

# **SUPPLEMENTARY REPORT BY THE AUSTRALIAN LABOR PARTY**

1.1 Labor Senators support the majority report's consideration of the evidence in most areas and endorse the majority report's recommendations. Labor Senators recognise that the recommendations are an attempt to rectify certain drafting and technical problems in the Bill, and are of the view that these recommendations will assist in improving relevant aspects of the Bill's practical operation.

1.2 However, Labor Senators are of the view that the majority report does not place adequate emphasis on a number of significant matters. First and foremost, Labor Senators are seriously concerned about the short timeframe set by the Government for this inquiry. The Bill proposes major amendments to copyright law in Australia and raises many complex issues. Further, and predictably, the committee received a large volume of detailed and lengthy submissions. Labor Senators consider that the complex nature of the issues, coupled with the extremely short timeframe set by the Government for the inquiry, has seriously hampered the committee in its efforts to comprehensively consider, and report on, all the evidence before it.

1.3 As highlighted in the majority report, consultation in relation to many of the amendments contained in the Bill has been inadequate, or in some cases non-existent. The Bill proposes 'unexpected' changes in some areas; these changes were not contained in the Exposure Draft of the Bill, nor were they the subject of public consultation processes. Labor Senators consider that some of the more contentious issues raised by the Bill might have been resolved at an earlier stage if adequate exposure and consultation had occurred. Labor Senators note that the committee has continued to receive submissions right up to its reporting date – this would appear to indicate that stakeholders are concerned that they have been unable to fully articulate their arguments. Labor Senators are also concerned that the inadequate consultation and short timeframe of this inquiry has prevented the information and communications technology industry, in particular the open source software sector, from having their concerns about innovation and competition heard and possibly addressed through the course of this inquiry.

1.4 Labor Senators agree that only those provisions of the Bill related to implementation of the AUSFTA could be considered 'urgent'. Ideally, consideration of several significant aspects of the Bill should be deferred until proper analysis and deliberation takes place by all interested parties, and by Parliament.

## **Strict liability provisions**

1.5 Labor Senators agree with the majority report's conclusions in relation to the Bill's strict liability provisions. Nevertheless, Labor Senators express the view that these provisions should be put on hold pending further consideration of how they will operate in practice. The committee has not been able to fully consider the impact of the provisions due to the short timeframe for the inquiry.

1.6 Labor Senators are particularly concerned about the potential impact of the strict liability provisions on the ordinary use of legitimately acquired products by consumers. Since the proposed provisions introduce new laws with potentially broad implications, a thorough consideration of their likely effect is required.

1.7 Labor Senators also remain concerned that the AFP indicated to the committee that it is yet to form a view on Schedule 1 of the Bill. This is a very good reason to defer implementation of these provisions until their full impact can be assessed.

### **Time-shifting and format-shifting**

1.8 Labor Senators consider that new and emerging technologies should be encompassed in any format-shifting exceptions to copyright infringement. However, they concede that this is not possible, due to the restrictive nature of the exceptions-based regime contained in the Copyright Act. Labor Senators also note the choice by the current Government to pursue specific exceptions rather than general 'fair use' exceptions for private use. It is extremely difficult for Labor Senators to consider the alternative path and recommend amendments to the Bill to establish a fair use regime, particularly in the timeframe permitted. In this context, Labor Senators note that further specificity with exceptions creates difficulties from the perspectives of both copyright holders and consumers, further enhancing the argument for a private 'fair use' regime.

1.9 Given the timeframe, however, Labor Senators have opted to recommend expansion of copyright exceptions, at the same time acknowledging that this will not solve the fundamental and ongoing problem of Australian copyright law's inability to recognise rapid changes in technology and the use of new technology by consumers.

1.10 Therefore, Labor Senators express the view that the use of currently available technologies (such as format-shifting to and from DVDs, and the use of podcasts, and webcasts) needs to be adequately recognised and addressed in the exceptions-based regime.

1.11 Labor Senators are also of the view that copying for personal and domestic use should be allowed in places other than the home. While supporting the majority's recommendation that the Bill be amended to make absolutely clear that consumers are not restricted to watching and listening to recordings in their own homes, Labor Senators also believe that consumers should not be restricted to making copies in 'domestic premises' only.

1.12 Further, Labor Senators believe that there is a need for the Copyright Act to explicitly recognise that time-shifting and format shifting often legitimately involves more than one copy being made. Otherwise, the real life usage of products that consumers have legitimately purchased will not be reflected in the legislation, and people will continue to break the law through normal and accepted usage.

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### **Three-step test**

1.13 Labor Senators also note the difficulties and competing interests with respect to implementation of the three-step test in domestic legislation. However, Labor Senators are of the view that the particular way the Government has chosen to embody the three-step test in the Bill is problematic and an example of poor drafting that will no doubt lead to confusion and uncertainty in practice. Not only will judges be required to interpret the three-step test, but so will the users to which the exceptions apply. This is not only impractical, but also potentially costly to those user groups who may have to seek expert advice on how to properly interpret the three-step test.

1.14 Labor Senators are of the view that the legislative embodiment of the three-step test requires further critical examination by the Government.

### **Fair dealing for research and study**

1.15 Labor Senators are of the view that the recommendation contained in the majority report in relation to fair dealing for research and study is an inadequate way of dealing with the issue. Labor Senators consider that arguments for the inclusion of a quantitative limit on 'deemed' reproductions to accord with international obligations are weak. Moreover, Labor Senators understand that there are conflicting legal opinions as to whether this is a correct interpretation. The majority's recommendation implies that the disadvantage the amendment creates ought to be 'clarified' to remove its negative impact. Labor Senators are of the view that a preferable approach would be to retain the existing provisions of the Copyright Act in their entirety.

### **Official copying of library and archive material**

1.16 Labor Senators expresses the view that the 'commercial availability test' contained in this exception that requires cultural institutions to take into account whether an electronic reproduction of a work can be obtained within a reasonable time, at an ordinary commercial price, may interfere with ordinary collections policies of cultural institutions. Labor Senators recommend that this requirement be removed from the Bill.

### **Maker of communication – Schedule 7**

1.17 Labor Senators note concerns raised by ISPs and search engines that they will incur additional costs and be vulnerable to liabilities for communications of copyright-infringing activities which are completely out of their control. Labor Senators are of the view that this issue warrants further consideration and urges the Federal Government to closely monitor such activities.

## **Copyright Tribunal amendments**

1.18 Labor Senators support an additional recommendation to resolve an issue raised by the Australian Vice Chancellors' Committee (AVCC) – namely, that the proposed provisions relating to the Copyright Tribunal permit the Copyright Tribunal to impose an expensive burden on educational institutions, about which they were not consulted. The issue of greatest concerns relates to so-called 'records notices'.

1.19 The Bill contains a repeal of the provisions which give effect to a prescribed record keeping system. The AVCC argued that this is despite the fact that the Copyright Law Review Committee considered these provisions in its Simplification Report Part 1, and recommended that they be retained. If the proposed repeal is implemented, the AVCC submitted that an institution issuing a records notice would be required to reach agreement with the collecting society regarding the form of record keeping system or, failing that, apply to the Copyright Tribunal for determination.

1.20 Labor Senators agree with the AVCC's assertion that this will have enormous costs consequences for the education sector and, further, that there appears to be no reason to impose this burden on the education sector when there is no evidence that the current records option is not working. Labor Senators agree that the proposed amendment gives further bargaining power to copyright owners and undermines the interests of important educational users in Australia who have not been consulted on such a proposal.

## **Review of impact of changes**

1.21 Labor Senators support the majority's recommendation in relation to a two-year review on the proposed changes to the Copyright Act by the Bill. However, in making such a recommendation, Labor Senators note that this represents a 'second-best' and belated approach to attempt to counteract the inherent inadequacy of this package of reforms.

### **Recommendation 1**

**1.22 Labor Senators recommend that the strict liability provisions in Schedule 1 of the Bill be removed, pending a comprehensive examination by the Federal Government of their intended operation.**

### **Recommendation 2**

**1.23 Labor Senators recommend that the time-shifting and format-shifting provisions of Schedule 6 of the Bill be amended to recognise all current and legitimate uses of technology, including format-shifting from podcasts and webcasts.**

### **Recommendation 3**

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**1.24** Labor Senators recommend that the time-shifting and format-shifting provisions of Schedule 6 of the Bill be amended to enable copying for personal and domestic use to occur in places other than domestic premises, including legitimate places of business.

**Recommendation 4**

**1.25** Labor Senators recommend that Schedule 6 of the Bill be amended to clarify that the time-shifting and format-shifting exceptions permit sufficient copies to be made and stored for reasonable use of legitimate products.

**Recommendation 5**

**1.26** Labor Senators recommend that Schedule 6 of the Bill be amended to remove proposed changes to the exception relating to fair dealing for research and study, so that existing section 40 of the *Copyright Act 1968* is retained in its entirety.

**Recommendation 6**

**1.27** Labor Senators recommend that Schedule 6 of the Bill be amended to remove the 'commercial availability test' from the exception relating to official copying of library and archive material.

**Recommendation 7**

**1.28** Labor Senators recommend that Schedule 11 of the Bill be amended to remove proposed paragraphs 135K(1)(b)(c) and (d), and proposed paragraphs 135ZX(1)(b)(c) and (d) in relation to records notices.

**Senator Patricia Crossin**

**Senator Linda Kirk**

**Deputy Chair**

**Senator Joseph Ludwig**

**Senator Kate Lundy**

