

I am the founder, owner, and publisher of Scribe Publications Pty Ltd, an independent Australian trade-publishing house that has been in business for over 30 years. We exhibit annually at the London and Frankfurt book fairs; we have rights agents all over the world; and we have strong international connections with agents and publishers. Our company, which specialises in serious non-fiction and quality fiction, publishes 65–70 books a year. We won the book industry’s inaugural small publisher of the year award in 2006, and again in 2008, and many of our books have won or been shortlisted for state and national literary awards. I’ve also been a book printer, an author, a freelance journalist, and a book reviewer. While our company is a member of the Australian Publishers Association, this submission represents our views solely.

## **THE INQUIRY**

Following a referral to it by the Council of Australian Governments, the Productivity Commission is inquiring into the efficacy of amendments made in 1991 to the *Copyright Act 1968* that allow the limited importation of overseas editions of books (‘parallel imports’) into Australia.

The 1991 amendments qualified one of the fundamental protections available to Australian authors and publishers — the exercise of Australian territorial copyright — by introducing two new rules that were aimed at increasing ‘the timeliness and availability of books in the Australian market’. The rules were introduced to stop foreign-owned publishers from sitting on their rights and not exercising them, which was a practice that had been making Australian consumers and booksellers increasingly frustrated. They are now known colloquially as ‘use it or lose it’ rules.

The first of these rules — the so-called ‘30-day rule’ — stipulated that, in order to continue to be protected against parallel imports, Australian publishers had to make their editions of foreign-sourced new titles available for sale within 30 days of their first publication overseas. If a book was not published locally within this period, Australian booksellers could import it from foreign publishers and distributors themselves. A related provision, ‘the 7/90-day rule’, obliged Australian publishers to supply the book trade, within 90 days of being asked to do so, with copies of foreign-sourced books to which they already had distribution or territorial rights.

The commission has now been asked, in effect, to examine whether these parallel import restrictions are working as they were intended, and whether they are justified. However, this straightforward summary of purpose has to be inferred; it is not used in the language in which the inquiry was launched. According to the terms of reference handed down by the Australian government’s assistant treasurer, the commission is obliged to examine:

- The extent to which the provisions promote and achieve the objectives of the Copyright Act;
- whether the provisions amount to a restriction on competition;

- if so, the costs, benefits, and effects of the restriction;
- whether the benefits to the community from the present provisions outweigh any costs from restricting competition; and
- any identified options for reform, including non-legislative approaches, and any transitional arrangements

These terms of reference, which focus on ‘competition issues’, are tendentious and partial — that is, they are designed to achieve a certain outcome, and avoid areas of investigation that should be included. However, for the commission’s benefit, this submission follows the terms sequentially.

### **Do the provisions promote and achieve the objectives of the Act?**

The Copyright Act does not spell out its objectives, although they can be inferred: they are intended to provide copyright holders with automatic and exclusive moral, commercial, and territorial rights to the fruits of their labour. In any case, this term of reference is a red herring, as the 1991 provisions were deliberately introduced to moderate the rights held by Australian publishers and distributors. They intentionally weakened the Act, for practical reasons. Nobody disputes this, and it is hard to understand why the commission should be asked to consider it.

Instead, the commission ought to have been asked whether the provisions work *as they were intended*. That is the logical starting-point for any such inquiry, which is hinted at strongly in the assistant treasurer’s announcements of the terms of reference. In providing the background to the inquiry, he explained that the 1991 provisions ‘were intended to address concerns about delays in obtaining copies of overseas books.’ Strangely, his next paragraph skips a beat and changes the subject: ‘However, there are a range of views about whether the provisions result in significantly higher prices for Australian consumers compared to other markets.’

There is an implication here that the provisions have fixed the problem they were established to deal with — delays in supply — but that an unintended consequence of higher book prices has since emerged. If this is what the assistant treasurer meant, it is hard to understand why he didn’t say so explicitly. It may be that it was a step too far to admit that an inquiry was being established into provisions that had done their job.

In either case, it’s clear that the ‘range of views’ about book prices is what is really driving this inquiry, even though it doesn’t appear explicitly in the terms of reference. I will come to this later in this submission.

### **Do the provisions restrict competition?**

This is a simple question with an apparently obvious answer, but it represents a bizarre inversion of reality.

The Copyright Act itself restricts competition — that is its point. The 1991 amendments were introduced precisely because the collateral damage being caused by the application of copyright purity was becoming unbearable. Australia was in an anomalous situation as a sizeable English-language book territory: its industry was dominated by UK-owned multi-nationals and US-owned distributors and publishers who had an irredeemable conflict of interest when it came to the question of serving the Australian market. If Australia hadn't qualified the exercise of territorial copyright, its book consumers would still be at the mercy of decisions being made by export departments in London and New York. On the other hand, if the authorities hadn't confirmed territorial copyright, there would have been no Australian publishing industry as we know it today.

Under the 1991 provisions, Australia virtually invented the trade paperback (because it was faster and cheaper to get to market than a hardback, which was the format in which the US and UK originated their titles); an improved range of books started to appear in bookshops promptly and at competitive prices; and smaller publishers, in particular, were able to expand their publishing programmes, and to support them with marketing expenditures and author tours. I give more detail on these points below.

Although Australians may not realise it, a publishing industry emerged that was to become the envy of the Western world. With territorial copyright guaranteed, a rights-buying culture emerged, and then a rights-selling one. Microscopic independent publishers became small and then medium-sized ones; new publishers emerged and flourished; multinational publishers beefed-up their local programmes; and independent booksellers retained their vitality and their market-share, at a time when their equivalents were (and are) being wiped out in the United States and the United Kingdom.

Seen in this context, the provisions *increased* competition. They forced rights-holders to either exercise their rights responsibly or lose them (a supply-side reform), and they gave booksellers competitive powers to access overseas titles that they'd never previously had (a demand-side reform).

The real question — again, not stated in the terms of reference — is whether the increased competition has gone far enough. This submission assumes that the begged question is the one that needs answering.

### **What are the costs, benefits, and effects of the restriction?**

Again, this question is loaded negatively, and it doesn't need to be. A more neutral question is: what have been the costs, benefits, and effects of the 1991 provisions?

#### ***Costs***

These are impossible to quantify. Presumably, the implied assumption here is that the provisions have allowed the local prices of overseas-originated books to be significantly higher than they would be if unrestricted parallel imports were to be allowed. Consequently, booksellers are missing out on the opportunities to import the cheapest possible editions of books, and consumers are being charged (much) higher prices for them than they need be.

The most stark presentation of this argument was recently made by a former Labor premier of New South Wales, Bob Carr, in a now-notorious article that appeared in ‘The Forum’ section of the *Weekend Australian* on 13–14 December 2008. Mr Carr, who sits on the board of the Dymocks bookselling chain, sought quite straightforwardly to justify the abandonment of territorial copyright for Australian publishers and authors on the grounds that it would result in cheaper books across the board. For the purposes of this submission, I take his article as a typical statement of the so-called price benefits that would be produced by parallel imports. It is a powerful, simple rationale — one which, as it happens, is completely wrong.

Mr Carr quotes several examples of apparently self-evident local rip-offs represented by local editions of overseas books. Amongst these examples, he cites the fact that the 2008 Booker Prize-winning novel *The White Tiger* sells for \$32.95 in Australia, but for only \$21.53 in the US and \$30.70 in Britain. There is an immediate problem with this case study, in that Mr Carr doesn’t add GST to the overseas prices (which would immediately make the UK edition — the larger, trade-paperback version available in Australia — dearer). More importantly, though, his argument assumes a frictionless universe in which books can be teleported from one continent to another. That is, he doesn’t take account of the fact that booksellers have to physically get copies of a US title into Australia in order to sell them.

To do so, booksellers have to pay for freight, compensate themselves for having to buy copies on a firm basis (not on sale-or-return basis, as they do locally) and, in the process of converting their costs from US dollars to Australian dollars, add a buffer to protect themselves against adverse currency fluctuations. The nett result of these practical factors is that, at the current \$US–\$Australian exchange rate (\$A0.67 to \$US1.00), booksellers multiply US prices by around 2.2 to arrive at an Australian recommended retail price inclusive of GST. Thus *The White Tiger*, which costs US\$14.00 in America, would retail here for \$30.80, assuming that booksellers didn’t round the price up — a maximum potential saving of \$2.15.

In fact, most of the time, locally printed Australian editions of US-originated books sell for less than the US edition would, if booksellers were free to import it. Any Australian publisher could demonstrate this point, but let me give a few examples.

We have just published *Obama’s Challenge*, by Robert Kuttner, a US paperback that retails for US\$14.95 in its home country. If booksellers were able to import it, they would charge around \$32.95 for it, based on the formula explained above. Our recommended retail price is \$27.95.

We have also just published a small-format paperback of *The Canon* by Natalie Angier. The US retail price of \$15.95 would become \$35.00 in local booksellers’ hands. Our price: \$27.95.

We publish many local editions of US-originated titles, and most of the time they demonstrate the same price disparity in Australia’s favour. But what is even more

extraordinary is that arguments such as Mr Carr's don't take account of the fact that Australian consumers get the further benefit of having reasonably priced paperback editions such as these available to them promptly, instead of the expensive hardbacks that US publishers originate.

Thus, for example, we've just published, simultaneously with its US publication, a book about the recent US election campaign entitled '*A Long Time Coming*', by Evan Thomas and *Newsweek* journalists. In the US, it has been published as a US\$22.95 hardback, which would have an Australian RRP of \$49.95. Instead, we've published our edition as a paperback for \$27.95.

In April, we're publishing *The Accidental Guerilla* by David Kilcullen. This title is being published in the US in March as a hardback retailing for US\$27.95 — which would have an Australian RRP of around \$61.50. Our edition, a trade paperback, has an RRP of \$35.00.

Similarly, early in 2009 we're publishing *Legacy of Secrecy*, by Lamar Waldron, an 864-page book on the Kennedy assassination. In the US, it's recently been released as a US\$33.00 hardback, which would be priced here at around \$72.50. We're publishing it as a paperback for \$45.00.

There are countless examples such as these available to demonstrate how Australian consumers continually benefit from the availability of the trade paperback.

But even comparing like with like — hardback with hardback — local pricing is often keener. The US edition of *The Man Who Owns The News*, by Michael Wolff, a recently released hardback biography of Rupert Murdoch, retails there for \$US29.95. If the Knopf edition were to be imported by local booksellers, they would charge around \$66.00 for it. Instead, the Australian edition, published by Random House, is priced at \$49.95.

In any case, book pricing is more at the mercy of booksellers than most book buyers realise. In recent years, when the local dollar was high, enterprising booksellers kept their windfall profits when importing US titles. And some booksellers have given recent evidence that they favour higher — not lower — prices, by selling a range of local books above their recommended retail prices.

The argument to abandon territorial copyright in order to reduce the retail price of books is not sustainable. It is not supported by the facts on the ground and, ultimately, is hostage to foreign-currency exchange rates and the behaviour of booksellers. Of course, if the Australian dollar were to strengthen considerably against the US dollar, local prices would become higher. But this is not, to put it mildly, a sound basis for public policy, or for making such a major change to existing policy.

### ***Benefits***

I have already alluded to the various benefits that the 1991 provisions have either caused or facilitated. Apart from the direct benefits to publishers and booksellers, local authors have gained more publishing choices and greater visibility; major

writers' festivals have sprung up and strengthened around the country, often headlined or attended by foreign authors who otherwise wouldn't have been heard of here; and the local media are continually offered a rich fare of talent to review and interview.

As one example of the latter point, I cite the recent case of Chris Abani, the Nigerian-born US writer whose horrific novella about boy soldiers, *Song for Night*, we published in 2008. (The US edition costs US\$12.95, which would translate to \$28.50 here; our price is \$22.95.) Abani had never been heard of or published in this country. But, as a result of the appearance of his book on our publishing schedule, Abani was invited to give the keynote address at the Brisbane Writers Festival (which turned out to be electrifying), and was profiled widely in the Australian media (including an interview on ABC-TV's top-rating program 'Enough Rope'). His book became the second-biggest seller at the festival and, as a result of the commitment we'd shown, we acquired southern African rights to it as well. To date, we've sold a moderate quantity within Australia — around 3000 copies — but that's a fine result for a book that might never have reached our shores. And booksellers, book readers, and every part of our literary culture and media has benefited from the book's availability.

As a result of countless experiences such as this, Australian book publishing has become the most successful cultural industry in the country (in terms of market share, much more successful than the local film industry) — all without any significant subsidies from government. It has never boomed but, compared to the US and the UK, it has become vibrant. Whereas it was once a plaything of foreign-owned distributors, it has become a complex ecosystem, playing an important role in Australia's economy and culture.

Australian book buyers now have timely access to a wide range of books from around the world. Political books of great urgency and significance are available here instantly; publishers compete vigorously for prize-winning overseas fiction; and some publishers (including us) even publish or translate foreign-language titles from around the world. The cultural benefits to Australia from such activities are immense. They are also unquantifiable, but they contribute significantly to our quality of life — in a country with a small population that is far from the metropolitan centres of power and influence.

Even Melbourne's recent acquisition of UNESCO City of Literature status demonstrates the vibrancy of Australian publishing, and the diversity of its publishing-related activities. Indeed, the pitch to acquire this recognition relied, to a significant extent, on the upsurge of quality independent publishing in the city.

What is not well understood, though, is that all of these developments and achievements have occurred despite the fact that local publishing is intrinsically a high-risk, low-margin business. Ironically, Australian publishers, large and small, foreign-owned and independent, have been able to increase their local publishing programmes precisely because they operate with the certainty of territorial copyright, and are effectively underwritten by access to more profitable overseas-originated titles.

All of this has happened because the 1991 provisions have worked very well — perhaps even better than was anticipated at the time. Nobody argues any longer that local publishers sit on their rights, or withhold titles from the market (even though the 30-day rule is, for practical reasons, very onerous for publishers to comply with — for one thing, it makes their publishing schedules dependent on overseas publishers’, and it puts a high premium on acquiring rights to books well before their overseas publication date, thereby increasing the acquisition risk). It is a settled fact that if publishers do not acquire or exercise their rights promptly to overseas-originated books, the parallel-import remedies provided by the provisions come into effect. As a result, Australian book buyers now have access to US books more-or-less instantaneously — and often before they are available in the United Kingdom. In terms of the assistant treasurer’s own words, there are now no ‘delays in obtaining copies of overseas books’.

Even the supposed problem of book prices being too high is a furphy — at least at anything like current exchange rates.

So the provisions have worked as intended, while producing a host of highly desirable ancillary benefits.

### *Effects*

One of the problematic effects of the provisions is not what they have done, but what they haven’t done: they have done nothing to provide relief to local booksellers against the increasing loss of business to offshore online suppliers. Some industry estimates, for instance, place the value of Amazon’s Australian business at over \$100 million annually.

Because these are mostly purchases, by definition, of overseas-originated titles, the pain they are causing has fed into some bookseller discontent with the current arrangements. They are being prevented from importing parallel editions themselves, while knowing that some of their customers are buying them online at lower prices than are available locally.

This is a real problem, but is a red herring for the purposes of this inquiry. It has nothing to do with territorial copyright, and would remain a marketplace reality whatever regime were imposed. Its real significance is that it is an example of an unlevel playing field — a gift to Amazon and its ilk — as the government imposes no GST on online purchases, to the great disadvantage of local booksellers, let alone local publishers. This is a genuine reform crying out to be undertaken, which would have the added benefit of contributing to government revenues. Of course, it is not included in the terms of reference of this inquiry.

Some booksellers have concerns with other effects, and doubtless they will make these clear to the commission.

I’m aware that they are troubled, in some cases, by the practical difficulty of finding out who holds the local rights for given titles.

There is also some concern that, given the competition from online booksellers, and in an era in which short-run digital printing has become more cost-efficient

and provides more-or-less instant availability, the '7/90' day rule is too generous to publishers. The provision exists to give publishers enough time to decide whether to reprint or resupply overseas-originated titles that are out of stock, and then to do so. Due regard needs to be given to the inherent difficulty of making these decisions — which involves trying to take account of unsold books yet to be returned, and trying to guesstimate levels of future demand — and the need to allow adequate time to physically resupply from local or overseas sources. However, the booksellers have a point: I suspect that if the '7/90' day rule were amended to a '7/60' day rule, publishers would still have adequate time to do their job.

Neither of the above concerns is fundamental to the centrality of territorial copyright enshrined in the current provisions, and both could be addressed by practical means.

**Do the benefits to the community from the present provisions outweigh any costs from restricting competition?**

Again, this term of reference is loaded and misleading. If it is to be taken literally, the answer is simple. Yes, they do: the benefits are substantial, and the costs are virtually non-existent. Competition has been enhanced, and not limited, by the current provisions. The system works very well; it isn't broken, so why would anyone even think about fixing it?

Once again, though, the real question hasn't been asked, which is: what would be the costs and benefits of allowing parallel imports?

In lawless or failed states, copyright does not exist, trade in 'intellectual property' is free, and piracy is rife. On the other hand, in the United States and the United Kingdom — the bastions of free trade — parallel imports are prohibited. Indeed, there is no publishing industry of any significance in the Western world that does not rely on exercising exclusive copyright in its own territory. This is not surprising, as it is impossible to imagine how an industry could develop without such an enforceable right, or how local authors could otherwise gain the full benefits of licensing their own copyrights to publishers. In Australia, which for many decades suffered from being a neo-colonial dumping ground, it is especially important in enabling indigenous publishing — and everything that goes with it — to flourish. To surrender territorial copyright would be the publishing equivalent of abrogating sovereignty. Like taxation, territorial copyright is one of the prices that a community pays for civilisation.

It is impossible to be certain about what would happen if Australian territorial copyright were to be effectively surrendered by allowing the parallel importation of books, as it involves trying to imagine what would happen under a copyright regime that would be unprecedented in Australia's history. However, everything I have learned about international publishing leads me to believe that the costs to Australia and to the Australian publishing industry would be immense. I think that the industry would be deracinated and devastated. And Melbourne, the city of literature, would become a literary ghost town.

Let me explain why I think this.

First of all, even under the 1991 provisions safeguarding territorial copyright, it's been very difficult to persuade US rights-holders — agents and publishers — to license Australian rights to local publishers. This is because most UK publishers insist, when they acquire UK rights from the US, that so-called 'Commonwealth' rights, including Australia, be included in the package. They are very aggressive about this because Australia is a highly profitable market for them. Australian publishers have had considerable success in recent times in breaking this stranglehold, but it is a battle that is still being fought. To give away territorial copyright at this critical juncture would undo more than a fundamental principle — it would return the Australian publishing industry to neo-colonial rule from London, severely weaken the financial basis of the industry, and undermine the prospects and careers of local authors. (For a more detailed account of this subject, see 'Territorial rights and wrongs (aka perfidious Albion)' one of my postings to 'Henry's Blog' on our website at [www.scribepublications.com.au](http://www.scribepublications.com.au).)

Above, I gave examples of US-originated titles that publishers like us acquire regularly. We do this, as I have said, in the face of intransigence and hostility from British publishers. But, more to the point, we can only do this if we have a territory to buy — that is, if our own territory is available to us exclusively. Without the protection of territorial copyright, no local publisher would be able to make an offer for the right to publish overseas titles here with any confidence (as our print-runs could be undermined by booksellers importing competing editions, or by overseas publishers or distributors exporting their editions, especially if the exchange rate moves in their favour). We certainly could not afford to support the publishing of such titles with local marketing and promotional activities.

It's also possible that US rights-holders (that is, publishers or literary agents) would be reluctant to license Australian rights at all, as they might be unnerved or emboldened by the prospect of UK editions competing with theirs in our market, or they might think they could do better by exporting their own editions.

Consequently, Australian local publishing programmes, which, as I've written above, are underwritten by our access to profitable overseas-originated titles, would shrink: there would be a severe reduction in quantity and quality, and a forced emphasis on likely bestsellers.

Meanwhile, Australian publishers selling rights would face unbearable competition from foreign editions of their own titles — either offered at run-on marginal costs, or as remainders. In either case, their authors would get low royalties or none at all. For this reason as well, local publishers would not be able to afford to pay significant advances to prominent local authors, and local publishing programmes would contract significantly.

I suspect that the first casualty would be local fiction, which, for most publishers, is marginal at best. In fact, I find it hard to believe that the local publishing industry would survive in anything like its current form. From multinationals to small independents, publishers would merge, fold, or revert to a stunted cottage

industry — very like New Zealand since it allowed parallel imports. (The commission might think this sounds like desirable rationalisation, of course.)

The collateral damage would also be significant. To begin with, book printers would be devastated, as their business has been built on local and UK-owned publishers printing locally to abide by the 30-day rule. This is very important, because, given that Australia has a relatively small population, book manufacturing rarely has available to it the large print-runs that provide economies of scale and produce lower unit-costs of production. The United States, with 15 times our population, is used to average first print-runs of around 20,000 copies; our equivalent is around 3000 copies. Australian book printers have had to be highly efficient to cope with this reality and stay in business. This is why there are only two large book manufacturers in existence, and why Australian publishers are very concerned that an unintended consequence of allowing parallel imports would be to knock out the weaker of the two firms, allowing the remaining one to force up its prices — and hence the price of books.

Local authors and literary agents would also be imperilled; arguably, our more commercial authors would be better off seeking overseas agents and publishers, while all the others — the vast majority — would struggle to be picked up. Independent and serious booksellers would face a crippling loss of diversity and quality in their range. And Australia would revert to its twentieth-century status of being a territorial dumping ground, our bookshops filled with books that other people wanted us to have.

All of these consequences would follow from responding to the siren song of ‘cheaper prices for books’. However, even if the Australian dollar rose substantially against the US dollar, and stayed there, and even if Australian booksellers promised to pass on all of the resultant savings, I would still argue that the cost of this benefit would be too great.

Don Grover, the chief executive officer of Dymocks, argues for access to parallel imports on the grounds that he wants freedom of choice as a retailer. The trouble is, he can only acquire his freedom by enslaving everybody else in the industry. If Mr Grover had his way, large bookselling chains would be free to import whatever titles they wanted to, whenever they wanted to. Everybody else would be free to wander a blasted heath.

**Are there any identified options of reform, including non-legislative approaches, and any transitional arrangements?**

It follows from all of the above that I find it inconceivable that the commission could find, on the evidence, that there is a need for any significant change to the current arrangements. Indeed, the damage that would most likely be done by allowing parallel importation would be far in excess of any benefits that might be realised by such a change.

In its Issues Paper, the commission canvasses, amongst possible compensations if parallel imports were to be allowed, ‘some form of subsidy to Australian authors

or publishers to provide them with a comparable level of support to the parallel import provisions'. I advise the commission to save its gunpowder, and the government to keep the lid on its coffers. There will be no industry left to compensate, or transition to, if territorial copyright is surrendered.

I also hope the commission realises that it is not coincidental that hardly anyone who understands the industry — from multinational publishers to independent publishers, from authors to literary agents, from writers' festival directors to most booksellers, from the Copyright Agency to state agencies — agrees with the idea of allowing parallel imports. It is most significant, I think, that the vast majority of booksellers, who are the natural constituency and previous champions of the idea, now either oppose or do not support it.

Parallel importation is the hobbyhorse of only a handful of individuals and large bookseller chains — most publicly, the Dymocks group, and some large discount department stores for whom books are a small part of their business. I cannot speak about the individuals, whom I'm sure are acting in good faith, but the chains are certainly putting what they think are their interests above everybody else's.

It is tempting to argue, as well, that a global economic and credit crisis is the worst possible time in which to introduce a change that would cause increased unemployment and financial havoc. This argument is necessary, but it is not sufficient, and it is not one that I wish to rely on. After all, if financial contingency were to be the only reason to leave the current provisions intact, the debate would be postponed, and not resolved.

I urge the commission to recognise the overwhelming evidence that the provisions work very well, to the great benefit of the industry and the community, and that, on the merits of the arguments alone, no substantive change should be recommended or made to them.

If the commission ignores or over-rides the evidence, it will be placing its trust in the cause of market fundamentalism and deregulation at a time when the whole world is suffering terribly from the consequences of such a demonstrably inappropriate approach.

*Henry Rosenbloom*