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# 1 About the study

## 1.1 Background

The production and sale of books is governed by copyright law which provides authors and publishers with a set of ‘exclusive rights’ over their work. Except in tightly prescribed circumstances, the law prevents others from publishing literary works without the permission of the copyright holder. Copyright law typically also contains parallel importing provisions that restrict foreign editions<sup>1</sup> of a book being imported and sold in competition with the local edition.

Copyright legislation in Australia predates federation, with restrictions on the parallel importation of books and other copyright material included from the outset. The current Copyright Act, when introduced in 1968, retained the import restrictions from earlier legislation. Other major English-speaking nations also have a long history of restricting parallel book imports and (other than New Zealand, which repealed its restrictions in 1998) continue to do so today.

Australia’s Parallel Import Restrictions (PIRs) have been reviewed frequently over the last two decades, amid concerns in some quarters that, as a result of these import restrictions, Australians may be paying too much for books and other copyright material. In general, the reviews found that the restrictions benefit local copyright holders but also affect competition and disadvantage consumers. Most have recommended that the PIRs be repealed (see box 1.1).

Although PIRs on musical CDs and computer software were abolished in Australia in 1998 and 2001 respectively, the restrictions on parallel imports of books have been retained, albeit with some amendments. In 1991, a ‘30 day release rule’ and a ‘90 day resupply rule’ were introduced to improve the timeliness and availability of titles on the Australian market. An attempt in 2001 by the (then) government to repeal the PIRs, in full, was blocked in the Senate.

Australian publishing output has grown markedly over the last two decades, and more Australian authors have found market recognition, both at home and abroad.

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<sup>1</sup> As well as restricting the parallel importation of foreign editions, such provisions also restrict the reimportation for commercial purposes of local editions that have been supplied abroad. For simplicity, and where relevant, the use of the term ‘foreign editions’ in this report should be taken to include local editions amenable to reimportation.

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### Box 1.1 **Previous reviews of Australia's parallel importation laws**

Australia's PIRs have been reviewed many times in the last 20 years. Previous reviews have taken a variety of approaches when assessing the PIRs. Most have recommended their removal.

The Copyright Law Review Committee reviewed the provisions in 1988. In recommending their general retention, it indicated among other things that it had insufficient evidence that books in Australia were being sold at 'unreasonably' high prices, although it emphasised that it had insufficient powers and resources to adequately investigate the matter. The Committee recommended some relaxation of the PIRs to improve the availability of titles, resulting in the subsequent introduction of the 30 day and 90 day rules in 1991.

Following that report, the Prices Surveillance Authority's (PSA 1989) surveyed the recommended retail prices of books principally in the Australian and the UK and US markets, finding prices to be on average higher in Australia. It recommended that the restrictions be removed, with some limited protection for Australian authors for a period of 10 years. The PSA recommendation to open the market was not adopted. The PSA updated its report in 1995 and concluded that, while the 1991 reforms had improved the timeliness of book releases in Australia, prices continued to be higher in Australia than in the UK and US.

The Australian Competition and Consumer Commission's (ACCC) 1999 and 2001 reports extended some of the PSA's price comparisons. The studies revealed that over a six-and-a-half year period, the price of bestselling books was generally higher in Australia than in the US and on par with prices in the United Kingdom, although these price differences varied over time. In particular, the ACCC found that, in 2001, book prices in Australia were lower on average than in the UK, and similar to those in the US. The 2001 report also noted that removal of the PIRs on books in New Zealand in 1998 had not caused the collapse in the industry that many had predicted. As in 1999, the 2001 ACCC report recommended that the laws be repealed.

In 2000, the Intellectual Property and Competition Review Committee (IPCRC 2000) examined the PIRs as part of the Australian Government's Legislative Review Program, as established by the Competition Principles Agreement. The Committee began with the presumption that restrictions on competition should be removed unless they result in a net benefit for the community, and there are not better alternatives. It concluded that the costs of removing the restrictions were likely to be small relative to the gains to Australia. The report noted that the net income leakage to foreign copyright holders ensuing from the PIRs was potentially significant.

In addition, the Senate Legal and Constitutional Legislation Committee reviewed the available evidence on the effects of the PIRs in 2001. The majority report recommended that legislation to remove the restrictions proceed to the parliament. However, two minority opinion reports recommended against removal, citing concerns about piracy and the viability of the Australian books industry.

The parallel importation laws have not been reviewed since 2001.

*Source:* ACCC (1999, 2001), CLRC (1988), IC (1996), IPCRC (2000), PSA (1989, 1995), SLCLC (2001).

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Meanwhile, a range of developments has begun to emerge that could, in time, appreciably affect the nature, production and sale of books, with implications for the operation and impact of the PIRs. The most prominent to date has been the rise of online book retailers. Australian consumers can now effectively parallel import books themselves, as soon as they are released anywhere in the world, and can take advantage of different prices and format choices, as well as the GST-free status of books purchased online from abroad. Other emerging developments affecting the books sector include the digitisation of texts, the diffusion of e-books and the deployment of ‘print-on-demand’ technologies. These latter developments are still in their infancy and their full ramifications are presently unclear.

## 1.2 Scope of the study

In August 2008, the Council of Australian Governments decided that Australia’s PIRs on books should be reviewed by the Productivity Commission, as part of the Council’s renewed competition policy agenda. On 13 November 2008, the Commission received a reference from the Assistant Treasurer, requesting that it undertake this study and report within six months. The terms of reference are reproduced at the front of this report.

In essence, the Commission has been requested to examine: the extent to which the PIRs promote and achieve the objectives of the Copyright Act; the benefits and costs of the restrictions on all affected parties; and options for reform. In doing so, it is required to have regard to: the impact on all relevant industry groups; the intended objectives of the parallel import provisions within the Government’s overall policy framework; approaches adopted in comparable countries; relevant international treaties; and the findings of other relevant reviews.

Importantly, although the title for this study refers to ‘copyright restrictions’, the study is not about the merits of copyright itself. The PIRs that are the subject of this study, while contained within the *Copyright Act 1968*, are additional to, and separable from, the core copyright protections for authors, publishers and other ‘creators’ contained in the Act. Further, while Australia has ratified some international treaties<sup>2</sup> that require signatories to provide a range of copyright protections, those treaties do not oblige signatories to restrict the parallel importation of copyright material.

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<sup>2</sup> These treaties include the *Berne Convention for the Protection of Literary and Artistic Works*, which was created in 1886 as the first attempt to create an international system of copyright, and the 1994 agreement on *Trade Related Aspects of International Property Rights*.

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For the purposes of this study, the Commission has followed the approach in section 44A of the Copyright Act of interpreting the term ‘books’ to have its usual meaning while excluding computer software manuals, periodicals and those books whose main content is a transcription of musical works.

### 1.3 Conduct of the study

In accordance with the *Productivity Commission Act 1998*, the Commission has sought to maximise the transparency of this study, including by providing as much opportunity as possible for interested parties to have input, within the limited timeframe provided for the study. Accordingly, the Commission:

- upon receipt of the reference, advertised the study on its website, in newspapers and in an initial circular, which was distributed to potentially interested parties
- visited or had phone discussions with a range of authors, booksellers, publishers and printers, as well as a number of industry associations and government agencies, to gain a better understanding of aspects of the books sector (appendix A lists these visits and discussions.)
- released an issues paper on 26 November 2008, which expanded on the terms of reference and invited participants to lodge written submissions by 20 January 2009
- released a discussion draft on 20 March 2009, which contained the Commission’s thinking at that stage of the study, and invited further submissions
- held roundtables in Melbourne and Sydney on 7 and 8 April 2009, respectively, to elicit some initial feedback on the draft
- communicated with a number of participants after the roundtables to clarify particular issues.

The Commission received some 272 submissions prior to the release of the discussion draft, and has received a further 288 submissions since then. These are listed in appendix A and are available on the Commission’s website. The Commission records its appreciation of the many people who have participated in the study.

As would be expected, most submissions have been made by people and entities closely associated with the books sector. The large majority of submissions support retention of the restrictions, and many have offered variations on a limited set of arguments. The Commission also received three petitions. One had 18 000 signatories, submitted by the Coalition for Cheaper Books, calling for the abolition of the restrictions (sub. DR509). Two petitions, together with almost 6000 signatories, were submitted by the Australian Society of Authors and the Australian

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Publishers Association, and called for the retention of ‘territorial copyright’ (subs. 118 and DR512).

In view of the large number of submissions received following the release of the discussion draft, the Commission requested, and was granted, an extension to the reporting date, to 30 June 2009. The Commission has considered the arguments contained in the post-draft submissions and undertaken additional analysis of the books industry. The final report reflects the Commission’s further deliberations.

## **1.4 The Commission’s approach**

While the terms of reference have several facets, the Commission’s overarching task has been to determine whether the current PIRs should be retained, modified or repealed. In doing so, the Commission has examined whether:

- the restrictions generate more benefits than costs for the Australian community
- there are other policy options that could generate greater net benefits.

In making such assessments, the Commission interprets ‘benefits’ and ‘costs’ in their fullest sense — that is, covering the value of social, cultural and educational matters, as well as financial or material ones — and assesses them within a community-wide framework, as required by the *Productivity Commission Act 1998*. Thus, while the terms of reference require that regard be had to the effects of PIRs on all relevant industry parties, the Commission has not directed its interest solely or necessarily primarily to the impacts on copyright holders or other stakeholders in the books industry. What matters ultimately is the wellbeing of the community as a whole.

Making such assessments is not a simple task, in part because restrictions on the parallel importation of books have an array of often complex effects. The benefits and costs associated with these effects vary across the books sector and the community generally. For some groups, including many authors, publishers and printers, the PIRs generate relatively direct and identifiable benefits. However, for many consumers of books and for workers, businesses and other entities outside the books sector, the impacts can be quite diffuse and less tangible.

Further, the terms of reference require the Commission to have regard to ‘the intended objectives of the parallel importation provisions within the overall policy framework of the Government including competition, intellectual property, trade and industry policies’. Although the terms of reference do not mention cultural matters explicitly, the Commission sees these as also being a pertinent aspect of the Government’s ‘overall policy framework’.

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There are thus many policies and impacts that are potentially relevant to the study. The challenge is to place them in a tractable analytical framework that creates clarity for weighing up the key policy considerations.

The analytical framework used in this study is essentially the same as that used in previous Commission studies into matters invoking significant social and cultural considerations, such as those dealing with broadcasting, heritage, gambling and social capital. Importantly, the framework's efficacy is not dependant on the quantification or even the individual identification of all the myriad impacts of the policies being studied. This is partly because, from a policy perspective, some impacts will be minor or offset by countervailing effects, and/or do not provide a rationale for government policy support. At the same time, the framework provides guidance on when government intervention may be warranted, and guidance on how it might be configured to meet particular goals.

## **1.5 Commentary on the discussion draft**

In submissions and some public commentary following release of the discussion draft, a number of members of the book industry criticised the draft on various grounds. These included concerns that the Commission:

- had failed to understand some aspects of the industry or had overlooked others
- did not have evidence to support some conclusions, and had overly relied on theory
- had made recommendations that would have no or little price impact but would cause significant damage to the local industry
- had rejected the views of the overwhelming bulk of submissions, which had favoured retention of the PIRs, broadly in their current form.

In making its assessments in the discussion draft, the Commission drew on a range of evidence that had been sourced from industry data, submissions and consultations with industry stakeholders, as well as its own research and analysis. Thus, while the timeframe provided for the study and the lack of up-to-date ABS industry data impacted on its analysis, the Commission was able to assemble a broad evidence base.

Much commentary which followed the discussion draft focussed on the evidentiary basis for the Commission's conclusions on the price effects of the PIRs. In this context, the Australian Publishers Association stated:

At most, the Commission judges that Australia's current territorial copyright rules "put upward pressure on prices in at least some segments of the books market" — but it cannot quantify the impact of that pressure, if any, and cannot explain why the rules do

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not have a consistent, measurable impact across all segments. The Productivity Commission offers no evidence for its findings — it clearly has not found any — only vague, theoretical justifications. (sub. DR513, p. 3)

In fact, the evidence drawn on by the Commission included:

- its own extensive quantitative price comparisons
- previous quantitative price comparisons undertaken by the Prices Surveillance Authority and the Australian Competition and Consumer Commission
- quantitative price comparisons submitted by industry participants
- qualitative evidence submitted by participants
- evidence of price changes in other markets following removal of PIRs
- previous research on the effects of other trade liberalisation actions.

As is typical in policy analysis in all fields, the Commission also drew on theory in various instances where the available evidence by itself could not sufficiently illuminate the issues at hand. Accordingly, it couched its analysis and conclusions carefully with the aim of neither overstating nor understating the level of certainty that attaches to them.

The issuing of a discussion draft is itself a means of eliciting additional evidence and of reducing uncertainties. It allows the Commission's preliminary thinking and judgments to be 'tested'. The post-draft report consultation process provided participants the opportunity to draw attention to any cases where the Commission may have overlooked or misconstrued evidence. While some of the responses to the discussion draft provided useful information on points of detail and nuance, they have not fundamentally altered the Commission's assessment of the effects of the PIRs. However, in relation to the appropriate way forward, the evidence received together with further research undertaken since the discussion draft has led the Commission to move away from the intermediate reform path that was proposed in the draft. The recommendations in this final report reflect the Commission's further considerations.

On the question of the 'volume' of support for various policy positions, this study has attracted a large number of submissions and some widely-subscribed petitions. However, as noted in the issues paper and the discussion draft, the Commission assesses all arguments on their merits, in the light of the evidence available to it, rather than on the frequency with which those arguments are put.

The contention underpinning much commentary (both prior to and following the discussion draft) — that reform to the PIRs would have little or no impact on book prices and yet would cause a significant contraction in local publishing — is not, in

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the Commission's view, sustainable. Among other things, as pointed out in chapter 4, if cheaper, or otherwise better value, books were not available for importation from overseas, removal of the PIRs would have little substantive impact on the industry.

In this context, the Commission notes that, during the debates about the reforms to Australia's PIRs in 1991 and New Zealand's PIRs in 1998, local book producers warned against the consequences of implementing those reforms. While those concerns may have been genuinely held, in neither case did they prove warranted — in the Australian case, quite the opposite. In this context, Kinokuniya Bookstores of Australia stated:

Throughout this debate publishers have commented on how the current PIRs have helped build the industry to its present-day state. This is interesting, considering the history of PIRs. When the 1991 [reforms to] PIRs were suggested, publishers spent an enormous amount of energy on retaining a closed market. The parameters changed in 1991 and publishers learnt to deal with the new set of rules, just as they would do if the rules changed again. (sub. DR288, p. 5)

This is consistent with the Commission's observations regarding reform in many other industries, where those facing changes in assistance often overestimate the adverse effects, while underestimating the benefits that might flow from the proposed reform.