scope of this bill currently before the committee. If that is so, as we believe it is, how long is it before the government makes more propositions for amendments to copyright to give more rights to directors and what will be the consultation process when that comes about?

It has to be said that the rest of the comments that we made about the consultation process with this particular bill still stand. We believe that there has been a lack of comprehensive consultation within the Attorney-General's Department. If, as we predict, more legislation is introduced in the future, where will this place the industry generally? If such an extension to copyright were to occur it would have the potential not only to have an inflationary effect on the cost of films generally but also to make investment in films less attractive. Most, if not all, of the associations lobbying to date have been, in the past few months at least, concentrated on the ideas of creating a commercially viable, more independent film industry which is more commercially focused, more able to make a profit and more able to compete internationally.

We believe that if you start to splinter the copyright in any kind of screen production this has the potential of making it less attractive to an investor. Certainly, investors want to be assured that producers have 100 per cent ownership over the copyright on any film when they ask for investment from various agencies, whether they be the FFC or private investors. Previously when we have spoken to the Attorney-General's Department about this bill we have asked for amendments to be made to the explanatory memorandum so that it can be made abundantly clear to anybody who reads the EM that it is not the intention of the parliament to go anywhere beyond this bill and so that we can be assured that the bill cannot

be used in any way as a precedent for industrial claims. We would once again suggest that course of action.

ACTING CHAIR—Thank you. The general thrust of your submission, as you have indicated in your opening remarks, is that, whist it is your view that it may not have an immediate catastrophic impact, it may impact on the longer term process that government appears to have gone down. In your opening remarks you said that it was a concern not only about copyright but also industrially—I think that was the term you used. Could you please expand by what you mean in an industrial sense?

Mr Marriott—Currently the Screen Producers Association enters into a number of agreements with different parties in screen production generally. Most of the parties involved would be crew, actors and writers, and certainly we have no general industrial arrangement with directors at the moment. However, there is a concern that, if in the future we did have some sort of right for directors, producers would always be required to pay a certain percentage to directors in payment for that kind of interest. At the moment such percentages already exist, not necessarily for copyright but more for repeats and residuals that have to be paid to performers. Obviously, the Australian Screen Directors Association represents a number of directors. If there were any kind of dispute with a producer, certainly they have the capacity as an industrial organisation to organise against the interests of producers generally.

Mr Brown—In the past the screen directors have made it very clear to my association that it is their intention to register as an industrial organisation and, in doing so, they will pursue industrial claims. Our concern here, as expressed by Mr Marriott, is that by creating a copyright in a statute—and a beneficial copyright, at that—that will be seen as a precedent for the directors and they will pursue industrial claims on the back of that. The statements by Mr Harris—and alluded to by Mr Marriott—in the trade publication made it very clear that that was the intent. They have a foot in the door, that is the opening and they will go through it with other claims, including other statutory rights regimes.

The major concern for us is that, whilst we understand this is confined and limited, it brings uncertainty to the investment client in the industry. Producers have to guarantee to their investors that the copyright in a cinematographic work is clear and unencumbered, that there is a clear chain of title, to create the confidence for investors to invest in the film. Once you start splintering that into copyright to individual creators in the process, you start to lose that confidence. It is difficult enough as it is at the moment to get private investment into our industry. Any further complication or complexity in that will just make things worse for us.

ACTING CHAIR—Mr Brown, I do not have knowledge of the chain of events that leads to an agreement. Obviously, prior to the start of a production there is an agreement between the parties about everything from conditions to the disbursement of potential profits—all those sorts of things. From a lay perspective, I would have thought that, at the moment, in a general agreement like that the director has the same terms of leverage as a number of directors and that if he does not want to provide his services under a certain arrangement then he has the choice not to, as in any agreement. I am at a bit of a loss to understand how these particular changes will allow the directors to gain a larger amount of leverage or a larger share in the profits. Whilst you have asserted that, I wonder if you could help me to understand better how that may be the case.

Mr Brown—At the moment directors are reimbursed on the basis of their skills, qualifications and experience. The fee for directors is basically a marketplace determinant. It is fair to say that in contracting directors various arrangement are entered into, mostly to do with cuts of profit at the back end for the higher end marquee directors and even participation at the earlier points, at the distributor's foreign gross. But they are market determinants. If the copyright were to be created by a director it would be a factor in determining that, way beyond the marketplace rate. It is a way of withholding or encumbering the film. It is a way of—I cannot think of any other term; you used the word 'leverage'—blackmailing the investors. I am not suggesting for a moment that the majority of directors would do that, but you are creating an economic right which is of value way beyond labour. It is that right that we think will create the uncertainty. Rather than having a straight relationship with a producer where there is a contract of service, we will end up with bargaining over the assignment of that copyright to the producer in order to give the clarity on the chain of title. It is fair to say that the Steven Spielbergs and the George Lucases of the world do not have this problem. But we do not have any Spielbergs or Lucases. We deal in a very closed market.

Senator KIRK—Thank you very much for your submission. You just mentioned Spielberg and Lucas. What is the situation in the United States in relation to copyright?

Mr Brown—There is no statutory copyright for a director. But you will find with the Lucases and the Spielbergs that they have been so involved in the written work, the authorship, that they will have a copyright in that written work, over and above the directorial control. So it varies. Here we have the same example. You might find that Rolf de Heer or Phil Noyce will be so involved in the creative process that in effect they are the writers as well as the directors, so they have an underlying authorship in the work, which is a sign to the producer of that certainty that I spoke of earlier. For the most part our directors here work on a contract of service or a contract for service to the production company.

Senator KIRK—You talked about investment in films. You mentioned that private investment is currently low. What sort of percentage of the capital—I suppose that is the word—that supports films is generally contributed by private investors?

Mr Brown—Not enough, not nearly enough. Most of our films at the moment are supported by direct investment through the Film Finance Corporation Australia. There are some exceptions to it. One major exception is a film coming out in the next couple of months called *The Proposition*, which is privately funded in Australia and coproduced with UK investors. That is the exception. We are looking to try to change that. The majority of our films have an element of public subsidy.

Senator KIRK—I am just wondering why it is you think that if directors were to claim some of the copyright it would affect private investment. You seemed to indicate that you thought that people would be more reluctant to invest if that were the case. Perhaps you could expand on that for us.

Mr Brown—The confidence that we give back to our investors is that if you use one of the tax based approaches to investing in films, 10B and 10BA, the copyright we are creating—which is their copyright as the investors—is totally unencumbered. They want that absolute surety up front. We have enough problems at the moment as it is with trying to get product

rulings on tax investments in films. We are virtually at the stage where every film and every television program that seeks to raise private investment has to get a product ruling from the tax department, so it is difficult to start with. If you put another layer of copyright in this, which creates further uncertainty, then it just makes it more difficult for us. We argue though, as Mr Marriott has said, that in terms of the remuneration of directors those market rates that we have set are more than reasonable, are more than fair, especially in our little market of 20 million people. We would like to give them a lot more work—we would like to have a lot more work—but at the moment the industry is a bit flat.

Senator KIRK—I think Mr Marriott said that you had already approached the Attorney General's Department in relation to some amendments that might be made to the explanatory memorandum. I wonder if you could let the committee know what the nature of those amendments was that you suggested to the A-G's Department.

Mr Brown—We suggested that, to satisfy our concerns, a simple approach may be if the EM were worded in a way where it was made clear that, in creating this beneficial copyright, it was going to be limited to the retransmission right and it could not be seen to be setting a precedent for any further claims for copyright either under a statutory system or under common law, especially through the pursuit of claims through industrial systems. That is all we ask for and we think that is a fairly modest ask in the scheme of things. It would certainly go a long way to giving that certainty back to my members that we need to go forward, without impinging on the bill itself.

Senator KIRK—So you are not proposing any amendments to the legislation itself?

Mr Brown—At this stage, no. We have read the legislation, we understand what it says; it is fairly clear and precise. We would not propose any amendments to that, but what we would suggest is that if the EM could be framed in a way that gave us the confidence we are seeking then that would satisfy us.

Senator KIRK—Of course the EM really has no value whatsoever in the scheme of things, though, does it?

Mr Brown—We have used them in the past with some bills that have become acts and have been deemed to be deficient—they carry sway. I take your point, but EMs reflect the intent of the parliament clearly and, whilst you are right that they are not an amendment to a bill, they do us some satisfaction.

Senator KIRK—But even if there were an amendment to the bill it is not to say that a later bill could not amend that. It is very difficult to stop parliament's intent if that is the direction it intends to take.

Mr Brown—Clearly. But, in fairness though, this has been a bit of a sleeper for us. We did not quite know where it was coming from; it arrived very late and we were taken by surprise.

Senator KIRK—In terms of that, you talked about the consultation and how it seems that an email was received but went astray so obviously there was nothing in writing, no letters directed to you or to Mr Marriott from—

Mr Brown—There had been earlier written submissions from SPAA going back some time. We did not hear anything for a long time and then the A-G's people came in two weeks

before the bill was to be tabled saying, 'We're here to consult again'. It seemed to us, as I indicated to the Attorney himself, that that was a deficient process. In putting our position before them, which is the position we are putting today—that it is probably too late for us, but if you can change the EM in a way that is meaningful to us we would be happy with that—we were ignored. The Attorney did not have any notes to that effect when I spoke to him about this a few weeks ago in Canberra, and we expressed our concern to him.

Senator MASON—Gentlemen, I was wondering if I could return to the field first tilled by Senator Scullion. If I make a mistake, just let me know. As I understand it, we are only talking in this bill about intellectual property over the retransmission rights—I know you talk about the thin end of the wedge, but let us get to that in a minute—and, even then, it is only when it is not in a contract of employment; in other words, we are not talking about films that have not been commissioned. Is that right?

Mr Brown—Yes.

Senator MASON—How many films are made in this country that are not commissioned? What percentage?

Mr Brown—We would think that is very few. That is why, in our opening remarks, we acknowledged the limited scope of it. It seems to us that in the definition of 'commissioned film' if not 98 per cent then perhaps 99 per cent of films in this country are excluded.

Senator MASON—Because they are commissioned and, in effect, there is a contract of employment with the director?

Mr Brown—Yes. So perhaps, going back to Senator Kirk's question, fiddling with the bill at this stage may not be required, because the impact will be so limited. That is why we have been talking about the principle more than the issue of the impact. The definition of 'commissioned film', as we have seen it and understand it in the bill, excludes the vast majority of works.

Senator MASON—The chair and Senator Kirk raised this. I suppose there are two answers to the question I am about to ask. Why does this worry you? That hardly applies: it is only one or two per cent of cases. Your concern is that it is the thin end of the wedge—

Mr Brown—It is the principle. And it is not only my industry but the American industry arguing this before their House of Reps and the British industry arguing this principle before the parliament over there. It is the certainty factor that I alluded to earlier.

Senator MASON—Could you not retain that certainty by—in 100 per cent of cases, even if you were dealing with George Lucas—simply putting them on a contract of employment, if that were your concern? The default position would then be that there are intellectual property rights over retransmission rights. Does that make sense?

Mr Brown—I understand where you are coming from, but the majority of our—

Senator MASON—What would be wrong with that?

Mr Brown—directors, for good reason, are contracted through lender companies back to the industry. So you are contracting for service, for the most part. Very few directors are employees in the sense that you and I understand it.

Senator MASON—I understand contracted service for particular work at a particular time.

Mr Brown—So it is company X, Y or Z that provides the services of Rolf de Heer for production Y. That is the normal course.

Senator MASON—But surely the terms of that contracted service could be such as to exclude intellectual property rights over retransmission, in every case, if that is your concern?

Mr Brown—Given the reading of the bill and depending on the work you are doing, you would not even have to mention it, because the right is not created for them.

Senator MASON—Indeed.

Mr Brown—It is the creation, even in this very limited way, or the acknowledgment and recognition of a beneficial copyright. Dr Rimmer, in his papers, alludes to the case of *Eucalyptus* and how that might have been different had the director had the copyright. I think the committee needs to look at that because that is the sort of concern we would have. It creates a power that can be exercised by a director against the interests of the producers and the investors.

Senator MASON—I must be missing something, I tell you, because it just does not strike me as being a particular problem—or, if there is a problem, it is one you can avoid. But you obviously think this really is the beginning of something else.

Mr Brown—Yes, and I am not alone, nor are my American companions or my British companions. This is a global issue for the film industry. We discuss this at the international assembly of the producers associations every year. It is all about the encumbrance issue; it is all about the confidence of the investment sector. There are already issues being discussed around the creation of an international performance copyright. We are concerned that that will get out there and get some legs shortly, as well. It is all about confidence for the investment sector. That is what it is all about: simple, unencumbered ownership of a product. That is what we have to guarantee.

Senator MASON—If that is your argument, and that seems to be the bottom line here, I suppose, we might need some more evidence on that. Is it possible to give evidence that would substantiate your claim that this will affect investor confidence?

Mr Brown—Yes. We can think about it and get back to the committee about how we present that to you, but we certainly can. I can talk to members of mine at Babcock and Brown, Macquarie Bank. They will certainly give that sort of evidence. I will do that for you.

ACTING CHAIR—Please take that as a question on notice. I would appreciate that.

Senator Mason—I do not mean to sound churlish: I do understand your point, but there does not seem to me to be a great issue as yet. But if you are telling me that that is what the industry is saying then we obviously have to take note of that.

Mr Brown—We will take it on notice.

ACTING CHAIR—Thank you very much for your evidence today, Mr Marriott and Mr Brown.

[9.32 am]

ATHERDEN, Mr Geoffrey, Past President, Australian Writers Guild

ELLIOTT, Ms Megan, Executive Director, Australian Writers Guild

PULSFORD, Mr Bruce, Legal Officer, Australian Writers Guild

ACTING CHAIR—Welcome. You have lodged submission No.11 with the committee. Do you wish to make any amendments or alterations to that submission?

Ms Elliott—No.

ACTING CHAIR—I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to submit questions.

Ms Elliott—The Australian Writers Guild is pleased to appear before the Senate's legal and constitutional committee's inquiry into the provision of the Copyright Amendment (Film Directors' Rights) Bill 2005. The guild is the peak professional association representing Australia's writers for film, theatre, television, radio and new media. We represent more than 2,600 writers across Australia and on their behalf we work to improve professional standards, working conditions and remuneration, and protect writers' creative rights and promote the Australian cultural voice.

The AWG does not disagree with directors receiving a share of retransmission royalties. However, we believe that this should be done at the point of contract and not through changes to Australian statutory legislation. We are convinced that all creative people should have sources of revenue from their work as a reward for excellence and as an incentive to be more creative. Access to ongoing revenue is a necessity if we are to build a sustainable and vibrant film and television production industry.

However, we have serious concerns that this legislation will take the industry in the wrong direction and give directors legislative status which should also go to other creators—in particular, to screenwriters. Primarily, the Australian Writers Guild would like to draw the Senate committee's attention to two major concerns, both of which hinge on the key significance that the writer plays in the creation of an audiovisual work. The first is the inadequacy of the consultation process that has been undertaken in regard to this bill. The AWG has not been consulted by government in relation to film directors' rights since prior to the announcement of the Arts for All statement in 2001. Indeed, even after the Attorney-General's second reading speech on 17 March of this year, the AWG was not approached to put in a submission to the inquiry. Instead, we learnt of the inquiry second-hand. The AWG believes that the consultation process should have involved a much greater dialogue between writer, producer and director and that as key participants in the creative process writers should have been consulted with much more by government. Writers are indeed intrinsic to the creation of an audiovisual work.

Mr Atherden—I apologise, Senators, if I am about to take you through something that you are already really familiar with, but I thought I would just give you a brief outline of how a project is created. What I want to do is emphasise the writer's role in this. All of the products that we are talking about begin with a script. Someone may well have an idea, but an idea is

only an idea—making a film about surfing, for example. It is the writer who puts together the story and the characters, decides what the themes are and decides what approach is going to be taken on a project. It is the writer who breathes life into the story and makes it real and makes it come alive. In general, there is a writer-producer relationship before there is the involvement of a director. I am not saying this to in any way disparage the role of directors—directors are vitally important creators of the kinds of works that we are talking about—but it begins with a writer.

In fact, in my own experience and in the experience of a lot of other writers, the writer-producer relationship is such that there is discussion between the writer and producer about who would be an appropriate director, because the vision is already established: there is a vision for the project that the writer and the producer have agreed on. So, in my own experience, there has been considerable discussion about which director would be the best, most appropriate director to involve in a project. There is often a process of sending scripts around to directors to get their views, to make sure that the director is going to share the same kind of vision, because you only get a really successful product if all of the people making the project have exactly the same vision and are all aiming the boat in the same direction.

I wanted to say that very briefly, just to emphasise the role of the writer in this. Our concern about this legislation is that it appears to give directors a status and a recognition that writers do not get. We would be more in favour of the legislation had writers been included along with directors. It does not place writers in a position where we will be able to share in these retransmission rights or any of the other secondary rights.

Mr Pulsford—I will add a couple of points further to those of Megan and Geoffrey. As you are probably already aware, writers in film-making in this country are required contractually almost in every case—in fact, in every case I know of—to assign all of their copyright for the script which they have written to the producer of the film. That does not give them any copyright entitlement as a part owner of the film itself.

Some years back, the parliament addressed the moral rights situation. The writers succeeded at that time in being recognised as one of the three makers or authors of the film for the purposes of moral rights, along with the producer and the director. In the view of the Writers Guild, which represents writers, that was a significant increase in the recognition of the due status of writers, whom Geoffrey has alluded to as the progenitors or creators of a screen product. However, this legislation seems not to have addressed that issue or seems to have skirted it and has instead identified the director along with the producer, but excluding the writer, as the makers of the film and as the owners of copyright for the film, but only, as you are aware, for a very limited purpose—that is, for the retransmission rights.

That, in the view of the Writers Guild—again, representing the interests and the professional wellbeing of professional writers, including film writers—seems to skew the proper contributions of those three main participants of writer, director and producer in an unnecessary way in that it gives directors a statutory entitlement, specifically under the proposed changes to section 98 of the Copyright Act, to the retransmission royalty which writers are, I think, left out of as a consequence. That is one of the main concerns about the copyright consequences of this proposal.

Ms Elliott—The final thing we would like to draw the committee's attention to is what the screen producers of Australia have also described as 'the thin end of the wedge'. As outlined in a number of submissions made by the Australian Screen Directors Association and as inferred from the Dublin declaration of the International Association of English Speaking Directors Organisations, to which the Australian Screen Directors Association is a signatory, we believe that the proposed bill will act as a precedent beyond the retransmission scheme.

As we have outlined in our submission, the AWG, like all of our international colleagues and members of international associations of writers guilds are opposed to the directors' claims that they are the primary authors of an audiovisual work in the same way we are opposed to any director's claim for a possess recredit. A possess recredit is when you see, for example, 'a film by Stephen Spielberg'. We have seen it in Australia recently with a film called *Peaches*, which was written by Sue Smith. It is credited as 'a film by Craig Monahan', who is merely the director of that work. As we have elaborated, an audiovisual work begins with the script, which is written by the writer. The writer imagines the film or the television episode through the creation of that script, without which the director would have nothing to direct but a ream of blank paper. In view of the inadequacies of the consultation process and the changes which would be wrought by the current bill, the AWG submits that the only course of action for government in terms of any regulatory options would be to maintain the status quo.

ACTING CHAIR—Thank you. In both your submission and your opening remarks you have made some suggestions about how directors could adequately and fairly negotiate or decide upon their remuneration or role in these productions. In your submission you assert that you think the directors should receive remuneration under some statutory licensing scheme. Ms Elliott, you also spoke about the capacity for directors to negotiate any retransmission rights as indicated in the proposed legislation at a time prior, obviously, to the production being made in the normal processes of an agreement. Could you rationalise those two proposals when you are speaking about, firstly, some statutory licence scheme and, secondly, a negotiated agreement? I want to get that clear in my mind.

Ms Elliott—It is about negotiating at the point of contract.

ACTING CHAIR—I have very little understanding of a statutory licence scheme.

Mr Pulsford—For example, the statutory licence scheme in this case is the retransmission scheme. That is an entitlement to a royalty—in this case, a retransmission royalty—which is prescribed by parliament and hence statutory. Often these rights are referred to as secondary rights as opposed to what might be referred to as primary rights, which is the copyright in the work itself. A statutory scheme gives some of the right to obtain a royalty only by virtue of an act of parliament. In this case, there is the educational royalty under part VA and also this new proposed retransmission royalty.

ACTING CHAIR—So the same thing is occurring; it is just the timing. One proposes a legislative change and the other is a contractual agreement.

Mr Pulsford—Yes.

ACTING CHAIR—It has been put to us in a number of submissions that the directors somehow have more leverage in this because they have recognition of some status. I would

have thought that, at a point of negotiation, it is an open negotiation—they are all willing participants in the negotiation for an agreed outcome. That is normally what happens in all agreements. Could you help me with any particular reason this gives directors, or any one party, greater negotiating rights or leverage in those circumstances?

Ms Elliott—This bill would recognise the director as a maker of the audiovisual work, whereas there is nothing in this legislation which would recognise a writer as the maker of an audiovisual work. The only people entitled to access royalties under retransmission are the owners of copyright, and the owner of copyright of the dramatic work or the underlying work is not the writer because the writer is forced to assign any copyright, generally at point of contract, to the producer. We are not being recognised as makers, whereas directors are recognised as makers and have that in their ability to negotiate.

ACTING CHAIR—Wouldn't any directors' rights of copyright at that point be also negotiated away, the same as the writers' are? It has been asserted in the previous submission that, for the processes of good business, all the copyright should remain in one pool. Obviously that would happen at the original point of agreement, in the same way that it happened to the writers. Outside the definition of who is a maker and the fact that any copyright or retransmission rights are accorded to the directors under this legislation, the fact is that at the point of agreement they would be negotiated back to the producers or the owners.

Mr Atherden—I think there is a difference in negotiating power because writers are engaged before there is real momentum for the project, when it is a bare idea and there is no investment. In fact, very often there is no prospect of investment. By the time the script is complete or at the stage where a director can be brought in, there is momentum and often investor interest, and a director is better placed than the writer was at the beginning to negotiate his contract.

Senator MASON—It is a legal jumble sale for intellectual property rights. It is very hard for us to unscramble the egg. Listening to the evidence, it seems like some sort of demarcation dispute. Are you asking why, if the writers are not seen as the makers of the film, directors should be?

Ms Elliott—That is one of the things.

Mr Atherden—I think we would like to be co-owners. We acknowledge that film and television are collaborative media. We feel that we are being left out in this process, that directors are being accorded a status that writers are not and that our status should be equal.

Senator MASON—What would you like to see? Under this legislation, would you like to see writers accorded similar intellectual property rights to those of directors?

Mr Atherden—I think that again this goes back to the lack of consultation around this bill and the way that any changes to copyright ownership could start to point the industry in the wrong direction. There has been no consultation and no discussion between the key stakeholders—writers, producers and directors—about the way forward, if you like, for any kind of statutory changes to copyright provisions.

Senator MASON—Let me ask a more brutal question: is your concern that directors may be given an intellectual property right, or is your concern really that they might be given one and you might miss out?

Ms Elliott—I have concerns about both.

Mr Atherden—This is something that we would like to have discussed and been given more time to think about during the consultation process.

Mr Pulsford—The Writers Guild is not on principle opposed to directors having, as Megan Elliott has suggested, a proper share of remuneration from their creative work on a film project. They are key collaborators, partners, with writers and producers in that process. What I think the Writers Guild is concerned about in this process is that this bill is—misconceived is not the correct word for it—not yet quite at a stage where it should be implemented. One reason is—and we have complained about this, but others may have a different view about it—that relative lack of consultation. The second is about how the copyright split between the three key participants will work out. In other words, when we say that we believe the status quo needs to be maintained, it is only because, without trying to sound condescending, it may be possible to get a better bill put together somehow down the line.

Senator MASON—At least you are being candid. I prefer that, because we know where are.

Mr Pulsford—This retransmission royalty may well not be a significant amount of money. We do not know that, and many submissions, including the government's own explanatory memorandum, have talked about the fact that we do not know how much is going to be paid by cable TV operators to Screenrights which will then pass on this retransmission royalty. But writers already face a very difficult task in getting their hands on any share of current educational royalties from Screenrights. Most of them miss out entirely.

Senator MASON—Mr Atherden gave good evidence about—and my colleagues in the Labor Party always use this phrase—bargaining power. He said that the bargaining power of writers is a lot less than that of directors might be because they come in at a much earlier stage, perhaps before there is any investor interest. I understand that. I suppose, from the committee's point of view, you are not so much saying that directors should not be given these intellectual property rights but, rather, that perhaps writers should be given intellectual property rights as well. Would you oppose directors having intellectual property rights in this context if writers were given them as well?

Mr Atherden—Again, I think we would want more time to think about what our position is on that, but I suspect that we probably would not oppose that. One of the things that writers would like in this industry is the opportunity for a revenue stream that goes beyond just a commission for the work. It is getting harder and harder to build a business in this industry as a writer. A lot of writers find that simply going from one commission to the next and to the next does not give them any kind of continuity of revenue. One of the points, we thought, behind this legislation was that creators of original works would have an opportunity to enjoy further streams of revenue in their work. Is that not right?

Senator MASON—The chair brought this up before. In a sense, you assign your rights to the producers, in effect, on completion of the script. That is what happens, isn't it?

Mr Pulsford—Yes—or even before.

Mr Atherden—Before we have done any work on the script, usually.

Senator MASON—So, even if you write a brilliant, original script, in effect the glory and the money are taken by someone else.

Ms Elliott—And often the credit, as we say, where a director will take a film by credit or be privileged above the writer in the credits, be it in terms of the movie poster or during the actual play of the film itself. So we would not like to see legislation introduced which further disequalises the collaborative process between writer, producer and director.

Senator MASON—There is politics in the film industry, as well, I can see.

Ms Elliott—There is.

Senator KIRK—I am trying to understand how it works when a writer is approached to write a screenplay. As Senator Mason said, it is unclear at that point as to whether or not it is going to be the greatest screenplay ever written. I am wondering how the process works. How does one negotiate in order to determine the amount that will be paid to the writer for the product they are producing?

Mr Atherden—That is a question for the writer and the writer's agent. There is a difference between writers. Some writers with higher status are able to negotiate better contracts than others. I could say that works begin sometimes by a producer approaching a writer and sometimes by a writer approaching a producer, or a writer approaching a broadcaster and the broadcaster commissioning the writer. Then, at a stage when the script is developed, a producer is brought in, and after that a director is brought in. So there are a number of ways in which a project can start. The point I want to make clear is that the idea can start with the writer; no-one else. The writer has the idea and approaches the producer. The writer is then looking for employment and, in a way, is in a kind of vulnerable position, because they want the work; they want the opportunity to pursue their idea and develop it as a feature script. It takes a writer with a very good agent and some status to be able to negotiate a strong contract at that point.

Senator KIRK—I would have thought so.

Mr Atherden—That is the point at which everything to do with the writer's contract is negotiated. I do not know of a contract where the writer gets the opportunity after the script is written to be able to do a better deal.

Senator KIRK—At what point are the copyright rights assigned across to the producer?

Mr Atherden—Right at that initial point.

Mr Pulsford—They are usually assigned even on a future basis, so the contract will say, 'Anything you write under this contract after this time will belong to the producer.'

Senator KIRK—I was going to ask a similar question along the lines of what Senator Mason has already asked you. That is, it seems to me from what you are saying—you seem to concede—that, had writers been given some form of entitlement to copyright as part of this

process, you would not be so opposed to the bill. Would it be the same sort of copyright that you would be seeking—that is, the retransmission royalty—or would it be of a different character?

Mr Atherden—It may be but I think that the weak position we are in at the moment is that we have not had the opportunity to discuss this properly amongst ourselves, let alone with other sections of the industry. It may be that, following those discussions, we would have a different view from one that I might propose off the top of my head now.

Senator KIRK—To sum up: it seems to me that you would prefer this legislation not to proceed as it is, given that it is quite limited in its operation. You would prefer, perhaps, for there to be greater consultation amongst yourselves and others in the industry as to how we might approach this issue more globally, so as to take into account the views of writers, directors and producers.

Mr Atherden—Yes.

Ms Elliott—That is right.

ACTING CHAIR—Perhaps this is something you could take on notice if you are not aware yourselves. In the 2001 election, there was a clear commitment from the government that they would be making amendments with regard to directors and their access to copyright. Not everybody pays a great deal of attention to the machinations of elections, but I would have thought that they would have seen what an entity of the nature of the guild is putting to us today. You have asserted, perhaps quite rightly, that there have not been direct consultations with regard to this matter. Has the guild, as a consequence of the clear and well-aired direction of government in 2001, made any representations to the government? If you have, I wonder if you could provide, on notice, any submissions to or contacts with the government.

Ms Elliott—I can take that on notice. I was not employed in the guild at that time.

ACTING CHAIR—I understand that might be the case.

Ms Elliott—That is why I could not find, looking through files, any representation that we had made to government regarding directors' rights after the 2001 Arts for All package was announced.

ACTING CHAIR—Thank you very much for appearing today.

[9.57 am]

HARRIS, Mr Richard, Executive Director, Australian Screen Directors Association

NOONAN, Mr Chris, Member, Australian Screen Directors Association

WOODS, Ms Kate, Board Member, Australian Screen Directors Association

ACTING CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Noonan—I am a writer and a director.

Mr Harris—I am also Executive Director of the Australian Screen Directors Authorship Collecting Society.

Ms Woods—I am a director.

ACTING CHAIR—You have lodged submission No. 6 with the committee. Do you wish to make any amendments or alterations to that statement?

Mr Harris—No.

ACTING CHAIR—I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Mr Harris—ASDA, the Australian Screen Directors Association, is the peak professional body that represents more than 500 Australian directors and independent producers who create feature films, TV drama programs, documentaries, animations, commercials, music videos and interactive digital works. ASDACS is the collecting society that collects Australia's directors' royalty income—income that is currently sourced solely from European collecting schemes. I should point out that I also run the International Affiliation of English-Speaking Directors Organisations, of which ASDA is a member. On behalf of all these organisations, I thank the committee for the opportunity to be here before it with regard to film directors' rights legislation.

Having had many discussions about these issues with all political parties over the past five years, it would appear to me that the creative and perhaps authorial role of the screen director is something that is not in serious dispute among the parties. It is something that seems to have been pretty much accepted across party lines, as far as I can tell. This suggests that the function of this committee is to deal with the issue of the 'how' of this legislation rather than to deal with the threshold issue of whether a director is a creator. Nonetheless, I thought it would be worth, just by way of background, quickly describing the role of the director to the committee before I briefly summarise ASDA's response to the details of the legislation itself.

I have often considered the term 'director' to be a little misleading because it seems to suggest something akin to a conductor or a band leader. The French term for director, realisateur, is perhaps a more appropriate term because it describes more accurately what the director does—that is, to realise, or make real, a film. The director is the person with the key creative responsibility for the realisation of a cinematograph film.

Film-making is a collaborative art form, and directors usually draw on the creative contributions of other people to make a film—often many others. They may work with a writer, a cinematographer, an editor, a designer, a composer, performers, a producer and possibly many more people. However, no matter how the creative team is comprised, no matter whether or not the director is working to a script, no matter whether the director is ultimately answerable to a producer or bound by certain constraints of production, it is the director's creative choices about story, casting, performance, framing, music, sound and editing that ultimately determine whether or not a film will engage with an audience.

The various creative elements that a director uses are ultimately the means to an end, and that is the final realisation of the film. It is the director who collaborates with all the creative practitioners throughout the entire process of production and integrates these contributions so that they create a cohesive whole. One simple fact worth bearing in mind is that while it is possible to make a film without a script, without sound and without music—of course, it may not be any good; if I were a director, I would prefer to be working with a script by Geoffrey Atherden—you cannot make a film without a director. When a film is made, the person shooting it, or someone else, is determining the creative choices—in other words, acting as the director. With digital animation technology, the very act of shooting the film, as we know it, is dramatically changing. In short, the director plays a fundamental and central authorial role in the cinematographic film—not necessarily the only authorial role, but a central one.

I will quickly mention our position on the legislation itself and summarise some of the issues we have raised. As we mentioned in our submission to the committee, ASDA welcomes the film directors' rights bill because it finally overcomes an anomaly in the Copyright Act that has excluded directors for the past 37 years. It will mean the act will for the first time formally acknowledge that directors have economic rights they should be able to negotiate—to assign or reserve—in the same way as other creators. Do we think it is perfect legislation? No. The legislation is far from our preferred model, as anyone who has read our submission will know. However, ASDA acknowledges that its best-case scenario would require a substantial reframing of the Australian Copyright Act. Such a reframing has happened in the UK to some extent, but ASDA understands that establishing a similar model in Australia would require extensive consultations and consideration, and that is currently not seen as a priority of government. ASDA looks forward to such considerations in the future, when we can look more comprehensively at the treatment of audiovisual films under the Copyright Act—for instance, whether films should be considered to be artistic works and whether there should be an author or authors, rather than makers. However, until such a time, ASDA is willing to accept directors being given this somewhat more limited authorship recognition than proposed in its original submission.

Having said that, ASDA remains concerned that this legislation is unreasonably limited as it continues to exclude directors from the existing educational copying statutory licensing scheme. ASDA's view is that if the threshold test has been met—that is, if there is not an argument that the director's creative contribution is at least as great as that of other creators in the film-making process—it is only reasonable that directors should be able to negotiate with the same rights as other creators. In other words, if directors are to be recognised for one right—retransmission—there is no clear policy reason to exclude them from the existing

scheme or from future schemes. ASDA contends that, at the very minimum, directors should be treated no less favourably than other copyright creators. In our view, it is neither consistent nor equitable not to allow directors access to a statutory scheme from which they have been unfairly excluded.

Mr Noonan—I am a writer and director. I have made documentaries, miniseries and telemovies for television, and a feature film called *Babe*. In my experience, film is a collaborative medium. To echo what everyone has been saying: it brings together the skills of an army of people, including producers, writers, directors, cinematographers, production designers and so on. For each of the TV projects that I have been involved in, I would claim authorship as one of the creators. I would not necessarily claim to be the primary creator—it depends on the history of the project—but certainly as a director I am one of the key creators. Writers may create the story of the project, although that is often done in collaboration with a producer or director. I have worked in a collaborative way, to perfect the story, with most of the writers of the projects I have worked on, but in every project I have been involved in I have played a major part in the process.

To the uninitiated, the director's work is often invisible. A cinematographer's work is right there on the screen; it is very easy to look at a film and say, 'That's beautifully shot.' For most people, it is not necessarily easy to look at a film and say, 'That's beautifully directed.' In my view, a beautifully directed film is one where all the parts click together, and it feels like the voice of one person. It feels like a cohesive statement or expression. It has no jagged edges and no contradictions within it, where every piece in the puzzle is working towards the same end result. I see that as the director's role. It is to corral a huge number of people's creative energies—all their input—into one style, one statement. Our role is to channel those contributions.

We set up a set of rules that will operate in the world of a movie or TV show. It is that set of rules which defines the world that is created. Each program creates a world which operates under a different set of rules to other programs. It is the director's job to set up that set of rules and enforce it, if you like, so that every prop and piece of fabric that you see in the film and every piece of performance in the film works towards that set of rules and that vision.

I do not think that anyone could argue convincingly that directors are not central to the process of the creation of a film, but in legal terms our acts of authorship—partly because our work is invisible, I suppose—are currently not recognised as having a bearing on copyright. So I welcome this bill to redress that situation. We are not out to prove that we are the only authors of a film. I believe that both producers and writers—and that is probably about it for the role of authorship—are also authors of films. It is a collaborative authorship, and the exclusion of directors from authorship is dangerous for us from the point of view of income producing and income collecting in the future. But, also, as we are so indispensable to a project, it is an injustice that needs to be corrected. Those are my comments for the moment.

Ms Woods—I agree with that and I do not have much to add to what Chris has said, because I believe that it is absolutely the truth. I have worked on a very wide range of productions in my career: the feature film *Looking for Alibrandi*, miniseries like *Changi* and *The Farm*, plus a lot of long-running series like *Wildside*, *Police Rescue*, *Phoenix*, *Janus* and many more. What I would like to add to what Chris has said is that, all the way down the line,

there is often an argument to say that, at a certain point of production, directors just wait for the script et cetera to come to them, and they just put something together that is really already in existence, which is absolutely not the case.

I am a co-author of every single piece of work that I have done over the last 17 years. As Chris and Richard have both said, we are not trying to say that we are the sole author. But even in a TV show there comes a point where—and it is quite common—everyone says that nothing else can be done until a director who can work with the writer on the script to produce a final draft arrives. From there the director will make the film, working with the actors, finding locations, working out the shots, finding the rhythm of the piece et cetera. The major difference between what happens on the page and what happens on the screen is that film is more associated to music than words, and that I think it is the greatest contribution that a director makes—its atmosphere, rhythm and emotion have to be brought out. You cannot separate those two major collaborators: the writer and the director.

For example, I worked with Melina Marchetta on the script of *Looking for Alibrandi* for about two years. Melina wanted me to take a writing credit on the film, but I said no because I did not create the character of Josie Alibrandi and therefore I did not believe that I should be called a writer of that film. But I also believe that that is what directors do. They are the major collaborator, and their most important collaborator is the writer. Both Chris and I have projects in development at the moment, which we have instigated ourselves, where we have approached writers to collaborate. That is the major part of the work—it takes years for a feature film. For many of the projects I have, we are still seeking producers. We are making them together. We are the authors of these new projects that will be films. So I support this legislation. It is a symbolic step towards an acknowledgment of co-authorship for what I consider to be a piece of artistic work—that is, a film or a television show.

ACTING CHAIR—Thank you. There seemed to be a common theme in there. Certainly, Mr Harris submitted that we need some consistent and equitable approach to these matters. Mr Noonan, because of your experience as a writer and a director, perhaps you can give us some insight into your views on whether this legislation, even in a symbolic sense, should extend to writers.

Mr Noonan—If any piece of legislation is going to label or determine who are the creators or the authors of a work, then it should not exclude writers. The challenge for the legislator in this area, it seems to me, is that each project is unique; each project is different. I directed one film where there was an existing script and I was called in as a director. Essentially, I rewrote that script. I really did rewrite it—there was very little of the original script left—although I did not try to take the credit as the writer. So that was one example of where I actually rewrote a script but I was only employed as the director. There are other examples where I have stuck very closely to a predetermined script. There is a project I am working on at the moment where the relationship between the writer and me is like that of twins. It is a complete union of two minds, working towards one goal.

It is very hard to create a piece of legislation that caters for the whole range of possibilities that might happen in a creative endeavour. But it seems to me that that is always the way with legislation. It is always a process of compromise and give and take. The first step towards achieving what is being set out to be achieved is to at least acknowledge that directors are

creators and get drawn into the whole process. It is a rights sort of era that we live in. It is about intellectual property and that sort of thing. Everyone is saying that that is the era we live in. It is not about goods any more; it is about rights and intellectual property. For us not to have our stake in that, when we are unarguably one of the primary creators, just seems ludicrous. So I welcome the legislation in its current form and I would welcome it even more if it said, 'The creation of films and TV material is a fluid situation, and there is a group of people involved as authors.' The acknowledgment of the group of people would be a more honest way of looking at the situation.

ACTING CHAIR—Of course, the sustainability of the film industry is often about investment. It has been put to us today that this legislation could have a significant impact on people's confidence in investment in Australian films rather than elsewhere—although it was not directly asserted—and on the level of confidence in and clarity about the copyright pool. What do you say to that assertion?

Mr Harris—Very similar arguments were mounted in relation to a moral right, which is a right which is much more likely to cause uncertainty in the film-making marketplace. I have not seen it do anything to the share prices or investment confidence in the film industry. As Chris just said, the truth is that we are in a rights industry. That is what we do. Directors, believe it or not, have contracts which say: 'You sign away all of your copyright right now.' They have none to give, yet they still sign contracts that say that if you have any possible copyright now, in the future, in the universe or in other dimensions you basically sign it away. The idea that directors being given a very small right, here for instance, is somehow going to create a ripple of uncertainty within the industry is just scaremongering.

Senator MASON—Mr Harris, you did say that—and I noticed this in your opening submission—if directors have access to retransmission rights directors should have other intellectual property rights as well. In your opening statement I think you said that this, in effect, was the beginning of a larger claim. Ms Woods implied that and even Mr Noonan used the word 'fluidity'.

Mr Harris—I understand.

Senator MASON—To be honest with you, I think that this is just the initial grab and perhaps after that, when you have established ownership of intellectual property rights, there will be a larger grab. That is right, Mr Harris, isn't it?

Mr Harris—This is the thin edge of the wedge argument.

Senator MASON—Indeed. I think that was conceded in your opening submission.

Mr Harris—No. We think that there possibly should be a broader consideration of the entire way that rights are dealt with. Having said that, at the moment we are also saying that whether or not that is what the industry and everyone else come to make their arguments about—what effect that could have; whether making a more significant change would actually have that impact—what we are arguing now is just the first step. To argue the thin edge of the wedge, to continue an injustice, is just not good policy.

Senator MASON—Mr Harris, unless this is the thin edge of the wedge, why would you want it? It hardly changes anything. Surely this is the thin edge of the wedge. Why would you be bothering to do it otherwise? It changes virtually nothing.

Mr Harris—In many ways it does. It changes things in that it addresses an anomaly.

Senator MASON—It addresses a principle, doesn't it?

Mr Harris—It does address a principle.

Senator MASON—And, from the principle, larger rights can be asserted. The rights given here are just so minimal—I think they are two per cent?

Mr Harris—They are not huge. There is no doubt that they are not a huge win, which is why we are arguing for something that we can negotiate, such as educational copying, which exists right now, and future statutory schemes. For instance, the other thing that we get from these statutory schemes, which is at risk right now, is the money we collect from Europe. We have European collecting societies who give our members royalty income. They are constantly asking us, 'Where is Australia's ability to reciprocate?' If we cannot reciprocate, we are always at threat that that money will disappear. Again, it is not a huge amount of money. We are saying that for us it is symbolic in many ways. I have to say that most of the writers' opposition to this is in symbolic terms. They do not want directors to be seen as somehow above writers. I can understand that. Ultimately, it is about the ability for us to negotiate for rights that we believe we should have been negotiating for in the first place.

As to the other argument about whether this will cause uncertainty in the system, I look at the UK as a great example. They are an example of where directors have much more extensive copyright than we have. They are literally the co-author of the film with the producer. Certainly, the UK had that forced upon them by harmonisation with Europe, but that does not mean that I look at the United Kingdom at the moment and suddenly think that there is a problem with their film and television industry because of these rights that directors now have.

The other thing I would point out is that in the initial consultations that they had about this, we actually negotiated. I have correspondence from the Screen Producers Association, who initially said they were prepared to come to an arrangement with us to introduce directors' copyright. They were concerned about what the legislation might turn out like. There was a very split sense among many producers in the industry about the recognition of directors. There was a lot of support out there among producers who are members of ours. SPAA does not speak for all producers in the industry. There are many independent feature film producers who are in a completely separate organisation.

The other point is that those negotiations that the Attorney-General's originally had were with the broadcasters and with Fox because SPAA basically went silent on it. They did not actually give a submission. So when they claim they have not been consulted, one of the reasons they may not have been consulted is that they did not put a submission in to the original consultations, because their membership was split. The people who went down to Canberra were from a number of big companies: Fox, the broadcasters and the subscription television association. The truth is that they are not here at these hearings. Why are they not here at these hearings? Because they recognise that this is something they can live with, I

have to say. They recognise that this is fairly minimal and it is not something that is actually going to upset the applecart in any major way.

Senator MASON—This piece of legislation may not, but the future may hold something different.

Senator KIRK—Mr Harris, you alluded there to a consultation process. When did you say that that occurred?

Mr Harris—The original consultations happened around 2000. There were press releases put out then, and I know that all the major stakeholders at the time were consulted. There was a commitment by the government at that stage, following those consultations, to do something about directors' copyright. As it turned out, in terms of the election commitment, it seemed to me that there was still a little bit of playing it safe by saying, 'We will continue to get consultations.' The truth is that SPAA did not make a submission to those initial consultations in 2000. That they have now got an attack of relevance deficiency is maybe their issue. But the fact was that those consultations happened at the time, and most of the consultations that happened for employers were taken with a particular alliance put together at the time.

Senator KIRK—And what about more recently, in relation to this particular legislation?

Mr Harris—For this particular legislation, we had a consultation about a year ago where we were contacted to bring up to speed some of the people in the department because it had been some years since it was initially agreed. We had a new Attorney-General and a new communications minister, so consultations took place then. In terms of this specific legislation, we were not given any details of the legislation; we were just told the parameters that they were working in. They told us the initial consultation issues. Essentially we saw the legislation this year, fairly quickly after we were told what it was going to look like.

Senator KIRK—It seems obvious that you people were told about, and consulted on, this legislation. Are you aware of whether or not other groups were consulted? We have heard here today that a number of groups—the Writers Guild, for example—were not consulted.

Mr Harris—I do not know whether they have been consulted since 2001. If they say they have not, I do not know whether that is true or not. I do know that in 2000 I was involved in extensive consultation, discussions and correspondence with both SPAA and the Writers Guild about what it could mean. I think they now have a new executive, so maybe they do not know the corporate history of that, but they certainly cannot claim to be unaware of the fact that it was around and that it has been around. Whether or not the department did formal consultations, I simply do not know.

Senator KIRK—You mention in your submission that you have some concerns about the definition of the term 'commissioned film'. I wonder if perhaps you could expand somewhat upon that.

Mr Harris—We are really seeking clarification about what 'commissioned film' means. If 'commissioned film' means a film that is kind of a corporate video—a film which is commissioned for a very specific purpose, where they are essentially employed—then that is less of an issue. But I have a concern, given that most cinematograph films involve a level of commissioning from a broadcaster before they can go ahead. If directors' rights that they

would otherwise have suddenly disappear because a broadcaster is commissioning the film, I would have concerns. For us, that was about a clarification of what that term was trying to catch. I am not sure whether it is really necessary.

Senator MASON—What would be wrong, rather than asserting ownership of copyright in certain contexts, with simply leaving it to the market to determine? Correct me if I am wrong, but I know that directors may ask for a percentage of the film takings or whatever. Perhaps that is only Steven Spielberg—I do not know. If directors, or for that matter writers, start asserting intellectual property rights they have an income stream, and I understand why they would want that, but surely if that is the case investors may receive less up-front. Does that make sense?

Mr Harris—Yes.

Senator MASON—So why can't we just leave it to the market? Why all the concern about intellectual property rights?

Ms Woods—Because at the moment all intellectual property rights or copyright goes to the producer and there is nothing to negotiate. Unless there is some kind of precedent or legislation that says we have a right to something, we will get nothing. For example, we do not have access to any kind of residuals as all the other collaborators in a film or TV show have. As I struggle to develop more projects, I look at the TV guide and every night there will be three or four of my shows of which everybody else gets some tiny amount of money. It would not change what the investors do, because it is still a percentage of the producer's profits, and because we will have to sign away the actual rights just to get those residuals back, if that makes any sense.

Senator MASON—As the writers would.

Ms Woods—As the writers would—absolutely. But it at least then puts us in a position where we can benefit from it financially. It is not going to work in the marketplace unless there is one holder of the copyright. Within that we can all have a share of what moneys could possibly be made. In the film industry in this case I got five per cent of my film and I will be waiting a long time to get any money.

Mr Harris—It has two elements to it. Clearly one is symbolic. We work in an industry of symbols, a symbolic industry, so there is no doubt that the fact that—

Senator MASON—We understand, Mr Harris—so do we.

Mr Harris—Yes, of course; we can exchange notes. But there is no doubt that directors or anyone who looks at the legislation will see that directors are not there and other creators are. It rankles, and people from Peter Weir at the top end right down to those at the bottom do not understand it. As to whether or not it will result in greater leverage immediately, I am possibly less sanguine than others are about what it is going to mean in terms of real money. It is probably not going to mean real money for some time. We do not even know what retransmission is going to be worth. And even if we talk about education or copying we are not sure how that works—they might well again have to sign them all away.

As to what it means for the future, it may be another 37 years before we get even one more step along the way to recognising directors the way we would like to have them recognised. It

is one of those discussions I have had with people as to whether or not they accept legislation which is not what they would like—not the greatest or most preferable scenario. I say to them that unless we are here when it comes around again in 30 years directors will once again be left off the table. I guess we see it in the long haul.

The other issue—it is something that the Writers Guild also raised—is that suddenly there is some sort of guaranteed amount of money that is going to come from these retransmissions by virtue of being a maker. Directors will be expected, as they are now, even though they have no copyright, to assign copyright prior to getting a job. That will not change immediately. That will take either an industrial change or some sort of legislative change.

Senator MASON—They assign it when they do not have it and they will assign it when they do.

Mr Harris—That is right. Exactly. So they will at least be—

Ms Woods—At least we will have it to sign away.

Mr Harris—That is another thing I have to say: symbolically, a lot of them get upset that they are signing away something they do not have. So there is a sense that what they are doing is not even being rewarded or that they are not getting recognition for that thing that they are signing away.

Senator MASON—So providing directors with these property rights will, in a sense, give them something more to negotiate with in the marketplace.

Mr Harris—Yes, it will give them something more. It will give them some small leverage to begin with. I am not sure how long it will be before we see a cent from it, but it will start the process.

Senator MASON—Thank you.

ACTING CHAIR—Before I let you go, Mr Harris, just for the record, in your opening remarks you made an assertion that you had a perception that both sides of parliament were wedded to some of the threshold issues. I just remind you that this committee is not limited by parliament or anyone else to the recommendations or deliberations we make on this matter. Thank you for your evidence.

[10.39 am]

RIMMER, Dr Matthew Rhys, Private capacity

Evidence was taken via teleconference—

ACTING CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Dr Rimmer—I am a senior lecturer at the Faculty of Law at the Australian National University but I am appearing in a personal capacity.

ACTING CHAIR—You have lodged submission No. 3 with the committee. Do you wish to make any amendments or alterations to that submission?

Dr Rimmer—I sent in an expanded 48-page submission a couple of days ago.

ACTING CHAIR—When I am referring to submission No. 3, that is the submission I am referring to. Do you wish to make any alterations or amendments to your most recent submission?

Dr Rimmer—No.

ACTING CHAIR—I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Dr Rimmer—Thank you very much for the opportunity to appear before the Senate Legal and Constitutional Legislation Committee. I welcome the effort by the federal government to consider the Copyright Amendment (Film Directors' Rights) Bill 2005. It is a long overdue matter and needs to be addressed. It goes back to the debates that were happening six years ago regarding the Copyright Amendment (Digital Agenda) Act. I want to deal with three matters. Firstly, I want to give you a quick sense of the history of authorship in cinematographic films. Secondly, I want to talk about some of the policy options available to the federal government and, thirdly, I want to refer to an international survey of authorship in relation to audiovisual works.

In the history of cinematographic films in Australia there have been three important revolutions. Originally, with the first copyright act, the Copyright Act 1912, Australia followed the lead of the United Kingdom and protected cinematographic films as either dramatic works or artistic works—photographs. This caused all sorts of difficulties and problems. Most notably, for instance, there was litigation over the ownership of the footage of the Melbourne Olympics, in which a Federal Court judge found that one could not protect the Melbourne Olympic Games as a dramatic work.

There was a push to develop a new range of subject matter that would receive copyright protection. The Gregory committee report in the United Kingdom and the Spicer committee report in Australia led to the development of the Copyright Act 1968, and that added to the old traditional subject matter of literary works, artistic works, dramatic works and musical works a range of new subject matter: cinematographic films, broadcasts, published editions and sound recordings.

There were different rules as to the ownership of those traditional works and the new subject matter. Essentially, the Gregory committee report and the Spicer committee report took the very strange notion that cinematographic films should be conceived of as other subject matter and that the ownership should be vested in the maker of the film, the producer. Since then, the category of cinematographic film has expanded rather dramatically. The Sega case meant that cinematographic films also cover technologies like video games, arcade games and possibly multimedia.

In 2000 there was a very important revolution with the Copyright Amendment (Digital Agenda) Act and the Copyright Amendment (Moral Rights) Act. There is a strange split at the moment. The producer holds economic rights in relation to cinematographic films, but moral rights for cinematographic films are shared between the director, the producer and the screenwriter. In my submission I argued that there was a need for greater symmetry in dealing with economic rights and moral rights. I argued that it would be sensible to have a similar share of authorship between producers, screenwriters and directors in relation to economic rights as well as moral rights. In my submission I critique the judicial fiction that a cinematographic film is really just other subject matter and that producers should be the only ones to gain ownership because they take entrepreneurial risks. I argued that there was a need for greater balance in the sharing of that particular authorship.

Finally, I think a very important issue is ensuring that there is some sort of harmonisation in the ownership of cinematographic films. Films are exploited internationally, so it becomes very tricky if there are different presumptions as to ownership in different jurisdictions. It is very important to remember that the Berne convention concedes that cinematographic films are literary and artistic works. Commentators like Paul Goldstein say that most countries treat motion pictures as joint works but differ on which contributors are to be treated as the work's co-authors.

Having a look at some of the main jurisdictions, it seems that Australia, Canada and New Zealand are in a very similar quandary. There have been very similar debates in Canada and New Zealand about who should be the owner of a cinematographic film in relation to economic rights. In the European Union, directives have required that member nations provide protection for the principal director in relation to cinematographic films. That has meant that countries like the United Kingdom and Ireland have had to revise their laws to recognise that directors can be the owners of cinematographic films. That is important to bear in mind, given that the Australian legislation was originally modelled on the British legislation.

The United States is a little bit different. It has a doctrine of works made for hire which deals with the conditions in which an employer can be presumed to be the owner of a copyright work. They also have an expansive vision of joint authorship in relation to audiovisual works. There has been some interesting litigation in relation to who can be a joint author in relation to films like *Malcolm X*. Israel seems to have taken a very similar route to the United States in dealing with audiovisual works.

In summary, I am arguing that Australia should consider reclassifying cinematographic films as works and recognise the possibility of joint authorship in relation to both economic and moral rights between the main collaborators in a film.

ACTING CHAIR—Thank you, Dr Rimmer. In both your submission and your opening statement you talked about the tension between economic rights and moral rights. You talked about your joint authorship model. Can you give us, in the simplest possible terms, the most fair, ideal allocation of the copyright rights to all the relevant stakeholders or individuals involved?

Dr Rimmer—Sure. I will just remind the committee that economic rights generally cover the right of reproduction and adaption, and the rights of publication, public performance and communication to the public. Economic rights can be traded, assigned and licensed. Economic rights are really quite strong in terms of the protections that they provide and the remedies that they offer. Moral rights are really personal rights. They derive from a European tradition. Moral rights cannot be assigned or licensed, so they remain personal to the particular author. Australia essentially recognised the moral rights of attribution and integrity and developed a very special regime to deal with cinematographic films in 2000. It is important to stress that within that regime Australia has adopted a diluted form of moral rights. In the European Union there is much stronger protection of moral rights.

My concern is essentially that I think there are going to be tensions in engaging in different allocations of rights between different parties. My concern at the moment is that there seems to be a bit of a disjunction with the status quo, with economic rights being provided to the producer and moral rights being shared between the producer, the director and the screenwriter. The proposal to the federal government is to include the director as an author or an owner for the purposes of the retransmission royalties. My concern about that is that on a theoretical level it is very confusing that a director is not considered to be an author for the purposes of economic rights and statutory licensing but will be considered to be an author for the purposes of retransmission royalties and in relation to moral rights. My preferred option is that there be a greater mirroring between the notions of authorship in relation to moral and economic rights.

Senator KIRK—Thank you for your submission, Dr Rimmer. I note the bill only deals with retransmission rights in relation to films that are not commissioned. There has been some discussion today about the definition in the bill of a commissioned film. What is your view about that—do you think the difference between the two needs to be more clearly articulated in the bill?

Dr Rimmer—There has always been a great debate in relation to copyright law about the circumstances in which someone should own a copyright work. The normal presumption in relation to the initial range of works is that the creator is the author and the owner but in relation to the employer, the employer is presumed to be the owner of copyright work created by the employee. The bill talks about the notion of commissioning.

I think it would be worth while to draw a contrast with the way in which the United States tries to deal with this particular issue. The 1976 US Copyright Act really deals with works made for hire. That means that, in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for the purposes of this act unless the parties have expressly agreed otherwise in a written instrument signed by them who owns all of the works comprised in the copyright. Canada has a similar provision dealing with works made in the course of employment.

There is some debate in Australia about whether the notion of commissioning is broader than merely work made in the course of employment. In the Screen Producers Association submission I think they used the language of employment very loosely. They suggested that directors were normally the employees of producers and therefore it made sense for producers to be considered to be the first owner. But I think normally you have to look at a number of factors to determine whether a person is an independent contractor or an employee. In relation to film and television there are going to be a much wider range of circumstances in which a television company or a film production company commissions a work perhaps by an independent contractor. Essentially, I perceive that the notion of commissioning would expand the range of films that would be owned by the film producers.

Senator KIRK—Obviously, the definition of 'commissioned' in this legislation is going to impact upon the scope. Do you think it should be made clearer in the legislation as to exactly what is intended?

Dr Rimmer—You could provide a finer definition of what would constitute a commissioned work. From my perspective I think that the issue under consideration in relation to the retransmission royalties is one of a range of different methods in which there could be secondary exploitation of a film. It seems to be dealing with quite a limited revenue stream. I am much more fond of general principles dealing with copyright ownership that apply to a whole range of different works rather than necessarily crafting special rules just for film. I much prefer to work with some general principles in relation to a range of different subject matters rather than set up special particular provisions dealing with the commissioning of films. There are very similar issues for instance in relation to commissioning of photographs and other kind of copyright work. So it tends to be quite a general issue.

Senator MASON—Dr Rimmer, I congratulate you on your submission. We have come to expect nothing less from the Australian National University. It is an excellent submission.

Dr Rimmer—Thank you.

Senator MASON—In your submission you support the adoption of a joint authorship model. I understand that reflects the current position in the United Kingdom which is a consequence of their membership of the European Union. Is that correct?

Dr Rimmer—Yes.

Senator MASON—We had some evidence earlier today that, if directors were to achieve intellectual property rights, this could affect the investment climate and people might be less likely to invest in films. Did that happen in the United Kingdom?

Dr Rimmer—In my submission I had a look at the economic activity in relation to film productions in the United Kingdom. Essentially, recognising directors' copyright did not seem to have a major impact. The 1999 *Copinger and Skone James on Copyright* suggested that in the region of about 100 films intended for theatrical exhibition were produced annually by UK producers, either acting alone or in coproduction with people from other countries, and that the total production cost of those films was about £630 million. I do not necessarily think that setting the default rules as to who should be the author of a film has such an instrumental effect upon the level of investment in film production in a particular jurisdiction. It seems to me that issues such as labour costs and, for instance, the facilities available in a particular

country might be much stronger considerations for a film producer when determining where they might want to exploit a film. Think about the popularity of Australia and New Zealand as destinations for Hollywood film producers of *The Matrix* and *The Lord of the Rings*. Perhaps they were more strongly motivated by lower labour costs in comparison to, say, the United States.

Senator MASON—So investors then would structure into their investment equations issues such as the ownership of copyright by directors. Would that just become part of the investment equation?

Dr Rimmer—Yes. It is very important to remember that essentially we are just setting the default rules and these can always be dealt with by contract in terms of the economic climate.

Senator MASON—I was going to ask you that. Can we move to contracts, because it is an important issue that my colleagues and I discussed this morning with other witnesses. Do you think that, if intellectual property rights are accorded to directors—and we might get to writers in a minute—those intellectual property rights should be able to be waived by contract?

Dr Rimmer—An important distinction should be made between economic rights and moral rights.

Senator MASON—I suppose I am talking about economic rights.

Dr Rimmer—Okay. It is very common for directors and writers to assign the ownership of economic rights entirely to another entity, like a producer. It is also possible for them to be licensed so they retain the ownership and can allow, say, a producer or distributor to use the work for a particular purpose. Let me give you a sense of how ownership works in the European Union. For instance, there is the case involving Luc Besson, who brought an action over an advertisement that used parts of his film, *The Fifth Element*, starring Bruce Willis. In France there is scope for joint ownership between the different parties. In that particular case there was a contract between the producer and the film-maker in which the film-maker retained certain rights in relation to adapting *The Fifth Element.* The producer and the director brought an action together against a particular advertising company that had featured a character from *The Fifth Element*.

The ownership of economic rights can always be changed by the terms of contractual dealings. The kind of contractual terms a particular party can achieve depend a lot upon their bargaining power. I noticed in the submissions that there was a lot of debate about whether under the current system directors could just seek good conditions in relation to a contract without any copyright interests. My perspective is that it is the copyright interests that would give directors the very strong bargaining power to argue—

Senator MASON—Dead right. That would give them the bargaining power, wouldn't it?

Dr Rimmer—Yes. For instance, to illustrate that point: there is a lot of litigation at the moment between Peter Jackson, who directed *Lord of the Rings*, and his film company, Wingnut, and New Line Cinema that produced the *Lord of the Rings*. Their contract is quite interesting. Essentially, Peter Jackson got a number of important conditions in approval rights and the final cut in relation to the theatrical home video and television versions of the *Lord of*

the Rings, but nonetheless a kind of dispute has broken out between the film-makers and the producers over the exploitation of the film. There is a contractual battle. Peter Jackson alleges that New Line Cinema engaged in self-dealing because it licensed DVDs and secondary merchandise to other members of the Time Warner Group and did not obtain the maximum value for such products. I think it is very important to keep in mind that, especially for commercially successful films, contractual battles will break out. I guess it is important to ensure that the director has sufficient bargaining power at the beginning of contractual negotiations in terms of their economic rights in order to achieve the best possible outcome in the exploitation of the film.

Senator MASON—I hope I am not verballing anyone but I think it is fair to say that there was some evidence to suggest that seeking intellectual property rights in relation to retransmission might be a first claim rather than a final one.

Dr Rimmer—I think that is certainly true. There have been a number of advocates for film directors' rights such as Jan Sardi and Scott Hicks and Paul Cox who were pushing six years ago, I think, in relation to the Copyright Amendment (Digital Agenda) Act that they should get retransmission royalties and that that should be the first step towards recognition of a full complement of economic rights for directors. I guess it is important also to note that in the past the Attorney-General, Phillip Ruddock, has emphasised that it is sometimes in Australia's interests not to lag behind emerging standards of important trading countries in relation to copyright matters. I think the quandary faced by Australia is that Great Britain and the European Union and the United States are willing to recognise joint authorship in relation to audiovisual works, at least in respect of directors claiming economic rights.

Senator MASON—Perhaps now is a good time to ask my next question, which relates to writers. We have heard some evidence from the writers this morning. What is the potential there, do you think, for allocating intellectual property rights for writers in addition to directors? Internationally has that been done and how is that handled?

Dr Rimmer—A good question. I think the thing about directors that is slightly different is that directors do not have any other subject matter, I guess, in which they can protect their work so they do not necessarily easily fit the categories of dramatic works or artistic works. Writers by contrast do have underlying copyright in relation to the literary work—the script—which is separate from the copyright in relation to the cinematographic film. Personally, I think that directors do have some strong claims in claiming economic rights in relation to cinematographic film. Jan Sardi, for instance, the director and screen writer, has argued that essentially there is no value in a script in and of itself; it is really the film that is the important product at the end of it. In certain circumstances I guess the film could really be conceived as a derivative product from the script or the literary work.

In terms of how different jurisdictions deal with the status of screenwriters, countries in the European Union would provide the strongest recognition of the role of screenwriters. I would exclude the United Kingdom and Ireland from that. They have focused really upon the screen director and the producer. In the United States, essentially it will be possible under the joint authorship rules for them to make a claim as to authorship; however, the works-made-for-hire doctrine means that producers and financers really can claim ownership in most

circumstances. Is seems that in the United States there are more industrial battles about the proper rates that should be paid.

Senator MASON—You are right; that is the issue. Correct me if I am wrong, but in effect the writers do have copyright in the screenplay—is that the right word—

Dr Rimmer—The literary work.

Senator MASON—and they assign that or contractually give it up.

Dr Rimmer—Yes.

Senator MASON—Directors are in a different position because they do not have that?

Dr Rimmer—Yes, that is well put. That is exactly the kind of problem that directors face: they do not necessarily have any underlying copyright, which can be quite problematic. Think of someone like Baz Luhrmann creating *Strictly Ballroom*. There is a range of people involved in that production who would have underlying copyright, like the composer, for instance, and the author of the screenplay. In relation to his work as the director, he would not necessarily have any underlying work in relation to the direction of that particular film.

Senator MASON—With respect to the writer, the problem is an industrial one or a negotiating one that only becomes a legal one by virtue of their lack of, as they say, bargaining power. Is that right?

Dr Rimmer—I think screenwriters would argue that really they are a key collaborator, along with the directors and producers. From their perspective they want to have a share of the authorship of cinematographic films because that is the important product that gets exploited and gets distributed. A claim to authorship in relation to a script might be useful in terms of pitching particular scripts to production companies but might not necessarily give them much control in relation to the proceeds that would come from the work.

It is also worth pointing out that sometimes these roles can be very fluid. Think of people like the Coen brothers, for instance, a double act who write, direct and sometimes produce. The roles can be sometimes blurred somewhat between those different specialisations within the film industry.

ACTING CHAIR—I have a brief question, although we have gone over time. The Screen Producers Association of Australia asserted that not only is this step the thin end of the wedge but really you are putting your foot on the sticky paper in terms of recognising those people who make some particular creative contribution and awarding some particular rights to them. What the Screen Producers Association has put to us is that potentially this can even go to performers, who obviously do make a particularly unique creative contribution to these outcomes. How far do you think this should eventually expand and what interests do you think deserve some special recognition in copyright?

Dr Rimmer—There seems to be two questions there: one about joint authorship and one about performers in audiovisual work, about which there is a very particular debate. In terms of general rules for joint authorship, I take a view different from the Screen Producers Association of Australia. Essentially I believe that you just need clear rules as to what contributions should amount to a claim for coauthorship. In my submission, for instance, I cite a US case involving a consultant called Aalmuhammed in an action against Spike Lee

over the film *Malcolm X*. Essentially Aalmuhammed was a consultant on Islamic matters in relation to that particular film and he made a claim that he should be considered to be the coauthor of that film.

The court, in that case, essentially held that he could not be considered the joint author. First of all, the court said that Aalmuhammed did not necessarily make a creative contribution to the film. Second, he was not a key collaborator in his dealings with the other parties in relation to the film. Third, his contribution was divisible from that of Spike Lee and the producer. If you have clear rules in relation to joint authorship you can strike out claims by claim-jumpers—those who should properly be considered to be contract labour.

The second question is about the protection of performers' rights in relation to audiovisual works. There has been a long debate about this subject. I like to tell my students about Gough Whitlam's bill on performers' rights, which did not get passed because parliament was prorogued by the dismissal. I like to joke to my students that really it was performers' rights that brought down the Whitlam government. More recently, Australia has provided some recognition for performers' rights in relation to sound recordings as part of the Australia-United States Free Trade Agreement. But it has defined performers as having an interest as joint tenants in common with the producers of sound recordings.

The debate over performers' rights in audiovisual works has been quite contentious. Essentially, there has been a battle in the World Intellectual Property Organisation between the European Union, which provides broad recognition of economic and moral rights in performances, and the United States, which is hostile to both notions of performers' rights and moral rights. Essentially, there have been diplomatic conferences about trying to form a treaty with respect to performers' rights and audiovisual works. I think Chris Creswell, who will be attending the committee hearing later today, attended that diplomatic meeting, and so he will have a good knowledge of those issues.

But an important point is that Australia has the constitutional power in terms of intellectual property to make laws in respect of performers' economic and moral rights. My own perspective is that perhaps it is inconsistent at the moment to provide broad economic rights and moral rights to performers in relation to sound recordings but not in relation to audiovisual works. There is some inconsistency in that.

The Media, Entertainment and Arts Alliance have been lobbying the federal government for a long time for recognition of performers' rights. During the moral rights debate, actor Steve Bisley appeared before this very committee. He talked about some of his experiences in which his performers' interests were ignored. He talked about making *Mad Max* and his voice being dubbed by an American in the American version of the film. He also talked about a case in which his performance in *The Big Steal* was used in an advertisement by a telephone company in Australia without his permission. The Alliance have been pushing quite strongly for performers' rights, but it remains a very contentious topic.

I do not think there is the same level of disagreement in relation to directors' rights. I think the major jurisdictions recognise that directors have some claim to economic rights and moral rights in relation to a cinematographic film. I do not think that necessarily means that you should expand authorship beyond that to include minor or lesser players in relation to the

cinematographic film. Screenwriters and performers both have some legitimate claims to copyright interests in relation to a cinematographic film, but those debates are for later, down the track.

ACTING CHAIR—Thank you for the evidence you have provided to the committee today.

[11.14 am]

AYRES, Ms Robyn, Executive Director, Arts Law Centre of Australia

GILES, Ms Katherine, Solicitor, Arts Law Centre of Australia

ACTING CHAIR—Welcome. You have lodged submission No. 5. Do you wish to make any alterations or amendments to that submission?

Ms Ayres—No.

ACTING CHAIR—I invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Ms Ayres—Thank you. I am going to make some comments about the role that the Arts Law Centre plays in the Australian arts community and some general comments about our position. Then I will ask Katherine Giles to address the bill in more detail.

The Arts Law Centre of Australia is the national community legal centre for the arts. One of the primary services we provide is free legal advice to artists across all art sectors in Australia. Obviously that includes film-makers and makers of multimedia works and video works. We basically support the broad interests of creators and do not represent any one particular interest group. It is important to say that the people who come to us for advice are both creators of original works and users, so we are always looking at both sides of the picture.

We provide initial advice to creators. Given our resources, we cannot provide ongoing casework services or representation services. The people who tend to come to us for advice are emerging film-makers or people coming new to the industry. That is the particular perspective that we have. About 20 per cent of the people who come to us for legal advice work in the film, video and multimedia sector, so we probably give between 400 and 500 advices each year to people working in the emerging end of the film industry.

The Arts Law Centre has always advocated equitable remuneration for creators, balanced with fair and reasonable access to copyright material. As we have stated in our submission, we support the previous and recent submissions made by the Australian Copyright Council and the Australian Screen Directors Association. We would like to commend the government for introducing this bill, which recognises the authorship rights of directors. We also commend the government's election policy that acknowledged the inconsistency in the Copyright Act that excluded directors from copyright remuneration or recognition and sought to provide appropriate copyright recognition for the creative contribution of directors. This bill is obviously an important symbolic recognition of film directors and their role in creating films.

In general, we support coauthorship for the director and the producer. We think that directors should have a share of the secondary income from a film; that a film should be defined as a work rather than as subject matter other than a work, with the director as one of the authors; that the principal director should be the author of the film; and that the film should be co-owned by the principal director and the producer. The director should have a non-transferable right to receive equitable remuneration for secondary rights in the film, and

if there is no principal director then all the copyright should vest with the producer. If the director is a full-time salaried employee then the copyright should vest with the employer/producer.

We support ASDA's position that the provisions would apply to films that are made subsequent to any legislation that would come into effect and we rely on international treaties, such as the Berne convention, to treat films in their own right and to treat authors of film in the same way that you would treat authors of other works, such as literary or artistic works. We see there is a need to treat directors in this way to meet reciprocal international obligations. At the very least, directors should be recognised as the underlying rights holders, particularly given that this is recognised in relation to their moral rights but not in relation to their economic rights. Those are the main points that I would like to make in general. I will ask Katherine to speak to the bill.

Ms Giles—In respect of the bill and in concurrence with the submission that we have made, one of our main observations is that the bill makes only minimal changes to the Copyright Act yet in some respects it makes it more complex for people working in the film area, particularly both directors and producers. We at the Arts Law Centre are coming from the perspective of representing creators, who often do not have access to a lot of legal assistance, apart from the minimal amount that we can offer, so a copyright act that does offer an uncomplicated solution to this would be the best possible option in our view. We also believe that the bill gives directors only one extremely limited right and no secure access to remuneration from any income that is generated by statutory licences either for educational use or for government use. We believe that this is inequitable as it treats directors differently from other creators, such as writers and visual artists.

The Arts Law Centre stresses the need for remuneration to be both secure and not able to be waived, particularly because the practical experience that we have had is often of creators bargaining from a weak position. If this remuneration is something that can be waived quite easily through contract, then often it will be. That would put creators, who are already coming from a weak position, in a weaker position. We point in particular to the European position of a preservation of the director's share from equitable remuneration schemes. As a result of that, the remuneration right cannot be waived. So the Arts Law Centre quite strongly believes that there is a need to protect creators and that this should be taken quite seriously, given that we witness constantly the unequal bargaining position that many creators, including directors and others who are involved in the film-making process, come from.

We also submit that in this bill directors have ownership of the retransmission right only in relation to films which are not commissioned. We believe that should also be further looked at. As a result of this, directors have no rights as to a commissioned film, and section 98(4) denies a director the potential to negotiate the retention of ownership of copyright as to a commissioned film. We believe that this is another area that should be addressed, by further consideration of what the definition of a commissioned film would be under the act, just to make it less complex for those who are dealing with that part of the Copyright Act. The Arts Law Centre quite strongly submits that these changes would be particularly important for the Australian film industry and would provide recognition for directors working within the Australian film industry. They would be quite important for those whom we represent—

emerging directors. We particularly look to the French and UK approach to directors' copyright, which ASDA have supported in their submission, and the European Union directive on this issue which requires that member states treat principal directors as the author of a film. Clearly, whatever approach the government takes in amending the act should try to make the landscape as non-complex as possible if only to encourage the growth and reputation of the Australian film industry and of those emerging artists in particular who have less of a bargaining position.

ACTING CHAIR—Thank you, Ms Giles. I note that the thrust of your submission is that in general you agree with the legislation, although you do indicate that in terms of consistency it should go further to embrace part VA and part VII of the Copyright Act, which deal with education and government work respectively. I am interested to know why that is the line for you, why that was as far the bill needed to go. I know there is an issue of consistency with moral rights, as you have just mentioned. In any event, these rights can be negotiated away; they are not the same as other rights. They are economic rights and they can be exchanged under contract. In your opening remarks, Ms Giles, you mentioned jurisdictions and that for some reason—this is just the way I heard you—some were not able to negotiate an economic role. Did I hear correctly? Could you just expand on that?

Ms Giles—As far as I am aware, the right to equitable remuneration in some jurisdictions, including the European jurisdiction, cannot be waived. It is our recommendation that that should be the case here.

ACTING CHAIR—That is more significant than the expansion of part VA and part VII.

Ms Giles—Certainly.

ACTING CHAIR—It is a fundamental change in the capacity for directors to negotiate, because it is not only about the negotiating; they have a right that cannot be negotiated away. That is something in terms of remuneration that happens automatically outside of the contractual sense. So that is a significant change. In your experience, how has that worked in terms of its economic impact on the jurisdictions that have made those changes?

Ms Giles—As far as we are aware, it has not had a detrimental effect on the film industries in Europe, and our belief is that it would only foster growth. Supporting directors can only foster the growth of any film industry.

ACTING CHAIR—I put a question to Dr Rimmer about the scope of the people involved. There are not only the ones you represent; beyond directors, obviously, there are other people with critical input into the creative components of the project, performers in particular. Do you think that the rights of performers are adequately or appropriately protected under the existing legislation, or do you think that this is simply the start of a re-evaluation of what those rights might be in the future?

Ms Ayres—We would probably take the same view that the previous witness took: we can see that there is a discrepancy between the way that performers are dealt with for audiovisual works and the way that they are dealt with for audio works. I suppose we see a need for the expansion of performers' rights in this respect, but we are here today to talk about the directors' bill and we are concerned about seeing directors properly recognised as authors of

the work. That is another discussion to be had, perhaps separately. At this point I do not think we need to tackle that issue as well.

ACTING CHAIR—Indeed. The reason I brought it up is that it was asserted by other witnesses that this was a path that led directly to the consideration of those matters, but I take your point.

Senator KIRK—Ms Giles, you noted that this bill, if enacted, will bring about more complexity in the law than currently exists. Nevertheless, you are still supportive of the legislation. Do you think this legislation ought to be put on hold, so to speak, until the broader issues can be examined in relation to the rights of not only directors but also screenwriters and others in the industry?

Ms Giles—To qualify the point that I made, I would point to the submissions of Kimberlee Weatherall and Matthew Rimmer. They both talked about the fact that these particular changes to the Copyright Act bring in aspects of the approaches by the US, the UK and Europe but do not rely specifically on any one of those models, and that it would perhaps make it less complex if the European directive model was relied upon, not only for the purposes of harmonisation but also because it does provide a less complex approach. The Arts Law Centre in no way think that the Copyright Act should not be amended but think that, when it is amended, the approach that is taken is one that attempts to make it less complex. From our perspective, creators who are emerging in visual arts, film or any other medium do not have a lot of access to legal advice on how the Copyright Act affects them. Whilst we can provide some advice, it is a difficult terrain and landscape for them to negotiate, and the less complex it is the better it is for them.

Ms Ayres—An observation I could perhaps make on that is that very often we find—and generally it would seem to be the practice—that the people who seek our assistance and most of the creators whom we deal with are very copyright compliant, so they do want to do the right thing in terms of negotiating copyright legislation. So the less complex it can be made and the more education that can be provided to people about their rights, as well as their obligations, the better it will be.

Senator KIRK—Also, the problem with this kind of piecemeal change is that, if this legislation were passed, there is an amendment that people would have to be made aware of. But if we are going to go through a process of continuing with piecemeal amendments then that will be quite difficult, especially for new players who, as you say, might not be aware of the law. You mentioned perhaps either going down the UK route, in accordance with the European Community directives, or taking the United States approach. Do you have any view as to which is to be preferred between the two?

Ms Giles—Along with the submission made by ASDA, we would support the European model over the US model.

Senator KIRK—Quite extensive amendment would be required to the Copyright Act.

Ms Giles—Just on that point, we are not talking about the Copyright Act in its entirety being remodelled to reflect the EU position.

ACTING CHAIR—Thank you, Ms Giles and Ms Ayres. I appreciate the evidence that you have given today.

[11.32 am]

CRESWELL, Mr Christopher Colin, Copyright Law Consultant, Attorney-General's Department

DOWN, Ms Elena Margaret, Senior Legal Officer, Copyright Law Branch, Attorney-General's Department

ACTING CHAIR—I welcome representatives from the Attorney-General's Department. I remind senators that, under the Senate's procedures for protection of witnesses, departmental representatives should not be asked for opinions on matters of policy. If necessary, they must also be given the opportunity to refer those matters to the appropriate minister. I now invite the witnesses to make a short opening statement, at the conclusion of which I will invite the committee members to ask questions.

Mr Creswell—I will present part of the statement and my colleague will present the concluding part. I will be seeking to highlight the main points of the history of and consultation on the bill, as well as the operative provisions of the bill itself. At the time when amendments to the Copyright Act made by the Digital Agenda Act 2000 were going through the parliament, directors requested that they be recognised as authors of their films and, as such, owners of copyright in them. They did so for the stated purpose of seeking economic rights in their films and, in particular, access to remuneration under a new statutory licence being inserted by that digital agenda amending act. They also expressed the desire to secure access to remuneration payable to directors for use of their films in Europe. They said they had been advised that access to further remuneration in some European schemes would be contingent on Australia providing reciprocal rights for overseas directors in Australia.

The government's position was at that time that the extension of economic rights to film directors could not properly be considered in the context of those digital agenda amendments. Accordingly, as soon as those amendments were passed in August 2000, the government published an issues paper and called for submissions on a possible directors' copyright in their films. A substantial number of submissions were received. Directors and producers made submissions, as did a range of other professional bodies, academics and others. In December 2000, further amendments to the Copyright Act granting moral rights to authors were passed and commenced. Directors were recognised as one of the classes of makers of films and, as such, authors for the purposes of those amendments. However, moral rights are different and separate from the economic rights comprising copyright.

Following consideration of the submissions on a possible directors' copyright and following development of the government's policy position, key stakeholders most immediately affected by it were consulted on the draft text of the bill in March 2005 to obtain their views prior to its introduction. These stakeholders were the Screen Directors Association; Screen Producers Association; Screenrights, which manages a statutory licensing scheme; and free-to-air and subscription television broadcasters. The Australian Writers Guild, not having made a submission in 2000, was not identified as seeking to be consulted. Although the consultees expressed very different attitudes on the objectives and scope of the bill, none of the stakeholders indicated outright opposition to the bill. The government

considered that to be an indication that a fair balance and compromise had been struck between their competing demands. The bill, as introduced, is the same as the draft seen by those stakeholders in March 2005.

The bill deems a director to be a maker of his or her film for the purposes of the provision in the act which vests first copyright in the maker or makers of a film. The bill goes on to provide that the directors' copyright is in effect limited to a right to a share of remuneration under the statutory licence in part VC of the act. This remuneration will be payable by subscription television broadcasters for retransmitting free-to-air broadcasts of films. The new directors' copyright will apply only to films made after the commencement of the bill. The new directors' copyright, like other copyright rights, will be transferable. The assignability of directors' copyright will allow sufficient flexibility for the negotiation of contractual arrangements necessary for effectively distributing films. The new directors' right does not apply to commissioned films, because the producers at present have no first right in such films. Thus, directors are put in no worse position than producers are now in and, indeed, have been in since 1968.

Ms Down—The bill will give directors the chance to secure additional financial reward by conferring on them a new right to remuneration as owners of copyright in their films. It will also strengthen the claim by directors to flow-on royalties for use of their films under remuneration schemes in other, mainly EU, countries. By limiting the new rights of directors to the part VC retransmission scheme, the bill avoids prejudice to the existing industry practices for the creation and financing of films. The bill should not disturb existing practices for securing investment in and arranging distribution of the films, nor should the bill affect the chances of producers to recoup their production costs. This is because the part VC scheme provides for a revenue stream that has not yet begun to flow.

Although part VC was introduced by the Copyright Amendment (Digital Agenda) Act in 2000, no revenue in fact has so far been collected or distributed under it. That is pending a determination by the Copyright Tribunal of the quantum payable under that scheme. Accordingly, the bill will not impact on investment in films in Australia. When the tribunal has made a determination, the remuneration payable will necessarily be additional to existing sources of remuneration for films.

The bill will have no effect on the existing rights of other contributors to film who have copyright in underlying material in the film. For example, it will not affect the position of screenwriters of the screenplay or composers of the soundtrack musical scores as authors of those copyright works. The government believes that a fair balance has been struck in this bill. It confers on directors some important new legal rights but limits them to a future revenue stream so as not to disrupt existing industry practices or investment in Australia's film industry.

ACTING CHAIR—Thank you very much. In terms of clarification, Ms Down, in your opening remarks you said the reason you think the government struck a fair balance is principally because you have reflected the existing industry practices and to avoid prejudice, and that is why you have limited the scope that you will provide directors. You particularly went to part VA and part VII and why they perhaps would not be included. Could you explain why—as has been asserted by other witnesses—we seem to have divided the type of director?

We have said that there are directors and this is a right that we wish to confer on the director, but it is only being conferred, as I understand it, on a principal director. Can you help me understand why you have made that particular distinction?

Mr Creswell—The term 'director' itself is not defined, so I guess it will be a matter for the courts to resort to the dictionary. I guess it is also a matter, it seems, of a fairly general understanding. If you ask people in the industry who is a director and who is not, they seem to know. But there are degrees of a range of directors who are more or less important. A casual observation of the credits at the start of a film will indicate that there is not only the director but a first assistant director and associate directors and so on. In the context of the development of the moral rights legislation that I referred to in my opening statement, I think these amendments were extensively negotiated with a group that had represented all principal players in the film industry and they seemed to accept that the moral rights should be limited to the principal director. There could be joint principal directors but these subordinates to the principal director should not receive those rights.

ACTING CHAIR—The Screen Producers Association of Australia today, and in fact the representatives of the directors today, said that this is the start of something, not the end, and it is not concise. Clearly, you have asserted today, 'Look, these are the circumstances under which we can have a fair and equitable outcome at the moment and that is why we are doing it in this way.' The Screen Producers Association of Australia felt that they would have a high level of confidence if the explanatory memorandum would include an intent that this was as far as we would go—and I understand that may not give particular succour in law. Because they have asked for that, what is your view or response to that request?

Mr Creswell—As to whether they have made that request formally, I cannot recall.

ACTING CHAIR—They have put that to the committee today.

Mr Creswell—I did hear them put that to the committee. I do not understand or expect, as a matter of general principle, that the government would ever seek to bind itself—or, indeed, a future government—to undertake or to not undertake to make any particular form of legislation. The other thing that I think is relevant to call to mind is that the Attorney-General alluded in his second reading speech to the possibility that there could be another remuneration scheme in the future. He was not saying that there would be, but he said that if there were—and I refer you to the last paragraph of his second reading speech—the government would consider giving directors a share of that.

Copyright law is scrambling all the time to keep up with new technological developments. There is always some aspect of it being reviewed. At the moment there is a review of whether there should be a fair use exception or other exceptions. This has been brought on by the very wide availability now of new consumer products like iPods—I was trying to think of 'portable music players'. One sometimes has to resort to proprietary terminology. 'Walkmans' are old hat now, so it is now 'iPod' or 'digital music player'.

The history of copyright law is littered with examples of where copyright law has had to be refashioned or adapted to accommodate new technology that enables new exploitation and new uses. I will not go further than to say that that is a very good reason why it would be

quite futile for a government to say, 'We won't change the copyright laws or do this or that in the future,' because technology may force it upon the government of the day.

Senator KIRK—I think it is fairly well agreed that this is a minimalist approach to amendment of legislation in this area, and we have just touched on that in relation to what changes may occur in the future. I do not expect you to either say or consider what they may be. But I did want to ask: in the process of consultation that you have referred to—and there seems to be some dispute as to just how broad that was—did you consult in relation to just this small change that is being proposed here, or was there a broader consultation amongst relevant stakeholders as to how, globally, it might be necessary to reconsider the rights of not only directors but producers and screenwriters in this area?

Mr Creswell—The issues paper that was published by the government at the time the digital agenda act was passed through parliament in 2000, raised a number of quite broad issues. It was a brief paper to raise a number of issues and I recall that one of those issues was: why should directors alone get this new right, and what about the claims of other contributors to film? Musical composers, screen production advisers and so on were given as an indicative but not exhaustive list of possibilities. Yes, it was open and this issues paper was published on the department's web site. The inquiry, which referred to this issues paper, was publicised in the newspapers, as well as being the subject of a press release and referred to online.

Senator KIRK—No doubt you received a number of submissions from various parties in response to this issues paper?

Mr Creswell—Yes.

Senator KIRK—Is it fair to say the issue of directors' rights in this context was the matter that emerged as being the most pressing area for reform?

Mr Creswell—It was the headline of the inquiry; the inquiry was about the possibility of directors' copyright. But, as I say, one of the questions is about the issue of why just directors; what about other substantial contributors to the production of a film?

Senator KIRK—In answer to the question that you posed, were very many submissions received saying, 'Yes, we do think that other contributors also need to be recognised in the process'?

Mr Creswell—I would not want to be tied down to this without combing through them. I have got the list of the submissions made in 2000, and one of them was from the Australian Cinematographers Society. I cannot remember how they characterised their claim or what it was they said, but I think they said, 'We are obviously a pretty important contributor to the production of a film.' As I say, the Australian Writers Guild did not put in a claim. Frankly, we were not surprised because, as has already been acknowledged, I think without dispute, the screenwriters are the authors of a copyright work and they may or may not hold the copyright in it. I think the AWG representatives that you heard earlier explained how, in many cases—perhaps in most cases, I do not know—they are asked to assign that copyright which, without contractual assignment, is vested in them as the authors of that work. They have got something whereas, as I think has already been well explained by Dr Rimmer amongst others,

directors have got nothing in the way of a musical score or a screenplay to lay claim to as intellectual property.

Senator KIRK—But we have also heard that, if and when they do get these limited copyright rights, chances are they also will be assigned through the contractual process.

Mr Creswell—That is my understanding, yes. Certainly, consistent with the way that copyright is handled commercially, that probably will happen. Mr Harris said that in many cases they will be asked to assign. That is the nature of copyright. Yes, there is inequality in the bargaining position but it does not only happen here. In the realm of literary works you will hear many less known authors complain bitterly that they have been forced to assign their rights to publishers in order to get published. As they become more powerful and have a bigger market, they have got a stronger bargaining position.

Senator KIRK—So really the impact of this bill is likely to be negligible?

Mr Creswell—I refer you again to not only what the government has said but also what Mr Harris has said. There is an important symbolism in at least having the opportunity of being a first owner of copyright in their film, subject to the assignment issue and subject to the employment issue. He also maintains—and we base our understanding on this, because his group are in the best position to know—that this will strengthen their case for getting real dollars from the European remuneration schemes to which they presently do not have access because of no reciprocal opportunity for directors of those countries to get remuneration for retransmission of broadcasts of their films in Australia.

Ms Down—Also, as was pointed out, the symbolic aspect of it is important to some people. Artistic creators consider those sorts of intangibles important in terms of the symbolic nature of the recognition that they get.

Senator KIRK—There has been some discussion here today about the definition of a commissioned film. Obviously it is quite critical to the operation of the act. Can the department clarify for us what is intended by the term 'commissioned film'?

Mr Creswell—We cannot give a legal interpretation of an existing provision of the act. I emphasise that although the draft bill, which we are under an obligation to explain, has the shorthand expression 'commissioned film,' it just refers you to section 98(3) of the Copyright Act. Obviously, that is an existing provision of the act that, as I mentioned in my opening statement, has been in the act since 1968. So it is nothing new. We have not created a new mystery; we have made a shorthand reference, by use of the terminology 'commissioned film', to an existing provision of the act. And that says:

Where:

(a) a person makes, for valuable consideration, an agreement with another person for the making of a cinematograph film by the other person ...

'Making of a cinematograph film' is in turn defined by section 22. I do not want to immerse you in too much legal verbiage, but section 22 says:

... the making of a cinematograph film shall be read as a reference to the doing of the things necessary for the production of the first copy of the film ...

That is where A knows nothing about making films and says to B, 'You are an expert; make me a film about this.' It would appear to be a case not of A being the producer and B being a director but rather A being a person who may or may not know or want to do anything about making a film, but wants a film made by somebody else and asks B to go away and do it.

Senator KIRK—No doubt there has been some judicial interpretation of the provision in the past that people could look to. Is that what you are saying?

Mr Creswell—Yes.

ACTING CHAIR—I understand the context in which you decided that we would stop at retransmission. But, in a wider context, the driver was the principle that the most important issue for government to resolve was the potential loss of remuneration from the European market and the reciprocal rights that that granted. During that process did you give any consideration to the allocation of direct rights in such a way that they would not be negotiated away, as with the European directed model? Whilst that was clearly suggested by an advocacy group for one of the stakeholders, would you give that any consideration at this time rather than taking a piecemeal approach? I respect the issues that you discussed in terms of copyright law generally and that you will have to continue to revisit this issue. It being not a matter of legislative convenience only, why would you not take a more holistic view of resolving a number of other issues while we are considering this proposed legislation?

Mr Creswell—I understand you are asking about whether or not to protect the weaker bargaining parties some rights should be made inalienable—

ACTING CHAIR—I am not asking that. I am asking if this would be an appropriate time to consider that range of issues.

Mr Creswell—Thank you for clarifying your question. As I hope I attempted to indicate a moment ago in reply to a question from Senator Kirk, the issue of inequality of bargaining positions is not peculiar to film. I gave as a throwaway, for instance, less known authors and publishers. That would also include less known recording artists and recording companies—the recording company being in a much stronger position than the little-known recording artist trying to get their first sound recording onto the market. This inequality of bargaining positions and the strong pressure on the weaker party to give up a copyright is almost ubiquitous throughout the range of situations covered by the Copyright Act. It would, to use your words, be piecemeal if we made a special provision without considering those other situations.

The government have not been asked to consider, and are not currently considering, an across-the-board approach to the inequality of bargaining power between rights owners and publishers and producers of materials. I guess it is always open for somebody to propose that that be done. But I hope I have made it clear that it is not peculiar to this area.

ACTING CHAIR—I understand that. I have absolutely no idea how the directive model in the European circumstances would apply to the remainder of non-cinematographic copyright law, but as I understand it from the arts law council—and I hope I have this right—in Europe not only do they have recognition of some copyright but also it is legislated in some sort of remuneration process that they cannot negotiate away that copyright against some contractual arrangement. In that way, they have some sort of remuneration guarantee.

I recognise that your answer was given in the context that, as legislators, you would have to look across the whole sphere, and this is not within a recommendation that we look at the whole sphere of copyright law; this is just one particular area. I just wondered if the intention was to try to provide a more equitable process and to move away from any particular prejudice. If that were the intent—apart from meeting our obligations or looking at the potential loss of remuneration in the European context—why would you not give some consideration, in this particular context, to providing a non-negotiable right that could not be negotiated away? Did you consider the type of right that would be allocated under this legislation, which is a right that we all know in a symbolic sense will be almost immediately negotiated away?

Mr Creswell—Certainly the issue of transferability was considered. It was not automatically or without reflection put into the legislation. Another thing I should refer to is section 196 of the Copyright Act. I know I am immersing the committee in various seemingly opaque legal provisions, but this has a ringing simplicity about it. It says:

Copyright is personal property and, subject to this section, is transmissible by assignment, by will and by devolution by operation of law.

That refers to things like bankruptcy. It is a pretty general statement that copyright is personal property and that personal property is generally transferable. I do not know about the continental context. I am well aware of those provisions in the European directive which confer inalienable rights on certain right holders in certain circumstances. I am dimly aware that the European legal tradition is quite different from the Anglo-Saxon tradition with regard to employment and employer-employee relations and even publisher-author relations. For instance, Germany has a law which specifically protects authors against being ripped off by publishers. Where a little-known author writes what turns out to be a bestseller, the publisher is not able to cream off everything from that and leave the author with very little because they were unknown before they wrote this runaway bestseller. That is an example of the very different legal environment out of which these inalienable rights came. That is not a comment on them or an evaluation of them; it is just saying that they are different.

ACTING CHAIR—I understand now, in the context of the property right nature of copyright in Australia, why you have taken that into consideration. Thank you very much, Mr Creswell and Ms Down. I would like to thank the witnesses who have given evidence to the committee today.

Committee adjourned at 12.04 pm