DISSENTING REPORT BY THE AUSTRALIAN DEMOCRATS

Inadequate time to consider legislation

1.1 This legislation makes a range of major amendments to Australian copyright law. I acknowledge that many of the components of the legislation have been the subject of various consultation processes over a period of time. However, the Senate still has to consider and assess the details of the actual legislative changes that are put before it. Given the complexity of the Copyright Act and the many different issues covered by the proposed changes, it is simply unacceptable to provide the Senate Committee with such a short timeframe to consider the legislation and consult stakeholders and experts on the issues raised.

1.2 The legislation was referred to the Committee sight unseen on 19 October 2006, with a reporting date only three weeks later of 10 November. This gave only 6 working days for the public to provide submissions to the Committee. The Committee had no option but to hold a substantial public hearing whilst the Senate was sitting and debating the Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006. Given that the Cloning and Research legislation was being determined by a conscience vote of all Senators, it was particularly undesirable to be holding Committee hearings during debate on that matter.

1.3 Given the complexity of this area of law, the wide range of changes being made and the evidence from a number of submitters that there are 'unexpected' components in the legislation and a lack of clarity in the drafting of some provisions, it is unwise to be proceeding with the legislation in such haste except where it is absolutely necessary.

1.4 Apart from the few segments of the Bill which make amendments to ensure necessary compliance with the AUSFTA by the end of 2006, there was no substantial reason given why the rest of the measures in the legislation needed to be passed in such a rush. In many cases the government has had years to consider and weigh up the various issues involved, yet it is giving the Senate Committee and the community just a few weeks to assess the final product.

1.5 In responding to my question as to why the Senate could not deal with the parts relating to the AUSFTA now and have a proper look at the remainder of the legislation later, the Department's representative said that "the government's preference is to do it as one major copyright reform bill and to get it all through this year."[1]

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[1] Committee Hansard, 7 November 2006, p 44

1.6 No indication was given that any other components of the legislation are urgent. Government 'preference' or convenience is not a strong enough reason to rush consideration of legislation. Given the importance of this area of law, the complexity of the issues and the potential consequences of getting it wrong, I do not believe it is reasonable for the Senate to absolve itself of its normal responsibilities to ensure adequate examination of legislation.

Recommendation 1

1.7 That the legislation be split to allow the provisions relating to the AUSFTA to be passed this year, while further consultation and consideration be given to the remaining provisions which can be considered by the Senate in the first session of 2007.

Alternative approach if recommendation 1 is not accepted

1.8 If the Senate decides to proceed with considering all of the legislation immediately, there is an additional matter which should be included.

1.9 As stated above, it is apparently the government's preference to do one major copyright reform Bill. In such a circumstance, it is reasonable to also include an amendment to Section 152(8) of the Copyright Act to remove the statutory one per cent cap which currently exists on licence fees paid by radio broadcasters for using sound recordings.

1.10 The government announced its intention to remove this cap back on 14 May 2006[2], at the same time as announcing the changes relating to fair use which form a significant part of the legislation currently before the Committee. This decision followed a period of consultation similar to that which was undertaken for the fair use provisions. As the Attorney-General, Mr Ruddock said at the time, "there is no reason why a statute should determine what the rate should be for music played on the radio."

1.11 In asking the Department's representative, Ms Helen Daniels, at the Committee's public hearing why the legislation didn't include the removal of the cap on commercial radio broadcasters, the following exchange occurred:

> **Ms Daniels** "The government has not made a decision as to when that reform will be implemented."
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> **Senator BARTLETT**—So there has not been a reversal of a decision, it is just not proceeding with it at this time?
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> **Ms Daniels**—That is right.

[2] "Major Copyright reforms strike balance", Media Release 088/2006, issued by the Attorney-General, 14th May 2006 (see http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006)

> **Senator BARTLETT**—Are you able to give us any bigger reason why not? Given what you have just said about the desirability of getting all the reforms through in one package, this would be a fairly simple one that has been discussed for a very long time, and one which has also had a review process and had a cabinet decision made on it.
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> **Ms Daniels**—There is very little I can add to what I have said: that the government has decided not to proceed at this stage in the bill with that reform.

1.12 The government has announced six months ago its decision to abolish the one per cent cap on what commercial radio has to pay for the recordings they use. That is still government policy, but for unexplained reasons they are not proceeding with this simple, discrete amendment to the Copyright Act. There is reason to be concerned that, if the change is not made as part of this reform Bill, it may not happen at all prior to next year's election. Given that this cap has been in place since 1968, it is fair to say that the commercial radio industry has already received a more than reasonable benefit from it.

1.13 This cap places a limit on what musicians can earn through royalties paid for the use of their performances. It is particularly appropriate that the cap be lifted as part of this legislative reform package, as the changes made as part of the fair use provisions are likely to lead to a drop in income for some of them. This was confirmed by Ms Libby Baulch from the Australian Copyright Council.

> **Senator BARTLETT**—Is it reasonable to suggest that these changes in this area are likely to lead to a loss of income for artists, performers and such people?
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> **Ms Baulch**—Certainly the format-shifting and time-shifting provisions will because they will interfere with markets for copyright content. That will have an effect on the income of copyright creators. There may also be those implications from other provisions as well, but certainly there are those for the format-shifting and timeshifting provisions which are not subject to the test of whether or not the material is available.[3]

Recommendation 2

1.14 If the legislation is not split and all Schedules are to be considered prior to the end of 2006, Section 152 of the Copyright Act should be amended to implement the government's promise and policy to remove the one per cent cap on the broadcasting fee required to be paid by commercial radio stations.

[3] Committee Hansard, 7 November 2006, page 10.