

The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional Legislation Committee

**Consideration of legislation referred
to the Committee**

**Inquiry into the Provisions of the Copyright Amendment
(Parallel Importation) Bill 2001**

MAY 2001

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CHAPTER 1

INTRODUCTION

Background

1.1 The *Copyright Amendment (Parallel Importation) Bill 2001* ('the Bill') was introduced into the House of Representatives on 28 February 2001.

1.2 On 28 March 2001, the Senate Selection of Bills Committee recommended,¹ and the Senate subsequently agreed to, the referral of the provisions of the Bill to the Legal and Constitutional Legislation Committee ('the Committee') for inquiry and report by 23 May 2001.

Reason for Referral

1.3 The Selection of Bills Committee stated that the referral of this Bill was 'to consider the impact on consumers and copyright owners of allowing parallel importation and subsequent commercial distribution of computer software products (including interactive computer games), books, periodical publications (such as journals and magazines) and sheet music.'²

Earlier Committee inquiries into similar legislation

1.4 In April 1998, the Committee reported on the *Copyright Amendment Bill (No. 2) 1997* which was designed to produce lower priced sound recordings by creating increased competition among distributors, and to provide the Australian consumer with a greater choice of music.³ That Bill was passed by Parliament and became the Copyright Amendment Act (No. 2) 1998.

1.5 Following the passing of that legislation, difficulties arose over the parallel importation of 'enhanced' CDs, which contain copyright material additional to the sound recording. As a result, the Committee also considered the *Copyright Amendment (Importation of Sound Recordings) Bill 1999* and presented its report to Parliament in August 1999.⁴ More detailed background to the current Bill is provided at Chapter 2.

Conduct of the present inquiry

1.6 The Committee advertised the inquiry in *The Australian* on 7 April 2001. The Committee received 29 submissions, including supplementaries, which are listed at Appendix 1.

1 Selection of Bills Committee, *Report*, No. 4 of 2001

2 Selection of Bills Committee, *Report*, No. 4 of 2001

3 Senate Legal and Constitutional Legislation Committee, *Report on the Copyright Amendment (Importation of Sound Recordings) Bill 1999*, August 1999. See also, Senate Legal and Constitutional Legislation Committee, *Report on the Copyright Amendment Bill (No. 2) 1997*, April 1998.

4 Senate Legal and Constitutional Legislation Committee, *Report on the Copyright Amendment (Importation of Sound Recordings) Bill 1999*, August 1999

1.7 The Committee held public hearings in Melbourne on 9 and 10 May 2001, and in Sydney on 15 May 2001. A list of witnesses who appeared at these hearings is at Appendix 2.

Note on References

1.8 References made in this report to submission page numbers are primarily to the page numbers in the printed volume covering Submissions numbers 1-15. Subsequent submission page references, including to supplementary submissions, are to the page numbers of those individual submissions. References to the Hansard transcript are to the proof Hansard. Page numbers may vary slightly between the proof and the official Hansard transcript.

CHAPTER 2

THE BILL

Background to the Bill

2.1 Parallel importation, or the importation of legitimate copies of material without the permission of the owners or licensees of the Australian copyright, is considered essential to the opening up of markets and providing greater competition. Its application to a number of areas has been considered over a considerable period¹ and is briefly outlined below.

2.2 In 1990, the then Labor Government introduced the *Copyright Amendment Bill 1990*. The purpose of this Bill was ‘to allow the commercial importation, without infringement of an owner’s copyright, of non-pirate copies of books first published overseas, non-pirate copies of books first published in Australia or overseas where they cannot be supplied within 90 days of an order being placed and non-pirate copies of books intended for private use’. In addition, the Bill provided that ‘the copyright in a foreign book will be retained if the book is published in Australia within 30 days of first publication abroad’.²

2.3 This Bill was passed by Parliament and came into effect as the *Copyright Amendment Act 1991* in December 1991. These amendments have since become known as the Labor Party’s ‘use it or lose it’ policy. The Bill currently before the Committee will repeal these arrangements.³

2.4 This Committee has considered the following bills in relation to parallel importation:

- *Copyright Amendment Bill 1997*;
- *Copyright Amendment Bill (No.2) 1997*; and
- *Copyright Amendment (Importation of Sound Recordings) Bill 1999*.

2.5 The Committee’s report on the *Copyright Amendment Bill (No. 2) 1997* provides a detailed history of the consideration of parallel importation in Australia and its relationship with copyright.⁴

2.6 The *Copyright Amendment Bill (No. 2) 1997* was passed by the Parliament in 1998 becoming the *Copyright Amendment Act (No. 2) 1998*. This Act is particularly important in

1 The issue was addressed by the High Court in 1977 in *Interstate Parcel Express Co Pty Ltd v Time-Life International (Netherlands) BV* (1977) 138 CLR 534

2 Bills Digest, *Copyright Amendment Bill 1990*, 17 October 1990, p. 1. See also, *Submission No. 2A*, Printing Industries Association of Australia, p. 1

3 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, Item 9

4 See Senate Legal and Constitutional Legislation Committee, *Report on the Copyright Amendment Bill (No. 2) 1997*, April 1998, Chapter 2

the consideration of the Bill currently before the Committee which implements a similar policy in respect of other key sectors of the information economy.⁵

2.7 The purpose of the 1998 amendment act was to produce lower priced sound recordings by creating increased competition among distributors, and to provide the Australian consumer with a greater choice of music.⁶ In theory, competition is facilitated by permitting parallel importation.

2.8 As noted above, following the introduction of the 1998 amendment act, difficulties arose over the parallel importation of ‘enhanced’ CDs, or CDs which contain copyright material additional to the sound recording. The Government then introduced the *Copyright Amendment (Importation of Sound Recordings) Bill 1999*. The purpose of this bill was ‘to close a loophole in the Copyright Act that currently allows sound recording producers to claim control, under the Act, of the importation of CDs by the inclusion of ‘film clips’ or other copyright protected subject matter, such as a photograph, on or with a music CD’.⁷

2.9 Opposition Senators outlined in their minority report on that bill that one of their reasons for rejecting it was that the Government had not resolved how it would deal with other multi-media material in other contexts; therefore, it was premature to deal with that Bill at that time.⁸ Debate on the Bill has not as yet resumed in the Senate.

2.10 Other relevant amendments to the *Copyright Act 1968* since the *Copyright Amendment Act (No. 2) 1998* include:

- *Copyright Amendment (Computer Programs) Act 1999*;
- *Copyright Amendment (Digital Agenda) Act 2000*; and
- *Copyright Amendment (Moral Rights) Act 2000*.

2.11 The Bill currently before the Committee appears to both encompass the policy direction of the *Copyright Amendment Act (No. 2) 1998*⁹ and incorporate the provisions of the *Copyright Amendment (Importation of Sound Recordings) Bill 1999*.¹⁰

5 Senate *Hansard*, Second Reading Speech, *Copyright Amendment (Importation of Sound Recordings) Bill 1999*, 26 May 1999, p. 5392

6 Senate Legal and Constitutional Legislation Committee, *Report on the Copyright Amendment (Importation of Sound Recordings) Bill 1999*, August 1999. See also, Senate Legal and Constitutional Legislation Committee, *Report on the Copyright Amendment Bill (No. 2) 1997*, April 1998.

7 Senate *Hansard*, Second Reading Speech, *Copyright Amendment (Importation of Sound Recordings) Bill 1999*, 26 May 1999, p. 5392

8 Senate Legal and Constitutional Legislation Committee, *Report on the Copyright Amendment (Importation of Sound Recordings) Bill 1999*, Opposition Minority Report, August 1999, p. 9

9 House of Representatives’ *Hansard*, Second Reading Speech, *Copyright Amendment (Parallel Importation) Bill 2001*, 28 February 2001, p. 24578

10 House of Representatives’ *Hansard*, Second Reading Speech, *Copyright Amendment (Parallel Importation) Bill 2001*, 28 February 2001, p. 24581

Purpose of the Bill

2.12 The *Copyright Amendment (Parallel Importation) Bill 2001* proposes to amend the *Copyright Act 1968* to ‘enable legal parallel importation and subsequent commercial distribution of computer software products, including interactive computer games, books, periodical publications (such as journals and magazines) and sheet music.’

2.13 The legislation also is stated to include ‘some minor correcting amendments in relation to the communication to the public of works and other subject matter using electronic networks’.¹¹ That is, schedule 3 of the Bill includes minor definitional and correcting amendments, mainly ensuring consistency with the provisions of the *Copyright Amendment (Digital Agenda) Act 2000*.

2.14 The Attorney-General, in his second reading speech, stated:

The central aim of the Bill is to improve access to a wide range of software products, books, periodical publications and printed music on a fair, competitive basis.

The Bill does this by allowing the importation for commercial purposes of non-pirate copyright goods without the permission of the Australian rightsholder.

The Bill offers the prospect of cheaper prices and increased availability of products for all Australians, but especially for small businesses, parents and the education sector

Retailers, particularly large retailers, are likely to support the reforms due to the beneficial impact the changes will have for them in competing and potentially extracting better terms of trade.

Small businesses will benefit from increased access to popular applications for word processing, database management, accounting, desktop publishing and graphical analysis.¹²

2.15 The Explanatory Memorandum states that the Bill includes provisions ‘to ensure that copyright owners are not disadvantaged in bringing infringement actions in relation to parallel imported material.’ An incentive to importers and distributors to ensure the legitimacy of the material they acquire is provided through the onus being placed on the defendant who has imported or commercially dealt with imported articles. The defendant is required to prove the copyright legitimacy of the copyright material that is the subject of the infringement action (to the extent that they rely on the parallel importation provision).¹³

2.16 The Bill also includes provisions to ‘ensure that trademark assignments cannot be used to defeat the parallel importation that would otherwise be permitted in relation to computer products, sound recordings and books and related items.’¹⁴

11 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 1

12 House of Representatives *Hansard*, Second Reading Speech, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 1, p. 24578

13 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 2

14 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 2

Parallel Importation

2.17 Parallel importation, in the Explanatory Memorandum, is defined as ‘importation that is parallel to, or alongside, that of the copyright owner’.¹⁵ The Act currently allows a copyright owner to take action for infringement of copyright where a person imports or subsequently commercially deals with imported copyright material of that copyright owner.¹⁶

Computer Software Products

2.18 The Explanatory Memorandum states that ‘restrictions on the parallel importation of software products in the Copyright Act prevent ready access by businesses and domestic consumers to the full range of available products, and limit competition between local and overseas suppliers’.¹⁷

2.19 According to the Australian Competition and Consumer Commission’s (ACCC) report¹⁸ released in April 2001, some computer software products are more expensive in Australia than in the USA. The key findings by the ACCC were:

- In February/March 2001, GST exclusive prices of 14 popular business software products on a selection of Australian websites were, on average, 11.5 per cent higher than prices advertised on US websites. Australian prices were similar, on average, with those in the UK and NZ. However, as with earlier surveys significantly higher differentials were found for some products, including McAfee Virusscan Classic and MS Windows 98.
- In February/March 2001, GST exclusive prices of 11 popular PC games on a selection of Australian websites were, on average, 19.5 per cent higher in Australia than on comparable UK websites and 5.4 per cent higher than in NZ. As with business software, there was considerable variation in the differentials of individual products. Significantly higher than average differentials were found for The Sims and Rollercoaster Tycoon.¹⁹

2.20 Currently, the importation provisions in the Copyright Act allow owners of Australian copyright in a software program to prevent legitimate copies of that program from being imported except through distribution channels approved by the local copyright owner.²⁰ The Explanatory Memorandum states that the Australian software market is dominated by a small number of large multinational firms and, as a result, the provisions effectively allow

15 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 1

16 *Copyright Act 1968*, Part V, section 115

17 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 3

18 Australian Competition and Consumer Commission, *Summary of the Commission’s March 1999 Report on The Potential 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

19 Australian Competition and Consumer Commission, *Summary of the Commission’s March 1999 Report on The Potential 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, p. 10

20 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, pp. 3-4

these firms to charge higher prices for their products and possibly restrict the range of goods entering the Australian market.²¹ The provisions, however, do not affect importation of software for private use.

2.21 In the Explanatory Memorandum, the Government recommends removal of parallel importation restrictions as this will ‘facilitate a more competitive market for software products and enable those benefits to be passed on to consumers in the form of lower prices and improved service and product availability’.²²

Books and Similar Products

2.22 The Explanatory Memorandum states that ‘Australia has a publishing market that is dominated by subsidiaries of multinational publishers based in either the USA or the UK’ and ‘this feature, together with the ability to divide markets territorially using copyright control over importation, creates the conditions that allow international price discrimination’.²³

2.23 Parallel importation in relation to books, means ‘importation without the licence of the local copyright owner of legitimately-made copies (that is, copies made with due regard to copyright in the place where the copies were made)’.²⁴ As a result of the above-mentioned amendments made in 1991, books published since 23 December 1991 but not published in Australia within 30 days of first publication elsewhere, as well as books ordered from the Australian copyright owner but not available within 90 days, can be imported.²⁵ However, in all other cases, the importation of copies for commercial purpose, if not authorised by the owner of the Australian copyright, is a copyright infringement that can be a criminal matter under s.132 of the Copyright Act.²⁶ The Bill seeks to alter this last arrangement.

2.24 The ACCC’s key findings of the best seller price surveys were:

- For the 12.5 year period 1988-89 to December 2000, Australians have been paying around 44 per cent more for best selling fiction paperbacks than US readers;
- Over the same period, Australian consumers paid, on average 8.9 per cent more for best selling paperback fiction than UK readers; and
- For the six and a half years to December 2000, Australians have paid, on average, around 18 per cent more for best-sellers other than hardback fiction than US readers.²⁷

2.25 The Explanatory Memorandum states:

21 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 4

22 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 21

23 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 23

24 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 24

25 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 24

26 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 24

27 Australian Competition and Consumer Commission, *Summary of the Commission’s March 1999 Report on The Potential 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, p. 3

The removal of parallel importation restrictions on books, which perform a significant role in maintaining existing price discrimination practices by restricting local competition, will create the opportunity for reduced prices and improved product range for consumers. The potential for increased competition will also provide an impetus for local suppliers to seek greater operational efficiencies, with consequent flow-on effects in terms of reduced costs and prices and/or improved service levels.²⁸

Provisions of the Bill

2.26 The Bill provides for the making of the amendments in three schedules:

- Schedule 1: deals with the parallel importation of computer software products (articles embodying computer programs and associated subject matter) as well as electronic books, periodical publications in electronic form and sheet music in electronic form.
- Schedule 2: provides for amendments to enable the parallel importation of printed books, periodical publications and sheet music. (The Government has deferred the implementation of the changes in this area for one year to assist the publishing and printing industries and authors to make the necessary adjustments in their business practices and legal arrangements).
- Schedule 3: relates to the correction or clarification of amendments made by the *Copyright Amendment (Digital Agenda) Act 2000* (the Digital Agenda Act). Those amendments will be taken to have commenced immediately after the commencement of the Digital Agenda Act (4 March 2001).

Reports and Inquiries

2.27 As noted above,²⁹ the issue of copyright has received considerable attention in recent years, with several reports and inquiries being undertaken in Australia.³⁰ Many of these have been commissioned in order to address issues previously raised in relation to parallel importation of CDs or to consider the possible impact of parallel importation on items such as books which are covered by the current Bill. Some items which have not been the subject of detailed investigation - including sheet music, periodicals, and short films – are nonetheless affected by the Bill.

2.28 It was evident to the Committee that the greatest difficulty which many witnesses had with certain of the available reports concerns the accuracy of the information on which conclusions were based, and the extent to which these reports evaluated information objectively.

28 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 43

29 See above, Paragraph 2.1

30 Reference was made in the Committee's inquiry to the number of reports and studies that had been undertaken on aspects of copyright, including on the extent to which there had been appropriate consultation including with writers and other creative individuals and groups (*Transcript of evidence*, Senator Cooney, pp. 25, 27). These reports were listed by the Attorney-General's department (see *Transcript of evidence*, Attorney General's Department, p. 25 and *Submission 12A*, Attorney-General's Department, and demonstrate that there has been considerable attention given to the issue of copyright over the last decade in Australia. The Committee has not had time to consider all the reports named

2.29 The two reports which are referred to most often were the so-called Ergas Committee report, undertaken by the Intellectual Property and Competition Review Committee,³¹ and the 1999 Australian Competition and Consumer Commission report,³² which was updated in April 2001.³³ A third report is the result of an inquiry by the House of Representatives Legal and Constitutional Committee into the enforcement of copyright law in Australia,³⁴ and there has been sufficient dissent about one of the appendices to the Ergas Committee report³⁵ to warrant a brief consideration of this also.

The Intellectual Property and Competition Review Committee (IPCR) report

2.30 This inquiry ‘considers the effect on competition of Australia’s intellectual property laws’.³⁶ It presupposes that copyright legislation must balance the interests ‘of the owners of intellectual property material with the interests of users or potential users of that material’,³⁷ stating that this has always been a goal of successive Governments.³⁸ The Committee uses this ‘balance’ to justify what might otherwise appear to be an unreasonable limitation on the rights of creators:

It is, in this respect, a fallacy to suggest that policies conferring more income on copyright owners are in and of themselves socially desirable relative to those that confer less. Rather, the goal of the intellectual property system is to provide a *sufficient* incentive for socially useful investment in creative effort. This requires that compensation flowing to rights owners be enough to encourage investments whose social benefits exceed their costs.

Over- compensating rights owners is as harmful, and perhaps even more harmful, than under-compensating them.³⁹

31 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000

32 Australian Competition and Consumer Commission, *The Potential Consumer Benefits of Repealing the Importation Provisions of the Copyright Act 1968 as they Apply to Books and Computer Software*. The report was not made available to the public until April 2001

33 Australian Competition and Consumer Commission, *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

34 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Cracking Down on Copycats*, November 2000

35 This appendix is discussed below at Paragraphs 2.55 – 2.62

36 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, Executive Summary, p. 5. Legislation examined included the *Copyright Act 1968*, the *Patents Act 1990*, the *Trade Marks Act 1995*, the *Designs Act 1906* and the *Circuit Layouts Act 1989*

37 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, September 2000, Executive Summary, p. 5

38 See Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, p. 34

39 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, p. 34

2.31 The scope of the inquiry is broad,⁴⁰ with emphasis being on general intellectual property issues, and the extent to which certain aspects of copyright are contrary to, or have an effect contrary to, competition principles:⁴¹

...the Committee also recognises that the rights granted by the intellectual property laws can be used for anti-competitive ends. This occurs when the rights are used to claim for the creator not merely a share of the gains society obtains from the creation, but also rents that arise from market power: that is, when the rights are used to add to the income that comes from differential efficiency, gains from reducing output in ways unrelated to that differential efficiency (for example, by the use of intellectual property licenses to effect a horizontal price-fixing agreement).⁴²

2.32 The Committee's approach to the relationship between the Copyright Act and parallel importing⁴³ is also shaped by its Terms of Reference, which emphasise that any increased competition provided by parallel importation must be evaluated in accordance with the assessment of gains and losses to the copyright owner and the community generally:

2) In undertaking the inquiry and preparing the report...the Committee shall have regard to:

a) the determination, in the Competition Principles Agreement, that legislation which restricts competition should be retained only if the benefits to the community as a whole outweigh the costs, and if the objectives of the legislation can only be achieved by restricting competition.⁴⁴

2.33 At the same time, the report also states that where intellectual rights are abused, there must be effective remedies. The House of Representatives inquiry addresses this second matter, the extent to which there is appropriate enforcement of copyright legislation.

Methodology

2.34 The IPCR inquiry was publicly advertised, inviting submissions.⁴⁵ An Issues paper was released in September 1999, an Interim report in June 2000, and a final report in September 2000. A section on the parallel importation of copyright material was published separately in August 2000. Much of this last report was incorporated into the final report

40 See Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, Introduction, p. 20

41 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, Executive Summary, pp. 6-7

42 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, p. 27

43 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, p. 41

44 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, Appendix 1, p. 217

45 The inquiry was advertised in July and November 1999, Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, Introduction, p. 20

produced in September 2000.⁴⁶ From evidence available, much of the material considered by the Committee comprised submissions provided, and comments made on the Issues Paper and the Interim Report, both written and oral.⁴⁷ Some consultancy reports were commissioned to supplement information available. In the context of this inquiry, the consultancy of most interest is Appendix 5, a report on the effects of parallel importation on the prices of CDs.⁴⁸

2.35 The Committee's approach in evaluating the benefits or otherwise of parallel importation was to summarise the arguments presented by various groups, and then identify a series of factors against which the arguments were measured.⁴⁹ These factors are called 'the tests relevant to assessing [existing] restrictions':⁵⁰

- What is the relevant test?
- What are the objectives being pursued?
- What do restrictions on parallel imports do?
- Do restrictions on parallel imports confer or enhance market power?
- What impact does the enhancement of market power have on the community?
- Would removing the restrictions reduce Australia's access to copyrighted material?
- Are there other economic arguments in favour of retaining the restrictions?
- Do concerns about copyright enforcement and consumer standards justify retaining the restrictions?⁵¹

2.36 It could be argued that the methodology is shaped by a desired outcome, the need to balance competing interests. By having limited parameters of investigation, the Committee is hampered in going outside current justifications for and against copyright, many of which may be based on outmoded concepts. It could also be argued that there is a substantial difference between the market for some books and the substantial profit that may be derived from those owning copyright in other, more popular, products. However, the construction of the terms of reference does not allow this type of exploration. Insofar as this leads to an

46 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, Introduction, p. 21, p. 41

47 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, Introduction, pp. 20-21

48 Gregor Urbas, *Parallel Importing and CD Piracy*, 2000. This is considered further below at Paragraphs 2.55-2.62

49 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, pp. 48-79

50 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, p. 60

51 Intellectual Property and Competition Review Committee, *Review of Intellectual property Legislation under the Competition Principles Agreement*, September 2000, pp. 60-71

equation of books with video games which may have a limited lifespan, it may not always be accepted as an approach which can differentiate appropriately between equitable returns for different types of material.

The Australian Competition and Consumer Commission (ACCC) report

Methodology

2.37 The ACCC in its earlier manifestation as the PSA first began to compare Australian with overseas prices of a number of items in 1989,⁵² on the basis that this was a valid approach in respect of import monopolies.⁵³ This point was not accepted by a number of witnesses, who could see no particular benefit in it. It was also argued that the comparisons, particularly in the updated report, were based on retail rather than wholesale prices, and that the sample was much too limited.⁵⁴ For example, the ACCC stated that:

The prices of technical and professional books are also high compared with the USA and the UK. The ACCC's surveys suggest that currently a selection of such books are around 23 per cent more expensive in Australia than in the USA, and 18 per cent more expensive than in the UK.⁵⁵

2.38 In response, the computer software⁵⁶ and the book⁵⁷ industries stated that such claims⁵⁸ were based on a distortion of facts.

2.39 The major difference of opinion, however, in respect of the first ACCC report, concerned the usefulness of averaging out prices over twelve and a half years: the high levels of price differences in the early years of the comparisons overshadowed the fact that in the past few years book and other prices have decreased substantially in Australia.⁵⁹ In its response to these and other comments, the ACCC provided information relating to its methodology and stated that it was less interested in absolute prices than price differences, and that its research indicated that price differences were still substantial.⁶⁰ The issue still remains, therefore, about the accuracy of the results of the ACCC's research.

52 See *Transcript of evidence*, Australian Competition and Consumer Commission, p. 43

53 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 44

54 See, for example, Table 3 in respect of technical and professional books, in Australian Competition and Consumer Commission, *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, p. 9

55 Australian Competition and Consumer Commission, *ACCC Report Points the Way for Cheaper Books and Software*, Media Release, 3 April 2001, p. 1

56 See Chapter 3

57 See Chapter 4

58 For similar comments concerning software, both business and popular, see Australian Competition and Consumer Commission, *ACCC Report Points the Way for Cheaper Books and Software*, Media Release, 3 April 2001, p. 1

59 *Transcript of evidence*, Australian Competition and Consumer Commission, pp. 43-44

60 See below, Chapter 3, Paragraph 3.4 and attached footnote(7)

2.40 The extent to which price decreases resulted from any specific legislation or from exchange rates was not argued to any great extent. The general economic premise on which the ACCC conclusions were reached was that competition generally opens up the market and results in a decrease in price:

The system operates by preventing retailers, whether they be booksellers or computer retailers, from directly importing products available in other countries at much lower prices. The system creates the possibility of price exploitation and of restricted availability of product in Australia, and, from time to time, there is in fact price exploitation and restricted product availability. The extent of the price differences depends particularly on exchange rates at any one time. But, over the long term, there have been quite substantial price differences between Australia and the rest of the world.⁶¹

2.41 The relationship between price decreases and the introduction of legislation in 1991, for example, was referred to but not in any depth:⁶²

It was the clear intention of the government at that time to bring in a reform which would not alter prices much. The nature of the reform stops there being big price effects, because the 30 day rule protects the two main types of books that are being sold – that is, Australian books and best sellers – because the publishers get them out.⁶³

2.42 It was the expectation of the ACCC that the continuation of such reforms would lead to increased benefits for book consumers:

...it is only at the edges of the market that you get many effects. In addition, the effects at the edge of the market would be a lot bigger if the main reform was made. The reason is that the business of importing books directly is not very profitable if you cannot tackle the main game.⁶⁴

2.43 The ACCC's assumption is that all commodities follow much the same patterns, or that specific processes will result in specific outcomes:

The more general knowledge that we have from numerous areas of commercial life is that, where import restrictions are removed and there is a history of large price differences, on the whole the price differences will be narrowed and removed if the costs of transport are not especially high and if there are no anti competitive or unlawful obstacles to the price changes going into place in the market – for example, provided there is no unlawful monopolistic behaviour.⁶⁵

61 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 42

62 See *Transcript of evidence*, Australian Competition and Consumer Commission, p. 46. The specific reference was to the 30 day rule, which requires that books be published in Australia within 30 days of being published overseas; otherwise, the product may be sourced from overseas. See also comments made by *Submissions 3 and 3A*, Text Publishing Company, on the relationship between the 1991 legislation and current book prices, especially *Submission 3*, Text Publishing Company, p. 24 *Submission 3A*, Text Publishing Company, p. 4

63 See *Transcript of evidence*, Australian Competition and Consumer Commission, p. 46

64 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 46

65 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 43

2.44 While acknowledging that it was not currently possible to demonstrate the benefits of increased parallel importation in respect of some products,⁶⁶ the ACCC did refer to the example of parallel importation in respect of CDs to demonstrate that this process enabled cheaper prices to become more widely available in respect of at least some items.⁶⁷ However, a number of witnesses to the Committee stated that although there were changes to some prices, reduced prices were not widely available in respect of all ‘top 40’ products; and did not apply to anything other than a very limited market. In one instance, the price of the same disc varied within one store, according to the geographical location.⁶⁸

2.45 It is acknowledged by those in the music industry that there may be no relationship between parallel importation and the failure to pass on lower prices; the main reason put forward for the limited changes obvious since parallel importation was allowed was that the retailers were not obliged to reduce price and therefore charged what they thought the market could bear. A spot check as undertaken by the ACCC, which was limited to few stores – these being major supermarkets and not music retailers – was no strong argument either for or against parallel importation.

2.46 With respect to computer software – the other area in which some studies have been undertaken – the ACCC also compared prices over a similar time period.⁶⁹ The conclusions of the ACCC were that both business and popular, including video game, software, was higher in Australia on average relative to the United States; some prices for games were higher than in the United Kingdom.⁷⁰

2.47 Responses to the ACCC in respect of these claims were primarily that the ACCC did not take into account a number of factors such as freight and conversion costs,⁷¹ that its survey was restricted⁷² and spot checks could not show a full picture, that the ACCC used prices which did not reflect substantial discounts available,⁷³ and then weighted figures in an unusual method.⁷⁴ A further concern of the software industry was the extent of piracy of

66 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 43

67 Australian Competition and Consumer Commission, *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*, 2001, pp. 17-18

68 *Transcript of evidence*, Music Industry Piracy Investigations, p. 69; *Submission 13A*, Music Industry Piracy Investigations, Section 1, text p. 3

69 Australian Competition and Consumer Commission, *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*, 2001, pp. 10-16

70 See Tables 4 and 5 in Australian Competition and Consumer Commission, *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*, 2001, pp. 13-14

71 See *Submission 7*, Business Software Association of Australia, p. 77, Paragraph 5.6, p. 78, Paragraph 5.10

72 *Submission 7*, Business Software Association of Australia, p. 77

73 *Submission 7*, Business Software Association of Australia, p. 77, Paragraph 5.7

74 *Submission 7*, Business Software Association of Australia, p. 77, Paragraph 5.8

goods.⁷⁵ The absence of consideration of these factors does weaken the ACCC's case, because it is difficult to determine the original cost in the United States or the United Kingdom, and therefore whether the apparently excessive prices are the result of a number of factors which may have little to do with parallel importation. If, as in the CD retail business, the issue is more one of the prices charged by retailers and the extent of their profit, identification of such matters is also important: parallel importation alone may not result in a price decrease.

Enforcement of Copyright Inquiry

2.48 The House of Representatives' Standing Committee on Legal and Constitutional Affairs was given a reference in March 1999 by the Attorney-General to 'inquire into and report on issues relevant to the effective enforcement of copyright in Australia.'⁷⁶

2.49 The inquiry methodology was similar to that of the Ergas Committee. The inquiry was advertised and received 67 submissions. The evidence in these submissions was then tested in public hearings. Additional material was obtained on the enforcement of copyright in other countries, primarily the United States and the United Kingdom.⁷⁷

2.50 The report noted that a major problem in conducting an inquiry into infringement of copyright was the absence of comparable data⁷⁸ and the shortage of reliable statistics.⁷⁹

2.51 The report concluded that there were clearly several problems with the effective enforcement of copyright in Australia, including the level of penalties imposed; the issue of onus of proof (Recommendation 15);⁸⁰ the extent to which the issue of copyright was regarded sufficiently seriously in the community or understood by the business community (Recommendation 4) and the need for additional action by the Australian Customs Service and the Australian Federal Police (Recommendations 20 and 21).

2.52 The value of the report in the context of this Committee's inquiry especially lies in the evidence provided about the extent to which a number of factors affect the income obtained by a copyright holder, or those with distribution rights.⁸¹ The different means by which copyright may be infringed and the limited prosecution of such infringement, indicates the limited understanding of the community that such action is a form of theft, and the

75 See below, Chapter 3, Paragraphs 3.9-3.17, and *Submission 7*, Business Software Association of Australia, pp. 69-76

76 See House of Representatives' Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats* November 2000, p. 1. The terms of reference for that inquiry are reproduced at Appendix 3 of this report

77 House of Representatives' Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats*, p. 3

78 House of Representatives' Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats*, pp.5-6, on terminology

79 House of Representatives' Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats*, pp.7-9, on statistics

80 See below, Chapter 3, Paragraphs 3.21-3.27

81 House of Representatives' Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats*, pp. 11-16

relatively limited resources devoted to its prosecution. This concern was addressed by the House of Representatives' Committee through recommendations concerning greater education, and recommendations on the role of the ACS and AFP.

2.53 The Committee also briefly considered the effects of parallel importation. Although the Committee did not consider there was much evidence to demonstrate a connection,⁸² this is because its concern was more with pirated goods and whether piracy was facilitated by parallel importation. The concern of copyright owners, whether large or small, is likely to be also that the availability of legitimate copies can be facilitated through parallel importation. Depending on circumstances, this may affect the price to the consumer, and reduce the royalty to the copyright holder.

2.54 With respect to piracy, the Committee noted that there was little information available on the extent of this, and that the Ergas Committee had commissioned a report on the extent of piracy arising from the parallel importation of CDs.⁸³ This report, undertaken by Gregor Urbas of the Australian Institute of Criminology (AIC) has received considerable criticism on the basis of its assumptions and methodology. However, it is important to note that there is no direct evidence linking piracy and parallel importation, regardless of the quality of the AIC report: in the view of the House of Representatives' Committee, limiting imported pirated material required other measures.⁸⁴

The Australian Institute of Criminology (AIC), Parallel Importing and CD Piracy⁸⁵

Methodology

2.55 This report is not really a quantitative study, but more an assessment of:

- the legislation as it then existed (January 2000) with respect to copyright, including the importation of copyright items;
- the penalties which existed with respect to infringement of copyright, including both civil and criminal; and
- a snapshot view of infringement (including pirated and counterfeit goods), including information on percentage increases of piracy in various countries.

Factors affecting the usefulness of the report

2.56 The specific terms of reference of the consultancy are not listed so it is not clear what the consultant was asked to do. However, a number of factors affect the extent to which the consultant is able to make more than general statements about the extent of piracy as it affects the Australian marketplace.

82 See House of Representatives' Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats*, pp. 17-20

83 See House of Representatives' Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats*, p.19

84 See House of Representatives' Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats*, pp. 20-22 and also Chapter 5, 'Civil Remedies for Copyright Infringement'

85 This report was reproduced as Appendix 5 of the Intellectual Property and Competition Review Committee report

2.57 The first three of these factors are probably the most important. They are:

- The apparent lack of interest or lack of involvement by the relevant parties, that is the Attorney-General's department and the AFP. The ACS, according to some sources, does make an effort to track possibly pirate goods or unauthorised import of copyright articles, but lacks the resources to do more.
- The possible resulting lack of detailed information on piracy. The consultant is therefore required to refer only to those matters which have to come to court. The lack of data also means that comparisons cannot be made with respect to previous years or with respect to other countries.
- Limited acceptance of the illegality of piracy within Australia and limited recognition of the effect on the creative community. These points were also made by the House of Representatives' report, *Cracking down on copycats*.

Possible misuse of report

2.58 There are grounds for arguing that this report has been misquoted and otherwise misused. While it could be said that some reports should not be undertaken in the absence of necessary data, the author was open about the scarcity of information available on the extent of piracy of CDs.⁸⁶

2.59 Nonetheless, some of the criticism of the report – that no information was sought from those most affected⁸⁷ - does indicate that the time allocated or the approach taken, or both, detracted from the credibility of the conclusions. Although the author stated he had taken information from 'recent publicly available reports and submissions of industry groups, academic researchers, and law enforcement agencies',⁸⁸ he only conducted interviews with the ACS, the AFP, and the DPP.⁸⁹

2.60 Relative to the fact that there was very little information collected systematically on piracy, the conclusion of the author that 'there is no data emanating from public agencies...that provides evidence of a significantly increased inflow of pirated or counterfeit goods', is factually correct: there is no such data.⁹⁰ However, this is a different matter to stating that there is no other means of measuring this form of inflow, or that there is no piracy or increase in piracy.⁹¹ Dr Urbas also noted that the issue of piracy and links with organised crime may have been underestimated by the AFP,⁹² suggesting independence from the AFP position.

86 *Parallel Importing and CD Piracy*, p. 232 (page references are to the report in its original form as an appendix to the IPCR report)

87 See for example *Transcript of evidence*,

88 *Parallel Importing and CD Piracy*, p.233

89 *Parallel Importing and CD Piracy*, p.233

90 See *Parallel Importing and CD Piracy*, p.247, p. 248

91 See House of Representatives' *Hansard*, Second Reading Speech, *Copyright Amendment (Parallel Importation) Bill 2001*, 28 February 2001, p. 24579

92 *Parallel Importing and CD Piracy*, p.251

2.61 Comments such as that excerpted above,⁹³ however, were used to justify broader conclusions that there was no evidence at all about piracy, and therefore parallel importation was beneficial. It is more appropriate to criticise this misuse than to suggest that the author deliberately misled his readers.

2.62 In addition, it should also be remembered that the issue of piracy is not directly connected to parallel importing not only because extensive operations would be required to assess all material being imported but because piracy is also a domestic issue.⁹⁴ Piracy may also not be connected to price *per se*, as was suggested by Professor Fels,⁹⁵ but to the expectations of consumers and their attitudes towards this form of appropriation of material. In short, the AIC report covered only a few issues, and should not be seen or used as a definitive comment by proponents of various arguments.

93 See also the Conclusion at *Parallel Importing and CD Piracy*, p.261

94 *Parallel Importing and CD Piracy*, p. 241, p. 247

95 See Senate Legal and Constitutional Legislation Committee, *Report on the Inquiry into the Copyright Amendment Bill (No. 2) 1997*, p. 55

CHAPTER 3

ISSUES RAISED BY THE BILL FOR THE COMPUTER SOFTWARE INDUSTRY

Current state of computer software industry

3.1 The aim of the Bill is to ‘enhance competition in price, availability and choice’ through limiting unnecessary restrictions.¹ According to the ACCC, ‘an open market would help to ensure that international price discrimination would not be practised to the detriment of the consumer’.² In such a market, the ACCC believes, the price of software will drop as it is likely that software developers will have to reduce the transfer price to the Australian copyright holder ‘so that distributors and retailers would be less likely to buy software from alternative overseas suppliers’.³

3.2 Bearing in mind the ACCC’s objective of the promotion of competition and unrestricted trade, it appears that the ACCC saw the computer software industry as one where retailers are often restricted to one or two distributors which is ‘not conducive to competitive pricing or service levels’.⁴ However, the ACCC believes that in an open computer software market, retailers would have a greater number of suppliers from which to choose which is likely to ‘reduce the wholesale price and increase the level of service offered by distributors’.⁵

Price of software in Australia is already internationally competitive

3.3 However, a number of organisations claimed that Australian consumers are not paying more for computer software than consumers in other countries. In fact, the Business Software Association of Australia (BSAA) argued that in some cases, Australian consumers are actually paying less:

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- 1 House of Representatives *Hansard*, Second Reading Speech, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 24578. See also above, Chapter 2, Paragraph 2.12
 - 2 Australian Competition and Consumer Commission, *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, p. 12
 - 3 Australian Competition and Consumer Commission, *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, p. 12
 - 4 Australian Competition and Consumer Commission, *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, p. 12
 - 5 Australian Competition and Consumer Commission, *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, p. 12

The Pricing Survey found that business PC software prices in Australia are, on average, 22 per cent lower than the same products in the UK and 2 per cent lower than in New Zealand. It found Australian prices were 3.54 per cent higher than average prices in the USA, but this did not include USA State sales tax where this applies. Although some differentials were found, these often related to programs where there were adaptations or modifications necessary to customise them for the Australian market, such as Computer Aided Design Software. On average, however, across a wide range of leading products, Australian software is priced lower than in comparable markets, and is on par with the USA, a market which does not have to bear export costs.⁶

3.4 The BSAA⁷ and the Australian Visual Software Distributors Association (AVSDA) questioned the accuracy and use of some figures for prices of computer software and the

6 *Submission 7*, Business Software Association of Australia, p. 78. See also, *Submission 11*, Australian Visual Software Distributors Association Ltd, p. 231. AVSDA consider an international pricing comparison prepared by Access Economics in 1998

7 *Submission 7*, Business Software Association of Australia, p. 77. For example, the BSAA state: 'Firstly, the ACCC included in its data set, information from the 1992 Prices Surveillance Authority Inquiry and included software prices data from 1989 – which is now twelve years out of date. Secondly, the ACCC report compared Australian software prices with the USA only. It made no comparison with other markets similar to Australia such as the UK or New Zealand. It is widely recognised that the USA is the largest software market in the world, resulting in economies of scale. Further, many large software companies are based in the USA, meaning that there are lower freight costs and no export-related costs. This narrow comparison also ignores the fact that many software programs require modification for Australian, European and Asian markets. Comparison of Australian software prices with other similar export markets such as the UK is far more soundly based, as it is comparing like with like. Thirdly, the ACCC's methodology involved researching prices in four Australian and four US PC magazines only. This is very narrow range of price data and does not take into account catalogues from discount stores, or web sites, which is where the most competitively priced products are advertised. Fourthly, the ACCC did not record actual prices, but arbitrarily applied a weighting based on the circulation of the magazines advertising software and the amount of advertising. Given the substantial differences in the circulation of USA and Australian magazines, and the vastly different quantities of advertising, this convoluted and questionable methodology produced a range of erroneous comparisons that do not reflect current market conditions'. In response to these claims, the ACCC made the following comments: 'The ACCC is interested in price differences, not absolute prices, therefore it doesn't really matter if absolute prices have changed a lot in the intervening periods. The issue is, are price differences persistent and large? Our research suggests the answer is, yes. Time series is preferable to snap-shot because snap shot can include many short term influences that tend to smooth out over time. In particular, the examples given in the question are a case of a typical pattern for an industry subject to rapid technological change. This pattern is a global one, and would be expected to have a more or less uniform impact across countries. That is the lags between introduction of a new consumer item in one country and another are not long and reducing. The March 1999 methodology was based on PSA methodology from the early 1990s, which is set out in detail in previous reports. Websites were not a popular form of advertising at that time ie-early 1990s. The criticism would be valid if we used discount stores from the US but not Australia. As it is, similar types of magazines were used for both countries, and it is likely there is a similar range of retailers advertising in those magazines. The purpose of the weighting was to reflect the fact that readers of the magazine would see the advertised price. Therefore, the greater the circulation of the magazine, the more potential buyers would be aware of the price, and the more likely it is that that price would actually represent a software sale. Weighting is a common statistical practice. The methodology was derived by the PSA in consultation with the Australian Bureau of Statistics and has been publicly available since 1992. During the inquiry and immediately afterwards, information about the survey methodology and statistics were freely available to the Australian Information Industry Association and its consultant Factotum Research. Despite differences of opinion as to the weightings to be used, there was not significant disagreement about the appropriateness of weighting, as opposed to simple averaging. The ACCC was not able to weight the updated prices, a reason being that there is no readily available information to use for weights - ie no of 'hits for a web-site'. Therefore the updates in the April 2001

comparisons made by the Australian Competition and Consumer Commission (ACCC) in its April 2001 price updates for books, computer software and sound recordings⁸ which are relied on by the Government:⁹

The assertion that lifting the parallel importation restrictions will lead to a decrease in the prices of software appears to be based on questionable research by the ACCC and on some unstated economic theory.¹⁰

3.5 In evidence to the Committee, the AVSDA stated:

We do not believe that allowing parallel importation of video games would achieve the stated aim of lower prices, and we do not believe that there is a lack of competition in the market in this industry at the moment. We believe that our submission has demonstrated that wholesale prices in Australia are very competitive by world standards. We think that the data that has been supplied to argue that prices are high is invalid. It is based on retail prices, and parallel imports do not target, in the first instance, retail prices; they target wholesale prices, which we believe we have demonstrated is quite low.¹¹

3.6 The BSAA submitted that the ACCC Report and the potential for cheaper software products are ‘an insufficient basis upon which to conclude that the parallel importation restrictions ought to be lifted, in light of the likely increase in imported counterfeit software which it will entail’.¹²

Availability of computer software in Australia

3.7 The AVSDA stated that on the issue of availability, ‘computer games are released on the same day throughout the world’.¹³ That being the case, Australian consumers would have almost all new releases available at the same time as others throughout the world. Therefore, the distribution of computer software does not affect pricing:

One of the main reasons to release titles throughout the world is to control piracy so that there is not the incentive for somebody to bring a product in because it is not available here. What has happened is that the products that were brought in to beat later release in Australia were pirated products, and so that is why they are released simultaneously throughout the world.

report are simple averages only.’ See *Submission 18*, Australian Competition and Consumer Commission, p. 4

8 Australian Competition and Consumer Commission, *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

9 *Submission 7*, Business Software Association of Australia, p. 76; *Submission 11*, Australian Visual Software Distributors Association Ltd, p. 231 See also, *Submission 10*, Australian Copyright Council, p. 219

10 *Submission 7*, Business Software Association of Australia, p. 76

11 *Transcript of evidence*, Business Software Association of Australia, p. 2

12 *Submission 7*, Business Software Association of Australia, p.76. See also *Transcript of evidence*, Business Software Association of Australia, p. 2

13 *Transcript of evidence*, Business Software Association of Australia, p. 2

To give you an indication: if we release a product in the US, within four days a full retail sample will be sent from the US into Asia. The code will be broken, and they will start duplicating and even replicating the artwork. The quality of the pirated copies is improving year after year. So, within four days, they are actually shipping pirated copies of that product out of Asia into various different territories.¹⁴

3.8 In light of pressures on the computer software industry in terms of piracy¹⁵ (see below), the Committee considers the level of availability of computer software in Australia to be acceptable. However, a relaxation of parallel importation restrictions would provide for the optimum level of availability.

Potential for ‘pirate’ copies of computer software products to increase

3.9 Some organisations¹⁶ expressed concern that the level of computer software piracy might increase as a direct result of repealing the current parallel importation restrictions. The BSAA submitted that, in the absence of strong copyright laws, software piracy is a major problem which can leave developers of software facing substantial revenue losses:

Experience has shown that the growth of a local software industry depends critically on the existence of strong copyright laws. In the absence of such laws, Australian software developers have little incentive to invest the resources necessary, often including years of time, in order to develop and bring new products to market. Assuming that they overcome the odds and create a successful product, without strong copyright laws, software piracy can immediately negate all that work and leave developers to face substantial revenue losses that will impede their future growth and product development.¹⁷

3.10 The BSAA asserted that enactment of the proposed new section 44E¹⁸ of the Bill will ‘substantially increase the already high rate of software piracy in Australia (which stands at 33% for business software)’.¹⁹

3.11 The Australian Copyright Council, the BSAA and the AVSDA informed the Committee that the assertion by the Attorney-General in his Second Reading Speech, that piracy is not a real and serious problem in Australia, is inconsistent with the finding of the House of Representatives’ Legal and Constitutional Affairs Committee’s report *Cracking*

14 *Transcript of evidence*, Business Software Association of Australia, p. 3

15 See Paragraphs 3.9-3.17

16 *Submission 7*, Business Software Association of Australia; and *Submission 11*, Australian Visual Software Distributors Association Ltd. See also *Submission 10*, Australian Copyright Council

17 *Submission 7*, Business Software Association of Australia, p. 69

18 The proposed new section 44E of the Bill provides for the importation and sale etc. of copies of computer programs: The copyright in a literary work: (a) that is computer program; and (b) that has been published in Australia or a qualifying country; is not infringed by a person who: (c) imports into Australia an article that has embodied in it a non-infringing copy of the program; or (d) does an act mentioned in section 38 involving an article that has embodied in it a non-infringing copy of the program and that has been imported into Australia by anyone

19 *Submission 7*, Business Software Association of Australia, p. 69

down on copycats (Copyright Enforcement Inquiry) that ‘copyright infringement is a real problem affecting Australia’s economy’.²⁰

3.12 The BSAA stated that the removal of parallel importation restrictions as proposed by the Bill, will increase the level of copyright piracy for the following reasons:

- a) The absence of such restrictions makes it much more difficult for the copyright owner to prevent illegitimate distribution channels distributing pirated software;
- b) Although importation of infringing products would still constitute infringement of copyright if the restrictions were lifted, there remains the requirement that the importer “knew or ought reasonably to have known” that the product was an infringing copy, a matter which is, practically speaking, very difficult to prove; and
- c) The absence of such restrictions makes it much more difficult for agencies such as the Australian Customs Service to detect infringing products at their point of entry into Australia, because there are a larger number of small consignments going to many distributors, rather than a smaller number of large consignments going to a single distributor.²¹

3.13 The BSAA informed the Committee that when the copyright owner cannot determine the distribution channels of software and appoint legitimate distributors (as is current practice with restrictions on parallel importation) ‘there is no way for the owner to keep track of who is bringing in its products and to assess whether they are genuine or counterfeit’. As a result, the BSAA stated that ‘it falls on consumers to determine whether the retailers from whom they acquire software are part of a legitimate distribution channel or not’.²²

3.14 In addition, the BSAA described the current situation for the detection of infringing products and the effect repeal of parallel importation restrictions will have:

Currently, the Australian Customs Service is assisted in isolating suspected pirate software simply by noting that the name and address of a consignee of imported software is not one of the authorised distributors for that type of software in Australia. The lifting of parallel importation restrictions will mean that the ACS can no longer rely on this as a cheap and first method of detection.²³

20 *Submission 10*, Australian Copyright Council, p. 221; *Submission 7*, Business Software Association of Australia, pp. 69-70; and *Submission 11*, Australian Visual Software Distributors Association Ltd., pp. 233-234. See also House of Representatives’ Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats*, November 2000, p. 18, Paragraph 2.45

21 *Submission 7*, Business Software Association of Australia, p. 71

22 *Submission 7*, Business Software Association of Australia, p. 71

23 *Submission 7*, Business Software Association of Australia, p. 72

*Australian Institute of Criminology Report on parallel importing and CD piracy*²⁴

3.15 The BSAA, AVSDA and the Australian Copyright Council urged the Committee not to rely on the Australian Institute of Criminology (AIC) Report, *Parallel Importing and CD Piracy* ('the AIC Report') as evidence that the lifting of parallel importation restrictions in relation to software, would not increase the rate of software piracy.²⁵

3.16 These organisations asserted that the AIC Report is relied upon by the Government as evidence that piracy of CDs has not increased as a result of the lifting of parallel importation restrictions and, therefore, removal of parallel importation restrictions in relation to computer software industry would be similar. The BSAA made the following comments in relation to the findings of the AIC Report:

The AIC Report purports to deal with the effect that lifting the parallel importation restrictions on music CD's has had on piracy levels of music CD's. It does not address copyrighted software at all. However, even as to music CD's, the author of the AIC Report is unable to conclude that the effect of lifting the parallel importation restrictions on the level of piracy of music CD's has not been negative.

The statement in the AIC Report that evidence of levels of piracy prior to liberalisation originates from industry rather than public agencies is an acknowledgment that the Government has not devoted any meaningful level of resources to measuring, let alone attempting to reduce, the level of copyright piracy in Australia.²⁶

3.17 Similarly, the AVSDA stated that the AIC Report is 'based almost solely on information provided by the Australian Customs Service, the police and the Director of Public Prosecutions ... for all of these bodies, copyright enforcement has a relatively low priority and this has not changed since the introduction of legislation allowing parallel imports of CD's'.²⁷

Commercial considerations and the distorting effect of piracy on investment

3.18 Whilst piracy of computer software products is arguably low in Australia by world standards, some 25 per cent, Australian companies are spending \$1 million per year in attempting to 'fight' piracy.²⁸ The AVSDA and the BSAA advised:

If parallel imports are allowed, those companies will not make as much money out of selling those titles, particularly, we strongly believe, because the level of piracy will increase as well. The companies that are making money out of selling the products in Australia at the moment [...] are paying over \$1 million a year to fight

24 See also above, Chapter 2, Paragraphs 2.55-2.62

25 *Submission 7*, Business Software Association of Australia, p. 73; *Submission 11*, Australian Visual Software Distributors Association Ltd, p. 234; and *Submission 10*, Australian Copyright Council, p. 221

26 *Submission 7*, Business Software Association of Australia, pp. 73-74

27 *Submission 11*, Australian Visual Software Distributors Association Ltd, p. 234

28 See *Submission 11*, Australian Visual Software Distributors Association Ltd, p. 233; *Submission 7*, Business Software Association of Australia, pp.70-71; and *Transcript of evidence*, Business Software Association of Australia, pp. 2, 4, 9, 12, 15

piracy [and] will not have the resources to do that because they will not have the income, and they will not have an interest in protecting their market.²⁹

3.19 The Managing Director of Acclaim Entertainment stated that his company is currently investing heavily in infrastructure, and particularly development in Australia. However, if the company were to start losing profits as a result of an increase in piracy from the relaxation of parallel importation restrictions, as is predicted by the industry, the incentive to invest in Australia would be lost and Acclaim Entertainment would need to move investment elsewhere.³⁰

3.20 The AVSDA, however, did agree that whilst authors and creators might lose profits as a result of piracy, they would not necessarily lose profits as a result of parallel importations.³¹

3.21 The Committee is sympathetic to those organisations, specifically the BSAA, the AVSDA and the Music Industry Piracy Investigations (MIPI), who outlined the difficulties in enforcement of copyright and the apparent low priority placed on enforcement of this issue by the AFP, the ACS and state governments. The Committee acknowledges the possibility that piracy is a real problem, and that additional methods are required to limit its proliferation. At this stage, however, the Committee believes that the issue of piracy is more appropriately addressed through recommendations such as those contained in the report, *Cracking down on copycats*, than in limitation of parallel importing.

Onus of proof in copyright infringement proceedings

3.22 The reversal of the onus of proof in relation to infringing copies of a computer program is provided for in the Bill in section 130B. The BSAA stated that the proposed section 130B should be extended to include the following:

(2) In an action by a plaintiff for infringement of copyright described in section 37, it must be presumed, unless the defendant proves otherwise, that the defendant knew, or ought reasonably to have known, that the making of the copy would, if the copy had been made in Australia by the defendant, have constituted an infringement of the plaintiff's copyright.

(3) In an action by a plaintiff for infringement of copyright described in section 38, it must be presumed, unless the defendant proves otherwise, that the defendant knew, or ought reasonably to have known, that the making of the copy constituted an infringement of copyright, or, in the case of an imported article, would, if the article had been made in Australia by the importer, have constituted an infringement of the plaintiff's copyright.³²

3.23 The BSAA stated that, if the Bill was enacted and parallel importation restrictions were removed, 'this should be accompanied by, or shortly followed by, the enactment of legislation to give effect to the recommendations of the Copyright Enforcement Inquiry'.³³ In

29 *Transcript of evidence*, Business Software Association of Australia, p. 4

30 *Transcript of evidence*, Business Software Association of Australia, p. 5

31 *Transcript of evidence*, Business Software Association of Australia, p. 5

32 *Submission 7*, Business Software Association of Australia, Attachment 4, p. 152

33 *Submission 7*, Business Software Association of Australia, p. 68

particular, reference was made to recommendation 15 of the report, *Cracking down on copycats*, that ‘the *Copyright Act 1968* be amended so as to place on the defendant the onus of proof in relation to the knowledge requirement in civil actions based on sections 37, 38, 102 and 103 of the Act’.³⁴

3.24 Essentially, the Australian Copyright Council agreed with the above amendments to proposed section 130B, although it directed its comments at section 130A:

The new provisions relating to the onus of proof are based on the existing provision relating to sound recordings (section 130A).

If the copyright owner still has to prove all elements of sections 37 and/or 102 to make out a prima facie case, including that the defendant knew, or ought to have known, that making the imported article in Australia would have infringed copyright, then we submit that section 130A makes no difference to the onus of proof that would apply in the absence of the provision. If on the other hand, the effect of the provision is to require the importer to prove that the imports are non-infringing copies once the applicant has proved absence of licence to import, then section 130A would make a difference to the onus otherwise applying.

The Bill would more clearly reverse the current onus of proof if it amended [the presumptions relating to] sections 37 and 102 so that the importer had to prove that he or she did not know ... and had no reason to know, that the imported CD’s would infringe copyright if made by the importer in Australia.³⁵

3.25 Those amendments proposed by the Australian Copyright Council would have the same effect as those proposed by the BSAA. Presumably similar arguments could be made in relation to section 130C, relating to electronic literary or music items. Representatives of the music industry, however, claimed that they did not consider the provisions in the Bill against importers of infringing material to be sufficiently strong,³⁶ and went so far as to consider it ‘a defence for an infringer in the event that they are sued.’³⁷ They also noted that, in their opinion, there had been strong opposition to the reverse onus of proof by the Attorney-General’s department:

...the Attorney-General’s Department has consistently argued...that there should in fact be no reversing of the onus of proof for importers, arguing that, in fact, this was unfair and anticompetitive and it put copyright owners in an unfairly strong position.³⁸

3.26 Insofar as MIPI wants a form of reverse onus of proof prior to importation of goods, it should be noted that the Customs Act currently requires importers of goods worth over \$2,000 to supply documents to the ACS prior to importation. While this does not affect imports under this price limit, it would add substantially to the ACS workload to do so.

34 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats*, Chapter 5, Paragraphs 5.20 – 5.22

35 *Submission 10*, Australian Copyright Council, p. 222

36 See *Transcript of evidence*, Music Industry Piracy Investigations, p. 71

37 *Transcript of evidence*, Music Industry Piracy Investigations, p. 71

38 *Transcript of evidence*, Music Industry Piracy Investigations, p. 71

3.27 With respect to the suggestions made by BSAA and the Australian Copyright Council, the Committee considers that they have merit insofar as they effectively integrate aspects of the Bill. If there is an intention to reverse the onus of proof, the amendments proposed by these groups strengthen this and would also assist in clarifying the intended purpose of S130A.

3.28 The Committee therefore suggests that consideration be given to these changes being incorporated into the legislation, and that, for the sake of consistency, S 130A should be expressed in a similar fashion.³⁹

Diminished effectiveness of the censorship regime

3.29 The AVSDA submitted that the censorship regime in Australia would be almost impossible to control in an ‘open import regime’.⁴⁰ The AVSDA stated that ‘the censorship regime in Australia consists of the Commonwealth legislation together with complementary State and territory legislation’ and ‘under the current system the States and territories are responsible for enforcement of the classification requirements, however, in fact, the States and territories undertake very little enforcement activity’.⁴¹

3.30 According to AVSDA, the industry, Customs and censorship authorities ‘monitor and control the overwhelming majority of product’ as AVSDA members ‘distribute most of the video games marketed in Australia’. AVSDA suggested that Australian censorship requirements may be avoided by importers of video games, as has been happening in New Zealand in the absence of parallel importation restrictions. In addition, detection will be increasingly difficult as enforcement activity is already low and distributors will again face the same problems in attempting to identify material that does not meet classification requirements, as they face in attempting to detect pirated copies.⁴²

3.31 The Australian Record Industry Association (ARIA) made similar arguments in relation to enhanced CD’s.⁴³ ARIA was concerned that with the removal of parallel importation restrictions in relation to enhanced CD’s, the Australian market may be flooded by unclassified material:

Our main concern is that these variations will have significant, substantial, unintended consequences, with the flooding of the Australian market with unclassified materials of all sorts. That material will basically be coming in with the sole motive of avoiding classification.⁴⁴

3.32 The Committee notes the potential difficulties that removal of parallel importation restrictions may have on the enforcement of classification requirements. However, as shown by ARIA and MIPI, this is already an issue and therefore not directly related to parallel

39 The Committee notes the Federal Court case on the meaning of S130A, referred to in *Submission 10*, Australian Copyright Council, p. 223, and would expect this to be taken into consideration

40 *Submission 11*, Australian Visual Software Distributors Association Ltd, p. 237

41 *Submission 11*, Australian Visual Software Distributors Association Ltd, p. 237

42 *Submission 11*, Australian Visual Software Distributors Association Ltd, pp. 237-238

43 *Transcript of evidence*, Australian Record Industry Association, p. 72

44 *Transcript of evidence*, Australian Record Industry Association, p. 72

importing. Again, the Committee believes that this issue is best directed to relevant enforcement agencies.

CHAPTER 4

ISSUES RAISED BY THE BILL FOR AUTHORS AND THE PUBLISHING AND PRINTING INDUSTRIES

The current state of the industry

4.1 As with computer software, the ACCC has examined the book industry over a considerable period of time in order to establish how Australian book prices fare compared with those in the US and the UK. In evidence to the Committee, the ACCC made the following observations:

The system operates by preventing retailers, whether they be booksellers or computer retailers, from directly importing products available in other countries at much lower prices. The system creates the possibility of price exploitation and of restricted availability of product in Australia and, from time to time, there is in fact price exploitation and restricted product availability. Over many years the system has operated to the substantial disadvantage of Australia, on any view. The extent of the price differences depends particularly on exchange rates at any one time. But, over the long term, there have been quite substantial price differences between Australia and the rest of the world.¹

4.2 In its 2001 Price Update, the ACCC stated that the 1991 amendments to the Copyright Act ‘mainly addressed the problem of the range and speed of availability of books in Australia’. The Commission’s believes its’ price surveys show that the price of books in Australia is still too high when compared with overseas. The ACCC also stated that the availability of technical and professional books had not improved to the extent expected from the 1991 reforms.²

4.3 According to the ACCC, anecdotal evidence suggests that some segments of the market are already purchasing directly from overseas via the Internet. Therefore, it believes that opening the market will ‘help local booksellers compete with the Internet on both price and availability terms’ and ‘if Australian prices were more competitive with overseas, and titles available quicker, then Australian consumers would have fewer incentives to purchase offshore’.³

4.4 In addition, the ACCC stated that ‘administrative difficulties in complying with the rules have reduced the effectiveness of the legislation in achieving the goal of improving the speed at which books are made available in Australia’ and that ‘the compliance costs also

1 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 42

2 Australian Competition and Consumer Commission, *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, p. 9

3 Australian Competition and Consumer Commission, *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, p. 9

reduce the competitiveness of local booksellers'.⁴ Members of the publishing and printing industries, together with Australian authors presented different theories on the current state of the book industry. These theories are outlined below.

ACCC Figures not an Accurate Representation

4.5 A number of organisations⁵ insisted that the overall percentage figures presented by the ACCC in its April 2001 price update were not accurate representations of a price comparison of books in Australia and overseas. Professor Fels, Chairman of the ACCC, in a media release dated 3 April 2001, stated that "on average, Australian paid around 44 per cent more for fiction paperbacks than United States readers did in the 12½ years from July 1988 to December 2000". In response, the Australian Publishers Association stated:

I think it is overstated. Really, the press release and the 44 per cent relates very clearly to what is called a US mass market paperback which, I would say, accounts for perhaps five per cent of the book market – perhaps less than that – and even within that category you would find some that are cheaper and some that are more expensive. We would suggest that their analysis is not comprehensive and could not be taken as representative of the total book market. They are not even arguing that. They are saying 44 per cent higher over mass market paperbacks which, as I say, does not account for a substantial part of the book market.⁶

4.6 The APA stated that the introduction of the 30/90 day rules in 1991 have supported a downward trend of the price of books in Australia:

We support the impact of the 30/90 day rules on prices. We do not believe the ACCC report has shown that book prices are more expensive. Our own evidence which we have submitted says that our best-selling lists and our major textbooks are in fact cheaper here in Australia than they are overseas. We have submitted that and we have schedules available analysing all the current bestsellers which suggest that our prices are as low or lower than overseas. The evidence Professor Fels has given shows prices that have been on a downward trend from the time they started investigating this. So that is the first thing I would like to do: defend the current practice. The status quo works, and we support it.⁷

4.7 Indeed, a number of organisations expressed concern that the ACCC was relying on figures that had been averaged over a 12½ year period from July 1988.⁸ The ACCC was accused of not accurately representing prices for books when the overall figure included book

4 Australian Competition and Consumer Commission, *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, p. 9

5 *Submission 2*, Printing Industries Association of Australia, p. 15; *Submission 2A*, Printing Industries Association of Australia, p. 4; *Submission 3*, Text Publishing Company, pp. 35-37; *Submission 4*, Allen & Unwin, p. 54; and *Submission 9*, Australian Publishers Association, pp. 188-191

6 *Transcript of evidence*, Australian Publishers Association, p. 37

7 *Transcript of evidence*, Australian Publishers Association, p. 31

8 *Submission 2*, Printing Industries Association of Australia, p. 15; *Submission 2A*, Printing Industries Association of Australia, p. 4; *Submission 3*, Text Publishing Company, pp. 41-42; *Submission 9*, Australian Publishers Association, p. 188; and *Submission 10*, Australian Copyright Council, p. 219

prices prior to the introduction of the current parallel importation restrictions. The ACCC defended its use of figures over a 12½ year period on the basis that it was necessary to consider the long-term impact.⁹

4.8 The PIAA argued that Table 2 of the ACCC 2001 Price Update shows that Australian prices for all bestsellers were 40.8 per cent higher than the USA and 17.9 per cent higher than the UK during the financial year 1988-1989. However, in the most recent period 1998-1999 to 2000-2001, prices for all bestsellers have on average been cheaper in Australia than the USA for two out of the three periods and cheaper than the UK for three consecutive periods.¹⁰ The table does, in fact, show that since the introduction of the current parallel importation restrictions, the price of books in Australia has been on a general downward trend. This table is reproduced below:

Table 2 Average Price Differentials for All Best Sellers^a: Australia, the US and UK, 1988-89 to 2000-01^b

Year ^a	US	UK
	Extent to which Aust Price exceeds US (%)	Extent to which Aust price exceeds UK (%)
1988-89	40.8	17.9
1989-90	29.3	18.6
1990-91	32.3	-0.9
1991-92	24.7	-3.5
1992-93	12.8	-1.2
1993-94	5.6	3.3
1994-95	24.6	3.8
1995-96	33.3	12.2
1996-97	39.3	4.5
1997-98	24.2	4.9
1998-99	-4.6	-11.3
1999-00	12.8	-3.8
2000-01 ^b	-0.8	-9.2
Extent to which Australian price exceeds overseas average for 1994-95 to 2000-01 (%)	18.4	0.2

Notes: a: Figures for 1988-89 to 1993-94 include fiction paperback and hardback, trade and children's. Figures for 1994-95 to December 2000 include fiction paperback, trad and children's but exclude fiction hardback.

b: Figures for 2000-01 are for the six months to end December 2000.

Source: 1988-89 to 1993-94 from PSA (1995). For the UK, 1994-95 to 2000-01 derived by ACCC from Bookseller and Publisher (Australia) and The Bookseller (UK). For the US, 1994-95 to 2000-01 derived by ACCC from Bookseller and Publisher (Australia) and Publishers Weekly (US).

4.9 In addition, the Text Publishing Company submitted that the 30-day rule has 'created an impetus for publishers to price their books competitively relative to overseas prices because it allows for the constant, daily possibility of the market opening'. The Text Publishing Company asserted that the 30-day rule has 'caused the market to behave as though it were already open while at the same time providing traditional territorial copyright to Australian publishers'.¹¹

9 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 44

10 *Submission 2A*, Printing Industries Association of Australia, p. 4

11 *Submission 3*, Text Publishing Company, p. 45

4.10 The APA conducted its own bestseller price survey, the findings of which are outlined in appendices 5-9 of its submission. The APA found that Australian prices were significantly cheaper than those in the US and the UK as follows:

... books, including mass market paperbacks, new release fiction and bestsellers, are on average cheaper in Australia than in the USA or the United Kingdom. For example, the APA compared the prices of the “top 20” bestsellers in Australia in the week of the introduction of the Parallel Importation Bill and found that the average price in the United Kingdom exceeded the Australian price by 38% and the average price in the United States exceeded the Australian price by 42%.

From the bestselling academic and professional titles compiled by the APA, the average price in the United Kingdom exceeds the Australian price by 14% and the average price in the United States exceeds the Australian price by 105%.¹²

4.11 The Committee acknowledges the price comparison surveys conducted by the APA, the ASA, the PIAA and Allen & Unwin, and the Committee is not satisfied that the overall average of figures across 12½ years represent an accurate picture of the price of books in Australia compared with overseas.

4.12 The Committee is also sceptical that the downward trend of the price of books in Australia, as presented above, can be attributed solely to the 30/90-day restrictions, and considers exchange rates to have had a particular impact on the price of books in Australia.

30/90 Day Rules Underpin Territorial Copyright and Investment in Intellectual Property

4.13 For Australia, the 30-day rule may be said to currently facilitate territorial copyright. Effectively, once a book is published in Australia, the Australian market for overseas editions of that book is ‘closed’. Territorial copyright is, therefore, said to encourage the selling of rights by authors and publishers.¹³

4.14 Australian author, Garth Nix, stated that one of the consequences of passing the Bill would be that Australia as a ‘copyright territory’ would cease to exist:

Once these amendments are passed the Australian copyright territory ceases to exist. Those American and British publishers will be able to publish in Australia anyway, and because they will have that capacity to get their edition into Australia and because they have much greater economic power they can reduce the price of their editions, improve their editions and improve their profits within their domestic territory. They can use Australia to leverage their print runs. Really, that just makes it uneconomic for an Australian publisher to buy rights from me just for Australia when they know there will be this American edition that could be coming tomorrow or next week.¹⁴

4.15 The Committee was informed that the current regime of 30 and 90 day parallel importation restrictions also promotes investment in intellectual property:

12 *Submission 9*, Australian Publishers Association, pp. 189-190

13 *Transcript of evidence*, Australian Publishers Association, p. 32

14 *Transcript of evidence*, Mr Garth Nix, p. 53

... the APA ... support ... the current 30-day and 90-day legislation. We supported it at its introduction in 1991 because it reinforces territorial copyright which we think underpins investment in copyright material and investment in publishing in the country. We support it because we think it works. The ACCC report seems to me to have very little or no evidence that books are not freely available in Australia. I think we would support the 30-day and 90-day rules as making a great contribution – perhaps a particularly original contribution – ensuring that books are available quickly in this country.¹⁵

4.16 The Committee was informed that removal of the 30/90-day regime would remove the incentive for publishers to invest in the promotion of authors and seek overseas rights sales.¹⁶

Why promote and author and seek out overseas rights sales when, in effect, the more successful one is the higher the probability that overseas publishers will undermine the Australian market? If Australian publishers lessened their efforts at overseas rights sales, then Australian authors would be further isolated and disempowered and the harm to Australian culture would far outweigh any putative benefits.¹⁷

4.17 Allen & Unwin supported these comments, adding that, in order to justify the long term investment required of publishers, the ‘level playing field’ of the current 30-day rule should continue.¹⁸

4.18 Based on the arguments put before it, the Committee is not satisfied that removal of the current restrictions will necessarily cause a downturn of investment in authors or publishing. This considered in more detail below.¹⁹

Other English Language Markets are Closed

4.19 The APA provided an overview of the global market of books for the Committee. The APA stated that ‘Australian publishing does not really operate in a global market in perhaps the way music does’ and Australia is one of four major English language publishers alongside the US, Canada and the UK – all of whom protect territorial copyright:

We operate in a market where there are four publishing centres – the UK, the US, Canada and Australia. The only other real English language publisher is the French, and the lucky Germans ... have natural territorial protection through their language. New Zealand and Singapore have open markets, but their markets are so insubstantial that there is very little local publishing. They cannot really be international publishers; they cannot be exporters of books. We can be. In fact what you are seeing is a burgeoning, strong Australian publishing industry, an industry that is on the edge of taking a real place as an exporter. And you are asking us to change our laws. The other three markets that we want to enter operate closed markets and have absolutely no intention of changing that. We would be an open

15 *Transcript of evidence*, Australian Publishers Association, p. 31

16 *Submission 6*, Australian Society of Authors, p. 62

17 *Submission 6*, Australian Society of Authors, p. 62

18 *Submission 4*, Allen & Unwin, p. 55

19 See Paragraph 4.38

market. It would significantly disadvantage us, in our view, and undermine what is a growing industry.²⁰

‘Remainders’ may be Dumped on the Australian market

4.20 Representatives from the printing and publishing industries, together with the ASA feared that as an open market, Australia would be susceptible to the ‘remaindering’²¹ of overseas editions of books:

... dumping and remaindering of books have a particular characteristic related to production runs which means that there is at any time a large number of overstocks. Frankly, the level of stocks in the US and the UK that are overstocks or reminders could completely overtake this market if we were an open market. It is a lovely market for the US and the UK to dump into. It is a long way from home, a long way from their authors’ bases; it is a rich and literate market, happy to buy books, and would prove to be a perfect dumping market for those other English language countries if we have no protection.²²

4.21 The potential effect of remaindered copies of books being dumped on a market such as Australia is that it may undermine sales of Australian editions of those books, particularly when those remaindered copies are sold at reduced prices. Australian authors will generally face reduced royalties as the sale of remaindered copies does not produce a royalty and ‘export royalties’ are generally less than royalties from domestic sales.²³ The flow on effect would be the potential for a reduced income for Australian authors.

4.22 The PIAA stated that the printing industry would not survive in its current form having to face the prospect of competition from overseas, particularly in the form of remainders:

It certainly would not survive in its current form, not in the short term. Another problem that we have is that overseas competition tends to be able to overcome fluctuations in the exchange rate. It does not seem to have any bearing on it. Whether it is absorbed or recouped at other times, I do not know. But you will always have that level of competition and, despite the 50 cents or 70 cents exchange rate, the pressures and the costs are much the same.²⁴

4.23 In response to industry concern over remainders, the ACCC stated that it believes this argument to be ‘highly exaggerated’ and may only happen ‘one in a thousand times’:²⁵

I will outline some of the reasons why we think it should not occur in on any great scale. If it started to become a regular practice, the books would be published in Australia ahead of overseas publication. Most of these products tend to be bought most heavily in the early months. So, if you are really worried about it, you get the

20 *Transcript of evidence*, Australian Publishers Association, p. 32

21 ‘Remainders’ is the term used for the overstock of books in a particular territory. Potentially, those remainders can be dumped on an open market in an attempt to recover some costs

22 *Transcript of evidence*, Australian Publishers Association, p. 32

23 *Submission 6*, Australian Society of Authors, pp. 61-62

24 *Transcript of evidence*, Printing Industries Association of Australia, p. 21

25 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 46

book out in Australia a bit ahead of the rest of the world and make most of your sales then.

On the remainders, there are a whole lot of assumptions in that story which need to be exposed. First of all, this is telling a story where some publisher or seller overseas totally miscalculates the market and ends up with a whole lot of unsold books out there which, again, is not going to happen huge numbers of times because, more likely than not, they will do the right print size at the beginning. More often than not, they will make the provision for a quick reprinting if there is a rush on the book.²⁶

4.24 Both the APA and the Text Publishing Company suggested that the ACCC was missing the point with the assumption that the sale in Australia of overseas remainders would be rare.²⁷ The APA stated that this assumption was ‘incorrect’ and ‘the error is significant’.²⁸ The APA stated that in the US, there are overstocks for virtually every book and remaindering is very common where almost all trade books are supplied to American retailers on a ‘sale or return’ basis.²⁹

4.25 The APA stated that while paperback overstock is generally destroyed, trade paperback and hardback returns remain in warehouses for at least a year. The APA suggested that if the Bill were passed, ‘Australia would provide an attractive destination for these books’.³⁰

4.26 The Committee notes the concerns of industry for the practice of dumping remaindered overseas copies. However, based on the information provided, the Committee considers many of the concerns in this area to be highly speculative. The Committee also suggests that non-remainder clauses in contracts may be an option to be more fully explored.

Cheaper Prices not passed on to the Consumer

4.27 The Committee heard evidence from representatives in the music industry³¹ that since the removal of parallel importation restrictions for sound recordings in 1998, the price of most CDs has remained around the \$30 mark³² and any savings are not being passed on to the consumer.³³

26 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 46

27 *Submission 3A*, Text Publishing Company, pp. 4-6; and *Submission 9A*, Australian Publishers Association, p. 3

28 *Submission 9A*, Australian Publishers Association, p. 3

29 *Submission 9A*, Australian Publishers Association, p. 3

30 *Submission 9A*, Australian Publishers Association, p. 4

31 See *Transcript of evidence*, Music Industry Piracy Investigations, pp. 69-78

32 Mr Speck, Manager of Music Industry Piracy Investigations stated: ‘On the issue of pricing, reference is made to cheaper CDs. Indeed, two retailers are referred to and a price of \$21.43 quoted. This clearly does not give a real indication of the price spread at the upper end of the market, let alone the entire market. In that regard, behind tab 1, for your own information, is a depiction of a number of CDs that were purchased from Sanity - and I will tender the originals. You will see that the prices range from \$27 to \$29.95 to \$30.95, as opposed to \$21.43 from Target ... which was specifically referred to with a price point of \$21.43 for top 40 CDs, a top 40 CD was purchased yesterday at \$22.95, which was the general price for top 40 CDs. However, other items that would fall into the top 40 and the perennial bestsellers

Without labouring the point, to crystallise the entire transcript – which is only three pages – he says on oath that the saving derived from buying CDs from cheaper territories is not passed on to consumers.³⁴

4.28 Music Industry Piracy Investigations suggested to the Committee that liberalisation of the music industry has not produced cheaper CDs overall, ‘merely a market where traders can more aggressively take advantage of consumers’.³⁵

4.29 The Committee is particularly concerned about the evidence provided above and considers follow-up studies of the music industry should be undertaken.

Australian Publishing Industry is not dominated by an import monopoly

4.30 In evidence to the Committee, the ACCC stated that, ‘pursuant to the Copyright Act, a system of import monopoly arrangements exist’ in relation to publishing and ‘that system operates against Australia’s interests’.³⁶ A number of organisations³⁷ dispute this claim, particularly the extent to which it ‘operates against Australia’s interests’. The APA told the Committee that within its association, ‘no publisher holds more than 10 per cent of the market, membership includes 19 firms that hold more than 1 per cent of the market, and 80 per cent of its 126 members have turnover under \$2 million’.³⁸

4.31 The APA stated that the publishing industry was quite disparate, spread over different sectors and with a lot of niche players. In fact, the APA suggested that if parallel importation restrictions were removed, this would not break the international price discrimination but concentrate power in the hands of those publishers capable of competing globally.³⁹

4.32 The Text Publishing Company stated that, to the extent that an import monopoly exists in the publishing industry, this works in the best interests of Australia in terms of exports:

This import monopoly, to the extent that it exists under the 30-day rule, also functions ... as an export monopoly for Australian producers, since foreign and

category are on sale in the same area of the store - and, indeed, in most of the Target stores I went to yesterday - at \$28.22 and \$24.13. In relation to HMV, which is another major retailer, we purchased a number of top 40 CDs on the weekend and the price was \$28.95, not \$21.43. You will see behind tab 1 and behind the photocopy of the slicks of those CDs a schedule of price comparisons of CDs between Woolworths stores. The stores selected were at Blacktown, Penrith, Town Hall and Warringah Mall. The chart speaks for itself. The prices of top 40 material vary between stores. The clear inference is that some consumers pay the price for the discount that is offered in that particular portion of the market.’ See *Transcript of evidence*, Music Industry Piracy Investigations, p. 69

33 *Transcript of evidence*, Music Industry Piracy Investigations, pp. 69-70, 77

34 *Transcript of evidence*, Music Industry Piracy Investigations, pp. 69-70

35 *Transcript of evidence*, Music Industry Piracy Investigations, p. 70

36 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 42

37 See, for example, *Submission 9*, Australian Publishers Association, pp. 190-191; *Submission 3A*, Text Publishing Company, p. 1. See also *Transcript of evidence*, Australian Publishers Association, pp. 31-32

38 *Transcript of evidence*, Australian Publishers Association, p. 32

39 *Transcript of evidence*, Australian Publishers Association, p. 32

multinational companies which acquire the rights to publish Australian books in their own territories overseas cannot export them back into the Australian market. This export monopoly is what makes Australian and independent publishers competitive with foreign and multinational companies, and it is what makes Australian writers competitive with foreign writers. It is what makes the playing field level.⁴⁰

Decline of the Australian Publishing and Printing Industries

4.33 A number of organisations⁴¹ told the Committee that the removal of the current parallel importation restrictions would likely result in a decline of Australia's publishing and printing industries. Specifically, the Printing Industries Association of Australia (PIAA) stated that preliminary estimates, based on industry feedback, indicated a loss of hundreds of jobs in regional centres and that industries peripheral to the printing industry would also be affected:

What we do know, however, is that changes as are mooted here will have a dramatic impact on the structure of the industry in Australia. We know, from discussions with major book printers in this country, that we will be looking at a loss of book production in the order of \$35 million, and that will involve probably of the order of \$13 million worth of lost paper production. We estimate that will entail a loss of jobs in the order of up to 500, and the impact of that will be very largely felt in regional areas of Australia, most notably, Maryborough in Victoria, Adelaide and parts of Tasmania where the paper production will be lost.⁴²

4.34 The Committee was told that should this legislation proceed, the predicted effect would be detrimental to the publishing industry in Australia:

This legislation will hand this territory to the multinationals; it will hand this territory to foreign publishers and wholesalers. It represents a transfer of revenue from Australian publishers and Australian writers to those companies and, once you take away that competitive fairness that we have now, you can expect a withering of Australian publishing.⁴³

Cheaper to print books in Australia

4.35 The PIAA suggested to the Committee that Australia's current printing industry was thriving on the production of import replacement of books. In fact, the PIAA stated that it is actually cheaper to print books in Australia than in the United States of America or the United Kingdom:

At Griffin Press 40 per cent of our business is import replacement. We have proved to the UK publishers and American publishers that it is cheaper to produce the goods in Australia than it is to produce them in the UK and ship them out.

40 *Submission 3A*, Text Publishing Company, p. 1

41 *Submission 2*, Printing Industries Association of Australia, p. 9; *Submission 2A*, Printing Industries Association of Australia, p. 12; *Submission 3*, Text Publishing Company, pp. 27-28; *Submission 4*, Allen & Unwin, p. 55; *Submission 8*, Mr Shane Maloney, p. 181; and *Submission 9*, Australian Publishers Association, p. 187

42 *Transcript of evidence*, Printing Industries Association of Australia, p. 17

43 *Transcript of evidence*, Text Publishing Company, p. 32

... We have reversed this trend: we are actually exporting books into the United States more cheaply than they can produce them there.⁴⁴

4.36 The Committee is particularly conscious of the concerns noted above by industry representatives. The Committee also acknowledges the efforts of the printing industry to become internationally competitive and encourages further pursuit of the export market.

Australian Publishers Do Not Simply Publish for the Australian Market

4.37 The Text Publishing Company disputed the claim⁴⁵ made by the ACCC that ‘most Australian authors publish solely for the Australian market, therefore, the threat of imported remainders is not an issue for those authors’.⁴⁶ The Text Publishing Company stated:

The problem with this is that many of those Australian authors whom most Australians want to read, ie. bestselling Australian authors, do not publish solely for the Australian market. That is why this proposed amendment threatens the income and incentive to create of our best and brightest authors. More to the point, we should not be legislating to entrench a status quo in which most Australian authors publish solely for the Australian market. We should encourage every Australian author to find a global audience.⁴⁷

4.38 Some of the above evidence appears contradictory. If most Australian authors produce solely for the Australian market and will not be affected by parallel imports, the effect is likely to be limited. If the Australian authors that most Australians want to read, do produce for overseas markets, publishers would presumably continue to invest in those authors who are successful enough to produce for overseas markets.

Australian Culture will suffer

4.39 A number of organisations⁴⁸ asserted that Australian culture would suffer as a result of the damage removal of parallel importation restrictions may have on Australian publishers and in turn, Australia authors: the disincentive for Australian publishers to invest in Australian authors due to the potential dumping of remainders; the potential decline in the Australian publishing industry; and, as discussed below, the disincentive for authors through reduced royalties.

4.40 The ACCC stated that if there were any effects felt in relation to culture, they would be marginal.⁴⁹ It was of the opinion that Australian culture would best be nurtured by making books cheaper and more accessible and by ‘offering direct targeted support aimed at

44 *Transcript of evidence*, Printing Industries Association of Australia, p. 19

45 *Submission 3*, Text Publishing Company, p. 38

46 Australian Competition and Consumer Commission, *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, p. 20

47 *Submission 3*, Text Publishing Company, p. 38

48 See for example, *Submission 3*, Text Publishing Company, p. 48; *Submission 4*, Allen & Unwin, p. 55; *Submission 5*, Linda Jaivin, p. 59. See also *Transcript of evidence*, Australian Publishers Association, Allen & Unwin, Text Publishing Company, and Mr Shane Maloney, pp. 31-41

49 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 47

Australian beneficiaries, rather than through a system where the main benefits go offshore'.⁵⁰ In addition, it warned against only considering the issue of culture from a one-sided point of view:

We believe there is some danger in this debate of a one-sided view being taken – that is, the producer side. From the point of view of the promotion of culture, it is important that Australians have access to it at reasonable prices. So the interests of the public and of culture itself are very much in its being available on reasonable terms and conditions.⁵¹

4.41 In relation to the use of financial grants to continue the nurturing of Australian culture, author, Frank Moorhouse stated that most authors would prefer financial mechanisms that were not arbitrary:

I am pretty sure that I speak for most authors, that all of us would rather have financial mechanisms that were not arbitrary. Grants are arbitrary – that is, some people get them and some people do not. They are made by a committee, partly a state body, coming through state funding. Most of us, traditionally and deeply in our psyche, accept grants; we accept that there is a need for patronage. However, ideally, most of us would argue that our income should be connected to the use of the book, to the marketplace.⁵²

4.42 The Committee acknowledges the concerns outlined above, but, based on the evidence provided, the Committee considers many of the arguments in relation to Australian culture and its decline to be highly speculative. The Committee believes that assistance to individuals, such as grants made through the Australia Council, are essential and should be continued.⁵³

Potential Reduction in Royalties for Authors

4.43 As discussed above, the Committee was informed that Australian authors potentially face a reduction in income, and thereby their livelihood, with the threat of remainders being dumped on the Australian market.⁵⁴ Australian author, Mr Shane Maloney, expressed his personal concerns in relation to the Bill:

My specific concern in this matter is, of course, about my livelihood. I am currently sold in a number of overseas markets. I doubt very much whether the Finnish editions of my book, if exported back here, would find much of a market. Maybe someone would buy the German hardback. But what I would be primarily concerned about is the way that this legislation, it is moves forward, would allow British and American editions of my work to be dumped here.

50 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 47

51 *Transcript of evidence*, Australian Competition and Consumer Commission, p. 42

52 *Transcript of evidence*, Mr Frank Moorhouse, p. 54

53 See also below, Chapter 5, Paragraph 5.23

54 See for example, *Submission 3*, Text Publishing Company, p. 31; *Submission 5*, Linda Jaivin, p. 59; *Submission 8*, Mr Shane Maloney, p. 181; and *Submission 9*, Australian Publishers Association, p. 187. See also *Transcript of evidence*, Australian Publishers Association, Allen & Unwin, Text Publishing Company, and Mr Shane Maloney pp. 31-41, and Australian Society of Authors, pp. 50-55

My work is the result of my intellectual activity; it is my intellectual property. It might not be much, but it is all I have got to sell. If I can find a buyer for it and establish a contractual basis on which I sell it to that buyer, I am really at a loss to understand why the Australian government would see it as its right to intervene in that contractual relationship.⁵⁵

4.44 Similarly, the ASA stated that authors receive a zero royalty on sales of remaindered books and, in addition, ‘export royalties’ are calculated at a much lower level for non-remaindered editions:

... on non-remaindered editions, overseas publishers calculate so-called ‘export royalties’ at a much lower rate than domestic ones, so that Australian authors could see competing editions of their titles selling here, knowing that these overseas editions were earning them a substantially lower or zero royalty, as well as undermining their Australian-originated edition.⁵⁶

4.45 In addition, the ASA was concerned that the proposed legislation would remove rights from Australian writers that will still be afforded to all authors in other English language countries.⁵⁷

4.46 The Committee acknowledges the concerns of authors. However, the Committee considers most arguments in relation to reduced royalties for authors relate to the practice of remaindering, and the practice of remaindering appears to be highly speculative. The Committee again suggests that the feasibility of non-remainder clauses in contracts has not been fully explored.

Potential for an Increase in the Level of Pirated Copies of Electronic Books

4.47 The APA submitted that no change should be made to the copyright law with respect to electronic books.⁵⁸ It stated that the electronic book market is still in its infancy and no changes should be made without ‘proper consideration being given to the effect of the proposed amendments on this market’.⁵⁹ Indeed, the APA suggested that, as is the case for most other computer software, books in electronic format may be susceptible to piracy:

We believe that insufficient research and analysis has yet been done to assess the potential detriment to the developing market for electronic books and journals. We note, for example, that works in electronic formats are highly vulnerable to piracy.⁶⁰

55 *Transcript of evidence*, Mr Shane Maloney, p. 34

56 *Submission 6*, Australian Society of Authors, pp. 61-62

57 *Submission 5*, Linda Jaivin, p. 59; *Submission 6*, Australian Society of Authors, p. 63; and *Submission 8*, Mr Shane Maloney, p. 181. See also *Transcript of evidence*, Allen & Unwin and Mr Shane Maloney, pp. 33-35

58 *Submission 9*, Australian Publishers Association, p. 191

59 *Submission 9*, Australian Publishers Association, p. 191

60 *Submission 9*, Australian Publishers Association, p. 191

4.48 The Australian Copyright Council agreed that 'books in electronic form are at risk of piracy in a similar way to computer software and music'.⁶¹

61 *Transcript of evidence*, Australian Copyright Council, p. 57

CHAPTER 5

CONCLUSIONS

5.1 Although the Committee supports the broad directions of the legislation, it wishes to emphasise its concerns about a number of issues that have been referred to throughout the report.

Objectives of the Legislation

5.2 A number of outcomes appear to be promised by this legislation, but the extent to which such expectations may be realised is unclear. Essentially, the legislation is premised on the economic theory that the more open the marketplace, the cheaper the product, and the belief that the benefits of copyright must not dominate to the detriment of benefits to consumers of the copyright item.¹

5.3 As the proposed benefits are conditional, the Committee believes that departments must make this fact clear, rather than suggesting a guaranteed result. Quite apart from the issues of relying on evidence which is questionable, or has been used inappropriately, there is too much dependence on general but not very satisfying statements in the Explanatory Memorandum. Examples of these are:

(a) Increased competition between wholesale suppliers **would ensure** that Australian business, household and government consumers of software have **improved access** to computer programs at prices comparable to the lowest prices available in the world.²

(b) Amendments to the Copyright Act...have been effective in lowering the price of popular compact discs for Australian consumers.³

(c) Amending the Copyright Act would enable consumers to realise these benefits identified by the ACCC of an open market.⁴

5.4 Certain of these comments and others may be explained as hyperbole, but this is not appropriate for an Explanatory Memorandum which in time may be relied upon for interpretation and explanation. Generally, also, it contributes to the creation of a more favourable and positive attitude towards legislation that may indeed have benefits, but which

1 See above, Chapter 2, Paragraphs 2.22, 2.30, 2.40, 2.42-2.43

2 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 8 – emphasis added

3 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 8 – the statement is misleading, in view of the qualifying comment in the following sentence: ‘Increased competition between suppliers of sound recordings has led to reported price reductions of up to 50 per cent for some volume selling titles.’

4 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 20: the preceding statement is that: ‘The 1999 ACCC report concluded that there are substantial consumer benefits that **could** be realised’ (emphasis added); apart from the controversy about the accuracy of the ACCC prices, the emphasis changes from ‘could’ to ‘would’ realise benefits

should also be carefully monitored to determine that the benefits outweigh possible substantial disadvantages.

Quality of evidence

5.5 In general, the quality of the evidence provided was not high. While the Committee acknowledges that the main players have been involved in a number of inquiries, it is nonetheless important for information provided to address issues directly and provide as much evidence in support of them as possible. Although economic theories underpin the direction of the changes, there is little information as to how these changes will occur. Much information provided on all sides was speculative. While this is understandable in some instances, it would be preferable to also suggest means by which possibly detrimental effects could be offset.

Uncounted costs

5.6 Additionally, there is no consideration of the direct and indirect costs to the community as well as to individuals and groups that may result from the proposed changes. It is apparent from the recent report from the House of Representatives' Standing Committee on Legal and Constitutional Affairs⁵ that theft of intellectual property is not regarded seriously in the community, to the point where the Committee has recommended educational programs for both the community and business. The costs of this recommendation, if implemented, may be substantial.

5.7 The cost already to Government of lost revenue from existing piracy is also substantial, as is the loss to legitimate companies. If additional benefits are expected to accrue to society through parallel importation, this must be matched by a much more rigorous application of the law in respect of copyright infringement and a greater responsibility by the community in respect of intellectual property. Other substantial costs are likely to arise if there is involvement by ACS, the AFP, courts, and other enforcement expenditure. This does not include the costs to companies of providing evidence and pursuing cases themselves, nor the costs involved in maintaining information on piracy and other copyright abuse. Other possible costs were suggested in the form of loss of exports, loss of jobs and loss of future investment, as well as loss of royalties. The indirect costs of lack of classification of some items⁶ should also be calculated.

5.8 In light of this, the statement that 'the proposed amendments are expected to have little or no impact on Commonwealth expenditure or revenue'⁷ requires further clarification.

Unsustainable data

5.9 With respect to those ACCC reports which support the general changes, the Committee notes that these were produced in the context of other inquiries. Additional information was provided to the Committee supporting the Commission's methodology. Nonetheless, the Committee has some major reservations about this evidence. Those

5 See above, Chapter 2, Paragraphs 2.52-2.54

6 See above, Chapter 3, Paragraphs 3.28-3.31

7 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 3, Financial Impact Statement

opposing the changes were able to provide considerably more detail about the cost of products across a broader spectrum of items than was the ACCC. If there is to be dependence on such material in the support of substantial change, it is the responsibility of the relevant departments to ensure that it is of the highest quality, and it is certainly incumbent upon the ACCC to provide sustainable data.

5.10 The Committee believes that there is possibly too much dependence on the ACCC for data, as is demonstrated by the use of the ACCC in the Explanatory Memorandum to justify acceptance or rejection of various options.⁸ A broader range of sources would provide evidence of a wider spectrum of opinion.

5.11 Doubling up on data is also another problem which the Committee noted, especially in the Explanatory Memorandum. Reference is made, for example, to the fact that:

The PSA and ACCC have both recommended this course of action as the only means to ensure genuine competition.⁹

5.12 The PSA report referred to was undertaken in 1992.¹⁰ The ACCC was formed in 1995 with the merger of the PSA and the TPC, which were previously chaired by Professor Fels¹¹ who is now the Chairman of the ACCC. The suggestion in the Explanatory Memorandum is that two bodies with no connection or common thread have come to the same conclusion.¹² The Committee has also noted above that another report has been quoted out of context to the point of distorting the information provided.¹³ Additionally, the Explanatory Memorandum states that the Australian Consumers' Association agrees with the ACCC in supporting a more open market for computer software,¹⁴ but the Committee found in evidence that the ACA was dependent upon information from the ACCC,¹⁵ although it had undertaken its own spot check survey of software prices.¹⁶

Guaranteeing benefits is not possible

5.13 A further concern is that other factors may interfere with the presumed benefits being passed on to the consumers. Evidence provided by the music industry demonstrated that there are no consistently lower prices available for top selling CDs, and no evidence was provided to demonstrate that consumers of items other than popular music obtained any benefits at all from parallel importation. The reason for the first situation was given as the retention by retailers of higher profit margins.¹⁷ In itself this does not disprove Professor

8 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, pp. 11-12

9 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 21

10 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 4, p. 12

11 Professor Fels was Chairman of the TPC from 1991-1995 and Chairman of the PSA from 1989-1992

12 See also Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 19

13 See above, Chapter 2, Paragraph 2.60

14 Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 12

15 See *Transcript of evidence*, Australian Consumers' Association, pp. 63-65

16 The Committee notes the article provided by the ACA as Submission 1A ('Parallel Bars' *Consuming Interest*, Summer 1999, pp.6-7) on its own survey of software prices

17 See above, Chapter 4, Paragraphs 4.27-4.29

Fels' theory that benefits will accrue if there is no unlawful behaviour;¹⁸ in fact it demonstrates that follow-through may be necessary to limit excessive profiteering, assuming that parallel importation has resulted in cheaper legitimate products being readily available for distribution. There is no evidence about the lack of other items.

Links between legislative change and advantages to the consumer

5.14 The Committee was surprised at the lack of evidence presented on specific links between legislative change and the availability of cheaper legitimate items to consumers. In particular, it noted that although there is general support for the 30 day rule in book publishing, including from those who had been opposed to it, little effort seems to have been made to collect information on the ongoing effects of certain substantial changes.

5.15 One of the reasons for this may be that there was less awareness a decade ago of the need to demonstrate the benefits of legislative change. It is also possible that, with respect to more recent changes, such as the parallel importation of CDs, there is little concrete evidence of widespread benefit. Given the dissatisfaction expressed with material provided by the ACCC, it would be useful for the more detailed data from the relevant organisations to be regularly assessed in order to measure the effects of change.

5.16 With respect to items such as books, journals, and sheet music the Committee believes that, as these are exempt from parallel importation for one year, it is essential to obtain accurate data about the current costs to consumers of such items as a baseline against which to measure future change. This move would also go some way to assessing the status of those areas such as sheet music and periodical publications where no assessment appears to have been made.¹⁹

5.17 Given the Committee's concern about the quality of data provided in respect of those industries which have been subject to some examination, the Committee makes the following recommendation:

Recommendation 1

The Committee **recommends** that the relevant departments allocate funding to an independent body such as the Australian Copyright Council to ensure that comparable data is collected and maintained on all industries affected by Schedule 2 of the Bill, particularly periodical publications and sheet music.

This data is to be the subject of a report to be completed prior to the commencement of Schedule 2, and to be made publicly available before commencement.

Effect on Australia

5.18 While there has been much emphasis on benefits accruing to consumers, and the profits currently made by multinational companies, there is little detailed assessment of the actual effects of the legislation in terms of owners of copyright. There is a suggestion that all copyright owners are multinational companies, making substantial profits. Be this as it may

18 See above, Chapter 2, Paragraph 2.43

19 See *Submission 10*, Australian Copyright Council, p. 220

in some cases, the fact is that some products which are desired by consumers are sourced overseas, and the copyright is held by multinational companies. These items may become cheaper, but the legislation will not be excluding the products of multinational companies.

5.19 In other instances, royalties may accrue not to multinationals but to individuals and to local companies. The Committee notes that the proposed changes were seen as leading to effects on exports, on employment, and on damage to some regional areas.²⁰ It is not yet convinced by arguments, especially from the publishing and printing industries, that parallel importation will have a detrimental effect on local product. However, it does note it is important to remember that royalties are of particular importance to individuals also.

5.20 In respect of local piracy of computer software and other electronic items, the Committee shares the concern of the House of Representatives' Standing Committee on Legal and Constitutional Affairs, as expressed in its report *Cracking down on copycats*. It endorses the recommendations relating to education in respect of copyright matters as a form of mutual responsibility from the consumer. However, it does consider that effective penalties need to be imposed on those making or distributing pirated goods, whether locally produced or imported.

5.21 The Committee therefore seeks a response from the Minister for Justice on the extent to which such measures will be enforced or improved where necessary. It acknowledges that on-line purchasing is likely to increase the difficulties of the enforcing agencies, but notes that they are funded to provide the enforcement services. Evidence provided to other committees or inquiries indicates that insufficient attention has been paid to this area.²¹

Individual copyright

5.22 With respect to individuals who own copyright in respect of their products, the Committee does acknowledge their concerns that the material which contributes to their income may be at risk. However, it would need to be convinced by statistics collected over a considerable period that the issues of remaindering copies at limited return to the author is a consistent problem,²² and one on which a successful author could have no impact in terms of arrangements made with overseas rights purchasers.

5.23 With respect to the issue of declining investment in Australian authors and others, the Committee acknowledges that this form of support and development is a complex matter. While the Committee is not in a position to consider the relationship between this form of investment and other research and development grants, it believes that increased emphasis on investment at all levels may lead to the extension of funding to artistic and creative areas. It also notes that building up investment in individuals does have some returns for publishers and others, and that if there is currently support for low-selling authors this is unlikely to be affected by parallel importation.

20 See Chapter 4, Paragraphs 4.33-4.44

21 See Chapter 2, Paragraphs 2.51-2.52, 2.54, and Chapter 3, Paragraphs 3.9-3.21 See also *Submission 12*, Attorney-General's Department, pp. 255-256

22 See Chapter 4, Paragraphs 4.39-4.42

5.24 In the absence of sufficient detailed information on this complex matter, the Committee notes that it supports the continuation of grants to authors and others in order to assist in the development of their careers.

5.25 Issues of copyright relating to locally designed software items were not discussed, although it is assumed that some of these may also be subject to piracy. Loss of royalties would therefore be linked more directly to law enforcement matters than to parallel importation.

Recommendation 2

The Committee recommends that, subject to the above recommendation (Paragraph 5.17) and Advice from the Minister (Paragraph 5.21), the legislation proceed. ²³
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Senator Marise Payne

Chair

23 The Committee has also made a suggestion at Paragraphs 3.27-3.28 on the onus of proof

MINORITY REPORT

BY LABOR SENATOR JIM MCKIERNAN

Intention of the Bill

1.1 The Bill aims to extend the amendments made to the Copyright Act 1968 through the Copyright Amendment Bill (No.2) 1997, that allowed the parallel importation of music CDs, to enable the legal parallel importation and subsequent commercial distribution of computer software products, including interactive computer games, books, periodical publications (such as journals and magazines) and sheet music.

Inquiry too truncated

1.2 Initially I would like to record my concerns with the time frame of the inquiry.

1.3 The short time frame given for the Committee to conduct the inquiry has given little time for submitters to prepare submissions and has allowed us time for only three brief public hearings in Melbourne and Sydney only.

1.4 Many of the individuals and organisations that appeared before the committee remarked that they had to keep their comments brief because of the tight time they had been allotted before the Committee.

1.5 The Senate referred the Copyright Amendment (Parallel Importation) Bill 2001 to the Senate Legal and Constitutional Legislation Committee on 28th March 2001, to report back by Wednesday, 23rd May 2001.

1.6 Contrast this to the previous inquiry into parallel importation for music CDs that was referred to the Committee on 2nd December 1997 for an inquiry and report by 23rd March 1998 (subsequently extended to 1st April 1998). This inquiry, into only one industry, the music industry, held seven public hearings in three cities, Sydney, Melbourne and Perth.

Poor Consultation

1.7 Of grave concern is the evidence from almost all of the bodies representing the industries concerned with the proposed changes, that they also were not consulted in the preparation of the current Bill, either by the Attorney General's Department or the Australian Competition and Consumer Commission (ACCC) whose research the Attorney General's Department has blindly accepted.

Poor Research

1.8 I am baffled as to why, in the preparation of this Bill to extend parallel importation to industries other than the music industry, no research was conducted into sheet music, electronic books or periodicals. Considering that all of the proponents of the current changes are relying on research from the ACCC, we find it extraordinary to say the least that no research whatsoever has been done by the ACCC, any Government Department, or the ACA in relation to parallel importation on these products.

Poor Interdepartmental Exchange

1.9 In the preparation for the development of the Bill it also seems that was little or no consultation with the Department of Communications, Information Technology and the Arts (DOCITA) or the Department of Industry, Science and Resources (DISR). Neither of these Departments made submissions to the inquiry nor appeared before any of the public hearings.

Confined Source Of Information And Too Little Independence

1.10 It would also seem that the four organisations and three submissions supporting the Bill (noting that the ACCC didn't make a specific submission, but relied their March 1999 report "*The Potential Consumer Benefits of Repealing the Importation Provisions of the Copyright Act 1968 as they Applied to Books and Computer Software*") relied on flawed ACCC research.

1.11 The Attorney General's Department and the ACCC stated during the hearings that they were not independent bodies and were acting on instruction from Government in relation to the proposed changes.

1.12 The remaining two organisations that indicated support for the proposed amendments were the Australian Consumers Association and the National Amusement Machine Operators Association (NAMOA).

1.13 Both of these organisations declared to the committee that they were basing their decision to support the current Bill almost solely on the research conducted by the ACCC and that they had therefore done little or no independent research.

1.14 One of the greatest flaws in the argument of the Government and those supporting the extension of parallel importing is the blind acceptance of statements and research produced by the ACCC. The inquiry has revealed that the research conducted by the ACCC was not specific to the current Bill and that it is at best unsustainable and incomplete.

1.15 It would seem based on all the evidence made available to the Committee and information gathered through the Public Hearings that the Government is not pursuing the extension of parallel importation to other industries through any other argument other than a blind ideological belief that it will lead to more competition and lower prices for consumers.

Accordingly The Bill Is Opposed

1.16 I cannot support the proposed Bill because it extends the deeply flawed decision to allow parallel importing for music CDs.

Poor Preparation Of The Bill

1.17 I am concerned that the Government failed to conduct proper research into the effect of parallel importation of CDs on the music industry since 1998. In making its decision to extend parallel importation to other industries, they have ignored evidence given to the Committee from the music industry.

1.18 Also there is an apparent lack of understanding of the importance of intellectual property rights for, in relation to this Bill, Australia's cultural industries, and Australian industry in general, to succeed as industries of the 21 Century.

1.19 On the evidence put to the Committee it is also obvious that the Government in preparing the Bill has also not sought or been provided with information in relation to the impact on the relevant industries of the proposed changes, such as impact on: employment; cultural identity; and investment in Australia's cultural industries.

1.20 I am also concerned with the illogical argument that parallel importation should be introduced because of a fundamental economic principle relating to competition yet the Bill excludes feature films, video and DVDs.

1.21 My recommendation to oppose the Bill is based on the fact that it was bad policy when it was introduced in relation to CDs and that attempts to extend it to other industries just continues that bad policy.

Evidence On Computer Software Contested: Evidence Unsatisfactory

1.22 I am particularly concerned that much of the evidence put to the Committee in support of the decision to extend the parallel importation to computer software from the ACCC is unclear. The Business Software Association of Australia (BSAA) and the Australian Visual Software Developers Association (AVSDA) solidly dispute the ACCC's assertions.

1.23 AVSDA also questioned the findings of the ACCC in relation to price comparisons and provided evidence of an Access Economics report that showed that in 1988, prices for games software were 32% higher in the UK than in Australia and only 7% lower than in the US.

1.24 The AVSDA also questioned the validity of the ACCC report that stated that computer games were 'on average 33 per cent higher than in the US' based on a comparison of 9 titles. The Access Economics report stated that the ACCC's '*comparison is badly flawed and should not be relied upon*'.

1.25 Ms Megan Simes, Chief Executive of the AVSDA told the public hearing, 'What the ACCC did at that time was to look at nine games at the retail level on the internet, so it was pretty random and not very scientific way of pricing. They have recently done the same thing for 11 games but again that was just a random spot check, as they call it' (page 2 Public Hearing Wednesday 9 May 2001).

1.26 Mr Michael Fegan, Managing Director, Acclaim Entertainment Pty Ltd also stated, 'It does not add up from my personal point of view, either, because—as you know we get information from PC Data, which is the US research company that gives us weekly sales. We get Chartrack from the UK. Inform, which is a local research data company, gives us all the sell through figures and all the retail price points and average street prices. That information shows that Australia is competitive. Australia is much cheaper than the UK and, in most instances, lower than the US now because of the Australian dollar. The ACCC figures do not stack up. We can provide all this information' (Page 3 Public Hearing 9 May 2001).

1.27 The AVSDA in its submission states that the decision to extend parallel importation to computer software would 'risk seriously damaging copyright protection' and that 'the protection of intellectual property and copyright more generally is central to the functioning of modern market based economies, especially if they aim to prosper through the creative talents of their peoples'.

1.28 The AVSDA also raised serious concerns in relation to the software industry that the proposed changes would have a significant impact on the level of piracy due to the inability to have appropriate knowledge of whether or not imported software was coming from a legitimate source.

1.29 The AVSDA state in their submission that ‘by allowing parallel imports the incidence of piracy and counterfeit product would increase significantly’ and that ‘law enforcement agencies and the courts simply do not have the ability or the will to deliver adequate protection’.

1.30 I am not persuaded that the ACCC figures on price are based on research of the level needed where the Government is making decisions that are to have such a major impact on the software industry.

1.31 The AVSDA questioned the ability of parallel importation to lower the retail price of software when the direct impact it was likely to have was on wholesale price.

The Issue Of Censorship

1.32 The AVSDA raised serious issues in relation to censorship that should be taken into account.

1.33 The Business Software Association of Australia (BSAA) had similar concerns in relation the information provided to the Committee from the ACCC.

Government Discounts Risk Of Piracy

1.34 The BSAA’s main concerns as expressed in its submission to the committee were that lifting the parallel importation restrictions will lead to an increase in the already unacceptably high rate of software piracy in Australia and that Australia software consumers are already paying competitive prices for software (BSAA submission 1.1 (a) and (b)).

1.35 BSAA Chairman, Mr Jim Macnamara raised serious questions in relation to statements by the ACCC, the Attorney General’s Department’s and the Attorney General that piracy was not a significant issue in Australia.

1.36 Mr Macnamara stated to the Committee:

‘The core of our argument is that, firstly, we point out that illegal software copying in Australia is worse than in other equivalent markets in the world, and we think this is an important part of the environment. Australia has a business software piracy rate of, on average, 32 per cent: one-third of all our products are stolen. That compares with 25 per cent or 26 per cent in the US and the UK, for example.’(Page 9 Committee Hansard Wednesday, 9 May 2001).

1.37 In relation to piracy the BSAA said that parallel importing would damage Australia’s IT industry. A 1999 study by the BSAA revealed that Australian distributors and retailers lose \$269 million per year through piracy alone and that a drop in piracy to the US level would mean the creation of 7,000 additional jobs and add \$1 billion to the Australian economy (Mr Macnamara Public Hearing, Wednesday 9 May 2001, Hansard page 10).

ACCC's Methodology Flawed

1.38 Mr Macnamara also questioned the ACCC's methodology in relation to its findings on the price of business software in Australia and stated that the BSAA had conducted its own extensive research that strongly disputed the ACCC findings.

1.39 The evidence from the National Amusement Machine Operators of Australia (NAMOA) was interesting. This organisation appeared before the committee to support the Bill. It provided important information to the Committee in relation to the effect on prices for consumers that demonstrated that the change would have little effect on price.

1.40 Mr Peter Hankin, Chairperson of NAMOA stated to the Committee that the biggest problem in his industry was not the lack of parallel importation but:

'These days we are suffering from other factors, including the competition from home games; we have not been able to collect the GST. These things are not helping. Things are more complex now.' (Public Hearing Tuesday 15 May, Hansard Page 61)

1.41 And Mr Hankin made the following statement in relation to whether parallel importation would lower the price of games for consumers:

'The cost has been \$2 for a dedicated game since about 1990. That is the most expensive simulator for a game. One dollar would be a more typical price for the games with software changes, without changing the cabinet' (Public Hearing Tuesday 15 May, Hansard Page 61) and

'No I do not see much in the potential to increase the prices in the future. The public enthusiasm is just not there to increase the prices.' (Public Hearing Tuesday 15 May, Hansard Page 62).

Books, Electronic Books, Periodicals and Sheet Music

1.42 The proponents of unrestricted parallel importation argued before the Committee that books are dearer in Australia than in other comparable countries such as the US, UK, that the Australian book industry is not competitive and that there is limited availability of books in Australia.

1.43 Evidence before the committee has clearly shown that the case being advanced by the Government, ACCC, Attorney General's Department and the Australian Consumers Association was based on flawed research.

1.44 The printing industry gave persuasive evidence to the Committee that the limited form or parallel importation that was introduced in 1991 has had significant positive impact on the book industry for both consumers and book printers in Australia.

1.45 The Printing Industry of Australia (PIAA) told the Committee that the 30 day rule which the Bill aims to remove did not insulate the book printing industry from international competition and did not allow it to embrace pricing policies which resulted in monopoly profits (Mr Fisher PIAA Committee Hansard Wednesday 9 May 2001, page 17).

1.46 The PIAA stated that the 30-day rule actually provided some safeguards against anti-competitive practices such as predatory pricing, and had been invaluable to the survival of book printers (Hansard Wednesday 9 May, page 17)

1.47 I have taken into account the evidence of the PIAA that the proposed changes in the Bill will have a heavy economic impact on the Australian printing industry. The PIAA estimate:

'...a loss in book production of the order of \$35 million ...\$13 million worth of lost paper production. We estimate that will entail a loss of jobs in the order of up to 500, and the impact of that will largely be felt in regional areas of Australia, most notably Maryborough in Victoria, Adelaide and parts of Tasmania where the paper production will be lost.' (Mr Philip Anderson, National Director, PIAA Hansard Wednesday 9 May, page 17).

1.48 In contrast to the argument put forward by the ACCC that books are more expensive in Australia the PIAA provided evidence that many books printed in Australia are in fact cheaper than those printed and sold in other markets.

1.49 When asked how the ACCC may have fallen into error in relation to pricing Mr Fisher said: *'Start from an ideological position and work backwards.'* (Hansard page 19)

1.50 It is a matter for concern that the PIAA, having written to the Government asking to be consulted on any changes proposed to the current arrangements for parallel importing, were not approached by either the Government, Attorney General's Department or the ACCC in relation to those now advanced. (Hansard page 21)

1.51 The Australian Society of Authors (ASA) make significant points in their submission that seriously tests the basic arguments put forward by the proponents of the Bill.

1.52 The ASA argued that the Bill would lead to the dumping in Australia of remaindered books from overseas and to lower or no royalties from them to Australian authors. (ASA submission no 6 page 1)

1.53 The ASA said there would be little incentive for local publishers to promote Australian authors when their investment could be undermined by imports dumped from overseas.

1.54 ASA gave evidence that the changes would impact badly on Australian publishing because it would limit the opportunities for them to sell their copyright overseas.

1.55 The ASA stated that if territorial copyright was abolished then Australian authors would have no choice but to sell their property to publishers overseas and then have their work imported back into Australia.

1.56 According to agents contacted by the ASA, 10 years ago only around five per cent had agents in the UK and US. Today, with the support of territorial copyright this figure has increased to approximately 20 per cent. (ASA submission no 6)

1.57 The ASA argues that no other jurisdiction with a market of significant intent other than Australia to make the same change in relation to parallel importing for its book industry.

1.58 The ASA states in its submission:

'Any move that weakens the position of copyright creators now will be seen as incredibly short sighted in a few years time. At a time when Australia is being criticised for being out of step with the burgeoning knowledge-based economies of the world, it will be seen as remarkable that we should even contemplate undermining our home grown copyright creating industries.' (ASA submission no 6, page 3)

1.59 The ASA criticised the ACCC latest updated report on price comparisons, stating that:

'The most remarkable thing about the updated ACCC report on comparative book prices is that it actually shows that books are cheaper in Australia than they are in either the US or the UK.'

1.60 This is in contrast to the interpretation that the ACCC put on current book prices and on the impact of the introduction of limited parallel importation by the 30-day rule in 1991.

1.61 The ASA also questioned the methodology of the ACCC in trying to exclude comparisons between Australian paperbacks and US/UK paperbacks, suggesting it demonstrated a total misunderstanding of the Australian Book industry.

1.62 The ASA took issue with the ACCC position that current low prices are a product solely of the low Australian dollar:

'This does not explain the fact that according to the ACCC's own figures the price differential has been in Australia's favour for the last three years compared to UK book prices, and two of the last three years when compared to the US' (ASA submission no 6, page 4)

1.63 The ASA stated that:

'To accept the proposed amendments to the Copyright Act would be to abandon a strategic resource and to diminish us as a nation that can represent itself as culturally unique to the rest of the world' (ASA submission no 6, page 4)

1.64 The effect on Australian authors of the legislation was best attested to by three successful Australian authors who made submissions to and appeared before the Committee.

1.65 Mr Garth Nix, an Australian author with more than 13 books published in Australia the United States and the United Kingdom stated that:

'The proposed changes to the Copyright Act to allow parallel importation will reduce the income of these authors and diminish their control over their intellectual property. It will drive established authors to be published of London and New York and it will reduce the opportunity for beginning writers to be published in their own country and thus to be published at all.' (Public Hearing, Tuesday 15 May 2001, Hansard page 50)

1.66 Another respected Australian author, Mr Frank Moorhouse, addressed the committee in relation to importance of the maintenance of Australia's cultural identity. This issue seems to have been totally overlooked in the research and drafting of the Bill by the Attorney General's Department.

1.67 Mr Moorhouse acknowledged the information that had been presented to the committee in relation to the damage that would be done to the publishing and printing industries and went on to elaborate on ‘a very abstract notion which we might call the cultural good or the national interest’. (Public Hearing, Tuesday 15 May 2001, Hansard page 51)

1.68 Mr Moorhouse said that elected representatives were sworn in to uphold, nurture and protect these abstract notions.

1.69 It is interesting that these same words ‘national interest’ were at the core of the debate in relation to the recent debate over the proposed foreign takeover of Woodside Petroleum yet the shapers of the Bill seem to have ignored the ‘national interest’ or the ‘cultural good’ in relation to this Bill.

1.70 Mr Shane Maloney, Australian Author, gave an important insight into the impact it would have on his livelihood during his appearance before the Committee.

1.71 Mr Maloney stated that he believed that the proposed changes would ‘have considerable consequences for me and, I think for contemporary Australian cultural activity’ (Public Hearing, Thursday 10 May 2001, Hansard page 34)

1.72 Mr Maloney also stated that he did not understand why the Government felt it had the right to take the result of his work, his intellectual property, and take away his right to sell it on a contractual basis to earn an income:

‘My work is the result of my intellectual activity; it is my intellectual property. It might not be much, but it is all I have got to sell. If I can find a buyer for it and establish a contractual basis on which I sell it to that buyer, I am really as a loss to understand why the Australian government would see it as its right to intervene in that contractual relationship. If this legislation advances, it means that a writer in Castro’s Cuba would have more control over their intellectual property rights than a writer in Australia. So it is quite unusual to find an Australian Liberal government pursuing a line like this.’ (Public Hearing, Thursday 10 May 2001, Hansard page 34)

1.73 I appreciate the frustration Mr Maloney demonstrated with the Government’s position in relation to this Bill. We are extremely concerned that there has been no consideration whatsoever of the impact on Australian authors, Australian cultural identity and the choices Australian consumers will have access to if unrestricted parallel importation is introduced into the Australian book industry.

1.74 The Australian book publishing industry was well represented through submissions and appearance before the Committee. The publishing industry echoed many of the criticisms that were outlined by the printers and authors.

1.75 The Australian Publishers Association (APA) stated in their submission that unrestricted parallel importation would lead to: dumping of overstocks and overruns of foreign editions; reduced value of Australian copyrights and royalties to Australian authors; reversal of the current competition that exists in the world market and reduce copyright holders to dependence on a single, usually multinational firm; reduce the level of local publishing. (APA submission, no 9, page 1)

1.76 One of the main concerns of the APA was the reliance of all of the proponents of the changes to rely almost solely on flawed research by the ACCC in relation to book prices.

1.77 The APA took issue with the fact the Government has relied on ACCC evidence from 1999 that was quickly updated for 2001 – showing dramatically different results.

1.78 The APA was concerned that the ACCC would not compare the price of trade paperbacks in Australia with hardbacks in the US and UK. If they had done this they would have shown that books in Australia were available at a much cheaper price to consumers.

1.79 It also raised serious questions in relation to price differential comparisons for educational, academic and technical books in the 1999 and 2001 ACCC reports. These concerns were based on the narrowness of the sample.

1.80 And most importantly concern with the way the ACCC calculated averages over up to 12 ½ years, from 1988-89 to 2000-01 for book prices – understating the clear downward trends in price differentials, especially since the introduction of the 30-day rule in 1991.

1.81 The APA submission provided startling evidence in its submission that when all books listed by the ACCC are listed:

'the extent to which the Australian price of books 'exceeds' the US for 1999-2000 is not 12.8% more it is 23% less. For 2000-2001 it is not 0.8% less but 27% less.' (APA Submission no 9)

1.82 I am extremely concerned that the evidence provided for the government in the preparation of the Bill by the ACCC is seriously flawed.

Experience of CD parallel importation since 1998

1.83 As stated previously I am concerned that in developing this Bill to extend parallel importing to books and software the Government has not undertaken a serious study of the experience of the music industry since the introduction of parallel importation in 1998.

1.84 It is therefore informative that the music industry took the time to address the Committee at such short notice and provide important actual experience in relation to parallel importation.

1.85 I am also concerned that the pricing survey the Music Industry Piracy Investigations undertook in their submission seems to demonstrate that the impact of parallel importation, on price to the consumer, has led to no significant reduction. In fact the MIPI submission says that the price is set by the retailer to maximise what the market will pay. The evidence given to the Committee seemed to demonstrate that a particular retailer actually varied the price of their top 30 to 40 CD's to suit their location with prices ranging from \$27 to \$30.95. (Mr Michael Speck, MIPI, Public Hearing, Tuesday 15 May 2001, Hansard page 69)

1.86 There appears to be nowhere near the price reductions that were promised to consumers by the Government and the ACCC in the lead up to the introduction of parallel importation in the CD industry, and this does not give the Committee confidence that price reductions would follow in the industries targeted by this Bill.

1.87 I am concerned that the evidence given by MIPI lends weight to the predictions made by the software industry that parallel importation is targeted at the wholesaler rather than the retailer. MIPI tabled in its submission a court transcript that supported the proposition that ‘the savings derived from buying CDs from cheaper territories is not passed on to consumers’ (Public Hearing, Tuesday 15 May 2001, Hansard page 70 and transcript in MIPI submission at section 2)

1.88 Therefore the Committee has heard evidence from the CD retailers and the National Amusement Machine Operators of Australia that retailers would have little intention to pass on any assumed or real price savings to the Australian consumer.

1.89 MIPI raised concerns the Attorney General’s Department and the ACCC discounted any link between parallel importation and piracy.

1.90 MIPI was concerned that the Government was ignoring the findings of its own report ‘*Cracking Down on Copycats: enforcement of copyright in Australia*’, which found that piracy was increasing and that this it was a concern for Australian copyright holders.

1.91 MIPI raised concerns in relation to the provisions that purport to provide a reverse onus of proof on importers. Stating that this in fact was ‘*a defence for an infringer in the event that they are sued*’. (Public Hearing, Tuesday 15 May 2001, Hansard page 71)

1.92 Comments made by Mr Michael McMartin, Director of the Music Managers Forum (MMF) are cause for concern in relation to the current Bill. Mr McMartin stated that the changes were part of a continuing ‘piecemeal dismantling of copyright protection’ (Public Hearing, Tuesday 15 May 2001, Hansard page 72)

1.93 He stated that there had been few benefits for consumers or industry. He said that the only beneficiaries of the change had been retailers, who were pocketing greater margins.

1.94 Mr John Woodruff, CEO of JWM Productions and Manager of one of Australia’s most successful bands, Savage Garden, said that the implementation of parallel importation had led to marked changes for bands. For example he said that bands are receiving lower advances and less investment in marketing and promotion.

1.95 An interesting statement came from Mr Speck of MIPI during the hearings in relation to the level of piracy in the CD industry and its impact on price:

‘I could probably with a bit of imagination today, get you a Holden that is substantially cheaper than the outrageous price which GMH charges for them in their showrooms. But it would be stolen. Somebody would have not paid for every component of it. A lot of products coming out of the countries that service this market with cheaper so-called legitimate products are stealing part of the intellectual property rights, if not just counterfeiting the product.’ (Public Hearing, Tuesday 15 May 2001, Hansard page 72)

1.96 I am persuaded by evidence presented to the committee that parallel importation in CDs has not led to substantially lower prices for consumers or greater variety but rather to increased piracy and an attack on the legitimate entitlements of the Australian music industry.

Concern with evidence put forward by the ACCC

1.97 As has been evident throughout this report, there has been some hesitation in relying on all the evidence that has been advanced by the ACCC in relation to pricing and the impact of parallel importing on books, software and CDs.

1.98 I have some misgivings about the ACCC's methodology used in its document titled 'The Potential 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'.

1.99 The title is consistent with the perception that the ACCC held certain presuppositions when it produced the document (what if there weren't any 'benefits'. What are the downsides of the proposed change?). The report is not comprehensive in that it fails to include any references to electronic books, sheet music or periodicals.

1.100 I am also concerned that the ACCC may have given too much weight to economic theory in support of parallel importation and not enough to comprehensive research.

1.101 For example the ACCC released a media release on the 3 April 2001 entitled 'ACCC Report Points Way for Cheaper Books'. This media release stated the findings that:

'On average, Australians paid around 44 per cent more for the fiction paperbacks than United States readers did in the 12 ½ years from July 1988 to December 2000' and

'Australian consumers of packaged business software had paid, on average, 27 per cent more over the decade to December 1998 than consumers in the US. During 1998, users of popular PC computer games paid on average 33 per cent more than users in the US.'

1.102 For example the ACCC media release failed to reveal that its own report showed, in relation to the Average Price Differentials for all Best Sellers in Australia, the US and the UK, that in 2000-01, Australian books were 0.8 per cent cheaper than in the US and 9.2 per cent cheaper than the UK and that these figures were based on its own findings.

1.103 The release failed to state that based on its own figures the price of books in Australia, relative to the UK and US has been trending down since the introduction of the 30 day rule in 1991 to the point where books have been cheaper here than there for most of the last three years.

1.104 I am concerned that the ACCC wasn't uniform in its price comparisons – it did not always compare 'apples' with 'apples'. For example its findings for Price Differentials for Best selling Fiction were based on data collected over 12 ½ years.

1.105 It then made its finding on the average calculated over that 12 ½ years. The Average Price Differentials for all Bestsellers for Australia, the US and UK, were taken over 12 ½ years yet the ACCC chose to quote a figure averaged over the period 1994-5 to 2000-01.

1.106 The methodology the ACCC used for the analysis of prices for software involved no comparison with either different forms of software, books or CDs.

1.107 For example the ACCC report conducted spot checks of 14 business software products over February and March 2001 using 19 websites, provided differential pricing

information on 11 PC games software products through spot checks in February and March 2001 using 20 websites, and Average Internet Spot Prices and Differentials, for packaged business software products, Australia and US, 27 June 2000, conducted on one day and surveying 10 websites.

Conclusion

1.108 The experience of parallel importation for CDs is that it has not led to the reductions in price that were promised. There is strong evidence that it has allowed increased piracy and has reduced royalties for the Australian music industry and has diminished investment in Australian bands.

1.109 The Bill also has taken too little account of the impact on Australia's cultural identity or the impact on our artists and cultural industries.

Recommendation

I recommend that the Bill be opposed.

SENATOR JIM McKIERNAN

DEPUTY CHAIR

ADDITIONAL COMMENTS BY SENATOR COONEY

1.1 I agree with the thrust of Senator McKiernan's report. I add the following comments.

1.2 Vast amounts of material are published around the world every day and it is well that this be done as inexpensively as is reasonable. But such material varies in nature and in worth. It may be manifest in republication of classical works, in news, in opinions, in propaganda, in policy statements, in novels, in poetry or in advice. Clearly the way material ought to be dealt with depends upon its type. So too does it depend on its quality.

1.3 This legislation seeks to lower the price of books and of other vehicles for disseminating the products of the mind and soul. It does not take account of the diversity that occurs in publications and treats the matter as one for the market place alone. Those supporting the legislation contend that its success is to be measured by the extent to which it reduces prices.

1.4 Those who question the legislation argue that the worth of books and other vehicles for communicating the outputs of the mind and soul should be measured by how they contribute to the well being of people in terms of their cultural social and spiritual life and not solely in terms of their economic gain.

1.5 The Australian Competition and Consumer Commission is an institution essential to the welfare of the Nation. But its functions do not include the guardianship of the people's cultural, social or spiritual life. Parliament must ensure that in performing its vital task on their behalf the Commission does not prejudice their soul and spirit. Accordingly parliament should not pass this legislation in its present form.

1.6 About 2000 years ago the Devil was told that "Man cannot live on bread alone..." Authorities should never become so obsessed with economic mechanisms that they sacrifice things of the spirit to the demands of market theory. Human beings are entitled to more than that.

Senator Barney Cooney

Committee Member

MINORITY REPORT

THE AUSTRALIAN DEMOCRATS

Overview

1.1 The Australian Democrats do not support the broad direction of the legislation. We believe that it is primarily motivated by an ideological conviction that a more open market will automatically deliver better outcomes for the consumer and is therefore in the national interest.

1.2 We do not believe that this dogged pursuit of the 'level playing field' is in Australia's best interest or the interests of Australian consumers. Ours is a relatively minor market in comparison to those of our major competitors in the production and consumption of software and books. None of our major competitors have a level playing field in these industries, nor are they contemplating establishing one.

1.3 The Australian Democrats are concerned that the Government seems intent on experimenting with some of the country's emerging and very successful industry sectors, which have the potential to be valuable export oriented industries in the near future.

1.4 The time is past when Australia can rely on the exploitation of our natural resources and 'old' primary industries to succeed in the global market place. We believe it is the creative and innovative industries, such as computer software and publishing, that offer Australia the ability to prosper and carve out a niche for ourselves on the world stage.

1.5 The Australian Democrats agree with the Majority Report's finding that

Much information provided on all sides was speculative.¹

1.6 No independent research was presented to the Committee to conclusively support the need for this legislation. On the contrary, the primary evidence cited by the Government to support the legislation, namely the work undertaken by the ACCC, has been stridently criticised by each industry association that appeared before the Committee on both methodological and factual grounds.

1.7 All of the industry bodies which appeared before the Committee support the current legislative regime and provided information about how effectively it is operating to the benefit of Australian consumers and our economy. Australia is benefiting from overseas and domestic investment in infrastructure and our intellectual and cultural property. We are also benefiting in terms of the work that is generated for upstream and downstream industries, such as the paper industry (much of which is located in regional Australia) or the advertising and marketing industries.

1.8 The Australian Democrats remain unconvinced that the legislation will achieve any of the projected consumer benefits outlined in the Explanatory Memorandum. Rather we

¹ Majority Report, Inquiry into the Copyright Amendment (Parallel Importation) Bill 2001, Chapter 5, para 5.5.

share the industries' concerns that the removal of parallel importation restrictions could achieve the exact opposite: higher prices, reduced product range, more counterfeit product, less consumer choice, a decline in our domestic software, printing and publishing industries, and negative flow-on effects for upstream and downstream industries.

1.9 The Australian Democrats are not convinced that the removal of parallel importation restrictions to the sound recording industry has delivered substantial benefits to Australian consumers in terms of cheaper CD prices. Nor are we encouraged by the anecdotal evidence emerging from New Zealand following their government's decision to lift parallel importation restrictions in their markets.

1.10 The Australian Democrats **conclude** that the potential risks associated with the removal of parallel importation restrictions for our book publishing and printing industries and the local software industry are simply too great to warrant our support of the legislation. We therefore do not support the legislation.

The Explanatory Memorandum

1.11 One of the conclusions of the Majority Report is that the Explanatory Memorandum contains a number of statements that are nothing more than "hyperbole" and that such statements are "not appropriate for an Explanatory Memorandum which in time may be relied upon for interpretation and explanation".²

1.12 This is a serious criticism of the Attorney-General in particular and the Government more generally. The fact that this conclusion has been drawn by a majority of the Committee, and that the Government members of the Committee constitute part of that majority, is worth noting.

The quality of evidence presented to the Committee

1.13 The Majority Report of the Committee concluded that the quality of the evidence presented "was not high"³. Consequently it has recommended that an independent body be resourced to "ensure that comparable data is collected and maintained on all industries affected by Schedule 2 of the Bill"⁴ because this data is not yet available. The Majority Report further recommends that Schedule 2 not be implemented until after this data is made available for public comment.

1.14 A majority of submitters to the inquiry from industry associations seriously challenged the methodology of the ACCC. The Business Software Association of Australia pointed out, for instance, that the 2001 ACCC report only compared software prices in four Australian and four US PC magazines.⁵ Moreover, the relevance of appealing to data going

2 Majority Report, Inquiry into the Copyright Amendment (Parallel Importation) Bill 2001, Chapter 5, para 5.4.

3 Majority Report, Inquiry into the Copyright Amendment (Parallel Importation) Bill 2001, Chapter 5, para 5.5.

4 Majority Report, Inquiry into the Copyright Amendment (Parallel Importation) Bill 2001, Chapter 5, para 5.17.

5 BSAA, *Submission No. 7*, para 5.7

back to 1989 was questioned. As Mr McNamara memorably pointed out, “in the IT industry, 1989 is a bit like 1789 in agriculture or manufacturing.”⁶

1.15 Similarly, the Access Economics survey commissioned by Audio Visual Software Distributors Association also challenged the ACCC’s methodology in respect to their claims on computer games and concluded that the ACCC’s “comparison is badly flawed and should not be relied upon”⁷

1.16 The Australian Democrats are satisfied the ACCC’s claims on prices are not reflective of current practice, and their methodology is sufficiently flawed as to be considered unreliable evidence. As a consequence, we believe that the assertion that allowing parallel importation will lead to cheaper prices is not substantiated because there is no evidence of price discrimination.

1.17 The Australian Democrats find the overall recommendation of the Majority Report that, subject to other recommendations being implemented, the legislation should proceed, highly irresponsible in light of these unresolved evidentiary inconsistencies.

1.18 We are also concerned that so little direct consultation occurred between the Government, the ACCC and the industries that would be affected by the legislation. It became apparent during the Committee hearings that it was only as a result of the inquiry that the views of the industry were directly being sought.⁸

1.19 The Australian Democrats **conclude** that the Committee has not been provided with sufficient information to say with any confidence that the possible benefits of the legislation outweigh the possible disadvantages. We believe sufficient information to the contrary has been provided, even if much of this is speculative.

1.20 The Australian Democrats **concur** with the Majority Report in its criticisms of the ACCC in terms of the methodology it used to profile each of the industries. We are also very concerned by the willingness of other parties, including the Attorney-General’s Department and the Australian Consumers Association, to accept the ACCC’s work without question and use it as the primary basis for advocating the legislation.

Anti-competitive behaviour - the Competition Principles Agreement

1.21 The ACCC’s main criticism of the current parallel importation restriction regime is that:

... it grants a monopoly of exclusive right to import to intellectual property owners. By preventing international arbitrage, these import monopolies may be used to support international price discrimination by firms with market power (either unilateral or coordinated market power). Indeed, the very existence of these exclusive rights tends to create a climate conducive to coordination rather than

6 Mr Macnamara, *Committee Hansard*, Melbourne, Wednesday, 9 May 2001, p. 10

7 as cited in AVSDA, *Submission No. 11*, p. 4

8 *Transcript of evidence*, Printing Industries Association of Australia, 9 May, 2001, p.21.

competition, since intellectual property owners know they are not constrained by import competition.⁹

1.22 However, Mr John Stonier, the dissenting member of the Intellectual Property and Competition Review Committee, suggests that while the copyright owner's power to prevent parallel imports is a power that enables them to restrict conduct, *not all restrictions on conduct are quantifiable restrictions on competition*. He argues that unless an extremely narrow definition of the market is adopted, the power to prevent parallel imports does not constitute a restriction on competition except possibly in very particular situations.¹⁰ He concludes:

It is therefore not clear that the parallel import provisions restrict the competitive process, or that the costs of such restrictions exceed the benefits. It is also not clear that there are alternative cost-effective means of achieving the same goals.

This conclusion is particularly true for the book industry in Australia. There are over 250 publishers employing more than 4 000 people. In 1997-98 they sold more than 110 million books (60 per cent Australian) and published nearly 7 000 new Australian titles. Sales exceeded \$1 000 million, of which more than \$100 million were exported, mainly to the United States (\$40 million), New Zealand (\$25 million) and the United Kingdom (\$17 million). These figures are consistent with Australia having a thriving and competitive industry. They are also consistent with the view that parallel imports are not impeding or restraining the competitive process.

1.23 The guiding principle of the Government's Competition Principles Agreement is that legislation should not restrict competition unless it can be demonstrated that:

- The benefits of the restriction to the community as a whole outweigh the costs; and
- The objectives of the legislation can only be achieved by restricting competition.

1.24 The Australian Democrats **recommend** that the Government return to the criteria contained in the Competition Principles Agreement and apply these tests to our book publishing and printing industries and our local software industries. This will require the Government to make an *informed* decision, based on independent research and industry consultation.

The current state of the software industry

1.25 The Bill will allow parallel importation of non-pirated computer software, including interactive computer games. The intent is to provide retailers with a wider choice of suppliers. The ACCC believe current arrangements restrict retailers to one or two distributors and, therefore, are 'not conducive to competitive pricing or service levels'.¹¹ The Government believes that wholesale prices will drop with a greater range of suppliers, which

9 Intellectual Property and Competition Review Committee, *Interim Report*, p.20.

10 Bills Digest, No. 119, p.7.

11 Australian Competition and Consumer Commission, *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, p. 12

in turn will lower costs to consumers, “especially businesses, parents and the education sector”.¹²

1.26 As with the products of the printing and publishing industries, the ACCC also believes that Australian consumers pay significantly more than their counterparts in the USA and UK. In the update to their 1999 report, released in April 2001, the ACCC stated that in February/March 2001, GST exclusive prices of 14 popular business software products on a selection of Australian websites were, on average, 11.5 per cent higher than prices advertised on US websites, and GST exclusive prices of 11 popular PC games on a selection of Australian websites were, on average, 19.5 per cent higher in Australia than on comparable UK websites and 5.4 per cent higher than in NZ.¹³

1.27 The Committee heard evidence from a number of submittees disputing the view that Australians pay more for computer software than consumers in other countries. The Business Software Association of Australia (BSAA) argued that in some cases, Australian consumers are actually paying less. They cited the results of a survey of 60 leading software programs by CARMA International, which found:

That business PC software prices in Australia are, on average, 22 per cent lower than the same products in the UK and 2 per cent lower than in New Zealand. It found Australian prices were 3.54 per cent higher than average prices in the USA, but this did not include USA State sales tax where this applies. Although some differentials were found, these often related to programs where there were adaptations or modifications necessary to customise them for the Australian market, such as Computer Aided Design Software. On average, however, across a wide range of leading products, Australian software is priced lower than in comparable markets, and is on par with the USA, a market which does not have to bear export costs.¹⁴

1.28 Similarly, the Australian Audio Visual Software Distributors Association cited evidence from a comprehensive Access Economics survey, which showed “that computer games here were over 30 per cent cheaper than in the UK and only a little bit higher than in the US”.¹⁵

1.29 The Australian Democrats **conclude** that the Committee was not provided with sufficient evidence to substantiate the claim that current software prices in Australia are inflated or disadvantaging Australian consumers relative to the prices charged in the US or UK.

1.30 An additional argument for allowing parallel importation is that it would increase availability of product. However the AVSDA demonstrated that computer games are released simultaneously around the world “to control piracy so that there is not the incentive for somebody to bring a product in because it is not available here”.¹⁶

12 Second Reading Speech, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 1, House of Representatives *Hansard*, p. 24578

13 ACCC, 2001, *op cit*, p. 10

14 Business Software Association of Australia, *Submission 7*, para. 5.10.

15 Ms Simes, *Committee Hansard*, Melbourne Wednesday 9 May, 2001, p. 2

16 Ms Simes, *Committee Hansard*, Melbourne Wednesday, 9 May, 2001, p. 3

1.31 The Australian Democrats **conclude** that the Committee was not provided with sufficient evidence to substantiate the claim that current arrangements adversely affect software product availability in Australia.

The current state of the book printing and publishing industries in Australia

1.32 The Printing Industries Association of Australia gave evidence that its output is currently around \$250 million per annum, and it is the direct employer of approximately 5,500 people.¹⁷

1.33 The PIAA provided the following overview of the experience of the Australian book printing industry since the introduction of parallel importation restrictions:¹⁸

The Australian book printing industry has adopted world best practices in international technology. As the assistance afforded the industry through the book bounty was gradually reduced ... the industry adapted to the continuing import pressures. The advent of the 30-day rule gave a fillip to the industry and lifted its share of the Australian-initiated book work to an historic high of around 60 per cent, a share it has maintained in the face of rapid technological change and cost pressures. ... [The 30 –day rule] did not insulate the book printing industry from international competition and it did not allow it to embrace pricing policies that would result in monopoly profits.

1.34 Griffin Press gave evidence that 40 per cent of its printing business is import replacement. The company went on to elaborate that:¹⁹

[W]e have proved to the UK publishers and American publishers that it is cheaper to produce the goods in Australia than it is to produce them in the UK ... and the United States. ..Currently we have about \$1.2 million worth of books being exported to the United States.

40 per cent of our business in Adelaide is import replacement. We are now going through a large capital investment plan to upgrade our facilities in Adelaide, and my feeling is that, if the 30-day rule is repealed, it will have a great effect on our business. ... Indeed, it will cost us huge embarrassment with our parent company because we have said, ‘Yes, there is a viable business here, spend the money.’ They have honoured that; I would hate to go back now and tell them that we are going to have a different business some months down the track.

1.35 The Australian Society of Authors provided the following overview of the development of the Australian book publishing industry, providing an indication of its recent ‘flowering’:²⁰

In 1972, there were only 19 first edition Australian novels published in this country; in 1992 there were 200, and today there are many more. According to the APA [Australian Publishing Association], the proportion of total book sales in Australia represented by Australian-originated books has risen from 10 per cent in

17 *Transcript of evidence*, Printing Industries Association of Australia, 9 May, 2001, p.17.

18 *Ibid*, p.17.

19 *Transcript of evidence* Griffin Press, 9 May, 2001, p.19 and 21.

20 *Submission 7*, Australian Society of Authors, p.2.

the mid 1970s, to 48.6 per cent in 1989, and to 61.2 per cent in 1998 (the latest year for which there are available figures).

This growth represents an extraordinary flowering of Australian literary culture over the past thirty years and it has been based on there being a secure copyright regime in the Australian market. This cultural flowering should not be taken for granted, however. Authors in Australia remain in a precarious position and must often look towards overseas markets to increase sales. And over the past decade they have become increasingly successful at doing so – latest ABS statistics show that book exports are growing at about 18 over cent per annum (for 1997 – 98).

1.36 A number of the submissions from various sectors of the book publishing industry also provided evidence to counter the ACCC's assertion that this is an industry dominated by a small number of foreign-owned companies who are forcing Australian consumers to pay monopoly prices.²¹

1.37 The Australian Publishers Association made the following remarks which suggest that the proposed amendments to the Copyright Act will transform it from a diverse and highly competitive industry that is catering to the demands of Australian consumers in terms of affordability, accessibility and product range, to one that is dominated by a self-interested oligopoly of multinational corporations – the exact opposite of what the Government is intending:

We do not believe the ACCC report has shown that book prices are more expensive. ... We have ... schedules available analysing all the current bestsellers which suggest that our prices are as low or lower than overseas. The evidence that Professor Fels [of the ACCC] has given shows prices that have been on a downward trend from the time they started investigating this.

... I am representing an association where no publisher holds more than 10 per cent of the market. If we were to read the ACCC report, we would believe that the market was dominated by a small group of international publishers. Our membership includes 19 firms that hold more than one per cent of the market, and 80 percent of our members, which is 126 members, have turnover under \$2 million, so it is quite a disparate industry spread over different sectors with a lot of niche players. The suggested [amendments] will ... simply concentrate power in the hands of those that are capable of being global publishers. So, instead of giving the Australian public greater options, in our view it will encourage a concentration in the hands of the few true global multinational publishers.²²

1.38 The Australian Democrats **conclude** that the Australian book printing and publishing industries are diverse, competitive and increasingly export-oriented industries that are delivering benefits to Australian consumers and the domestic economy.

21 See *Submission 3*, Text Publishing Company, p.5; *Submission 4*, Allen & Unwin, p.2; *Submission 9*, Australian Publishers Association, p. 6.

22 *Transcript of evidence*, Australian Publishers Association, p.31 –32.

The removal of parallel importation restrictions on sound recordings

1.39 One of the Government's arguments for removing the parallel import restrictions for the software, printing and publishing industries is the benefits to Australian consumers that have resulted from its removal in relation to CDs.²³ [Second Reading Speech, p.1]

1.40 However, in the opinion of the Australian Record Industry Association, our music industry has not fared well since the amendments were introduced in 1998: [Sub 15, p. 3& 4]

The Australian and New Zealand experience has failed to produce the level of benefits promised and touted by various promotions of open imports. ... Relevant factors include:

- Consumers do not gain wider range. Parallel importers are free riders ... who merely "cherry pick", ie: parallel importers confine themselves almost exclusively to imports of Top 40 products or perennial best sellers.
- Parallel imports assist in a transfer of rents from wholesale to retail.
- The price range for new release so called full price products that has existed since the mid 1990s has continued relatively unchanged. ... The claim in the second reading speech by the government that Big W and Target were selling "Top 30 CDs for around \$21.43" and "that it is now cheaper than prior to parallel importation" is incorrect. As we have said above, the price ranges referred to in the reading speech have been in place since the early to mid 1990s.
- As predicted, the change of law in 1998 has created an inflow of imported CDs and cassettes, but not from America or the European Union. Instead, they come from lesser developed countries. CDs and cassettes from these countries have lower royalties than CDs made in Australia. In many instances, CDs so imported are counterfeit or pirate copies.
- Piracy activity and pirate product has increased.

1.41 The Australian Democrats **conclude** that the experience of the Australian music industry after the removal of parallel importation restrictions provides ample reason why similar amendments should not be carried out in relation to Australia's software, printing and publishing industries.

The New Zealand experience without parallel importation restrictions

1.42 In his Second Reading Speech, the Attorney General commented:

[W]e have the benefit of developments in foreign markets, such as New Zealand, to address many of the concerns and debunk many of the claims [that the potential benefits of the legislation are outweighed by the possible disadvantages].

1.43 However, in evidence before the Committee, senior staff from the Attorney-General's Department admitted that their knowledge of the New Zealand experience to date

23 Second Reading Speech, *Copyright Amendment (Parallel Importation) Bill 2001*, p. 3.

amounted to a recent discussion paper that was authored by the New Zealand Ministry of Economic Development and “general knowledge”.²⁴

1.44 However, anecdotal evidence was presented by the Business Software Association of Australia that the removal of parallel importation restrictions in New Zealand has been accompanied by an increase in the amount of counterfeit material entering that market.

What is happening in New Zealand is that people are using the lifting of the parallel importation restrictions as an excuse for saying, ‘Well, if that is counterfeit, I did not know about it. I assumed that the lower price was due to it being parallel imported.’²⁵

1.45 The fact that Australia’s domestic market is a small fraction of the size of the market in the United States or the UK is testament to the fact that we are not on a level playing field with our competitors in the software, printing and publishing industries. These territories are not even considering or likely to consider further deregulating their intellectual property industries. The mere fact that New Zealand, with an even smaller domestic market than ours, has removed parallel importation restrictions is not sufficient reason for Australia to follow suit, particularly when we have no research to suggest that this decision is benefiting New Zealanders.

1.46 The Australian Democrats **conclude** that there is insufficient evidence of New Zealand’s experience since the removal of parallel importation restrictions to draw any conclusion as to whether there has been a net gain for New Zealanders.

The commodity of Australian culture – what price for our cultural heritage?

1.47 The following comments from the Australian Society of Authors sum up the international trend towards greater territorial protection of copyright that the Australian Government seems so determined to fight against, despite Australia’s marginal position in the international economy.²⁶

No significant overseas markets are loosening their copyright regimes at the moment – in fact, the trend is in the opposite direction. Whereas at the moment Australian authors can effectively control their copyrights in the same way as British or American authors do, if the proposed legislation were passed, this would no longer be the case. Australian authors would be the poor cousins not the peers of these overseas authors.

At a time when Australia is being criticised for being out of step with the burgeoning knowledge-based economies of the world, it will be seen as remarkable that we should even contemplate undermining our home-grown copyright creating industries.

1.48 The ASA went on to eloquently summarise the argument that the debate about parallel importation and copyright law more generally is much more than a debate about property, geographic monopolies and economic exploitation. Particularly when we are talking

24 *Transcript of evidence*, Attorney-General’s Department, Mr Fox, 15 May, 2001, p.84.

25 *Transcript of evidence*, Business Software Association of Australia, 9 May, 2001, p.11.

26 *Submission 6*, Australian Society of Authors, p.3.

about the Australian book industry, it is a debate about part of our future cultural heritage and our ability to articulate our own stories to ourselves and the rest of the world.²⁷

Writers are at the creative forefront of the innovative, knowledge-based information society of the future. The current copyright regime encourages them to create new work that is intrinsically Australian and essentially universal at the same time. The current parallel importation restrictions reward Australian publishers if they imaginatively exploit the work of Australian authors both here and overseas. The proposed legislation will discourage Australian authors from looking overseas, and it will convince local subsidiaries of multinational publishers that they ought to revert to being more of a branch office for their economic masters in the northern hemisphere.

... Australia's authors and publishers, seen as cultural producers, are as important to the national interest as our primary producers. To accept the proposed amendments to the Copyright Act would be to abandon a strategic resource and to diminish us as a nation that can represent itself as culturally unique to the rest of the world.

1.49 The Australian Democrats **conclude** that the legislation could be an impediment to the development of Australia's literary culture and our ability to become net exporters of intellectual property.

1.50 The Australian Democrats **recommend** that the legislation be evaluated in terms of the cultural costs that will be borne by current and future generations of Australians, as well as the socio-economic costs.

The potential rise in piracy in Australia as a result of the removal of parallel importation restrictions

1.51 In his Second Reading Speech, the Attorney-General asserted that piracy is not a real and serious problem in Australia. However, several submitters pointed out that this claim is inconsistent with the finding of the House of Representatives Legal and Constitutional Affairs Committee's report *Cracking Down On Copycats* that 'copyright infringement is a real problem affecting Australia's economy'.²⁸

1.52 The Business Software Association of Australia and the Australian Visual Software Distributors Association both identified the inter-relationship between Australia's trade policy, our enforcement of copyright laws in Australia, and the level of counterfeit software in Australia.²⁹

1.53 Whilst they acknowledge that ideally each of these matters should be addressed separately, the Government appears determined to introduce wide-ranging trade reforms in three national industries, even though it has neglected to provide adequate resources to

27 *Submission 6*, The Australian Society of Authors, p.4.

28 Australian Copyright Council, *Submission 10*; House of Representative Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats: Enforcement of Copyright in Australia*, November 2000, p. 18, Paragraph 2.45. See also BSAA, *Submission No. 7*, para 3.4 - 3.8.

29 *Transcript of evidence*, Business Software Association of Australia and the Australian Visual Software Distributors Association, 9 May, 2001, p.8 and 12.

effectively enforce existing copyright laws, and consequently has a significant software counterfeiting industry that remains ‘under the carpet’.

1.54 The BSAA suggested that the rate of business software piracy in Australia is already 32 per cent, compared with about 25 percent in the USA and UK. In addition to corporate piracy, the BSAA suggested that counterfeit software is a major problem due to Australia’s proximity to Asia.³⁰

1.55 Experience has shown that the growth of a local software industry depends critically on the existence of strong copyright laws. In the absence of such laws, Australian software developers have little incentive to invest the resources necessary, often including years of time, in order to develop and bring new products to market. Assuming that they overcome the odds and create a successful product, without strong copyright laws, software piracy can immediately negate all that work and leave developers to face substantial revenue losses that will impede their future growth and product development.³¹

1.56 The BSAA summarised its concerns with the existing enforcement regime in the following way:³²

We would argue that law enforcement should have preceded the discussion of trade matters. The reality is that it has not. What we are saying is that we are an industry that has one-third of our products stolen. If we were the car industry or the grocery industry and we were sitting here saying that one-third of all the products on our shelves are shoplifted, I think we would get a very sympathetic hearing.

... in an act of desperation we are saying that if the government is going to contemplate there trade policy changes and still has not addressed a legal environment, then it appears to be insanity to continue with trade policy in the absence of a protected environment for legal product in this country.

... The mechanism for intercepting counterfeit software at the moment is essentially ... working with the Australian Customs Service.

1.57 There is widespread concern in the software industry that if the parallel importation restrictions are removed and significantly larger volumes of imported products begin to enter Australia, the burden on Customs will increase dramatically. There does not appear to be great confidence in the domestic software industry that Customs will be able to get ahead of the counterfeit producers and smugglers who will gain access to the Australian market overnight.

1.58 Whilst no industry bodies wanted to criticise the Australian Federal Police for Australia’s poor enforcement record for enforcement of copyright laws, there was unanimity that this is not a priority issue for the Government or the courts, and resources are not allocated to make it one. The BSAA pointed out that there have only ever been six criminal prosecutions of counterfeit software in Australia, the last case being in 1996.³³

30 Mr Macnamara, *Committee Hansard*, Melbourne, Wednesday 9 Mat 2001, p. 9

31 BSAA, *Submission 7*, p.

32 *Transcript of evidence*, Business Software Association of Australia, 9 May, 2001, p.12 – 13.

33 *Transcript of evidence*, Business Software Association of Australia, 9 May, 2001, p.14

1.59 The Australian Democrats **recommend** that adequate resources be made available to Customs, the Australian Federal Police and the Director of Public Prosecutions to ensure copyright law enforcement and the eradication of piracy are prioritised.

Positive aspects of the legislation are outweighed by the overarching intent

1.60 The proposed sections 130 B, C and D reverse the onus of proof in regard to proceedings concerning the unlicensed importation of pirated copies of printed books, periodicals and music. If enacted, the defendant in a civil action would bear the onus of establishing that a parallel imported copy was not an infringing copy, rather than this expensive and laborious burden falling on the prosecution. These provisions are the one feature of the legislation that the Australian Democrats support.

1.61 The Business Software Association of Australia provided the following evidence which cogently outlines the current prohibitive burden that is born by copyright owners to prove their ownership of the title, and which these provisions would help to address:³⁴

It is only ... the multinational software companies that can currently afford to defend their copyright through the civil system, because effectively it is a loss making exercise. You spend about \$50,000 and sometimes get \$10,000 or \$20,000 in damages. So let me be very clear: we lose money, even when we go to court. We do it to try to arrest the problem, trying to make a point to the marketplace, and we heavily publicise our cases. As a small Australian developer, you really do not have any recourse. If the Federal Police will not or cannot take criminal action, you probably cannot afford civil action. We have small companies saying that they literally have to let it go.

1.62 The Australian Democrats have **concluded** that whilst sections 130B, C and D are a positive development, they are peripheral to the main purpose of the legislation: the removal of parallel importation restrictions. For this reason, we do not support the legislation as a whole.

1.63 The Australian Democrats **support** the maintenance of the 30-day and 90-day rules relating to parallel importation restrictions. We reserve the right to consider future amendments to the legislation that more fully address our concerns as outlined in this report.

Senator Brian Greig

Committee Member

Senator Natasha Stott Despoja

Participating Member

34 *Transcript of evidence*, Business Software Association of Australia, 9 May, 2001, p.15.

APPENDIX 1

INDIVIDUALS AND ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1. Australian Consumers Association
- 1A. Australian Consumers Association
2. Printing Industries Association of Australia
- 2A. Printing Industries Association of Australia
3. Text Publishing Company
- 3A. Text Publishing Company
4. Allen & Unwin
5. Ms Linda Jaivin
6. Australian Society of Authors
7. Business Software Association of Australia
- 7A. Business Software Association of Australia
8. Mr Shane Maloney
9. Australian Publishers Association
- 9A. Australian Publishers Association
10. Australian Copyright Council
- 10A. Australian Copyright Council
- 10B. Australian Copyright Council
11. Australian Visual Software Distributors Association
- 11A. CONFIDENTIAL
- 11B. Australian Visual Software Distributors Association
12. Attorney-General's Department
- 12A. Attorney-General's Department

- 12B. Attorney-General's Department
- 13. Music Industry Piracy Investigations
- 14. Music Managers Forum
- 15. Australian Record Industry Association
- 16. WITHDRAWN
- 17. National Amusement Machine Operator's Association
- 18. Australian Competition and Consumer Commission

APPENDIX 2

INDIVIDUALS AND ORGANISATIONS WHO APPEARED BEFORE THE COMMITTEE TO GIVE EVIDENCE

Wednesday, 9 May 2001

Australian Visual Software Distributors Association

Ms Megan Simes, Chief Executive Officer

Mr Michael Thomas Fegan, Acclaim Entertainment Pty Ltd

Business Software Association of Australia

Mr Jim MacNamara, Chairman

Mr Patrick Flynn, Solicitor, Mallesons Stephen Jaques, appearing on behalf of the BSAA

Printing Industries Association of Australia

Mr Philip Andersen, National Director

Mr Ron Fisher, Industry and Trade Consultant

Mr Alex Donaldson, Managing Director, Griffin Press

Thursday, 10 May 2001

Commonwealth Attorney-General's Department

Mr Peter Ford, First Assistant Secretary, Information & Security Law Division

Mr Stephen Fox, Acting Assistant Secretary, Intellectual Property Branch

Text Publishing Company

Mr Michael Heyward, Publisher

Australian Publishers Association

Ms Susan Bridge, Chief Executive Officer

Mr Sandy Grant, President

Allen & Unwin

Mr Patrick Gallagher, Managing Director

Shane Maloney, Author

Australian Competition and Consumer Commission

Professor Allan Fels, Chairman

Mr Ross Jones, Commissioner

Ms Margaret Arblaster, General Manager Transport and Prices Oversight Branch

Ms Lin Johnson, Director, Transport and Prices Oversight Branch

Tuesday, 15 May 2001

Australian Society of Authors

Mr Jose Borghino, Executive Director

Mr Frank Moorhouse, Author

Mr Garth Nix, Author & Literary Agent

Australian Copyright Council

Ms Libby Baulch, Executive Officer

National Amusement Machine Operators Association

Mr Peter Hankin, Chairman, NAMOA Parallel Importation Committee

Australian Consumers Association

Mr Charles Britton, Senior Policy Officer, IT & Communications

Music Industry Piracy Investigations

Mr Michael Speck, Manager

Mr Michael William, Gilbert and Tobin Solicitors

Music Managers Forum

Mr Michael McMartin

Mr John Woodruff, Chief Executive Officer, JWM Productions

Australian Record Industry Association

Ms Cathy O'Brien, Legal and Business Affairs Manager

Commonwealth Attorney-General's Department

Mr Peter Ford, First Assistant Secretary, Information & Security Law Division

Stephen Fox, Acting Assistant Secretary, Intellectual Property Branch

APPENDIX 3

COPYRIGHT ENFORCEMENT INQUIRY

Terms of Reference

1) The Committee will inquire into and report on issues relevant to the effective enforcement of copyright in Australia and, in particular, on:

- a) evidence of the types and scale of copyright infringement in Australia including:
 - i) the availability and accuracy of data on copyright infringement;
 - ii) the scale of infringement in Australia in comparison with countries in our region and Australia's major trading partners;
 - iii) the geographical spread of copyright infringement in Australia;
 - iv) the cost of infringement and impact on Australian business;
 - v) whether there is evidence of the involvement of organised crime groups in copyright infringement in Australia, and if so, to what extent;
 - vi) likely future trends in the scale and nature of copyright infringement.
- b) options for copyright owners to protect their copyright against infringement, including:
 - i) actions and expenditure undertaken, and that could be undertaken, by copyright owners to defend their copyright;
 - ii) use of existing provisions of the *Copyright Act 1968*;
 - iii) use of legislative provisions other than those of the *Copyright Act 1968*;
 - iv) technological or other non-legislative measures for copyright protection.
- c) the adequacy of criminal sanctions against copyright infringement, including in respect of the forfeiture of infringing copies or devices used to make such copies, and the desirability or otherwise of amending the law to provide procedural or evidential assistance in criminal actions against copyright infringement;
- d) the adequacy of civil actions in protecting the interests of plaintiffs and defendants in actions for copyright infringement including the adequacy of provisions for costs and remedies;
- e) the desirability or otherwise of amending the law to provide further procedural, evidential or other assistance to copyright owners in civil actions for copyright infringement;

f) whether the provisions for border seizure in Division 7 of Part V of the *Copyright Act 1968* are effective in the detention, apprehension and deterrence of the importation of infringing goods, including counterfeit goods; and

g) the effectiveness of existing institutional arrangements and guidelines for the enforcement of copyright, including:

i) the role and function of the Australian Federal Police, and State Police exercising Federal jurisdiction, in detecting and policing copyright infringement;

ii) the relationship between enforcement authorities and copyright owners;

iii) the role and function of the Australian Customs Service at the border in detecting and policing copyright infringement; and

iv) coordination of copyright enforcement.

2) In undertaking the inquiry and framing its recommendations, the Committee will have regard to:

a) Australia's obligations under relevant international treaties, in particular under the *World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights*;

b) the provisions of the *Copyright Act 1968* and any amendments to that Act that have been introduced or have been publicly proposed by the Government, to be introduced into Parliament;

c) established principles of criminal and civil procedure which apply in cases generally;

d) Commonwealth criminal law policy;

e) enforcement regimes for other forms of intellectual property;

f) existing resources and operational priorities of Government enforcement agencies; and

g) the possible effect of any proposed changes on the operation of Government and private sector organisations.

