



Australian  
Competition &  
Consumer  
Commission

# **ACCC submission to the Productivity Commission's study into Copyright Restrictions on the Parallel Importation of Books**

January 2009

© Commonwealth of Australia 2009

This work is copyright. Apart from any use permitted by the *Copyright Act 1968*, no part may be reproduced without permission of the Australian Competition and Consumer Commission. Requests and inquiries concerning reproduction and rights should be addressed to the Director Publishing, Australian Competition and Consumer Commission, GPO Box 3131, Canberra ACT 2601.

# Contents

<b>Glossary.....</b>	<b>v</b>
<b>Summary.....</b>	<b>vii</b>
<b>Introduction.....</b>	<b>1</b>
Current restrictions on the parallel importation of books.....	2
Copyright Act provisions.....	2
The parallel import restrictions.....	2
Relationship between intellectual property protection and competition law .....	3
Assessing the parallel import restrictions.....	5
General approach.....	5
Are restrictions on parallel imports of books justified? .....	5
Summary .....	9
<b>Prior ACCC reports and methodology .....</b>	<b>11</b>
Methodology used by the ACCC .....	11
Price studies.....	11
Availability studies .....	16
Assessing the impact of removal of restrictions on parallel imports— case studies .....	18
<b>Conclusion.....</b>	<b>23</b>
<b>Attachment A: ACCC reports and submissions on parallel importation.....</b>	<b>24</b>
<b>Attachment B: Past report survey methodologies and outcomes .....</b>	<b>25</b>
<b>Attachment C: Table summary of past report survey methodologies                     and outcomes .....</b>	<b>32</b>
<b>Attachment D: Interaction with the Trade Practices Act .....</b>	<b>37</b>



# Glossary

ABPA	Australian Book Publishers Association
ACBA	Australian Campus Booksellers Association
ACCC	Australian Competition & Consumer Commission
AGPS	Australian Government Printing Service
CLRC	Law Review Committee
CPI	consumer price index
Ergas report	Review of intellectual property legislation under the Competition Principles Agreement, final report by the Intellectual Property and Competition Review Committee
IPCRC	Intellectual Property & Competition Review Committee
ISBN	international standard book number
MED	Ministry of Economic Development
NECG	Network Economics Consulting Group
NZIER	New Zealand Institute of Economic Research
PC	Productivity Commission
PSA	Prices Surveillance Authority
RRP	recommended retail price



# Summary

The Australian Competition and Consumer Commission (ACCC) and its predecessor, the Prices Surveillance Authority (PSA), have at the request of the Australian Government conducted a number of public inquiries and reports on parallel importation since 1989. In this submission to the Productivity Commission's (PC's) study into *Copyright Restrictions on the Parallel Importation of Books*, the ACCC draws on its past experience, explaining the approach it considers to be appropriate in assessing whether the current restrictions should remain.

The *Copyright Act 1968* provides certain exclusive rights to holders of copyright in literary works relating to the production of works, including to reproduce, publish, perform, communicate to the public and make an adaptation of works. A key objective of copyright law is to overcome the market failure associated with non-exclusivity of consumption of copyright (the free rider problem) by granting exclusive statutory property rights, thereby encouraging the production of creative efforts. By encouraging socially optimal levels of production, copyright law is complementary to, and shares an objective with, competition law to enhance overall societal welfare.

However, the parallel import restrictions in the Copyright Act apply special rules to the distribution (rather than production) of certain works. Having regard to the policy objectives of intellectual property and competition, including the Competition Principles Agreement, a blanket legislative restriction on parallel imports that relates to distribution should not be maintained unless it can be justified by demonstrated societal benefits. Given that the parallel import restrictions amount to a restriction on competition, consistent with the approach taken in the Ergas report<sup>1</sup>, the onus of demonstrating such benefits should be on those advocating for their retention.

In effect, parallel import restrictions grant an import monopoly to intellectual property owners. The ACCC's primary concern in this regard is the potential for the exercise of market power conferred by such restrictions to the detriment of consumers in the form of higher prices and/or restricted supply. While amendments to the parallel import restrictions aimed at supply problems may have addressed those concerns to some extent, it may be the case that Australian consumers are still paying too much for books.

Reports by the ACCC aimed at quantifying the likely costs to consumers of the restrictions were prepared until 2001. These consistently showed that (at least until 2001) though some titles were priced competitively with comparable overseas markets, there were large differences in respect of other titles. Availability of titles was also an

---

<sup>1</sup> Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, final report, September 2000.

issue. As a result, the ACCC considered that there were substantial consumer benefits that could be realised in an open market.<sup>2</sup>

Parallel import restrictions in Australia were removed for sound recordings in 1998 and computer software in 2003. While there has not been a formal review of the effect of parallel import competition on the price of these products and the industries in which they are supplied, periodic price surveys conducted by the ACCC up to the early 2000s suggested that the difference between Australian and overseas prices of sound recordings narrowed considerably after the importation provisions were repealed.

Studies in New Zealand assessing the impact of the 1998 removal of the restrictions on parallel imports have concluded that the reforms had resulted in lower or stable prices, improvements in supply and service and product differentiation. In addition, the studies found that the reforms had not resulted in any adverse effect on the creative book industry in New Zealand.

In conclusion, the ACCC submits that special legislative restrictions on the distribution of parallel imports in this industry are not necessary in order to address the free rider problems which are the focus of the general copyright protections in the production sphere.

While free riding may occur in the sphere of distribution—for example, on marketing and promotional investments or on pre- and after sales service—this is nothing unique to, nor a necessary feature of, intellectual property. Rather it is a feature which may occur in any market to a greater or lesser degree and one which is generally tackled by contractual means.

As such, any arrangements that seek to overcome free riding in the sphere of distribution should be treated just as they are in other industries and be subject to the general provisions of the Trade Practices Act. Where such contractual restrictions may contravene the Trade Practices Act, their potential public benefits can be considered on a case by case basis under the authorisation and notification provisions of the Trade Practices Act.

---

<sup>2</sup> Recognising that the PC may wish to conduct a further study in 2009, the submission also includes a discussion of methodological issues involved in such price and availability surveys.



# Introduction

The ACCC is the independent Australian Government statutory authority with primary responsibility for ensuring that individuals and businesses comply with the Commonwealth competition, fair trading and consumer protection laws. The ACCC assumed the functions of the PSA and the Trade Practices Commission in 1995.

A key objective of the *Trade Practices Act 1974* is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The role of the ACCC under the Trade Practices Act in intellectual property matters includes enforcement of the restrictive trade practices provisions (Part IV), adjudication of authorisation and notification applications (Part VII) and price inquiries, price notifications and price monitoring (Part VIIA). The ACCC has additional functions in relation to the dissemination of information, law reform and research (s. 28). The ACCC also has a role under the *Copyright Act 1968* in relation to proceedings before the Copyright Tribunal of Australia.

At the request of the Australian Government, the ACCC and the PSA have released a number of sector-specific reports into the parallel import provisions and price surveys comparing Australian prices with prices in overseas countries. The reports ranged from public inquiries, monitoring reports and general reports. The specific objectives of each inquiry were defined by the terms of the reference from the Australian Government, so not all were held under public inquiry conditions. The most recent ACCC report was published in 2001.<sup>3</sup> In this submission, reference will be made to the ACCC when referring to previous work of the PSA or ACCC, unless comment is made about a specific PSA report.

Attachment A contains a list of all published reports and submissions by the PSA and the ACCC in relation to parallel importing. The main features and outcomes of those studies are detailed in attachment B and summarised in a table in attachment C.

The reports have consistently concluded that removal of the importation restrictions from the Copyright Act is likely to benefit consumers in providing lower prices and improved availability of books. Potential costs of removing the import restrictions were considered but it was concluded that the likely net overall benefits of repealing the import provisions would be socially beneficial.

This submission provides some background to the competition issues surrounding the restrictions on parallel importation of books in Australia and comments on what the ACCC considers is the appropriate framework for assessing whether such restrictions

---

<sup>3</sup> ACCC, 2001, *Summary of the Commission's March 1999 Report on The Potential Consumer Benefits of Repealing the Importation Provisions of the Copyright Act 1968 as they Apply to Books and Computer Software – Including Price Updates for Books, Computer Software and Sound Recordings*, April 2001.

should be retained. It also discusses the interaction of private contractual arrangements designed to restrict parallel importation with the Trade Practices Act in the event that the parallel importation restrictions were repealed at attachment D. This submission explains the previous studies and methodology undertaken by the ACCC, in order to assist the PC in considering what, if any, price studies it will undertake as part of its study. Finally, the experience in New Zealand, which removed its restrictions on parallel imports, is outlined.

## Current restrictions on the parallel importation of books

### Copyright Act provisions

The Copyright Act provides certain exclusive rights to holders of copyright. In relation to books, copyright protects original ‘literary works’<sup>4</sup> and gives the copyright owner a number of exclusive rights for a specified period in relation to **production** of the work. These are the rights to:

- reproduce the work in material form
- publish the work
- perform the work in public
- communicate to the public
- make an adaptation of the work.

Owners of copyright in published editions have the exclusive right to reproduce the material.

### The parallel import restrictions

In addition to the rights set out above, the Copyright Act also restricts **distribution** via parallel imports of some copyright-protected material. The parallel importation provisions of the Copyright Act provide that the copyright in respect of literary works is infringed by a person who, without the licence of the owner of copyright, commercially imports an article into Australia, if the importer knew or ought reasonably to have known that, had the article been made in Australia by the importer, it would have constituted an infringement of copyright.<sup>5</sup>

---

<sup>4</sup> Part III of the Copyright Act.

<sup>5</sup> Section 37 of the Copyright Act provides that it is an infringement of copyright to import a literary work (among other works) into Australia for commercial purposes without the copyright owner’s consent where the importer knew, or ought reasonably to have known, that if the literary work had been made by the importer in Australia, it would have infringed copyright. Under s. 38, it is generally an infringement to sell an imported literary work if the seller knew that if the work had been made in Australia by the importer, it would have infringed copyright.

Parallel imported books refer to books that have been lawfully published in another country and then imported into Australia without the permission of the Australian copyright holder or licensee. The parallel importation restrictions give the Australian rights holder an import monopoly and restrict competition between domestic and overseas versions of copyright goods.

Amendments to the Copyright Act in 1991 altered the regime applying to books, aiming to address issues of availability.<sup>6</sup> The ‘30-day rule’ means that if a book is not published in Australia within 30 days of overseas publication, protection from the parallel import restrictions is forfeited permanently. The ‘7/90-day rule’ means that if a publisher does not respond to a written order within seven days, or is unable to fill that written order within 90 days, booksellers can import enough copies to satisfy their reasonable requirements until the publisher restores availability. Booksellers are also able to import to fill verifiable orders from individuals and libraries. Furthermore, individuals retain their ability to import for their own use.

### **Relationship between intellectual property protection and competition law**

As set out in its submission to the Intellectual Property and Competition Review Committee (IPCRC) review in 2007, the ACCC agrees with the general proposition that there is no general or necessary conflict between intellectual property rights and competition policy. Both share the same objective of overcoming market failures and increasing economic welfare. Intellectual property laws are also directed at certain other policy objectives, such as equity and moral rights. The Trade Practices Act also accommodates such objectives through the authorisation and notification provisions, which allow for exemption from the Trade Practices Act on public benefit grounds.

A key economic objective of copyright law is to encourage production of creative works by granting exclusive statutory property rights to certain creative efforts. These exclusive rights are necessary to address free rider problems that arise in the sphere of production of creative works; in the absence of intellectual property rights it is not possible to exclude third parties from consuming the underlying intellectual effort. Without the ability to exclude others, creators of intellectual property may have insufficient incentive to invest in new intellectual property that would otherwise be useful to society.

This free rider problem is a feature of most intellectual products, including books. Copyright law addresses the problem of non-exclusivity by granting the copyright owner the exclusive right to control the reproduction and sale of the product. It attempts to trade off the benefits of providing incentives for the production of intellectual works by conferring exclusive rights against the costs of limiting access to public goods. By encouraging socially optimal levels of production, copyright law is complementary to competition law and pursues similar objectives of promoting societal welfare.

---

Sections 102 and 103 of the Copyright Act extend importation protection to subject matter other than works. Essentially, in relation to books, these provisions protect the published edition of a book.

<sup>6</sup> The *Copyright Amendment Act 1991* introduced, among other changes, ss. 44A and 112A into the Copyright Act to improve book availability.

However, the provision of exclusive rights incurs a social cost in restricting the diffusion and use of these creative efforts. The need to balance the benefits and costs was recognised in the considerations to enact the Copyright Act:

The primary end of [copyright law] is to give the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.<sup>7</sup>

From a public interest perspective, the balance between the interests of copyright creators/owners and consumers should be maintained.<sup>8</sup>

Competition policy seeks to address a type of market failure that occurs where competition is insufficient to ensure prices reflect the opportunity costs of production. Where a firm has market power, prices can be raised above this level, extracting monopoly rent for the firm but resulting in lower demand and output levels than would occur in a competitive market, where resources would be allocated to balance consumer willingness to pay with the opportunity costs of production. Competition law aims to address this type of market failure by regulating market structure and conduct in such a way as to promote the operation of competitive markets.

However, the benefits that regulation seeks to realise come at a cost. Just as competition law unchecked may discourage the very thing it aims to achieve through increased compliance costs or creating inefficient market structures, there are also costs associated with excessive protection of intellectual property. Similarly, over-regulation of intellectual property may discourage further investment and/or additional investment may not produce benefits commensurate with its opportunity costs, exacerbating other market failures, particularly those associated with competition. That is, the higher prices that result from over-regulation of intellectual property may result in sub-optimal consumption, excessive levels of production and/or reduced levels of innovation and dynamic efficiency.

Regulation should ensure that the benefits to society as a whole outweigh the costs associated with imposing it. As such it may also be necessary to limit intellectual property rights in order to maximise economic welfare in the same way as tangible property rights are limited to achieve the same goal. If the extent of the intellectual property right granted by legislation is greater than what is required to correct market failure, then the level of protection may be excessive and to the detriment of consumers of the product and society as a whole.

---

<sup>7</sup> Copyright Law Review Committee, *Report of the Committee appointed by the Attorney General of the Commonwealth to consider what alterations are desirable to the Copyright law of the Commonwealth* (Spicer report), AGPS, Canberra, 1959, p. 8.

<sup>8</sup> ACCC, *Potential Consumer Benefits of Repealing the Importation Provisions of the Copyright Act 1968 as they Apply to Books and Computer Software*, March 1999, p. 41.

# Assessing the parallel import restrictions

## General approach

The guiding principle in clause 5 of the Competition Principles Agreement, as agreed by the Council of Australian Governments, states that:

... legislation should not restrict competition unless it can be demonstrated that the:

- (i) benefits of the restriction to the community as a whole outweigh the costs; and
- (ii) objectives of the legislation can only be achieved by restricting competition.<sup>9</sup>

As set out by the IPCRC in the Ergas report, because of the potential costs to society of restrictions on competition, such restrictions need to be justified as being in the public interest.<sup>10</sup> The IPCRC also explained that the benefits from restrictions on competition generally accrue to concentrated groups in the community, whereas the costs of those restrictions are spread widely throughout the community. The ACCC agrees with the view of the IPCRC that it is therefore appropriate that those groups benefiting from the restrictions bear the onus of establishing that the restrictions are in the public interest by conferring net benefits.<sup>11</sup>

## Are restrictions on parallel imports of books justified?

Consistent with the legislation review principles contained in the Competition Principles Agreement, in reviewing legislation that restricts competition, alternative means for achieving the objectives of the legislation should be considered, including non-legislative approaches.

In order to apply this approach, it would be necessary to confirm the contemporary aims of the parallel import restrictions as they apply to books and to specify both the costs of restricting competition and any benefits.

## *Effects of the parallel import restrictions*

Restrictions on parallel importation grant an import monopoly to local copyright holders. Supporters of the existing restrictions have previously argued that import restrictions are necessary to promote production of creative works, consistent with the underlying objectives of intellectual property laws. In the past, the main concerns of those opposing the removal of the restrictions on books were the impact on pre-sales

---

<sup>9</sup> The Competition Principles Agreement was made on 11 April 1995 between state and territory governments and the Australian government.

<sup>10</sup> See Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement* (Ergas report), September 2000, p. 61.

<sup>11</sup> Ergas report, p. 61.

promotions of books and the impact of overseas remainders on Australian authors and local independent publishers.<sup>12</sup>

However, the parallel import restrictions, which in essence restrict competition for books, can also be harmful to society's welfare. By restricting competition, Australian consumers may pay higher prices for, and have reduced access to, copyright products than would otherwise be the case. Inquiries by the ACCC (discussed below) consistently showed that Australian prices were substantially higher than in the United Kingdom (UK) and the United States (US) until the mid-1990s. At least until 2001, the surveys suggest that though some titles in Australia were priced competitively with overseas, there were large price differentials in respect of other titles. Restricted availability was also an issue.

These problems may arise if international publishers find it profitable to engage in so-called 'international price discrimination'. This is the practice of charging different prices in different countries for the same product to take advantage of differences in demand and supply conditions in those different countries. In past reports, the ACCC set out three circumstances that generally exist where international price discrimination tends to occur:

- the existence of market power held by suppliers
- differences in demand and/or supply conditions between markets
- effective segmentation of geographical markets, such that profitable international arbitrage is not possible.<sup>13</sup>

In extending copyright into distribution, the importation provisions provide publishers with market power in individual titles. The provisions also allow publishers to segment geographical markets since distributors are prohibited from importing books from a low price country to a high price country. Additionally, there are likely to be differences in demand and supply conditions between markets. For example, there are likely to be differences in the costs in supplying to countries arising from differences in print runs and distribution costs. There are also likely to be international differences in price elasticities of demand reflecting differences in the availability and closeness of substitutes and differences in the proportion of income spent on the item.

The Ergas report noted that despite Australia having a relatively small market, Australians were likely to have a relatively high willingness to pay, most notably when compared with poorer parts of the world.<sup>14</sup> Under the current provisions and in the above-mentioned market structure, rational profit-maximising publishers who operate in more than one country have the ability and incentive to engage in some form of price

---

<sup>12</sup> Remainders are sold at an extra discount to clear stock. Royalties are either payable at a reduced rate or not at all.

<sup>13</sup> See PSA, *Book Prices, Interim Report*, report no. 24, August 1989, p. 33.

<sup>14</sup> Ergas report, p. 62.

discrimination between markets, particularly in relation to poorer countries where demand for English-language books exists.

In the absence of import restrictions, the conditions necessary for the practice of international price discrimination would be dramatically reduced. In particular, books could be imported from lower-priced countries thus putting downward pressure on domestic book prices to the benefit of consumers.

Information has been submitted to the ACCC in previous inquiries that consistently supports the view that Australian consumers were generally paying higher prices for books as a result of the restrictions.<sup>15</sup>

In particular, the ACCC undertook a number of different types of quantitative studies relating to the price differentials and availability of books until 2001, including the publishers' survey, bestsellers' survey, bookshop survey, the technical and professional books' survey and the availability survey. These can be found in the publications listed in attachment A.

Inquiries by the ACCC consistently showed (up to 2001 at least) that though some titles were priced competitively with comparable overseas markets, there were large differences in respect of other titles. Availability of titles was also an issue. The main features and outcomes of the studies conducted are detailed in attachment B and summarised in a table in attachment C.

The reports consistently concluded that removal of the importation restrictions from the Copyright Act is likely to benefit consumers in providing lower prices and improved availability of books. Potential costs of removing the import restrictions were considered but it was concluded that the likely net overall benefits meant that repealing the import provisions would be socially beneficial.

In relation to other markets, parallel import restrictions in Australia were removed for sound recordings in 1998 and computer software in 2003. While there has not been a formal review of the effect of parallel import competition on the price of these products and the industries in which they are supplied, periodic price surveys conducted by the ACCC up to the early 2000s suggested that the difference between Australian and overseas prices of sound recordings narrowed considerably after the importation provisions were repealed.

Studies in New Zealand assessing the impact of the 1998 removal of the restrictions on parallel imports have concluded that the reforms had resulted in lower or more stable prices, improvements in supply and service and product differentiation. In addition, the studies found that the reforms had not resulted in any adverse effect on the creative book industry in New Zealand.

The ACCC considers that it is important to emphasise that restrictions on parallel imports do nothing to protect domestic industry; they simply provide the domestic

---

<sup>15</sup> See, for example, PSA, August 1989, pp. 32–37, 49.

rights holder with an exclusive right to import. Whether they choose to invest and manufacture domestically are separate decisions which will be influenced by factors such as the likely international returns from investing in local authors and the cost of local versus offshore manufacturing.

***Is there an economic rationale for parallel import restrictions?***

While legislative restrictions on imports of pirate and counterfeit goods are a necessary adjunct to the restrictions on the production of creative works, legislative restrictions on parallel importing are not justified by the traditional free rider concerns relating to intellectual property. These relate to the sphere of production, protecting intellectual property owners from unauthorised reproduction. By contrast, restrictions on parallel imports extend these rights into the sphere of distribution.

As noted in the ACCC's submission to the IPCRC, while free riding may occur in the sphere of distribution—for example, on marketing and promotional investments or on pre- and after sales service—this is nothing unique to, nor a necessary feature of, intellectual property. Rather it is a feature which may occur in any market to a greater or lesser degree and one which is generally tackled by contractual means. Where these contractual restrictions are likely to contravene the Trade Practices Act, their potential public benefits can be specifically considered by the ACCC under the authorisation and notification provisions and immunity from legal action Trade Practices Act granted in certain circumstances.

Consistent with its statutory functions the ACCC considers that, in principle, arrangements that raise competition concerns should receive equal treatment to any other property right under the Trade Practices Act. See attachment D for a discussion of possible interaction with the Trade Practices Act, if the parallel import restrictions were to be removed.

In particular, removing the blanket statutory restrictions will not necessarily result in an unrestrained supply of parallel imported books. Rather, it is likely to result in a level of restriction more nuanced to the level of any actual problems of free riding on marketing or service, based (as in other industries) on normal commercial contractual arrangements. While private arrangements that restrict parallel importation may have the potential to contravene the Trade Practices Act, ultimately this is a matter for the courts.

Section 51(3) may provide certain conduct with an exclusion from committing a contravention; however, this exclusion is limited and has not directly received judicial consideration, adding to the uncertainty of its application. Having regard to the international nature of parallel importation, it is also important to note the jurisdictional limitations of Part IV of the Trade Practices Act. Furthermore, in the event that conduct is likely to contravene the Trade Practices Act, industry participants may apply to the ACCC to seek immunity from legal action for that particular conduct through the authorisation and notification provisions.

Having regard to the policy objectives of competition and intellectual property law, the ACCC submits there is no economic rationale to justify a blanket legislative restriction on parallel imports.



## Summary

Special legislative restrictions on the distribution of parallel imports in this industry are not necessary in order to address the free rider problems that are the focus of the general copyright protections in the production sphere. Such blanket restrictions are likely to go too far in addressing any remaining free rider issues in the distribution sphere in relation to books.

In particular, based on the ACCC's previous studies, there is quantitative data that supports the view that Australians may pay too much for books. Removal of the importation restrictions from the Copyright Act is likely to benefit consumers in providing lower prices and improved availability of books. Potential costs of removing the import restrictions were considered but it was concluded that the likely net overall benefits meant that repealing the import provisions would be socially beneficial.

Studies in other markets show that the removal of importation provisions has positive effects. The New Zealand studies also found that the reforms had not resulted in any adverse effect on the creative book industry in New Zealand.

While free riding may occur in the sphere of distribution—for example, on marketing and promotional investments or on pre- and after sales service—this is nothing unique to, nor a necessary feature of, intellectual property. Rather it is a feature that may occur in any market to a greater or lesser degree and one which is generally tackled by contractual means. Where these contractual restrictions may contravene the Trade Practices Act, their potential public benefits can be specifically considered under the authorisation and notification provisions.



## Prior ACCC reports and methodology

The terms of reference for this study note that the current restrictions on the parallel importation of books potentially result in higher prices and less availability of books, to the disadvantage of Australian consumers. The issues paper identifies two approaches to measure the effect of parallel import restrictions on prices for books in Australia:

- studying the impact of removing parallel import restrictions in other markets
- comparing prices and availability in the Australian book market to those in foreign markets from which imports might be sourced were the restrictions removed.<sup>16</sup>

The ACCC's prior involvement in this issue has primarily focused on the latter approach in attempting to measure the effect of removing the restrictions.

The ACCC undertook a number of different types of studies relating to the price differentials and availability of books until 2001, including the publishers' survey, bestsellers' survey, bookshop survey, the technical and professional books' survey and the availability survey. These can be found in the publications listed in attachment A.

Inquiries by the ACCC consistently showed that Australian prices were substantially higher than in the UK and the US until the mid-1990s. Up to the date of the last study in 2001 at least, the surveys suggested that though some titles were priced competitively with comparable overseas markets, there were large differences in respect of other titles. As such, the ACCC concluded that there were substantial consumer benefits that could be realised if the restrictions were removed. The main features and outcomes of the studies conducted are detailed in attachment B and summarised in a table in attachment C.

Recognising that the PC may choose to undertake an up-to-date survey of price differentials and/ or availability in 2009, this section discusses the methodology used in past ACCC surveys and what aspects of those methodologies might be changed if an up-to-date study were to be conducted.

## Methodology used by the ACCC

### Price studies

The PSA's first inquiry into book prices in 1989 followed the review by the Copyright Law Review Committee (CLRC) and aimed to provide a more extensive analysis of the price effects of parallel import restrictions on books.<sup>17</sup>

---

<sup>16</sup> PC issues paper, p. 11.

<sup>17</sup> PSA, *Inquiry into Book Prices, Final Report*, report no. 25, 19 December 1989.

During the course of the inquiry, the PSA received price data from a range of sources. The PSA noted that it is difficult to make price comparisons but undertook its own comparisons of international book prices:

- In the first comparison, the PSA undertook an analysis of the recommended retail price (RRP) of books included in the current catalogues of three major British publishers for the UK, Canadian and Australian markets (publishers' survey). The PSA compared Australian prices with those in the UK and Canada to investigate any price discrepancies resulting from the structure of international publishing, in which identical books were sold in these countries. The 1989 report detailed how, traditionally, world markets for English language books have been divided between the UK and US publishers, with Australia and Canada forming part of the UK's territories. However, given Canada's proximity to the US, Canadian consumers enjoyed competition from cheaper US books.<sup>18</sup> This price comparison was aimed at examining whether publishers with copyright in more than one territory engaged in geographic price discrimination.
- The PSA also compared prices of bestsellers available in the UK and the US (bestsellers' survey). The PSA recognised that the UK and US editions of a title will not usually be identical—for example, there may be qualitative differences in typesetting, paper quality, binding and cover design. The PSA noted that in a competitive market, relative price differences would be determined by consumer preferences and the costs of supply. However, in the absence of parallel imports of typically cheaper US editions, consumers generally were not able to express their preferences for competing editions.

The PSA pointed out that its studies measuring current price differences allowed some light to be shed on current international price discrimination practices. Notwithstanding that the studies did not reveal what prices in Australia might be in the absence of the parallel import restrictions, as noted in the PC's issues paper, it is not feasible for any particular price comparison to precisely quantify any price reductions that might follow if the restrictions were removed.<sup>19</sup> For example, in comparing Australian prices with prices in the UK, in the absence of the restrictions, Australian booksellers could import directly from the UK, but they would not necessarily sell the books at the UK retail price in Australia. On the one hand, they would have to cover freight costs; but on the other hand, retail prices in the UK were said to be distorted by resale price maintenance. The PSA stated that the net result of removing the restrictions could not be accurately predicted.<sup>20</sup>

Later studies conducted by the PSA and ACCC used a generally consistent approach, in order to measure trends in price differentials and availability measures. Adjustments to the methodology were made, for example, for the introduction of the goods and

---

<sup>18</sup> *ibid.*, p. 18.

<sup>19</sup> PC's issues paper, p. 12.

<sup>20</sup> PSA, August 1989, p. 48.

services tax (GST) in 2000 and to reflect changes in the industry such as the rise of large format paperbacks in Australia.

### ***Methodology issues in comparative price studies***

A number of methodological issues arise in comparative price studies:

1. Use of RRP.
2. The exchange rate.
3. Costs of freight and distribution.
4. Like-for-like formats.
5. The time period for comparison.

These are discussed below, together with approaches taken to them by the ACCC in prior price studies. Since 2001, the industry and data sources available are likely to have changed. If the PC chooses to conduct updated book price comparisons, it would be necessary to consider these methodological issues. The ACCC considers that it is important to compare like with like, to compare prices over a long period, and use a conversion rate that does not distort comparisons.

#### **1. Use of RRP**

The PSA used the RRP of books as the basis of its price comparisons, and this was also adopted by the ACCC in subsequent studies. At the time, readily accessible data available on actual prices was not available and there was little evidence of discounting from RRP. Thus the PSA was satisfied that the RRPs were a suitable proxy for actual prices for the purposes of price comparison. The ACCC has not undertaken price comparisons since 2001. However, anecdotally, it appears that the rate of discounting of book prices from RRP has increased. Thus it may be appropriate for the PC, if it is to undertake price comparisons, to consider whether RRPs remain a suitable proxy for international price comparisons. It appears that there is now more readily accessible data on actual book prices than was the case when the ACCC undertook price comparisons, which may assist the PC.

#### **2. The exchange rate**

The PSA recognised that there is no ‘right’ answer to the choice of the appropriate exchange rate to use when making price comparisons between countries. While prices would adjust immediately to exchange rate fluctuations in a perfectly competitive market, in the real world there are lags in the process of adjustment, resulting in suppliers absorbing part or all of any exchange rate fluctuation. The book industry was considered to be an imperfect market, with the importation provisions in various countries’ copyright legislation severely restricting arbitrage. Lags were also introduced by the widespread use of forward exchange pricing in Australian dollars for books imported into Australia.

In its 1989 publishers' survey, the PSA converted prices into Australian dollars using average exchange rates for 1988–89, as calculated by the Treasury, both allowing for lags in the pass-through process and avoiding extreme results arising from the use of an exchange rate at any one particular time.<sup>21</sup> A similar approach was taken in subsequent surveys.

### **3. Costs of freight and distribution**

Another measurement problem referred to is the impact of costs of freight and distribution. Such costs would vary from book to book and there is the more fundamental problem of what the currently observed distribution costs actually reflect. In the absence of a competitive market, there is no reason to believe that current operations are cost efficient. The analysis in the PSA's 1989 inquiry therefore did not allow for differences in freight costs.

### **4. Like-for-like formats**

The growth of the large format paperback in Australia was one result of the 30-day rule and the 7/90 rule resulting from the 1991 amendments, and presented some problems for the ACCC in its price comparisons. Given time lags associated with printing the traditional first edition in hardback, Australian publishers began producing this edition in large format paperback to ensure that they retained territorial copyright.

In addition, it also enabled publishers to continue to price discriminate; consumers who want early access to a bestseller are forced to purchase the large format paperback (at a higher price) rather than the small format paperback edition that becomes available later. The large format paperback is cheaper to produce than the traditional hardback, but more expensive than the smaller paperback edition.

The data sources used by the ACCC for its price comparisons did not distinguish between large format paperbacks and hardbacks; large format paperbacks were classified as hardbacks. During its 1999 study the ACCC received information that indicated that the price of a large format paperback was around 30 per cent less than a hardback edition. In making price comparisons, the ACCC was conscious of the need to compare products that are substantially similar.<sup>22</sup>

The growth in the use of the large format paperback in Australia and the continued use of hardbacks in the UK and the US prompted the ACCC in its 2001 report to exclude books categorised as fiction hardbacks from the category 'all bestsellers' for the period from 1994 to 1995. This was considered necessary so that the price comparisons were not distorted.

---

<sup>21</sup> *ibid.*, pp. 49–51.

<sup>22</sup> ACCC, March 1999, pp. 23–24.

If the PC is to undertake international price comparisons, the issue of different book formats should be considered. It appears that the large format paperback (termed ‘trade paperback’ in the US) is now also used to some extent in the US and the UK. *Publishers Weekly*, which was the source of the bestseller lists used in ACCC surveys, now separately categorises the large format paperback, which appears to be capturing market share of the mass market paperback.<sup>23</sup> There are also indications that the large format paperback has become increasingly popular with booksellers and libraries from at least 2002.<sup>24</sup>

## 5. The time period for comparison

The appropriate time period over which to compare prices was the focus of a concern raised by industry in response to the ACCC’s latest report in 2001 in relation to the choice of a 12.5 year period to examine the changes in book prices.<sup>25</sup> This time period was used since it was considered necessary to show a long-term trend in prices to accurately reflect market movements, without distortions from exchange rate fluctuations. Because the ACCC had data from the previous 12.5 years, it was considered inappropriate to arbitrarily exclude data that it was in possession of. As explained in the 2001 report, short-term changes in exchange rates can affect the calculated price differentials.<sup>26</sup> For example, a depreciation in the Australian dollar relative to the country of comparison raises the Australian dollar price of products in overseas countries and therefore reduces the (positive) differences between Australian and overseas prices.

This ‘exchange rate effect’ does not mean that restrictions on import competition are not of concern; it means that imports are temporarily less attractive where the Australian dollar depreciates and vice versa. However, so long as import restrictions remain, it is likely that the differentials will rise again where the Australian dollar fluctuates relative to the overseas currencies. This is because local retailers are unable to source commercial quantities of relatively lower priced overseas supplies. For these reasons, a sufficiently long time period is was considered necessary in order to examine underlying price differentials.

---

<sup>23</sup> See C. Memmott, ‘Paperback Publishers put Premium on Size’, *USA Today*, 14 August 2005, viewed 10 December 2008 at [www.usatoday.com/life/books/openbooks/2005-08-14-paperback\\_x.htm](http://www.usatoday.com/life/books/openbooks/2005-08-14-paperback_x.htm). Separate bestseller lists for trade paperbacks are available, see [www.publishersweekly.com/bestsellerslist/7.html?channel=bestsellers&listdate=10%2F04%2F2008](http://www.publishersweekly.com/bestsellerslist/7.html?channel=bestsellers&listdate=10%2F04%2F2008); US book retailer [Barnes and Noble](http://www.barnesandnoble.com) also compiles bestseller trade paperback lists.

<sup>24</sup> See J Rosen, ‘Paperbacks Trade Up for Impact’, *Publishers Weekly*, 2002, viewed 6 November 2008, [www.publishersweekly.com/article/CA231551.html?q=trade+paperback](http://www.publishersweekly.com/article/CA231551.html?q=trade+paperback).

<sup>25</sup> Senate Legal and Constitutional Committee, *Consideration of legislation referred to the Committee Inquiry into the Provisions of the Copyright Amendment (Parallel Importation) Bill 2001*, May 2001.

<sup>26</sup> ACCC, 2001, p. 6.

## Availability studies

As noted in the PC's issues paper, in examining the availability of books, the two relevant concepts to consider are the range of titles available and the speed at which titles become available.

In 1988 the CLRC analysed whether changes to the parallel importation provisions should be introduced.<sup>27</sup> In relation to books, the CLRC recommended modifications to the legislation to increase the choice of titles (especially niche titles) available and to accelerate the introduction of new releases into Australia. The CLRC acknowledged that Australia had a wide range of titles and large stocks of books available, and it did not appear that Australia suffered greatly from the unavailability of titles. However, the CLRC stated that this should not preclude attempts to improve both the number of titles and the stockholdings.<sup>28</sup> The CLRC recommended reform of the provisions to allow parallel importation of a book where it was not available in Australia, or to fill a written order.

In the PSA's 1989 inquiry, submissions indicated that most books were released in Australia later than they were published overseas. The *Copyright Amendment Act 1991* was introduced in December 1991 to address the issue of availability raised in the reports of the CLRC and the PSA.

There was little robust data available to the ACCC from the book industry on availability and information presented was largely anecdotal. The ACCC therefore conducted its own survey. The methodology used by the ACCC to measure changes in the availability of books in Australia is set out below.

### *1995 PSA inquiry into book prices and parallel imports*

In 1995 the PSA examined the time gap between when titles first entered the bestseller lists in Australia and the bestseller lists in the UK and the US. The PSA noted in the report that the methodology provided a reasonable estimate of changes in the delay, but did not indicate the precise extent of any delay between releases in Australia and overseas.

For all titles common to both lists, the number of months between the time a title first appeared on a bestseller list in the UK and in Australia was determined and the results for the financial years 1989–90 to 1993–94 were averaged.

The same survey was conducted in relation to Australian and US bestsellers.

---

<sup>27</sup> Copyright Law Review Committee, *The Importation Provisions of the Copyright Act 1968*, Australian Government Printing Service (AGPS), Canberra, 1988.

<sup>28</sup> *ibid.*, p. 103.



Issues arose in relation to the time of release of bestseller lists in Australia compared with overseas, as well as the publication date of the trade magazines used (*Bookseller & Publisher* (Australia), *Publishers Weekly* (US) and *The Bookseller* (UK)). For example, bestseller lists were produced monthly in Australia and weekly in the UK and the US. Additionally, in the *Bookseller & Publisher* the bestseller list was two months behind the publication date of the magazine. In its survey, the PSA assumed that overseas lists were one month behind the publication date of the relevant magazine.

These timing inaccuracies were acknowledged in the report, but it was noted that they were consistent for all measurements. For the purposes of measuring a change in the delay in availability, the methodology was considered appropriate.

The survey results supported the argument that the speed of availability of books had improved since 1989–90. The results were also consistent with anecdotal comments that publishers/distributors were testing the expected new rules prior to the passage of the 1991 amendments.

### ***1999 ACCC report***

In 1999 the ACCC used the same methodology developed by the PSA in 1995 to examine the time gap between when titles first entered the bestseller lists in Australia and the bestseller lists in the UK and US. The results were calculated for the financial years 1989–90 to 1997–98.

The survey results indicated that the amendments appeared to have improved the availability of new releases, but the gains apparent in the early 1990s appeared to have diminished.

### ***2001 ACCC report***

While the ACCC did not update the availability study in its 2001 report, it highlighted a problem with the availability of books in the technical and professional sector. It received anecdotal evidence that suggested that many consumers in some specialist segments of the market were bypassing local distribution channels by buying direct from overseas via the internet in order to get titles quickly. While the ACCC considered that the 1991 amendments had improved the speed with which most new releases were available in Australia, the impact on backlist<sup>29</sup> titles was less clear. Information received by the ACCC indicated that administrative difficulties in complying with the rules had reduced the effectiveness of the legislation.<sup>30</sup>

---

<sup>29</sup> Backlist titles are slower moving and less popular titles, usually outside the top 5000 titles (by sales).

<sup>30</sup> ACCC, 2001, p. 9.

## **Assessing the impact of removal of restrictions on parallel imports—case studies**

As noted in the PC's issues paper, another technique to determine the effects of parallel import restrictions is to study the impact of removing parallel import restrictions in other markets.

Parallel import restrictions in Australia were removed for sound recordings in 1998 and computer software in 2003. There has not been a formal review of the effect of parallel import competition on prices of sound recordings and computer software and the industries in which those products are supplied. However, periodic price surveys conducted by the ACCC up to the early 2000s suggested that the difference between Australian and overseas prices of sound recordings narrowed considerably after the importation provisions were repealed for sound recordings. These findings are discussed below.

Considering there is likely to be a time lag between the removal of the restrictions and the realisation of the effects on the market, it may be useful for the PC to investigate the long-term movement of price and availability of sound recordings and computer software before and after parallel import restrictions on these products were lifted. Notwithstanding differences between the industries, such as market structure and varying technological advances, this may provide an understanding of the possible outcomes for the industry and consumers in the book market if the parallel importation restrictions on books were to be removed.

New Zealand removed restrictions on parallel imports in 1998 and there have been a number of studies into the effects of the reform. These are briefly outlined below.

### ***ACCC surveys of CD prices***

On 30 July 1998 the parallel importation restrictions on sound recordings were removed.<sup>31</sup> To allay concerns about piracy, increased fines were introduced and the onus was placed on the importer to establish the legitimacy of parallel imports. Implementation lags were also granted to affected industries to allow them to adjust to the new arrangements.

In monitoring the impact of the changes, the ACCC observed a gradual rise in competition from lower priced parallel imports. This appeared to result in lower prices of both imported and locally made compact discs. The ACCC also noted the entry of non-traditional suppliers of CDs supplying low-priced imports to Australian consumers.

In its 2001 report the ACCC noted a downward trend since August 1998 in the average prices of CDs available at specialist music stores.<sup>33</sup> In December 2000 the price

---

<sup>31</sup> *Copyright Amendment Act (No. 2) 1998.*

<sup>32</sup> 'Parallel importing', speech by Professor Alan Fels, 21 June 1999, available at [www.accc.gov.au/content/index.phtml/itemId/179183](http://www.accc.gov.au/content/index.phtml/itemId/179183).

<sup>33</sup> ACCC, 2001, pp. 17–19.

reduction in national average CD prices was around 6.1 per cent since deregulation and around 13 per cent in real terms.<sup>34</sup> In that month, prices of CDs in Australia were on average 11.8 per cent less than in the US, 20.7 per cent less than in the UK and 24.7 per cent less than in Japan. However, Australian prices were found to be 27.3 per cent higher than in New Zealand and 18.6 per cent higher than in Singapore. The ACCC acknowledged that the weaker Australian dollar influenced the magnitude of the differentials. However, it considered that the repeal of the importation provisions had also provided competitive impetus to the industry.<sup>35</sup>

The report also noted that discount chain stores existed in most locations around Australia, offering 'Top 40' CDs to customers at prices as low as \$12, without a significant compromise in technical quality. It was found that most of the Top 40 CDs had been sourced from South-East Asia, instead of the US. The ACCC considered that this was due in part to the depreciation of the Australian dollar against the US currency, and that the diversity and volume of CDs available from US wholesalers would increase the competitive influences on the Australian market once the exchange rate improved.

### ***The New Zealand experience***

In May 1998, following a report by the New Zealand Institute of Economic Research (NZIER), New Zealand copyright legislation was amended to remove parallel import restrictions on all copyright goods.<sup>36</sup>

#### *Studies by the NZIER*

The NZIER found that while prices of books and CDs in Australia and New Zealand were broadly comparable, both were around 25 and 10 per cent higher, respectively, than in some US outlets. The NZIER considered that the New Zealand market was not large enough for parallel importing to have any significant effects on incentives for innovation. The NZIER concluded that lifting the parallel importation restrictions on all copyright goods would provide net gains to the New Zealand economy as a whole.

The NZIER prepared a review for the IPCRC in the Ergas report, providing an empirical analysis of prices in the book, CD and software markets.<sup>37</sup> The 2000 survey replicated the 1998 survey to compare results before and after the reforms.

The NZIER found that in 1999 the nominal average price for a selection of bestsellers in New Zealand was around 12 per cent lower than in 1998, but those in Australia, the US and UK had increased over the same period.<sup>38</sup>

---

<sup>34</sup> After CPI adjustment.

<sup>35</sup> ACCC, 2001, p. 17.

<sup>36</sup> The Copyright (Removal of the Prohibition on Parallel Importing) Amendment Act 1998 (NZ) amended the Copyright Act 1994 (NZ).

NZIER, *Parallel Importing: A Theoretical and Empirical Investigation*, February 1998, viewed 10 December 2008 at [www.med.govt.nz/templates/MultipageDocumentTOC\\_5664.aspx](http://www.med.govt.nz/templates/MultipageDocumentTOC_5664.aspx).

<sup>37</sup> Ergas report, appendix 6.

The NZIER considered that 1999 prices in New Zealand compared more favourably against other countries than those in 1998, caused in part by a weakened exchange rate. The NZIER concluded that the reforms had contributed to improvements in availability, access, speed of delivery, and timing of release dates. While the range of titles offered in-store had narrowed, accessibility had improved through ordering and indent (request) services.

The NZIER reported more aggressive price competition between large retail players. Without the economies of scale in purchasing, small and mid-sized firms were less able to compete with the larger players without concentrating on a particular niche. Generally, retailers benefited from greater negotiating power relative to distributors because of the threat of parallel importing.

Existing supply networks remained largely unchanged, with no significant volumes of parallel imported books. Local publishers/wholesalers were providing competitive prices and continued to play a significant part in the supply chain. There was also information that suggested that the possibility of parallel importing had encouraged wholesaler efficiency and service.

There were two or three reported cases where New Zealand-authored books remaindered on overseas markets had been imported back into New Zealand for sale at less than the locally available price. However, it was considered too early to see any discernible change in publishers/wholesalers' support for New Zealand authors.

The NZIER found that, since 1998, the nominal average price for the bestsellers' selection remained basically unchanged in New Zealand, was lower in the UK and Germany, and higher in Australia and the US.

The CD retail market was considered to be more internationally competitive than books even before the reforms, and there was some market consolidation as a result of parallel importing. It was also considered that parallel importing inhibited any price rises, which may have been expected with the depreciating dollar. Similar to the book market, retailers were armed with greater negotiating power relative to distributors. Piracy was also cited as a major issue of concern for the CD market as a result of parallel importing.

---

<sup>38</sup> *ibid.*

Overall, the NZIER noted that several anticipated effects appeared to have flowed from allowing parallel importation:

- lower prices: in software; and prices held in books and CDs
- diversity of sources: in software
- improved responsiveness of service: books in particular
- product differentiation/market segmentation: in software, books and CDs.<sup>39</sup>

The NZIER noted that due to differences in market structure between Australia and New Zealand, the experience in New Zealand may not necessarily translate to the Australian situation.

#### *2000 Creative industries discussion paper*

In December 2000, the NZ Competition and Enterprise Branch of the Ministry of Economic Development (MED) released a discussion paper, *Parallel Importing and the Creative Industries*, reviewing the need for industry-specific parallel importing policies.<sup>40</sup> The discussion paper analysed the book publishing industry and concluded that since 1998 the volume of parallel-imported books had remained small and sales of remaindered books were not common occurrences.

#### *2004 NECG report: The impact of parallel imports on New Zealand's creative industries*

In 2004, a report by the Network Economics Consulting Group (NECG) found that the increased competitive threat of parallel imports in New Zealand had improved service for retailers and the speed at which orders were filled, as well as the availability of, and access to, titles for customers. Additionally, it found no evidence of detrimental effects on investment in the book industry.

NECG conducted a price survey that suggested that parallel importation had substantially reduced New Zealand's book price differentials since 1998 compared with Australia and the US. NECG compared the prices of 100 reader-picked books from one of the major bookstores in each country: Whitcoulls in New Zealand, Dymocks in Australia and Borders in the US. The price survey suggested that parallel importation had substantially reduced New Zealand's book price differentials compared with Australia and the US. NECG recommended that New Zealand continue to allow parallel importation because it considered that the gains to society as a whole exceeded any observable detriments.

---

<sup>39</sup> *ibid*, p. 297.

<sup>40</sup> NZ Ministry of Economic Development, *Parallel Importing and the Creative Industries: A Discussion Paper*, December 2000, viewed 10 December 2008 at [www.med.govt.nz/upload/2266/creatdisc.pdf](http://www.med.govt.nz/upload/2266/creatdisc.pdf).

*2007 LECG review: MED parallel importing review: impact upon creative industries*

In November 2007 LECG conducted a follow-up review of its report that found that parallel importation appeared not to have adversely affected the creative book industry in New Zealand. Its findings indicated that recent movement of international publishers' distribution infrastructure to Australia appeared to have been driven more by other changes like rationalisation of the supply chain and technology trends, rather than parallel importing.

LECG's review was based on interviews with stakeholders. According to book publishers, commercial parallel importation occurred mainly for niche titles and discount backlist titles, but booksellers stocked books from local publishers where possible.

Booksellers reported retail sales growth, improved service and title range availability. However, they attributed increased prices for new releases to increases in transportation and fuel costs.<sup>41</sup> Additionally, booksellers found that new consumers had entered the market since the parallel importation restrictions were removed. This was reflected in an increased demand for niche titles and entry into the market by those with a lower willingness to pay for books. Booksellers stated that remaindering of children's books occurred, but with little adverse impact on the industry.<sup>42</sup> Export growth was reported as significant for New Zealand children's new releases.

LECG concluded that since both retail and wholesale industries were enjoying growth, and without further evidence indicating otherwise, there was no need to reintroduce the parallel importation restrictions on books.

The New Zealand MED, on the basis of LECG's review, concluded in 2008 that parallel importing did not appear to have affected the publishing and promotion of New Zealand titles.<sup>43</sup>

---

<sup>41</sup> From about \$21 in recent times to \$26–\$27 in 2007. See LECG, [MED Parallel Importing Review: impact upon creative industries](#), November 2007.

<sup>42</sup> In New Zealand, parallel importation raised concerns that creativity in the local children's book segment would be hampered by foreign remainders.

<sup>43</sup> See NZ MED, *2008 Parallel Importing Cabinet Paper*, viewed 5 January 2009, [www.med.govt.nz/templates/MultipageDocumentPage\\_35595.aspx](http://www.med.govt.nz/templates/MultipageDocumentPage_35595.aspx).

## Conclusion

The ACCC's in-principle view is that special legislative restrictions on the distribution of parallel imports in this industry are not necessary in order to address the free rider problems inherent in production.

In effect, parallel import restrictions grant a monopoly to import to intellectual property owners. The ACCC's primary concern in this regard is the potential for the exercise of market power conferred by such restrictions, providing the ability and incentive for rights holders to restrict supply and engage in international price discrimination, the result being higher prices to the detriment of Australian consumers.

As such, while amendments to the parallel import restrictions aimed at supply problems may have addressed supply concerns to some extent, it may be the case that Australian consumers are still paying too much for books. The ACCC studies in the past into price differentials between books available in Australia compared with books available overseas consistently found that intellectual property owners were engaging in international price discrimination to the detriment of Australian consumers. Inquiries also heard evidence of problems with the availability of books.

Indications from the removal of parallel import restrictions for sound recordings and computer software in Australia and generally in New Zealand are that the reforms have resulted in positive outcomes for consumers without dire consequences for local industry.

In assessing whether the current restrictions should remain, the ACCC has applied the guiding principle in clause 5 of the Competition Principles Agreement. Having regard to this approach, the ACCC finds no economic rationale to justify a blanket legislative restriction on parallel imports. Furthermore in previous studies conducted by the ACCC, it has consistently concluded that there are likely to be net overall benefits to removing the restrictions. The ACCC agrees with the Ergas report<sup>44</sup> in that, at the least, repealing the parallel import restrictions is an effective way of ensuring that Australians do not pay more than overseas consumers for copyright protected books.

It is noted that in the event that the restrictions were removed, private contractual arrangements might still be used to place some restrictions on distribution, as in any other industry. Such arrangements would be subject to the general provisions of the Trade Practices Act.

---

<sup>44</sup> Ergas report, p. 73

# **Attachment A: ACCC reports and submissions on parallel importation**

## **PSA published reports**

*Inquiry into Book Prices and Parallel Imports*, report no. 61, April 1995.

*Progress Monitoring Report on Book Prices and the Impact of the 1991 Amendments to the Copyright Act 1968*, monitoring report no. 10. September 1993.

*Inquiry into the prices of sound recordings*, final report, 13 December 1992.

*Inquiry into Prices of Computer Software*, final report, reports nos. 44 and 46, December 1992.

*Inquiry into the Prices of Sound Recordings*, final report, report no. 35, December 1990.

*Inquiry into Book Prices*, final report, report no. 25, 19 December 1989.

*Inquiry into Book Prices*, interim report, report no. 24, 31 August 1989.

## **ACCC published reports**

Australian Competition and Consumer Commission (ACCC), 2001, *Summary of the Commission's March 1999 Report on The Potential Consumer Benefits of Repealing the Importation Provisions of the Copyright Act 1968 as they Apply to Books and Computer Software – Including Price Updates for Books, Computer Software and Sound Recording*.

ACCC, March 1999, *Potential Consumer Benefits of Repealing Importation Provisions of the Copyright Act 1968 as they Apply to Books and Computer Software*.

## **ACCC submissions to government inquiries**

Inquiry into the provisions of the Copyright Amendment (Parallel Importation) Bill 2001, Senate Legal and Constitutional Legislation Committee, May 2001.

Review of intellectual property legislation under the Competition Principles Agreement, Intellectual Property and Competition Review Committee, September 2000.

Consideration of legislation referred to the Committee: Copyright Amendment Bill (No. 2) 1997, Senate Legal and Constitutional Legislation Committee, April 1998.



## Attachment B: Past report survey methodologies and outcomes

The ACCC undertook a number of different types of studies relating to the price differentials of books. These studies are summarised below.

### Publishers' surveys

#### 1989 PSA inquiry into book prices

In its 1989 inquiry the PSA analysed the recommended retail price of books included in the current catalogues at the time for the UK, Canada and Australia of three major British publishing houses.<sup>45</sup> Australian prices were obtained from *Australian Books in Print*.

This study was designed to assess arguments made to the PSA in the course of its inquiry that rational pricing by British publishers with copyright interests in both Australia and Canada was likely to result in price discrimination in favour of Canada and unfavourable to Australia.<sup>46</sup> The inquiry heard that Australian and Canadian subsidiaries of international publishers set the local RRP at 'what the market will bear'.<sup>47</sup>

The sample included all titles supplied by those publishers to all three countries in the same edition, matched by International Standard Book Numbers (ISBNs) to ensure that an identical product was being compared.

The mean, median, upper and lower quartile price differentials for all titles were calculated in absolute terms and also as a percentage of the UK price. Prices were compared for each publisher, as well as for the categories paperback fiction, paperback non-fiction, hardback fiction, hardback non-fiction and children's fiction. By separating the titles into categories, the price differentials were less affected by changes in product mix (between high-priced hardbacks and cheaper paperbacks) in each period.

The PSA found that, on average, Australian consumers paid about 30 per cent more than UK consumers. Canadian consumers, however, had access to UK published books about 2.5 per cent cheaper than UK consumers despite additional freight and distribution costs of transporting books from the UK to Canada. The PSA considered that competition from US publishers was driving down book prices in Canada.

---

<sup>45</sup> These publishers were not identified so as not to single out individual publishers. The publishers were chosen because they were major publishing houses and had the first Canadian price lists available.

<sup>46</sup> See PSA, August 1989, chapter 4.

<sup>47</sup> PSA, August 1989, p. 49.

The PSA concluded that the provisions allowed copyright holders to practice international price discrimination by preventing arbitrage.

### **1995 PSA inquiry into book prices and parallel imports**

The PSA, in conjunction with the ABPA, undertook further analysis in 1995, based on the publishers study. The 1995 survey measured the percentage price differentials for a sample of titles contained in the new release sheets of 13 publishers. The 1989 methodology was amended so that it was not restricted to comparing only titles with the same ISBN, since it was considered that this would result in a narrow sample and that there were only minor differences in editions with different ISBNs.<sup>48</sup>

Publishers were selected to provide their new release lists for the first six months of 1994. The PSA randomly selected a sample of titles from these lists and *Global Books in Print* and *BookFind – CD* were searched for each of the titles in the sample. The prices for Australia, the UK, US and Canada were recorded. Very few prices for Canada were found so comparisons involving Canada were abandoned for this survey.

A simple average of the price differentials of all titles in the sample was calculated for each publisher's list and the differentials for each list were calculated to give an industry average.

The PSA found that, on average, Australian consumers still paid about 15 per cent more than UK consumers and 19 per cent more than US consumers.

## **Bestsellers' surveys**

### **1989 PSA inquiry into book prices**

In its 1989 inquiry the PSA also received submissions about the cheaper prices of US editions compared with UK editions. As mentioned above, the copyright in English language books was generally divided between a US and a UK publisher. The two editions of the book were not usually considered identical and may have differed in terms of typesetting, paper quality, binding and cover design, for example. Comparing prices of the different editions was not necessarily comparing like with like, but did give an indication of the price differentials that consumers were facing in different countries.

The PSA compared prices for all books appearing in both the US and UK bestseller lists (in *Publishers Weekly* and *Bookseller*, respectively) some time during the two-year period between 1987–1988 and 1988–89. An average of the exchange rates for the two-year period was used to convert the UK prices into US dollars.

---

<sup>48</sup> The stated differences included spelling for a small number of words, units of measurement, quality of paper used and the printing process undertaken.

The mean, median, upper and lower quartile price differentials were calculated in absolute terms and also as a percentage of the US price. In addition, the prices were compared for hardback fiction, hardback non-fiction and mass market paperback. These comparisons confirmed that US bestsellers were generally cheaper than the equivalent in the UK. The largest price differential (of over 30 per cent) was found for the mass market paperback category.

The PSA considered that although the quality of UK and US editions was not necessarily the same, if Australian consumers were given the choice between UK and US books, the competitive market would allow consumer preferences to balance the advantages of price and quality. The PSA suggested that the importation provisions prevented competition between UK and alternative (usually US) editions, from occurring in Australia.

### **1993 PSA progress monitoring report on book prices and the impact of the 1991 amendments to the Copyright Act 1968**

This survey attempted to measure the average differential between Australian and overseas prices that a consumer experiences with respect to a title chosen from the bestseller lists. The focus was on bestsellers because these books represented a significant volume of books sold and publishers were likely to seek to retain the import monopoly for bestsellers because these books were likely to be the most profitable.

Two comparisons were made: RRP for all titles appearing in both the Australian and UK bestseller lists, and RRP for all titles appearing in both the Australian and the US bestseller lists. These comparisons were made for the financial years 1988–89, 1990–91 and 1992–93. The sample for each year comprised all titles which first appeared in both bestseller lists published in that particular year. Again, for this study comparisons were not necessarily between books with the same ISBN, since all titles were not available in the same edition in each country.

The PSA study found that while Australians were, on average, paying about 18 per cent more per title than consumers in the UK for bestsellers in 1988–89, in 1992–93 they were paying 1 per cent less. The reduced differential was reflected in both fiction hardback and fiction paperback categories. The Australia/US differential also fell over the period, from about 41 per cent to about 13 per cent. In 1992–93 there was effectively no differential for fiction hardback titles. There was, however, a significant difference for paperback titles (41.84 per cent).

The PSA considered that there continued to be segments of the domestic market, including bestselling paperbacks, where Australian consumers paid significantly more than consumers overseas. This suggested that there continued to be an impediment to international arbitrage.<sup>49</sup> The PSA considered that it was difficult to isolate the cause of the apparent reduction in the observed price differentials.<sup>50</sup>

---

<sup>49</sup> PSA, *Progress Monitoring Report on Book Prices and the Impact of the 1991 Amendments to the Copyright Act 1968*, Monitoring Report No. 10, September 1993, p. 29.

<sup>50</sup> A discussion of the possible factors is at PSA, 1993, pp. 31–32.

## **1995 PSA inquiry into book prices and parallel imports**

In 1995 the PSA updated the analysis of the bestseller survey, including prices for 1993–94 and the first half of 1994–95, as well as 1989–90 and 1991–92. The PSA noted that the distinction between hardback and paperback had become blurred due to the trend to first publish in large paperback format. Titles published in this format were included in the hardback category for this survey from 1993–94 onwards because the published data sources used by the ACCC did not distinguish between large format paperbacks and hardbacks, but classified large format paperbacks as hardbacks.

The findings of this study were that the differentials between Australian and UK prices, while falling since 1988–89, had risen in the last two years. The PSA noted that this was consistent with the Australian dollar's appreciation.<sup>51</sup> The differentials between Australian and US prices had improved, falling to 5.6 per cent in 1993–94. However, fiction paperbacks remained considerably more expensive (35.2 per cent) in Australia than in the US.

## **1999 ACCC report**

In 1999 the ACCC updated the bestseller surveys in order to present a time series of data. It was considered vital to use a long-term perspective to address the question of potential consumer benefits, since short-term international price comparisons can be heavily influenced by factors that do not fundamentally alter the structure of the industry, such as the exchange rate.

By the time the 1999 surveys were conducted, large format paperbacks had become widespread in the Australian book market and the ACCC expressed misgivings about the validity of the survey results. However, in the timeframe available, it was unable to reclassify the books to ensure that large format paperbacks were not being compared with hardback versions.<sup>52</sup>

Over the 10-year period from 1988–89 to 1997–98, the ACCC found that Australian consumers had paid, on average, 50 per cent more than US consumers and 12.3 per cent more than UK consumers for best selling paperback fiction, indicating sustained and substantial price differences between Australian and US bestsellers, excluding hardback fiction.

## **2001 ACCC report**

Following the introduction of the *Copyright Amendment (Parallel Importation) Bill 2001*, the ACCC updated the bestseller survey to inform parliamentary and public debate.

---

<sup>51</sup> PSA, *Inquiry into Book Prices and Parallel Imports*, Report No. 61, April 1995, p. 64.

<sup>52</sup> ACCC, 1999, pp. 23–24.

The RRP for the period from July to December 2000 were adjusted to extract the GST component, to ensure that the price comparisons gave an indication of the effect of the restrictions on import competition rather than differences in international tax regimes.<sup>53</sup>

Over the 12.5 year period to December 2000, the ACCC found that Australian consumers had paid, on average, around 44 per cent more than US consumers and 8.9 per cent more than UK consumers for best selling paperback fiction. For the 6.5 years to December 2000, Australians paid on average around 18 per cent more for bestsellers other than hardback fiction than US readers. The ACCC excluded books categorised as fiction hardbacks from the category 'all bestsellers' for the period from 1994 to 1995 because of the continued trend in Australia to first publish in large format paperback.<sup>54</sup>

## Bookshop surveys

### **1993 PSA progress monitoring report on book prices and the impact of the 1991 amendments to the Copyright Act 1968**

In the 1993 study the PSA, in consultation with industry representatives of publishers and retailers, conducted another method of price comparison, known as the 'bookshop methodology'. This methodology produced a price comparison indicative of the average price differential between countries with respect to a title chosen at random from a representative bookshop. The PSA noted that titles sold by specialist bookshops and educational and academic books may not be represented in this survey.

A list of titles sold in the seven months from December 1992 to June 1993 was obtained from a bookshop considered by the Australian Booksellers Association to be representative of an 'average' bookshop in terms of the type of titles sold.

The seven-month period was chosen to avoid distortions from selecting a shorter period (such as a month) and to exclude non-current titles which a longer period (such as a year) may introduce. December was included in the sample to include titles associated with Christmas sales, to ensure that consumer preferences were appropriately represented.

Titles that sold less than two copies in the period were removed to exclude low volume books, resulting in 3737 titles. A random sample of 374 (10 per cent), representing 50 suppliers, was chosen from this list. These titles and the relevant ISBNs were sent to the ABPA, which contacted the relevant publishers/suppliers requesting that the RRP for each title in Australia, the UK, US and Canada be supplied to the PSA. The comparisons may not have been between books with the same ISBN, since all titles

---

<sup>53</sup> Taxes were also removed from international prices where relevant.

<sup>54</sup> ACCC, 2001, pp. 5–8.

were not available in the same edition in each country. The limitations of this were discussed in the report.<sup>55</sup>

Four comparisons were made: between Australia and the UK, Australia and the US, Canada and the UK, and Canada and the US. The sample for each comparison consisted of titles for which the current price in both countries was received from publishers.

The difference between the prices in the two countries was calculated for each title and expressed as a percentage of the UK or US price as the base. For each comparison, the mean, median, upper and lower quartile price differentials were calculated.

The results from this survey were an average differential for Australia/UK of 10.58 per cent and 12.01 per cent for Australia/US.

### **1995 PSA inquiry into book prices and parallel imports**

The PSA updated the bookshop survey in 1995 for the period from December 1993 to June 1994. The final list consisted of 3631 titles and a random sample of 363 titles (10 per cent), representing 43 suppliers. Weighted averages of the differentials were also produced, according to sales volumes at the bookshop for the relevant period.

The results from this survey were an average differential for Australia/UK of 7.8 per cent and 14.2 per cent for Australia/US. The weighted average results were 13.1 per cent and 20.2 per cent, respectively. The PSA considered that weighting the differentials according to volumes sold would give a closer approximation of the average differential experienced by consumers.

## **Technical and professional books**

### **1999 ACCC report**

Previous inquiries had received submissions about high Australian prices for technical and professional titles. The Australian Campus Booksellers Association (ACBA) provided a comparison of Australian and US prices for 10 medical titles and Australian and UK prices for nine medical titles. Its surveys indicated that Australian consumers paid on average 39 per cent more than US readers and 23 per cent more than UK readers. While the ACCC recognised the limitations of these surveys, it considered that the findings suggest that there were potentially large gains for Australian consumers of certain technical and professional books from an opening of the market.

### **2001 ACCC report**

The ACCC updated the ACBA survey in 2001, comparing prices of the same titles used in the 1999 survey.<sup>56</sup> It found that Australian consumers paid on average 23.2 per cent

---

<sup>55</sup> PSA, 1993, p. 10.

<sup>56</sup> 2000 and 2001 prices were adjusted for GST.

more than US readers in March 2001 for certain medical titles and 26.8 per cent more in August 2000. The relevant differentials for the UK were 18.4 per cent in March 2001 and 17.8 per cent in August 2000.

## Attachment C: Table summary of past report survey methodologies and outcomes

Report survey	Data sources	Time periods	Editions	Outcomes
1989 PSA publishers	RRPs of titles in catalogues of three major British publishers <i>Australian Books in Print</i> on CD-ROM	1988–89	Same ISBNs	AU: UK +31.3% CA: UK -2.58%
1989 PSA bestseller	RRPs of all titles appearing in both US and UK bestseller lists at same time <i>Publishers Weekly</i> (US), <i>The Bookseller</i> (UK)	1987–89	Mass market paperback Hardback fiction	UK: US +30.6% UK: US +6.7% UK: US + 18.7%
1993 PSA bookshop	RRPs of random sample of titles sold by ‘average’ bookshop RRPs from relevant suppliers	Dec 1992 to Jun 1993	Different ISBNs	AU: UK +9.8% CA: UK -4.1% AU: US +12% CA: US +3.9%
1993 PSA bestseller	RRPs of all titles appearing in both Australian/US and Australian/UK bestseller lists at same time <i>Bookseller</i> + Publisher (Australia), <i>Publishers Weekly</i> (US), <i>The Bookseller</i> (UK)	1988–89 1990–91 1992–93	Different ISBNs	AU: UK +17.86% AU: US +40.75% AU: UK –0.93% AU: US +32.31% AU: UK –1.22% AU: US +12.78%
1995 PSA publishers	RRPs of titles in catalogues of 13 publishers <i>Global Books in Print</i> and <i>Book Find</i> – CD	Jan to Jun 1994	Different ISBNs	AU: UK +14.9% AU: US +18.6%



Report survey	Data sources	Time periods	Editions	Outcomes
1995 PSA bookshop	RRPs of random sample of titles sold by ‘average’ bookshop RRPs from relevant suppliers	Dec 1993 to Jun 1994	Different ISBNs	AU: UK +7.8% CA: UK –12.7% AU: US +14.2% CA: US –5.2%
1995 PSA bestseller	RRPs of all titles appearing in both Australian/US and Australian/UK bestseller lists at same time <i>Bookseller</i> + Publisher (Australia), Publishers <i>Weekly</i> (US), <i>The Bookseller</i> (UK)	1989–90  1991–92  1993–94  Jul to Dec 1994	Different ISBNs	AU: UK +18.6% AU: US +29.3% AU: UK –3.5% AU: US +24.7% AU: UK +3.3% AU: US +5.6% AU: UK +4.0% AU: US +18.6%
1999 ACCC bestseller	RRPs of all titles appearing in both Australian/US and Australian/UK bestseller lists at same time <i>Bookseller</i> + Publisher (Australia), Publishers <i>Weekly</i> (US), <i>The Bookseller</i> (UK)	1994–95  1995–96  1996–97  1997–98  <u>Average 1988–98</u>	Different ISBNs	AU: UK +1.0% AU: US +13.0% AU: UK +6.5% AU: US +20.3% AU: UK –1.6% AU: US +20.1% AU: UK –5.7% AU: US +2.8% AU: UK +3.4% AU: US +20.2%

Report survey	Data sources	Time periods	Editions	Outcomes
1999 ACCC bestseller – hardback fiction	RRPs of hardback fiction <sup>57</sup> appearing in both Australian/US and Australian/UK bestseller lists at same time <i>Bookseller</i> + Publisher (Australia), <i>Publishers Weekly</i> (US), <i>The Bookseller</i> (UK)	1994–95	Different ISBNs	AU: UK –1.9% AU: US –2.4%
		1995–96		AU: UK –7.9% AU: US –6.7%
		1996–97		AU: UK –10.6% AU: US –8.2%
		1997–98		AU: UK –29.2% AU: US –26.1%
		<u>Average 1988–98</u>		AU: UK –5.4% AU: US –0.7%
1999 ACBA professional and technical books	Comparison of Australian RRP of US medical titles and nine UK medical titles	Unknown	Different ISBNs	AU: UK +23% AU: US +39%

---

<sup>57</sup> Including large format paperback.

Report survey	Data sources	Time periods	Editions	Outcomes
2001 ACCC bestseller	RRPs of all titles <sup>58</sup> appearing in both Australian/US and Australian/UK bestseller lists at same time <i>Bookseller</i> + Publisher (Australia), Publishers <i>Weekly</i> (US), <i>The Bookseller</i> (UK)	1994–95	Same ISBNs	AU: UK +3.8% AU: US +24.6%
		1995–96		AU: UK +12.2% AU: US +33.3%
		1996–97		AU: UK +4.5% AU: US +39.3%
		1997–98		AU: UK +4.9% AU: US +24.2%
		1998–99		AU: UK –11.3% AU: US –4.6%
		1999–00		AU: UK –3.8% AU: US +12.8%
		Jul to Dec 2000		AU: UK –9.2% AU: US –0.8%
		<u>Average 1994 to 2001</u>		AU: UK +0.2% AU: US +18.4%

<sup>58</sup> Figures for 1994–95 to December 2000 exclude fiction hardback.

Report survey	Data sources	Time periods	Editions	Outcomes
2001 ACCC professional and technical books	RRPs of hardback fiction <sup>59</sup> appearing in both Australian/US and Australian/UK bestseller lists at same time <i>Bookseller</i> + Publisher (Australia), Publishers <i>Weekly</i> (US), <i>The Bookseller</i> (UK)	1994–95	Different ISBNs	AU: UK –1.9% AU: US –2.4%
		1995–96		AU: UK –7.9% AU: US –6.7%
		1996–97		AU: UK –10.6% AU: US –8.2%
		1997–98		AU: UK –29.2% AU: US –26.1%
		<u>Average 1988–98</u>		AU: UK –5.4% AU: US –0.7%

Sources: PSA, *Book Prices*, reports nos. 24 and 25, 1989.

PSA, *Progress Monitoring Report on Book Prices and the Impact of the 1991 Amendments to the Copyright Act 1968*, Monitoring Report No. 10, September 1993.

PSA, *Inquiry into Book Prices and Parallel Imports*, Report No. 61, April 1995.

ACCC, *Potential Consumer Benefits of Repealing the Importation Provisions of the Copyright Act 1968 as they apply to Books and Computer Software*, 1999.

ACCC, *Summary of the Commission's March 1999 Report on The Potential Consumer Benefits of Repealing the Importation Provisions of the Copyright Act 1968 as they Apply to Books and Computer Software – Including Price Updates for Books, Computer Software and Sound Recordings*.

<sup>59</sup> Including large format paperback

# Attachment D: Interaction with the Trade Practices Act

## The effect of removing parallel import restrictions

The PC's issues paper identifies an argument that, if the parallel import restrictions were to be removed from the Copyright Act, copyright holders might still be able to use contractual arrangements to control parallel imports of books.<sup>60</sup> The implication of this is that the claimed adverse effects on local authors and publishers from removing the restrictions might not be as significant as supporters of the current restrictions claim (although, as noted, the corollary of this argument is that the potential benefits to consumers of removing the restrictions would be smaller).

The corollary question to the effect of removing the restrictions is to what extent would the Trade Practices Act apply to private arrangements restricting parallel importation of books?

### Part IV of the Trade Practices Act

Part IV of the Trade Practices Act covers anti-competitive practices that limit or stop competition. It fosters the competitive environment to give consumers a choice in price, quality and service. It prohibits commercial conduct that substantially lessens competition in a market, because a lack of competition might allow some traders to push prices up and lower the quality of the goods and services they offer to consumers. Some anti-competitive conduct is prohibited outright (e.g. price fixing), while other conduct is prohibited only if it substantially lessens competition. In some circumstances a refusal to supply is unlawful under the Trade Practices Act. These include instances of misuse of market power, third line forcing, boycotts, resale price maintenance and placing limitations on resellers.

Private arrangements that restrict parallel importation have the potential to contravene a number of sections of Part IV of the Trade Practices Act.<sup>61</sup> This is because arrangements restricting supply, more so by their nature than other arrangements, have an adverse effect on the potential for competition and can therefore raise concerns under Part IV. Further information on Part IV of the Trade Practices Act can be found on the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)).<sup>62</sup>

---

<sup>60</sup> Productivity Commission, *Copyright Restrictions on the Parallel Importation of Books – Issues Paper*, Canberra, 2008, p. 7.

<sup>61</sup> An example of a matter in which the ACCC was involved that illustrates some of the issues involved in such a contravention was *Australian Competition and Consumer Commission v Universal Music & Ors* (2001) FCA 1800, and *Universal Music & Ors v Australian Competition and Consumer Commission* (2003) FCAFC 193. This matter arose in light of the 1998 amendment to the Copyright Act removing the restrictions on the parallel importation of sound recordings.

<sup>62</sup> For a list of ACCC publications dealing with anti-competitive agreements, see [www.accc.gov.au/content/index.phtml/itemId/720772](http://www.accc.gov.au/content/index.phtml/itemId/720772).

Other than ss. 4D (exclusionary provisions), 47(6) and (7) (third line forcing), 45A (price fixing) and 48 (resale price maintenance), conduct is generally only prohibited under Part IV if it has the purpose, effect or likely effect of substantially lessening competition in a market.<sup>63</sup> The term ‘substantial’ has been interpreted differently to mean real or of substance<sup>64</sup>, not merely discernible but material in a relative sense<sup>65</sup> and meaningful.<sup>66</sup> The precise threshold between a lessening of competition and a substantial lessening of competition will depend on the particular facts of a matter.

The ACCC publication *Merger Guidelines* provides more information on the way the ACCC approaches the substantially lessening of competition test for merger matters and is also used by the ACCC as a guide to the approach it takes to the test in non-merger matters.<sup>67</sup>

Having regard to the application of a competition test under certain provisions of Part IV, if the parallel import restrictions are to be removed, it may be the case that conduct engaged in that has the effect of restricting parallel imports would not relevantly affect competition and so may not contravene the sections of the Trade Practices Act discussed above. On the other hand, if the arrangement in question is of a kind described in ss. 4D or 47(6) or (7), for example, it could in fact be prohibited irrespective of its effect on competition. Whether arrangements seeking to restrict parallel imports substantially lessen competition or are prohibited by the Trade Practices will, of course, ultimately be a matter for the courts.

### **Section 51(3) of the Trade Practices Act**

With respect to copyright works, s. 51(3) excludes certain conduct from committing a contravention in respect of certain parts of Part IV of the Trade Practices Act. The exclusion relates to conduct that involves the imposing of or giving effect to conditions of licences or assignments of copyright. The exclusion applies in respect of ss. 45 and 4D (anti-competitive agreements, including exclusionary provisions), ss. 45A, 47 (exclusive dealing) and s. 50 (mergers and acquisitions). The exclusion does not extend to s. 46 (taking advantage of a substantial degree of market power) or s. 48.

The exclusion only arises in relation to conditions of copyright licences or assignments restricting the parallel importation of books where the condition of the licence or assignment in question ‘relates to ... the work or other subject matter in which the copyright subsists’.

---

<sup>63</sup> Or, in the case of s. 50, has the effect or likely effect of substantially lessening competition. Under s. 4G, a lessening of competition includes, but is not limited to, preventing or hindering competition.

<sup>64</sup> Trade Practices Legislation Amendment Bill 1992, explanatory memorandum, paragraph 12.

<sup>65</sup> Australia, Senate 1992, *Debates*, vol. S157, p. 4776.

<sup>66</sup> *Rural Press Limited v Australian Competition and Consumer Commission* (2003) HCA 75 at 41.

<sup>67</sup> ACCC, *Merger Guidelines*, available online at [www.accc.gov.au](http://www.accc.gov.au).

Only one judicial decision, *Transfield v Arlo*, has touched on the meaning of the words ‘relates to’ in s. 51(3) (in the context of patents) in obiter by a single judge.<sup>68</sup> The views expressed in *Transfield* by Mason J have subsequently been used to support a range of interpretations.

The ACCC has provided submissions to both the National Competition Council (NCC) in its *Review of sections 51(2) and 51(3) of the Trade Practices Act 1974* (1999) and the IPCRC about its understanding of s. 51(3). The ACCC, the NCC<sup>69</sup>, the IPCRC<sup>70</sup> and the Australian Government Solicitor<sup>71</sup> have all noted that there are a number of interpretations regarding the application of excluded conduct.

Under the narrow interpretation, s. 51(3) would only apply to a condition that relates directly to the work itself—for example, the presentation of a book. On an intermediate interpretation, a condition relates to intellectual property if the condition seeks to protect and exploit the exclusive rights of the rights holder or to secure an advantage that is not collateral to the rights holder’s rights.<sup>72</sup> Under the broad interpretation almost any condition would relate to a copyright work and be excluded.

Recognising a purpose of s. 51(3) may be to reconcile the public policy considerations of intellectual property and competition law, an application of the intermediate view would seem the most appropriate; however, the issue has yet to be tested in court. In addition the ACCC considers that, depending on the facts, while some such territorial restrictions are likely to be considered ancillary or collateral to a rights holder’s exclusive rights and fall within the scope of s. 51(3), some will not.

Because of the uncertainty over the scope of the operation of s. 51(3) and in the absence of specific facts to consider, the ACCC is unable to advise whether s. 51(3) would apply to exclude similar private contractual arrangements from application of the relevant Part IV provisions if the statutory restrictions were repealed. However, if faced with a particular factual scenario, the ACCC would make an assessment of the matter having regard to the specific facts, its role under the Trade Practices Act and consistently with its principle view that those arrangements that raise competition concerns should receive equal treatment to any other property right under the Trade Practices Act.

## Authorisation and notification

If the restrictions were removed from the Copyright Act, the ACCC can grant immunity from legal action in certain circumstances to parties who consider that they may potentially contravene Part IV of the Trade Practices Act.

---

<sup>68</sup> *Transfield Pty Ltd. v Arlo International Ltd* (1980) 144 CLR 83.

<sup>69</sup> National Competition Council, *Review of sections 51(2) and 51(3) of the Trade Practices Act 1974*, Canberra, 1999, p. 186.

<sup>70</sup> Ergas report, p. 212.

<sup>71</sup> In its advice to the IPCRC; see Ergas report, p. 207.

<sup>72</sup> National Competition Council, *Op cit*, p. 184

The authorisation and notification processes in Part VII of the Trade Practices Act provide protection from action by the ACCC or any other party for potential breaches of certain provisions of Part IV.

One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’. Broadly, the ACCC may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The ACCC conducts a comprehensive public consultation process before making a draft decision and ultimately a final decision to grant or deny authorisation. Parties considering lodging an application for authorisation are strongly encouraged to meet with the ACCC and discuss their application prior to lodgement.

The notification process provides protection from actions by the ACCC or any other party for potential breaches of the exclusive dealing (s. 47) provisions of the Trade Practices Act. To assist its consideration of a notification, the ACCC may contact interested parties inviting submissions on proposed exclusive dealing conduct.

The ACCC will revoke immunity for exclusive dealing (other than third line forcing) only if it considers that the conduct has the purpose or has or is likely to have the effect of substantially lessening competition and the public benefit from the conduct do not outweigh the likely detriments to the public. To deny or revoke immunity for notified third line forcing, the ACCC must be satisfied that the likely benefits to the public from the conduct do not outweigh the likely detriments to the public.

The ACCC’s authorisation and notification processes are outlined in further detail in the *Guide to authorisation* and *Guide to exclusive dealing notifications*, available from the ACCC website. These publications discuss in detail the processes underlying the grant of immunity.<sup>73</sup>

## Summary

Overall, repealing the statutory restrictions will not necessarily result in an unrestrained supply of parallel imported books. While private arrangements that restrict parallel importation would certainly have the potential to contravene the Trade Practices Act, there are also likely to be many instances where such arrangements would not, although ultimately this is a matter for the courts. It is also likely that s. 51(3) may provide certain conduct with an exclusion from committing a contravention, bearing in mind the exclusion is limited and has not directly received judicial consideration, adding to the uncertainty of its application.

Having regard to the international nature of parallel importation, it is also important to note the jurisdictional limitations of Part IV of the Trade Practices Act. Furthermore, in the event that conduct is likely to contravene the Trade Practices Act, industry

---

<sup>73</sup> ACCC, [Authorisations and notifications—a summary](http://www.accc.gov.au/publications/authorisations-and-notifications-a-summary) is available online at [www.accc.gov.au](http://www.accc.gov.au).



participants may apply to the ACCC to seek immunity from legal action for that particular conduct through the authorisation and notification provisions.