



Intellectual Property Arrangements
Productivity Commission Issues Paper
October 2015

Submission from Hachette Australia
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INTRODUCTION

Hachette Australia is pleased to present its submission to the Productivity Commission's Inquiry into Australia's Intellectual Property Arrangements, despite the government's pre-emptive announcement that it has accepted the Harper Competition Policy Review's recommendation to remove the limited restrictions on the parallel importation of books.

Hachette Australia is an independently managed Australian subsidiary of Hachette UK, itself the global publishing house Hachette Livre, which is owned by French media group Lagardère. It is considered one of the 'big five' publishing companies along with Penguin Random House, Macmillan, HarperCollins and Simon & Schuster. Hachette Australia publishes a wide range of fiction, non-fiction, illustrated, classics and children's books. It is a 'trade' publisher as opposed to an educational (schools and tertiary) publisher.

Hachette Australia has seen the submissions of Copyright Agency | Viscopy, the Australian Copyright Council and the Australian Publishers Association in draft form, and supports each of those submissions. Our submission supports our contention that a copyright framework is central to the success of the Australian publishing industry and that, far from '*impeding further innovation, competition, investment and access to goods and services*,' the existing copyright, IP protection and parallel importation framework is the foundation and basis for an innovative and creative Australian publishing industry.

Publishing is an industry built and reliant upon '*creations of the mind*' and is therefore a core copyright industry. In our industry, IP is wedded to territorial copyright in an intricate structure designed to protect the rights of authors, creators and publishers. Exclusivity is an essential

component of copyright. Any undermining of that exclusivity or any watering down of copyright in Australia would reduce investment in Australia and in its authors, booksellers and printers.

Both parallel importation restrictions and a clearly defined set of exceptions (including the current fair dealing and statutory licence provisions) protect our ability to innovate, our authors' ability to create and give us the '*freedom to build on existing innovation.*' Insufficient IP protection stifles innovation by allowing free-riding conduct that directly and negatively impacts creators.

In his address to the opening of the Australian Digital Alliance Copyright Reform Forum in February 2014,¹ the Attorney General (and then Minister for the Arts), Senator George Brandis, quoted Thomas Macaulay, the famed historian and Whig politician, from his 1841 address to the House of Commons on the great subject of copyright. Macaulay said:

'It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated; and the least objectionable way of remunerating them is by means of copyright.'

Senator Brandis then went on to point out that, according to a 2012 report by PricewaterhouseCoopers, (PwC)² the Australian creative industries generated 6.6% of gross domestic product and accounted for 8% of employment in the national workforce. A 2015 update of that report by PwC found that, in the most recent year for which data is available (2013–2014) Australian copyright industries were the fourth biggest industry, generated economic value of \$111.4 billion, the equivalent of 7.1% of GDP (greater than the health care and manufacturing sectors) and constituted 8.7% (over 1 million people) of the national

¹ Available at

<https://www.attorneygeneral.gov.au/Speeches/Pages/2014/First%20Quarter%202014/14February2014-openingoftheAustralianDigitalAllianceForum.aspx>.

² PricewaterhouseCoopers, *The Economic Contribution of Australia's Copyright Industries 1996–97–2010–11* (2012), prepared for Australian Copyright Council, at 4; referred to in the Australian Law Reform Commission report *Copyright and the Digital Economy* (DP 79) at para 3.21.

workforce. In addition, Australian copyright industries generated \$4.8 billion in exports. The report concludes by stating that, *'Australia's copyright industries continue to be a significant contributor to the Australian economy and our current and future national prosperity.'*

The Australian book sector is estimated to generate over \$2 billion annually; returns in GST alone amount to \$75 million.³ It employs over 15,000 people directly and receives virtually no government support other than approximately 4% of the Australia Council's funds (\$6-9 million per year). It is also, we contend, of immense cultural value to this country, ensuring a distinctive Australian voice.

The Australian film industry, by contrast, took \$818 million in total box office in 2005 and received \$160 million in direct government funding in the year 2006-07.⁴

Hachette Australia believes that copyright, including the current territorial copyright laws, is crucial to the continued success of our industry – publishers, authors, illustrators, booksellers, distributors and printers – and to our continuing investment in creativity and innovation. As Hachette Australia relies on new product for 71% of its turnover each year, we are forced to reinvent ourselves continually. Publishers are by nature and necessity creative and innovative; strong copyright protection is essential to our continued prosperity and our continued ability to invest in that creativity and innovation.

THE ROLE OF A PUBLISHER

At Hachette Australia, our mission is to contribute to the development and health of Australian culture through the power of the written word. As publishers we acquire the IP of a creator (author and illustrator) usually under an exclusive licence, secured by an advance against royalty payments, and we then take the full financial risk of publishing the book in all its forms – that is, estimating market demand, editing, designing and printing, marketing, selling and

³ Extrapolated from data in Neilsen and Thorpe Bowker reports.

⁴ Australian Government Department of Communications, Information Technology & the Arts, *Review of the Australian Government Film Funding Support: Issues Paper*, July 2006, p. 15.

distributing the book in print and digital formats to markets both in Australia and overseas, managing the ongoing supply of the book to market and seeking out licensing opportunities.

Importantly, the risk in publishing local titles (books by Australian authors originated by local publishers) is the same as that of a distributed book (a book published by an international publisher and distributed within Australia), in that a quantity for the market has to be estimated, and that quantity (albeit without the cost of unearned advances, editing and design) forms the basis for a print run, which is then also sold on sale or return.⁵ Whether a book is acquired locally or distributed locally, in print or digital form, there are a large number of risks and sunk costs that cannot be avoided.

No description of the role of a publisher should exclude the commitment to growing the careers of its authors, and it can be many years, and often many books, before an author 'breaks out' to the extent that he or she, along with the publisher, may enjoy a return on investment. As part of this process we provide editorial support to Australian authors to ensure the best possible book is enjoyed by Australian readers. Our role is to identify, develop and publish the best writers and illustrators and work with them to both promote and sell their books to the broadest possible reading audience and to seek out licensing opportunities (including film and television deals and translations into as many languages as possible).

Hachette Australia also invests in and supports other creative organisations to ensure the literary future of Australia. These include:

- The Queensland Writers Centre
- The Emerging Writers' Festival
- The Book Design Awards
- The Indigenous Literacy Foundation
- The Sydney Story Factory
- The Richell Prize for Emerging Writers
- The Australian Book Industry Awards

⁵ 'Sale or return' are the usual trade terms on which a bookseller will buy stock, and is a system under which any stock not sold is returned to the publisher. This means that the publisher carries a much higher risk in its relationships with retailers than most manufacturers – a risk that directly translates to a heightened consciousness that the publisher must focus on producing what will sell in the market and what the market wants.

This represents an annual spend of some \$60,000 in cash contributions alone.

Additionally, we invest in innovation, including in trade paperbacks, which are now the preferred print format of Australian readers; digitisation to ebooks (Hachette has digitised a back catalogue of 35,000 books); and the introduction of low recommended retail price (RRP) A+ formats, digital Apps and digital content hubs.

The issues paper rightly suggests that *'The internet allows creators to market and sell their works to consumers directly, both in Australia and overseas, reducing the need for (and returns to) intermediaries.'* It is important to note, however, that so far self-publishing has only been successful⁶ in a limited number of genres: those with well-defined and active digital communities – romance and, to a lesser extent, science fiction and fantasy. The channels to market for self-published authors are limited to four global tech companies – Amazon Kindle, Google Play, Apple iBooks and Kobo – and new terms of trade in place from Amazon in particular have dramatically reduced self-published author incomes. It is also important to note that many successful self-published authors seek traditional publishing deals because they lack the skills and resources to leverage effective distribution of their book, including in different languages, in different markets and in different forms (including as film or television productions).

As a result, publishers retain a vital and ongoing role in ensuring the publication of a rich and diverse range of books.

THE ROLE OF COPYRIGHT LAW

Whether or not the current intellectual property arrangements in respect of copyright are working as intended can only be measured against the purposes behind the current legislation – the *Copyright Act 1968* (Cth) ('the Act').

Those purposes are clearly set out in the report of the Spicer Committee:⁷

⁶ Success in this context being defined as generating enough income to incentivise an author to continue writing other than as a hobby.

⁷ *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* at para 13.

‘The primary end of the law on this subject is to give to the author of a creative work his [sic] just reward for the benefit he [sic] has bestowed on the community and also to encourage the making of further creative works.’

In other words, the core purpose of copyright is to encourage innovation, and it does this by providing both economic incentives and rewards to authors and to people such as publishers who work in tandem with authors.

However, for people involved in the publishing industry in Australia, copyright incentivises and rewards more than the creation of literary works. It also provides the essential legal framework which then permits publishers to develop, distribute and license innovatively, with the value returned to the originators and the investors in that innovation. This in turn permits further innovation.

It is against this overarching purpose that provisions relating to parallel importation and provisions that provide exceptions to the rights of copyright owners should be measured.

<p>Purpose of territorial copyright and the current exceptions that allow parallel importing in some circumstances</p>

While copyright is an international form of protection, it has traditionally operated territorially so as to ensure that the local creator and copyright owner maintain maximum control over the distribution and licensing of their material.

In practice, this is a pro-innovation approach that means publishers are able to engage in the orderly publishing, distribution and licensing of materials, having regard to local conditions and markets, thus ensuring local innovations and efficiencies. This is particularly important in countries with small populations, such as Australia. The current laws have given Australia a vibrant publishing industry with the broadest variety of available books of any English-speaking country.

In the past, however, territorial copyright has been characterised by some as operating against the needs or interests of Australian consumers, and there have been various amendments to the Act that have wound back a copyright owner’s rights to control ‘grey’ imports. For example, section 44A in the Act was introduced to ensure that Australian

consumers would get ready and timely access to books available to consumers elsewhere in the world, by providing a balanced approach to the circumstances in which books might be imported from overseas without the permission of the local copyright owner.

As detailed below, Australian consumers now have ready access to all books from any part of the world. In part this results from digital publication, but (for hardcopy materials) it also results from the co-operative 'speed to market' initiative undertaken by the Australian Publishers Association and the Australia Booksellers Association.

If anything, the market failures that current section 44A was intended to address no longer apply, and Hachette Australia submits that these provisions could now safely be repealed.

Nonetheless, Hachette Australia is happy to support the current situation, noting both that full territorial rights are common practice and fully enforced in comparable countries (including the UK) and standard contracting practice in the US, and noting also that the current regime enables Australian publishers – who have to invest heavily in local marketing and support – to stay innovative, to invest profits from successful books back into the Australian market, and to further nurture and develop Australian writers and books.

In Senator Brandis' speech on copyright he also quoted Charles Dickens, who in 1842 travelled to America to advocate for copyright reform. He did so because his works were being legally pirated under US copyright law, which permitted publishers to reprint British books at will. The senator quotes Dickens as describing, *'the exquisite justice of never deriving sixpence from an enormous American sale of all my books.'*

Lifting parallel import restrictions would deprive Australian authors of the copyright protections afforded to authors in virtually all other major markets and allow foreign publishers to dump books in our market without Australian publishers being allowed to do the same in theirs. Far from protecting competition, the removal of a publisher's ability to control their territorial copyright would work to protect the foreign publishers with whom Australian publishers compete because they would continue to operate in other major English-language territories with the standard benefit of full territorial copyright.

As publishers, we buy the right to publish an author's work in Australia and search out how best to bring Australian authors to the world. If the Australian rights to an author's work no longer exist, what is it that we will actually be investing in? A change to territorial copyright

may lead to overstocked titles from English language publishers in the UK, US, India, Canada, South Africa and South East Asia being dumped in our market. It would therefore decrease Hachette Australia's ability to take risks in Australia, diminish authors' incomes and, potentially, destroy Australian publishing in the long term. Put simply, removing the existing parallel importation restrictions risks damaging our ability to find, nurture and support the Australian Charles Dickens of the future.

Issues Paper Questions around Territorial Copyright and Parallel Importation Restrictions

'Do existing restrictions on parallel imports still fulfil their intended goals in the digital era?'

As discussed above, Australian readers now have ready and wide access to books from both Australia and from anywhere in the world under provisions in the Copyright Act that still enable Australian publishers to invest with confidence in Australian authors and creators.

The existing restrictions also form the essential legal framework for the book industry's 'speed to market' initiative that pro-actively improves upon the process set out in the legislation and that has resulted in the efficient distribution of books in and into Australia.

Consequently, the existing restrictions on parallel importation still fulfil their intended goals – which relate entirely to distribution of physical books (which still make up the bulk of sales).

Insofar as the application of those restrictions in *'the digital era'* is concerned, Hachette Australia notes that the concept of parallel importation of ebooks has no application other than when an ebook is imported for commercial distribution in a physical medium (such as a CD or USB). This is, however, a mode of distribution that has simply not taken off.

Rather, the business model for distributing ebooks is by way of download from a website (for example, from Amazon, Apple and other online distributors) or by way of digital delivery via email (as is necessary with digital reading devices such as Kindle).

To the extent that other submissions may suggest that Australian consumers be permitted to buy from overseas digital retailers who otherwise are not authorised to sell into Australia, Hachette Australia makes the following brief comments.

As with copyright rights generally, licensing of digital rights for ebooks occurs on a country-by-country basis, and online retailers in other jurisdictions are licensed by publishers only to sell to those countries for which the publisher has rights (which in many cases, will reflect those countries in which third-party rights – such as in illustrations, cover art and quotes – have been cleared).

Such territorial licensing is backed up by the metadata included in each ebook. As a result, any overseas retailer is not permitted to alter metadata to sell copies into the Australian market – and in the unlikely event that they did, given roughly 20% of trade consumer sales are now digital, authors and publishers stand to lose 20% of their income from Australian sales.⁸

In addition, were a retailer in another country to sell to consumers outside their licensed territory, then they would (potentially) be both in breach of their contractual obligations and authorising an infringement of copyright.

Further, a consumer who successfully obtained in Australia an ebook for which the online retailer did not have Australian rights (including by using VPN technology to fool a retailer as to where he or she is located), may also be in breach of warranties concerning their location, may be infringing copyright by accessing a download or email that they are not authorised to receive, and would likely also lose – or not be able to rely on – consumer protection laws if there were a problem with the file they received (for example, if it failed to open or if it contained a virus).

Current intellectual property arrangements for copyright: effective, efficient, adaptable and accountable

In the following comments, Hachette Australia particularly notes the four criteria adopted by the Commission to assess whether intellectual property arrangements are *'fit for purpose'*.

⁸ In this respect, the Commission should note that the same publisher does not always control the rights throughout the world and that even where they do, the economics of international book sales are such that the amount an Australian publisher is able to pay to an Australian author is always lower for overseas sales through third parties than it is for sales in Australia by that publisher. Please see Annexure A for a worked example.

Changes to the book industry in the digital era illustrate that the current IP system is ADAPTIVE

The digital era has prompted many changes in the book industry, including:

- The establishment and growth of online booksellers, first in print books then in ebooks. Offshore retailers including Amazon and The Book Depository sell print books directly to Australian consumers. Digital sales are dominated by major global tech companies including Amazon Kindle, Google Play, Apple iBooks and Kobo. The strongest local print and digital online booksellers are Booktopia and Angus & Robertson Bookworld, both owned by Booktopia.
- Improvements in technology have led to more efficient printing and digitising processes, enabling books to be brought to market more quickly.
- Social media and the internet have enabled publishers and authors to connect more directly with and market more effectively to readers.

The current provisions under the current parallel importation regime support that adaptability by providing a level of competition that addresses any market failures (including failure to publish in Australia or any failure to keep material available in the Australian market).

The current provisions also ensure that individual consumers continue to have the freedom to import print books from the retailer of their choice, including offshore retailers, for their own use (including from suppliers such as Amazon and The Book Depository and including by asking Australian retailers to import a single copy for them). At the same time, the current provisions provide the certainty that Australian publishers need to invest in the Australian market (including Australian distribution networks) by protecting against mass-imports into that market while a title is available from the Australian copyright owner.

There are therefore both sound economic and cultural reasons for maintaining the current frameworks. As Warwick Rothnie (a Melbourne-based barrister, academic and contributing author to leading intellectual property texts) has noted:

'If you want people to write Australian books, the publishers are going to have to earn most of their income back from Australia, or that's where the publishers expect they will have to earn most of their income back. Now I raise that because that's one of the ramifications that might flow from [the recommendation of the IT Pricing Inquiry to allow unrestricted parallel importation of physical goods such as books].'⁹

The pro-innovation effects of the current parallel importation system illustrate that it is EFFECTIVE

'Do IP rights encourage genuinely innovative and creative output that would not have otherwise occurred? Do IP rights avoid rewarding innovation that would have occurred anyway?'

Hachette Australia submits that the current provisions have delivered on their intended goals, providing choice, accessibility, efficiency and innovation to Australian consumers from publishers who continue to invest in:

- (a) creativity in the form of new titles, around 71% of our annual turnover (including in niche publications and in the development of Australian talent); and
- (b) innovation in the form of new formats (including the trade paperbacks introduced some years ago as a cheaper alternative to UK and US hardbacks and now preferred by Australian readers, the new lower priced A+ format for backlist, exclusive and limited editions, boxsets); new ways of enriching their titles (such as ebooks enhanced with links and with audio and visual material); and innovations around packaging (including Australian designed covers which are more appropriate and relevant for the Australian reader).

Hachette Australia is unaware of how any other approach (including direct subsidy of publishers by government) could possibly achieve the same objective. Writing may happen

without financial reward, but without financial reward and innovation in distribution, marketing, sales and publicity, it is likely that that new writing will not be effectively or efficiently marketed, distributed or licensed and that, subsequently, such new writing would largely go unread, with Australian cultural life poorer as a result.

⁹ 'At what Cost? The IT Pricing Inquiry and Copyright', (2013) 31 *Copyr Rpt* 8.

The pro-competitive effects on speed to market of the current parallel importation system also illustrate that it is EFFECTIVE

As noted, the current parallel importation provisions were introduced at a time when there were concerns that Australian readers were unable to access – or to access in a timely manner – titles available overseas.

Hachette Australia submits that the current parallel importation provisions in section 44A of the Copyright Act – together with industry initiatives such as the ‘speed to market’ initiative and the Book Industry Strategy Group comprised of publishers, printers, librarians and authors – have ensured that Australian readers are able to access titles available overseas in a timely manner.

This is because:

- (a) copyright owners who do not publish a title in Australia within 30 days of overseas publication (with the industry ‘speed to market’ initiative reducing that further to 14 days) lose their territorial copyright, with the consequence that anyone can thereafter freely import that title; and
- (b) copyright owners who have established territorial copyright but fail to maintain adequate stock in Australia (or fill orders within 90 days, with the industry ‘speed to market’ initiative reducing that further to 14 days) lose their territorial copyright for that order.

Hachette Australia publishes international ebooks on the same day as the first overseas publication. In addition, we work tirelessly to ensure that as many print titles as possible are published not just within 30 or even 14 days of overseas publication, but in line with exact global publication dates.

To ensure Hachette Australia supplies reorders to market as quickly as possible, Hachette holds stocks locally for over 15,500 different titles in our fully owned distribution centre. This large stockholding – which represents a substantial financial investment and risk to Hachette Australia – allows Australian retailers to compete with offshore online retailers in terms of speed of supply.

Hachette Australia also draws the Commission's attention to the fact that the current provisions affect only retailers – they do not affect consumers, who already have the freedom to import books from overseas for their own use (including from suppliers such as Amazon and The Book Depository).

The pro-competitive effects on price of the current parallel importation system illustrate that it is EFFICIENT

'Are there sufficient safeguards to ensure that IP rights do not lead to unduly restrictive market power?'

Whatever the position may be in relation to other copyright products, insofar as books are concerned, the relative price differences between books produced by Australian publishers and books available overseas do not provide any grounds for concluding that publishers are price-gouging or that their pricing policies are in any way anti-competitive.

Any such differences in prices are understandable – and, Hachette Australia submits, acceptable – by reference to factors such as:

- (a) GST is currently only applied to print and digital books sold locally in Australia (with GST not to be collected from international retailers until 1 July 2017);
- (b) the general costs of doing business in a jurisdiction such as Australia with a smaller potential customer base spread over a large geographical area (once marketing, distribution and customer support services are taken into account);¹⁰
- (c) international 'free post' arrangements that, we understand, mean that an Australian publisher or retailer posting a book from one side of Sydney to the other pays on average \$8.44 while The Book Depository pays only 70 cents to send the same book from the United Kingdom; and
- (d) the costs of maintaining a presence in Australia as an Australian publisher (with the consequent national cultural benefits) rather than as merely a distributor principally of books originating overseas.

¹⁰ See similar costs referred to in the Canadian study *Role of the Book Importation Regulations in Canada's Market for Books* by Canadian Heritage (2012).

Hachette Australia includes as Annexure B a table showing the Average Selling Price ('ASP') of the top 20 best-selling Hachette Australia titles on Nielsen BookScan (October 2015 YTD). These prices are compared with prices available on Amazon.com. Once the GST anomaly and delivery costs are taken into account, the Commission will note that the Australian book is, by reference to ASP, generally available to an Australian consumer from an Australian retailer at a lower price than when that same consumer orders the same book online from overseas.

Hachette Australia's further research confirms that the ASP on books has been falling over the last 10 years as the industry finds more efficiencies, including through achieving cheaper local printing prices due to improved technologies available at Australian printing companies – such as Griffin Press and the OPUS Printing Group – and the high level of domestic and international competition under the current market structure.

Hachette has also invested heavily in the digitisation of all of its books, with the estimated biggest English language catalogue of any publisher available as ebooks, over 35,000 titles. There is little industry-wide data on the pricing of ebooks, but Hachette Australia confirms that ebooks are priced to allow new readers to discover books at competitive prices. For example, John Grisham's *Rogue Lawyer*, as a trade paperback, is published with a recommended retail price of \$32.99. The ASP for this print edition, however, is \$19.52 and the ebook is available for \$16.99.

This clearly demonstrates how the current market, within the current legislative framework, is delivering in competition terms, including by reference to criteria such as equity and access.

The pro-competitive effects on diversity in publishing of the current parallel importation system illustrate that it is EFFICIENT

Australian readers reap the benefits not only of a diverse book retailing market, but of a diverse publishing industry. A diversity in publishing delivers competition in terms of pricing, retailer trading terms and, perhaps most significantly, broad investment in a large range of books for every reader, from commercial mainstream fiction to specialist niche titles.

LIKELY OUTCOME OF THE REMOVAL OF PARALLEL IMPORTATION RESTRICTIONS:

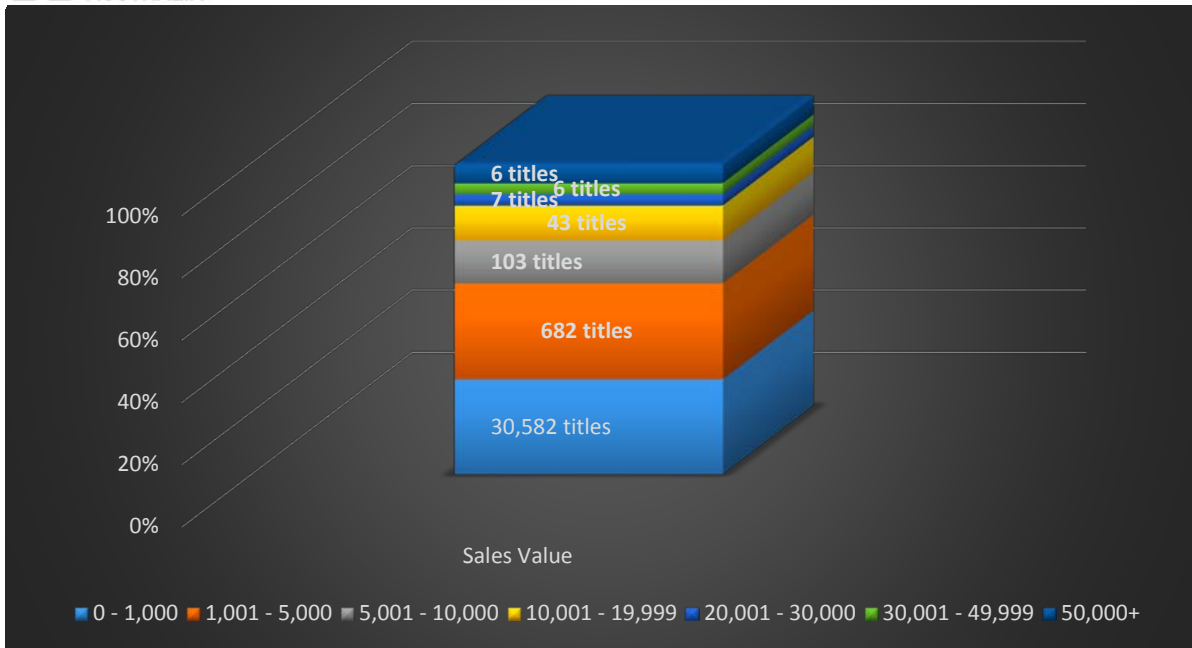
REDUCED EFFICIENCY AND ACCESSIBILITY

Fewer Australian bookshops will lead to fewer Australian books - less EFFECTIVE and less EFFICIENT

Hachette Australia's view is that, in light of economies of scale, smaller Australian retailers will probably only risk buying the top 10 to 20 Hachette Australia books a year from overseas suppliers. This is because purchase from overseas is highly likely only to be possible on a 'firm sale' basis, rather than on the 'sale or return' basis that operates between most Australian publishers and bookstores.

The top 10 to 20 Hachette Australia books are the cream of its lists, and account for up to 19% of its turnover per year.¹¹ Losing 19% of turnover a year from the sales of our top titles because large retailers and discount chains can bring in cheap stock from overseas would have a substantial impact on Hachette Australia's business, particularly insofar as the range of titles it supports.

¹¹ Source: Hachette Australia figures: in 2014, the top 10 titles delivered 13% of its net sales turnover.



Australian retailers buying books from overseas on a firm sale basis would, in turn, force Hachette Australia to also move to a firm-sale business model. This is because, in an open market, the larger bookselling concerns would quite likely place an initial firm sale order from an overseas wholesaler or publisher and then draw on local ‘sale or return’ stock to top up.

The Commission should note that, currently, some 18% of the books that Hachette distributes to Australian retailers are returned on a ‘sale or return’ basis. With initial orders of our biggest commercial titles going offshore, without moving to firm sale we could expect our returns to increase to commercially unviable levels. In addition, the uncertainty for publishers around where retailers will purchase their books markedly increases the risk of understocks as publishers reduce stock holdings of commercially riskier titles and untried authors. This would be a bad result for all parties: publishers, distributors, printers, booksellers, authors and consumers.

A ‘sale or return’ basis allows booksellers to take risks on new writers – and particularly on new Australian writers with whom their readers may not be familiar. Moving to a ‘firm sale’ basis would inevitably undermine Hachette Australia’s ability to invest in such writers, as the booksellers that remain will not have the confidence to stock new books in discoverable numbers. Instead, only the largest Australian supermarkets and discount chains – with warehousing space – would be able to afford to bring in a broad range of commercial quantities of books from overseas. Independent and independently owned franchise booksellers would

therefore gain no real commercial advantage with a move to parallel imports, particularly once one also takes into account both the economies of scale of the largest retailers (in relation to both purchasing and transporting costs), and also that large retailers with large turnover are necessarily able to sell at margins that are unsustainable for smaller players.

Inevitably, Hachette Australia submits, the result will be a closure of more independent and franchise bookstores. As these stores are the real champions of Australian writing, Australia will see fewer successful Australian writers and books. So – less variety, less choice and therefore less competition.

By way of a further potential scenario, given that books are not always high on the agenda for the discount department stores (DDS; or Big W, Kmart and Target) a move to firm sale may see the DDS either massively reduce their range of titles on offer or cancel their book offering altogether. At the moment, in some Australian towns, the local DDS is the only source of books for readers who do not shop online.

Overall, we believe, there will be fewer Australian bookstores and fewer other Australian book retailers selling books in an open market, and therefore a less diverse range of books will be accessible to Australian book consumers.

With fewer options for Australian readers to source a wide and varied selection of print books from Australian retailers, where new Australian books and authors are available, readers will be forced to look for both ebooks and print books from offshore online retailers.

However, Hachette Australia has grave concerns over the ability (or willingness) of these online offshore retailers to meet Australian readers' needs.

First, offshore online retailers will not necessarily effectively merchandise or promote Australian writers and books.

The major sellers of ebooks in the Australian market are four of the big international tech companies:

1. Amazon Kindle;
2. Apple iBooks;

3. Kobo; and
4. Google Play.

As ebook sales growth has plateaued, Hachette Australia has seen less investment from the big international tech companies in the merchandising and marketing of Australian books for the Australian market. In fact, for three of the four big players, the key decision-makers are not based in Australia:

- Amazon Kindle employ an American merchandiser based in London;
- Google Play are in the process of allocating a US-based American merchandiser;
- Kobo employ a Canadian merchandiser.

The lack of merchandising and marketing of Australian print books is also evident on the biggest of the offshore online retailers, Amazon in particular.

Second, offshore online retailers will not be able to supply successful Australian books in a timely manner.

Successful Australian writers often achieve separate UK and US territorial copyright deals and these territorial rights are strictly enforced. US and UK publishers do not consider Australian publication dates when buying rights, but can exercise their territorial rights even if they choose to publish the book elsewhere months or even years later.

Case Study 1: *Lost & Found* by Brooke Davis

Lost & Found was the most successful debut Australian fiction launch of 2014.

Hachette Australia supported Brooke's July 2014 publication with a major marketing campaign and publicity tour, including a 36-bookshop event tour of the East and West Coasts. If those bookshops were no longer around, Australian readers may have been forced to look to Amazon to order their print copies of the book.

The Australian edition has been available since June 2014.¹² The UK and US editions were not, however, available until the end of January 2015,¹³ and as a result of strong territorial protection in the United States (through contractual restrictions) and the United Kingdom (through legislation), Hachette Australia is not able to sell the Australian print edition through Amazon. This means that Australian readers were unable to purchase copies of *Lost & Found* through Amazon until January 2015. The UK has full territorial protection and Amazon US will not take data feeds from Australian publishers, only US publishers.

Third, offshore retailers will not be able to supply many Australian books at all or not in formats that Australian readers may want.

Case Study 2: Julie Goodwin's 20/20 Meals by Julie Goodwin

In Australia, this book is available in hardcover.¹⁴ On Amazon, however, it is available in the US only as a Kindle edition.¹⁵

Offshore online retailers have expressed little interest in setting up full trading relationships for print book sales with Australian publishers. As a result, many Australian authors with little overseas appeal will not be available from the major offshore online retailer site (Amazon), let alone be merchandised or promoted.

¹² <http://www.booktopia.com.au/lost-found-brooke-davis/prod9780733632754.html>

¹³ See http://www.amazon.co.uk/Lost-Found-Brooke-Davis/dp/0091958903/ref=sr_1_1_bnp_1_har?ie=UTF8&qid=1412924122&sr=8-1&keywords=Lost+Found+Brooke+Davis

http://www.amazon.com/Lost-Found-Brooke-Davis/dp/0525954686/ref=sr_1_2?ie=UTF8&qid=1412924260&sr=8-2&keywords=Lost+Found+Brooke+Davis

¹⁴ <http://www.booktopia.com.au/julie-goodwin-s-20-20-meals-julie-goodwin/prod9780733631986.html>

¹⁵ http://www.amazon.com/s/ref=nb_sb_ss_c_0_13?url=search-alias%3Dstripbooks&field-keywords=julie%20goodwin&srefix=Julie+Goodwin%2Caps%2C167

Reduced range of Australian and international titles if the current restrictions are removed – Less EFFECTIVE

Hachette Australia envisages that, if the current restrictions are removed, it will need to reduce its range of titles.

With retailers able to turn to offshore suppliers to supply the bigger selling titles, publishers will not be able to effectively target or plan print runs. This in turn would lead to more conservative stock holding and the potential for patchy and slow supply for any book that is in high demand. Consequently, Hachette Australia anticipates that, outside of offshore online retailers for international titles, Australian readers will have access to fewer titles, particularly Australian titles, as the loss of 19% of our income from top selling titles will mean that Hachette Australia will not be able to justify holding stock of slower selling titles.

Currently, Hachette Australia stocks approximately 15,667 different books. Stock figures for these titles as at 30 October 2015 are set out in the following table:

	Number of titles
Over 10,000 copies	28
Between 5000 and 10,000 copies	42
Between 1000 and 5000 copies	512
Between 500 and 1000 copies	394
Between 200 and 500 copies	909
Between 50 and 200 copies	2838
Below 50 copies	10,944
TOTAL number of titles	15,667

(Source: Hachette Australia Vista Stock, 30 October 2015)

In a completely open market, however, it is likely that Hachette Australia will not be able to hold stock for titles that have combined sales of 1000 or fewer copies. This is because the costs in light of margins would make stocking such titles uneconomic. Applying this threshold, the number of titles that Hachette Australia would likely stock following removal of the current

parallel importation restrictions would fall to 582 – or only 3.7% of its current stock holding. As a result, quick supply to Australian booksellers of ‘the long tail’ will cease and the choice available, locally, for Australian readers will become much more limited.

Reduced ongoing ability for publishers to invest in new Australian writers – Less EFFECTIVE

Australian adults and children want to read, and identify with, their own stories and they want their stories to be created by Australian authors and illustrators.

Analysis of the Nielsen BookScan 2014 Christmas Top 100 bestsellers highlights this demand for Australian stories:

Top 100 (for each category)

	Australian authors
All titles	29
Adult fiction	30
Non-fiction	38
Children's	23

Hachette Australia submits that it is culturally significant for readers to be able to connect with Australian writing, in all its forms, through locally authored books. As well as being immediately relevant and often setting the news agenda, many of these books continue to sell for many years, appearing on school reading lists, ensuring that younger generations also remain connected with Australian culture and – more importantly in terms of the broad goals of competition – that there is continuing economic growth over the next 20 and more years.

Hachette Australia’s view is that the removal of restrictions to parallel importation will lead to less investment in Australian writing by Australian publishers. This will, in turn, lead to reduced accessibility and discoverability of Australian writers and Australian stories by Australian readers, with the overall outcome being that Australian readers will not be able to read as many Australian stories as they are currently able to read.

Reduced income for established Australian writers – Less EFFECTIVE and less EFFICIENT

Even where Australian writers are successful in other markets, it is likely that – with the removal of the current parallel importation restrictions – retailers will buy up US and UK editions to import back into Australia, including some at remainder (or clearance) prices.

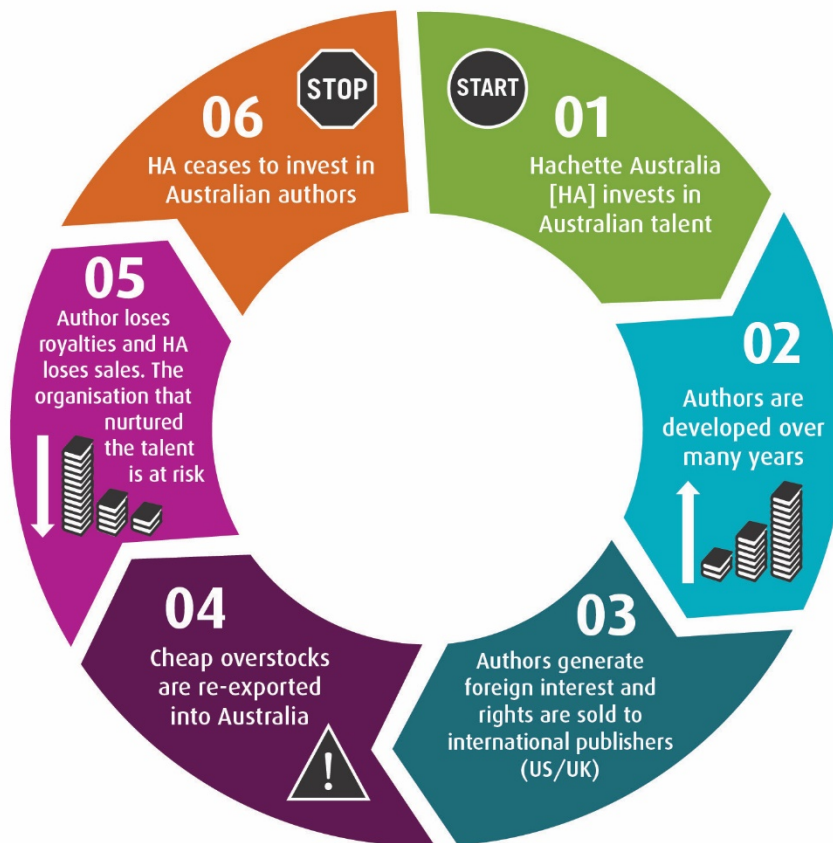
As the relevant publishers in the United Kingdom and United States would deem these imports as an export sale they would only attract an ‘export’ author royalty rate, even though the destination of the book is the Australian author’s home market. By contrast, the ‘local’ Australian-published edition would attract a considerably higher ‘home’ royalty. Essentially, for every copy of the locally published book that was replaced by an imported version, Australian authors would be receiving a considerably smaller cut of a lower purchase price, particularly if the imported copies were remainders, which would generate no income at all for authors.

This reduction in royalties will be compounded by the lowering of advances due to the increased risk to Australian publishers of reduced sales due to offshore imports. It goes back to the central question: If the Australian rights to an author’s work no longer exist, what is it that publishers will actually be investing in?

Sustainable writing careers for Australian writers no longer possible – Less EFFECTIVE and less EFFICIENT

Consequently, a sustainable writing career for many new and even established Australian writers will simply no longer be possible. According to the Australian Authors Industry Brief of October 2015, the average annual income derived from practising as an author in Australia is \$12,900 and it is just not feasible for this to be reduced any further and retain a rich, diverse and vibrant culture of writing in this country.

The following illustrates the vicious cycle that would ensue were the remaining parallel importation restrictions removed:



This scenario was played out in full for Hachette in New Zealand. The 1998 removal of parallel import restrictions in the New Zealand market has had a severe impact on the ability to publish and sell books into that market.

In 1998, approximately 32% of sales through the New Zealand book trade were through the natural champions of new New Zealand writers – independent booksellers. By way of contrast, Hachette Australia’s New Zealand sales figures for October 2015 ‘year to date’ show that independent booksellers now make up only 10% of the market (bearing in mind that overall market figures do not include what is being sold direct to NZ readers by offshore online retailers).

The reduction in local NZ book retailers has led to less return on local publishing with Hachette deciding to close its local publishing program in 2013, meaning the end of Hachette publishing New Zealand authors for the New Zealand market.

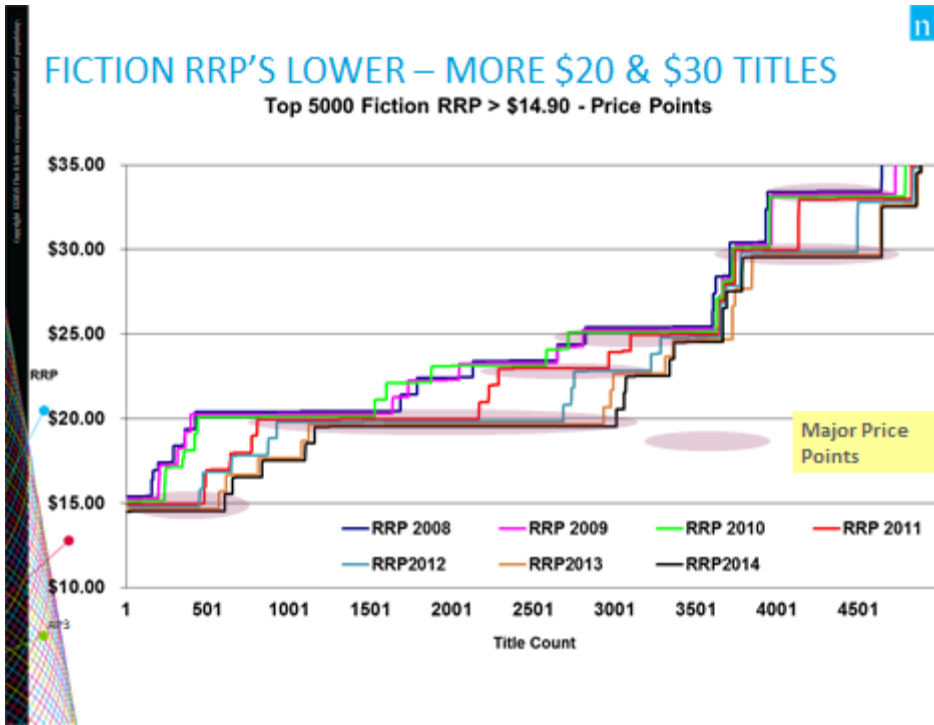
Prices will not necessarily decrease; in fact, in many cases they will increase – leading to intellectual property arrangements that are less EFFICIENT than is currently the case

Hachette Australia submits that moving to an open market will not guarantee that prices will drop when assessed on an average basis.

With increased pressures on margins as a result of their inability to capitalise on their best-selling works, publishers will need to increase prices on the less commercially successful books they continue to publish to safeguard a diverse reading culture. In other words, the cross-subsidisation that currently occurs on such titles will become unsustainable. Also, as discussed below, the effect of a repeal of the remaining parallel importation restrictions would likely lead to fewer independent and independently owned franchise bookshops, leaving the market to be dominated by offshore online retailers and the Australian discount department stores ('DDS') – Big W, Kmart and Target. The DDS are inevitably best placed to take advantage of the economies of scale available from bulk-buying and bulk transport of books from overseas (including through the purchase of remaindered stock).

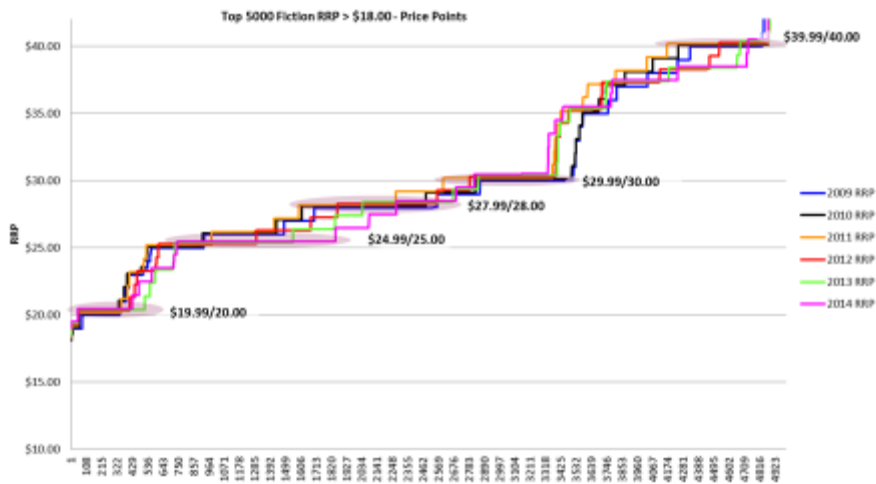
In such circumstances, there is reason to believe that, with less competition, prices would inevitably increase. This can be clearly seen in New Zealand, where industry-led downward pressure on price has not been as great as in Australia in recent years. This can be illustrated when we compare recent price drops on fiction in Australia versus fiction in New Zealand. Fiction best illustrates the extent of price drops as there are only two major formats and therefore two key price points.

The following graph illustrates that, in Australia, there has been a significant move from \$35.00 and \$32.99 trade paperbacks to \$29.99, and a move from \$24.99 and \$22.99 paperbacks to \$19.99.



In New Zealand, there has been a reduction in prices in the same period, but this price reduction has not been as great as we have seen in Australia.

New Zealand Fiction RRP's Lower – more \$24.99 titles



Source: Nielsen BookScan

**Reduced access to international and Australian authors for Australian readers –
Less EFFICIENT**

Publishers promote their authors through marketing, media interviews and author events in bookshops or at writers' festivals. Hachette Australia will inevitably have less turnover and therefore less money to spend on promoting, marketing and publicising new titles, international and local alike. We will also have less money for investing in author tours, book prizes and writers' festivals, which garner media attention and raise the profiles of many new and upcoming Australian authors. And why would a publisher spend time and revenue on promoting international titles imported into the market from our US competitors if they won't see any return on that investment?

Likely industry job losses – Less EFFECTIVE and Less EFFICIENT

With the removal of parallel importation restrictions, there will inevitably be fewer opportunities to sell Australian books by Australian authors to Australian readers. In such a climate, Hachette Australia would have no choice but to reduce its investment in Australian publishing, thereby further decreasing competition.

As noted above, Hachette Australia calculates that it will lose approximately 19% of its annual turnover if retail supply of its top 20 print books goes to offshore suppliers, which means operating at a loss. In addition, another 20% of turnover will be lost due to the running down of the local publishing program, and a further 20% of turnover will be lost if all ebooks sales go to international competitors. Even the loss of only the initial 19% would result in major changes at Hachette Australia. A 59% reduction in annual turnover would make the current structure of Hachette Australia financially untenable. The very likely result would be a loss of around 65% of staff at Hachette Australia and a further 48% of staff at Alliance Distribution Services (Hachette Australia's wholly owned distribution hub):

- the end of, or at least the dramatic reduction in, Hachette Australia's Australian publishing program (with consequent loss of 16 jobs in the Australian Publishing Division);
- the loss of around 25 jobs in Sales, Marketing, Product and Publicity;
- the loss of around 6 jobs in Finance and Administration;
- 108 permanent employees at Griffin Press (together with up to another 20 contract staff); and

- reduced stock holding of books in Alliance Distribution Services, with consequent loss of around 30 jobs.

Hachette Australia further notes that without being able to confidently hold stock of many existing titles there would be a much greater reliance on airfreighting books from UK publishing partners (in order to meet client expectations of turnaround times). The supply of Hachette Australia's books is currently split at 61% locally printed; 34% sea freight; and just 5% via airfreight. Airfreighting books is the least economical and easily the most environmentally damaging of all freight. We estimate that this component could climb to closer to 15%.

If (as is likely) other Australian publishers suffer similar reduced turnover, it is likely that similar job losses will be experienced across Australia. Potentially, the overall financial damage caused by creating an open market in Australia for books might be managed to a certain extent by mergers, but any such mergers would not stop job losses, and would lessen competition and innovation further.

Based on what Hachette Australia has directly seen in New Zealand, the share of Australian independent booksellers in the market will halve – this would result in the closure of approximately 100 stores and job losses of around 600 people. It is likely that we will see similar closures for the independently owned Dymocks and Collins franchise stores, with the loss of approximately 60 stores and job losses of around 360.

Job losses are also likely in the printing industry. For example, Hachette Australia understands that, currently, 59% of books Griffin Press produce are Australian books for Australian publishers, with the remaining 41% of its Australian production from international subsidiaries. Hachette Australia understands from Griffin that the 41% of the volume they produce for international subsidiaries is dependent on the 59% Australian publishers actually existing.

In the printing industry, then, the jobs at risk would include:

- (e) 8 staff at Die Cutting and Creasing.

There are likely to be similar losses at the other major Australian printer, OPUS.

Hachette Australia further notes that the paper mill in Tasmania has 265 employees. While book paper isn't the key product of that mill, and is only a small part of their business there, it will doubtless also be affected by the flow-on effects of fewer books being printed in Australia.

In other words, the removal of the remaining parallel importation restrictions will have a disproportionately severe effect on small and medium-sized businesses within Australia without any commensurate public benefit through sufficiently lower prices. There would be permanent harm to the Australian economy with no long-term benefit to consumers, and Australia would be left with a publishing industry that is both less effective and less efficient than is currently the case. Australia would also have a copyright regime at odds with nearly all other territories around the world.

General Questions Raised in the Issues Paper around IP and Copyright Law

'Do IP rights provide rewards that are proportional to the effort to generate IP? What evidence is there to show this? How should effort be measured?'

Publishing is an extremely high risk industry with less than one in three Australian books on the Hachette Australia list breaking even or making a profit and, as mentioned earlier, with the average annual income derived from practising as an author in Australia being only \$12,900¹⁶

Publishers and authors are prepared to take those financial risks, but can only do so within a copyright framework that provides certainty and an appropriate level of incentives and rewards.

Any changes to copyright law that lead to the reduction in the incentives and rewards for authors and their publishers will inevitably lead to a decline in time invested by authors in the creation of new works and a decline in publisher investment in new writing and innovation.

¹⁶ *Australian Authors Industry Brief No. 1: Key Findings*. Jan Zwar, David Throsby, Thomas Longden, October 2015.

'What are the relative costs and returns to society for public, private and not-for-profit creators of IP? Are there any government programs or policies that prevent, raise or lower the costs of generating IP?'

The costs to Australian society of the current intellectual property arrangements are extremely low, with very little taxpayer funding going to the literary sector. Rather, development, distribution and other costs are borne by the creators and publishers themselves, who together deliver a robust and healthy literary landscape. In this context, returns to publishers and creators depend entirely on their supplying Australian society with the innovative materials that it wants, with no costs imposed on Australian society for those materials that fail to find a market.

This is entirely in line with the overarching purpose of copyright, as outlined in the first parts of this submission.

For the book industry, any 'cost' of such provisions is minimal – but in any event these are not necessarily matters for publishing companies and producers alone. It is a reasonable expectation of government that it provides a clear legal framework that is supportive of copyright owners. IP provisions are enabling of trade, in the way that a tax-funded road or port facility is also enabling. The cost of moving tradeable book IP around electronically is negligible, as is the cost of the IP provisions that protect and control this movement.

'Are IP rights too easy or hard to enforce in Australia, and if so, why? To what extent can Australian firms enforce their IP rights internationally? Does this differ across regions and/or countries? Which features of the current enforcement system work well, and which could be improved? Is the role expected of ISPs a practical option? Are there particular issues relating to IP enforcement that are different from the general community's ability to access Australia's justice system, and if so, what are they? What improvements could Australia adopt from overseas approaches?'

The rise of piracy in the digital age has been significant and there have been some changes to UK law which have addressed the changing digital landscape in terms of piracy. The EU Commission is also reviewing its approach to digital piracy, and it would be good for Australia to take on board how the UK and EU approach such issues.

Changes in UK law (section 97A of the Copyright, Designs and Patents Act 1998) now allow rights owners, through their trade bodies, to apply for a blocking order against the main UK ISPs (telecom companies, not search engines) to stop access within the UK to websites that host infringing content and force them to disable their customers' access to such sites. The owner has to show that they have tried repeatedly to get the pirate site to take down the infringing material and therefore the site is aware of the infringing material and is not doing anything. Proceedings under Section 97A are becoming more frequent. While a costly process, indications suggest that use of the infringing sites has been reduced by up to 75%.¹⁷

Hachette Australia appreciates that part of the copyright infrastructure available to Australian publishers now includes a similar provision (new section 115A of the Copyright Act).

At this stage, however, there is also a drive in the UK to get Google to delist websites which contain infringing content, but the potential legal costs involved have resulted in some hesitancy by IP holders. Governments therefore must further support copyright owners by ensuring that search engines play a bigger role in tackling infringements and piracy, and if they are not doing so voluntarily the law must be robust enough to force compliance without expensive legal action being necessary. Current safe harbour provisions in Australia are very narrow, and do not currently extend to search engines (only to ISPs).

The UK Digital Economy Act has also inspired a market-led solution: the Creative Content UK program, Get it Right from a Genuine Site – <https://www.getitrightfromagenuinesite.org/> So far, this program has been limited to an educational campaign in the media but in 2016 there will be notifications from ISPs to infringing subscribers on their networks. There are similar market-led initiatives in Australia with the Digital Content Guide website launched to enable consumers to find out where copyrighted material can be accessed.¹⁸

The existence of the UK Publishers' Association's independent online service to combat digital piracy, the Copyright Infringement Portal¹⁹, has made it very easy for publishers to issue

¹⁷ See <http://www.publishers.org.uk/policy-and-news/news-releases/2015/publishers-win-high-court-support-in-fight-against-infringement/>

¹⁸ See <http://digitalcontentguide.com.au>.

¹⁹ <http://www.publishers.org.uk/services-and-statistics/copyright-infringement-portal/>

takedown notices to infringers. However it is well known that they pop up elsewhere and actions taken for copyright breaches are more difficult and complex.

The Hachette Group in the UK subscribe to the anti-piracy service Mark Monitor. The principal weakness of commercial services is that there are major infringing sites which simply ignore notice-and-takedown instructions – particularly those located in overseas jurisdictions such as China. The fact that notice-and-takedown is only partially effective is a strong argument in favour of having domains removed from search or blocked at an ISP level. The UK Publishers' Association has coordinated legal action on behalf of its members to force ISPs to block infringing websites.²⁰

As illustrated above, when digital piracy is on the rise the costs – in time, effort and legal fees – to enforce copyright are prohibitive.

As part of the enforcement infrastructure that Hachette Australia would like to see provided by government, Hachette Australia submits that the Productivity Commission recommend that government investigate low cost enforcement processes such as those available via the UK's Intellectual Property Enterprise Court ('IPEC', formerly the Patents Court).²¹ IPEC has been shown to benefit small businesses in design and trademarks through the small claims process.

"To what extent does copyright encourage additional creative works, and does the current law remain "fit for purpose"? Does the "one size fits all" approach to copyright risk poorly targeting the creation of additional works the system is designed to incentivise? Are the protections afforded under copyright proportional to the efforts of creators? Are there options for a "graduated" approach to copyright that better targets the creation of additional works?"

²⁰ <http://www.publishers.org.uk/policy-and-news/pa-in-the-news/2015/high-court-orders-uk-isps-to-block-ebook-sites/>

²¹ See <https://www.gov.uk/guidance/take-a-case-to-the-intellectual-property-enterprise-court>

As previously mentioned, the average annual income derived from practising as an author in Australia is \$12,900 and less than 5% of authors earn the average annual income from their creative practice alone.²² Any changes to copyright law that reduce the ability of authors to invest time into creation, such as further reductions to this already low income, would have a negative impact on Australia's literary output.

Hachette believes that authors should be equally rewarded, regardless of what kind of book they create. There should be no distinction between the rewards for creating literary fiction versus cookbooks versus primary school textbooks, and therefore no graduated approach to copyright.

'Is licensing copyright-protected works too difficult and/or costly?'

Finding copyright holders can be a lengthy and intricate process, but, of course, the availability of internet searches has opened up much easier methods for tracking down original copyright holders. In general it is not costly to clear rights in copyright material. Many requests now fall under copyright exceptions and, as publishers are users as well as licensors of copyright material, fees are kept low and generally cover the costs of administration rather than being a major revenue stream.

'What role can/do copyright collecting agencies play in reducing transaction costs? How effective are new approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?'

The UK Copyright Hub is still very much a work in progress, with development focused around photography licensing in the first instance, with poetry to follow shortly. Its reach is increasing though and as a central resource for finding out about copyright law it is excellent. There are complexities in establishing the copyright situation in trade (non-educational) books as publishers rarely acquire an assignment of copyright, which means the rights they own can be incomplete or fragmented – e.g. limited by territory, by period of licence and by the variety of sources of material in their books (including photos, extracts, drawings, maps etc.). However,

²² Australian Authors Industry Brief No. 1: Key Findings. Jan Zwar, David Throsby, Thomas Longden, October 2015.

as publishers' own data improves, the Copyright Hub will be able to offer advice on how to clear usage in copyright material.

The UK industry feedback is that the Hub has great potential to solve the problems consumers face when trying to access content online and that the UK government is considering further funding for development. It has the potential to be a strong market-based, licensing-led solution.

Hachette Australia supports the initiatives of Copyright Agency | Viscopy to provide streamlined licensing solutions that will reduce turn-around times and transaction costs for permission requests. Those initiatives include Copyright Agency | Viscopy partnering with the UK Copyright Hub to use technology to reduce licensing frictions, particularly in high-volume, low-value transactions relating to the reuse and re-purposing of copyright material.

'Are moral rights necessary or do they duplicate protections already provided elsewhere (such as in prohibitions on misleading and deceptive conduct)?'

Hachette Australia supports the current moral rights regime, as providing an appropriate degree of support, recognition and respect to authors. These rights were introduced precisely because other laws did not – and do not – sufficiently provide that support, recognition and respect.

'What have been the impacts of recent changes to Australia's copyright regime? Is there evidence to suggest that Australia's copyright system is now efficient and effective?'

Since the current Act first came into force in 1969, there have been two major extensions to the rights of copyright owners:

- The duration of copyright was extended in 2005 from a general 'life plus 50 years' to a general 'life plus 70 years' (a contentious extension that resulted from the Free Trade Agreement between Australia and the United States, but which also largely reflects the position that applies in the European Union); and
- The 'making available' right was introduced in 2000 (based on international consensus through the World Intellectual Property Organization treaty-making process, that

recognised that authors and copyright owners should be entitled to the value created by the online availability of their materials and that extending control over copyright material to online uses would operate as an incentive for literary and artistic creation).

Over the past 15 years, the range of exceptions has also been extended, including those in 2000 to cover digital uses and those in 2005 to cover:

- various personal uses of copyright material;
- the 'flexible dealing' exception in section 200AB to cover gaps for libraries, archives, museums, galleries and educational institutions in respect of what is currently covered by other exceptions and which is licensed by copyright owners; and
- the new 'fair dealing' exception for parody and satire.

These changes have ensured that the Australian copyright system continues to be efficient and effective, with books readily accessible and affordable for Australian readers and at the same time ensuring that there are sufficient rewards in place for investing time, talent and money into creation and innovation.

'Are there obstacles in the IP system which limit the efficient trade of IP between creators and users? Are there particular areas where trade, licensing and use of IP could be more readily facilitated? Are there sufficient safeguards to ensure that IP rights do not lead to unduly restrictive market power? Are there ways (including examples employed overseas) to improve the dissemination of IP while preserving incentives to generate IP? Could such methods be adopted or adapted within the Australian IP system?'

In response to the above group of questions, Hachette Australia would like to comment on recommendations that earlier enquiries have made: that section 51(3) of the *Competition and Consumer Act 2010* (Cth) be repealed.

In particular, Hachette Australia is concerned that such recommendations flow solely from academic concerns about tidiness and that all property (tangible or intangible) be treated exactly the same.

Clearly, however, tangible and intangible property are not the same, and licensing a copyright work subject to territorial or other restrictions does not have an anti-competitive effect, particularly as such licensing does not operate to prevent new entrants using the same ideas or publishing on the same topics.

Hachette Australia particularly refers the Commission to the submission of the Business Law Section of the Law Council of Australia to the Harper Review,²³ which includes the following comment from the Ergas Committee's report:

'the IP legislation confers upon the intellectual property rights holder a series of exclusive privileges designed to promote innovation. Given that these are conferred by legislation they should be able to be effectively exercised even when this involves (as it generally must) the exclusion of others.'

The Law Council itself concluded that the current section 51(3) is both economically beneficial and pro-competitive, and that it would be:

'inconsistent to use IP laws to stimulate innovation and then subject any dealing in commercialising that innovation to the competition test. Doing so will in all likelihood reduce post innovation returns and at worst, result in market failure. The imposition of a substantial lessening of competition test will impose an additional level of complexity into IP contracting which does not currently exist ...'

'For example, if section 51(3) were repealed, exclusive IP licensing agreements would be subject to the prohibition against exclusive dealings in s 47 of the CCA. Not only is it incongruous in principle that IP rights holders would not be allowed to exercise their exclusive rights conferred by statute, but this would also have the effect of discouraging licensing by the rights holder. This in turn can have the downstream effect of reducing competition in the market due to the refusal to license.'

Hachette Australia also notes that removal of the subsection – and the consequent uncertainty that would be created – would by itself operate to limit efficient trade of IP between creators and users (including through the licensing of that IP by publishers to online retailers) and

²³ Available at <http://competitionpolicyreview.gov.au/issues-paper/submissions/>

would usher in a perhaps prolonged period of business caution and hesitancy.

Purposes of exceptions, including the 'fair dealing' exceptions

The Spicer Committee noted that copyright law was not only concerned with providing rewards and incentives to authors. It also had to ensure that *'the rights conferred are not abused and that study, research and education are not unduly hampered'* (our emphasis).²⁴ This approach is in line with the development of the various 'fair dealing' exceptions in UK copyright law.

Hachette Australia also notes that the Australian approach – one that also applies in the UK – has been for Parliament to enact additional exceptions to address particular issues and concerns, including perceived market failure. For example, a number of the current exceptions for libraries have their origins in the paper shortages that followed World War Two and the slowness of international parcel delivery by ship.²⁵ The Australian approach therefore contrasts with 'fair use' under US copyright law, where the scope of exceptions is repeatedly before the courts and where the courts (not the elected parliament) are the arbiters of where the important balance between copyright owners and copyright users is set.

The international treaties to which Australia is party provide for an overarching 'three-step test' that guides member countries as to how exceptions should be delineated. Under this test, any exceptions must:

1. be limited to 'special cases';
2. not conflict with a 'normal exploitation' of the relevant copyright material; and
3. not 'unreasonably prejudice' the legitimate interests of the relevant authors and copyright owners.

²⁴ *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* at para 13.

²⁵ See the UK *Gregory Committee Report* (1952) at 17 and the Australian *Report of the Copyright Law Committee on Reprographic Reproduction* (1976).

The international test clearly aligns both with the common law development of copyright exceptions in the UK and with the broad objectives outlined by the Spicer Committee. It is also appropriately reflected in the current Australian Act.²⁶

Hachette Australia strongly recommends that any further exceptions be rigorously tested against the international treaty standard, to ensure that writers continue to be fairly compensated for their creative efforts and that they continue to be able to sustain writing careers that culturally enrich Australia.

Issues Paper Questions Around Fair Dealing/Fair Use

'How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/or fair use provisions play in striking a better balance? Are copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators? Does the degree of certainty vary for businesses relative to individual users?'

The 2012 changes to copyright law in Canada (outside Quebec) introduced US-style 'fair use' guidelines that have had a catastrophic impact on educational publishers and authors. A full report on the impact of the law changes can be found in the PricewaterhouseCoopers (PwC) report of June 2015 *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines*.²⁷

In short, the Canadian changes have resulted in creators and innovators receiving much lower rewards for their work. This in turn has resulted in less investment in Canadian content and fewer Canadian titles being published for Canadian educators and students. Ultimately, the Canadian public lose out, with investment in new publications drying up, and with students being provided with out-of-date and sub-standard material (including material created for US students – a different culture and education system).

²⁶ For example, in section 40(2) of the Act, which provides a list of what needs to be considered in assessing whether reproducing something will be a fair dealing for research or study.

²⁷ See http://www.accesscopyright.ca/media/94983/access_copyright_report.pdf.

An analogy might be that furniture manufacturers are not required to supply desks free to schools just because they are for educational use, so it is not clear why intellectual property should not be similarly valued and paid for.

Hachette Australia further submits that the introduction of a 'fair use' provision would also cause a great deal of business uncertainty; and that 'fair use' inevitably would have a haphazard development, and transfer to the courts what should be an obligation on the Parliament to fine-tune the respective rights between users and copyright owners. Copyright's purpose is to *'protect the original expression of literary, musical and dramatic works, as well as their industrial form, such as books, sound recordings, films and broadcasts'*. If adjustments to the 'copyright balance' are needed, then this should be done carefully and incrementally by Parliament, to ensure that copyright continues to support copyright owner innovation rather than innovation by free-riders.

CONCLUSION

In conclusion, the points Hachette Australia makes are simple:

- the entire purpose of copyright law is to support and reward innovation;
- publishers require stability and certainty to invest in the Australian market and any changes to copyright law (including parallel import restrictions) that introduce uncertainty and instability will necessarily limit or stifle innovation;
- as a basic matter of fairness, the rewards of copyright should go to those who invest their time, resources and energy into creating material that is useful for Australian society;
- as a matter of practice, Australian publishers:
 - are innovative and competitive, and are best placed to further build on their investments of time, energy and resources;
 - have a track record of providing the Australian community with ready access to books from all over the world in a timely fashion; and
 - under current law, have been able to develop and export a distinctive Australian literature;

- copyright law that enables the Australian copyright owner to manage the distribution in Australia of their material – including physical product – will best support Australian innovation;
- copyright law that limits the scope of exceptions to very specific cases where the balance of the public benefit has been properly assessed and weighed by Parliament (not the courts) is the best means of encouraging innovation and discouraging free-riding;
- copyright law that enables mass use of copyright material for socially desirable goals should, as a general principle, be paid for under statutory licences and not under exceptions that are free; and
- the infrastructure that publishers require includes adequate support to protect rights (including cheap and effective enforcement mechanisms and prompt assistance from ISPs and search engines).

Yours sincerely,

Justin Ractliffe & Louise Sherwin-Stark
Joint Managing Directors
Hachette Australia

ANNEXURE A – *Past the Shadows* by Favel Parrett

Hachette Australia published *Past the Shallows* in Australia and licensed publishing rights to Hodder & Stoughton in the UK and Atria, Simon & Schuster in the US. Each territory's edition of *Past the Shallows* was refined editorially, re-packaged and promoted differently.

Australian author Favel Parrett earned a 'home' royalty in each territory, meaning increased earnings; which in turn encouraged the author to create new works. As Favel's originating publisher we gained licensing revenue, helping us invest further in Australian writing and the creation of new works.

Without parallel importation restrictions in the case of *Past the Shallows*, foreign editions could be imported by Australian booksellers who would simply look for the lowest purchase price. This wouldn't benefit the local consumer as they would be reading an overseas edition of the book, edited and repackaged for an overseas reader. The UK and Canada, for example, still have territorial restrictions in place, meaning that our ability to export our own edition would be limited, giving foreign publishers an unfair advantage.

For the author, this would lead to a significant reduction in income. Export royalties received on a US or a UK sale can be as low as 5%, calculated by reference to net receipts (not recommended retail price, as is often the case in 'home' markets). If the UK exported *Past the Shallows* to Australia the author would only receive 7.5% of net receipts. Priced at £8.99, with an average royalty export discount of 70%, ($£8.99 \times 0.3 \times 0.075$) would mean a £0.20 pence royalty, which would then be subject to a subrights income split, of which the author would receive £0.16 pence or 33 cents at today's exchange rate. This is a huge difference to the 10% home royalty on RRP on an A\$19.99 priced copy where the author would receive A\$1.99 per copy sold. In summary, the author would receive 83% less income in this situation.

**ANNEXURE B - HACHETTE AUSTRALIA TOP 20 BOOKSCAN PRICE COMPARISONS YTD
OCTOBER 2015**

Title	Author	AU RRP inc GST	AU RRP exc GST	ASP inc GST	ASP exc GST	US RRP in AUD (no GST)	amazon.com sales price in AUD (no GST)	amazon.com sales price + postage AUD
Girl in the Spider's Web,The	Lagercrantz, David	\$32.99	\$29.99	\$16.41	\$14.92	\$39.27	\$24.44	\$39.72
Gone Girl	Flynn, Gillian	\$19.99	\$18.17	\$11.49	\$10.45	\$21.07	\$13.51	\$28.79
Secret Paris	Cases, Zoe de Las	\$14.99	\$13.63	\$11.60	\$10.55	\$22.46	\$15.06	\$30.33
Secret Japan	Cases, Zoe de Las	\$14.99	\$13.63	\$11.98	\$10.89	\$22.46	\$30.79	\$50.15
Birds & Butterflies	Chadwick, Alice	\$14.99	\$13.63	\$11.79	\$10.72	\$22.46	\$11.99	\$22.47
Dream Cities	Goodwin, Rosie & Chadwick, Alice	\$14.99	\$13.63	\$17.98	\$16.35	\$22.46	\$13.80	\$50.17
Liar,The	Roberts, Nora	\$29.99	\$27.26	\$16.66	\$15.15	\$39.27	\$23.58	\$38.86
Gone Girl Film Tie In	Flynn, Gillian	\$19.99	\$18.17	\$14.71	\$13.37	\$21.07	\$13.51	\$28.79
Longest Ride,The	Sparks, Nicholas	\$19.99	\$18.17	\$15.56	\$14.15	\$11.24	\$8.92	\$24.20
Dark Places	Flynn, Gillian	\$19.99	\$18.17	\$19.75	\$17.95	\$19.67	\$12.14	\$27.42
Finders Keepers	King, Stephen	\$32.99	\$29.99	\$15.35	\$13.95	\$42.15	\$24.78	\$40.05
Sharp Objects	Flynn, Gillian	\$19.99	\$18.17	\$18.79	\$17.08	\$19.67	\$12.15	\$27.42
Goldfinch,The	Tartt, Donna	\$19.99	\$18.17	\$20.34	\$18.49	\$28.10	\$15.70	\$30.97
Stranger,The	Coben, Harlan	\$32.99	\$29.99	\$18.16	\$16.51	\$39.27	\$17.08	\$27.56
Obsession in Death	Robb, J. D.	\$29.99	\$27.26	\$26.52	\$24.11	\$11.23	\$10.48	\$25.75
Little Paris Bookshop,The	George, Nina	\$29.99	\$27.26	\$21.14	\$19.22	\$35.12	\$25.45	\$35.72
Close Your Eyes	Robotham, Michael	\$29.99	\$27.26	\$16.17	\$14.70	none	\$21.66	\$58.02
Eleanor & Park	Rowell, Rainbow	\$19.99	\$18.17	\$9.44	\$8.58	\$26.68	\$15.65	\$30.93
Bollywood		\$12.99	\$11.81	\$9.80	\$8.91	\$14.03	\$13.38	\$28.66
Nature	-	\$12.99	\$11.81	\$9.80	\$8.91	\$14.03	\$13.48	\$28.76