



**Australian Government**

Australian Government response to the House  
of Representatives Standing Committee on  
Infrastructure and Communications report:

*At What Cost? IT Pricing and the Australia Tax.*

March 2018

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# Overview

## Background to the Inquiry

On 24 May 2012, the House of Representative Standing Committee on Infrastructure and Communications (the Committee) announced that it would conduct an Inquiry into differential pricing of IT hardware and software in Australia compared to other jurisdictions such as the United States, the United Kingdom, and the Asia-Pacific.

The Inquiry was motivated by the widely-held perception amongst consumers and businesses that Australians were being overcharged by overseas suppliers of software and hardware, with reasons for this attributed to:

1. Australia's isolated geographic location,
2. its comparatively small population, and
3. the historical weakness of the Australian Dollar.

Interest in the comparative pricing of IT products has steadily grown in response to the development of the global online marketplace and the Australian dollar's increased value against the US dollar and other currencies.

In addition to increased public awareness, the perception that Australian consumers were unfairly treated in comparison to overseas consumers had been supported by the Productivity Commission's Review into the Economic Structure and Performance of the Australian Retail Industry. In its 2011 report, the Productivity Commission described arguments used by international suppliers to defend regional price discrimination as "not persuasive".

The importance of IT products to productivity, innovation and growth in Australia is beyond dispute. IT products continue to be a major contributor towards improvements in the standard of living, and they have a significant presence in the modern Australian economy. The claim that Australia is at a distinct economic disadvantage due to pricing disparities was subject to inquiry because availability and affordability of technology is seen to be critical to Australia's continued competitiveness in the global economy.

Comparatively unjust pricing has also contributed to the rationalisation of behaviours such as online copyright infringement—which can harm local content industries and rights holders. Whilst the issues of content access and pricing are not explicitly dealt with by the Committee's recommendations, the Government acknowledges their importance in the context of this debate and is seeking to resolve some of those issues through the recent consultations on its Online Copyright Infringement discussion paper.

## Tabling of the Inquiry Report and Government Response

On 29 July 2013, the Committee tabled its report, *At What Cost? IT Pricing and the Australia Tax* (the Report). The Committee's Report was informed by eight public hearings and a public consultation process which attracted 153 submissions. The Report made ten recommendations falling under the broad headings of: price discrimination, consumer impacts, copyright, circumvention, and competition and remedies.

The Government holds that, within the boundaries of both domestic and international law, Australian consumers should be empowered to seek out goods and services at the best available

price. As consumers continue to avail themselves of the opportunities afforded by the global marketplace, price competitiveness and diversity of products in the domestic market will increase.

The Government has carefully considered the Committee's recommendations. The recommendations raise a number of complex copyright, trade, competition and consumer law issues.

In formulating its response, the Government sought to balance the rights of private companies to set the price of goods and services free of undue government intervention and the rights of consumers to participate in global markets and access goods and services at reasonable prices.

The Government would also like to acknowledge that the tabling of its response comes whilst two other relevant processes are taking place:

1. the consultation on reforms to provisions in the Copyright Act 1968 through the discussion paper on online copyright infringement, and
2. the Government consideration of its response to the Australian Law Reform Commission's report into Copyright in the Digital Economy and the Productivity Commission's report on Intellectual Property Arrangements.

These processes both look at issues directly related to those raised in the context of the IT Pricing Inquiry. This signifies not only the importance of these issues to the Government, but the complexity of the issue and the need for multipronged approach to ensuring fair prices for Australian consumers.

The Government is grateful for the work the Committee has undertaken on this important subject and to all those who contributed with their submissions to the Inquiry.

The Government response on individual recommendations made by the Committee follows.

## Australian Government response

The Australian Government's response to *At What Cost? IT Pricing and the Australia Tax* is set out in detail below.

### Price Discrimination and Consumer Impacts

#### Recommendation 1:

The Committee recommends that the ABS develop a comprehensive program to monitor and report on IT Products, hardware and software, both domestically and overseas, as well as the size and volume of the online retail market.

The Government **notes** the recommendation.

The ABS has a work program which is established in response to current and emerging statistical priorities. The ABS considers new work and changes to surveys in the context of this broader work program and competing priorities, within the limitations of the resources allocated to it.

There are a number of priority areas where there is pressure to increase the statistical coverage provided by the ABS. The ABS has in place processes, such as statistical user group forums, that attempt to identify and prioritise these pressures.

Since publication of the Inquiry Report the ABS has already addressed the need for data on the online retail market. From November 2013 the monthly survey on retail trade includes an experimental time series of current price estimates of 'online retail turnover' in Australia (see cat. no. 8501.0).]

**Recommendation 2:**

Considering the importance of IT products to education, and in the interests of greater transparency in this area, the Committee recommends that the Australian Government, in consultation with Universities Australia and CAUDIT, conduct a comprehensive study of the future IT needs of and costs faced by Australian Universities, in order to provide clearer financial parameters for negotiations.

The Government **does not** support the recommendation.

The Government considers that the proposed study is no longer relevant to the contemporary management and IT environment facing the higher education sector. These are matters that are best resolved by local management of universities within the context of their business needs and strategic plans.

**Recommendation 3:**

The Committee recommends that the Australian Government consider a whole-of-government accessible IT procurement policy, to be developed by relevant agencies including AGIMO, and in consultation with stakeholder groups including ACCAN.

The Government **supports** the committee's recommendation.

ACCAN has advised the Department of Finance that requiring suppliers to comply with Section 508 of the US Rehabilitation Act will meet the intent of the recommendation.

Section 508 requires that US Federal departments and agencies make reasonable efforts to provide information via systems that are equally accessible to the disabled and, if they cannot do so, it requires that they provide individuals with disabilities with an alternative means for equivalent access to the information and data that those information systems provide.

The Digital Transformation Agency has advised that, in March 2017, the Commonwealth Procurement Rules (CPRs) were updated to address this issue through the adoption of Standard EN 301 549 (Accessibility requirements suitable for public procurement of ICT products and services) into the CPRs.

## Copyright, circumvention, competition, and remedies

### Recommendation 4:

The Committee recommends that the parallel importation restrictions still found in the Copyright Act 1968 be lifted, and broadened to ensure it is effective in allowing the importation of genuine goods.

The Government **notes** the recommendation to lift parallel importation restrictions in the *Copyright Act 1968*.

The Committee received evidence that lifting parallel importation restrictions may increase competition. Parallel importation restrictions only apply to certain copyright material (books and film) embodied in a physical item. They do not apply to digital content. These restrictions also do not apply to importation by consumers for personal use.

In its August 2017 response to the Productivity Commission's (PC) Inquiry into Intellectual Property Arrangements, the Government supported in principle the PC's recommendation to repeal parallel importation restrictions on books and undertook to consult with the book industry to develop a reform pathway that is in the public interest.

**Recommendation 5:**

The Committee recommends that the Australian Government amend the Copyright Act's section 10(1) anti-circumvention provisions to clarify and secure consumers' rights to circumvent technological protection measures that control geographic market segmentation.

The Government **notes** this recommendation.

However, the Government considers an amendment to section 10(1) of the Copyright Act is not needed. The definition of technological protection measure for the purpose of the anti-circumvention provisions is sufficiently clear. The Government is of the view that it is unlikely that technologies that control geographic market segmentation fall within the definition of technological protection measures in the Copyright Act.

Anti-circumvention provisions are intended to provide copyright owners with a means of protecting and enforcing their rights in the online digital environment, while allowing for appropriate exceptions to recognise the rights of users. It is important to acknowledge that not all technologies used in the online environment are intended to be subject to these provisions.

The Government is mindful of its international obligations in relation to technological protection measures.

### **Recommendation 6:**

The Committee further recommends that the Australian Government investigate options to educate Australian consumers and businesses as to:

- The extent to which they may circumvent geoblocking mechanisms in order to access cheaper legitimate goods,
- The tools and techniques which they may use to do so, and
- The way in which their rights under the Australian Consumer Law may be affected should they choose to do so.

The Government **notes** this recommendation.

As the Committee observed, geoblocking has resulted in Australian consumers being discriminated against in certain instances on the basis of geographic location. This discrimination, in some cases, may diminish Australian consumers' purchasing power which may adversely impact on investment in, and engagement with, the digital economy.

Australian consumers should be informed participants in the global economy. The Australian Competition and Consumer Commission is responsible for delivering the Government's program to educate consumers about their rights when engaging in the online marketplace, including information on Australian Consumer Law. The delivery of advice and information on technological protection measures and geoblocking by the Government takes into account issues such as copyright protection, authorising or encouraging infringing activities, contractual requirements, and the interests of rights holders.

The Government further notes the valuable role played by consumer groups, such as CHOICE in educating consumers about online engagement.

### **Recommendation 7:**

The Committee recommends that the Australian Government, in conjunction with relevant agencies, consider the creation of a ‘right of resale’ in relation to digitally distributed content, and clarification of ‘fair use’ rights for consumers, business, and educational institutions, including restrictions on vendors’ ability to ‘lock’ digital content into a particular ecosystem.

The Government **supports, in principle**, a detailed analysis of the economic impact of this recommendation.

The Government acknowledges that consumers and businesses have concerns about the legal environment applying to digital content rights. In particular, these relate to the question of whether a right of resale exists and how other methods for disposal of digital content are dealt with by the existing legal framework (for example, transferring ownership of an e-book to a beneficiary).

While a secondary market could result in some lower minimum prices, such a market could increase original content prices where consumers are required to purchase the content rather than licence it for use.

The Australian Law Reform Commission (ALRC) has previously reviewed copyright exceptions in the digital economy, including whether a new ‘fair use’ exception should be enacted. The Attorney-General received the Final Report of that review on 2 December 2013.

The Productivity Commission (PC) also examined Australia’s copyright exceptions in 2015-16 and endorsed the ALRC’s recommendations. The Government has responded to that recommendation by announcing additional consultation on details of implementing changes to Australia’s copyright exceptions framework, which will occur in the first half of 2018.

The Government notes that it would be inappropriate to comment on the merits of a ‘fair use’ exception until it has finalised its consultation on the ALRC and the PC recommendations.

**Recommendation 8:**

The Committee recommends the repeal of section 51(3) of the Competition and Consumer Act 2010.

The Government **supports** this recommendation.

In its response to the Productivity Commission's (PC) Inquiry into Intellectual Property Arrangements, the Government committed to seek to repeal section 51(3) of the Competition and Consumer Act 2010.

**Recommendation 9:**

The Committee recommends that the Australian Government consider enacting a ban on geoblocking as an option of last resort, should persistent market failure exist in spite of the changes to the Competition and Consumer Act and the Copyright Act recommended in this report.

The Government **does not** support this recommendation.

Geoblocking technologies serve to provide a legitimate means for licensed sellers and distributors of copyright material to comply with their contractual obligations to limit their activities to a defined geographic market.

A ban on geoblocking would be fundamentally inconsistent with the territorial nature of copyright protection and evolving business licensing and distribution models.

**Recommendation 10:**

That the Australian Government investigate the feasibility of amending the Competition and Consumer Act so that contracts or terms of service which seek to enforce geoblocking are considered void.

The Government **does not** support this recommendation.

The Australian Consumer Law (ACL), set out in Schedule 2 of the Competition and Consumer Act 2010, contains provisions relating to unfair contract terms in standard form consumer and small business contracts.

The unfair contract term provisions are intentionally broad in scope and provide that a Court can determine that a term of a standard form consumer contract or small business contract is void if the term is unfair.

Unfair terms are those that would cause significant imbalance in the parties' rights and obligations arising under the contract, are not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, and it would cause detriment (financial or otherwise) to a party if it were to be relied upon.

Consumer Affairs Australia and New Zealand recently undertook a comprehensive review of the ACL, concluding in March 2017.