CHAPTER 3

KEY ISSUES

3.1 Submissions to the inquiry were divided between those expressing strong support for the Bill and its policy objectives, and those expressing strong opposition to it. Some submissions also expressed preference for one or more of the alternative options set out in the EM in respect of film directors' copyright. This chapter discusses the key issues raised in the course of the committee's inquiry.

In-principle support for the Bill

3.2 Many submissions and witnesses argued strongly for changes to the Copyright Act to give directors recognition for their creative contribution to films.

Symbolic recognition for film directors

3.3 The committee received considerable evidence to the effect that the Bill represents an important symbolic recognition for directors. For example, ASDA noted that 'for the first time since the Copyright Act was introduced in 1968, Australian film directors are to have their claim to copyright recognition formally recognised'.[1] Dr Matthew Rimmer, an academic specialising in intellectual property law, stated that the Bill was 'long overdue'.[2] The Arts Law Centre of Australia (the ALCA) also acknowledged the Bill as 'an important symbolic recognition of film directors and their role in creating films'.[3]

3.4 ASDA also submitted that the Federal Government, in introducing the Bill, has 'identified a need to redress an injustice that has occurred because of a simple, historical oversight'.[4] It argued that the Bill will not only allow directors to be granted a rightful share in the films they create, but should also open up greater export revenue streams for Australian directors from Europe and other territories.[5]

3.5 At the hearing, representatives from the Attorney-General's Department (the Department) asserted that, although the impact of the Bill is likely to be negligible, there 'is an important symbolism in [directors] at least having the opportunity of being

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1 *Submission 6*, p. 2.

2 *Submission 3*, p. 4.

3 Ms Robyn Ayres, Executive Director, ALCA, *Committee Hansard*, 8 July 2005, p. 23.

4 *Submission 6*, p. 2.

5 *Submission 6*, p. 2. A representative from the Department explained that the Bill will strengthen directors' case 'for getting real dollars from the European remuneration schemes to which they presently do not have access to because of no reciprocal opportunity for directors of those countries to get remuneration for retransmission of broadcasts of their films in Australia.' See *Committee Hansard*, 8 July 2005, p. 29.

a first owner of copyright in their film'.[6] Further, '(a)rtistic creators consider those sorts of intangibles important in terms of the symbolic nature of the recognition that they get'.[7]

The Bill's minimalist approach

3.6 Despite applauding the symbolic policy measures taken in the Bill, some submissions and witnesses noted that the copyright balance remains unfairly weighted against directors. They noted that the Bill allows directors to share in only one very narrow and limited right, the value of which has not yet been determined, and, in any case, only with respect to a very small range of films. Moreover, the Bill does not extend to directors the ability to negotiate for other copyright rights that are open to other creative contributors.[8] In its submission, Viscopy noted that the Bill will only have a negligible impact for the current copyright arrangements for producers, because a director will never work without being in an employee relationship with a producer.[9] As explained above, directors who are employees are not automatically entitled to copyright, which is generally vested in their employer.

3.7 Some contributors to the inquiry argued that the Bill is at odds with the Federal Government's Strengthening Australian Arts election commitment, which indicated that more than one right would be granted to film directors. The Bill does not provide directors with an opportunity to benefit from income generated by other statutory licences, including the educational use statutory licence in Part VA of the Copyright Act and the government-use statutory licence in Part VII.[10]

3.8 ASDA contended that the Federal Government has favoured the approach in the Bill in order to minimise the impact of any move to recognise directors' copyright:

> Other than completely maintaining status quo, it is the absolute minimal position that the Government could adopt.
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> In reaching this decision, the Government appears to have accepted the somewhat apocalyptic arguments by certain producers and copyright owners that the added complexity and cost of allowing directors to have access to educational copying remuneration under Part VA of the Copyright Act is too much to bear. That, somehow, having directors included will create an unfair and overwhelming burden on their businesses, threaten their economic viability, and create extreme uncertainty for investors. [11]

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6 *Committee Hansard*, 8 July 2005, p. 28.

7 *Committee Hansard*, 8 July 2005, p. 29.

8 See, for example, ASDA, *Submission 6*, p. 3; ALCA, *Submission 5*, p. 2; Law Council of Australia, *Submission 9*, p. 1.

9 Viscopy, *Submission 1*, p. 4.

10 For example, see Australian Copyright Council, *Submission 2*, p. 3; ASDA, *Submission 6*, p. 5.

11 *Submission 6*, p. 6.

3.9 Similarly, Dr Rimmer noted the Bill's minimalist approach:

> With its current minimalist approach, the Bill will certainly achieve the modest aims of helping to provide recognition to film directors, and providing royalties from the subscription television retransmission scheme. It seems that the Government has limited the rights of film directors because of a concern that providing directors with a full complement of economic rights might result in an adverse impact upon investment in Australia's film industry. It is not clear whether there is any economic evidence to support this contention.[12]

3.10 Ms Katherine Giles, from the ALCA, had a slightly different perspective on the Bill:

> …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.[13]

Inconsistent treatment of film directors

3.11 The committee received substantial evidence pointing to the inconsistent way in which directors are treated under copyright law in Australia. For example, in ASDA's opinion, the lack of copyright rights for directors is inconsistent in policy terms because directors are essentially treated differently to other creators:

> ASDA will continue to argue that directors are in fact entitled to even greater copyright recognition than that proposed under the Film Directors Copyright Bill…However, it submits that being able to negotiate for all statutory schemes that are open to other copyright creators is the very least that directors should be afforded.[14]

3.12 At the public hearing, Mr Richard Harris from ASDA, reiterated this argument:

> 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

12 *Submission 3*, p. 31.

13 *Committee Hansard*, 8 July 2005, pp 23-24.

14 *Submission 6*, p. 2.

> 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.[15]

3.13 Mr Chris Noonan, on behalf of ASDA, emphasised that the collaborative nature of the film-making process adds weight to the argument that directors should not be treated differently to other creative contributors:

> 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.[16]

3.14 ASDA's submission also noted the specific proposal on directors' copyright it made in response to the Federal Government's consultation with key film and television stakeholders regarding the Copyright Amendment (Digital Agenda) Bill 2000. ASDA proposed that films be reclassified as works (as in Option 2 in the EM);[17] and that directors should be recognised as makers of films and joint copyright owners with producers, along with a presumption in favour of producers in relation to primary economic rights (Option 3 in the EM).[18] ASDA also proposed that directors should be granted non-transferable rights to remuneration under the statutory licensing schemes.[19]

3.15 In his submission and in evidence at the public hearing, Dr Rimmer made some similar arguments to those put forward by ASDA. He argued that it is inconsistent to consider film directors as copyright owners of films for the purposes of certain statutory licensing schemes and retransmission royalties, but not for the rest of the economic rights regime. In his view, such an inconsistent approach could mean

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15 *Committee Hansard*, 8 July 2005, p. 12.

16 *Committee Hansard*, 8 July 2005, p. 12.

17 See *Explanatory Memorandum*, pp 8-21.

18 See *Explanatory Memorandum*, pp 8-21.

19 *Submission 6*, p. 4.

that film directors are put at a significant disadvantage in the event of any conflict over the production of a cinematographic film.[20]

3.16 Dr Rimmer also argued that there is a growing problem with the lack of correspondence between the economic rights scheme and the moral rights regime under the Copyright Act. This is because different stakeholders in film are essentially accorded different copyright rights: producers are considered to be the owners of cinematographic films in respect of economic rights; directors will have some claim to authorship in respect of retransmission royalties (if the Bill is passed as currently drafted); and authorship is shared between screenwriters, directors and producers for the purposes of moral rights.[21]

3.17 At the hearing, Dr Rimmer repeated his concerns in this regard:

> 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…[O]n 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.[22]

3.18 This would mean that all creators involved in the film-making process would receive the same complement of economic and moral rights across the range of available subject matter (Option 2 in the EM):

> …film directors could be conceived of as joint authors of cinematographic films for economic and moral rights, along with producers and perhaps screenwriters…Such an approach provides much greater legislative consistency and harmony.[23]

3.19 Ms Robyn Ayres from the ALCA made a similar suggestion to that made by Dr Rimmer:

> 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

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20 *Submission 3*, p. 31.

21 *Submission 3*, p. 32.

22 *Committee Hansard*, 8 July 2005, p. 18.

23 *Submission 3*, p. 32.

should vest with the producer. If the director is a fulltime salaried employee then the copyright should vest with the employer/producer.[24]

Arguments that the Bill is unnecessary and misguided

3.20 The committee received evidence from the Screen Producers Association of Australia (SPAA), on behalf of producers, and the Australian Writers' Guild (AWG), representing screenwriters, objecting in-principle to directors receiving any economic rights with respect to films, even the limited rights granted by the Bill. Although acknowledging that the Bill is 'extremely limited in its scope and will not immediately affect the vast majority of the industry nor the vast majority of our members',[25] SPAA expressed reservations about the long-term impact of the Bill. The AWG were dissatisfied that the Bill extends copyright to directors but not to other stakeholders, particularly writers, who are involved in the film-making process.[26]

3.21 SPAA put forward several arguments, including:

- directors are already in an advantageous commercial bargaining position under existing industry arrangements to negotiate over the profits of film and TV productions, and to receive significant recognition for their work;[27]
- the Bill does not make any distinction between different categories of directors and makes a policy prescription, which is not based on the commercial realities of the industry (for example, directors do not take any 'economic risks' in the film-making process);[28]
- the Bill 'creates a power that can be exercised by a director against the interests of the producers and the investors';[29]
- the Bill has the potential to impact adversely on investment in, and commercial viability of, the Australian film industry;[30] and
- the Bill represents the 'thin edge of the wedge', that is it will 'become the genesis of a number of broader claims both by way of lobbying and also in law' by creating 'a general perception that directors have copyright in films and that this can and should lead to the grant of further rights'.[31]

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24 *Committee Hansard*, 8 July 2005, p. 23.

25 Mr Stephen Marriott, SPAA, *Committee Hansard*, 8 July 2005, p. 1.

26 *Submission 11*, p. 1.

27 *Submission 4*, p. 1.

28 *Submission 4*, p. 1.

29 Mr Geoffrey Brown, SPAA, *Committee Hansard*, 8 July 2005, p. 5.

30 See, for example, Mr Stephen Marriott, SPAA, *Committee Hansard*, 8 July 2005, p. 2.

31 *Submission 4*, p. 7.

3.22 SPAA's main concerns, as elaborated upon at the hearing, seemed to lie with the Bill's potential impact on investment in the Australian film industry, and the 'thin edge of the wedge' issue. The committee will examine these two issues in more detail below.

Impact on investment in the Australian film industry

3.23 As mentioned above, one of the major concerns raised by SPAA was the Bill's potential to impact on investment in the Australian film industry. At the hearing, Mr Geoffrey Brown from SPAA outlined his concerns in this regard as follows:

> 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.[32]

3.24 Further, Mr Brown argued that potential investors require certain guarantees before deciding to commit financial backing to films:

> 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 [Film Finance Corporation Australia] or private investors.[33]

3.25 Mr Brown contended that, despite the negligible impact of the Bill, such issues remain of significant concern for producers:

> 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.[34]

3.26 SPAA undertook to provide the committee with evidence that the measures proposed by the Bill would adversely affect investor confidence. However, it had failed to do so by the committee's reporting date.

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32 *Committee Hansard*, 8 July 2005, p. 2.

33 *Committee Hansard*, 8 July 2005, p. 2.

34 *Committee Hansard*, 8 July 2005, p. 2.

3.27 In response to 'thin edge of the wedge' arguments by groups such as SPAA, and the possible adverse impact on investment in the Australian film industry, Mr Harris from ASDA acknowledged the precedent set by the granting of moral rights to directors. Moreover, he noted the practice within the film industry where directors are required to sign away any copyright they may have:

> 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…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.[35]

3.28 At the hearing, a representative from the Department assured the committee that the Bill would not impact negatively on investment in the film industry:

> 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.[36]

3.29 The representative explained further that, although the retransmission scheme in Part VC of the Copyright Act was introduced by the *Copyright Amendment (Digital Agenda) Act 2000*, no revenue has yet been collected or distributed under it. This is pending a determination by the Copyright Tribunal of the quantum payable under the scheme. The representative told the committee that when the Copyright Tribunal has made a determination, 'the remuneration payable will necessarily be additional to existing sources of remuneration for films' and 'will not impact on investment in films in Australia'.[37]

'Thin edge of the wedge' arguments

3.30 SPAA expressed staunch opposition to the Bill on the grounds that it would set a precedent for directors to pursue further copyright and industrial claims. As Mr Brown from SPAA told the committee, directors will 'have a foot in the door, that is

35 *Committee Hansard*, 8 July 2005, pp 13-14.

36 *Committee Hansard*, 8 July 2005, pp 26-27.

37 *Committee Hansard*, 8 July 2005, p. 27.

the opening and they will go through it with other claims, including other statutory rights regimes'.[38]

3.31 Mr Stephen Marriott from SPAA also raised this issue:

> …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.[39]

3.32 The AWG agreed. Ms Megan Elliott told the committee that 'we believe that the proposed bill will act as a precedent beyond the retransmission scheme'.[40]

3.33 SPAA did not propose any amendments to the Bill in order to allay its concerns. Instead, Mr Brown told the committee that his organisation would be satisfied by a clear statement in the EM to clarify that directors' copyright will be limited to the statutory retransmission right only, now and into the future:

> …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.[41]

3.34 In response to doubts expressed by the committee regarding the practical effectiveness of such a proposal, Mr Brown noted the EM's importance in reflecting the intent of Parliament:

> 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.
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> …

38 *Committee Hansard*, 8 July 2005, p. 2.

39 *Committee Hansard*, 8 July 2005, p. 1.

40 *Committee Hansard*, 8 July 2005, p. 7.

41 *Committee Hansard*, 8 July 2005, pp 2-3.

> We have used them in the past with some bills that have become acts and have been deemed to be deficient—they carry sway…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.[42]

3.35 However, a representative from the Department questioned the utility of such an approach:

> 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.[43]

3.36 Further, the representative explained that the changing nature of copyright law would make any government reluctant to bind itself in this way:

> 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.[44]

The Bill's impact on screenwriters

3.37 The AWG was highly critical of the Bill's provision of film copyright to directors, but not to screenwriters. It submitted that it is unable to support any legislation which recognises directors as 'makers' of films because, in its view, writers are the original creators of audiovisual works through their creation of the script.[45] Further, since film-making is a collaborative process principally involving three key participants – the writer, the producer, and the director – any amendment to the Copyright Act should reflect this collaborative process.[46]

3.38 Ms Megan Elliot, Mr Geoffrey Atherden, and Mr Bruce Pulsford, on behalf of the AWG, elaborated on some of its key concerns at the hearing. For example, Mr Atherden maintained that the Bill accords directors 'a status and a recognition that

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42 *Committee Hansard*, 8 July 2005, p. 4.

43 *Committee Hansard*, 8 July 2005, p. 28.

44 *Committee Hansard*, 8 July 2005, p. 28.

45 *Submission 11*, p. 2.

46 *Submission 11A*, p. 2.

writers do not get'[47] and that the AWG 'would be more in favour of the legislation had writers been included along with directors'.[48] Mr Pulsford noted that the Bill '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…which writers are…left out of as a consequence'.[49]

3.39 However, Ms Elliott emphasised that the AWG does not inherently disagree with the provision of directors' copyright in relation to the statutory retransmission scheme:

> 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…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.[50]

3.40 Dr Rimmer also provided some comments to the committee in relation to screenwriters' copyright:

> 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 cinematographic film 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. The other thing to point out is 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 rules can be sometimes blurred somewhat between those different specialisations within the film industry.[51]

3.41 In terms of a way forward, Ms Elliott told the committee that the AWG's preference would be for the status quo to remain:

> 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.[52]

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47 *Committee Hansard*, 8 July 2005, p. 6.

48 *Committee Hansard*, 8 July 2005, p. 7.

49 *Committee Hansard*, 8 July 2005, p. 7.

50 *Committee Hansard*, 8 July 2005, p. 6.

51 *Committee Hansard*, 8 July 2005, p. 21.

52 *Committee Hansard*, 8 July 2005, p, 7.

3.42 However, in a supplementary submission, the AWG expressed support for a possible amendment to the Bill which affords to writers the same right as directors. Notwithstanding this, the AWG noted that such an amendment would only have a viable practical effect if the right is made non-transferable, and if the right to receive the retransmission royalty is retainable jointly by the writer, the producer and the director.[53]

Lack of consultation with relevant stakeholders

3.43 SPAA and the AWG expressed dissatisfaction with the Federal Government's consultation process in relation to the Bill. SPAA submitted that '(t)here has been a distinct lack of comprehensive industry consultation on the issue of directors' copyright' and that its position, in particular, had been ignored.[54] The AWG noted 'the complete lack of comprehensive industry consultation on the issue of directors' copyright'.[55]

3.44 At the hearing, Ms Elliott from the AWG reiterated this criticism:

> 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…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.[56]

3.45 However, Dr Rimmer presented a different view. His submission noted that:

> …the debate over film directors' copyright has been an exhaustive process, with much special pleading by all sides. The various stakeholders have all had ample opportunities in the past six years in which to address this issue. There certainly has been a comprehensive consultation about film directors' copyright.[57]

3.46 A representative from the Department also maintained that there has been adequate consultation in relation to the issue of film directors copyright. He outlined the recent history of the issue and the consultation process as follows:

> [At the time when amendments to the Copyright Act made by the Digital Agenda Act 2000 were going through Parliament,] (t)he government's position was…that the extension of economic rights to film directors could not properly be considered in the context of those digital agenda

53 *Submission 11A*, p. 1.

54 *Submission 4*, p. 1.

55 *Submission 11*, p. 4.

56 *Committee Hansard*, 8 July 2005, p. 6.

57 *Submission 3*, p. 4.

> 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 director's 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.[58]

3.47 The representative continued:

> Following consideration of the submissions on a possible director's 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.[59]

3.48 The representative also informed the committee that the Federal Government believes that the Bill strikes a fair balance between all relevant stakeholders:

> 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 scheme so as not to disrupt existing industry practices or investment in Australia's film industry.[60]

3.49 In this context, the committee notes evidence from ASDA that SPAA had earlier been prepared to contemplate directors' copyright in films:

> …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

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58 *Committee Hansard*, 8 July 2005, p. 26.

59 *Committee Hansard*, 8 July 2005, p. 26.

60 *Committee Hansard*, 8 July 2005, p. 27.

> 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.[61]

Potential problems with the Bill's practical operation

3.50 While most submissions and witnesses expressed in-principle support for the Bill, some drew the committee's attention to potential problems and suggested possible amendments to improve its technical operation. The committee examines some of these issues further below.

Concept of a 'commissioned film'

3.51 The Bill gives directors an opportunity to be the owner of the retransmission right only in relation to a film which is not a 'commissioned film'.[62] The committee heard that the percentage of uncommissioned films made in Australia is very small, perhaps only 1 or 2 per cent; since directors waive most of their 'rights' under the terms of their contractual arrangements with producers.[63]

3.52 Several submissions and witnesses commented on the issue of commissioned films: some deemed the meaning of the term unclear (for example, whether or not the term is also intended to include films that have been commissioned by broadcasters, distributors or producers, as well as those of a 'corporate nature');[64] others were of the opinion that the Bill should have a wider ambit so that copyright rights for directors are also provided, at least on a theoretical level, in relation to commissioned films.[65]

3.53 In relation to the latter point, Ms Giles from the ALCA told the committee that:

> …in this bill directors have ownership of the retransmission right only in relation to films which are not commissioned. We believe that should…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

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61 *Committee Hansard*, 8 July 2005, p. 14.

62 See para 2.22 above and proposed subsection 98(4) of the Bill.

63 Mr Geoffrey Brown, SPAA, *Committee Hansard*, 8 July 2005, p. 4.

64 See, for example, ASDA, *Submission 6*, p. 8; Australian Film Commission, *Submission 10*, p. 1.

65 See, for example, Australian Copyright Council, *Submission 2*, p. 4; ALCA, *Submission 5*, p. 2; ASDA, *Submission 6*, p. 8. It is possible under current copyright law for the maker of a film to retain copyright in a commissioned film. The Bill would deny directors that opportunity under the retransmission scheme, even though, in practice, directors will ordinarily assign to producers any copyright they are entitled to in relation to a commissioned film.

> 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.[66]

3.54 When questioned by the committee about whether the definition of 'commissioned film' could be refined, Dr Rimmer preferred a broader way of dealing with the issue:

> 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.[67]

3.55 A representative from the Department explained that the Bill 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'.[68] Further, the representative told the committee that the term 'commissioned film' is contained in an existing provision of the Copyright Act and is not altered in any way by the Bill:

> I emphasise that although the draft bill…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 [A]ct that, as I mentioned in my opening statement, has been in the [A]ct 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 [A]ct.[69]

Multiple definitions of 'owner'

3.56 In her submission, Ms Kimberley Weatherall raised a number of legal issues which, in her view, may make the practical operation of the Bill problematic. She pointed out that the Bill adds a new definition of the 'owner' of a film so that, under

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66 *Committee Hansard*, 8 July 2005, p. 24.

67 *Committee Hansard*, 8 July 2005, p. 19.

68 *Committee Hansard*, 8 July 2005, p. 26.

69 *Committee Hansard*, 8 July 2005, p. 29.

the Copyright Act, 'owner' would be defined in two ways for two different purposes. She argued that this may cause confusion and legal drafting problems because it is no longer possible to simply refer to the 'owner' of copyright in a film and be clear on what that means.[70]

Lack of international harmony

3.57 Ms Weatherall also informed the committee that the Bill defines a unique Australian position which is out of harmony with the law in all other significant jurisdictions. She noted that this would add to an already complex international system in relation to the position of directors and, as a result, may impact on the complexity of relevant contractual dealings.[71] This line of reasoning was supported by other submissions and witnesses.[72]

3.58 Several submissions and witnesses compared the Australian approach to authorship and ownership of cinematographic films with the approaches taken in other countries. Dr Rimmer provided a neat summary:

> Films are exploited internationally, so it becomes very tricky if there are different presumptions as to ownership in different jurisdictions.
>
> …
>
> 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.[73]

3.59 Dr Rimmer distinguished the approach in the United States:

> 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.[74]

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70 See further *Submission 8*, pp 1-2.

71 *Submission 8*, pp 3 & 4.

72 For example, see Dr Matthew Rimmer, *Submission 3*, p. 33.

73 *Committee Hansard*, 8 July 2005, p. 18.

74 *Committee Hansard*, 8 July 2005, p. 18.

3.60 Dr Rimmer noted that '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'.[75]

3.61 Ms Giles from the ALCA also highlighted the approach taken in the United Kingdom and France as being particularly noteworthy:

> 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.[76]

3.62 Ms Giles also stressed that, while the ALCA supports the European model over the approach taken in the United States,[77] whichever approach the Federal Government prefers ultimately, it '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'.[78]

3.63 Further:

> 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.[79]

Transferability of rights under the Bill

3.64 Under the Bill, all rights are transferable by contract. Some submissions and witnesses disagreed with this approach. The committee notes that, in many countries, certain rights granted to performers and authors, including directors, are made non-transferable.[80] The ALCA was particularly critical of the Bill's approach in this regard. Ms Giles told the committee that:

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75 *Committee Hansard*, 8 July 2005, p. 20.

76 *Committee Hansard*, 8 July 2005, p. 24.

77 The committee notes that the ALCA does not advocate remodelling the Copyright Act in its entirety to reflect the position in the European Union. See *Committee Hansard*, 8 July 2005, p. 25.

78 *Committee Hansard*, 8 July 2005, p. 24.

79 *Committee Hansard*, 8 July 2005, p. 25.

80 Ms Kimberlee Weatherall, *Submission 8*, p. 5.

> 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.[81]

3.65 Dr Rimmer also noted the relevance of bargaining power to the negotiation process:

> 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.
>
> …
>
> Essentially, the questions about ownership can always be changed in relation to economic rights in 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 essentially 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…very strong bargaining power…[82]

3.66 The committee notes advice from the AWG that, while screenwriters possess underlying copyright in relation to their scripts (as opposed to directors who do not hold copyright in any other subject matter), in reality this counts for very little:

> …writers – as a matter of course – are required by producers to assign almost all parts of their copyright in the script to the producer at an early stage of the production process. As a result it is not the case that writers are able to retain any substantial level of copyright ownership in their scripts and that all primary rights are owned by the producers. It is the producers who will receive a revenue stream from the exploitation of those primary rights and not the writer.[83]

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81 *Committee Hansard*, 8 July 2005, p. 24.

82 *Committee Hansard*, 8 July 2005, p. 20.

83 *Submission 11A*, p. 2.

3.67 A representative from the Department informed the committee that the Bill allows the assignability of directors' copyright so that there is 'sufficient flexibility for the negotiation of contractual arrangements necessary for effectively distributing films'.[84] In terms of lack of bargaining power for film creators, the representative pointed out that the issue of inequality of bargaining positions is not unique to film:

> …the issue of inequality of bargaining positions is not peculiar to film. I gave as a throwaway, for instance, lesser known authors and publishers. That would also include lesser 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 position 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…be piecemeal if we made a special provision without considering those other situations.[85]

3.68 The representative also informed the committee that the issue of transferability of directors' copyright rights was given careful consideration by the Department:

> 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.[86]

3.69 The representative continued:

> 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

84 *Committee Hansard*, 8 July 2005, p. 26.

85 *Committee Hansard*, 8 July 2005, p. 29.

86 *Committee Hansard*, 8 July 2005, p. 30.

> these inalienable rights came. That is not a comment on them or an evaluation of them; it is just saying that they are different.[87]

The committee's view

3.70 It is apparent that the Bill will have little practical impact on the Australian film industry or on investment in that industry. The Bill will only confer a limited right on directors (that is, the right to retransmission in a free-to-air broadcast). This right only applies in respect of the retransmission scheme under Part VC, which is a new regime that has yet to generate an income stream. It does not extend to commissioned films, which are the overwhelming majority of films currently being made in Australia. Nor does it automatically extend to employed directors. Moreover, industry practice in Australia is for directors to assign any copyright they may have to the producers of the film they are to direct. The committee also notes the Department's advice that the Bill will not disturb existing industry practices for the financing of films, nor for securing investment and arranging distribution.

3.71 It is also apparent that opposition to the Bill appears based on the view that conferring any rights on directors will set an undesirable precedent.

3.72 The committee does not share this view. It remains unconvinced by arguments from producers and screenwriters that the Bill represents the 'thin of the wedge'. It is important to appreciate the very limited nature of the right being conferred.

3.73 The committee also considers that there is a need to address the existing anomaly in the Copyright Act that denies directors any recognition for their creative contributions. The film-making process is a collaborative one involving a complex interaction between the principal parties – producers, writers and directors. Each of these parties makes significant and indispensable contributions to the process. Accordingly, the committee believes that the Copyright Act should reflect the collaborative nature of the film-making process and the role of directors in that process. The committee accepts that recognition should extend beyond the granting of moral rights where doing so will not adversely impact on existing industry practices. As explained above, the committee does not consider that the Bill will have an adverse impact on the Australian film industry. Indeed, both SPAA and the AWG acknowledged that the Bill will provide only a limited right to directors which will be brought to bear in very few instances.

3.74 For the same reasons as those outlined above, the committee's view is that consideration should be given to affording screenwriters the same limited economic rights that the Bill will extend to directors. The committee sees some logic in the argument that the Copyright Act has already recognised directors and screenwriters – together with producers – as the three *makers* of a film for the purposes of conferring moral rights and that similar recognition should be afforded when conferring

87 *Committee Hansard*, 8 July 2005, p. 30.

secondary rights, such as the retransmission right. A distinction can reasonably be drawn between secondary and primary rights. Directors and writers are routinely required by producers to assign copyright they may have in a film or script to the producer. The result is that primary rights are invariably owned by the producer, who will receive a revenue stream from the exploitation of those rights. This appears appropriate in that, as SPAA pointed out, it is the producers who carry the entrepreneurial risk.

3.75 The above is an issue on which further consultation appears warranted. The committee notes evidence from the AWG at the hearing that its members had not had the opportunity to discuss such a proposal amongst themselves, let alone with other sections of the film industry. The AWG was given an opportunity to express a view on this point after the hearing in a supplementary submission. However, other stakeholders have not had a similar opportunity and the AWG may also wish to consult more widely on this specific proposal. In the committee's view, the Bill need not be delayed pending consideration of this issue and consultation with stakeholders.

3.76 The committee acknowledges the concerns expressed by SPAA and the AWG in relation to the lack of consultation on the general issue of directors' copyright, and with respect to the Bill itself. However, the committee accepts the assurances by the Department, supported by other submitters, that all relevant stakeholders have been given ample opportunity to express their views over the past six years. Notwithstanding this, the committee considers it unfortunate that the AWG appears to have been left out of the Federal Government's consultation process.[88]

3.77 The committee acknowledges the other concerns raised in respect of the Bill – such as those in relation to the concept of a commissioned film and the need to harmonise Australia's laws on directors' copyright with those of other countries. However, after careful consideration, the committee's view is that these concerns do not warrant rejection of the Bill and the limited right that it seeks to confer on film directors.

Recommendation 1

3.78 The committee recommends that the Federal Government, in consultation with relevant stakeholders, consider amending the *Copyright Act 1968* to provide for screenwriters to be joint copyright owners of films, along with producers and directors, for the purposes of the retransmission statutory licence in Part VC of that Act.

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88 In response to a question taken on notice at the hearing relating to whether the AWG had made any representations to the Federal Government on the issue of directors' copyright in 2001, Ms Megan Elliott informed the committee that she was not employed by the AWG during the 2001 federal election but is 'certain that [her] predecessor knew of the Government's election policy'. She stated that she could 'find no record of any submissions made to Government by [her] predecessor after the 2001 election regarding Directors Copyright': *Submission 11B*, p. 1.

Recommendation 2

3.79 Subject to the preceding recommendation, the committee recommends that the Senate pass the Bill.

Senator Marise Payne

Chair