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Submission to the Productivity Commission, following its draft report on Intellectual Property Arrangements

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Last November, the Turnbull government committed itself to the abolition of parallel-import restrictions (PIRs) on books, following the final report of the Competition Policy Review led by Professor Ian Harper. The relevant part of that report relied on a previous conclusion by the Productivity Commission in 2009 that removing such restrictions would be in the public interest.

Now the Commission has issued a draft report on Intellectual Property Arrangements. In those parts of the report that are concerned with PIRs, the Commission agrees with its previous conclusion and that of the Harper Review, and now recommends that PIRs be abolished by the end of 2017.

In this response to the draft report, I direct my attention solely to the matter of PIRs.

Perhaps because the government has already announced its intention to abolish PIRs, the Commission's argument for the abolition of PIRs turns out to be desultory. It doesn't even bother to make the case that books are more expensive under the current regime.

On e-books, it quotes a three-year-old House of Representatives standing committee conclusion that prices were between 13 and 16 per cent higher than US prices — with no mention of GST, or what current e-book prices are under a much lower A\$.

On physical books, the Commission merely refers to its own seven-year-old research from its previous inquiry, showing that book prices were then ‘significantly’ higher than they would have been without PIRs. The only other reference to prices is an aside about a 2013 study by Deloitte, showing that, on average, Australian books are around 10 per cent higher than they otherwise would be. Again, the Commission has made no attempt to get current figures.

In fact, there has been no analysis that I’m aware of by the Commission or any other body which compares current Australian book prices with like-for-like editions in other English-language markets. The only price comparisons, such as those above, are several years old, when the Australian dollar was much higher relative to the US dollar and the British pound. It is an inconvenient truth that, currently, Australian book prices are not high. Astonishingly, this means that the core problem for which the abolition of PIRS is proposed as a solution is either non-existent, or, at best, has not been proved.

More importantly, there has been a refusal by the Commission to acknowledge that Australian book prices only look dear or cheap according to the ruling exchange rate. In the next few months, the Australian dollar may drop even further — in which case, our book prices will seem even lower. If the opposite happens, they will seem higher. In each case, the apparent fluctuations would clearly be beyond the control of publishers.

The other main ground for PIR abolition has historically been the supposed poor local availability of international editions. And yet the Commission doesn't complain about this any more — and neither do booksellers. All Australian publishers release their licensed editions of US- and UK-originated books within 30 days of initial publication (which they're required to do by law, if they want to secure territorial copyright). Many publish within 14 days, and some do so more or less simultaneously. Besides, consumers can buy the overseas edition from offshore online retailers whenever they feel like it, and local e-book editions are also often available simultaneously.

So the price-and-availability argument is bogus. What is left? Running through the draft report, one can detect the Commission's fundamental belief that there should be no impediments to free trade, and that — whatever the details — the benefits to society as a whole from eliminating protectionist instruments will always outweigh the damage to affected industries caused by taking such a measure. If industries like the book-publishing industry can't survive without some form of protection, they should get out of the way and disappear. Their resistance to the loss of protection should be disregarded by policymakers as merely self-serving.

None of this is stated quite so baldly. In fact, there's scant attention to making a case at all. All I could find in the Commission's draft report is a kind of statement of first principles: 'Prohibiting parallel imports enables IP holders to engage in geographic price discrimination ... Rights holders price discriminate to increase the total returns they earn from their works globally, by charging prices that reflect each country's willingness to pay.'

And yet, even the mechanics of this apparently clear principle are surprisingly fuzzy. It's not clear who the PC is referring to by 'IP holders' in this passage, although I assume they are the original publishing-rights holders (presumably, US publishers or agents) who seek to sub-license their rights. But whatever they're being accused of doesn't make sense. In practice, they don't 'charge' or 'discriminate' based on each territory's 'willingness to pay'; they merely seek offers, and take what they can get, wherever they can get it. They might have only one publisher offering in a given territory, or they might enjoy the fruits of a heated auction. What this has to do with Australian PIRs is not clear.

The mechanics are fuzzy because the statement is an expression of what is an ideological and hermetically sealed position. The Commission's recommendation that PIRs be abolished is not based on any factual analysis, and it ignores a number of important industry realities. It is a brutal solution in search of a problem, and in turn it would cause massive adverse consequences for writers, publishers, booksellers, and the culture as a whole.

If PIRS were abolished, as the Commission has recommended, the bedrock of Australian publishing would cease to exist. Local publishers would be unable to acquire rights from overseas publishers or agents with any confidence, as Australia would be an 'open' territory, so different export editions of the one book could compete with theirs, or local booksellers could import copies against their edition. Even if they acquired rights, local publishers would be wary of investing in marketing or promotional activities — such as bringing an author out to a writers' festival — lest they enable free riders to benefit from their expenditure.

They could still acquire rights from local authors, of course, but they couldn't license those, with any confidence, to overseas publishers, as it would be open to those licensees — or third-party distributors — to export stock to Australia, to compete with them. It is even conceivable that there could be several editions of an originally Australian book competing in our marketplace: the Australian edition, and, for example, a US, UK, and Indian one. Local authors and their publishers would be placed in a highly invidious position: either give up on overseas licensing of their books, or hope that the size of the overseas advances compensated for compromised local sales and the export or nil royalty rates that might flow consequentially from such deals.

The consequences of all this would be catastrophic. Without the income and the profits from overseas-originated books, or the income from overseas English-language rights sales, local publishers would become much reduced — and in some cases would disappear. Local authors would find their incomes and opportunities diminishing further, in response to their publishers straitened circumstances. And in one of the greatest of ironies, book prices would probably go up, as publishers sought to compensate for their limited market.

Ultimately, Australian publishing would wither on the vine, as power shifted back to New York and London. When licensing rights to Australia, US publishers would come to demand access to it on a non-exclusive basis, as they do now with Europe vis-a-vis UK publishers. And UK houses, in acquiring UK and Commonwealth rights, would lower the implicit value of the Australian component, and their commitment to Australian distribution would come under pressure. Australia, which is such an important export market for UK publishers, would become a highly contested one.

As for us, it would be back to the 1960s. Unable to secure the exclusive right to publish in our own country, Australian publishers would become oxymorons. Australia would once again become a book depot for US and UK houses. Local authors with international potential would be forced to acquire overseas agents, to seek initial publication in the US or the UK, and to accept overseas editing. Local authors would struggle to find local publishers, and midlist books would become an endangered species.

Bookshops would soon reflect the consequences of all this. With the ecosystem winnowed out — as independent houses declined, and those remaining, along with multinational subsidiaries, reduced their output and the variety of their lists — the shops would lose the vibrancy and range of their offerings.

And the culture as a whole? Fewer local authors, fewer local stories, fewer local publishers, worse bookshops, and a diminished national identity. And all this to satisfy a highly ideological worldview, and on the basis of an unproven case.

Perhaps the greatest irony of all for the Commission and the Treasury is that their ideological home, the United States — the capital of capitalism, and the bastion of free trade — does not allow the parallel importation of books. Nor, of course, does the UK, even with the City constantly championing free-trade theory and policies. Neither country is stupid enough to endanger a vital cultural industry in this way.

The draft report indicates that the Commission knows very little about the above industrial realities. But even if it did, it gives the clear impression that it wouldn't care.

The Commission sees the demise of the Australian publishing industry as simply collateral damage, incurred for a greater good.

For the first time ever, the whole industry — including booksellers, the supposed proxy for exploited consumers — is united in opposition to the abolition of PIRs. We see it as an existential threat. But we would say that, wouldn't we? The Commission knows better.