



**Update:**

## **Unbinding book barriers**

Why import restrictions are sending book retailers broke and harming Australian culture

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## Executive Summary

This *Unbinding Book Barriers* update paper builds on the 2009 edition of the paper by the same name. This version includes more recent data in light of recent events and the challenges faced by the Australian book retail industry.

In 2009 the Productivity Commission inquiry recommended Australia abolish parallel import restrictions (PIRs) on books to make books cheaper for Australian consumers.

The recommendation was rejected by the then Rudd Cabinet.

Since then the REDGroup of book retailers has collapsed, more than one thousand jobs have been lost and it has all largely been a result of PIRs which make it hard for domestic businesses to compete with internet purchases.

Australia's PIRs are not a form of IP protection. Australia's PIRs are a trade barrier designed as IP protection. They should be liberalised. And liberalising them would not undermine territorial copyright.



Liberalisation of PIRs in Australia's sound recording industry provides an indicator of the potential impact.



Despite claims that removal of PIRs would significantly hamper Australia's music industry, data from the agency responsible for the distribution of royalty payments shows an increase in the number of, and total amount given to, Australian writers and publishers following the removal of PIRs.



In the first edition of this paper the data clearly showed the number of writers and publishers, and the amount they received in royalties, had increased since the scrapping of PIRs, while the wholesale cost of CD albums reduced by 32 per cent.



Updated data for this paper shows that between 2002 and 2009 royalties paid from local sales has increased from \$70 million to \$127.9 million, or 83 per cent. Similarly the number of writers and publishers paid increased from 2005's 130,000 to 2009's 224,000, or 51 per cent.

ARIA industry data shows that following liberalisation there has been a decline in the overall number of physical CD albums sold but the average price of a CD album has decreased by 34 per cent.

Considering the shift from physical to electronic books, there is no reason to believe that this does not provide an instructive indication of an equivalent trend for books.

In short, rather than showing PIRs provide a clear trend that would harm the industry, the evidence shows the argument for their removal in favour of industry interests increases; especially when there is now clear evidence that PIRs are harming the retail sector.

## 1.0 Introduction

Since the 1980s the Australian government has progressively reformed the Australian economy by promoting liberalisation of industry to improve its capacity to compete in a global economy.

In 2009 the Productivity Commission completed an Inquiry into whether the government should liberalise parallel import restrictions (PIRs) on books. In 1991 the Hawke government partially liberalised PIRs on books. In its final report the Commission proposed a series of measures to further liberalise Australia's PIRs regime but the recommendation was rejected by the then Rudd Cabinet.

This updated paper will assess the nature of Australia's PIR regime for copyrighted works in light of the recent collapse of the REDgroup and, using data, assess whether the same justification still applies for the abolition of PIRs.

In particular it will assess the validity of PIRs for books under Australia's IP regime and whether PIRs are necessary for IP protection; or whether they are a trade barrier.

This paper will also consider the limited evidence following the liberalisation of PIRs on sound recordings in Australia.



## 2.0 Parallel import restrictions in Australia

Parallel importation is the process of importing a non-counterfeited intellectual property (IP)-protected innovation (patent), brand (trade mark) or work (copyright) into Australia, without the right-holder's permission.

Prior to the 2009 Productivity Commission inquiry, the most significant Inquiry into PIRs on books was completed in the 1980s by the then Prices Surveillance Authority (PSA). The PSA's 1989 report argued that these restrictions were not serving the industry or consumer interest and argued for their repeal.<sup>1</sup>

At that time The Act outlawed all commercial parallel importation of copyrighted material, except for personal use. The PSA's report found that PIRs were allowing industry to release titles in Australia later than the rest of the world, and that they were also charging Australians substantially higher prices than the rest of the world.

The Hawke government chose not to progress with full liberalisation of parallel importation of books, and instead proposed a series of amendments to The Act. The 1991 reforms introduced what is known as the '30 day' rule and the '7/90 day' rule.

The '30 day' rule requires publishers to make available a title within 30 days of its publication internationally. If they do not, they will not enjoy parallel importation rights for the copyrighted work, and booksellers can parallel import the title.

The '7/90 day' rule requires that if a bookseller requests to be restocked with a title and the publisher does not respond within 7 days, or does not supply stock within 90 days, the bookseller can parallel import a reasonable quantity of the title. Both the '30 day' and '7/90 day' rules apply for the entire life of the copyrighted work.

Booksellers can also import a single copy of a book to meet a specific order, and individuals can also parallel import a single copy of a work.

Following the 1991 reforms the PSA completed another inquiry which found the reforms improved the dates that titles were released in Australia, and subsequently argued for a full repeal of PIRs.<sup>2</sup>

During its recent inquiry the Productivity Commission released a draft report that recommended:

- Limiting PIR restrictions for a title to only 12 months from the date of its first publication,
- Abolishing the '7/90 day' rule; and
- Allowing the aggregation of individual import orders by booksellers.<sup>3</sup>

In the final report the Commission recommended full liberalisation with structural adjustment assistance to the printing industries. The recommendation was rejected by the then Rudd Cabinet after successful lobbying by the multinational publishing industry and authors.

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<sup>1</sup> Prices Surveillance Authority, December 1989, "Inquiry into book prices", Final report, PI/89/3, Commonwealth of Australia, p7

<sup>2</sup> Prices Surveillance Authority, 1995, "Inquiry into Book Prices and Parallel Imports". Commonwealth of Australia, Canberra, Australia, n61

<sup>3</sup> Productivity Commission, March 2009, "Restrictions on the parallel importation of books", Productivity Commission Discussion Draft, Commonwealth of Australia, Melbourne, Australia, pxiv

### 3.0 Parallel import restrictions: Necessary for intellectual property rights or a trade barrier?

The Commission’s inquiry prompted a significant response. While opinions varied, the majority can be broken down into two major groups - those in favour of reforms (primarily book retailers and importers) and those who wish to maintain the status quo (primarily printers, publishing houses and authors).

The arguments in favour of keeping and removing parallel import restrictions are already well known. The arguments are summarised in Box 1.

#### Box 1 | Summarised arguments for and against removing PIRs\*

##### For PIRs on books

- A core component of territorial copyright
- Undermines capacity for publishing industry to foster Australian authors
- Supports jobs in the printing and publishing industries
- Provides certainty for companies to invest in expensive technology that has a long repayment timeline

##### Against PIRs on books

- Act as a trade barrier and a form of industry protection
- Unnecessarily raises the price of books for consumers
- Restricts available titles on sale through retail stores
- An unnecessary addition to territorial copyright

\* may not reflect all arguments, just those that were regularly cited  
Sources: Submissions to the Productivity Commission’s Inquiry

But in assessing the relative merits of PIRs on books it is important to understand whether they are a necessary component of Australia’s IP regime, or whether they are a trade barrier designed as part of Australia’s IP regime.

Under section 51(xviii) of the Commonwealth constitution the Federal Parliament has responsibility for “Copyrights, patents of inventions and designs, and trade marks”. As a result the commonwealth government has responsibility for administering Australia’s IP regime.

PIRs are not uncommon in Australia’s IP regime, or that of other countries. Under Section 13 of the *Patents Act 1990* a patent holder is given “the exclusive rights, during the term of the patent, to exploit the invention and to authorise another person to exploit the invention”. In the dictionary of that Act “exploit” is defined as “make, hire, sell or otherwise dispose of the product, offer to make, sell, hire or otherwise dispose of it, use or import it, or keep it for the purpose of doing any of those things”.<sup>4</sup>

Similarly, the *Trade Marks Act 1995* provides a registered trade mark holder the power under that Act to the exclusive rights of a registered trade mark, including, under Part 13, stopping

<sup>4</sup> Commonwealth of Australia, “Patents Act 1990”, available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/pa1990109.txt/cgi-bin/download.cgi/download/au/legis/cth/consol\\_act/pa1990109.rtf](http://www.austlii.edu.au/au/legis/cth/consol_act/pa1990109.txt/cgi-bin/download.cgi/download/au/legis/cth/consol_act/pa1990109.rtf)

another party importing a good that “infringes, or appears to infringe, a registered trade mark”.<sup>5</sup>

And PIRs exist in the *Copyright Act 1968* under Section 37 that states copyright has been “infringed by a person who, without the licence of the owner of the copyright, imports an article into Australia”.<sup>6</sup> But just because the three major IP laws all include PIRS, it does not mean that they are all warranted.

Traditionally IP is broken up into two distinct groups – industrial property and copyright. Industrial property (patents, trademarks, industrial designs etc.) is unique from copyright because it is a registered right and for it to be established and enforced an application must be made to the relevant competent authority.<sup>7</sup> Copyright is different because it is an automatically recognised form of IP and right holders do not need to make an application to have their rights established, recognised and enforced.<sup>8</sup>

And the difference is obvious when international IP law is considered in light of Australian IP law. Australia is a party to numerous IP treaties, but the principle treaties relevant to PIRS include the World Intellectual Property Organisation (WIPO)-administered treaties - *The Paris Convention for the Protection of Industrial Property*<sup>9</sup> and *The Berne Convention for the Protection of Literary and Artistic works*<sup>10</sup>; and the World Trade Organisation’s (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*.<sup>11</sup>



The Paris Convention specifically deals with PIRs on registered rights, including patents and trademarks. Under Article 5<sup>quater</sup> of the Paris Convention “the patentee shall have all the rights, with regard to the imported product, that are accorded to him”, and Article 9 covers trademark PIRs by stating “All goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such mark or trade name is entitled to legal protection”. And patent PIRs are reinforced under TRIPS which states under Article 28 that Parties will “prevent” the importing of a product patent or process patent.

But the Berne Convention is silent on PIRs. Instead stating under Article 16 that only “infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection”. Similarly, Article 51 of TRIPS addresses infringing copies, but not parallel importation of copyrighted works.

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<sup>5</sup> Commonwealth of Australia, “Trade Marks Act 1995”, Parliament of Australia, Canberra, Australia, at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/tma1995121.txt/cgi-bin/download.cgi/download/au/legis/cth/consol\\_act/tma1995121.rtf](http://www.austlii.edu.au/au/legis/cth/consol_act/tma1995121.txt/cgi-bin/download.cgi/download/au/legis/cth/consol_act/tma1995121.rtf)

<sup>6</sup> Commonwealth of Australia, “Copyright Act 1968”, Parliament of Australia, Canberra, Australia, at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1968133.txt/cgi-bin/download.cgi/download/au/legis/cth/consol\\_act/ca1968133.rtf](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133.txt/cgi-bin/download.cgi/download/au/legis/cth/consol_act/ca1968133.rtf)

<sup>7</sup> The competent authority to register industrial property in Australia is IP Australia, <http://www.ipaustralia.gov.au>

<sup>8</sup> Wilson, T., April 2008, “Intellectual Property Matters”, IPA Backgrounder, Institute of Public Affairs, Melbourne, Australia, at [http://www.ipa.org.au/library/publication/1210829978\\_document\\_intellectual\\_property\\_matters.pdf](http://www.ipa.org.au/library/publication/1210829978_document_intellectual_property_matters.pdf)

<sup>9</sup> World Intellectual Property Organisation, March 1883, “Paris Convention for the Protection of Industrial Property”, Geneva, Switzerland, at [http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs\\_wo020.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf)

<sup>10</sup> World Intellectual Property Organisation, September 1886, “Berne Convention for the Protection of Literary and Artistic Works”, Geneva, Switzerland, at [http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs\\_wo001.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf)

<sup>11</sup> World Trade Organisation, 1995, “Agreement on Trade-related aspects of intellectual property rights”, Geneva, Switzerland, at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf)

PIRs on patents and trademarks are a necessary component of Australia's property rights regime. Under the Paris Convention and TRIPS, patent and trademark holders are entitled to register their rights in each country, but they are not automatically granted them, and in many cases they are not exercised because of cost barriers for registration or the questionable potential for a commercial market. Because they need to be registered in every individual country where protection is sought, without PIRs an innovation or trademarked product could arrive in Australia from a country where the property right is not recognised and no royalties are paid to the property right holder.

But the reverse is the case with copyright. Because copyright is an automatically registered right, the obligation to pay royalties to the copyright holder is automatic within the union of contracting Parties to the Berne Convention. The royalty rates may vary depending on the country, but the copyright holder is paid royalties and therefore the only PIRs that legitimately need to be enforced are those that limit infringing copies where no royalty is paid.

It should be recognised that international treaties on IPRs only provide a minimum standard for IPR protection. But equally when a national government exceeds its obligations from a Treaty, it must also have sound and comprehensive evidence of the benefits.

Australia's PIRs on books go beyond Australia's international obligations to stop infringing copies instead stopping all parallel imports without the copyright holder's permission. Their objective is not to uphold Australia's IP obligations, but to act as a trade barrier to protect the domestic publishing and printing industries.

Importantly, removing PIRs will have no impact on territorial copyright, beyond protection unnecessarily afforded as a trade barrier.



## 4.0 Liberalising Australia's parallel import restrictions

As outlined in Section 2.0, before the 1991 reforms to the *Copyright Act 1968*, Australia's PIRs were afforded for all works for the life of the copyright, except for personal use.<sup>12</sup> The PSA's 1989 report recommended the full liberalisation of PIRs, but the 1991 reforms only partially liberalised PIRs and has left Australia with the regime operating today.

It is difficult to assess the potential impact of a liberalised PIR-regime for Australia, and many of the submissions made to the Commission's previous Inquiry suggest the consequences will come at the expense of Australia's book industry, but there is surprisingly little evidence to support their claims.

Part of the challenge is that there is limited data available, for example:

- The ABS has not collected data for a number of years on books and has failed to do so after recommended by the Commission at the conclusion of their 2009 inquiry.
- The impact of liberalisation of PIRs on books will need to consider the impact on authors, publishers and printers, but the inquiries into the liberalisation of PIRs on sound recordings in 1998 focused mostly on musicians and composers, and not the printers of sound recordings.<sup>13</sup>
- There is only one major comparable economy that has liberalised its PIRs that can provide instruction on the likely impact – New Zealand.

New Zealand is a comparable market because it faces many of the unique challenges Australia faces – a small domestic consumer population (by world standards), equivalent cost structures and standards-of-living, geographic isolation and English as its first language. Similarly, Australia and New Zealand have a comparable retail supply of domestically published books at 58 per cent<sup>14</sup> and 60 per cent<sup>15</sup> respectively. And following a report by the New Zealand Institute of Economic Research (NZIER), the New Zealand government liberalised its PIRs for copyright protected works in 1998.<sup>16</sup>

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<sup>12</sup> Carey, S., July 2008, "Between two worlds: Australian publishing on the horns of an import dilemma", Publishing Research Quarterly, Springer Press, v23, n4

<sup>13</sup> Senate Legal and Constitutional Affairs Committee, 1997, "Copyright Amendment Bill (No.2) 1997", Parliament of Australia, Canberra, Australia, at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/1996-99/copyright/report/contents.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1996-99/copyright/report/contents.htm)

<sup>14</sup> Australian Bureau of Statistics, August 2005, "Book publishers", 1363.0, Commonwealth of Australia, Canberra, Australia, p4

<sup>15</sup> Moore, D., Volkerling, M. & van der Scheer, B., November 2007, "MED Parallel importing review: impact upon creative industries", Report for Ministry of Economic Development, Wellington, New Zealand, p12

<sup>16</sup> Ministry of Economic Development, May 2008, "2008 Parallel importing cabinet paper: Background", Wellington, New Zealand, at [http://www.med.govt.nz/templates/MultipageDocumentPage\\_\\_\\_\\_35587.aspx](http://www.med.govt.nz/templates/MultipageDocumentPage____35587.aspx) and Moore, D., Volkerling, M. & van der Scheer, B., November 2007, "MED Parallel importing review: impact upon creative industries", Report for Ministry of Economic Development, Wellington, New Zealand, p3

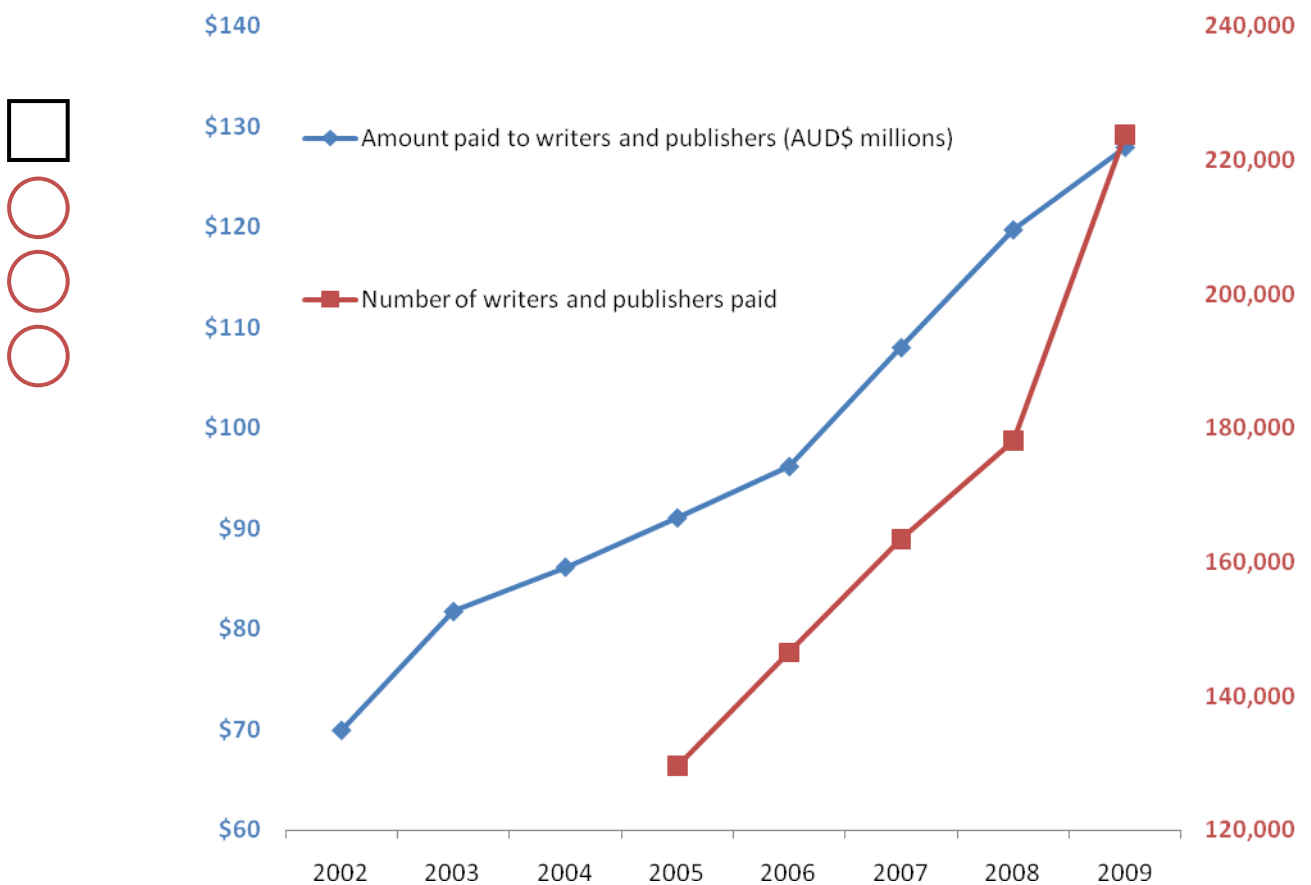


## 4.1 The impact on authors

A regular claim made by publishers and authors is that increased competition from parallel imports, particularly remainders,<sup>17</sup> will decrease profitability in the Australian market and result in publishers reducing the works commissioned from Australian authors.

It is a highly speculative argument with no evidence to support the claim. Similar claims were made prior to PIR liberalisation in New Zealand. But there is no evidence to demonstrate it actually occurred. A 2004 report commissioned by the NZ Ministry of Economic Development found that, “with the exception of children’s books, there was no evidence to support any claim of total investment in publishing local works by the subsidiaries of multinational publishers falling dramatically”.<sup>18</sup> And since liberalisation there has been an increase in the number of New Zealand books published.<sup>19</sup>

**Graph 1 | Amount paid (AUD\$ millions) to, and number of writers and publishers paid by APRA-AMCOS**



**Note:** Royalty payments made exclude foreign income

**Source:** APRA-AMCOS data

And trends since the liberalisation of Australia’s sound recording PIRs also point in a similar direction. Royalty payments for writers and publishers of music are administered through an

<sup>17</sup> Over-produced books parallel imported at discount prices

<sup>18</sup> Network Economics Consulting Group, October 2004, “The impact of parallel imports on New Zealand’s creative industries”, Final Report, Prepared for the Ministry of Economic Development, p38

<sup>19</sup> Mackenzie, J., 2001, “Government loses plot on books”, New Zealand Herald, 8 May, at [http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=187632](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=187632)

organisation jointly managed by the Australian Performing Right Association and the Australian Mechanical Copyright Owners' Society Limited (APRA-AMCOS).

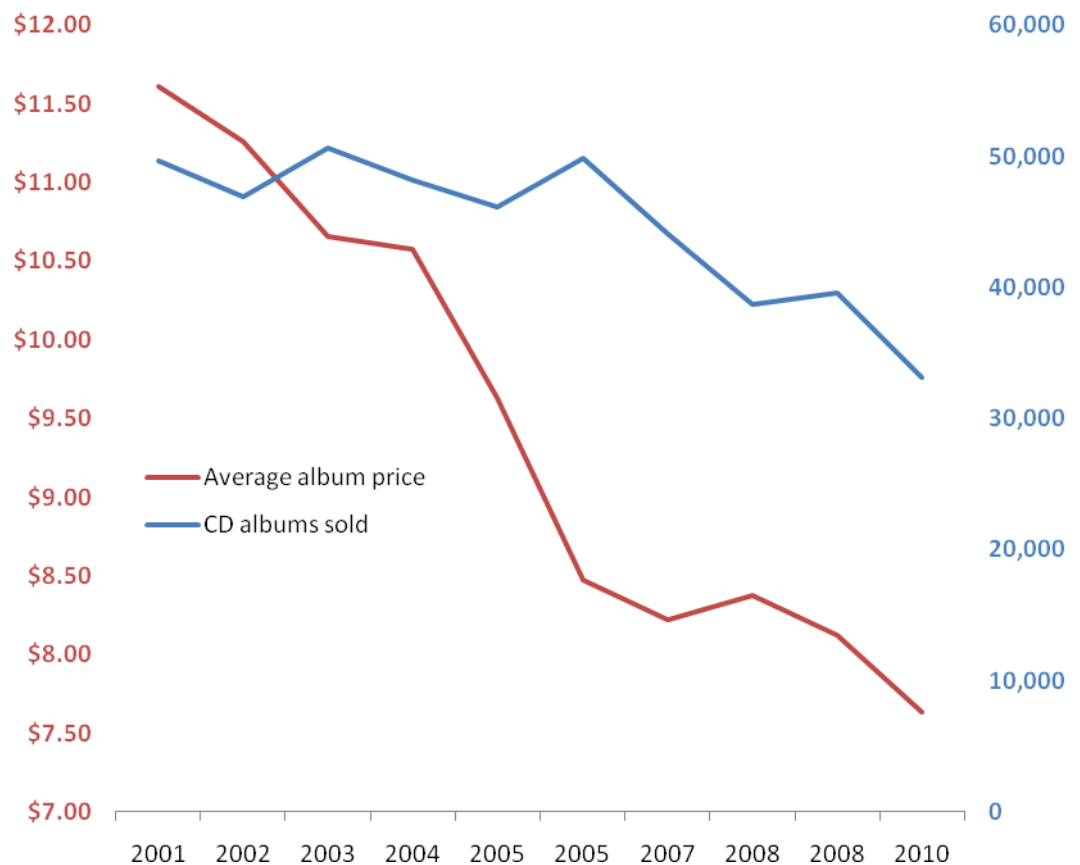
As Graph 1 demonstrates there has been strong growth in the years following the removal of PIRs for the amount paid and number of persons receiving royalty payments from sound recordings. Between 2002 and 2009 royalties paid from local sales has increased from \$70 million to \$127.9 million, or 83 per cent. Similarly the number of writers and publishers paid increased from 2005's 130,000 to 2009's 224,000, or 51 per cent.

While there are spectacular claims about the removal of PIRs may have on local artists, it cannot be backed up by the data based on the experience of the music industry.

## 4.2 The impact on competitive businesses

PIRs don't just affect artists, they also affect the competitiveness of the domestic retail industry and their capacity to compete against imports. This harsh reality was a contributing factor to the recent collapse of the REDD retail group.

**Graph 2 | CD Album sales and their average wholesale price**



Source: ARIA data

As Graph 2 demonstrates, the number of CD albums sold has decreased by a third between 2001 and 2010; but the average wholesale price of CD albums has decreased by 34 per cent in the same time period.

It should be noted that the data in Graph 1 includes total royalties, including royalties from non-CD sound recordings (eg advertisements and internet sales), and Graph 2 only includes CDs. But the trend is clear.

## 5.0 Conclusions

In addition to earlier arguments outlined in the first version of this paper, Unbinding Book Barriers, the evidence is that clear that there is no justification for Australia to continue operating parallel import restrictions.

In making a judgement about the comparative merits of liberalising PIRs it is vital to understand whether PIRs are a necessary component of Australia's IP regime, or whether they are a trade barrier designed as part of Australia's IP regime. This paper concludes they are the latter.

Australia's PIRs are in excess of Australia's obligations under the two treaties that cover copyright – The Berne Convention and TRIPS. And it is entirely consistent with Australia's obligations, and the function of a workable IP regime, to remove PIRs on copyrighted books, but maintain them on industrial property because of the difference in the process for utilising the exclusive rights that they confer. The only justification for imposing PIRs in copyrighted books is to stop the importing of counterfeits. And removal of PIRs would have no impact on Australia's territorial copyright.

Despite claims by authors that they would be negatively affected by PIR liberalisation, the evidence from the liberalisation of PIRs on sound recordings shows the reverse. In the years following liberalisation of PIRs on sound recordings in Australia there has been an increase in the total value, and number of people to whom, royalty payments are being paid for sound recordings concurrent with a reduction in wholesale prices.

In the first edition of this paper the data clearly showed the number of writers and publishers, and the amount they received in royalties, had increased since the scrapping of PIRs, while the wholesale cost of CD albums reduced by 32 per cent.

Updated data for this paper shows that between 2002 and 2009 royalties paid from local sales has increased from \$70 million to \$127.9 million, or 83 per cent. Similarly the number of writers and publishers paid increased from 2005's 130,000 to 2009's 224,000, or 51 per cent.

ARIA industry data shows that following liberalisation there has been a decline in the overall number of physical CD albums sold but the average price of a CD album has decreased by 34 per cent.

Considering the shift from physical to electronic books, there is no reason to believe that this does not provide an instructive indication of an equivalent trend for books.

In short, rather than showing PIRs provide a clear trend that would harm the industry, the evidence shows the argument for their removal in favour of industry interests increases; especially when there is now clear evidence that PIRs are harming the retail sector.



## About the Institute of Public Affairs

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The IPA has a demonstrated track record of contributing to, and changing the terms of the public policy debate in Australia and internationally. In particular, in recent years the IPA has been at the centre of public discussion in Australia and in appropriate international fora on:

- Regulation
- Trade
- Intellectual property
- Water
- Energy
- Housing
- Industrial relations
- Taxation
- Investment

## About the Author, Tim Wilson

Tim's currently Director of the Intellectual Property and Free Trade Unit at the Institute of Public Affairs - the world's oldest free market think tank. Tim is also Principal Consultant for the public policy Dynamic Sunrise Consulting Group and a Senior Associate at communication strategy consultancy SDA Strategic.

Tim also serves on the Department of Foreign Affairs and Trade's IP industry consultative group, as a Senior Fellow at New York's Center for Medicine in the Public Interest and the Steering Committee of the Sydney Opera House's Festival of Dangerous Ideas. He regularly appears on Australian and international television, radio and in print media and previously co-hosted ABC News 24 TV's *Snapshot* segment.

He's worked in international development across South East Asia, consulting and politics, including delivering Australia's aid program for the Vietnamese government to host APEC and advising State and Federal politicians. In 2009 *The Australian* newspaper recognised him as one of the ten emerging leaders of Australian society, was included in the 2011 *SameSame25* list of most influential gay and lesbian Australians and is a recipient of an Australian Leadership Award from the Australian Davos Connection.

At University Tim was twice elected President of the Student Union as well as to the University's Board of Directors.

Tim's currently completing a Graduate Diploma of Energy and the Environment (Climate Science and Global Warming) at Perth's Murdoch University. He has a Masters of Diplomacy and Trade and a Bachelor of Arts from Monash University, a Diploma of Business and has completed Asialink's Leaders Program at the University of Melbourne. He has also completed specialist executive education on IP at the WIPO Worldwide Academy and international trade and global health diplomacy at the Institut de Hautes Études Internationales et du Développement, Geneva.

