

THE BOOK PUBLISHING INDUSTRY

55. The principal protagonists in the field of books and publishing were the Australian Book Publishers Association ("The A.B.P.A.") and the Australian Booksellers' Association ("the A.B.A."). The A.B.P.A. was established in 1949. It is a "national Association and has members in Adelaide, Brisbane, Canberra, Melbourne and Sydney. It also has members in some country areas. The majority of its members are based either in Melbourne or in Sydney. Membership of the Association is open to any organization engaged in the publishing of books in Australia, regardless of size or nationality of ownership. The Association has approximately 150 members. A principal object of the Association is as follows, "The A.B.P.A. believes that copyright law is the foundation of an orderly publishing industry, and one of the prime activities of the Association is to maintain and defend copyright". The A.B.A. is an organization which represents most of Australia's major booksellers. It has members in all states of Australia. The contest between the two associations may be shortly stated. It was the A.B.P.A.'s submission that there should be no amendment to ss. 37 and 38. The A.B.A. submission urged the redrafting of the sections "in a way which, whilst preserving territorial copyright and the legitimate interests of copyright owners, will protect Australian students and book purchasers generally from situations in which the present wording (of the sections) could in future and

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indeed in some cases does at present work against the public interest". Thus the A.B.A. did not advocate the repeal of the sections. The precise nature of the amendments it sought will be indicated later on.

56. A number of the members of the A.B.P.A. made submissions independently of the A.B.P.A. itself. Most of these supported the case which the A.B.P.A. made. There was the suggestion in some of these that the onus of proof in relation to knowledge in the sections should be reversed so that an importer, or person dealing in imported books, should be required to establish positively that he had no knowledge that the books had been imported without the licence of the copyright owner. This case was also made by the Copyright Council which strongly supported the A.B.P.A. submission. A number of booksellers made submissions generally supporting the submissions made by the A.B.A. However, one significant bookseller, University Co-operative Bookshop Limited, which operates the Co-op Bookshop, made a submission which went much further than that made by the A.B.A. and most of its members by seeking to extend the relaxation of ss. 37 and 38 to permit the importation of any "legitimate" edition, that is, any edition, the publication of which had been licensed by the copyright owner even though the licence was for publication only in a market outside the Australian market.

57. It is convenient here to note that a comprehensive account
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of the marketing of books in Australia is given in the decision of Eggleston J., when sitting as President of the Trade Practices Tribunal, in Re Books (1972) 20 F.L.R. 256. His Honour's account appears to be as apposite for today as it was for 1972.

#### Submissions by the Booksellers

58. The submissions made on behalf of the booksellers may be summarized as follows:-

- (a) The Act as presently drafted creates a monopoly or exclusive dealership for licensed agents of overseas publishers. This has several consequences. It means that a bookseller is compelled to purchase from one agent who can set the price as high as the market will bear. It was claimed that a mark-up of 30-50 per cent was common compared with the price at which the same book was sold overseas particularly in the United States or the United Kingdom. Mark-ups as high as 300 per cent were claimed in particular cases. A detailed submission received by the Committee from a bookseller after the public hearings had concluded, included a tabulation which suggested that in a large number of cases books could be purchased wholesale in the United States and the United Kingdom at a price which, after allowing for freight, was sometimes 50 per cent to 60 per cent cheaper than the price charged by the Australian supplier.

- (b) Booksellers are compelled to purchase the edition which the local licensee cares to make available in Australia. This can mean that only a hard cover edition, or only a paperback edition, may be available to booksellers.
- (c) A further difficulty is that the licensee may not have copies available for supply to booksellers in Australia until long after the book is published overseas. This is particularly a problem when book reviews are syndicated in Australia from overseas publications, for example, Time Magazine. Booksellers are often embarrassed because, as a consequence of such reviews or other publicity, customers ask for such books and are unable to understand why the bookseller is unable to supply them. This damages the credibility of booksellers with their customers who are themselves able legally to purchase the item directly from overseas for their own use, as are libraries.
- (d) There have been a number of cases where it has been impossible to discover the owner in Australia of the publication rights. In many cases these have been for titles published by an overseas publisher but not yet bought by its Australian subsidiary or agent. The latter will often not know whether it will acquire the Australian rights or whether they have been sold, or will be sold, to some other publisher.
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(e) The exclusive licence conferred by the copyright owner on the holder of the Australian rights gives booksellers no redress against inefficient suppliers. Whilst it was conceded that there were excellent suppliers who carry a wide range of titles in substantial quantity and whose indenting service is reliable, there were others who were said to carry little stock, make little attempt to keep up their inventory and whose promises of delivery were frequently not fulfilled. They were also said to be quite unhelpful in responding to enquiries about whether and when particular titles might become available.

59. It was said earlier that the amendments of ss. 37 and 38 sought by the A.B.A. would be explained later on. It is now appropriate to refer to what they seek to achieve. This can best be done by quoting some of the paragraphs of their submission which appear under the heading, "Proposed Policy". The paragraphs are as follows:-

"Proposed Policy:

The prohibition of importation in Section 37 of the Copyright Act would not apply to an article forming part of a printed edition of the work, if that edition had prior to the importation in question, been published in both Australia and another country by the owner of the Copyright at the time of publication. (By is meant the supplying of publication comprised in the edition to the public in Australia and the other country concerned).

Although the proposal contemplates prior

publication it does not require the publication in Australia and the other country to have taken place simultaneously. In the context of our proposal, the Copyright owner means the person holding the exclusive right of publication of the work published in Australia, and/or the other country and/or by virtue of those countries' respective Copyright laws.

Section 38 will need to be amended to permit sale of articles falling within the exception to the importation barrier referred to in Section 37.

The common expression of this policy would be as follows:-

That an Australian Copyright owner could not prosecute for breach of Copyright, any person or bookseller importing into Australia a copy of the work which is a copy from the same printing or edition as that sold by the Copyright owner in Australia. In other words, a book cannot be considered an infringing copy merely by virtue of having been purchased from an alternative source.

However, any bookseller who imports into Australia a book which is from other than the printing, edition or version authorised for sale in Australia by the Australian copyright owner, shall remain liable for prosecution under the Act.

In presenting this submission, we realise that other booksellers acting independently seek to widen the opportunities for direct importation much more than would be the case put forward in this submission. We are sympathetic to the problems which bring them to this view, but as an Association have decided to seek only the minimum changes acceptable to our members, on the basis that this will provide a 'safety-valve' with the minimum threat to those other bodies whose interests prompt opposing views.

The Australian Booksellers Association is utterly desirous of maintaining Copyright territories as they presently exist. It seeks only to avoid the threat of action by Australian distributors who, not having a required book in stock themselves,

object to the purchase by an Australian bookseller, of the required book (of the correct copyright edition) from an alternative source."

60. Elsewhere in the submission the A.B.A. said that it supported the upholding of international copyright and the protection of copyright owners,

"and the clear purpose and intention of ss. 37 and 38 which is to ensure that the only editions of a copyright work sold commercially in Australia are those editions which have been authorised by the copyright owner for sale within Australia . . . Members of this Association support the intention and practice for which these paragraphs are designed, i.e. that only the edition of a book legally authorised for sale in Australia by the copyright owner should be allowed to be imported for resale. The majority of our members have always understood and appreciated this need and shown little inclination to disregard it."

61. The A.B.A. submitted draft amendments to ss. 37 and 38. The original amendments were modified after the public hearings. The amendments as originally proposed and the modifications thereof are attached to this Report as Appendix F. At the public hearings, the A.B.A. contended that its object would be achieved if the words at the end of s. 37 of the Act, "where, to his knowledge, the making of the article would, if the article had been made in Australia by the importer, have constituted an infringement of the copyright", were replaced with the words, "where, to his knowledge, the imported article is a different edition or printing or of different manufacture

or origin from that which is normally sold in Australia by the copyright owner". It may be observed at this point that the A.B.A. would be able to achieve part of its goal if the existing words of s. 37 were retained with the exception of the words, "by the importer". This in fact is the form of the present United Kingdom section, s. 5(2) of the Copyright Act 1956 (U.K.). Section 5 of the United Kingdom Act is in similar form to s. 16 thereof which is the United Kingdom counterpart of s. 102 of the Australian Act. Section 16 of the United Kingdom Act was the subject of consideration by Browne-Wilkinson J. in CBS United Kingdom Limited v. Charmdale Record Distributors Limited [1981] 1 Ch. 91. His Lordship held that there was no breach of s. 16 where records manufactured abroad were imported into the United Kingdom, provided that the records were manufactured by a company which either owned the copyright or had an exclusive licence to manufacture in both the United States and the United Kingdom. In the course of his judgment he distinguished the provisions of the Australian Act which, unlike the United Kingdom Act, includes in both ss. 37 and 102 the words "by the importer". It is the presence of these words in the Australian section which explains the different conclusions reached in the CBS case and in the Time-Life case earlier cited. This is a matter which is examined in more detail in the analysis which is Appendix D to this Report.

62. After the public hearings, the Committee received a letter

dated 16 June 1986 from Mr. Leonard Woodley, a past President of, and the Copyright Spokesman for, the A.B.A. The letter was written on the letterhead of the A.B.A. Amongst other things, Mr. Woodley said:-

"It was evident [at the public hearings] during the day on which I attended that the publishers, too, understood that poor performances by many of their colleagues put a pressure on serious booksellers which was being met by their present habits of 'buying around'. It was also apparent that their concern was not that this practice is presently followed by legitimate booksellers, but that, if the wording was changed as we originally proposed, established Australian publishers and distributors could have their existence threatened for two principal reasons:

- (i) that, for inadequate reasons, any given bookseller might import titles in substantial quantities, to the detriment of the Australian publisher/distributor, eg. quantities of educational textbooks which provide a substantial economic base for some of these Australian publishers/distributors, or significant quantities of new releases of 'bestsellers' .
- (ii) booksellers could buy in significant quantities of titles which, whilst still current in Australia, are available from some overseas sources at heavily discounted 'remainder' prices."

These considerations led the A.B.A. to suggest an amendment which would permit the importation by a person for the purpose of trade of less than 20 copies in any calendar month of an article which was the same printing or edition as that normally supplied in Australia by the copyright owner. That was the principal change made in

the modifications to the proposed amendments which were suggested by the A.B.A. after the public hearings.

63. It is not without relevance to mention some information about the history of importation of books by Australian booksellers given during the public hearings by Mr. Woodley. Mr Woodley said that most overseas publishing and distribution companies had been established in Australia since about 1960. He said that some provided good service, some of them poor service and "most of them are mediocre in between". He went on to say that this had not mattered very much in the past. Where the service had been good the booksellers had supported the local companies and bought from them. Where they had been poor the booksellers bypassed them and bought from United Kingdom and United States wholesalers. This was what Mr. Woodley described as "buying around", that being the expression which the trade uses to describe this practice. He said that the booksellers had carried on in this way with clear consciences until about 1977 when they attended a conference which was addressed on the problems for booksellers which ss. 37 and 36 created. It was because of this that steps were taken to attempt to persuade the then Government to introduce amendments to these sections. That the booksellers should be under this misapprehension is understandable. Until the present Act came into force, copyright law in Australia was governed by the Copyright Act 1912 which picked up the provisions of the Copyright Act 1911 (U.K.). Its provisions, as the analysis,
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Appendix D hereto shows, were not different in effect from the present United Kingdom provisions. The different wording of the Australian sections resulted from the Report of the Committee Appointed by the Attorney-General to Consider what Alterations are Desirable in The copyright Law of the Commonwealth (1959) under the chairmanship of Sir John Spicer. Paragraph 98 of the Report is as follows:-

'\*We also recommend that the words 'by the importer' be added after 'made' in a provision corresponding to s. 5(2) [of the United Kingdom Act]. Under the United Kingdom provision it might, perhaps, be argued that importation does not constitute an infringement if anyone, including the copyright owner, could, in the place of importation, have made the article free from infringement ."

It is to be observed that because of the decision in the CBS case, the United Kingdom sections are to be amended to bring them into line with the Australian provisions. In a White Paper prepared by the Department of Trade and Industry entitled, "Intellectual Property and Innovation" presented to Parliament by the Secretary of State for Trade and Industry in April 1986 it is stated (para. 12.13) that the effect of the decision is seriously to reduce the value of the exclusive licence. The law, subject to the United Kingdom's obligations under European Community law, is to be amended "to enable an exclusive copyright licensee to prevent importation of copies of the work in respect of which he is licensed when these are

made abroad by the copyright owner, and imported into the United Kingdom by a third party". Such goods are also to be infringing copies for the purposes of defining criminal offences. See clauses 22, 27(3) and 103 of the Copyright, Designs and Patents Bill passed by the House of Lords earlier this year.

Submissions by the Publishers

64. The submissions made on behalf of the booksellers were strongly opposed by the A.B.P.A. and the Copyright Council. Some reference has already been made to the thrust of their submissions; see paras. 19 and 20 above. The book publishers fear that amendments to the sections along the lines of those contended for by the booksellers would open the market up to such an extent that the value of their exclusive licences would be substantially diminished. This would not only have the result of adversely affecting their businesses; it would seriously jeopardise the value of rights conferred on copyright owners by the Act. In the book publishers' submission, the complaints made by the booksellers were said either not to be substantiated or of such a minor nature as not to warrant any change to the existing law. In order to understand the case made by A.B.P.A. and its members it is necessary to go in a little detail to the submission which was made.
65. The A.B.P.A. submission commenced with some statistics about the Australian publishing industry. The Committee
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sees no reason why it should not accept the information given it as correct. Twenty years ago the majority of books sold in Australia were imported from overseas. What is referred to as the 'massive growth' in the sales of Australian-published books in Australia over the last two decades was said to be shown by figures which indicated that retail sales of Australian-published books had risen from \$2 million in 1960 to \$14 million in 1970 and to \$240 million in 1980. Allowance must, of course, be made for inflation, but, nevertheless, the figures indicate a substantial increase. The 1985 figure was \$328 million. In 1982 the total Australian book trade at retail prices was estimated to have amounted to \$630 million. The figure for 1985 was \$722.2 million. In that year Australian-published books accounted for 45.5 per cent of sales. In the educational market Australian-published books accounted for 63 per cent of 1985 sales. A survey of member companies conducted in March 1986 showed that a total of over 257,000 titles were held in stock by 70 publishers in Australia. Of these, 216,840 were imported titles. The investment in the stock of imported titles was over \$50 million. Many of the imported titles are held in stock in small numbers. Sometimes as few as a dozen copies are held. The A.B.P.A. said that the fact that copies were held in stock at all in Australia meant that they were available at short notice, as compared with the three months, say, it might take to import the books from England.

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66. The submission then turned its attention to what it described as "territorial copyright". It said that a good publishing contract placed rights in the hands of those able to exploit them in the interests both of the wide availability of the texts and also of income to the author and of those who work for the author, that is, the publisher or literary agent. It followed that the publisher who asked for control of certain geographical territories had a responsibility to the author to have the professional skills needed to exploit those rights and to be active in doing so. The submission continued:-

"It can be seen that the essential element of publishing transactions is not necessarily ownership of copyright but ownership of an exclusive licence to publish in a given market area, granted by the copyright owner in return for a consideration. It is this property which publishers seek to protect and develop in the substantially common interests of their authors and themselves.

In order to maximise the company's investment in an exclusive licence, the publisher must also be able to incur the considerable costs associated with printing, marketing and distributing the work contracted to publish. The publisher relies on the exclusivity of the licence acquired when investing in printing, marketing and distributing the book - and naturally is unlikely to incur such costs unless this exclusivity can confidently be relied on."

67. Emphasis was placed upon the international acceptance of the principle of the territorial division of copyright. It was said that recognition of this principle was particularly important to writers in the English language. Books written in the English language provided the largest

market for books which supported large publishing organizations "which exist to serve distinct, separate territorial markets - in the U.S.A. and in the U.K. in particular, but in other separate territories such as Canada, Australia, New Zealand and South Africa as well". This statement was followed by six case studies designed to show the importance of the principle of the territorial divisibility of copyright. The Committee does not refer to all these examples but it has taken them all into account. TWO are referred to to indicate the way in which the matters relied upon by the A.B.P.A. are said to have practical importance. The first of these is described as, "Case Study No. 2 - Angus & Robertson" and is as follows:-

"In 1969 Angus & Robertson negotiated to sell the rights to publish New Poems by A.D. Hope to an American publisher. This publisher bought the exclusive right to produce and market the Hope book in the U.S.A.

However, while A.D. Hope is almost household word in Australia, in fact his net book of poetry was not a commercial success in the U.S.A. The US publisher therefore decided, after some years, to dispose of his stock of the book at cost (this means without any royalty being paid to the author).

A.D. Hope's New Poems continued to sell steadily in Australia, and the author received a full royalty on the published price of every copy sold. Sections 37 and 38 of the Copyright Act prevented the importation by Australian bookshops of the US edition of the book - for the very good reason that such cut-price copies would jeopardise the Australian author's and publisher's potential income from the full-price Australian edition."

The other example is, "Case Study No. 3 - Anne O'Donovan".

It is as follows:-

"Anne O'Donovan Pty Ltd. is a small (turnover just under \$250,000 p.a.), successful Australian publishing company founded in Melbourne in 1978. The company publishes Australian books only; it does not import, nor does it buy any exclusive licences from overseas to publish titles in Australia.

The company's successes have included such titles as The Age Good Food Guide and a book about an Australian-developed method of natural contraception, The Billings Method. This latter book has to date sold 10,000 copies in Australia - which is a lot of copies for any firm, but particularly good for a small publisher.

The Billings Method was first published in Australia in 1980. In January 1981, the US rights were sold to a US publisher, but copies of the book were not available in the USA until June 1981. In the meantime, the Australian publisher was receiving enquiries and orders from US booksellers, but was not able to supply these orders because of the sale of the US rights; if the US publisher had found that copies of the Australian edition were already available in his market area the whole deal may have been in jeopardy. When the deal was finalised, the Australian publisher passed on all US orders for The Billings Method to the publisher in the USA.

The current situation with this book is that it is still, particularly after a related program on ABC Television, selling well in Australia. It did not sell as well as expected in the USA in hardback, but a paperback edition has now been published. However, the Australian publisher can continue to promote The Billings Method - for the benefit of both authors and the publisher - in this country in the knowledge that s. 37 and 38 of the Copyright Act protect her investment in the book, by preventing any possible dumping of infringing copies of the US hardback edition on the Australian market."

68. The A.B.P.A. submission then confronted the arguments relied upon by the booksellers concerning price and availability of books. It was said that because of perceived problems concerning these matters, those advocating the amendment of the sections argued that the author's and publisher's territorial rights, as set out in contracts, should be set aside or given second place to the interest of making books more available and available more cheaply to the Australian public. It was recognized that there were sometimes legitimate complaints made by Australian customers about these matters, but it was said that, in looking at the incidence of such complaints, it should be recognized:-

- "1. The' problem is not unique to Australia. There is no possibility, even in theory, that books will be available in all countries at the same time and at the same price. Australian customers suffer from this limitation in exactly the same way as do customers in the UK or USA, or Brazil, or West Germany, or New Zealand.
2. The problem affects only a minute fraction of the hundreds of thousands of titles in print in the English language at any given moment.
3. There are often very good reasons for the delay in the availability of books, and very good reasons why books (like other imported goods) are priced higher in Australia than in their country of origin."

It was acknowledged that a book published in the United Kingdom would usually be priced higher in Australia than in Britain. Some of the reasons for this were said to be

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as follows:-

- "1. Cost of freight to Australia: British and us publishers supply their Australian distributors at an export price exclusive of freight. Therefore, the price of imported books here (like the price of any other imported goods) must reflect in some way the cost of transporting those books up to 12,000 miles.
2. Cost of domestic freight: according to figures gathered from a 'control group' of 18 ABPA member companies, domestic freight costs averaged 9.5% of operating expenses and 4.4% of sales in 1982. The equivalent figure for the UK would be 0.5%. Distribution costs for books in Australia are very high - and it must be kept in mind that it is usual for a book to sell at the same recommended retail price in the city close to the warehouse, as in a remote country area, a thousand miles away...
3. Larger discounts to booksellers: the average discount on trade hardback books (publisher to bookseller) in Australia is about 43%; on educational books it is 33%. In the UK the average discount on trade hardbacks is 35%; on school books (non-net) it is 17.5%, and on academic and professional books it averages about 30%.
4. High cost of warehousing and other Overheads: overheads in the Australian publishing industry are high; the 1982 survey quoted in 2. above showed that across the 18 companies surveyed, operating expenses averaged 45.9% of sales, with warehousing, etc., accounting for 8.8%...
5. Importation of small quantities: importing publishers, in order to provide a service, often import very small quantities - say 20-50 copies of titles for which they believe there is a market, but a limited one, in Australia. When negotiating with the overseas supplier, it is not likely that such favorable terms will be obtained for the supply of 50 copies as might apply to the supply of 2,000 or 20,000 copies;

therefore in many cases the original cost of the unit is higher. Then, those 50 copies of a title still require cataloging, warehousing, advertising and distribution in the same way as do the 2,000 or 20,000 copies of another, bigger-selling title. It is natural that the retail price of books brought in in small quantities will reflect these costs more."

A further factor which has manifested itself significantly in the last 12 months or so is the substantial fall in the value of the Australian dollar. The effects of this were not dealt with in the submissions because, for the most part, they preceded the devaluation which has occurred. Undoubtedly, however, the fall in the exchange rate must affect the price of imported books.

69. The submission attempted to forecast the effects of the repeal or substantial relaxation of the provisions of ss. 37 and 38 on consumers, authors and publishers. The relevant paragraphs of the submission are as follows:-

"What would happen would be . . .

(a) Consumers would suffer

prices would probably fall for a while, but then they would rise to higher levels than before to cover the cost of high stock write-downs resulting from lack of any informed basis for order levels;

availability would reduce dramatically, as publishers cut back on orders to reduce loss on overstock, and also cut loss on freight-paid supply to small and geographically remote customers to cut costs. (Country people especially would suffer - it should

be noted again that books in Australia have always been available at publisher's recommended prices - or less - in all country areas);

quite soon, prices of individual books would rise, and availability of all but popular fast-moving titles would reduce dramatically. It is a maxim that most publishers derive 80% of their turnover from 20% of their titles; and the other 80% of titles often contain those books of highest cultural and educational value.

(b) Authors would suffer

the author, who is the owner of literary copyright under existing domestic and international copyright law, would be disenfranchised in one area - control of his/her copyright territory. An author could no longer expect an advance of royalty from a publisher to cover expected sales in Australia, since the Australian market would be open to any edition;

diminished author royalties would result from diminished sales; if a publisher is not sure of his exclusivity, he could not afford to print and market as many copies of a book as he can with the protection of Sections 37 and 38.

(c) Publishers would suffer

if Australia could not offer reciprocal territorial protection to overseas publishers, overseas publishers would be less likely to enter into agreements to buy Australian-originated books. Exports of Australian books and rights would be seriously harmed.

Australian publishers would be vulnerable to the dumping here of remaindered copies of exported books which might still be a commercial success here in Australia;

publishing companies here who depend for much of their income on turnover from imported books would no longer - have a secure market in which to operate. Gross profit earnings would

be severely cut: they would be forced to cut staff in all areas, and also in all likelihood to cut back on their Australian publishing programs (currently assisted by cash flow and marketing machines set up for the imported products)."

70. Further matters relied upon by book publishers were put forward in other "written submissions or at the public hearings. The most significant of these were as follows:-

(a) The Australian author was advantaged because the local subsidiaries of overseas publishers used the profits gained from their agency for overseas books to finance their publication of Australian authors. Very few Australian publications of works written by Australian authors for the Australian market were themselves profitable but local publishers amortised their publishing and distribution costs for Australian books across their total operation. Moreover the existence of territorial rights permitted Australian publishers to sell the overseas rights for Australian publications to their overseas principals or other overseas publishers. This would be much less probable if similar territorial rights could not be offered in Australia.

(b) It was accepted that not all Australian agents were equally efficient any more than in any other industry. The problems relating to lack of local rights or unavailability of stock were not

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peculiar to the Australian market; they were also experienced in overseas countries. They appeared greater in Australia because this country drew on intellectual property from both the United States and the United Kingdom whereas these countries had much larger and more self-sufficient publishing markets. 'In fact there was a greater range of titles available through Australian booksellers and Australian suppliers than in either the United States or the United Kingdom.

- (c) The amendments to s. 37 and s. 38 proposed by the A.B.A. (Appendix F) were opposed because the amendments would be likely to destroy the present structure of the Australian publishing industry. While the amendments would permit booksellers to circumvent inefficient suppliers, they would also permit the purchase overseas of large quantities of major selling titles. While booksellers represented by the A.B.A. might not presently believe that they would find it profitable to purchase overseas, the A.B.A. amendments would permit large retail chains, such as Coles - Flyer, which had buyers constantly active overseas, to purchase large quantities of attractive new titles. Whereas overseas purchase of small quantities of such books might not be attractive to A.B.A. members, retail chains would buy in much larger quantities and often on special terms for

volume.

71. It remains to quote the conclusions reached by the A.B.P.A. in its submission. These are as follows:-

- "1. That the principle of territorial copyright is a principle which is internationally recognised;
2. That the principle of protecting territorial copyrights by specific legislation such as Sections 37 and 38 is common in domestic copyright law;
3. That without such protection of territorial exclusivity, the Australian publishing industry would be unable to operate efficiently;
4. That concomitant with this, without Sections 37 and 38 and the protection they give to exclusive dealerships, the Australian consumer, as well as the Australian author and publisher, would be disadvantaged;
5. That complaints about unreasonably high price and lack of availability apply to very few of the hundreds of thousands of titles in print in the English language;
6. That if Sections 37 and 38 were abolished, and an open market were created in Australia, book prices would not come down, and availability of titles would be less;
7. That even any modifications to Sections 37 and 38 would prove harmful to the Australian book trade, and would not benefit the consumer in the long run."

#### Submissions in Relation to Libraries

72. Specific mention should be made of submissions put forward on behalf of libraries and publishers concerning the application of ss. 37 and 38 to libraries. At the moment the sections do not apply to libraries because books are not imported by them for the purposes of sale or other distribution for the purposes of trade. Accordingly, libraries "buy around" in the same way as booksellers once

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used to do. There is no evidence that, in doing so, they purchase pirated works, but the Committee points out that the sections would not prevent libraries or individuals from doing so. Some, but by no means all publishers, suggested that libraries should be brought within the scope of the sections. The submission was not supported by the A.B.P.A. Those relying on the submission claimed that a substantial amount of public money was being spent in business dealings with overseas suppliers which could have been allocated to Australian suppliers. It may be noticed in passing that the comparable United Kingdom and New Zealand sections do apply to libraries. This is because the United Kingdom and New Zealand sections, instead of listing the purposes for which importation is prohibited (as do the Australian sections), prohibit a 1 1 importation "otherwise than for . . . private and domestic use" (s. 5(2) Copyright Act 1956 (U.K.); s. 10(2) Copyright Act 1962 (N.Z.)).

73. Submissions were received from the Library Association of Australia, the Library Board of Western Australia and Ms. Carol Mills, the Institute Librarian at the Riverina-Murray Institute of Higher Education, which is situated at Wagga in New South Wales. Two librarians attended the public hearings. They were Ms. Mills and Mr. Rob Brian, who is the Law Librarian at the University of New South Wales. The submissions from the library interests all supported the retention of the present position under which libraries are not affected by the

sections. The following points were made by the Library Association in its submission:-

"1. If Australian publishers holding the rights to an overseas publication decide not to market this publication in Australia, the publication is effectively banned from Australia and the Australian public would be prevented by law from obtaining a copy. Such a situation would clearly be intolerable in a free society.

2. We are concerned that the requirement to purchase a title from the sole Australian agent might well reduce the options available to libraries in obtaining the best price and most timely delivery of the title. The absence of any competitors would not encourage the Australian agent to market the title at a reasonable price or to provide speedy delivery.

3. The Australian rights market is volatile and characterised by rapid changes. Australian libraries would have great difficulty in establishing which titles were the subject of Australian rights at any particular time. There is a listing of Australian rights in each monthly issue of the Australian Bookseller and Publisher, but library purchasing is on such a large scale that a requirement to check each title against this listing before each order is placed would represent a very significant additional workload on library staff and would seriously delay the acquisition of needed publication. Furthermore, it would be essential for there to be an accurate listing of Australian rights produced more frequently than monthly."

Similar points were made in the submission from the Library Board of Western Australia. Additionally, reference was made to the services provided by local publishers to purchasers. It was said that it is not necessarily true that, given a choice in source of supply,

purchasers (individuals or institutions) will prefer overseas to local sources. The submission continued:-

"In the experience of The Library Board of Western Australia, local distributors have distinct advantages over overseas sources. These are such elements of trade relations as understanding of Australian conditions and being within reasonable distance so that problems, negotiations and other necessary contacts are not hampered by time or expense. "These are vital factors when dealing with the vagaries of publishers.

The provision of good service to purchasers by local distributors, even at a cost, is a balance against the fact that good commercial outlets overseas can sometimes achieve economies that local trade outlets cannot "achieve.

Without the element of competition, any commercial enterprise is subject to complacency and an inadequate response to market forces. The result, for the Australian book reading public, is inadequate access to information and entertainment provided by the overseas publishing trade.

By ensuring that the purchaser has a choice of purchasing sources, the element of competition is maintained."

74. In her oral submissions to the sub-committee, Ms. Mills, of the Riverina-Murray Institute of Higher Education, advocated the repeal of the sections. She said that she was the founder of the Acquisition Section of the Library Association of Australia. She referred to the combined budgets of the academic libraries in Australia and to the amount of these budgets which is spent overseas. She said that, in the case of her own library, 85 per cent of its budget of approximately \$500,000 was spent outside the
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country. She said that she would rather be spending the money in Australia but could not afford to because of the dearer prices charged by local suppliers for books which her library needed. Instances of books being dearer in Australia than overseas were given. The figures were given in May 1986 at a time when the fall in the value of the Australian dollar had commenced. Ms. Mills' theme was that the repeal of the sections would increase competition and make the local suppliers more efficient.

75. Mr. Brian furnished particulars of the way in which the University of New South Wales' Library budget was spent during the year 1985. The total budget was just over \$2 million. \$736,000 was spent on monographs and \$1,380,000 on serials. Payments to local companies amounted to \$900,000 and to overseas suppliers, \$1,200,000. Mr. Brian did not advocate any change in the existing position. In other words, he was not concerned to support Ms. Mills in her attempt to persuade the Committee that the sections should be repealed.

76. A late submission was received from a library supplier, James Bennett Pty Limited of Collaroy near Sydney. It advocated the extension of the sections to libraries.

#### The Competing Considerations

77. It is proposed now to summarize the competing considerations. In short, the benefits which those who seek the repeal of the sections submit will arise are as
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follows:-

(a) There will be increased competition amongst publishers and distributors in Australia and competition, which now does not exist at all, between local suppliers and overseas suppliers.

(b) This increase in competition will lead to:-

(i) cheaper books for the Australian community; and

(ii) an improvement in the availability of overseas books in Australia;

(iii) a reduction of the time taken to fulfil 'overseas orders;

(iv) increased efficiency in local suppliers' businesses thus improving generally their customer services, particularly such matters as their information about the source of supply of overseas books and when overseas books are likely to be available here, and also their indent services for special orders.

It should be remembered that there was no suggestion that the sections should be repealed to permit the importation of pirated books. This is something to which the Committee would have been opposed in any event. The

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reference to the repeal of the sections should be understood, therefore, to refer to repeal only in relation to their application to parallel imports. Not many submissions went to this length. However, it was the principal submission made by the Office of Consumer Affairs. Reference should be made to the paragraphs earlier quoted from this submission; see para. 30 above. The bulk of the submissions advocating change sought no more than a relaxation of the provisions so as to enable the importation of legitimately made copies of books which were unavailable in Australia. It was contended that, if this were done, there would be an improvement in the availability of books, but it was conceded by the booksellers that it was unlikely that books would become cheaper or that the change would substantially increase the present level of competition amongst suppliers. They did, however, consider that there would be an improvement to their customer information and indent services.

78. The benefits which it is claimed will result from the retention of the sections in their present form are:-

- (a) The sections are an important part of the protection which copyright law affords to copyright owners, whether authors or not. This protection is international in that it extends in Australia to protect, not only Australian authors, but also authors resident in convention countries.
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- (b) The sections could not be repealed without adversely affecting Australia's position as part of the international copyright community which comprises much of the world. Certainly it comprises most of Western and Eastern Europe, the United States and Canada, New Zealand and, increasingly, the majority of the Asian nations. Although the sections were not enacted to fulfil any of Australia's treaty obligations, they have counterparts in the copyright laws of most of the countries to which preference has been made. Australia would be disadvantaged if it embarked on a course of its own and repealed the sections without similar steps being taken in other countries.
- (c) Because of the protection which the sections afford, publishers and their local suppliers can confidently establish and maintain repositories and distribution facilities providing a constant and readily available source of supply of a very large number of titles covering a wide range of subject matter. The opening up of the market to permit unlimited importations of books from other countries would be likely adversely to affect the operations of local companies who would tend to reduce their investment in buildings, facilities, often including complex computerized systems for keeping track of stock and controlling the ordering and supply of books, and in stockholdings of books. Numbers of people employed
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in connection with these activities would fall.

- (d) In consequence the repeal of the sections would not increase the availability of books in Australia. On the contrary, fewer books and titles would be available eventually than is now the case. The reduction in stockholdings would mean that in many cases books would not be held in stock in Australia, but would have to be imported pursuant to specific orders with consequent delay in their availability when they were required.
- (e) Because overseas publishers or their associated companies enjoy the protection conferred by the sections, they are not only able to establish stockholdings which are adequate for the Australian market; they are also able to undertake the establishment of Australian publishing houses which publish both books originating in other countries and books written by Australian authors. Again the certainty afforded by the protection which the sections confer enables interests confidently to set up these publishing undertakings and carry them on. In this way investment in premises and facilities is increased as is the employment of local people. The employment of these people is not only important for its own sake; a consequence is that a substantial input of technical know-how is made of which the Australian community is the beneficiary.
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(f) Publishing by associated companies of overseas publishing houses is not the only publishing which is done in Australia. There are a large number of Australian publishing companies which have no connection with any overseas publishing house. Most of these are quite small. These companies also benefit by the protection which the sections afford but in a different way. Illustrations of how this comes about are to be found in the case studies referred to in the A.B.P.A.'s submission, two of which are set out in para. 67 above.

(9) The viability and success of the local publishing industry has meant that publishers, particularly associates of overseas publishers, are often prepared to take a financial risk in relation to material written by Australian authors. Sometimes this is subsidised because it results in a loss. On occasions it is recognized from the outset that the publication is unlikely to be profitable. I f t h e sections were repealed, or even relaxed, it is the publishers' case that their ability to subsidise Australian writing in this way would be diminished.

#### The Level of Book Prices

79. The first matter to be considered is the question of the level of prices for overseas books. Is the price of overseas books in Australia due, in whole or in part, to the abuse by the suppliers of the protection which the

sections confer on them as licensees of the Australian copyright? As has been seen, a number of assertions that this is occurring are to be found in the submissions. These assertions are denied by the publishers. After the public hearings a number of them supplied the Committee with information as to their pricing structures. The information was supplied in confidence and cannot be mentioned in this report. Those asserting that prices are being unduly maintained as a result of the operation of the sections were unable to back up their case with any evidence except to give specific examples (none of which the Committee was able to check) of comparisons between prices paid (usually at an unspecified time) for books overseas and prices paid for the same or similar books in Australia. Many of these examples came from the educational or other specialist fields. An example is provided by the attached schedule which was supplied to the Committee by the Armidale Christian Book Society (Appendix G). Early in 1988 the Secretary of the Committee carried out an informal survey of the recommended retail prices in Australia for 215 general paperback books. Almost all were imported from the United Kingdom. Most of the books show the prices recommended to be charged in the United States or Canada or both these countries, as well as in Australia. Taking into account the current exchange rate and the costs of importation (mainly freight and insurance) the prices recommended did not appear to be excessive. Nevertheless, the survey was of a comparatively small sample and, in any event, did not

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relate to hard covers or to educational, technical or specialist books. Moreover, it should be emphasized that the comparison was of recommended retail prices. Prices actually charged, whether in Australia or elsewhere might have been different. A copy of the survey is attached as part of Appendix G. The paucity of the evidence from those who asserted that prices were being unduly maintained is not a matter for which those making the assertions should be criticized. In the nature of things it would have been very difficult for them to obtain evidence to back up their claims. And there is the point made by the Office of Consumer Affairs in its letter of 4 December 1986 earlier quoted (see para. 33) that consumers who experience some degree of dissatisfaction with the purchase of goods or services often do not, for a variety of reasons, complain formally either to the seller or to government agencies. Absence of complaints does not necessarily indicate satisfied consumers. This can be due to limited knowledge on the part of the public of the structure of the relevant market and the effect that this structure has on prices.

80. Whilst there is no doubt that considerations such as are mentioned by the Office of Consumer Affairs ought to be borne in mind, a degree of caution is required in applying them. Those who rely on such statements should be careful to ensure that underlying them is not their own intuitive feeling that there is an abuse of some kind somewhere. This may sometimes be a good reason for holding a public
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inquiry. But, so it seems to the Committee, it will not often provide a good reason for altering legislation, particularly when there is a body of material which, if accepted, would suggest that in fact there is no abuse. In other words, an intuition, even if it appears to be reasonably held, would be a dangerous base for what would amount to a profound change in existing legislation and practice which has been in force, not only in Australia, but in most of Western Europe and the United States of America for a very long time. It cannot be emphasized too strongly that neither the Office of Consumer Affairs itself nor any of the State or Territory Consumer Affairs Bureaux has put forward any evidence of abuse. Furthermore, the Committee's reference has been widely advertised and has been the subject of public hearings which themselves were advertised. Particular interests, including consumer affairs agencies, were invited to make submissions. These responses amount to no more than the expression of an uneasy feeling that there is a degree of abuse of the system which is leading to higher prices.

81. Reference has earlier been made to the nature of this Committee. It has no coercive power to enable it to compel the attendance of witnesses, to compel witnesses to answer questions or to compel the production of documents. If, notwithstanding these limitations upon its power to obtain information, the Committee had decided to attempt to persuade the large number of witnesses necessary to reach a conclusion on the question of pricing to attend
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hearings, whether in public or in private, the Committee would have been faced with other difficulties. It has no investigative staff to interview people and to prepare evidence in a comprehensive form nor has any budget been provided to enable it to pay witnesses' and other expenses. Undoubtedly an inquiry into the level of prices for books would be a long running affair. The matter has been the subject of attention in some earlier public inquiries. In 1979 the N.S.W. Prices Commission embarked on such an inquiry. The Commission did not complete the reference and no report has been published. The question of prices for Australian books arose incidentally in an inquiry concluded by the Industries Assistance Commission in 1979. On 20 July 1975 the then Special Minister of State had referred to the Commission the question of whether assistance should be accorded publishing in Australia, and if so, what should be the nature and extent of such assistance. The Commission reported on 17 October 1979. Its recommendations (p. 77 of the Report) were that there should be no assistance granted. Reference was made to copyright legislation in para. 4.1.4 (p. 42) and para. 6.1.4 (p. 68) of the Report. In para. 6.1.4 the Commission said:-

"While benefits are conferred on the originators of copyright material the community has had to accept some inevitable losses, in relation to the availability and prices of publications, associated with the exercise of the monopoly power conferred by copyright. The relative benefits and costs of copyright legislation will change over time as a result of factors, such as improved copying prevention techniques and

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returns to writers and publishers, say through sponsorship, which do not depend upon their power to exclude some potential readers. Since it is not clear that the benefits of copyright legislation outweigh the costs, the assumptions on which the legislation is based should be reviewed.

The Commission was not able to carry out a thorough investigation of the copyright system within the bounds of the current reference. However, it can observe that copyright legislation has probably given rise to pressures for the introduction of additional measures to offset its unwanted side effects."

One of the Commission's recommendations was that there should be a review of copyright legislation, with emphasis on the hidden costs it generates. So far as the Committee is aware, no such review has taken place except to the extent that it was undertaken by the N.S.W. Prices Commission in the inquiry which was not concluded.

82. A factor not far mentioned is that there is a competitive market for general books not only from other general books but from alternative ways of enjoying leisure. Furthermore, extensive promotion campaigns are often set up to create demand for some general books. Thus a variety of market forces operate to limit the prices of general books. In contrast there is no competitive market for many specialist books. The practitioner may need the most up to date or reliable information or an authority which can be cited in support of an action or submission. Thus the cost of supplying specialist books for which there is only a small number of
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potential customers is usually higher than the cost of supplying general books.

83. As mentioned, some of the publishers provided figures designed to demonstrate that prices being charged were not excessive. An examination of the material supplied would not suggest otherwise. But it must be understood that, for the reasons given in the previous paragraph, the Committee has not been in a position to conduct an inquiry in which the material could be adequately tested. This is not to say that the Committee questions the good faith of those supplying the material. Earlier the Committee has recorded its appreciation for the submissions made to it, whether orally or in writing. But common experience teaches that, with the best will in the world, mistakes are sometimes made or situations are viewed in a particular way which, upon analysis, proves erroneous. Furthermore, parties with an interest in the maintenance of a particular system or practice will, with the utmost good faith, often put forward a submission which is one-eyed. What it comes down to is that the Committee has some material which could suggest that in some areas, particularly in specialist areas, there is an unfavorable differential between prices paid for books in Australia and prices paid for the same or similar books in overseas countries, even after an attempt has been made to allow for freight, insurance and distribution costs. The Committee is unable to make an informed judgment about the extent to which the apparently high mark-up on many

specialist books is due to the high cost of supply or excessive profit-taking in a captive market. There is thus no guarantee that higher mark-ups would not continue if the sections were repealed. These are the best conclusions which can be drawn until there is conducted a wide ranging inquiry by a suitably constituted tribunal with power to compel witnesses to attend and answer questions and to compel the production of documents.

84. An independent consideration in relation to pricing is this. A principal object of those seeking the repeal of the sections, except insofar as they apply to pirated articles, is the reduction of prices charged for them. If excessive prices are being charged, this would indicate that the protection conferred by the sections is being abused. The solution would not necessarily lie in repealing them in their application to parallel imports. Such a course may have the undesirable effect of taking away an important right which a copyright owner or licensee should have. The solution should rather be one that corrects the abuse, but does not destroy the right. The preferable course may be to remove some of the restrictions on the application of the Trade Practices Act to dealings in copyright material. Alternatively, the problem could be dealt with in some form of price control or consumer protection legislation which would have a general application rather than an application which was restricted to imported copyright articles. The Committee does not express any view on what would be the preferable

course to take. It simply draws attention to some of the various possibilities which there would be to correct abuses leading to unreasonably high prices.

The Availability of Books

85. The remaining matters relied upon by those advocating a change in the sections was that their repeal or relaxation would lead to improved availability of books and increased competition with the consequences not only of increased availability of titles, but also improved procedures whereby books would be available in requisite numbers in shorter times. The Committee has been impressed with the evidence placed before it about the very substantial number of titles which are available in Australia in a variety of subject areas. In fairness to distributors of overseas books, overseas publishers who have Australian establishments and Australian publishers, it must be acknowledged that Australia, despite the many criticisms which are voiced from various quarters in the community, has available to it a large range of titles and stocks of books. That does not mean that attempts should not be made to improve both the number of titles and the stockholdings, but it does not seem to the Committee that Australia, generally speaking, suffers greatly from unavailability of titles in any absolute sense. It has previously been mentioned that no submissions were received from those who sell large numbers of books, principally the departmental and chain stores and the newsagents. The complaints came from booksellers who
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carry on business only as such and who, for the most part, are concerned to provide personal customer service so that they may fulfil, if possible, almost any demand which a customer makes for a book. Not infrequently, so the Committee was informed by booksellers, customers sought books which were referred to in weekly reviews carried in the Australian press or in magazines, some Australian and some overseas.

86. The Committee has the impression that it was frustration on the part of the booksellers at not being able to obtain a recently published work, and in some cases, not even being able to find out where the book might be obtained, that led them to make the submissions they have. It seemed to the Committee that, after the hearings had proceeded, for a little time, the booksellers recognized that there would be a substantial danger to their own businesses if the sections were, except in the case of pirated copies, repealed. This would open the door to the departmental and chain stores and the newsagents to import large quantities of legitimate copies from overseas. The booksellers could see that they themselves might then be placed in a position not dissimilar from that in which the publishing companies would claim to be if the sections were repealed. The businesses of the booksellers would be threatened. Nevertheless, the written submissions made by the A.B.A. and the suggested amendments of ss. 37 and 38 (Appendix F hereto) show that, at least originally, they wanted to be returned to the position which they formerly
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enjoyed where they could "buy around". This would enable them to buy in unlimited quantities and irrespective of any previously known consumer demand. If this were permitted, it is difficult to see why much larger organizations, such as the department stores, would not take advantage of the change in order to bring large quantities of overseas books into Australia from unlicensed sources. It seemed to the Committee that the public hearings brought about a change in the booksellers' approach. In the end what they really appeared to be seeking to do was to have the sections relaxed sufficiently to allow them to procure legitimate copies of books published overseas if, after reasonable inquiry, the books proved to be unavailable here.

Conclusions in relation to Books and Publishing

87. After due reflection the Committee has reached the conclusion that it should not recommend the repeal of the sections in their application to the parallel importation of books. But the Committee has also reached the conclusion that it should recommend some relaxation of ss. 37 and 38. Before coming to the terms of the recommendation which the Committee has decided to make, the Committee expresses its reasons for not recommending repeal of the sections in their application to imported books .
88. The Committee has already indicated that, upon the material before it, repeal of the sections because of a

supposed high level of prices of overseas books in Australia, is not warranted. But there are other considerations, some in favour of and some against, taking the course advocated by the Office of Consumer Affairs. Whenever it is proposed to introduce legislation which may have the effect of opening up competition, or to repeal legislation which may be thought to inhibit competition, those affected will always say that the legislative proposals spell disaster for their businesses. A person enjoying a protected position will always fear competition. The Trade Practices Act has been in force for over 12 years; its predecessors go back a further nine years. There is no evidence that the introduction of the legislation has been, generally speaking, otherwise than beneficial. So, statements such as have been made by the publishing companies in the submissions made to the Committee need to be viewed cautiously. It would be a mistake to think that it would necessarily follow that viable organizations, whether offshoots of overseas parents or local companies, would necessarily cease to carry on business or restrict their activities just because of statements to that effect by those who advocate no change. The impact of change is very difficult to assess. So many factors are relevant that one cannot be sure of what its effect may be. On the other hand, there is undoubtedly a vital and viable publishing industry in Australia which is a valuable part of its economic structure particularly in the present economic climate. There is also a substantial availability of titles and

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books in Australia. It would be unfortunate if a change in the sections led to any adverse affect on this situation. The Committee repeats that it has insufficient evidence that books are being sold at unreasonably high prices and has not the powers or resources to make an adequate investigation into that matter. Nor is there a great deal of evidence that there is any marked unavailability of books in Australia. There was *not* the degree of complaint nor number of complaints that one might have expected if there were the abuses which have been referred to. Reference has already been made to the absence of submissions from all but one consumer organization and then to the generality and lack of specificity of the submissions from that organization, the Office Of Consumer Affairs. The Committee has also referred to the absence of submissions from those who might be expected to be the large importers of legitimately made books from overseas if the sections were repealed, namely, the departmental and chain stores and the newsagents. No such submissions were received. Nor, apart from the submission from the office of Consumer Affairs (which itself acknowledges that it has no sufficient evidence of abuse), has the Committee received any submission from any federal or State government agency. The Committee's terms of reference were widely advertised on two occasions. There is not, therefore, the cry for change which one might have expected if there were serious abuse in progress.

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89. Then regard must be had to a number of the factors mentioned in para. 69 and the examples given in para. 67 above which are relied upon by the publishers. Central to these is the fact that the sections are part of the overall protection thought in many submissions to be appropriately afforded to those who originate copyright material in this area, the authors of books. Undoubtedly, their copyright is assigned or licensed to commercial undertakings. But unless that were done, they would not be able properly to exploit their work and obtain the reward from it which is their right. Furthermore, s. 30 of the Act gives legislative recognition to the reality of international copyright which, as has been earlier said, involves the grant of a large number of licences and assignments in numerous countries so that the copyright becomes owned or controlled by many different interests in the various countries where the work is available. The term for this is the territorial divisibility of copyright. It is something which is internationally recognized. Most books imported into Australia are, perforce, written in the English language. The majority of English speaking countries have in their copyright legislation provisions similar to those of the Australian Act. So far as the Committee is aware, there is no proposal current in any of these countries which suggests that the provisions be repealed or relaxed. The Committee is of opinion that to repeal the sections, without there being comparable legislation passed in at least some of the other countries, would put Australia out of step

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internationally. The Committee is aware that, because Australia is under no treaty obligation to have provisions in the form of ss. 37 and 38 of the Act as part of its law, there is room for the view that being out of step internationally is of little importance. After all, Australia is a net importer of copyright material and the more competition in the market the better it will be both for its balance of payments and those members of the public who buy overseas books. Loss of the benefit the sections confer on Australian authors, as evidenced by the examples given in para. 67, would not become critical in many cases and could be thought to be outweighed by the advantages which a freer market would bring about. These are weighty considerations, but the benefits which the sections do confer on Australian authors (in an age in which they are becoming increasingly read overseas) and the tendency repeal would have to disturb the long-standing concept of the territorial divisibility of copyright might militate against change. Furthermore, some members of the Committee find it difficult to foresee all the consequences repeal might have internationally. Undoubtedly there would be, an unfavorable reaction in a number of quarters. Whether that reaction would be translated into some form of retaliation of substantial disadvantage to Australia, those members find it very difficult to say.

90. The considerations mentioned in the last two paragraphs have led the Committee to the conclusion that it should
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not recommend the repeal of the sections in their application to books. However, the Committee has decided to recommend some relaxation of the sections. The Committee believes that the adoption of its recommendation will not adversely affect authors nor endanger the businesses of the publishers and distributors in the way that they fear. The benefit to the community will be still further to increase the availability of books in Australia. The change will be a spur to distributors to become more efficient than they are now and to improve their indenting services so that they will be ready themselves to ensure that books, if not already in Australia, will be made available quickly even if the quantities required are small.

91. The relaxation which the Committee recommends is designed to permit the parallel importation of books provided the importer and persons dealing commercially with the books are able to satisfy one of two alternative conditions. These are either:-

- (1) The book is not available in Australia from the copyright owner or a person authorized, i.e. licensed by him to distribute it; OR
- (2) Although the book is available here, the importer has received an order from a customer for it before making the importation.

The Committee comments on these recommendations as

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follows:-

- (a) If the book is not available in Australia, it is difficult to perceive any reason why a legitimate copy of it produced in another country should not be able to be imported. In the public interest, Australians should have access to as much information as possible. If those entitled to the benefit of the copyright in the book are unable or unwilling to import it, the importation of it should be permitted in whatever numbers the demands of the market require.
- (b) A question will arise in relation to what is meant by "available" in this context. Because of the variety of different circumstances which are likely to be encountered, the legislation, if the recommendation is adopted, will need to be flexible enough to cope with a variety of situations. The essential matter upon which an importer should satisfy himself is that, having made a reasonable investigation, he is satisfied that the article cannot be obtained in Australia within a reasonable time from the copyright owner or his or her licensee or agent. The suggested test is not a completely objective one. It will be met if the importer, after reasonable investigation, satisfies himself that the book is unavailable. Provided he acts in good faith, this, in the Committee's opinion, should be enough. To impose an
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objective test would tend to defeat the object of the suggested amendment.

- (c) The matters referred to in para. (b) mask some underlying difficulties. For instance, what is a reasonable time? This will vary from case to case and may ultimately have to be a matter for a court to decide. One of the matters impressed on the Committee was the need for commercial decisions to be made to delay the release of a particular book in Australia in order to enable those entitled to the benefit of the copyright to obtain the maximum return from its publication. Provided the copyright licensee is acting reasonably, the Committee sees no objection to considerations of this kind being taken into account in the determination of whether a book is available within a reasonable time. In an attempt to make the matter more certain, it recommends that there be included in the legislation provisions along the lines of sub-sees. 109(3) and (4) of the Act which would empower the making of regulations prescribing, in relation to all articles or all books, or in relation to particular articles or books, the period or periods which is or are to be a reasonable time or times.
- (d) Another difficulty is to determine how different one edition of a book must be from another, which is available here, before it can be said to be
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unavailable in Australia. The Committee's recommendation is that a book be deemed to be available in Australia if there is available here a book which is substantially similar to that which the importer proposes to import. The Committee is not able to suggest a more precise expression than "substantially similar to". It will be for the courts to apply these words to the infinite variety of circumstances that are likely to arise. In order to give guidance to those reading this Report of what the Committee has in mind, it indicates that, in its view, a book should be regarded as available in Australia if there is, or will be within a reasonable time, available for purchase in Australia, an edition of the book (whether hardcover, softcover or paperback) which comprises essentially the entirety of the work which is the subject of the copyright. The Committee does not suggest that such a statement be included in the legislation. It has said what it has simply to provide an indication of what it has in mind.

- (e) In relation to its second alternative recommendation, the Committee points out that the Act presently permits the importation of unlimited quantities of parallel imports (and also of pirated articles) provided the importation is not for one of the purposes prohibited by s. 37. Thus both individuals and libraries frequently import books from overseas.

notwithstanding that they are available here. It seems to the Committee that there is no reason why this practice should not be facilitated by enabling dealers, i.e. booksellers, to make the importation provided they do so on the basis of a written order first obtained from the customer. The Committee has taken into account that such a proposal, if implemented, may be abused. It cannot be said that abuse will not occur but, because of the substantial availability of the most sought after titles which there is in Australia, it does not think that the likelihood of abuse is great. The Committee considers that the ability of booksellers to import upon the written order of a customer is a necessary complement to its proposal that importation be permitted if a book is unavailable. The areas intended to be covered by its proposal are not identical, but there is an overlap between them. In cases where the question of availability was uncertain a relaxation of the sections which did not permit importation upon a written order might be no advantage to the customer.

- (f) Finally, because it will be the importer who must satisfy himself about availability or hold a written order for the book, it seems fair to place the onus of establishing the conditions of exemption which the Committee recommends on the importer rather than to require the copyright owner or his licensee to
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exclude them.

92. It remains to say something of libraries. What has been said in the previous paragraph has foreshadowed the Committee's conclusion in relation to libraries. The Committee recommends no change in the existing position whereby libraries - and, for that matter, others - may import for purposes other than those specified in s. 37. The Committee is persuaded by the submissions made on behalf of libraries by the Library Association of Australia and the Library Board of Western Australia that the present position operates satisfactorily and is in the public interest. The principal matter upon which the Committee relies for its conclusion is the public interest which there is in the Australian community having access to the greatest possible amount of information. It is the Committee's opinion that this public interest outweighs the public interest which there is in protecting copyright. It would be possible to qualify the existing provisions by permitting libraries only to import material which was established not to be available from licensed suppliers here. But the Committee is of opinion that such a modification would impose a substantial burden on libraries because they would have to ascertain what the availability of a particular work was in Australia before being able to order. One argument which was put in favour of applying ss. 37 and 38 to library purchases was that more money would be channeled into Australia. Figures supplied by the University of New South Wales Library

indicate the amount spent locally and the amount spent overseas. But it should be understood that much of the money which is spent initially in Australia nevertheless finds its way overseas. This is because local distributors account to their overseas associates for overseas books sold by them in Australia. It does not seem to the Committee that channeling the money to local distributors will have very much effect on the total amount of money sent out of Australia as the result of the purchase by all importers of overseas books. It will either go directly from the importer or, indirectly, through the local distributor. The Committee makes no recommendation that the sections be changed so that they accord with the provisions of the United Kingdom Act in this respect. If this recommendation be adopted, the present practice of libraries being able to "buy around" will remain unchanged.

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