

Dear Members of the Review Panel,

Thank you for the opportunity to make a submission in response to the 22 September 2014 Draft Report of the Competition Policy Review chaired by Professor Ian Harper. I am the publisher at a small business, The Text Publishing Company, an independent book publishing company based in Melbourne which publishes many leading Australian writers and sells their rights internationally. Text is an innovative and entrepreneurial company which successfully competes against much larger companies here and abroad and which successfully exports the intellectual property that it licenses from the writers that it publishes. Our authors include Graeme Simsion, Helen Garner, Peter Temple, Kate Grenville, Shane Maloney, Tim Flannery, Peter Singer, Anna Funder and Raimond Gaita, among many others.

The Draft Report recommends abolishing the qualified territorial copyright arrangements or parallel import restrictions we have in Australia. These precisely limited arrangements which have operated in Australia since 1991 make copyright enforceable in Australian book publishing. They are the market mechanism that allows Australians to compete with other English-language writers and publishers throughout the world who all (with the exception of those suppliers who remain in New Zealand) publish under the umbrella of

territorial copyright. Without this market mechanism the ability of Australian writers and publishers to compete for the benefit of Australian consumers would be eroded. I note that the Panel says it 'has been particularly mindful of the concerns and interests of small business'. I applaud this intention but there is no evidence in the Draft Report of any attention to the concerns and interests of those small business people who are authors and book publishers.

The Draft Report outlines a number of goals of competition policy.

These include:

- making markets work in the long-term interests of consumers;
- encouraging innovation, entrepreneurship and the entry of new players;
- establishing competition laws and regulations that are clear, predictable and reliable.

The Panel also asked itself a number of questions which include:

- Does the law focus on enhancing consumer wellbeing over the long term?
- Does the law protect competition rather than protecting competitors?

These are laudable goals. The recommendations made in the Draft Report would however if they were adopted make it impossible for these goals to be achieved in the writing and publishing of Australian

books. The wellbeing and long-term interests of consumers who are book buyers would be harmed, the ability of writers and publishers to be entrepreneurs and to innovate would be harmed, and it would be harder for new players (emerging writers, publishers and booksellers) to enter the market. Far from protecting competition the removal of territorial copyright would work to protect the foreign publishers with whom Australian publishers compete because they would continue to operate in the other major English-language territories with the benefit of territorial copyright.

In the context of these goals I believe the Panel should examine how best we can frame our competition rules to encourage new entrants to the market who will be innovative and entrepreneurial. Will the removal of restrictions enable consumers to have the widest possible choice of Australian books? Will the removal of restrictions encourage Australian writers to enter the market who are looking to be rewarded appropriately for their work? Will the removal of the restrictions encourage new publishers? (The Panel may wish to bear in mind that Australia publishes fewer books per capita than many OECD countries.) Will the removal of restrictions encourage new booksellers at a time when online bookselling has made choice, price and diversity more important than ever? The most obvious

disincentive for new Australian booksellers to enter the market is the fact that offshore online bookselling has made it easy for consumers to avoid paying the GST when they buy books, thus protecting some foreign booksellers at the expense of their Australian competitors. Furthermore many Australian booksellers are competitively disadvantaged against these international competitors by the current arrangements with postage rates. Can the Panel achieve its goal of protecting competition without considering these two factors in its review?

One critical point must be understood in this entire debate. The current limited parallel import restrictions not only encourage competition, but make it possible. You cannot have proper competition without proper copyright laws, and Australian suppliers (writers and publishers) cannot compete in their own territory or internationally without the same rights that suppliers have in other English-language markets. The precisely limited restrictions on parallel importation that we have in Australia encourage Australian suppliers to compete and therefore are in the long-term interests of Australian consumers, some of which, as the Panel notes, are also Australian 'businesses transacting with other businesses'.

The goal of the Panel should be to argue for a clear, predictable and reliable regime which properly protects and balances the interests of consumers, writers, publishers and booksellers. Australia has the most successful copyright regime in the English-speaking world in relation to books because the 1991 amendments to our copyright law are an example of brilliant legislative reform which balanced the interests of all these parties. That reform ensured that books would be made available to consumers in a timely fashion, thus protecting the competitive interests of booksellers, and it upheld the principles of territorial copyright for Australian writers and publishers, allowing them to compete. It permitted parallel importation for own use, allowing consumers to buy books from all over the world, and it permitted booksellers to parallel import upon customer request. Australia now has the greatest diversity of independent booksellers in the English-speaking world, who operate in the fairest and most liberal territorial copyright regime in any major English-language country.

The 1991 amendments were wise and timely reforms given the advent of online retail. The right of the Australian consumer to buy books wherever there are online book retailers has been enshrined in law for more than two decades now. It is important to understand

moreover that when consumers parallel import for their own use they uphold the ability of Australian writers to compete internationally because the Australian writer whose foreign edition is bought by the consumer is paid a full domestic royalty for that sale.

The Panel summarises its preliminary views on page 100 of its Draft Report.

Parallel import restrictions are similar to other import restrictions (such as tariffs) in that they benefit local producers by shielding them from international competition. They are effectively an implicit tax on Australian consumers and businesses. The Panel notes that the impact of changing technology means that these restrictions are more easily circumvented.

The removal of parallel importation restrictions would promote competition and potentially lower prices of many consumer goods, while the concerns raised about parallel imports (such as consumer safety, counterfeit products and inadequate enforcement) could be addressed directly through regulatory and compliance frameworks and consumer education campaigns.

These two paragraphs require some discussion. Parallel import restrictions on books do not shield local producers (writers and publishers) from international competition but enable local producers to compete both nationally and internationally. Are they really similar to tariffs? Tariffs are designed to prevent substitutable products from competing with one another on a level playing-field by applying an impost at the point of importation. No such thing

happens with imported books in Australia. Some Australian prices are lower than US or UK prices, as the Productivity Commission found in its 2009 report, and some Australian prices are higher. The Productivity Commission could not quantify the upward pressure on prices it nonetheless believed that our qualified restrictions create. Clearly this is unlike tariffs whose upward pressure on prices is measurable. And it is possible that the restrictions, by giving certainty and a level playing field to Australian suppliers, in fact contribute to competitive prices in Australia. We must always keep in mind that the US and the UK have far stricter parallel import restrictions than Australia.

Furthermore, does the Panel believe that books are universally substitutable, no matter their type or origin? That a British or an American book produced under the umbrella of territorial copyright is substitutable in Australia for an Australian book which cannot compete because the umbrella of territorial copyright has been removed? Does the Panel believe that it is in the interests of Australian consumers for Australian editions of Australian books to be substituted for by British and American editions of Australian books by removing the market mechanisms which allow Australian

writers to compete with British and American writers in their own country?

I cannot see how the Panel's preliminary views are consistent with its own goals—with the protection of competition rather than competitors. Those competitors who would be protected by the removal of territorial copyright are foreign writers and publishers.

The Panel states, as did the Productivity Commission in its 2009 report, that parallel import restrictions are an implicit tax on Australian consumers and businesses. The corollary of this statement, if it is true, is that removing parallel import restrictions would place an implicit tax on other Australian consumers and businesses (ie, writers and publishers) because every time their books were made available in the US and the UK the potential would be created for those foreign editions to enter the Australian market in ways that would amount to anti-competitive conduct, distorting the market, reducing the incomes of Australian suppliers and inhibiting entrepreneurship and innovation. Most Australian publishers and all Australian writers are small businesses who would be harmed if territorial copyright were to be unilaterally dismantled in this country.

Nor is it the case that 'changing technology' allows Australians to circumvent any restrictions because the law already allows Australian consumers to parallel import for own use. Changing technology does however allow Australians to buy books, including books by Australian authors, from offshore online retailers without having to pay the GST which Australian booksellers, most of whom are small businesses, must apply to the books they sell. The Panel does not address this anomaly which protects the foreign retailers whom Australian booksellers compete against and allows them to free-ride in this market.

The Panel provides no evidence that removal of the qualified parallel import restrictions would promote competition and it provides no evidence of its own to support its statement that removing the restrictions would potentially lower book prices. Does the Panel mean that consumers would have access to cheaper books because foreign publishers and distributors could become free riders in our market, including by means of dumping and remaindering, particularly by dumping and remaindering books by Australian authors given that this is the world's largest market for Australian authors?

The Panel recommends an overarching enquiry into intellectual property but it has not waited for the findings of any such enquiry to make its own recommendations for the removal of our qualified restrictions, which would require legislative amendment of the Copyright Act if they were to be adopted. Does the Panel have things the wrong way around? If there is to be an overarching enquiry into intellectual property it should be free to do its work without this Panel pre-empting its findings.

The Panel ought, in the interests of transparency, put its assumptions to the test. It ought to commission a proper and independent price analysis before it recommends dismantling the extraordinarily successful arrangements which came into place in 1991. There has been no ABS data on the industry for a decade, since 2003–04. The Productivity Commission did some price analysis in its 2009 report, but was not prepared to quantify the effect of parallel import restrictions on prices or to predict what would happen to prices if they were removed. On page 6 of its supplementary report issued in September 2009, the Productivity Commission said:

In summary, while it is not possible to provide a definitive estimate of the effects of PIRs on book prices, or an unequivocal prediction of market-wide price movements in their absence, the evidence assembled during the study enabled the Commission to draw conclusions about those price

impacts that, in its experience, are sufficiently robust for assessing the merits of policies such as PIRs.

The contorted logic of this statement remains painful to read. It is not clear to me how any report can draw robust conclusions in the absence of definitive estimates or unequivocal predictions. In any event, the price data that the Panel quotes from the work of the Productivity Commission on page 90 of its Draft Report is now out of date. Putting to one side the fact that the Productivity Commission's data was vigorously contested at the time, its findings have now been overtaken by the convulsive impacts on book publishing of, among other things, the effects of the global financial crisis, the changes in the relative value of the Australian dollar, and the migration of consumers to forms of digital reading.

The Panel should give due weight to the Productivity Commission's equivocation. What if Australian prices under the current regime are not higher than they would be if territorial copyright were dismantled? What is the price evidence in those markets—none of them major English-language publishing territories as Australia is—that do not observe territorial copyright: New Zealand, Singapore, Europe, for instance? Where is the up-to-date analysis of the key comparative markets of the US, the UK and Canada, all of which apply

far more rigorous parallel import restrictions than apply in Australia?

I urge the Panel to think about this issue without preconceptions. It assumes there is a cost to the current arrangements. It is silent on the question of whether there are benefits. The costs of parallel import restrictions can only be greater than the benefits if prices are significantly higher now than they would be without territorial copyright—a prediction the Productivity Commission was not prepared to quantify—and there is substantial and reliable evidence that in the absence of the current law prices would fall significantly. That is because the benefits of territorial copyright are in fact essential to the wellbeing of Australian consumers, to the maintenance of the principles of competition, and to the encouragement of innovation.

If there are costs inherent in the application of territorial copyright, what are their effects? Have they led to a narrower reading culture than would be the case otherwise? Since Australia has very high rates of literacy and of book consumption we must take this argument seriously, while at the same time acknowledging that our high consumption of books per capita has been achieved in the context of prevailing arrangements. In the light of our flourishing book culture

it would be difficult to show, since the current regime was introduced in 1991, that prices have discouraged readership and the benefits for consumers that book-reading literacy brings.

What then are the benefits of the current arrangements which have been in place since 1991? Many questions must be asked to arrive at an answer. Have consumers benefited? Are books cheaper in real terms? Are books more widely available? Are more books being published in Australia? Are more authors being published in Australia? Is the market share of Australian books greater now than in 1991? Has qualified territorial copyright helped our book printing industry? Has the value of Australian book exports increased? Has our publishing infrastructure grown? Has it diversified? Are there more people at work in the publishing industry now? Are the standards of editing and book production higher than they were? Do higher editorial standards have an economic value? Is there greater diversity of bookstore ownership? Has the market share of independent book retailers grown? Do we have higher standards of book retailing?

I believe the answer to all of these questions is yes.

The Panel makes indirect and glancing reference to the benefit of the current arrangements comes on page 90 where it says: 'The PC also

found that parallel import restrictions poorly target cultural externalities and much of the assistance provided by the restrictions does not promote Australian-authored work'. This was one of the most contentious areas of the Productivity Commission's work, including its recommendation that territorial copyright be replaced by 'appropriate subsidy arrangements'.

How would it be in the long-term interests of consumers for the taxpayer to subsidise the increased revenues that would flow to foreign copyright holders at the expense of Australian copyright holders if parallel import restrictions were removed? The Productivity Commission was proposing the partial replacement of copyright, a market-driven instrument, with the patronage of the taxpayer. This would be a regressive move. In a liberal society the value of books depends, amongst other things, on the *absence* of government funding. Free speech in a democracy inheres in a free publishing industry no less than a free media. The most obvious outcome of a broad-based system of public patronage in the absence of fully enforceable copyrights would be the loss of independence for Australian writers and publishers. This is not in the long-term interests of consumers.

The Productivity Commission did no modelling about how much it would cost the taxpayer if all those affected were compensated for the abolition of territorial copyright. It couldn't because by its own admission it couldn't quantify any upward pressure of prices caused by parallel import restrictions. ('Given that there is uncertainty about the magnitude of the price raising impact of the PIRs,' the Productivity Commission said, 'setting an appropriate subsidy rate to replicate the assistance provided by PIRs would be problematic.')

Total public funding of writers in Australia, including Public Lending Right and Educational Lending Right which are market-driven schemes that compensate writers who are already published, is less than \$30 million annually. Publishing is a \$2.5 billion industry, bigger than film and recorded music combined. How big would the compensation package be, on a recurrent basis, if free-riding foreign editions of Australian books were permitted to be sold here without restriction? The Productivity Commission could not answer this question.

And this is only to consider those who are already part of the industry. How do you compensate a debut author whose novel cannot find a publisher because of the loss of confidence that would follow the abandonment of territorial copyright? How do you

compensate an author whose book is not edited or published to the same standard because of the contraction in the industry that would follow the abandonment of territorial copyright? How do you compensate an author whose foreign rights are not sold because in the absence of territorial copyright the publisher which might have traded them no longer acts entrepreneurially? How do you compensate a trainee editor or designer who cannot get a job because the publishing industry has contracted?

The Panel cites the Productivity Commission's acknowledgment of 'significant adjustment costs for book producers' but does not consider the costs to consumers through potential job losses in the printing and publishing industries, the lessening of writers' incomes, the loss of export revenue or the potentially higher production costs and therefore higher prices of Australian books that would ensue because fewer books would be published in Australia. The Productivity Commission's discussion paper, released on 4 April 2009, was clear about all of this. It predicted: 'a reduction in publishing activity'; 'authors would generally face reductions in their income'; 'lower royalty payments'; 'would likely result in some authors exiting the market, and might discourage some others from entering it'; 'new or undiscovered authors would find it more difficult

to gain attention in an open market'; 'the difficulty for all new authors in obtaining local publication'. None of these effects are in the long-term interests of Australian consumers, nor do they encourage innovation or entrepreneurship.

The Draft Report notes the fact that Australia is a net importer of copyright. The fact is that every writer whose book is published in the US or the UK (or any other market) is a net exporter of copyright. Some publishers, of which Text is one, are net exporters of copyright. Writers and most independent publishers are small businesses. The Panel is aware that 'small business makes a vital contribution to Australia's economy'. The dismantling of territorial copyright, to the extent that it disabled the export of Australian writing, would therefore damage creators and entrepreneurial producers, and in turn the Australian economy.

It would be wrong to argue that because Australia is a net importer of copyright that it should legislate to ensure that it remains a net importer of copyright, which is effectively what would happen apropos of books if we dismantled territorial copyright.

It would also be wrong to argue that our qualified territorial copyright means that Australians make higher payments to foreign book creators. This argument, made by the Productivity Commission,

is cited on page 90 ('the additional income flowing overseas is around 1.5 times that retained by local copyright holders'). The Productivity Commission did not explain how it could arrive at this figure while also declaring that it was 'not possible to provide a definitive estimate of the effects of PIRs on book prices'.

This Panel is obliged to ask, in line with the Productivity Commission's findings, what the effects in fact are if the qualified restrictions do not result in higher prices. In that case the restrictions benefit Australian copyright holders but not foreign copyright holders. The overwhelming majority of Australian authors are on domestic royalties in Australia and the overwhelming majority of foreign authors whose books are distributed here are on far lower export royalties. (Export royalties are commonly around one third the value of a domestic royalty calculated on recommended retail price less GST.) In general, the only foreign writers on domestic royalties are those who have licensed their books to Australian publishers just as Australian authors receive domestic royalties in foreign countries when they license their books to publishers in those countries.

If the Panel accepts the Productivity Commission's logic on this issue, is it then in favour of the maintenance of parallel import restrictions

in the US and the UK because the existence of restrictions in those countries causes a leakage of revenue overseas to the benefit of Australian exporters?

The fact is that our qualified territorial copyright benefits Australian creators above foreign creators because Australian creators are in general paid much higher royalties here. The effect of abandoning territorial copyright would be to benefit foreign copyright holders at the expense of Australian copyright holders simply because the volume of foreign books sold here would be likely to increase, and the volume of Australian books would be likely to decrease, whether or not there was any measureable impact on prices. Australian writers would begin to earn export royalties on foreign editions of their books sold in their own country, so their incomes would fall, as the Productivity Commission acknowledged.

In this context, by recommending the removal of the qualified parallel import restrictions that we have, the Panel also recommends changing the law to prevent Australian authors practising international price discrimination in their own country at the same time as it recommends against legislation to address international price discrimination in Australia. In the absence of definitive evidence about the pressure of parallel import restrictions on prices,

this contradictory signal will not help the Panel achieve its goal of recommending competition laws for Australian writers and publishers that are clear, predictable and reliable.

It is important to understand that territorial copyright makes copyright itself enforceable. Territorial copyright means that the contracts that creators enter into under the terms of copyright are in tune with the law. Territorial copyright can therefore be justified as a means to enforce the inherent right of copyright that attaches to creative effort. The Copyright Act cannot fulfil its objectives in the absence of territorial copyright because without it copyright holders cannot enforce the contracts they license.

Trading in rights—buying and selling—is critical to any modern publishing industry such as we have in Australia. Any visitor to the Frankfurt Book Fair where publishers from the nations of world gather each October can see this in a moment. This activity can only happen within a regime of territorial copyright. The benefits of selling the territorial rights of Australian authors abroad should be obvious. The benefits of buying Australian territorial rights from foreign writers to publish here are also widespread. The books of these writers are printed in Australia, creating jobs. Their contracts are written and negotiated in Australia, creating jobs. Their books

may be edited for Australian conditions, creating jobs. Their books may be designed in Australia, creating jobs. Many of these jobs are created by small business.

Buying and selling rights creates economic opportunity. There is a great deal of evidence that the current arrangements have since 1991 allowed Australian publishers who license rights to bring books to market successfully in ways that would never have happened otherwise. Licensing foreign rights here has added to the vigour of the domestic economy.

The anticipated loss of confidence, in the event of territorial copyright being dismantled, would hit Australian authors and Australian publishers hardest, because they will be penalised for taking the global risks that success in this industry requires. The ultimate loser would be the Australian consumer who will have a poorer choice of titles to select from. It must be clearly understood that the great majority of those Australian authors whom most Australians want to read, ie bestselling Australian authors, do not publish solely for the Australian market. The abandonment of territorial copyright threatens the income and incentive to create of our best and brightest authors, at the same time as it reduces the publishing infrastructure available to debut authors.

This is why any proposal to dismantle territorial copyright is in fact a radical instrument of cultural engineering. Any proposal to remove parallel import restrictions needs to acknowledge this even if questions of cultural value lie outside its remit. Previous enquiries have struggled to find the expertise to address this question. For instance, back in 1995 when the former Prices Surveillance Authority recommended removing the 1991 arrangements it commented: 'In general, books which are distinctively Australian are less likely to be affected by an open market. Indeed, it could be expected that an open market would give greater encouragement to publishers to publish such books to the benefit of local authors.' These sentences are puzzling because many of the distinctively Australian books that Australians read are also published outside Australia. The PSA's argument in 1995 falls into place once we realise that 'distinctively Australian' means 'lacking in export potential'.

Not only can profoundly Australian books be exported, they routinely win international prizes. It would be a disaster if in the absence of territorial copyright the competitive response of Australian publishers was to publish books without export potential in order to shield themselves from the consequences of exporting rights.

Entrepreneurial and innovative Australian publishers would pay a

price, which no publisher in Britain or the US has to pay, to enter this business. Without territorial copyright we would abandon the protection of competition at the cost of the long-term interests of Australian consumers.

The key question posed by this possible competitive response from Australian publishers is: who is going to publish in Australia bestselling Australian writers who also have international readerships? The answer, I believe, is foreign companies who would be competitively advantaged in the quest for such authors by the absence of territorial copyright. It is not in the economic interest of Australia for Australian copyrights to go offshore. And who is going to publish debut authors, the bestsellers of tomorrow, in the absence of territorial copyright? Fewer publishers, taking fewer risks, I would suggest.

The removal of territorial copyright, as the Productivity Commission acknowledged, would trigger a contraction in every aspect of our industry: fewer authors published, fewer books printed, fewer Australian-made books sold. The rights market would be eroded because one could no longer define Australia as a publishing territory. The extent of this decline would exactly mirror the extent to which the abolition of territorial copyright was effective.

The removal of territorial copyright would cause Australian publishing companies and book printers to contract in size. It would seriously damage smaller and independent companies, perhaps to the point of failure. In 2001, when the government of the day introduced legislation to change our territorial copyright regime, the Explanatory Memorandum which accompanied the Copyright Amendment (Parallel Importation) Bill 2001 acknowledged that if the legislation was passed 'there may be some loss of confidence' and that 'some individual publishers' may 'fail'. Let us be clear about this. The first publishers who will fail in the contraction that follows the absence of territorial copyright are small businesses, independent Australian publishers. If the purpose of removing the restrictions is somehow to make foreign companies earn their Australian market share then its purpose will always be doomed because its single greatest effect will be to give foreign publishers unprecedented access to this market at the expense of Australian suppliers who trade in copyright. It will hand the territory to foreign head offices. I will not rehearse the obvious cultural and social arguments which could be mounted about how undesirable this would be, but in the absence of territorial copyright we will be more likely to have a

monochromatic publishing industry, and a monochromatic book retailing industry.

The 2001 Explanatory Memorandum effectively conceded this, and implied that the policy of the government of the day in proposing this legislation was to marginalise independent book publishers. ‘The largest publishers,’ it declared, ‘are large corporations well able to make adjustments to meet changed business conditions. The small publishers may be less well-placed but many publish in niche markets that are unlikely to become targets for parallel importers.’

This was a gross distortion for the many small businesses for whom the publication of Australian writers is a mainstream activity and who behave entrepreneurially to export the work of those writers. By what logic is publishing and exporting Australian writing a niche activity?

Under a regime of unilateral parallel importation there is no such thing as a successful exporter of rights, because an exporter of rights will be punished precisely to the degree that he or she is successful. The greater the number of books that are manufactured outside Australia under licence, the greater the number of books which will potentially be imported into Australia to capture the market which the Australian publisher created in the first instance. It is hard to

imagine a more effective means of making Australian publishers, who cannot export their editions into those significant territories where they have sold rights, uncompetitive.

The removal of parallel import provisions would transfer revenue from Australian companies and from Australian authors to foreign companies and it would make it extremely difficult for internationally focussed Australian publishing companies to compete. It would impede their ability to continue to provide Australian consumers with greater choice than has ever existed before in the Australian books they can buy and read.

Australian publishers are operating in a market where the demand for Australian books is at historically high levels and is growing. A majority of books sold in Australia are originated here. Australian companies have a domestic base which is secure under the current copyright regime to allow them to cultivate export markets. Domestic and export success are inextricably linked.

At Text, for instance, the foreign revenue we attract by selling rights considerably exceeds the royalties we pay as a consequence of Australian sales. Most of this foreign revenue flows through to the Australian writers we publish. The value (measured in Australian dollars) of our books in print outside Australia is greater than the

value of our original domestic editions. It shows what can be achieved if—as the current territorial copyright regime allows us to—we conceive of Australia as a sovereign territory upholding the same rights in copyright as our international competitors. And it shows the threat to competition if those books, produced precisely because we have licensed rights outside Australia, are allowed to enter this market as free riders. The profitability of our company and many companies like ours is directly related to our ability to license foreign rights on exactly the same terms as the foreign publishing companies we compete with. Between a fifth and a third of our company's revenue is generated internationally. Around two-thirds of the royalties we pay our writers are generated internationally. Removing territorial copyright would give access to the Australian market to foreign publishers to whom Australian publishers sell rights without any reciprocal access to their markets. Editions of our books published by foreign publishers would be sold here even though Australian publishers could not export their editions of Australian books into overseas markets because overseas markets are closed once the rights sale has been made. This would discriminate against Australian publishers in favour of foreign publishers.

In selling rights, Australian publishers currently insist that the foreign publisher remove Australia (and New Zealand) from the list of territories where it can sell their edition of the book. Australian publishers have no trouble doing this now because they can secure territorial copyright by publishing first under the 1991 arrangements. In general Australian publishers have no trouble publishing first where they control the sale of British and North American rights because the foreign publisher will co-operate under the current rights regime.

Without territorial copyright Australian publishers would be selling rights from a much weaker competitive position. The foreign publisher might well refuse to buy rights unless Australia is designated as a non-exclusive market. British publishers who still think of Australia as a traditional territory for them to exploit would be likely to insist on this, because the fact that they have territorial copyright while we do not would give them a competitive advantage over the Australian publisher.

This would put the Australian publisher in an untenable position. To refuse the sale would be to strip the writer and the publisher of rights income. To accept it would be shrink the domestic market as

the foreign publisher distributed its own free-riding editions here.

Publishers would have no competitive response.

In cases where the Australian publisher has only Australian and New Zealand rights, contracts with the author in New York and London might in the absence of Australian territorial copyright designate Australia as a non-exclusive territory and foreign publishers would be free to import their books directly as soon as they publish.

The foreign publisher would use its ability to enter the Australian market to extend its print run and lower its unit cost. This would happen even though the Australian publisher has edited, designed and manufactured the book, and has invested in promoting the book with author tours, bookstore signings, poster campaigns and so on.

The free-riding foreign publisher might pay the Australian author an export royalty for Australian sales, far lower than the full domestic royalty the Australian publisher would pay. The Australian writer would subsidise this sale, and the Australian publisher would have already subsidised the cultivation of the market for the foreign publisher.

These are all competitive advantages which would be denied the Australian publisher of an Australian book which cannot sell its book

in the foreign territory, cannot extend its print run to lower the unit cost and pays a full domestic royalty.

What might happen where the Australian publisher has been able to find a co-operative foreign publisher to buy rights who is prepared to exclude Australia from its own non-exclusive territories? The foreign publisher would in the normal course of its business sell copies of its books to wholesalers with whom the Australian publisher has no contractual relationship and who would be free to bring the competing edition into this territory. The publisher cannot refuse to sell to the wholesaler and would have no control over where the wholesaler sells the book. It is natural that the wholesaler would want to sell foreign editions of Australian books into this territory because in many cases this territory would constitute the largest market for the book.

The foreign edition would then be sold under export royalty clauses alongside books sold by the Australian company on which a full domestic royalty is paid. The author would be short-changed and the Australian publisher, who has invested heavily in the domestic market, would be competitively disadvantaged. The competitive response of some Australian publishers might be to lower domestic royalties but it would be unethical to offer less than full domestic

royalties to Australian authors for copies of their books sold in Australia. The Australian publisher would almost certainly be forced to lower its advances to Australian writers. In any event, revenue would be translated from Australian publishers to foreign wholesalers and publishers.

Australian publishers would also be vulnerable to remaindered foreign editions—from which the author either derives a minuscule royalty or no royalty at all—being dumped here. This practice would have the greatest impact on the most successful Australian books.

None of this would protect competition and none of it would be in the long-term interests of consumers. Consumers benefit from the quality, price and diversity of the books they buy and read. We want the best possible quality, we want lowest possible prices under a regime which protects the principles of competition for all players, and we want the great possible diversity of choice. In particular it is in the long-term interests of Australian consumers to have a broad choice of Australian authors to read.

I note that the Panel is in favour of diversity in government services and standards of access and equity. These principles of diversity, access and equity depend on Australian writers and publishers being able to compete internationally with the same territorial copyright

rights that English-language authors in other countries have. We need competition laws and regulations which enshrine these standards for readers.

These are hugely important points which go directly to the principles of the wellbeing of consumers. We cannot debate the function or benefit of territorial copyright or parallel importation in the forms we currently allow without asking bigger questions.

How can Australian writers, publishers and retailers best serve the long-term interests of Australian consumers?

Do we want to encourage small business to participate in the supply and retail of books, an industry in which small business has traditionally always played a significant role?

Do we want to cultivate the innovative and entrepreneurial expression of ideas in books in a competitive regime focussed on export?

Do we want to encourage new booksellers to enter the market and succeed by providing them with clear and reliable arrangements that will allow them to continue to compete against international booksellers?

In particular, do we want to remain the English-language market with easily the highest percentage of independent bookstores which are also small businesses?

Do we want to encourage a culture of excellence?

No review can deal with the issues of copyright and competition without trying to answer these questions. There is no precedent for an English-language territory as significant as Australia abandoning territorial copyright. Australian consumers are entitled to make their decisions about what to read and write in a competitive environment which rewards, by means of territorial copyright, innovation, entrepreneurship and the creation of high publishing standards. We are all of us, every time we buy a book, also a consumer of the copyright arrangements which encouraged the writer, publisher and retailer of that book to play their parts to create it, bring it to market and sell it.

Sincerely,

Michael Heyward

Publisher, The Text Publishing Company