Responses to questions taken on notice by the Treasury at the public hearing of the House of Representatives Standing Committee on Infrastructure and Communications *Inquiry into IT Pricing* on 31 October 2012.

Question 1

Mr STEPHEN JONES: This question goes directly to the geoblocking issues. You said that you do not favour any market interventions—that was the force of your submission. What about a proposition that sought to void the term of a contract—voided it for the purposes of Australian law—which sought circumvention of geoblocking. That is to say, in the instance that Mr Husic pointed out, where the terms of the sale contract is void if you have used a geoblocking circumvention mechanism to purchase the product, it would be within our legislative competency, would it not, as we do in a whole range of other areas, to say that we void that term in that contract?
Ms Bounds: I am wondering if it might be a—
Mr Francis: We might take that on notice. There are certain provisions in Consumer Law that basically stop—
Mr STEPHEN JONES: There are lots of ways that we could do that.
Mr Francis: or strike out certain conditions, typically if they are unfair or unconscionable conduct. Regarding some of the terms that could potentially already fall foul of that, it would have to be tested, I guess, in the court, but it also might be something to take up with—
…
Mr STEPHEN JONES: I just want to clarify the question I put to you. You said that you would go away and provide an informed response to it. I just want to be very precise about the question that I ask you. It is: is there any impediment that you know of that would prevent us from making a law that would void any term within a sales contract that seeks to enforce geoblocking?
Mr Francis: We will go away and have a think about it. I will give you a quick response, because we had a bit of a discussion in the break about this, because I think we were divining where you were coming from. I guess we are not sure how that would actually work in practice. Theoretically, you could make a condition of supplying the Australian markets that you not include geoblocking technology in the software, but of course that is a product coming into the Australian market. To enhance competition, you really need to be able to import from a foreign market, say the US market, and that means, of course, that they could still have the geoblocking technology in the product that they supply in the American market—

The Australian Consumer Law includes core consumer protection provisions voiding unfair contract terms in standard-form consumer contracts. A term is unfair if:

- *it would cause a significant imbalance in the parties' rights and obligations under the contract;*
- *it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and*
- *it would cause detriment to a party if it were relied on.*

It may be possible to draft a specific law that voids contract terms that seek to enforce geo-blocking. However, as with any Australian law, the effectiveness of such a measure on the rights of Australian consumers engaging in contracts internationally may be impacted by the laws applying in the relevant international jurisdiction. This may include: where the foreign law was the proper law governing the contract in question; when the requirement was imposed on an Australian distributor by an international IP rights holder (such as through an exclusive licensing agreement); or if the geo-blocking mechanism was already embedded in the product prior to sale in Australia. In such circumstances an Australian law voiding contract terms may be ineffective.

Further, any such proposal would need to be considered in the context of both existing Australian law and any international agreements made in relation to intellectual property. In particular, the implications for Australia under the provisions of the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the intellectual property provisions of agreements such as the Australia-United States Free Trade Agreement (AUSFTA) would need to be carefully considered before any measures could be put in place.

The Committee may wish to further consult the Attorney-General's Department, IP Australia and the Department of Foreign Affairs and Trade in relation to our international obligations in this area.

Question 2

Mr STEPHEN JONES: You have pre-empted my next question, Mr Francis. The Australian government has, through the Treasurer, been a very vocal supporter—even in a legislative context—of competition within many industries. The banking and finance industry is one example where we have made legislative and other reforms. The government has been very strong about encouraging consumers, particularly mortgage holders, to go out there and dump their current bank and go to another one if they think they are not getting a good enough deal. In fact, we have put websites up on that, I think.
Mr HUSIC: We have seen the end of exit fees and—
Mr STEPHEN JONES: Yes—all of those sorts of things. Within that context, can you see any obstacles—legislative or other—which would prevent our government from promoting geoblocking circumvention mechanisms?

From a competition point of view, the removal of measures such as geo-blocking is likely to benefit competition and, accordingly consumers. This would need to be balanced against ensuring that protections for IP rights holders are appropriate to incentivise the development of new works.

It is possible that geo-blocking, particularly of IP addresses, would not be protected under intellectual property laws such as under the technological protection measures (TPM) provisions of the Copyright Act 1968. As in relation to Question 1 above, Australia's international obligations are also likely to be relevant to whether the Government could promote geo-blocking circumvention measures.

The Treasury does not have policy responsibility for intellectual property matters and this is a question that would be more appropriately considered by the Attorney-General's Department, IP Australia and the Department of Foreign Affairs and Trade.

Additional question asked but not formally taken on notice

Mr STEPHEN JONES: The third in the suite of remedies I am exploring is information. It probably should have been the first, because it is usually the first remedy to anticompetitive behaviour within a market. Consumers who are fully informed about price and price discrimination—particularly where it is not cost based price discrimination—are better able to exercise their consumer sovereignty. To that end, what mechanisms are available to government or to other parliamentary bodies which would enable more light to be shone on price and price discrimination mechanisms?

Public statements or information put forward by individuals, consumer groups or governments can all serve to highlight pricing differentials further in the future. In turn, well-informed consumers are more likely to send price and preference signals to businesses and encourage greater competition and lower prices in the Australian market.

However, it is clear from this inquiry and other evidence that consumers are much more aware of price differentials than in the past. While it would be possible for a government, agency or consumer group to initiate an information campaign, in many cases consumers already have good access to information on current national and international pricing through the internet.

It could be said that there are three stages of markets over time in the context of price discrimination: a lack of price transparency, increased transparency/consumer awareness and a market response. It appears likely that we are in the transition period between the second and third stage. More consideration may need to be given to whether there are barriers to the market responding to consumers' concerns and, if so, what can be done to address them.