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Submission to the Productivity Commission Inquiry into Copyright  
Restrictions on the Parallel Importation of Books

Dear Commissioners,

## **1. Introduction**

I am writing to make a submission to the Productivity Commission inquiry into Territorial Copyright in Australia. I am going to argue that, for the good of the economy and consumers (readers), and for the good of the book industry—writers, agents, publishers, printers, booksellers—we need to maintain the core provisions of the 1991 Amendments to the Copyright Act, in particular the 30-day rule.

Territorial copyright in relation to books—a product that remains one of the enginehouses of ideas in our society—is an issue of enormous importance. Neither it, in the form of the 30-day rule, or parallel importation as allowed under the rule, can be debated without reference to an even bigger question: what kind of publishing industry do we aspire to have in Australia in the twenty-

first century? Do we want to cultivate the expression of our own ideas and culture in a competitive marketplace focussed on export? Do we want to give writers the fullest incentives to succeed both domestically and internationally? Do we want to encourage the writing of books by giving our potential writers the same opportunities to succeed as writers have in the US and the UK? Do we want a publishing industry in which both independent and multinational publishers can compete and succeed? Do we want to continue to encourage new publishers to enter the market and succeed? Do we want to encourage a culture of excellence in editorial practices? What kind of bookselling environment do we want to have in this country? Do we want to remain the English-language market with easily the highest percentage of independent bookstores? How would we change, if we could, the mix of publishers and retailers in this country? No inquiry can deal with the issues of copyright and competition without trying to answer these questions. There are no precedents for a vigorous and competitive book publishing environment in which independent publishers do not play a meaningful role. There is no precedent for an English-language territory as significant as Australia abandoning territorial copyright. The loss of independent booksellers in every foreign territory where it has happened has diminished retail

diversity, and it can be argued that both the US and the UK are currently paying the price for the erosion of their independent bookselling sectors. We are in the extraordinary situation where our independent retailing sector is maintaining its strength. Australian readers and Australian writers—all of them consumers of books in this country—are entitled to make their decisions about what to read and write in a publishing environment which rewards, by means of territorial copyright, editorial excellence and entrepreneurial selling and marketing.

## **2. The costs and benefits of territorial copyright**

The Productivity Commission issues paper sets out to weigh up the costs against the benefits of our 30-day rule. If there are costs, what are they? The issues paper seems to assume there must be costs but the only possible cost it cites is higher prices for the book consumer (with the arguable attendant consequence of this leading to a narrower reading culture) than would be the case without the 30-day rule. Since Australia has very high rates of literacy and of book consumption we must take this argument seriously, while at the same time acknowledging that our high consumption of books per capita has been achieved in the context of prevailing prices. In the light of our flourishing book culture it would be very difficult to

show, since the 30-day rule was introduced in 1991, that prices have discouraged 'readership and the broader social and cultural benefits it may bring'.

What then are the benefits of the 30-day rule? Many questions must be asked to arrive at an answer. How has our industry evolved since 1991? Are more authors being published in Australia now? Has the 30-day rule worked to help our book printing industry? Is the market share of Australian books greater now than in 1991? Are we selling more rights internationally? Are we buying more rights internationally? Has the value of these deals increased since then? Has our publishing infrastructure grown since 1991? Has it diversified? Are there more editors at work in the publishing industry now? Are publishers and editors adding more value to the manuscripts they publish? Is the standard of editing and book production higher than it was in 1991? Do higher editorial standards have an economic value? Are there more bookstores in Australia now? Is there greater diversity of bookstore ownership? Do we have higher standards of book retailing than prior to 1991? Have the prices of books fallen in real terms since 1991?

I believe the answer to all of these questions is yes.

The issues paper never quite says so but it seems to ask many of its questions on the assumption that any costs of the 30-day rule must outweigh the benefits. For instance, the issues paper floats various ideas of how to compensate creators with taxpayer dollars for the loss of the benefits that the 30-day rule brings through the public purse. I think the Productivity Commission could only float this idea if it believed that the costs of territorial copyright were so significant and the benefits so slender that the taxpayer really could fund the inevitable contraction of the industry if territorial copyright were abandoned. I think this belief, if it is the belief of the Productivity Commission, is profoundly mistaken. In any case, the inquiry does not yet know enough about prices to be proposing ideas such as this.

Moreover, the issues paper does not consider any costs associated with removing the restrictions that are in place as a consequence of the 30-day rule. It does not consider the costs to economy through job losses in the printing and publishing industries, it does not consider the costs to the consumer as a consequence of high production costs and therefore higher print prices.

The issues paper does reflect in passing on the environmental costs of removing the import restrictions, and the higher carbon footprint

associated with more books being airfreighted to Australia, rather than locally shipped.

This inquiry is doing things the wrong way around. Whether or not the Productivity Commission believes the costs of the current arrangement are greater than the benefits it ought, in the interests of transparency, put all assumptions to the test. We ought to have a proper and independent price analysis over a sustained period before we enter into any debate about costs and benefits, or any proposed remedies. There has been no ABS data on the industry since 2003/04. The Productivity Commission has done no price analysis, and it is not clear how any meaningful analysis could be done in the very short time frame available.

What if Australian prices under the current regime are not higher than they would be if territorial copyright were dismantled? Which is the same question as, what if Australian prices are already competitive with or cheaper than prices in the US and the UK? Why have a debate about territorial copyright if the consumer already has access to books at internationally competitive prices?

In the absence of comprehensive and independent data I do not see how this inquiry can draw any conclusions about the costs of territorial copyright. The data needs to be broadly collected. A

number of markets—none of them major publishing territories as Australia is—do not observe territorial copyright: New Zealand, Singapore, Europe, for instance. It is essential that we have a transparent price analysis of bestselling titles in those markets, as well as the key markets of the US, the UK and Canada, to find out if books are less or more expensive here in our market with its qualified territorial copyright.

The largest fully open market for English-language books is in Europe. It is reasonable to expect that the Productivity Commission will exhaustively research the prices of English language books in Europe before it reaches any determination about what might happen if the 30-day rule were abandoned or further relaxed. If English-language books are more expensive in the world's biggest open market than they are in Australia, why would this be the case?

I urge the Productivity Commission to think about this issue without preconceptions. The costs can only be greater than the benefits if prices are significantly higher now than they would be without territorial copyright, and there is substantial and reliable evidence that in the absence of the 30-day rule prices would fall significantly.

### **3. Import and export of copyright**

The issues paper notes the fact that Australia is a net importer of copyright. And it observes that we import more books than we export, though no one has properly measured the value or growth of our exports, either of books or rights. Every writer whose book is published in the US or the UK (or any other market) is a net exporter of copyright. Some publishers, of which Text is one, are net exporters of copyright. The dismantling of territorial copyright, to the extent that it disabled the export of Australian writing, would therefore damage creators and entrepreneurial producers.

It would be wrong to argue that because Australia is a net importer of copyright that it should legislate to ensure that it remains a net importer of copyright, which is effectively what we would be doing apropos of books if we dismantled territorial copyright.

It would also be wrong to argue that our qualified territorial copyright means that Australians make higher payments to foreign book creators. This argument is cited on page 7 ('the benefits of the restrictions for local book creators are far outweighed by higher payments from Australians to foreign book creators') and again on page 15 ('if parallel import restrictions increase book prices in Australia, they will ostensibly benefit not only Australian copyright holders but also foreign copyright holders') But what if the qualified



restrictions we have do not result in higher prices? In that case the restrictions benefit Australian copyright holders but not foreign copyright holders. In any case, the overwhelming majority of Australian authors are on domestic royalties and the overwhelming majority of foreign authors whose books are distributed here are on far lower export royalties. (Export royalties are commonly 10 per cent of net receipts, around 3 per cent of a domestic royalty calculated on recommended retail price less GST.) In general, the only foreign writers on domestic royalties are those who have licensed their books to Australian publishers just as Australian authors receive domestic royalties in foreign countries when they license their books to publishers in those countries.

On the assumption that prices are competitive our qualified territorial copyright benefits Australian creators above foreign creators because Australian creators are in general paid much higher royalties here. Whether or not the import restrictions are removed, export royalties will remain in place for the overwhelming majority of foreign writers.

The effect of abandoning territorial copyright would be to benefit foreign copyright holders at the expense of Australian copyright holders simply because the volume of foreign books sold here

would be likely to increase. Australian writers would begin to earn export royalties on foreign editions of their books sold here, so their incomes would fall. The logic of the propositions cited in the issues paper seems to me to be quite wrong.

The issues paper cites the conclusion of the Ergas report that territorial copyright cannot be 'justified in terms of some inherent right that attaches to creative effort'. Why not? Territorial copyright makes copyright itself enforceable. Territorial copyright means that the contracts that creators enter into under the terms of copyright are in tune with the law. Territorial copyright can therefore be justified as a means to enforce the inherent right of copyright that attaches to creative effort. The Copyright Act cannot fulfil its objectives in the absence of territorial copyright because without it copyright holders cannot enforce the contracts they license.

Trading in rights—buying and selling—is critical to any modern publishing industry. Any visitor to the Frankfurt Book Fair where publishers from the nations of world gather each October can see this in a moment. This activity can only happen with territorial copyright. The benefits of selling the territorial rights of Australian authors abroad should be obvious. The benefits of buying Australian territorial rights from foreign writers to publish here are

also widespread. The books of these writers are printed in Australia, creating jobs. Their contracts are written and negotiated in Australia, creating jobs. Their books may be edited for Australian conditions, creating jobs. Their books may be designed in Australia, creating jobs.

The mix of foreign and local writers on a publishing list is as critically important to the cultural health of that list as is the mix of foreign and local authors in a bookstore. Buying rights introduces writers and ideas into a culture in a more active and engaged way than mere book distribution could ever do. There is a great deal of evidence that the 30-day rule has allowed Australian publishers who license rights to bring books to market successfully in ways that would never have happened otherwise. Licensing foreign rights here has added to the intellectual vigour and cultural diversity of our society.

#### **4. Public subsidy**

The issues paper exercises the idea that the book industry could be compensated by public funding for the loss of benefits that come with territorial copyright. I find it extraordinary that a commission which says its job is to act in the long-term interest of the community thinks it is a good idea to put a healthy and thriving

industry on public sustenance. How is this in the long-term interests of the community? Effectively the taxpayer would be subsidizing the increased revenues that that would flow to foreign copyright holders at the expense of Australian copyright holders.

What the Productivity Commission is really proposing here is the partial replacement of copyright, a market-driven instrument, with patronage, in this case the patronage of the taxpayer. This is a regressive move. The most recent model of systematic government patronage of literature and publishing is the Canadian model, which has accompanied not dispensed with a rigorous commitment to territorial copyright. The Canadians spend about \$50 million a year on their publishing industry and have extremely strict parallel import provisions. It would not occur to them to trade one off against the other because they want their writers to succeed internationally as well as domestically. Their program has been spectacularly successful.

The Productivity Commission wrestles in the issues paper with the idea of the cultural value of books. There are many arguments to be put about this, arguments involving the benefits of reading, of learning, of exercising the imagination, arguments which are finally about the quality of our society and our democracy. But in terms of

the arguments the commission wants to float that creators and publishers should all be put on some form of cultural dole, one thing is clear. The cultural value of books depends in part on the *absence* of government funding. Free speech in a democracy inheres in a free publishing industry no less than a free media. The most obvious outcome of a broad-based system of public patronage in the absence of fully enforceable copyrights would be the loss of independence for our writers and publishers.

The Productivity Commission seems to have done no modeling about how much it would cost the taxpayer if all those affected were compensated for the abolition of territorial copyright. Total development grants for writers and writing are less than \$5 million dollars annually. Total public funding of creators, including PLR and ELR, is less than \$30 million annually. Publishing is a \$1.5 billion industry, bigger than film and recorded music combined. Writers, agents, publishers, printers and many independent booksellers would end up on the public drip.

This is only to consider those who are already part of the industry. How do you compensate a debut author whose novel is rejected because of the loss of confidence that would follow the abandonment of territorial copyright? How do you compensate an

author whose book is not edited or published to the same standard because of the contraction in the industry that would follow the abandonment of territorial copyright, and who therefore loses sales? How do you compensate an author whose foreign rights are not sold because in the absence of territorial copyright the publisher which might have sold them no longer acts entrepreneurially? How do you compensate a trainee editor who cannot get a job because the publishing industry has contracted?

## **5. Booksellers, availability and GST**

Our bookselling environment is dynamic. We have already observed how healthy our independent retailing sector is. I fear for these booksellers in the absence of territorial copyright because the widespread co-operative arrangements between publishers and independent booksellers would be likely to erode. What publisher, for example, would launch a new book by an author in a bookstore selling foreign editions of the same book or send an author on tour to that store? It is the independents who do the vast majority of this kind of entrepreneurial work with Australian authors, and publisher investment in that work would be likely to shrivel if we scrapped the 30-day rule.

We have aggressive discounting cultures across the book trade so that the average selling price of bestselling books is far below the recommended retail price. It is important to remember that those discounted editions of Tim Winton or Helen Garner still earn their writers full royalties because they are domestic editions. It was a surprise to discover, when the ACCC investigated the A&R acquisition of Borders, that both chains routinely inflate the prices of some books above the recommended retail price. It is difficult for booksellers to argue about the prices of books if this is a widespread practice. It would be a terrible outcome for Australia to become a low-royalty territory in the absence of territorial copyright in which books were not cheaper at all.

The issues paper is at pains to stress that the Productivity Commission wants to hear about any matter which submitters consider relevant to the terms of reference. At the same time the Commission makes it clear that it does not believe that the disadvantage that Australian booksellers suffer because they are compelled to charge GST, whereas overseas online booksellers are not, falls within its terms of reference. It is a pity that the Productivity Commission, in the context of an inquiry into the rules that govern book importation, feels it is narrowly bound by the terms of reference, and will not consider evidence on this issue.

The right of consumers to parallel import for own use is clearly enshrined in the 1991 legislation. It is precisely the exercise of this right that enables consumers to evade the GST. Any review of the legislation should consider this anomaly. It was impossible to anticipate in 1991 that online consumption of books would assume the dimensions that it has.

GST-free online sales may now be 10 per cent of the total trade. If so, a quarter of imported books evade tax. Why does Amazon have privileges denied to our booksellers who work tirelessly to sell Australian books? Some American states compel Amazon to charge sales tax. Making the GST rules fair for book importers is a long-overdue reform in the national interest.

Of course the obvious solution is to zero-rate books for GST, which is what happens in the UK. That would make the playing field level for everybody. It would also immediately reduce book prices by 10 per cent.

The 30-day rule was introduced specifically to tackle problems of availability. It has worked as a powerful incentive for publishers to bring books to market in a timely way. I think the evidence of its effectiveness is irrefutable. At the same time, online bookselling has abolished completely the concept of the unavailable book. For the



first time in history, no book is unavailable anywhere to any consumer with access to a phone line, a computer and a credit card.

Traditional booksellers have a powerful competitor in online selling with its promise of virtual total availability, though the importance of the traditional bookstore where the books themselves can be browsed and the customer service is face to face has in many ways been enhanced by the fact that it now has a digital competitor.

Some booksellers may want to argue that the abolition of territorial copyright would help them to compete with online selling. But booksellers can now import any book at any time on customer request. The migration of consumers to online buying is happening in all territories whether or not they observe traditional territorial copyright. It is hard to see how the consumer who wants to buy a book could be better served than now, when they have the maximum freedom to parallel import, and an unprecedented range of Australian books on offer, thanks to territorial copyright.

The migration of consumers to online buying is not going to be modified by changing our import laws. As an independent publisher I understand the booksellers' frustration—we compete against publishing companies massively bigger than we are every day—but why should a shift in buying patterns provide an excuse to erode the copyrights of authors? Why should online technology

become the excuse for Australian booksellers being allowed to sell editions of Australian books not authorized by their writers to be sold here? This is precisely the point Peter Garret was making in his September 2007 statement 'New Directions' when he promised that: 'Labor will examine ways to adequately protect artists' copyright given the challenges posed by new and emerging platforms and changes in consumer patterns.'

## **6. The fate of the book printers**

Many overseas books are now printed here as a result of the 30-day rule, a factor which incidentally could also help to keep prices low especially where the book is published in trade paperback rather than hardcover, though Australian printers are also printing hardcovers in Australia for foreign, especially British, publishers.

This issue with the printers is critically important and it is given insufficient attention in the issues paper. The 30-day rule keeps our book printing industry alive. It allows our two major printers—McPherson's and Griffin Press—to manufacture books that would otherwise be imported. This work earns tens of millions of dollars and creates skilled jobs. It helps keep prices low, which encourages publishers to take risks with new authors. McPherson's is the biggest employer in Maryborough, giving jobs to 300 people in a

town of 9000. Close to 50 per cent of Griffin's business is import replacement. Without the 30-day rule one of these printers will almost certainly fail, and trigger a domino effect in the book industry.

Last year Griffin and McPherson's, the two leading book printers, wanted to merge, arguing that their survival was otherwise uncertain. The ACCC blocked the merger on the grounds that it would stifle competition. The consequences for books if we lose a printer would be bleak. As the ACCC observed, the absence of competition among printers 'will likely lead to higher book printing prices (or lower service conditions) for publishers, and, ultimately consumers'. More expensive print prices would mean fewer and dearer books, fewer authors published, fewer innovative publishers, less choice for consumers.

The evidence of the ACCC suggests that the absence of territorial copyright might in this case lead to higher prices and loss of range for consumers. This point of view does not find its way into the issues paper.

## **7. The evolution of the book industry under the 30-day rule**

As noted, we have extraordinary reading cultures in this country. Our consumption of books per capita is one of the highest in the

world. We have wonderful, mushrooming literary festivals. The interesting question is why our reading cultures have not until recently (post 1991) begun to generate equivalent publishing cultures.

Our publishing industry is much younger than those in the US or the UK. Our publishing history, like many other of our histories, is one of isolation. Our classic literature is still intermittently known even in Australia and effectively unknown outside Australia. It is only in the last few decades that our writers have begun to be read elsewhere, a process that has accelerated since 1991. We are now systematically promoting Australian literature internationally.

Australian publishing companies of all sizes now publish internationally successful Australian writers. Many Australian companies export either rights or finished books in ways that would have been unimaginable before 1991. It is hard to imagine a more exciting period in the evolution of writing and publishing in this country than the one we are in now.

As a result of the 30-day rule, our market has grown. We have more books, more writers, more publishers, more booksellers, and a greater market share for Australian books. The 30-day rule is so successful because it gives us the best of both worlds: a market

which has encouraged and allowed significant growth in the publishing of Australian literature and which allows for a great degree of flexibility in the retailing of many categories of books. The 30-day rule is a great Australian adaptation that has given us the most creative and efficient territorial copyright regime in the world. It allows us to have our cake and eat it too.

Under the rule, Australian publishers are obliged to behave competitively, but can do so without surrendering traditional territorial copyright. The 30-day rule gives Australian writers and Australian publishers the same right to control territorial copyright as writers and publishers in the US, Britain, and most other countries. It allows us to compete on a level playing field.

The 30-day rule encourages investment in editorial infrastructure. Like many publishing companies in Australia, we at Text have created the infrastructure to edit, design, publish and promote books to world-class standards, and then to reach readers in other countries through the selling of international rights. Our company, for instance, in the fourteen years of its existence, has vigorously nurtured the careers of a number of Australian writers, such as Tim Flannery, Helen Garner, Kate Grenville, Peter Temple, Anna Funder, Shane Maloney, Murray Bail, Inga Clendinnen and

Raimond Gaita. In addition we have licensed many important foreign writers: Lionel Shriver, Carlos Ruiz Zafon, Barack Obama, Lloyd Jones are a few. Our company is part of a flowering of Australian publishing under the current territorial copyright regime.

The infrastructure is critical. One third of our staff is editorial. We employ so many editors because we want our books to be of the highest possible quality. It is the goal of our company to offer Australian writers, both debut and established, a world-class publishing experience. We know this is essential to success, especially in exporting rights. The international rights market is extraordinarily competitive, hungry for merit. Our editorial infrastructure has grown in step with our rights activity. Growth in rights allows growth in editorial. Editorial excellence enhances rights outcomes. All of this depends on territorial copyright.

But rights activity is not simply about selling. It is also about buying and our editorial infrastructure puts us in a strong position to acquire international rights because we have the expertise to assess the manuscripts offered to us. This is a critical part of our business, because it increases the intellectual richness and diversity of our list, is attractive to writers who might want to be published by Text, and

enhances our offerings to booksellers. It is also easier to trade if trading means both selling and buying. We buy from the publishers we sell to, and I have no doubt that it is powerfully in the interests of the Australian writers we publish that we are active buyers on the international market.

There are more publishing companies in Australia now than in 1991, in spite of the fact that the last couple of decades have been a period of conglomeration in the industry internationally. The increase has come through the growth in independent companies, which utterly depend on a level territorial rights playing field because they do not share the same economies of scale as multinational Australian publishers. In 1991 Allen & Unwin was the only significant new independent publisher in Australia. Now we have Scribe, Black Inc. Hardie Grant, Text, Giramondo, Black Dog and others. There is no doubt that technology has played a role in lowering the entry price for new publishers. But how will this growth in new publishing houses continue if the incentive to export is taken away with the removal of territorial copyright? Companies like Scribe and Text are irretrievably dependant on their international trading to support their Australian publishing activities.

Australian publishers (ie, both independent and multinational Australian publishers with extensive Australian lists) care passionately about the publishing of books in Australia because our responsibility is to create, as best we can, the conditions which will allow our writers to tell our stories. Nobody else will do this for us, and we can only do it to the highest standards if we are allowed to compete equally with foreign publishers through territorial copyright.

If we remove territorial copyright what will be the model for growth in our publishing industry?

#### **8. The cultural benefits of territorial copyright for books generally and for Australian books**

The Productivity Commission has asked whether the cultural benefits generated by books differ from those of other forms of cultural expression. They do, even though the benefits generated by books are complementary to rather than exclusive of those generated by film, TV, radio, music etc. Nonetheless, unlike film, TV, radio and music, we consume books at our own speed. We are in control of how we read. Books represent a respite from distraction, and I think this is largely why people read, especially fiction. Most other forms of media are designed to distract us from



ourselves. When you are reading you are communicating intimately with the voice of the author. You are making that voice your voice and this imaginative process is central to being immersed in a book. You are underlining your own individuality, and this is why books are critical to our democratic vitality because, apart from their educative properties, they remind us of our singularity as an individual and the worth of our point of view. We often use the phrase 'lost in a book' to describe this feeling of complete connection with what we are reading, and disconnection with the everyday world. We can't be lost in a newspaper or a magazine or a film or a TV show, either because their contents are disconnected or because we do not control the speed at which we consume them. Two people reading the same book on a bus will be having quite different experiences, even though the words are identical.

On page 10 of its issues paper the Productivity Commission questions whether there are cultural benefits attaching to the reading of Australian books as opposed to foreign books. There is a benefit attached to the reading of all books but a country without books in which it can describe itself, without a literature, without its own histories and biographies, without its own novels and poetry and plays, will be imaginatively impoverished.

The anticipated loss of confidence, in the event of territorial copyright being dismantled, would hit Australian authors and Australian publishers hardest, because they are the ones who will be penalised for taking the global risks that success in this industry requires. The ultimate loser would be the Australian consumer who will have a poorer choice of those titles to select from. The issues paper quotes from a 2001 Books Alive survey that found that 10 per cent of Australians purchased a book on the basis that it was by an Australian author. If this means that 10 per cent of consumers discriminated in their purchases solely on the basis of the nationality of the author it is a remarkable statistic, and helps explain why Australian books have a market share much greater than Australian film (less than 5 per cent) or Australian music (around 10 per cent) does. The writers of the issues paper think this is a small percentage. 'Only 10 per cent,' they say. But 10 per cent gives a clear competitive advantage to the publisher of world-class Australian books. That competitive advantage would of course be eroded without territorial copyright because foreign and low-royalty editions of those books would be dumped here.

It must be clearly understood that the great majority of those Australian authors whom most Australians want to read, ie bestselling Australian authors, do not publish solely for the

Australian market. The abandonment of territorial copyright threatens the income and incentive to create of our best and brightest authors, at the same time as it reduces the creative publishing infrastructure available to debut authors. Abandoning territorial copyright is a way of legislating to entrench a status quo in which most Australian authors can publish solely for the Australian market. We should be encouraging every Australian author, agent and publisher to find a global audience.

This is why any proposal to dismantle territorial copyright is in fact a radical instrument of cultural engineering. In its 1995 report the PSA was explicit about this. It commented (p. 108) 'In general, books which are distinctively Australian are less likely to be affected by an open market. Indeed, it could be expected that an open market would give greater encouragement to publishers to publish such books to the benefit of local authors.' These sentences puzzled me. Many of the distinctively Australian books I read are also published outside Australia. The PSA's argument in 1995 fell into place once I realised that 'distinctively Australian' means 'lacking in export potential'.

It is no longer the case that profoundly Australian books cannot be exported, and this is partly due to the entrepreneurial activity of

Australian publishers. At international book fairs I am constantly being told that interest in Australian writing internationally is growing rapidly, and the success of Australian publishers in selling rights supports this. It would be a disaster if in the absence of territorial copyright the competitive response of Australian publishers was to publish books without export potential in order to shield themselves from the consequences of exporting rights.

Publishers of local histories, Australiana, etc would not be adversely affected. Publishers of bestselling fiction and non-fiction with export potential would be severely affected. Publishing is a globalised business, but in an open market entrepreneurial Australian publishers would pay a price, which no publisher in Britain or the US has to pay, to enter this business. Without territorial copyright Australian publishing might again become the ghetto it once was. It is not to the benefit of local authors for them to be published by Australian publishers who are fearful of the consequences of exporting rights.

The key question posed by the identification of this competitive response from Australian publishers is: who is going to publish in Australia bestselling Australian writers who also have international readerships? The answer, I believe, is foreign companies who would be competitively advantaged in the quest for such authors by the

absence of territorial copyright. It is not in the national interest for Australian copyrights to go offshore.

And who is going to publish debut authors in the absence of territorial copyright? Fewer publishers, taking fewer risks, I would suggest.

When those copyrights go offshore the words change. The Productivity Commission will also have to take into account in its deliberations on cultural issues the fact that US editions of Australian books frequently edit out Australian words to replace them with US idioms. There can be hundreds of changes per title: 'footpath' might be replaced with 'sidewalk', 'thong' with 'flip-flop', 'torch' with 'flashlight' and so on. These modified editions would be sold and read here. Do we want our kids to grow up reading these modified editions?

## **9. How publishers will fail if territorial copyright is abolished**

The removal of territorial copyright would trigger a contraction in every aspect of our industry: fewer authors published, fewer books printed, fewer Australian-made books sold. The rights market would be eroded because one could no longer define Australia as a publishing territory. The extent of this decline would exactly mirror

the extent to which the abolition of territorial copyright was effective.

The removal of territorial copyright would cause Australian publishing companies and book printers to contract in size. It would seriously damage smaller and independent companies like Text, perhaps to the point of failure. Seven years ago, when the previous government wanted to change our territorial copyright regime, the Explanatory Memorandum which accompanied the Copyright Amendment (Parallel Importation) Bill 2001 acknowledged that if the legislation was passed 'there may be some loss of confidence' and that 'some individual publishers' may 'fail'. Let us be quite clear about this. The first publishers who will fail in the contraction that follows the absence of territorial copyright are independent Australian publishers, not multinationals. If the purpose of removing the restrictions is somehow to make multinational and foreign companies earn their Australian market share then its purpose will always be doomed because its single greatest effect will be to give the multinational and foreign publishers unprecedented access to this market at the expense of their independent competitors here. It will hand the territory to them. In the absence of territorial copyright we will have a monochromatic publishing industry, and a monochromatic book retailing industry.

The Explanatory Memorandum a few years ago effectively conceded this, and implied that the policy of the government of the day in proposing this legislation was to marginalise independent book publishers. 'The largest publishers,' it declared, 'are large corporations well able to make adjustments to meet changed business conditions. The small publishers may be less well-placed but many publish in niche markets that are unlikely to become targets for parallel importers.'

This was a gross distortion for the many independent publishers who rightly regard the publication of Australian writers as a mainstream activity and who rightly behave entrepreneurially to export the work of those writers. What is the niche market? Australian writing?

#### **10. How the abolition of territorial copyright would destroy successful rights trading**

Under a regime of unilateral parallel importation there is no such thing as a successful exporter of rights, because an exporter of rights will be punished precisely to the degree that he or she is successful. The greater the number of books that are manufactured outside Australia under licence, the greater the number of books which will be imported into Australia to capture the market which the

Australian publisher created in the first instance. It is hard to imagine a more effective means of making Australian publishers, who cannot export their editions into those significant territories where they have sold rights, uncompetitive.

The removal of parallel import provisions would transfer revenue from Australian companies and from Australian authors to multinational and foreign companies and it would make it extremely difficult for internationally focussed Australian publishing companies to succeed. It would make Australian companies uncompetitive. It would impede their ability to provide Australian consumers with greater choice than has ever existed before in the Australian books they can buy and read.

It is in the national interest for a copyright-poor country like Australia to encourage Australian creators and licensors of copyright. It is in the national interest for Australian publishers to exploit those copyrights internationally. It is Australian government policy, through the Australia Council, to assist Australian companies to find export markets for their books. Government export assistance has helped companies like ours to find new international markets for Australian books.



It is also true that Australian publishers are operating in a market where the demand for Australian books is at historically high levels and is growing. More than 60 per cent of books sold in Australia are originated here. Australian companies now have a domestic base which is secure under the current copyright regime to allow them to cultivate export markets. It is in the national interest to maintain a territorial copyright regime for Australian publishers to continue to make gains in the domestic market to enhance this export drive.

At Text, the foreign revenue we attract by selling rights considerably exceeds the royalties we pay in Australia. This figure is not just significant because it represents a happy story about taking Australian talent to the world and boosting the incomes of Australian writers. It represents a state of affairs in which the value (measured in Australian dollars) of our books in print outside Australia is greater than the value of our original domestic editions. Of course this makes sense in a world in which our major English-language trading partners constitute a population of half a billion people. But it also shows just what can be achieved if—as the current territorial copyright regime allows us to—we conceive of Australia as a distinct territory upholding the same rights in copyright as our trading partners. And it shows just how vulnerable we would be if those books produced precisely because we have

licensed rights outside Australia are allowed under Australian law to be sold here. The profitability of our company is directly related to our ability to license foreign rights on exactly the same terms as the foreign publishing companies we compete with on a global basis. Between a fifth and a quarter of our company's revenue is sourced internationally. Around two-thirds of the royalties we pay our writers are sourced internationally.

Removing territorial copyright would give access to the Australian market to foreign publishers to whom Australian publishers sell rights without any reciprocal access to their markets. Editions of our books published by foreign publishers would be sold here even though Australian publishers could not export their editions of Australian books into overseas markets because overseas markets are closed once the rights sale has been made. This would discriminate against Australian publishers in favour of foreign and multinational publishers.

In selling rights, Australian publishers currently insist that the foreign publisher remove Australia (and New Zealand) from the list of territories where it can sell their edition of the book. Australian publishers have no trouble doing this now because they can secure territorial copyright by publishing first under the 30-day rule. In

general Australian publishers have no trouble publishing first where they only have Australian and New Zealand rights because the foreign publisher will co-operate under the current rights regime.

Without territorial copyright Australian publishers would be selling rights from a much weaker bargaining position. The foreign publisher might well refuse to buy rights unless Australia is designated as a non-exclusive market. British publishers who still think of Australia as a traditional territory for them to exploit would be likely to argue this case, because the fact that they have territorial copyright while we do not would give them a competitive advantage over the Australian publisher.

This would put the Australian publisher in a terrible position. To refuse the sale would be to strip the writer and the publisher of rights income. To accept it would be shrink the domestic market catastrophically as the foreign publisher distributed its own free-riding editions here. Publishers would have no competitive response.

In cases where the Australian publisher has only Australian and New Zealand rights, contracts with the author in New York and London might in the absence of Australian territorial copyright

designate Australia as a non-exclusive territory and foreign publishers would be free to import their books directly as soon as they publish.

The foreign publisher would use its ability to enter the Australian market to extend its print run and lower its unit cost. This would happen even though the Australian publisher has edited, designed and manufactured the book here, and has invested in promoting the book with author tours, bookstore signings, poster campaigns and so on. The free-riding foreign publisher might pay the Australian author an export royalty for Australian sales, far lower than the full domestic royalty the Australian publisher would pay. The Australian writer would subsidise this sale, and the Australian publisher would have already subsidised the cultivation of the market for the foreign publisher.

These are all competitive advantages which would be denied the Australian publisher of an Australian book which cannot sell its book in the foreign territory, cannot extend its print run to lower the unit cost and must pay a full domestic royalty. The competitive response of Australian publishers might be to avoid investing resources in books where they only have Australian rights. If this were so the Australian writer might be published in Australia out of

New York or London. Or might not be published at all because the publisher will decide that the risk is too high. This is not in the national interest.

Australian writers with international readerships might conclude that it was not rational for them to sign contracts with Australian publishing companies. They might conclude that it makes more sense to sign contracts in New York and London which would designate Australia as a non-exclusive territory, and to insist on receiving a full domestic royalty for their Australian sales. In this way the Australian writer would be able to diminish the number of competing editions in this market to two rather than three, and to diminish the possibility of being paid export royalties for their domestic sales. The local publisher, however adept at editing, designing and promoting books, would be at a competitive disadvantage because it could not reassure the writer that the incursion of foreign editions in to this market would be offset by sales of Australian editions in foreign territories. Those territories would be closed by the rights sale. It could not reassure the writer that copies of foreign editions sold here would earn a full domestic royalty.

Over time the ability of independent Australian publishing companies to publish internationally successful writers would erode. Australian publishing companies which are subsidiaries of multinationals would be likely to become the conduits of these authors into the Australian market. This is how those Australian writers with international markets were once published—before Australian writing and Australian publishing was taken seriously internationally. The dramatic recent growth of Australian companies exporting rights might be halted. Copyrights would go offshore and revenue would be transferred from Australian companies to foreign companies.

What might happen where the Australian publisher controls world rights and has been able to find a co-operative foreign publisher to buy rights who is prepared to exclude Australia from its own non-exclusive territories? The foreign publisher would in the normal course of its business sell copies of its books to wholesalers with whom the Australian publisher has no contractual relationship and who would be free to bring the competing edition into this territory. The publisher cannot refuse to sell to the wholesaler and would have no control over where the wholesaler sells the book. It is natural that the wholesaler would want to sell foreign editions of

Australian books into this territory because in many cases this territory would constitute the largest market for the book.

The foreign edition would then be sold under export royalty clauses alongside books sold by the Australian company on which a full domestic royalty is paid. The author would be shortchanged and the Australian publisher, who has invested heavily in the domestic market, would be competitively disadvantaged. The competitive response of some Australian publishers might be to lower domestic royalties but it would be unethical to offer less than full domestic royalties to Australian authors for copies of their books sold in Australia. The Australian publisher would almost certainly be forced to lower its advances to Australian writers. In any event, revenue would be translated from Australian publishers to foreign wholesalers and publishers.

Australian publishers would also be vulnerable to remaindered foreign editions—from which the author either derives a minuscule royalty or no royalty at all—being dumped here. This practice would directly impact on Australian publishing companies. Remainders would generally enter the market some time after a book has been published here and would have their greatest impact on backlist titles, which might be selling well for a number of

reasons: simply because demand has grown, or because a film based on the book is screening or because the book has been placed on school courses.

## **11. How publishers help authors to develop their talent and generate backlist sales using territorial copyright**

It is worth discussing in some detail how backlist sales can work because backlists have embedded in them the publisher's significant investment in editorial, design and market development. All publishers survive on their backlists. Our own backlist at Text—and we are a young company—is typically 30 per cent to 50 per cent of our sales, and many retailers report that 50 per cent of their sales are of backlist books. Let us imagine an Australian publishing company signs a manuscript by an unpublished Australian author and makes a considerable editorial investment to work with the author to bring that manuscript up to the requisite standard which will position the book for success. The publisher publishes the debut novel which is well received, and sells a modest quantity, say 3000 copies. The publisher's investment in editorial, design and marketing is yet to pay off on this front list edition but the author is talented and is writing with confidence so the publisher decides to back its judgment and offer a second contract. Two years later it publishes a



second novel, having made an even greater investment in editorial, design and marketing, which does better because sales are helped by the reputation of the first novel, and because the Australian publisher now has a base from which to promote the writer. The second novel sells say 6000 copies. At this point sales of the first backlisting novel jump because new readers of the second novel want to read both books. It is very possible that in the year in which the second novel is published the first novel would sell 2000 copies as readers catch up. A third contract is signed. The publisher is yet to earn out on its advances for the first two, but it completely believes in the talent of this author and both writer and publisher have formed a great creative partnership. Let us imagine that, two years after that, the Australian company breaks the writer out with a third novel. The writer is now approaching a peak of his or her talent. Let us say that the third novel sells 20,000 copies, is shortlisted for a prize or two (the Booker, the Commonwealth), and the publisher sells the entire list of three novels around the world, but in particular to US and UK publishers. At this point the backlist is selling very well indeed as new readers continue to catch up. In a market without territorial copyright these escalating sales would be vulnerable to low-royalty competing editions and dumped remainders, even though the British and US publishers have done

none of the painstaking development work or shared any of the risk in developing the talent or the market of the writer. The market the Australian publisher has developed would be cannibalised.

I have taken the trouble to paint this scenario because it is real and it describes how Australian—and foreign—publishers work over long periods of time to build authors. In the absence of territorial copyright it will be much harder for Australian publishers to do this kind of development work because the goal of their work—international success on the back of national success—will be the very thing that erodes their profitability.

## **12. The competitive responses of Australian publishers if the 30-day rule were abolished**

What tactics would be available to the Australian publisher to protect its activities in a market without territorial copyright? Where the Australian publisher has world rights it can delay selling the book for as long as possible. This would essentially be about three months before Australian publication. The agents who represent our company, for instance, in New York and London prefer to sell from manuscript in advance of Australian publication. They do this because they want the publishers with whom they deal to respond in the same way that they do to their own domestic manuscript

submissions. It puts them in the best position to make a sale. In general the foreign publisher would then publish the book six months to a year after the copyright licence has been acquired. This gives the Australian publisher about a 3–9 month window of opportunity to sell the book without foreign competition. A 9-month window is not nearly long enough to prevent erosion of precious sales.

This option of delaying rights sales is available where the Australian publisher has world rights. In cases where the Australian publisher has only Australian and New Zealand rights this tactic is not available. The Australian publisher of, for instance, Tim Winton, publishes his books at around the same time as British and American publishers. Foreign editions of Tim Winton's novels might be imported into Australia from the moment of their publication in the US or the UK.

Even in a market without territorial copyright booksellers might prefer to deal with local suppliers rather than overseas wholesalers and publishers. This might provide consistent revenue streams for Australian publishers. But these revenue streams would only be reliable to the extent that a market without territorial copyright had failed to change the status quo. The more successful the dismantling

of territorial copyright was, the more that Australian publishing companies would pay a price for their own entrepreneurship of their Australian titles. The more that Australian booksellers ordered Australian books in their foreign editions from overseas wholesalers, the greater would be the cost to the Australian economy.

### **13. The operation of the 30-day rule in the market**

Under the 30-day rule, the market is effectively open now, with the exception of almost all Australian titles and most—but certainly not all—bestselling titles. Territorial copyright does not apply to thousands of titles. The real price of books in Australia has been falling in Australia since 1991. The last time we had any systematic attempt to measure prices was when the ACCC did its 2001 Update. Table 2 (p.7) in that update demonstrated that in two of the three years surveyed by the ACCC bestselling titles were cheaper in Australia than in the US and in all of those three years bestselling titles were cheaper in Australia than in the UK. This was unequivocal evidence that the current regime is working both for the benefit of consumers who have access to cheaper books and for creators whose territorial copyright is protected. The data powerfully suggested that eliminating territorial copyright

completely in Australia would not cause prices to fall further than they already have.

Why is it that bestselling Australian books are cheaper than in the US or the UK or comparable in price, if indeed this has remained the case? There are clearly a number of factors at work. A falling dollar creates pressure to raise prices on overseas books. The falling dollar also works in the short term to make Australian books cheaper in international price comparisons. These two factors over time could be expected to balance each other out, but the 2001 ACCC report suggested that Australian prices have fallen further than could be explained by fluctuations in the exchange rate.

Perhaps one key reason, however, is that the current law already provides so many opportunities for parallel importation of foreign books. Australian booksellers have privileges that no bookseller in the US, the UK or Canada enjoys. Parallel importation is allowed where the publisher has not met the requirements of either the 30-day rule or the 7/90-rule. Parallel importation is allowed where the consumer places a special order with the bookseller. The bookseller is allowed to promote the special order and to place the foreign book on the shelves of the Australian bookstore if the special order is not collected. The emergence of on-line bookselling has also given

the Australian consumer unprecedented access to foreign books. Parallel importation is permitted for own use under Australian copyright law, even if the Australian publisher has met the requirements of the 30-day rule.

These special-order opportunities for Australian booksellers exist of course in regard to Australian books published internationally just as they do in regard to foreign books. It is logical that Australian booksellers would take advantage of them if Australian books were not competitively priced in relation to their overseas editions because in some cases the largest market for the book would be in Australia. The current regime thus provides an incentive for internationally focussed Australian publishers to price their Australian editions competitively while also providing them with the same protection of territorial copyright that British and American publishers have.

Where would the impetus for further falls in prices come from if the market were fully open? It is here that the situation with books may be different from the situation with CDs. CDs are an homogenous product which can be cheaply manufactured and freighted. The consumption of CDs is not language-specific in the way that the consumption of books is. CDs can be cheaply produced in low-wage

countries for export all over the world, because there is sufficient market for them in those countries to give the manufacturer a base. There was patchy evidence a decade ago that parallel importation allowed some CDs to be imported into Australia more cheaply than was previously possible. The key factor however in the forces brought to bear on the prices of CDs now is, of course, forms of digital distribution. The consumption of CDs is shrinking as listeners choose to hear and consume music in digital form using digital platforms.

The paper book is however alive and well, and will be for the foreseeable future. The supply of books onto digital platforms remains a tiny fraction of total book sales. It may grow in the years to come but it is not the case that digital books have begun to erode existing territorial arrangements, not at all. The US is the leading country in the consumption of digital books. Its territorial copyright is firmly in place, as is understanding of territorial copyright as it applies to other countries.

Books, printed on paper, are shaped and designed for particular markets, and their consumption depends on the language they are written in. It is not the case that English-language books are being manufactured and published under licence in territories apart from

their traditional territories to enable them to be imported more cheaply if territorial copyright were removed. Even if this were the case it is highly debatable whether their quality would be acceptable to Australian consumers.

The 30-day rule has created an impetus to for publishers to price their books competitively relative to overseas prices because it allows for the constant, daily possibility of the lifting of import restrictions. It has caused the market to behave as though it were already open while at the same time providing traditional territorial copyright to Australian publishers.

This is a critical point. As I hope I have demonstrated, Australian publishers have flourished because they have been able to publish Australian books to world-class standards and sell the rights in them to foreign publishers without fear of being competitively disadvantaged. They have been able to develop the infrastructure to publish mainstream titles and to edit, design and promote these books without the fear of free riders entering the market to take advantage of the fact that it has been cultivated by the Australian publisher. They have been able to take risks and find new voices. Some of these new voices are now routinely heard around the world.



## **14. The export of Australian literature**

This year *The New York Times* named seven Australian writers on its annual list of the 100 Notable Books of the Year. Australian writers are routinely shortlisted for the most prestigious awards in the world. It is reasonable to argue that overseas readers have begun to enjoy and value Australian literature because we have successfully marketed it to them. It is reasonable to conclude that territorial copyright has permitted Australian exporters to flourish because the 30-day rule gives them the same rights as their competitors in the US and the UK. It has permitted them to flourish not because they have resorted to publishing books without export potential but because they have used territorial copyright to increase their revenue by selling rights and buying rights which in turn has allowed them vigorously to compete for new writers. The evidence of new Australian publishers emerging in an environment where the real price of books has fallen would also suggest that such publishers can compete on price because they are offering genuine choice to consumers who increasingly want to buy Australian books. They can compete on quality with overseas books.

I want to make this point very strongly. As the publisher at a leading independent Australian company, I represent one aspect of

the future of Australian publishing. I support a regime that allows books to be sold in Australia at reasonable and competitive prices in a fair market. My plea is that we be allowed to compete with multinationals and foreign publishers in the way territorial copyright allows us to do so. We have no interest in being protected from foreign publishers but am pleading for the maintenance of a climate in which Australian publishers can compete around the world on an equal footing. It is reasonable to conclude that some of the sales of our bestselling Australian titles—titles such as Kate Grenville's *The Secret River* or Tim Flannery's *The Weather Makers*—are at the expense of foreign titles being sold in Australia. It is in the national interest for Australian publishers to flourish domestically and internationally.

Lower prices might increase demand for books and might lead to more people reading books, a desirable national goal. Lower prices might lead to more people reading Australian books, an even more desirable goal, but international best-practice can only be achieved in Australia if Australian publishers can invest the creative and capital resources in this market on the basis of territorial copyright. Only with effective territorial copyright can fair and effective competition be achieved.

Australian publishing companies need territorial copyright to buy and sell rights. A flourishing Australian publishing sector, which has now unmistakably emerged, provides the best long-term hope for Australians to read foreign and Australian books produced in a truly competitive market. It would not be in the national interest if Australian publishing companies were prevented by parallel importation from taking their place in the world of international publishing.

I cannot see a single benefit for Australian writers or Australian publishers in an open market. The competitive disadvantages Australian publishers would be forced to operate under would make them eternally marginal players. It is not in the national interest for the growing Australian-owned sector of the publishing industry to shrivel in the international environment of books.

## **15. Conclusion**

I note in conclusion that many of the previous inquiries into this issue were clearly aware of the problems created by parallel importation for Australian publishers and for Australian writers. In 1989 the PSA recommended that 'restrictions on parallel imports would still apply to pirated editions of books, and books by Australian resident authors with separate Australian publishing

contracts (protection which was recommended to continue only for ten years)'. This recommendation may have been in contravention of the Berne convention, and in the event the 30-day rule was adopted by the government of the day to grant territorial copyright to Australian writers and publishers. I am of the view that the 30-day rule is a superior solution in any case because it allows Australian publishers to become fully fledged rights traders like publishers in the US, the UK and Canada.

I also note that in 1995 the ABA submitted its 'Australian Version' proposal to the PSA inquiry. This was a proposal that only books published in an Australian version should have importation rights. It clearly would provide for Australian writers and publishers to work on the same competitive footing as writers and publishers in foreign territories, and it would allow for full rights trading. This proposal might warrant further investigation.

A number of booksellers I have spoken with who support territorial copyright and the 30-day rule can nonetheless see no further purpose in the 7/90 day rule. It is now irrelevant to many publisher practices and an impediment to bookseller efficiencies. If the 7/90 day rule were replaced by an equivalent 30-day rule booksellers

would benefit. It is important to note that the 7/90 day rule can be relaxed without eroding the rights of authors in this market.

Whatever view we take of the 7/90 day rule now, we should be aware of just how successful the 30-day rule remains. It provides a first-world copyright regime for Australian publishers and writers and it has worked to transform the pricing trends for books in Australia to the benefit of Australian consumers. I strongly argue for its retention.

Yours sincerely,

Michael Heyward

Publisher

The Text Publishing Company