

Parallel Importation: the current debate in Australia

‘Out of intense complexities, intense simplicities emerge’

Winston Churchill

Preamble:

In July this year the Council of Australian Governments (COAG), representing the Federal, the six State and the two Territory governments, took the Australian book trade completely by surprise by initiating yet another review of the provisions in the Australian Copyright Act that restrict parallel importation. COAG authorised the Productivity Commission to enquire and make recommendations.

The groan around the industry was audible. ‘Oh my God, here we go again!’ said David Gaunt, owner of independent bookshop Gleebooks in Sydney.

This debate has raged since November 1988 when journalist Robert Haupt wrote a series of articles in the *Sydney Morning Herald* arguing that it was high time Australia cast off her last colonial shackle and allowed the free import of books. 1988 was Australia’s bicentennial year. The mood was republican.

The cry was taken up by competition czar Allan Fels whose Prices Surveillance Authority, later to become the Australian Competition and Consumer Commission (ACCC), strongly recommended to the then Hawke Labor government that the very restrictive importation provisions in the Copyright Act since 1968 be totally abolished and an open market established.

As it was in many countries the 1980’s was a decade of wide-ranging economic reform in Australia, propelled by the realization that the country needed to rejuvenate its stagnating industrial, financial and commercial infrastructure to far more effectively compete in the world economy and raise its living standards. The whole panoply of industry protection that had been built up over the previous century needed to be dismantled. The high tariff wall was brought crashing down, and quotas and most other regulatory barriers to imports and capital flows demolished.

One major principle guiding these reforms was the need to provide vigorous and effective competition at all levels of the economy. COAG initiated a series of enquiries which ultimately led to the Competition Principles Agreement. This set binding targets on all governments to break monopolies and establish open and competitive trading regimes and practices across the entire economy.

Intellectual Property laws were not isolated from this agenda, particularly the parallel importation provisions.

What has become known as the ‘30/90 day rule’ was the eventual legislative outcome, coming into effect in 1991. Publishers had 30 days to bring a title first published overseas to Australia or lose territorial copyright protection. If they subsequently went out of stock they had 90 days to replenish, after which time booksellers could freely import. The 30 days concept was the technical definition in the Act of ‘simultaneous publication’. It was the only way Australia could give protection to local titles and still fulfill the Berne obligation of treating local and overseas titles equally. (It was erroneously thought by some commentators that the government was forcing publishers to airfreight in all stock. At that time air freighting was certainly not the norm, as it is now.)

The Australian Publishers Association (APA) fought long and hard against any reform, only very reluctantly embracing the 30 day concept when all else was lost. The Australian Booksellers Association (ABA), led by respected independents David Gaunt, Mark Rubbo from Readings in Melbourne, and Tony Horgan from Shearers in Sydney, had lobbied for an open market.

The Debate:

Over the last 20 years the debate has flared on a number of occasions – particularly in 2001 when the conservative Howard government opened the market for music CDs and software and wanted to do the same for books. The APA and the authors once again vigorously opposed it, and the ABA supported it. Opposition to the move was strong in the Labor party and within the minor parties who had the balance of power in the Senate, however, so it didn’t progress.

To me, an active participant in the debate since day one, this was profoundly disappointing. I have always supported the abolition of the provisions, having been a strong supporter of the economic reform agenda of the previous Labor government. I was also hoping we’d abolish the simple awfulness of the debate! As I wrote at the time:

Occasionally this particular sleeping dog gets kicked into life, usually by Allan Fels, and when it does, you can be sure that our penchant for rhetorical overkill will get a real workout.

Over the last few months we’ve seen some genuine hysteria, especially from authors, and some publishers new to the debate.

I’ve never been able to understand why the book industry finds it so difficult to grasp the basic economic (and hence, copyright) facts surrounding this issue, and why, when Allan Fels, Henry Ergas, Paddy McGuinness, Imre Saluszinsky (economists) and others point them out, albeit clumsily sometimes, and without the specialist trade knowledge familiar to practitioners, we resort to a very familiar but ugly bunker, and lash out at all who dare encroach with their rationalist nostrums on our “cultural” terrain.

This time around the ABA seemed determined not to fall into this trap. It decided to review the arguments dispassionately and honestly, and not resort to the rhetoric and name calling of the past. It issued a statement which basically proclaimed that the proposed abolition of the 30/90 day rule was a fairly innocuous move, and perhaps it was time the trade moved on. In my view it was equivalent to announcing that removing the remaining dingo fence from around suburbia would probably not do much harm to our lifestyle. We don't live on Fraser Island any more.

I couldn't have been more wrong. It seems we do live on Fraser Island. We're surrounded by savage booksellers hungry and desperate to indent everything in sight. Their whole perverted purpose is quite simple – it's to eat us until we die. (1)

The Federal Government had set up the Intellectual Property and Competition Review Committee, led by noted economist Henry Ergas. It had strongly recommended abolishing the provisions.

Removing the restrictions is one effective means of integrating the Australian market into larger, more competitive markets such as the United States, and bringing the advantages of strong competition to the Australian market. (2)

In 2005 the debate flared again, this time prompted by an article written by the new CEO of the large bookstore chain Dymocks, Don Grover. Grover was re-stating Dymocks' position of support for an open market, but this time with a new twist. Instead of the abolition of the provisions being a fairly innocuous move, it would allow booksellers to buy much cheaper from overseas thus improving margins, and to offer consumers lower prices. By this time the Australian dollar had strengthened considerably and publishers were enjoying high profitability on imports. Booksellers were being denied a share.

On some key titles, we have found an enormous reduction in the net price for the same product overseas, compared to the price at which it is being offered locally. However, within the current copyright regime and the 30/90 day rule, we have little leverage with local suppliers.

There is simply little scope for booksellers to improve margins. (3)

Peter Field, then President of the APA and CEO of Pearson Australia, responded with his famous cane toad analogy:

Sugar cane farmers had a problem in 1935. Beetles were destroying crops, so experts decided that a smart solution would be

to import 101 cane toads from Hawaii to control the beetles. That was an experiment that went disastrously wrong. Changing copyright legislation, as Don is demanding, would prove just as catastrophic for our industry – and just as impossible to undo once the door has been opened to invaders. (4)

You can see what's happening here. Some booksellers are starting to overstate what benefits an open market would bring, and publishers what apocalyptic disasters. But interestingly, today's booksellers as a whole are not united any more. Not too many independents are as gung-ho as Dymocks. Even the ABA's official position is softening. At their annual conference in June 2007 they sought accommodation with publishers, seeking a middle ground or at least a shared understanding. Chris Burgess, General Manager of Leading Edge Books, Australia's largest buying group of independent bookstores, put it this way:

In an open market where there is no guarantee of demand from retailers, wouldn't publishers find it even harder to effectively predict stock holdings? Wouldn't this make a case for publishers to risk *less* local editions with a consequent shrinkage of the depth and breadth of titles available to booksellers at a price and in a format suitable to their market?

There are enough concerns to prompt a rethink by those who strongly advocate the removal of the current rules. I have real concerns that the baby would leak out with the bathwater. (5)

So in 2008 the flavor of the debate has shifted. What seems to have happened is that independent booksellers are being more and more persuaded by the publisher and author arguments. David Gaunt has decided to absent himself from the debate this time around, and Mark Rubbo is in two minds:

It's a really complex and difficult situation. There's arguments on both sides. I have sympathy for the authors and publishers but probably less sympathy for books that come from overseas. The concerns of Australian authors are valid.

In the last 20 to 30 years, Australia has built up quite a book industry. It's the most successful cultural industry we have ... you wouldn't want to jeopardize that. But obviously the world is changing and what was appropriate in 1991 may not be now. There probably does need to be some adjustments, since things have changed quite a lot.

But if Australian publishers don't have exclusive rights to a book, they'd be reluctant to spend money to market it and to create a demand for it, which is what's good for us ... It will take quite a few years to see the effect. The cultural impact is potentially harming, that's my greatest concern. (6)

To me this new bookseller uncertainty is profoundly disappointing. The arguments from the authors and my fellow publishers are still uniformly superficial and overblown and demonstrate little appreciation of supply realities or even, at times, fundamental economic literacy.

They universally rest on the flawed premise that the abolition of the parallel importation provisions would abolish Australia as a rights territory.

I am surprised there is support for an “open” market in Australia because it would be no such thing. It would actually be a “surrendered” market. The entire publishing world still works on the basis of territorial copyright and it will do so for a long time to come. (7)

The cultural cost of allowing parallel imports is simply too great. It would be a strong disincentive towards the publishing of Australian stories and to the unearthing and nurturing of new talent. (8)

Australian books could be crowded out altogether; forced off the shelves by floods of cheap books by foreign writers. (9)

All these contributors argue that the fundamental dynamics of the Australian trade, underpinned by the ability of publishers to buy and sell rights, will be destroyed. They think that Australia will no longer be a rights territory if the provisions are abolished, and therefore it will be a chaotic free-for-all where competing British and American editions are imported by all and sundry. No local publisher would ever invest in a strong marketing campaign, release dates would not be under the publisher’s control, publishers would not bring overseas authors to Australia to promote their books in the media or at writers’ festivals, etc.

As I have repeatedly argued nothing could be further from the truth. Australian rights to overseas titles will still be bought in similar volumes as now. They will be established by a contract between the overseas publisher/agent and the Australian (or far more frequently British) publisher, just as they are now. Firstly, Australia’s geography won’t change if the provisions are repealed. We’ll still be 12,000 miles from the major English language publishing centres of London and New York. Secondly, Australia won’t suddenly shrink in population to become a market that can’t support economic print runs. (This is why the Singapore, Hong Kong and New Zealand examples of open markets are profoundly misleading.)

The only thing that will change is that the rights holder will not receive protection under the laws of Australia to indulge in overpricing and underservicing. If this happens they will be vulnerable to buying around, as they should be.

The authors also arrogantly pretend to know how booksellers would act under the changed landscape. Or, in a profound misunderstanding of supply patterns in the trade, how overseas publishers would ‘dump’ massive amounts of cheap books on our shores thus making local publishing virtually impossible. The truth is this: if Australia remains a rights territory, as it most assuredly will, foreign editions can only come here if local booksellers *order them* from an overseas wholesaler. Overseas publishers *can’t dump them*. It simply doesn’t work that way. They’ve sold or don’t have the Australian rights and they would be in breach of contract if they did. And the bookseller won’t order them if the local rights holding publisher makes it an uneconomic proposition to do so. Which they would do by fair pricing, competitive trading terms and efficient distribution.

This is not to say that, from time to time, remaindered foreign editions of original Australian works would not find their way back here. They will. There have been and there will continue to be well-known examples, for whatever reasons. But it defies logic to imagine that this prospect would ever be more than an irritant at the margins.

Michael Heyward, Managing Director and Publisher of Text Publishing in Melbourne, in an article riddled with non-sequiturs, focuses principally on this distinct possibility:

By bringing out Australian editions first, our publishers can prevent US or British publishers dumping low-royalty stock here, ripping off our writers and stealing the market.

Let’s be clear about what the unqualified removal of import restrictions would mean. US, British and Canadian copyright law would continue to prevent the sale of Australian editions of Tim Flannery or Geraldine Brooks or Helen Garner in those countries. But there would be nothing to prevent US, British or Canadian editions of their books being sold here no matter what contractual agreements had been made.

We would have the worst of both worlds for our writers if our booksellers, having been allowed to parallel import without restriction, marked up low-royalty foreign editions of Australian books. (10)

According to Heyward, the 30/90 day provisions, strenuously resisted by publishers 20 years ago, are ‘an ingenious solution to the problem of how to protect both the producer and the consumer’.

Heyward well articulates the current and virtually unanimous view of the Australian publishing and writing industry. It’s as if the provisions have achieved a mythological status. They support the huge edifice and successful dynamic of the whole publishing and bookselling trade; they have stimulated cultural forces such as Tim Winton and Kate Grenville; they have encouraged a dramatic increase in the number of Australian titles being published every year, and the emergence of highly successful independent publishers; they have established Australia as a rights territory; they have allowed Australians to enjoy the best mix of book retailers in the English-speaking world; etc, etc.

All this is nonsense of course, but it is highly politically effective. No arid report or recommendation from an economic body like the Productivity Commission is going to be able to dislodge these noble sentiments from any politician's breast. So my strong sense is that the reform initiative will falter and the 30/90 day provisions remain.

In the meantime the huge and critical activity of importation by the Australian trade from the major English language publishing centres of the world will continue to be constrained and shoehorned into buttressing our defense against the infrequent probability of re-importation of original Australian works, works which make up barely 2% of English language output. This is disproportionate, anti-consumer and a major misallocation of economic resources.

Abolition of the provisions would open the doors to higher levels of direct importing or rights buying by Australian publishers, and importing by booksellers, of so much of the richness and variety of US publishing. Australian consumers would enjoy lower prices, higher production values and far wider availability of important titles on retail shelves.

Booksellers would have a chance of improving their share of industry profitability, a share that has seriously dwindled in this decade in favor of publishers. This can only be healthy for the Australian book buying public, and therefore the trade.

The Commonwealth rights funnel would no doubt be weakened as the Australian market became much more challenging for British publishers. But I wouldn't be at all surprised if, after the initial shock, things settle within a few years and old rights trading patterns re-emerge, perhaps as strongly as ever.

But this would be an unforced, natural and commercial balance, the best outcome for all players. And the miserable and tiresome debate would finally be over!

Peter Donoghue, August 2008.

Notes:

1. From 'Dingoes in Suburbia: In Defense of the ABA' by Peter Donoghue, **The Australian Bookseller and Publisher**, August 2001.
2. 'Review of Intellectual Property Legislation Under the Competition Principles Agreement'; Final Report of the Intellectual Property and Competition Review Committee, September, 2000.
3. From 'Untapped Opportunity, but Significant Hurdles' by Don Grover, **The Australian Bookseller and Publisher**, September, 2005.
4. From 'Be Careful What You Ask For – You Just Might Get It!' by Peter Field, **The Australian Bookseller and Publisher**, November, 2005.

5. From 'What the Trade Is Talking About' by Chris Burgess, **The Australian Bookseller and Publisher**, August, 2007.
6. From 'Writers Throw the Book at Proposed Reforms, by John Elder and Jono Pech, **The Age**, July 20, 2008.
7. From 'No Surrender' by Garth Nix, **The Australian Bookseller and Publisher**, August, 2008.
8. From a letter by Nick Earls to the Prime Minister Kevin Rudd, July 8, 2008, posted on the ASA website: www.asauthors.org
9. From a letter by Jenny Darling to the Prime Minister Kevin Rudd, July 14, 2008, posted on the ASA website: www.asauthors.org
10. From 'Save Their Stories' by Michael Heyward, **The Sydney Morning Herald**, August 9-10, 2008.