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A NEWS CORPORATION COMPANY

 HarperCollins *Publishers*
Australia

30 November 2015

Intellectual Property Arrangements Inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY 2601

Dear Sir/Madam

**PRODUCTIVITY COMMISSION'S ISSUES PAPER ON INTELLECTUAL PROPERTY
ARRANGEMENTS – OCTOBER 2015**


HarperCollins Publishers Australia welcomes the opportunity to respond to the Productivity Commission's Issues Paper on Intellectual Property Arrangements.

HarperCollins Publishers supports the submissions made by the Australian Publishers Associations and the Australian Copyright Council and makes the attached submissions which are limited to the Productivity Commission's questions on copyright.

By way of background, HarperCollins Publishers Australia is a leading Australian publisher. Established in 1989, with the amalgamation of Harper & Row (USA), William Collins (UK) and Australia's oldest publisher, Angus and Robertson Publishers, HarperCollins Publishers is part of a global network, with affiliates in New Zealand, the United Kingdom, the United States of America, Canada and India. HarperCollins Publishers publishes extensively in all major sections of the book market, publishing approximately 200 new titles per year.

HarperCollins Publishers also provides a full range of services to book retailers and markets; it distributes books published by local and overseas publishers in Australia and New Zealand; and pursues licence opportunities for Australian books to be made into films and television, anthologies and digital products both in Australia and New Zealand and in a large number of other countries.

Yours sincerely

 James Kellow
Chief Executive Officer

**HARPERCOLLINS PUBLISHERS AUSTRALIA'S SUBMISSION IN RESPONSE TO THE
PRODUCTIVITY COMMISSIONS'S ISSUES PAPER ON
INTELLECTUAL PROPERTY ARRANGEMENTS – OCTOBER 2015**

Copyright

Copyright law establishes the proprietary rights that allow creators to be compensated for their originality, time, effort and skill. Copyright is a creator's intangible asset which grants him/her exclusive limited rights in the work he/she has created for a specified period and allows knowledge to be widely diffused, while protecting the creator's investment of originality, time, effort and skill. It is a form of personal property - an asset - which can be traded and commercialised through licensing and sale.

Whilst copyright protection is not necessarily proportionate to the level of a copyright owner's effort (sometimes authors and artists create the greatest works with little effort – at other times they labour for years on the one work), it is not intended to be and market forces will determine which works have the most value to society. This position is not dissimilar to the way value is created and/or awarded in other property systems (including real property).

Copyright does not inhibit competition or stifle innovation. It does not *"unreasonably impede further innovation, competition, investment and access to goods and services"*. Nor does copyright give a creator a monopoly over a particular idea or topic. Rather, copyright – an inherent and natural human right recognised in a complex framework of international bodies, multilateral conventions and bi-lateral treaties – ensures that the creator's investment of their creativity, originality and innovation is protected and rewarded. In turn, this encourages innovation and development of new works for the public benefit.

Copyright is fundamental to the creation and supply of creative works. There is a national interest in ensuring that innovation and creativity is protected and rewarded and that incentives are provided to ensure that copyright material is widely distributed, thereby ultimately serving the long-term interests of the Australian community.

The Productivity Commission proposes a framework for assessing intellectual property arrangements in Australia: effectiveness; efficiency; adaptability; and accountability. It is unclear why the Commission differentiates intellectual property rights from other property rights. In our view, the Commission should examine intellectual property arrangements using the same framework with which it would assess other property arrangements. Further, the Commission's framework does not address the inherent differences between copyright and other intellectual property rights.

Nonetheless, we contend that the current copyright framework is effective, efficient, adaptable and accountable:

- copyright-based industries make a significant contribution to the Australian economy;
- copyright enables content to be disseminated and traded while recognising its value;
- copyright enables publishers to invest, enabling creators to continue to create;

- copyright does not require any formal registration or registration fees;
- the exceptions to copyright infringement are fair and balanced;
- the licensing of works is not complex or costly;
- the licences managed by Copyright Agency enable copying and sharing with minimal transaction costs;
- copyright has adapted well to technological and other developments through legislative changes and business arrangements to meet existing challenges; and,
- significantly, the publishing industry is self-sufficient and does not rely on Government funding or subsidy.

In particular, the publishing industry has proved itself adaptable to changes in the economic, commercial and technological environment to ensure that the interests of consumers and creators remain well-balanced:

- In 1991, the introduction of the 30/90 day rule addressed availability challenges and gave more flexibility to booksellers at a time when the release of overseas books into the Australian market was slow;
- Also in 1991, consumers became allowed to import a single copy of a book of their choice for personal use, striking a balance that still adequately protects creators and publishers while meeting the needs of consumers;
- In 2011, the 14 day agreement between the Australian Publishers Association and Australian Booksellers Association further addressed availability and speed issues to meet customer needs; and
- The industry has been quick to develop new digital business and distribution models to harness digital technology to provide readers with enhanced products.

Copyright has developed over centuries to meet the challenges of a fast-moving technological society. These changes have grown and encouraged Australian literature, at the same time afforded booksellers flexibility. It has also obliged publishers to publish competitively to meet consumer needs, without losing the concept of territoriality and encouraging investment. The purpose and function of copyright has remained relevant and "fit-for-purpose" and, in a global and digital economy, has become increasingly important for creators.

The current framework has led to a very rich, diverse, and highly competitive publishing industry, to the envy of other international English-speaking markets, which we contend, appropriately balances the interests of the creator, publishers and Australian readers, enabling access benefitting society. It does this on terms that do not undermine the creation of new Australian material. It is only because of the current copyright framework and current parallel importation protections that publishers like HarperCollins Publishers Australia are prepared to invest in material. Any framework for assessing intellectual property arrangements must sustain the ability of copyright owners to be innovative and create new material.

It is important to recognise that publishers bring an enormous amount of value to publishing. Publishers work hand in hand with authors to develop their material and brand in a unique creative partnership. Publishers bring knowledge and expertise in a variety of services from editorial and design, marketing and publicity to sales. In addition, publishers have wide networks which assist in exploiting rights to mutual advantage with creators.

Publishers have also shown that they are innovative and creative in meeting consumer needs. For example, over the last few years, HarperCollins Publishers Australia has:

- introduced the Harper360 program which enables more Australian and New Zealand titles to be sold in international markets by our affiliate companies, achieving more exposure for authors;
- sold ebooks to consumers under subscription models;
- offered print and ebook editions in bundled products;
- invested in new licensing opportunities and new ways to exploit content;
- invested in the production and exploitation of new products;
- utilised print on demand and short print runs to meet bookseller and consumer needs; and
- created accessible editions, including large print formats.

Below are some facts specifically evidencing how the current copyright regime and parallel importation protections support the activities of Australian authors and HarperCollins Publishers Australia:

- HarperCollins Publishers Australia presently publishes, prints and distributes approximately **150-200 new Australian titles** every year;
- Since 2010, HarperCollins Publishers Australia has published approximately **700 individual authors and illustrators**;
- HarperCollins Publishers Australia employs **198 staff** across two sites, Sydney and Moss Vale;
- HarperCollins Publishers Australia engages the services of about **160 freelance contractors** annually in design, editorial, marketing and public relations;
- Every year, HarperCollins Publishers Australia generates substantial sums of money by way of royalties for Australian authors and from overseas publishers and other licensees;
- Revenue from the Copyright Agency has also been substantial – both for HarperCollins Publishers Australia and its authors; and
- HarperCollins Publishers Australia typically pays approximately \$6 million to authors, illustrators and other creators in advance payments per year.

Licensing and Assignment Arrangements: section 51(3) of the *Competition and Consumer Act 2010* (Cth)

We note that the terms of reference for the Productivity Commission's current review include having regard to the recommendations of the Harper Competition Policy Review. While not specifically addressed in the Issues Paper, HarperCollins Publishers notes that one of the recommendations of the Harper Competition Policy Review was the repeal of section 51(3) of the *Competition and Consumer*

Act 2010 (Cth). HarperCollins Publishers therefore takes this opportunity to comment on that recommendation.

In particular, we are not aware of any empirical evidence suggesting that licensing or assignment arrangements in the context of copyright are inherently anti-competitive or that they lead to unduly restrictive market power. To the contrary, licensing and assigning copyright is inherent to the copyright holder's proprietary rights – rights which can be licensed or assigned, similar to any other property right.

In this context, it is important to recall the limits of copyright: it extends only for a limited (albeit lengthy) period; the monopoly it provides relates only to the particular expression of a work, and not to the ideas in a work; and it gives the copyright owner no right to prevent others creating rival works, provided they express that work in their own way.

If section 51(3) of the *Competition and Consumer Act* were repealed, this would lead to publishers having to apply for authorisation or approvals, thus leading to a substantial increase in transaction costs which would necessarily need to be recouped by higher prices or absorbed by limiting product range. It would also mean that Australian authors would be competitively disadvantaged against authors from America, Europe, Canada and New Zealand, which jurisdictions all acknowledge and accommodate the uniqueness of copyright as a proprietary right within their competition regimes.

Fair Use

HarperCollins Publishers submits that the current balance between creators and consumers is appropriate and that the fair dealing exceptions as they currently apply – together with the various statutory licences – strike the right balance in achieving the overall purposes of copyright.

HarperCollins Publishers, therefore, is opposed to any introduction of a US-style “fair use” exception or any move to an open-ended “fair dealing” exception.

In brief, any such moves would introduce an unacceptably high degree of uncertainty and unpredictability to a currently stable and flourishing publishing landscape. In particular, such a move would likely lead to a sustained period of litigation while the contours of the new exception/s were established, providing both an unnecessary and expensive distraction from the real work of publishers – looking for new and innovative ways of creating, distributing and licensing creative material.

For further comment on this issue, HarperCollins Publishers refers the Commission to its submissions to the Australian Law Reform Commission's enquiry into *Copyright and the Digital Economy*, together with the submissions to that enquiry of the Australia Copyright Council, the Australian Publishers Association and the Copyright Agency Limited.

We have read with concern the effects of a broad interpretation “fair use” as apparently adopted by the Canadian Education sector, and analysed in the PriceWaterhouseCoopers report of June 2015, The

Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines. We fear that the Australian publishing industry would suffer similar effects if substantial changes were made to the current "fair dealing" and statutory licensing schemes.

Parallel Importation Protections

The question of parallel importation has been examined many times over the previous two decades. Copyright owners have, however, retained some protections from parallel importation because such protections serve sound policy and economic objectives and support the interests of Australian consumers, authors and publishers.

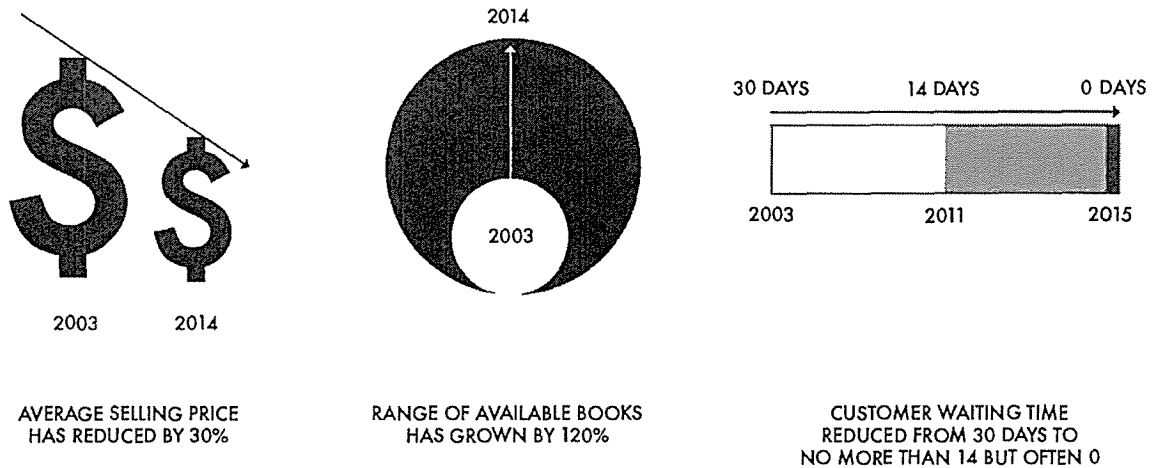
It is also important to acknowledge that the industry has developed since 1991, and particularly in the last 5 years, and is in quite a different state today to when the parallel importation restrictions were first examined by the Productivity Commission in 2009 (and, prior to that, by (among others) the Copyright Law Review Committee in 1988, the Prices Surveillance Authority in 1989, the ACCC in 1999 and 2001, and the IPCRC in 2000). In our view, the Productivity Commission's concerns about the anti-competitiveness of the parallel importation restrictions are not relevant to the current publishing landscape.

The Australian publishing industry, working within the current parallel importation provisions, has delivered a pro-competitive book publishing landscape that ensures that Australian readers enjoy cheaper prices, greater choice and faster availability than ever before:

1. **Price:** Nielsen Bookscan reports that the average selling price of a book in Australia in 2003 was AUD\$20.02 and in 2014 was AUD\$16.91. This represents an average decrease of 1.5% per year, representing a total decrease of 15.5% since 2003 but, when factoring in inflation and currency fluctuations, the average selling price of a book is now a third less than it was a decade ago.
2. **Choice:** Nielsen Bookscan reports that the number of individual ISBNs (individual titles) sold in Australia in 2003 was 252,000 and in 2014 had increased to 558,135, representing an average increase of 7.5% per year, representing a total increase of 120% since 2003.
3. **Availability:** The Australian Publishers Association and the Australian Booksellers Association "Speed to Market" initiative reduced the conditions around parallel importation of books from 30/90 days to 14/14 days which has meant that all print books published overseas in an English language territory are now made available twice as fast. In reality however, the ebook edition is often available simultaneously globally. However, most major titles are made available simultaneously in all editions and we expect that this trend will only continue to grow.

The following illustrates the increase in competition in the book publishing industry:

INCREASE IN COMPETITION IN THE MARKET



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In addition, we contend that the recommended retail prices of books, exclusive of GST, published and distributed by HarperCollins Publishers in Australia are generally no higher, and often lower, than the recommended retail prices of the same titles in the United States and the United Kingdom. See Annexure A for a table showing the recommended retail prices of the top 10 titles published and distributed by HarperCollins Publishers for the week ending 21 November 2015 showing the recommended retail prices in each region.

The Productivity Commission asks whether *'restriction on parallel imports still fulfil their intended goals in the digital era?'* The digital era has ushered in an era of greater choice, availability and price flexibility than previously existed. This has been good for consumers and good for competition, but it has also made the maintenance of the current parallel importation provisions more important than ever. Ebook sales only represent about 20% of the total publishing business and the majority of revenue is generated by print books. We maintain that the current parallel importation provisions still achieve their goal in a market dominated by print sales and appropriately balances the interests of authors, consumers and publishers.

Importantly, the current provisions also ensure that Australian creators are afforded the same protections as copyright creators in international markets, including the UK and Canada. The removal of the restrictions would take away protections that UK and Canadian authors enjoy, and would substantially disadvantage Australian authors and ultimately, readers who want to read Australian

content. Why would it serve the national interest for Australian authors to be disadvantaged in this way, which would effectively devalue Australian rights and mean Australia would be funnelling money offshore to international copyright owners and international publishers? Why should there not be a level playing field? Why would it be in Australia's interest to allow foreign publishers to dump books in our market without Australian publishers being allowed to do the same in theirs?

We contend that the effectiveness of the protections should not be judged solely on economic factors. The effectiveness of the current provisions must also include a re-examination of the cultural argument. To ignore the cultural importance of the Australian publishing industry would be a grave disservice to Australian literature and to Australian society at large. Australia has produced strong Australian content, and we should ensure that Australian creators and publishers are encouraged, and are in a position, to continue to do so. The current parallel importation provisions support the aims and objectives of copyright in ensuring that creators receive fair return on their investment and have proven effective in maintaining and developing Australian literature and culture.

As the Canadian government states on its Canadian Heritage website, the provisions in Canadian law dealing with parallel importation:

“are intended to support investment in Canada's book industry by protecting the commercial interests of book businesses operating in Canada. As such, they help serve the Government's policy objective of ensuring access by readers everywhere to a wide range of Canadian-authored books.”

It should be noted that the term used by the Commission – “parallel importation restrictions” – is a misnomer. The term should be examined to see it for what it is: the right of a creator to license (to the exclusion of all others) his/her work to a licensee in a territory for a price (if any) of their choice. In our view, the current provisions (that stop others interfering with the value of that licence) are well suited to the natural application of copyright, being to protect a copyright owner's inherent rights in a territory, while at the same time returning value to copyright owners in that territory, so they can continue to create and continue to invest in creation. The protections given by the current parallel importation provisions are also well balanced in that they ensure continued consumer access to books from any part of the world. We contend that the provisions should not be viewed as restrictions, but as protections – important to retaining value, in sustaining innovation and in contributing to Australian literature.

Whilst the Productivity Commission and Harper Competition Policy Review have championed opening the market for “pure” economic reasons, they have failed to produce any evidence to show that the removal of the parallel importation protections are anti-competitive, that their removal would lower the price of books for Australian readers or that, overall, the removal would be good for Australians.

¹ See <http://www.pch.gc.ca/eng/1349101812088>.

The argument that the removal of the parallel importation restrictions will benefit competition, and hence Australian consumers, is in our view fallacious. We contend that, given the impacts it would have on the publishing industry, it would in fact have the opposite effect. The removal of the protections would cause a contraction in the market and lead to less investment from publishers because the Australian rights to an author's work would, in effect, be devalued, and ultimately damage an industry that has a strong record of operating successfully and self-sufficiently. The effect of abandoning the parallel importation protections would threaten the income of authors and their incentives to create. It would particularly benefit foreign copyright holders, at the expense of Australian copyright holders because the volume of foreign books would likely increase. In this context, we particularly note that the Commission itself found, in its 2009 review that the removal of the protections would lead to a contraction of the publishing industry in Australia.

Significantly, it would also inflict long-term damage on important players in the industry, namely, printers, independent bookshops (who are, in our view, the best promoters of Australian authors) as well as publishers. Australia currently enjoys a unique, diverse and balanced book retailing landscape which would be unnecessarily disturbed by the removal of the provisions. It is also important to recognise the big impact the removal of the protections would have on Australian printers such as Griffin and McPhersons. The current provisions help keep prices low, which, in turn, encourages publishers to take risks with new authors. More expensive print runs would mean fewer and dearer books and ultimately, fewer authors published and less choice for consumers.

In our view, the removal of the parallel importation protections will not achieve the Government's aims and we disagree with the Government's recent statement that the removal of the protections will "promote lower prices for consumers and ensure the timely availability of titles". Consumers already compare prices for all goods, including books, with online retailers. The parallel importation protections only currently apply in limited circumstances – where a book is not published at all in Australia or is published but then becomes unavailable – and they have been effective because they have led to a flourishing of Australian literature, benefitting Australian consumers, Australian publishers and in turn, Australian local and independent booksellers.

In our view, the provisions ensure that Australian publishers publish competitively and can do so without surrendering territorial copyright.

Case study: New Zealand

In order to understand the impact of the removal of parallel importation protections, we can learn a great deal from the experience of HarperCollins in New Zealand.

In 1998, the parallel importation restrictions were removed in New Zealand. Since then there has been a steady and significant decline in the book industry as the industry has contracted.

New Zealand market:

1. **Price:** Price has marginally increased. Nielsen Bookscan reports that the average selling price in New Zealand was NZD\$23.57 in 2008² and NZD\$23.75 in 2014.
2. **Sales:** Sales have declined. In 2009, Nielsen Bookscan reports total New Zealand sales as being NZD\$140 million and in 2014 as being NZD\$115 million³. This represents an average decrease of 3.9% per year, representing a total decrease of 17.9% since 2009.
3. **Choice:** Choice has reduced. Nielsen Bookscan reports that the number of individual ISBNs (individual titles) sold in 2008 in New Zealand was 195,000 and in 2013 had reduced to 145,000, representing an average decrease of 6.1% per year, representing a total decrease of 34.5% since 2008.

HarperCollins Publishers New Zealand:

- HarperCollins Publishers New Zealand previously published approximately 50 new books every year, however now publishes approximately 15 new books every year. This represents a decline of 65%.
- HarperCollins Publishers New Zealand previously employed approximately 50 staff, but now employs 9 staff, representing a reduction of over 80%.
- HarperCollins Publishers New Zealand previously distributed books locally, but all distribution in New Zealand is now undertaken from Australia.

Conclusion

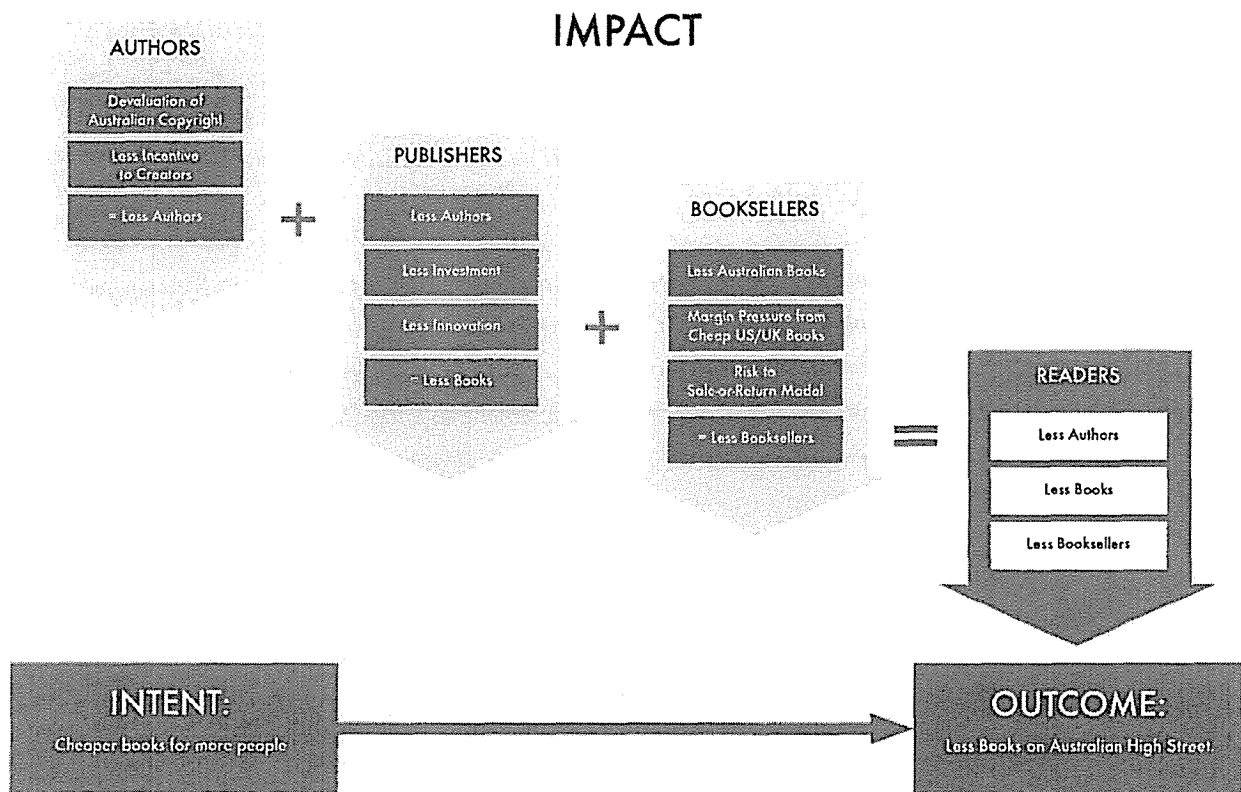
We maintain that the public interest will be damaged by the uprooting of the copyright system that has successfully operated for over two centuries. The removal of the parallel importation protections would mean: a devaluing of Australian copyright rights; less investment by publishers in Australian content; higher print costs; and reduced print runs. This in turn would mean fewer Australian titles in Australia and more international titles in Australia, meaning Australian content in Australia would be uncompetitive as against international content.

Ultimately, this would also impact booksellers and Australian readers and mean reduced Australian title choice; a narrower range; decreased availability; and higher prices, while threatening the local supply chain (including the "sale or return" distribution model), printers, distributors, booksellers and jobs across the industry.

² Note: Nielsen Bookscan commenced recording sales in New Zealand in 2008.

³ Note: Excludes sales made by Whitcoulls and Fishpond New Zealand.

The following illustrates the impact that would follow if the parallel importation protections were removed:



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The current copyright regime and parallel importation protections have delivered to Australian readers both a vibrant and dynamic publishing industry, and rich and diverse content, with publishers consistently investing in Australian content, all of which drives the growth of the book market and culture, to the benefit of consumers, authors, booksellers, printers and publishers.

Publishers have proven that they are competitive and innovative. To ensure that publishers and Australian creators can continue to be innovative and compete on the world scale, publishers require stability and certainty. Any changes to copyright law and the removal of the parallel importation protections will negatively affect this stability and ultimately will damage the successful vibrant and dynamic Australian landscape.

The publishing industry has faced various challenges in recent years with the establishment and growth of online retailers, the 30/90 and 14/14 day rules and the various improvements and developments in technology. We contend that the publishing industry has adapted, and will continue to adapt, organically, to any challenges it will face in the future, without the need for legislative change.

We query why, in the absence of evidence proving any benefits, the Government would be willing to destabilise a healthy balance of interests and the successful and self-sufficient Australian publishing industry.

We submit that, in order to stimulate reading and bookselling, an alternate way would be to instigate a zero or reduced GST rate on printed books and eBooks, which would mean cheaper books for booksellers and Australian readers. We refer to the *International Publishers Association and Federation of European Publishers Global Special Report on VAT/GST on Books & Ebooks* dated 20 July 2015, and support their findings, namely:

"Books are engines of knowledge acquisition and transfer, and the digital economy of the future depends on their flourishing. The circulation of books, however is particularly sensitive to price and therefore especially vulnerable to the imposition of a VAT/GST. Taxing books restricts their circulation, which is of concern to developing countries trying to bridge a knowledge deficit, but should also worry developed countries trying to maintain their competitive advantage."

"In order to support the knowledge economy, to encourage reading, and to promote the benefits of life-long education, the IPA recommends a zero-rating for books no matter what their format is and how they are accessed."


Copyright, as a proprietary right, should be championed to ensure that creators are supported and rewarded for their efforts and incentivised to continue to create and contribute to Australian literature.

ANNEXURE A

HARPERCOLLINS TOP 10 TITLES W/E 21.11.15

| Title | Author | AU \$ RRP | US \$ RRP | UK £ RRP | AU (ex GST) AUD | US AUD | UK AUD |
|---|---------------------------------|--------------|--------------|-------------|--------------------|-----------|-----------|
| Millie Marotta's Tropical Wonderland:A Colouring Book Adventure | Marotta, Millie | 19.99 | 14.95 | 9.99 | \$18.17 | \$20.78 | \$20.88 |
| Millie Marotta's Animal Kingdom | Marotta, Millie | 19.99 | 14.95 | 9.99 | \$18.17 | \$20.78 | \$20.88 |
| Official A Game of Thrones Colouring Book,The | Martin, George R. R. | 19.99 | 14.99 | 9.99 | \$18.17 | \$20.84 | \$20.88 |
| Golden Lion | Smith, Wilbur & Kristian, Giles | 39.99 | 28.99 | 20.00 | \$36.35 | \$40.30 | \$41.81 |
| Grandpa's Great Escape | Walliams, David | 19.99 | 16.99 | 12.99 | \$18.17 | \$23.62 | \$27.16 |
| Depraved Heart | Cornwell, Patricia | 39.99 | 28.99 | 20.00 | \$36.35 | \$40.30 | \$41.81 |
| All the Light We Cannot See | Doerr, Anthony | 19.99 | 13.97 | 8.99 | \$18.17 | \$19.42 | \$18.79 |
| Knight of the Seven Kingdoms,A:Being the Adventures of Ser Duncan the | Martin, George R. R. | 39.99 | 30.00 | 20.00 | \$36.35 | \$41.71 | \$41.81 |
| Oh, the Places You'll Go!:Yellow Back Book:Dr. Seuss Yellow Back Book | Dr. Seuss | 9.99 | N/A | 4.99 | \$9.08 | N/A | \$10.43 |
| Pick Your Poison:Ruby Redfort | Child, Lauren | 19.99 | 16.99 | 12.99 | \$18.17 | \$23.62 | \$27.16 |

Exchange Rate at 27.11.15
 AUD = USD \$0.7265
 AUD = UKP £0.4812

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