

Australian Literary Agents' Association (ALAA)
Response to the Productivity Commission Discussion Draft into Restrictions on the
Parallel Importation of Books, March 2009.

ALAA was shocked by the Commission's recommendation that territorial copyright for Australian writers be removed except for the first 12 months in a book's life. Territorial copyright is the international standard for writers in other English language territories. If the Productivity Commission's recommendations are accepted Australian writers will no longer be able to compete on the same terms with writers in those countries, publishers in those same countries will have a new export market, and a successful industry will have been undermined by its own Government.

Our writers and our very culture stand to be damaged by the recommended changes and there will also be a loss of jobs throughout the industry, as the Commission acknowledges.

Thousands of people are employed because writers write and create. Yet there is little in the Draft that suggests the Commission has spent any time trying to understand the working lives of writers, the primary producers in the publishing industry. We wish to take this opportunity to offer the commission a more detailed look at those lives.

1. The Writer as Primary Producer.

The Draft fails to show any understanding of what the lives of our clients, that is writers, the primary producers in this industry, are like. We understand basic economics. We understand the theory of supply and demand. We understand that there is a large pool of writers and that relatively few books are published, meaning that many if not most writers will struggle to get an offer of publication let alone a decent contract. We understand that as producers of product publishers

prefer to license copyrights at the 'best' price and that under the majority of contracts writers are placed at a significant economic disadvantage relative to the publisher. We also understand that it is writers who are vulnerable and who carry a huge amount of risk, more so than publishers who work from balance sheets and an asset base, and more so than booksellers who are able to buy their stock on sale or return (unable even to make definite decisions about what to stock although they must have extensive knowledge of their own customers). We understand our clients are not book or script editors under the classification of "professional writers". They are creators. They own their own work (copyright).

We don't know that the Commission understands any of this, although after widespread industry consultation we had expected a modicum of understanding, not just comments such as this "... *publishers are typically seen as having the upper hand in dealing with authors*" as though this is what people say but it's basically incorrect.

2. The Industrial Reality of being a Writer.

There is little understanding in the Draft of the industrial realities of being a writer in Australia today. There is scant reference to the paltry amounts of money most writers make (see Point 8, Culture, below) and no understanding that at all times, with each new contract, each individual writer has to fight for decent terms. Just recently one of our members negotiating a contract for an author (who has published more than 40 books) was offered a royalty of 8% on a bind-up of two books - essentially a royalty of 4% per book. This author had never signed a contract, or indeed been offered a contract, where the beginning royalty was less than 10% and here we are in 2009 with a lower offer than ever before from a trade publisher. "But in essence it's marketing" said the publisher. No. In essence it's an

insulting offer. It's amazing how glibly a writer's work can be treated and it's amazing what publishers will give away in the name of marketing. Imagine if the publisher were asked to take a pay-cut for a week – just in the name of marketing? For writers, however, such conversations are a regular part of their day - just one more battle to be fought.

Additionally there is certainly no understanding that for most writers all they wish for is (a) to get a basic and reasonable royalty rate every time they sign a contract and (b) to have royalty payments made in a timely manner. The commission does not seem to be aware that every time a publisher issues a new contract they are essentially making a land grab – that is, the publisher tries to grab as many rights as possible usually using a line something like this “This is our standard contract”, or this “Other writers are happy with this”. How can book prices seriously be examined (and it's debatable whether they are in the Draft) when there is no acknowledgement that the primary producers are not always paid a standard royalty? The Commission repeatedly and misguidedly overestimates a writer's capacity to dictate terms to their publisher. And we're not talking about terms that would help them make a living wage here, simply a standard royalty, on regular book sales.

3. Writers and Publishers are not the same.

Throughout the Draft the Commission conflates writers and publishers. This is brilliantly illustrated on page 3.6 where the Commission writes “Without copyright protection, authors and publishers would find it more difficult to recoup the cost of their investment”. Hello! Without copyright writers have no way in which to earn a living, and it is not protection it is a right under international law.

Yes, writers and publishers operate within the same industry, but they are not the same group. They are not involved in the same part of the process of 'book producing'. They do not have the same needs and demands. Publishers are companies that have licensed a writer's copyright and that seek to make a profit from that copyright. Those who work for the publishers are salaried workers whose main responsibility is towards that company not towards the writer.

4. Copyright is not a way of ripping off the consumer.

A writer wants to be reasonably paid for the licensing of their copyright. As mentioned in point 2 above, most would like a standard royalty to be paid on each book contract. Copyright is a writer's livelihood; without it they would be unable to earn an income from their work. Individual rights agreements, contracts, are the scaffolding of a writer's business. These agreements allow the market to determine the commercial value of the copyright in the work. Authors can maximize this value by participating in an active and competitive marketplace as they do now.

Remember, we are not talking about them being paid a living wage here we are talking about their wish to reliably get a basic royalty on each and every book contract.

Within the marketplace there are ways a writer can try to increase the income they earn from their copyright. They can endeavour to limit the rights they license to publishers, which allow them the possibility of earning additional money from uses of copyright other than the book rights. For example a writer (through his or her agent) would always try and hold back audio rights from the publishing contract as most publishers take a minimum of 20% of these earnings from these rights whereas the writer can license them directly to the audio publisher for the

same advance (or more) without giving the publisher a cut of this income. Such are the ways in which writers can try to increase their paltry earnings and they are successful in these attempts less often than not.

5. Who is growing rich on copyright?

On page 3.6 of the Draft it says: “There is a social cost to granting authors and publishers the exclusive right to exploit their work. Such exclusive rights enable copyright holders to restrict the diffusion of their work in order to raise its price and thereby increase private profits”.

Where do we see writers restricting the diffusion of their work? Why would they possibly do this? To do such a thing would surely render the whole point of producing a work obsolete. Writers are far more likely to try and increase the ways their work is disseminated.

This point might be worth thinking about more seriously if most writers were growing rich on their copyright. The fact is that around the world publishing companies and institutions, such as Universities and media groups have grown far richer through the control and ownership of copyrights, than have most writers. Traditionally, within the Academy copyright in books, when published, is vested in the University because the writer is an employee of that institution. This has been also true of journalists’ work - the copyright is held by the organization that employs them. Educational publishers today continue this habit – although they don’t employ writers – with many of them expecting copyright and all other rights including photocopying payments - to be vested in them, a good enough reason never to enter a contract with such publishers.

The Productivity Commission’s recommendation that territorial copyright

essentially be abandoned for Australia's writers will mean more profits from writers' copyrights for companies, rather than more money to writers, the primary producers.

6. "But you're doing what you love!"

This is a common refrain to writers, a useful way of excusing everyone from having to pay writers adequately for their work.

Theoretically, of course, we have no issue with the concept of Psychic Income, and agree that it is probably important to many writers just as it is to many lawyers and doctors and public servants and politicians and agents and so on. Where it becomes problematic, both within this report and in the wider community, is that the underlying assumption is that the psychic rewards for writers constitute part of the payment for their work. **Instead of a decent salary they get to be poorly compensated because they are doing what they love and are therefore lucky enough to be the recipients of psychic income.** Other professionals of course do not have to forgo a decent salary as part of their employment 'package', only writers. Imagine suggesting footballers could be paid a lot less because they love what they do!

And it's curious how psychic income never works in reverse. The people doing jobs with little or no psychic income are not compensated for doing such jobs. No one says "this is a crap job with few rewards so you should be paid more for it as you can't possibly be getting any job satisfaction".

Historically the emphasis on psychic income has hindered the community coming to terms with the notion that writers should be paid correctly for each and every use of their work. An extract of a novel is printed in a newspaper – the writer

should be compensated for such use. An extract is read on the radio – the writer should be compensated for such use, and so on and so forth.

7. The Subsidy Alternative

We repeat our view expressed in our original submission that the thought of replacing a successful export industry with a series of subsidies is bizarre and, in this, our response to the Draft, we'll add the word regressive. How would such a practice help Australia's long-term economic growth?

Currently consumers decide what books they will buy. The Australia Council provides some support to writers through grants and through programs such as the VIPs and it is appreciated. The current system is a good balance and it works.

But most writers want to be self-supporting if they possibly can and the Commission fails to note that if a series of subsidies were to replace the marketplace the decision-making process for such subsidies are likely to be based in the hands of a few gatekeepers operating out of the various bodies that award the grants. Arts administrators would make the call for the industry and the community? How would this be a good thing?

We also wonder whether such a concentration on this is actually relevant under the scope of this study, and note in this as in all other parts of the Draft the Commission's solutions favour the larger publishers at the expense of smaller publishers and writers.

8. Culture, what's that?

We appreciate that the Commission has gone to considerable effort to

understand and explain how culture works. But much of the description is theoretical rather than practical and thus fails to capture the realities of a writer's life within that culture. For us the Draft fails to illustrate any understanding of the intangibles of culture that are so important in this debate, specifically: (1) the fact that culture is not measurable; (2) that the basic economic structure of all cultural industries is "feast or famine"; and (3) that *leakage* is a natural part of a global culture.

One has to assume that the Commission believes that publishing is a cultural industry because there is an entire chapter of the report devoted to "Culture and related impacts". However there is little evidence within the report, apart from that chapter, that publishing is anything other than a market driven industry. How can you think about an industry clearly if you cannot attend to the vastly different range in earnings experiences within the primary producers of that industry and what that means to the industry?

Or perhaps the Commission has been blinded (as so often is the media and sometimes the public) by the success stories – by the high advances and the Hollywood film deals – as most of the writers quoted or referred to in the report are all established and successful (feast) authors. The Commission doesn't seriously consider any experiences from the majority of authors, i.e., the 'famine' part of the group, although many of them sent in submissions.

The Commission's concern that the supposed support PIRs provide to writing "is not differentiated according to the cultural significance of the output concerned" is amusing. To what are they referring here? Are they saying that some writing should be protected and some not? Are they saying some writing has more cultural value than others? Who is to be the judge of such value? Surely the cultural

significance of the output is measurable by the number of books sold, the books industry equivalent of the old 'bums on seats' approach?

And can the commission really believe that "there may be little or no additional cultural benefit arising from an Australian authored 'do it yourself' book, financial guide or computer manual, as opposed to a foreign authored one"? How do we know? As Australians we have not generally lived in a world where these books are written by Australians, but what if they were? Might not the consumer buy more of these books? The Australian authored book on how to pay off your mortgage quickly was a best seller and the sales of Robyn Love's childcare books increase each year and might soon outgrow sales of English or American childcare books, if they haven't already. Who's to say that in the future if the industry continues to grow - if Australian authors are able to operate under the same trading terms as their international colleagues - that Australian consumers might not be happier reading computer manuals written by Australians? There are Australian writers ready to write these books if Australian publishers would publish them.

Leakage is seen as an economic problem for the Australian consumer because they might be sending some money into foreign authors' pockets – Quelle horreur! ¡Hola! This is how the global trade in culture works. If we were to take this argument to its conclusion we would never have any Australian books sold in England or America. We would never have Vladimir Ashkenazy conducting the Sydney Symphony Orchestra. Simone Young wouldn't be allowed to run the Hamburg State Opera. The Paris Ballet would not perform in Brisbane later this year.

Culture is both vertical and horizontal. From its country of origin it spreads out across the world, from within its country it functions on multiple levels. Culture

is both global and local. Local cultures need to be strong to feed into other cultures. Australian culture can only have an effect on the culture of other countries if it exists, if it has a base form which to function. If Australian writers have no territorial copyright they will not have a culture to sell to the world. There will be no externalities to worry about then!

9. Why are you here? What is it you actually do?

There is little evidence that the Commission understands the role of an agent in a writer's life. The linking of agents and Editors, page 2.12, was the give-away; agents and editors do completely different jobs. Editors edit books, often with no view to publication. Agents want to get the best deal and the best publisher - sometimes but not always the same thing - for their clients.

Why would the Commission understand what agents do? Most publishers don't even understand the role of the agent in a writer's life. And why would they bother to? After all there is nothing a publisher likes more than an un-agented writer and it's certainly a help to publishers if writers don't have agents, as writers don't have the knowledge that an agent has about what is and what is not possible in a publishing contract. The agent also has an institutional memory that works on behalf of all their clients and so is unlikely to be taken in by lines such as that previously mentioned: "But it's really a form of marketing".

ALAA does not agree that only full-time writers use agents, which is as silly as saying only full-time writers use publishers. If the Commission had looked at the client list of any of the members of ALAA it would have noticed that many of the writers represented, perhaps a majority, have only published one or two books, so surely cannot be classified as 'full-time writers'. And of course it is the agent's

hope, as it is the writer's, that one day the part-time writer will become a full time writer.

And finally, sorry, but we don't agree with your statement that "A significant minority of Australian authors are represented by literary agents" (page 2.11). According to a study done by Hannah Westland as part of the Unwin Fellowship in 2006, the figure is 50%, which is half, not a "significant minority".

In America and Britain the number of authors with representation is much greater. It is a sign of the infancy of the Australian industry that only half of the writers here have agents. We would expect the number of Australian writers with representation to increase if the industry continues to flourish. Of course this is something that won't be achieved if the Commission has its way and territorial copyright is denied to Australian writers who are then likely to move offshore, back to the agents in the UK and the USA who used to represent them.

10. A few last (brief) points

- * Territorial copyright for twelve months only is in essence the repeal of territorial copyright. Do not do this to Australian writers.

- * Most writers who come close to earning a reasonable income from their writing do so because of their backlist sales. Do not take this away from them.

- * Books sales are increasing; not the reverse. Is there any evidence - and if so where is it - from consumers or consumer bodies that book prices in Australia are a problem for them?

- * Writers are not aware of any 'upward pressure' on book prices. Mostly what they are faced with is constant downward pressure on their royalties as publishers try to keep prices *down down down*.
- * Does the Commission seriously think that letting British and American publishers increase the size of their own market by opening the Australian market up to them – essentially delivering them a new market for full priced books or special export editions - can be a good long-term result for the Australian community or lead to long term growth for Australia?
- * Does the Commission not understand that to think about the community as a whole one must think about not only consumers but about the industry that functions effectively within that community?
- * 272 submissions were received in response to the Issues Paper. About 15 of these were in favour of a change in territorial copyright. Does this say anything to the Commission?
- * Sign seen recently in Big W: **"Dymocks' Price - \$29.95. Our price - \$26.95."** Does the Commission have any awareness that what we are really dealing with is a turf war between the chain stores and the Discount Department Stores? The retailing landscape changes all the time. Is it worth ruining an industry because of yet another change in the retailing landscape? Is it worth altering territorial copyright over this?

* Although we recognize that the GST treatment of books is not relevant to the central policy issue in this study we do want to point out that on average the Government earns the same from the sale of a book as does a writer.

* And while we're on comparisons, booksellers receive, on average, a minimum of four times what a writer does for each book sold. In the event that the market is opened, how would we ensure that booksellers pass on any (currently completely imaginary) savings to consumers? Major retailers including Angus & Robertson and Borders regularly mark UP from the RRP set by the Australian publisher; why should we assume they'd act differently when selling foreign editions?

And so to Conclude

It is difficult for those who have all the benefits of the workplace to help them survive the vagaries of life to imagine the ups and downs of most writers' earnings. What the wider community chooses to see is the experience of a lucky few, not the experience of the majority who fight with every book for a decent contract.

What Australian writers want is the right to trade – to be able to license their original works (copyright) - under the same conditions as their colleagues in other major English language territories. We are not asking for more – indeed we already have less as we operate under a time constraint that they don't have– we simply want to continue to trade, to compete, as best we can within law as it currently stands.