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The Parliament of the Commonwealth of Australia

# At what cost?

## **IT pricing and the Australia tax**

House of Representatives  
Standing Committee on Infrastructure and Communications

July 2013  
Canberra

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## Foreword

The importance of IT products to every sector of Australian society can hardly be overstated. IT products are woven into the fabric of our economy and society, and have driven rapid change in the way Australians communicate, the way we work, and the way we live.

Australian consumers and businesses, however, must often pay much more for their IT products than their counterparts in comparable economies. In many cases Australians pay 50 to 100 per cent more for the same product.

Consumer and business concern over IT price differences prompted the Minister for Broadband, Communications and the Digital Economy, Senator the Hon. Stephen Conroy, to refer the question of IT pricing in Australia to the House of Representatives Standing Committee on Infrastructure and Communications for an inquiry and report.

Evidence presented to this inquiry left little doubt about the extent and depth of concern about IT pricing in Australia. Consumers are clearly perplexed, frustrated and angered by the experience of paying higher prices for IT products than consumers in comparable countries.

High IT prices make it harder for Australian businesses to compete internationally and can be a significant barrier to access and participation for disadvantaged Australians (in particular Australians with a disability).


Based on the evidence received over a 12 month inquiry, the Committee has concluded that in many cases, the price differences for IT products cannot be explained by the cost of doing business in Australia. Particularly when it comes to digitally delivered content, the Committee concluded that many IT products are more expensive in Australia because of regional pricing strategies implemented by major vendors and copyright holders. Consumers often refer to these pricing strategies as the 'Australia tax'.

While the Committee recognises that businesses must remain free to set their own prices in a market economy, it has nonetheless made a range of recommendations that are intended to sharpen competition in Australian IT markets. The Committee hopes that these measures will increase downward pressure on IT prices and improve the access of Australian businesses and consumers to cheaper IT products.

Given the ever-increasing importance of IT products to Australian society and the economy – in driving innovation, reducing isolation in regional and rural Australia, or improving the lives of Australians with a disability – it is essential that Australians get a fair deal.

Nick Champion, MP  
Chair





## Membership of the Committee

**Chair**            Mr Nick Champion MP

**Deputy Chair**   Mr Paul Neville MP

**Members**        Mr Paul Fletcher MP

                      Mr Ed Husic MP

                      Mr Stephen Jones MP

                      Mr Rob Oakeshott MP

                      Mrs Jane Prentice MP

                      Mr Mike Symon MP

## Committee Secretariat

Secretary	Ms Julia Morris
Inquiry Secretary	Ms Sonya Fladun
Research Officer	Mr Peter Pullen
Administrative Officer	Ms Jessica Hargreaves



## Terms of reference

Noting the estimated value of the internet to the Australian economy, and the importance of competitively priced IT hardware and software being made available to business, government and the community, the House of Representatives Standing Committee on Infrastructure and Communications is asked to inquire:

- Whether a difference in prices exist between IT hardware and software products, including computer games and consoles, e-books and music and videos sold in Australia over the internet or in retail outlets as compared to markets in the US, UK and economies in the Asia-Pacific;
- Establish what these differences are;
- Determine why these differences exist;
- Establish what the impacts of these differences might be on Australian businesses, governments and households; and
- Determine what actions might be taken to help address any differences that operate to the disadvantage of Australian consumers.



# List of recommendations

## 2 Price discrimination and consumer impacts

### Recommendation 1

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

### 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.

### 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 relevant stakeholder groups including ACCAN.

## 4 Copyright, circumvention, competition, and remedies

### Recommendation 4

The Committee recommends that the parallel importation restrictions still found in the *Copyright Act 1968* (Cth) be lifted, and that the parallel importation defence in the *Trade Marks Act 1995* (Cth) be reviewed and

broadened to ensure it is effective in allowing the importation of genuine goods.

#### 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.

#### 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.

#### 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, businesses, and educational institutions, including restrictions on vendors' ability to 'lock' digital content into a particular ecosystem.

#### Recommendation 8

The Committee recommends the repeal of 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.

#### 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.



## Introduction

- 1.1 On 18 May 2012, Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, requested that the House of Representatives Standing Committee on Infrastructure and Communications inquire into the pricing of information technology (IT) products in Australia.
- 1.2 In his letter of referral, Minister Conroy highlighted 'growing interest in the differentials that exist in prices for IT hardware and software sold in Australia,' an interest which has intensified as the Australian currency gained value against the US dollar.
- 1.3 The Minister noted the internet's value to Australian business and consumers, and the considerable opportunities for economic expansion the digital economy presents. He also noted, however, the concern that when purchasing IT hardware or software, Australian small businesses, private consumers, and governments could face price disparities that may affect their international competitiveness.
- 1.4 Consequently, the terms of reference for the inquiry required the Committee to investigate:
  - whether IT products sold in Australia are more expensive than those sold in comparable overseas jurisdictions, and if so, how much more expensive;
  - why any such differences may exist;
  - the impacts price differences may have on Australian consumers and businesses; and
  - what actions, if any, may be taken to mitigate those impacts on Australian consumers.
- 1.5 For the purposes of the inquiry, the term 'IT products' includes both IT hardware and software, and covers games, consoles, e-books, music and video sold in Australia, either online or in retail outlets.

## Context of the inquiry

- 1.6 IT is omnipresent in businesses of any size or complexity, in schools and universities, and in millions of Australian homes. Information technology influences almost every aspect of Australia's economy and society.
- 1.7 IT products are at the heart of our financial and logistics systems, and support critical infrastructure, health, education and welfare systems. IT products are critical to research and innovation, economic competitiveness and Australia's future social and economic prosperity.
- 1.8 The internet has transformed the Australian economy over the past 20 years, and is poised to play an even greater role in daily life as Australia's engagement with the global digital economy broadens and deepens.
- 1.9 According to a 2011 Deloitte Access Economics report, the internet made a direct contribution of approximately \$50 billion – or 3.6 per cent of Australia's Gross Domestic Product – to the Australian economy in 2010, a contribution of similar value to the retail sector or Australia's iron ore exports. The direct contribution of the internet is forecast to increase by another \$20 billion to roughly \$70 billion by 2016.<sup>1</sup>
- 1.10 Between 2010 and 2011, 6.2 million or nearly three quarters of Australian households had broadband internet access.<sup>2</sup> In the same period 91.2 per cent of businesses had internet access, and 43.1 per cent had a web presence. 50.8 per cent of businesses placed orders via the internet, and 28 per cent received orders over the internet.<sup>3</sup>
- 1.11 More Australians now use internet banking than visit a bank branch. 'As of December 2010, 45 per cent of Australians had used internet banking in the previous four weeks, overtaking the 44 per cent who visited a branch.' Internet banking usage has risen from 1 per cent to 45 per cent in the last 12 years.<sup>4</sup>

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1 Deloitte Access Economics, *The Connected Continent: How the internet is transforming the Australian Economy*, August 2011, executive summary, [http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Services/Corporate%20Finance/Access%20Economics/Deloitte\\_The\\_Connected\\_Continent\\_Aug\\_2011.pdf](http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Services/Corporate%20Finance/Access%20Economics/Deloitte_The_Connected_Continent_Aug_2011.pdf), viewed 21 June 2013.

2 Australian Bureau of Statistics, *Media Release*, 162/2011, 15 December 2011, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/180CCDDCB50AFA02CA257522001A3F4B>, viewed 20 June 2013.

3 Australian Bureau of Statistics, *Summary of IT Use and Innovation in Australian Business, 2010-11*, 26 June 2012, <http://www.abs.gov.au/ausstats/abs@.nsf/Products/372A095FDBCC2B9CA257A2800145B72?opendocument>, viewed 21 June 2013.

4 Roy Morgan, *Research, Internet Banking Surpasses Branch Visitation*, 23 May 2011, <http://www.roymorganonlinestore.com/News/1346---UInternet-Banking-Surpasses-Branch-Visitati.aspx>, viewed 21 June 2013.



- 1.12 In 2012, online sales in Australia totalled more than US\$35 billion. Over 10 million Australians, almost half Australia's population, made a purchase online in 2012, on average spending A\$3,431 per person. This expenditure was on average 54 per cent higher than the United States and the highest in the world with the exception of the United Kingdom.<sup>5</sup>
- 1.13 In its submission to the inquiry, the Department of Broadband, Communications and the Digital Economy (DBCDE) noted that IT hardware and software are a 'key driver of productivity growth in our economy', and that therefore:
- ... [it] is important for Australia's global competitiveness that Australia pays no more for the technology that underpins its success than it must. The ubiquity and affordability of technology is a key requirement for Australia's competitiveness in the global economy and underpins everything from home finances to our export trade.<sup>6</sup>
- 1.14 It is generally accepted that Australians have tolerated higher prices for a range of goods for much of their history. In general, higher prices have been attributed to:
- Australia's geographical remoteness
  - its comparatively small and scattered population, and
  - a historically weak Australian dollar.
- 1.15 In recent decades, however, the internet has allowed Australian consumers to observe and participate in the global marketplace, and to become increasingly aware of prices in comparable overseas markets. Many consumers have also become aware of, and frustrated by, regional pricing strategies that prevent them from taking advantage of cheaper prices overseas.
- 1.16 The Committee sought to explore any structural or commercial reasons for the significantly higher prices paid by Australians for IT products. These included claims by IT product vendors about higher business costs, taxes, Australian regulatory regimes and requirements unique to the Australian market.
- 1.17 The Committee is aware that while regional pricing strategies may exist across many industries, they are particularly noticeable in relation to IT products, including those which are digitally delivered with identical content in different countries. In many cases prices are significantly higher

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5 'Online sales reach a trillion', *The Age*, 11 April 2013, <http://www.theage.com.au/small-business/online-sales-reach-a-trillion-20130411-2hmks.html>, viewed 21 June 2013.

6 Department of Broadband, Communications and the Digital Economy, *Submission 55*, p. 1.

than what might be expected as a consequence of any costs arising from delivery in the Australian market.

## Conduct of the inquiry

- 1.18 The terms of reference of this inquiry were very broad. IT products now permeate every aspect of the Australian economy and society. No single government department or agency is responsible for relevant policy or regulation. Business and consumer groups offered a wide range of perspectives, but none dealt with the totality of issues raised by the terms of reference.
- 1.19 To familiarise itself with current policies and issues relevant to the inquiry, the Committee requested briefings from DBCDE, the Attorney-General's Department, the Department of Finance and Deregulation, the (then) Department of Industry, Innovation, Science, Research and Tertiary Education, the Treasury, the Australian Competition and Consumer Commission, and the Productivity Commission.
- 1.20 In the inquiry's initial stages the Committee sought submissions from the public and invited a broad range of IT companies, business and industry bodies to make submissions. The inquiry received 133 submissions, 15 supplementary submissions and 5 exhibits. The inquiry generated significant interest in the community, and this has been reflected in high levels of media coverage.
- 1.21 More than half of the submissions received were from consumers, most of whom expressed frustration at what they characterised as unfair prices for IT products. The majority of consumer submissions reported high prices for computer games, software, hardware, e-books and digitally downloaded music.
- 1.22 The Committee held eight public hearings: in Sydney on 30 July 2012 and in Canberra on 19 September, 5 October, 31 October, 28 November 2012, and on 13 February, 13 March and 22 March 2013. The Committee heard evidence from consumer groups, government agencies, and industry groups representing IT companies, publishers, retailers, and record labels.<sup>7</sup>

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7 Transcripts of the Committee's public hearings can be found at:  
[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=ic/itpricing/hearings.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/hearings.htm).

## Engagement with industry

- 1.23 From the beginning of the inquiry, the Committee expressed the reasonable expectation that relevant IT industry organisations and companies would take an active role in the inquiry through submissions and participation in public hearings. In offering an opportunity for participation in a public inquiry, the Committee hoped that business and industry bodies would seek to engage with and respond to some of the observations and concerns raised quite openly and regularly by consumers. In this manner, the Committee anticipated a rigorous and fair examination of issues of clear concern to Australian consumers.
- 1.24 From the outset, the Committee experienced the frustration felt by consumers in seeking an answer to legitimate queries. Some large companies stated they would be represented by an industry body, while the industry body stated it could not represent the views of individual members. While various 'peak bodies' took this approach, it was most acutely stated by the Australian Information Industry Association (AIIA).<sup>8</sup>
- 1.25 Communications between the Committee and various industry bodies and individual companies continued for several months. While some material was provided at various stages in written submissions, and in response to specific requests, it was of limited benefit to the inquiry and in the Committee's view did little to address consumers' concerns. The Committee continued to extend written invitations to various individuals and organisations to attend hearings; these were repeatedly declined.
- 1.26 On 29 October 2012 the Chair, Mr Nick Champion MP, in updating the House on the progress of the inquiry, stated:

To one degree or another, there has been a real unwillingness to submit evidence in public or to appear before the Committee on the part of both industry associations and major companies in the area of IT. The committee detects a deep reluctance and resistance on the part of the relevant companies to discuss in public the issues that the Committee is considering or to publicly defend their business models and pricing structures. The committee would, of course, be willing to hear in camera matters that were commercially sensitive – which is a common practice amongst committees – but the Committee's offer to do so has not been taken up. Rather, the industry seems to employ the tactic of giving either little or limited cooperation to the Committee, particularly in public testimony. This stands in stark contrast to what has

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8 Suzanne Campbell, *Committee Hansard*, 30 July 2012, pp. 2, 5.

happened in other inquiries which have investigated areas of commercial sensitivity in that these inquiries received cooperation and information from industry participants...It is not good enough for the industry to simply stonewall the inquiry – or, for that matter, to ignore interested consumers who have a legitimate public interest in IT pricing. It would be far better for companies to defend their business model and their pricing structure in public before the Committee. The committee has offered these companies more than once the chance to appear. We would give them a fair hearing; they have my public commitment on it. The companies' failure to appear leaves the Committee with an unenviable choice between compelling the attendance of individuals to give evidence and reporting without hearing in detail from industry. The choice between one or other of these alternatives can only be averted by the IT industry's following the first rule of good public relations: always turn up and put your case.<sup>9</sup>

- 1.27 The Committee resolved that the companies be required to provide evidence in general terms on how IT is priced in Australia. The Committee took the view that the Parliament has a duty to inform itself about all manner of issues in the Australian community and that if necessary, parliamentary committees should be prepared to require the attendance of witnesses in order to secure relevant evidence.
- 1.28 Therefore on 7 February 2013, the Committee took the unusual action of summoning the following individuals to appear before the Committee at a public hearing on 22 March 2013:
- Mr Tony King, Vice President, Apple Australia
  - Mr Paul Robson, Managing Director, Adobe, Australia and New Zealand, and
  - Ms Pip Marlow, Managing Director, Microsoft Australia.

## **Structure of the report**

- 1.29 The report is divided into four chapters. Chapter 2 of the report provides some definitions of 'international price discrimination', and considers the growing consumer awareness of its presence. It then provides a context for reflecting the evidence which suggests that, across a range of categories, IT products in Australia are more expensive than those sold in comparable overseas markets. The chapter then outlines some of the clear
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9 *Committee Hansard*, 29 October 2012, p. 12170.

impacts of higher IT prices on Australian consumers, businesses and institutions.

- 1.30 Chapter 3 presents some explanations for higher prices as advanced by industry and IT vendors, including about some of the increased costs of doing business in Australia. The question of responsibility for setting prices in the Australian market is discussed, including the roles of businesses and rights holders. Aspects of industry approaches to pricing are considered, including the legitimate ability to set prices 'according to what the market will bear.' Some views of major IT vendors are included in this chapter, as well as some responses from Australian consumers.
- 1.31 Chapter 4 examines aspects of Australia's copyright system, with a focus on competition in digital copyright markets. It also examines potential international agreements, and concludes with a discussion of the remedies available to Australians affected by international price discrimination.



## Price discrimination and consumer impacts

- 2.1 The terms of reference for this inquiry ask the Committee to investigate whether IT products sold in Australia are more expensive than those sold in comparable overseas jurisdictions, and, if so, the reasons for these price differences, and their impacts on Australian consumers.
- 2.2 This chapter will focus on the nature of price discrimination and how it operates. Definitions will be followed by a brief discussion of increasing consumer awareness of pricing, as well as changing technologies such as the increasing cloud services offered, and means by which 'geoblocking' occurs. The Committee then canvasses the incidence of price discrimination across various product categories (including software, hardware, and products available as digital downloads), as described in evidence to the inquiry, noting concerns about the reliability of data on these issues. The Committee also considers the impacts of higher prices on various groups in our community, including those on low incomes, and those who live with disability.

### What is International Price Discrimination?

- 2.3 The Treasury's submission to the inquiry defined international price discrimination in these terms:

Geographic price discrimination occurs when a business charges different prices for the same product in two or more different locations. International price discrimination is when geographic price discrimination occurs across country borders.

To maximise profit, many businesses do not sell based simply on a mark-up of what the product cost to produce, but rather price

according to what they consider the market can bear, that is, according to the consumers' marginal willingness to pay.<sup>1</sup>

2.4 Mr Geoff Francis, General Manager of the Treasury's Competition and Consumer Policy Division, further noted that:

... there are two conditions that must be present for price discrimination to be effective. Firstly, the willingness to pay for a particular good or service must vary between different groups of consumers in order for a business to benefit from price discrimination. Secondly, the business must be able to separate these groups of consumers in order to prevent them from arbitraging the price differential.<sup>2</sup>

2.5 The Productivity Commission in its 2011 *Retail Industry Report* described international price discrimination as:

...a common and generally legal business strategy to maximise profits and performance. It is sustained through sufficient demand from consumers, lack of competitive rivals, and the ability for market and/or consumer segments to be kept separate (that is, there are often restrictions on those that are charged a cheaper price to prevent them reselling their goods to other consumers who are charged higher prices).<sup>3</sup>

2.6 Price discrimination is not restricted to the IT sector, and is not a new feature of the Australian economy. According to Mr Francis, Australians have faced price discrimination for many years:

... price discrimination is not actually a new phenomenon, and it is not surprising that Australians may find prices for products somewhere else in the world that are lower than the prices they find in Australia. As you know, it is common for people to shop overseas while on holiday because they believe that the prices may well be lower on certain items when they are overseas.<sup>4</sup>

2.7 Ms Suzanne Campbell, CEO of the Australian Information Industry Association (AIIA), argued that variations in price are to be expected internationally:

...price comparisons across categories of consumer goods clearly show price disparities are not technology industry-specific. To

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1 Treasury, *Submission 85*, p. 6.

2 *Committee Hansard*, Canberra, 31 October 2012, p. 10.

3 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, 2011, p. 155. [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0019/113761/retail-industry.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0019/113761/retail-industry.pdf), viewed 25 June 2013.

4 *Committee Hansard*, Canberra, 31 October 2012, p. 9.



give an indication of the range of price variation globally, the latest Big Mac index, compiled by the Economist magazine, shows a difference of 426 per cent between the lowest price of \$1.89 in India and the highest of \$8.06 in Switzerland.<sup>5</sup>

- 2.8 Treasury observed in its submission that, in spite of any negative connotations which may be associated with the term, price discrimination is not necessarily objectionable in all cases:

[Price discrimination] allows businesses to maximise the profits earned in each respective market – something that should not be considered inherently ‘bad’, and which their shareholders would reasonably expect in order to maximise the return on their investment.<sup>6</sup>

## Greater consumer awareness

- 2.9 Although arguably a feature of the Australian economy across many markets and across many decades, international price discrimination has become more of a concern for consumers and businesses in recent years.
- 2.10 Rising rates of internet use have increased Australians’ awareness of overseas prices generally and of price differences for similar goods and services in Australia. Many Australians purchase goods directly from overseas suppliers with considerable savings even when distribution costs are taken into account.
- 2.11 At the same time, as the Australian currency rose to parity (and for a time beyond) with the US dollar, Australian consumers became increasingly aware of higher prices for essentially identical IT products.
- 2.12 In his evidence to the Committee Mr Francis noted the internet’s effect on consumer purchasing habits:

Increasingly, price transparency due to the internet has made such price differentials far more obvious than they were in the past, but it is also giving Australian consumers access to international markets without having to travel. I think these price differentials have always existed but they are now far more obvious due to the availability of the internet and due to the availability for consumers to potentially use the internet to effectively shop overseas while at home.<sup>7</sup>

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5 *Committee Hansard*, Sydney, 30 July 2012, p. 1.

6 *Treasury, Submission 85*, p. 6.

7 *Committee Hansard*, Canberra, 31 October 2012, p. 9.

2.13 Mr Les Andrews, Assistant Commissioner at the Productivity Commission, noted the effect that the internet has had on consumer perceptions of value:

... people have always been aware of the fact that if you went to Hong Kong or Singapore on holiday you could buy things more cheaply there and come back with your bargains. But the internet every day exposes people to different prices and I think that makes people far more aware of the differences.<sup>8</sup>

2.14 This growing awareness has featured prominently in the numerous submissions by consumers to the Committee. Mr Dane Weber, to give one example, gave his perspective on the increased access to markets and price transparency:

... many other consumers like myself have grown up with items costing the way they do now. They were that way in the past, so it is natural to assume they would be the same. The reason for this difference would be taking advantage of the status quo: the Australian consumer has not known any better. ... We seem willing to pay this much, because that's the way it has always been. But now we have access to international prices, and purchases are fast and simple. Our higher dollar has made savings of 50 per cent possible and people are taking advantage of that.<sup>9</sup>

## Changing technologies

2.15 The Committee acknowledges that added to increasing consumer awareness of IT pricing is an increase in the means of delivery of services and products to consumers. The Committee notes that the prospective shift towards digital delivery, and subscription models, are discussed in many submissions to the inquiry, and there has been extensive commentary suggesting that these developments are changing the relationship between IT vendors and consumers in significant ways. While consumer and industry perspectives on technology are discussed throughout this report, the Committee presents a brief overview of some of these issues, by way of introduction.

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8 *Committee Hansard*, Canberra, 15 August 2012, p. 3.

9 Dane Weber, *Submission 8*, p. 2.

## Cloud computing and subscription models

- 2.16 In the course of the Committee's inquiry numerous references were made to the development of cloud computing. Indeed one large IT vendor, Adobe, announced a major shift to subscription-only delivery of its latest products. The term 'cloud computing' can refer to a broad range of technological developments. Essentially, the 'cloud' is a network of connected computers which can be used to provide shared computing resources for specific applications (e.g. software services like email, web applications, or synchronisation services) and which are accessed remotely, either through a web browser or via a particular service's application programming interface (API).<sup>10</sup>
- 2.17 Cloud services may enable consumers and businesses to reduce their upfront IT costs by paying for access to and use of shared computing resources rather than purchasing IT assets outright. Customers may benefit from the faster upgrades and cross-device synchronisation that the cloud makes possible, while the growth of an access-oriented 'subscription economy' can provide significant cost savings, and steadier revenue streams, to IT vendors.<sup>11</sup>
- 2.18 The Australian Industry Group (Ai Group) noted that large numbers of Australian businesses had already adopted or intended to use cloud services in the near future.<sup>12</sup> While industry groups and major vendors are vigorously promoting the transition to cloud-based services, the platform can involve significant disadvantages. Subscription services may not be financially beneficial in the long term.
- 2.19 Cloud services are an integral part of digital ecosystems – they provide the infrastructure through which information on multiple devices is synchronised, they can be used for backups, and sharing of content. While some cloud services are multi-platform, a large number are provided by specific vendors as a means of deepening consumers' dependence on a given ecosystem or service.
- 2.20 Cloud-based subscription services also have the potential disadvantage that ongoing access to content acquired through them may depend on continuing to pay the subscription fee, and on the ongoing existence of the

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10 Knorr, Eric and Galen Gruman, 'What cloud computing really means', 7 April 2008, *InfoWorld* <http://www.infoworld.com/print/34031>, viewed 13 June 2013.

11 'How the Subscription Model will change your business applications,' *Forbes*, 20 January 2012, <http://www.forbes.com/sites/danwoods/2012/01/20/how-the-subscription-economy-will-change-your-business-applications/>; and 'The Subscription software revolution', *SmartCompany*, 9 May 2013, <http://www.smartcompany.com.au/tech-head/055441-the-subscription-software-revolution.html>, viewed 13 June 2013.

12 Australian Industry Group, *Submission 56*, p. 2.

provider. Should a customer cease paying, or should its operator decide to cease providing the service, access to content could be affected. The Committee also heard evidence that cloud services can serve to increase a consumer's dependence on a given ecosystem or service, which can also affect pricing as well as increasing a vendor's or publisher's control.<sup>13</sup> Issues concerning the control of intellectual property are discussed in chapter 4.

## Geoblocking

- 2.21 As discussed earlier, Australian consumers are increasingly conscious of differential pricing imposed by IT vendors and rights holders, and to avoid international price discrimination, often prefer to purchase products, particularly digitally delivered products, at cheaper overseas prices. International price discrimination can only be effective when vendors are able to maintain the separation of markets, and thereby prevent customers from accessing cheaper prices elsewhere.
- 2.22 Historically, international markets were easily segmented by their geography, trade barriers, and the comparatively high cost of transporting goods. In the past two decades however, barriers to the formation of global markets have been greatly eroded; the internet has provided direct access to overseas markets without the need to travel; and as global communication networks have matured, digital delivery of content and services has become commonplace.
- 2.23 In response, global IT firms and content providers have erected virtual barriers between markets, which permit different prices to be set in different locations. The methods vendors have adopted to differentiate between regions and keep customers separate are broadly referred to as 'geoblocking', defined by the Department of Broadband, Communications and the Digital Economy (DBCDE) as:
- ... the name for a variety of techniques used to verify a user's location and provide related content on that basis. It is most commonly used for content delivery, such as films and television programs, and to verify a purchaser's location at point of sale. A person's location can generally be derived from their computer's IP address, but at the sale stage can be verified using the person's credit card details or mailing address.<sup>14</sup>

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13 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 6.

14 Department of Broadband, Communications and the Digital Economy, *Submission 55*, p. 11.

- 2.24 Mr Hamish McCormick, First Assistant Secretary of the Office of Trade Negotiations in the Department of Foreign Affairs and Trade (DFAT), described geoblocking as:
- ... the use of internet addresses, credit card numbers or other means of electronic identification to block internet sales and downloads of electronic products – for example music, games and computer programs – based on the geographic location of the consumer.<sup>15</sup>
- 2.25 Geoblocking may effectively restrict consumers' ability to compare prices and accordingly make purchases. The Committee is aware of cases in which firms include conditions in their product's terms of service (which customers must consent to in order to use the product) that prevent customers from using the product outside the region in which it was sold.<sup>16</sup> The Committee heard that geoblocking can be enforced by onerous, multilayered conditions. In the case of IT hardware, geoblocking may be the result of exclusive distribution agreements, in which manufacturers assign the rights to distribute their products in a given territory.
- 2.26 The practical effect of geoblocking from the Australian consumer's perspective is to restrict access to a cheaper global marketplace. According to views expressed in submissions, many Australian consumers see themselves as limited to a national market characterised by markedly higher prices for IT products and services. Consumers' perspectives on geoblocking are discussed later in this chapter; responses from industry are considered in chapter 3; and proposed remedies are canvassed in chapter 4 of this report.

## Warranties

- 2.27 The issue of warranties for IT products arose in various contexts in the course of the Committee's inquiry. Australia's national warranty regime was raised as a factor in explanations for the higher cost of IT products in Australia, and it was also suggested that overseas IT purchasing can involve inadequate or no warranty protection for consumers. Warranties in the sense of consumer protection are examined in this section. Warranties are cited by business as a cost, and this is considered in chapter 3. Options for international warranty harmonisation are considered in chapter 4.
- 2.28 Australia has a national consumer protection regime. Under the Australian Consumer Law (ACL) which is located in schedule 2 to the

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15 *Committee Hansard*, Canberra, 28 November 2012, p. 1.

16 See, for example, Charles Gutjahr, *Submission 43*, p. 6.

*Competition and Consumer Act 2010*, consumers have the same protections, and businesses the same obligations and responsibilities, across Australia. The ACL, in effect from 1 January 2011, provides consumers with a comprehensive set of rights in relation to the goods and services they acquire.<sup>17</sup> DBCDE told the Committee that:

Warranties in Australia can be more rigorous and provide greater protections than those in other countries. The Australian Consumer Law, a schedule of the Competition and Consumer Act 2010, can provide different and in some cases stronger protections than that found in US or UK law.<sup>18</sup>

2.29 Mr Matthew Levey of consumer organisation Choice noted that some importers of IT products maintained ‘extremely strong refund/return polic[ies]’ and that such practices show that ‘it is quite possible to operate here profitably, sell a lot of products and still offer significant price savings’.<sup>19</sup> Some concerns were expressed in submissions about the limitations of warranties for products purchased overseas, in terms of consumer risk and the provision of service and repair for such goods, and a need to provide a greater degree of certainty and security for consumers.<sup>20</sup>

2.30 The Australian Communications Consumer Action Network (ACCAN), a consumer organisation focussed on the communications sector, argued that uncertainties about warranty protection inhibited consumers from seeking to access lower prices overseas and was consequently a factor in maintaining higher IT product prices in Australia:

I think it is something that can prevent consumers from shopping overseas and accessing those lower prices, which we know that some people are doing anyway. ... The more businesses realise that Australians are doing this, I think that could have an impact in terms of competition and bringing prices down. However, we are concerned about whether Australian Consumer Law or any consumer law will apply to those purchases. It is very hard; there are no legal examples we can really refer to, to our knowledge, in

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17 Further details on Australian warranties can be found on the Australian Competition and Consumer website: <http://www.accc.gov.au/business/treating-customers-fairly/warranties> and *Consumer Guarantees: A guide for business and legal practitioners, 2010*, <http://transition.accc.gov.au/content/item.phtml?itemId=964215&nodeId=e16d444b734b11d82b151a17f657780a&fn=Consumer%20Guarantees%20a%20guide%20for%20businesses%20and%20legal%20practitioners.pdf>.

18 Department of Broadband, Communications and the Digital Economy, *Submission 55*, p. 9.

19 *Committee Hansard*, Sydney, 30 July 2012, p. 24.

20 See for example, Choice, *Submission 75*, p. 37, and Erin Turner, *Committee Hansard*, 19 September 2012, p. 6.

these cases.<sup>21</sup> Not every consumer at the moment feels competent about shopping online. ... Knowing that there is an international warranty for a purchase can go to help ease some of that stress and nervousness.<sup>22</sup>

- 2.31 The Committee is also aware of consumers' concerns about warranties for the increasing variety of goods (physical and digital) bought online, including for example the devices and software upgrades bought by Australians living with disability. The Committee acknowledges that consumer concerns about warranty and ongoing servicing costs can have a role in purchasing decisions.

## Evidence about price differences

- 2.32 As noted in chapter 1, of the submissions received, more than half were from consumers or consumer groups, and a significant proportion were from small businesses. The vast majority of these submissions expressed concern at the high price of IT hardware and software. Since calling for submissions in May 2012, the Committee has received information on more than 500 products. Given the fluidity of the IT market, many price comparisons discussed may no longer be accurate.
- 2.33 The Committee understands that, for thorough and statistically valid conclusions on IT pricing, data would need to cover reasonable time periods and cross multiple jurisdictions. The Committee notes the views of Mr Les Andrews from the Productivity Commission that even if such data were available, it is likely that some of it would be commercially sensitive and therefore unlikely to be published.<sup>23</sup> The Committee considers, however, that the examples received in submissions, many of which contain detailed lists of products compared over time, represent a series of 'snapshots' of IT prices, providing an indication of Australian consumers' recent experience in purchasing IT products.
- 2.34 Some submissions provided price comparisons across a range of products, while others focused on a particular IT product or vendor. The Committee's analysis of the evidence received across all product categories revealed the following results:

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21 *Committee Hansard*, Canberra, 19 September 2012, pp. 6-7.

22 *Committee Hansard*, Canberra, 19 September 2012, p. 11.

23 *Committee Hansard*, Canberra, 15 August 2012, p. 4.

- **Professional software:** submissions compared more than 150 products. The comparisons showed an average price difference of 50 per cent, with a median price difference of 49 per cent. Of the major vendors:
  - ⇒ **Adobe** products showed an average difference of 42 per cent, with a median difference of 49 per cent
  - ⇒ **Microsoft** products were on average 66 per cent more expensive, with a median difference of 67 per cent, and
  - ⇒ **Autodesk** products were on average 51 per cent more expensive, with a median difference of 46 per cent.
- **Hardware:** more than 50 products were compared. On average Australian prices were 46 per cent more expensive than the US, while the median difference was 26 per cent.
- **Music:** more than 70 products were compared. Australian prices were, on average, 52 per cent more expensive, while the median difference was 67 per cent.
- **Games:** submissions compared the prices of more than 70 products. The average price difference was 84 per cent, while the median difference was 61 per cent.
- **E-books:** submitters compared the prices of more than 120 e-books. Price comparisons of books sold both in Australia and the US revealed average price differences of 16 per cent, while the median difference was 13 per cent.<sup>24</sup>

2.35 In addition to the Committee's own analysis of material included in submissions, a submission from Choice compared the prices of more than 200 products in several categories, finding that Australian consumers experience an average price difference of more than 50 per cent (compared to US customers) when purchasing IT hardware, software, music, and games.<sup>25</sup> Before looking at the examples provided in many submissions across a range of different products, the Committee notes that other submissions raised concerns about the validity and reliability of such comparisons.

2.36 The Committee acknowledges that drawing conclusions on the basis of simple price comparisons can be problematic. The Productivity Commission 2011 report on *The Economic Structure and Performance of the Australian Retail Industry*, noted that price comparisons may fail to capture 'many aspects of the product and retailer-specific considerations that are valued by consumers'. These aspects may include:

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24 Analysis prepared by Committee, based on submissions received throughout inquiry.

25 Choice, *Submission 75*, p. 4.



- the time it takes for a consumer to receive the product (i.e. delivery times)
  - the potential for consumers to negotiate final prices in-store, often using online retailers' prices as leverage
  - the level of after-sales service available on the product
  - compatibility in Australia, and
  - the extent of close substitutes for products.<sup>26</sup>
- 2.37 The Productivity Commission's observations were supported by Treasury in its submission to this inquiry:
- ... there may be other aspects of the product and the consumer's experience that may not be captured by price comparisons.<sup>27</sup>
- 2.38 In submissions and in appearances before the Committee, industry representatives have questioned the utility of price comparisons and identified a range of non-financial factors that are not captured by price alone. Ms Campbell expressed doubts about the utility of 'snapshot' or 'spot' price comparisons:
- ... spot comparisons are not useful, as prices differ from one country to another for a range of reasons and across channels for many different reasons.<sup>28</sup>
- 2.39 In its submission, the Ai Group also expressed concerns about price comparisons, arguing that snapshot price comparisons:
- do not capture prices paid by consumers who 'negotiate a lower price in store compared to advertised price'
  - 'do not take into account price discounts from the sale of bundled goods' or discounts obtained during contractual negotiations, and
  - do not capture 'non-price' factors like after-sales service, convenience or reliability, that may affect a consumer's decision to make a purchase.<sup>29</sup>
- 2.40 In its submission, Microsoft expressed reservations about the utility of price comparisons of its products:
- We note that the Committee's inquiry is based upon an effort to compare absolute prices for particular product lines offered in different jurisdictions. Microsoft respectfully submits that any such attempted comparisons are of limited use, as prices differ

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26 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, 2011, p. 145.

27 The Treasury, *Submission 85*, p. 3.

28 *Committee Hansard*, Sydney, 30 July 2012, p. 1.

29 Australian Industry Group, *Submission 56*, p. 2.

from country-to-country and across channels due to a range of factors. There is a need to compare like with like.<sup>30</sup>

2.41 In relation to comparisons of prices for digitally downloaded music, the Australian Recording Industry Association argued that:

... the methodology required to be able to make an informed and useful comparison of retail prices for recorded music in Australia and other countries raises significant design issues and collecting the necessary data is a considerable challenge.<sup>31</sup>

### Availability of data

2.42 The Committee accepts that its inquiry has not been assisted by statistical data which would allow for a systematic analysis of comparative IT pricing, and notes that the Productivity Commission experienced a similar problem in the course of its 2011 report on the Australian retail industry. The Commission noted that while the United States had been collecting official data for e-commerce retail sales for over a decade, and while the United Kingdom had been collecting official data on internet retail sales since late 2006, no comparable statistics are available in Australia. The Commission observed that, 'given the growing importance of this part of the retail industry, it is important that more precise statistics are available'.<sup>32</sup>

2.43 The Commission's 2011 report recommended that the Australian Bureau of Statistics (ABS) monitor and report online expenditure both domestically and overseas by Australian consumers. The Commission further recommended the ABS consider options to enable the disaggregation of online spending and employment associated with 'multi-channel' establishments (i.e. retailers that sell products through physical shopfronts and via the internet) and 'pure play' online retailers.<sup>33</sup>

2.44 The Committee followed up this issue with the ABS, which advised that it does not measure prices paid for IT goods and services which are purchased overseas and that consequently 'does not have the data required to enable a comparison of prices paid for IT products in Australia and overseas'. The ABS acknowledged the Productivity Commission's concerns that the ABS' data collection and statistical analysis 'do not accurately cover the importation of products purchased from overseas

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30 Microsoft, *Submission 67*, p. 2.

31 Australian Recording Industry Association, *Submission 93*, p. 3.

32 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, 2011, p. 89.

33 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, 2011, p. 89.

retailers'. The ABS advised that it has been working with the Australian Customs and Border Protection Service to develop indicators for this activity 'based on Customs audits and numbers of parcels'.<sup>34</sup>

- 2.45 The Committee also wrote to the Australian Customs and Border Protection Service which responded that detailed data is provided to the ABS on imported goods valued in excess of A\$1000:

This data includes information on such things as the tariff classification, value and origin of the goods but does not include any information on the method of the purchase, for example, whether the goods were purchased online. The ABS will have information provided by Customs and Border Protection that will enable them to provide information on the value of IT purchases above the entry threshold.<sup>35</sup>

- 2.46 Given the growing importance of IT products and the online economy more broadly, the Committee is of the view that there is a need for more precise and comprehensive statistics that provide government, business and consumers a better understanding of Australia's digital economy.

### **Recommendation 1**

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

### **Evidence by product category**

- 2.47 While the Committee acknowledges views that 'snapshot' comparisons can be of limited use, it does not accept Microsoft's claim that the inquiry is 'based on an effort to compare absolute prices'. The Committee has made every effort to seek information from a range of sources (including repeatedly, from large IT vendors, as noted in chapter 1) to provide a thorough foundation on which to base its observations and conclusions. The Committee has not sought to make generalisations, or accept all evidence without question. The Committee accepts that the wide range of personal accounts from consumers, as well as evidence from peak bodies

34 Australian Bureau of Statistics, *Correspondence*, 10 July 2012, p. 1.

35 Australian Customs and Border Protection Service, *Submission 88*, pp. 2-3.

and consumer advocacy organisations, demonstrates a level of concern which should be reflected fairly in this report. The following sections consider hardware, software, and digital downloads, including games, music, and books, before looking at impacts on consumers across Australian society.

## Hardware

2.48 The Committee did not receive extensive examples of price differences for IT hardware, but notes the submission from Choice which compared the prices of twenty-five computers manufactured by Apple and Dell. The Dell products – a range of laptop and desktop computers – were on average 41 per cent more expensive in Australia than in the US, with differences ranging from 18 per cent to more than 80 per cent.<sup>36</sup>

2.49 The prices for Apple products were much closer to parity – the majority of Apple’s iPad, iMac and Macbook lines were generally 10 to 15 per cent more expensive in Australia. As Choice noted:

The average price difference for Apple’s computer products is 12 per cent. This is only marginally higher than the 10 per cent GST rate, and therefore it could be claimed that Apple’s Australian hardware prices are more or less at parity with the US.<sup>37</sup>

2.50 The Committee heard of several examples of specialist consumer electronic products, and also various ‘consumables’ which also appear to be subject to significant price differences. Mr Douglas Linacre compared the costs for Epson printers and printer cartridges and found differences of more than 100 per cent.<sup>38</sup> Mr Phil Festa described a price difference of between 40 and 50 per cent on a brand of electronic ‘fish finders’, suggesting that this is because only one Australian wholesaler holds distribution rights.<sup>39</sup> The Committee also received several inquiries from consumers who wished to provide submissions describing their experiences of price discrimination with purchasing electronic goods, including cameras and electrical equipment, but the Committee has maintained its focus on IT-specific goods.<sup>40</sup>

2.51 In his submission, Australian web developer Mr Daniel Myles stated that price differences exist in IT and gaming hardware. For Lenovo and Alienware laptops, Mr Myles claims there are price differences from 60 to

36 Choice, *Submission 75*, p. 23.

37 Choice, *Submission 75*, pp. 23-24.

38 Douglas Linacre, *Submission 103*, pp. 1-2.

39 Phil Festa, *Submission 20*, p. 1.

40 See, for example, Daniel Myles, *Submission 33*, p. 17, regarding costs for digital cameras and accessories.

100 per cent; for Sony's PlayStation Vita or the PlayStation 3 console, there are price differences of 40 per cent; and the Nintendo 3DS costs 45 per cent more in Australia than in the US.<sup>41</sup>

- 2.52 As noted earlier in this chapter, 'geoblocking' is a term which can be applied to the means by which Australian consumers are restricted from accessing a cheaper global marketplace. The Committee heard several examples of geoblocking in sales of IT hardware and software products. In the case of IT hardware, geoblocking may be the result of exclusive distribution agreements, in which manufacturers assign the rights to distribute their products in a given territory. Evidence suggests that Australian consumers' access to global markets for IT hardware may in fact be shrinking as more manufacturers implement such agreements.<sup>42</sup> Competition issues are considered in chapter 4 of this report.

## Software and digital downloads

- 2.53 Evidence presented to the Committee suggests that price discrimination is most acute in the case of digitally delivered content – including software, music, games, and books. In these sectors the products delivered are essentially identical when downloaded in Australia, the United States or elsewhere. Digital delivery also means that there are no costs for packaging, shipping and physical delivery, and many consumers question the reasons for large price differentials between Australian and overseas markets. This section therefore reflects evidence received on software pricing in general, as well as products available as digital downloads.
- 2.54 Choice compared the prices of more than fifty software products, focusing on Microsoft and Adobe, comparing Australian and US prices, using data collected in 2008 and in mid-2012. Across more than thirty Microsoft software products, Choice data showed consistently higher prices in Australia for substantially identical products, with Australians paying an average 49 per cent more than US customers. According to Choice, Microsoft Office products, including Microsoft Word, Excel, and Access were more than 30 per cent more expensive in Australia, while the various iterations of Microsoft's popular Windows 7 operating system were 40 to 50 per cent more expensive.<sup>43</sup>
- 2.55 In relation to Adobe software, the Choice submission also revealed significant price differences, although Adobe's prices displayed more variability. Adobe's standard Creative Suite 6 products showed a

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41 Daniel Myles, *Submission 33*, pp. 10, 16-17.

42 Andrew Boisen, *Submission 3*, p. 1.

43 Choice, *Submission 75*, pp. 16-18.

relatively consistent price differential of 60 to 65 per cent.<sup>44</sup> ACCAN also noted price disparities for Adobe products, finding that, on average and assuming the Australian dollar is at parity with the US dollar, Adobe's range of standard, perpetual-license products were 48 per cent more expensive in Australia.<sup>45</sup>

- 2.56 Choice noted that Adobe also sells discounted 'student edition' licenses which permit tertiary students to purchase its software at substantially reduced prices. When student editions were taken into account, Choice data showed a price difference of only 17 per cent.<sup>46</sup>
- 2.57 Many consumer submissions raised the issue of geoblocking practised by Apple, both in relation to its own hardware and for content licensed through its iTunes store.<sup>47</sup> To maintain the separation of national markets, Apple requires a mailing address and credit card at the point of purchase.
- 2.58 The Committee was advised that, in addition to requiring its resellers to verify a customer's location at the time of purchase, Autodesk, a leading 3D design software vendor, requires customers to make contact after purchase to obtain a license key. In this way geoblocking is maintained even if a customer initially circumvents the reseller's efforts at market segmentation.<sup>48</sup>

### Professional software

- 2.59 In relation to professional software, Mr Myles' submission shared concerns expressed by Choice and ACCAN: significant price differences exist in relation to Adobe software, Microsoft software and some Apple products, although Apple's move toward more equitable prices for its hardware is noted.<sup>49</sup> Impacts of geoblocking apply in this sector, as indicated in submissions.
- 2.60 Mr Nic Watt, Creative Director of Nnooo, an Australian video game developer, drew the Committee's attention to significantly higher prices for Autodesk's Maya 2013 3D visualisation software. Nnooo must also purchase Adobe software to create and edit images and vector graphics:

As a games developer for PlayStation (Sony), Wii U (Nintendo) and Nintendo 3DS we have to use one of these packages to be able to create and export our 3D artwork into our games.

44 Choice, *Submission 75*, pp. 18-19.

45 ACCAN, *Submission 74*, pp. 14-16.

46 Choice, *Submission 75*, pp. 18-19.

47 See, for example, Daniel Myles, *Submission 33*, p. 14; Kyle Ridley-Smith, *Submission 61*, p. 1; Paul Barker, *Submission 70*, p. 1.

48 Nnooo, *Submission 114*, p. 2.

49 Daniel Myles, *Submission 33*, pp. 10-15.

Like Autodesk there are no serious competitors and so for making textures (images to put onto a 3D model) for use in games we are required to use their products...<sup>50</sup>

- 2.61 According to Mr Watt, Australian businesses must pay nearly 45 per cent more for Autodesk software, in an industry without significant competition.

[Autodesk] have in the last 7 years purchased the three main 3D visualisation packages used for making films, TV and video games ... the net result of this is that we have to buy the software from [Autodesk] Australia and they control the pricing. We cannot buy a competing product as in our industry they own the major ones.<sup>51</sup>

- 2.62 Mr Ron Rennex characterised the price differential for Autodesk's computer assisted design software AutoCAD as 'appalling'.<sup>52</sup> Mr Paul Bicknell noted the price differentials for a digitally downloaded copy of Autodesk's computer-aided-design software Autocad LT:

I have recently bought 5 licences for Autocad LT. Again delivered over the net Australian price \$1775.00 per licence. Yet if I was in America I could buy these licences for \$1200. The cost of me doing business in Australia was nearly \$3000 based on the location of where I was clicking the buy button from.<sup>53</sup>

- 2.63 Cybertext Consulting, a specialist technical writing and online documentation firm based in Western Australia, uses Adobe products. According to Managing Director, Ms Rhonda Bracey:

As someone living in Australia, I cannot buy these downloadable products from the Adobe store at the US prices -Adobe will not take my Australian credit card, nor will it accept my Australian address. When I try to enter these details, the Adobe website forces me to the Australian Adobe online store webpages, where the prices are incredibly inflated over those available to US customers.<sup>54</sup>

- 2.64 The Choice submission highlighted the largest price difference unearthed in the course of the inquiry. Australian software developers who wished to purchase Visual Studio Ultimate software with full Microsoft Developer Network membership were charged A\$20,775, whereas American developers could obtain the same products for US\$11,899, a difference of

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50 Nnooo, *Submission 114*, p. 4.

51 Nnooo, *Submission 114*, pp. 2, 4.

52 Ron Rennex, *Submission 104*, p. 1.

53 Paul Bicknell, *Submission 39*, pp. 1-2.

54 Cybertext Consulting, *Submission 35*, p. 3.

more than \$8,600. Choice noted that '[f]or this amount, it would be cheaper to employ someone for 46 hours at the price of \$21.30 per hour and fly them the US and back at your expense – twice'.<sup>55</sup>

### Other specialist software

2.65 ACCAN noted price disparities in products designed to facilitate disabled access (braille readers, assistive devices, etc.). ACCAN examined prices for HumanWare assistive devices, noting:

- HumanWare's BrailleNote range of products showed consistent increases of 20 to 30 per cent, with prices difference of up to \$2,300.
- SmartView video magnifiers ranged from 4 per cent more expensive (i.e. close to parity) to nearly 30 per cent more expensive.
- The DeafBlind Communicator products were approximately 25 per cent more expensive in Australia.<sup>56</sup>

2.66 Mr Barry Napthine drew the Committee's attention to price disparities faced by Australians who wish to purchase software to assist the visually impaired. Mr Napthine's screen reading JAWS (Job Access with Speech) software is regularly updated with new features. To gain access to these updates, JAWS customers may purchase a 'Software Maintenance Agreement (SMA) which permits them to access a number of updates. Mr Napthine said:

My complaint is very simple. If I lived in America the cost would be considerably less. In America the cost of an SMA was in December last year \$120, I paid to Vision Australia \$205. Given that at the time the Australian dollar was about parity with the American dollar I find the price difference hard to accept.<sup>57</sup>

2.67 Submitters also drew the Committee's attention to large price differences faced by businesses which use geographical information system (GIS) software. GIS software is used by a wide range of businesses, including mining companies, engineers, local councils, environmental organisations, and various other institutions. Submissions from users of GIS software noted that prices for ArcView, a leading GIS software package sold by ESRI, are significantly higher for Australian businesses. According to Mr Pierre Rousseau:

In April 2012 I was quoted \$4000 for a package (ArcView) that is sold for \$1500 in the U.S. When I queried the sales person on the matter he was clear that it was a matter of regional pricing and

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55 Choice, *Submission 75*, p. 19.

56 ACCAN, *Submission 74*, p. 17.

57 Barry Napthine, *Submission 25*, p. 1.



that their license conditions do not permit me to buy the software in the United States, which compelled me to pay the asking price.<sup>58</sup>

- 2.68 Mr Greg Keeley noted that similar price discrepancies exist for users of other GIS software:

Good examples are MapInfo and ArcInfo ....common GIS software used for example by most mining companies, local councils and planners in Australia...In the case of MapInfo, it is only available from Pitney Bowes in Australia and at much higher prices than elsewhere on the planet. If you attempt to buy it from outside Australia the supplier will refuse to send it to an Australian address.<sup>59</sup>

- 2.69 J Mahuika drew the Committee's attention to price differentials charged by the providers of online training courses:

As an alternative to classroom-based training, many training courses can be purchased online, including training provided by companies for their own software products.

I have found examples of public courses where the Australian price is higher than the US price by between 27 per cent and 50 per cent. In these examples, the courses appear to be the same delivery format, topics and duration, but are displayed on 'Country' specific web pages with differences in the course code (where the Australia course code has the suffix 'AU') and pricing.<sup>60</sup>

- 2.70 Price differences were also noted for software and hardware for children's use. Mr Greg Bell described products by Leapfrog, which sells portable gaming devices and downloadable applications for them, which can be accessed through its proprietary gateway Leapfrog Connect. Mr Bell said:

I recently purchased an app called 'Explorer™ Game App: Globe: Earth Adventures' for \$45, by nominating Australia as my country during the checkout procedure. A quick internet search for the same app shows it is \$25 in the United States.<sup>61</sup>

## Ongoing subscription costs

- 2.71 Submissions to the inquiry also drew the Committee's attention to price differentials in a range of product categories where subscriptions must be purchased. Mr James Rudd, for example, highlighted large price

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58 Pierre Rousseau, *Submission 110*, p. 1.

59 Greg Keeley, *Submission 102*, p. 1.

60 J Mahuika, *Submission 68*, p. 1.

61 Greg Bell, *Submission 63*, p. 1.

differences faced by software developers when purchasing subscriptions to Microsoft's TechNet and the Microsoft Developer Network (MSDN). A Microsoft TechNet subscription provides licenses to nearly all Microsoft applications. IT professionals may require such a subscription to develop or maintain professional skills; businesses may require one for use in creating a 'development environment' to safely test new software or changes to their IT operating environment.

- 2.72 Mr Rudd found that TechNet subscriptions cost approximately 75 per cent more in Australia when compared to the equivalent US price.<sup>62</sup> In relation to MSDN subscriptions, which provide access to Microsoft programming tools for software developers, Mr Rudd said:

The prices of MSDN subscriptions are significantly higher than that of TechNet subscriptions, but the price difference of paying 75 per cent more than the USA remains the same. This means for Visual Studio Ultimate 2010 with MSDN, you will be paying A\$20,775 in Australia and US\$11,899 in the United States, or US\$10,518 through Amazon.<sup>63</sup>

- 2.73 Mr David Poole highlighted the fact that Australian consumers of digital news content can face significantly higher costs. Mr Poole noted that Australian subscribers to The Economist magazine pay 23 per cent more than subscribers in the UK, and 77 per cent more than subscribers in the US. Although The Economist produces several regional editions, Mr Poole notes that they contain substantially identical content.<sup>64</sup> Mr Leonard Cronin raised similar concerns in relation to New Scientist magazine subscription costs.<sup>65</sup>

## Music

- 2.74 Downloadable music was a prominent theme of complaints about price discrimination. It is undisputed that the internet has transformed the way in which consumers can buy, store and listen to music. Although many of the consumer concerns described in submissions focus on Apple iTunes, the Committee extended its consideration to other suppliers of digital music, in recognition of the fact that the contemporary music market is diverse and rapidly expanding. After canvassing consumer concerns, responses from music industry and IT representatives will be considered in chapter 3.

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62 James Rudd, *Submission 40*, p. 3.

63 James Rudd, *Submission 40*, p. 1.

64 David Poole, *Submission 77*, p. 1.

65 Leonard Cronin, *Submission 99*, p. 1.

- 2.75 Launched in 2003, iTunes, an online digital media storefront developed by Apple, has been the biggest music vendor in the US since April 2008, and the biggest music vendor in the world since February 2010.<sup>66</sup> By February 2013, the store had sold over 25 billion songs. On average 15,000 songs are downloaded per minute from a catalogue of over 26 million songs that are available in 119 countries.<sup>67</sup>
- 2.76 Individual songs are priced at several 'tiers' in the Australian and US iTunes stores. In the US store, songs can be priced at US\$0.69, \$0.99, or \$1.29. In Australia, the equivalent tiers are A\$1.19, \$1.69 and \$2.19. The majority of the price comparisons for individual tracks sold through the iTunes store showed prices of US\$1.29 and A\$2.19 respectively – a mark-up of 67 per cent.<sup>68</sup>
- 2.77 Choice compared the prices of 50 individual songs and 20 'classic' albums in the Australian and US iTunes stores. The data showed that songs were, on average, 51 per cent more expensive in Australia, while the median price difference for the songs was 67 per cent. The Choice data showed a similar mark-up for a selection of 20 'classic' albums. Prices in the Australian iTunes store ranged from A\$8.99 to \$29.99, though the majority of albums were priced at \$16.99. In the US store, prices ranged from US\$7.99 to \$16.99, with a majority of albums priced at or around the \$9.99 mark. On average Australians were charged 51 per cent more for an album.<sup>69</sup>
- 2.78 Choice's Mr Matthew Levey referred to the 'dominance of iTunes in the Australian market, as in any market that has a player of that size, is a factor [influencing prices], but we would also suggest that prices for recorded music have been artificially high in Australia for a long time'.<sup>70</sup>
- 2.79 The Committee is aware of music subscription services, from free music access (i.e. advertising supported models) to paid subscriptions which deliver music to multiple platforms (i.e. mobile devices and computers). Further, a plethora of web and streaming services such as YouTube, Soundcloud and Bandcamp, offer access to music in various forms.

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66 Apple *Media Releases*, 3 April 2008, <http://www.apple.com/pr/library/2008/04/03iTunes-Store-Top-Music-Retailer-in-the-US.html>; and 25 February 2010, <http://www.apple.com/pr/library/2010/02/25iTunes-Store-Tops-10-Billion-Songs-Sold.html>.

67 Apple *Media Release*, 6 February 2013, <http://www.apple.com/pr/library/2013/02/06iTunes-Store-Sets-New-Record-with-25-Billion-Songs-Sold.html>.

68 Choice, *Submission 75*, pp. 7-10.

69 Choice, *Submission 75*, pp. 10-11. None of the albums compared in the Choice submission is a new release – all have therefore been on the market for a substantial amount of time.

70 *Committee Hansard*, 30 July, p. 25.

2.80 A common theme of these consumer complaints was incredulity as to the size of price differences between Australia and the United States for identical music downloaded from a digital shopfront. This perspective was summed up by Choice which, in its written submission, observed that:

It is important to note that these products are identical and are delivered directly to consumers through a means which bypasses many production and overhead costs, such as rent, distribution and labour.... Choice does not believe that a price difference of 50 per cent is justifiable.<sup>71</sup>

2.81 Scepticism is not confined to consumer advocacy groups. The Committee also noted the Productivity Commissions' conclusion in its retail industry report that argues justifying higher prices for digitally delivered content are 'not persuasive'.<sup>72</sup>

## Games

2.82 Choice compared the prices for a number of computer games, again finding substantial price differentials. The submission compared the prices of 20 recent and new-release games sold on EB Games' Australian website against the same company's US website. Only one game – *The Elder Scrolls V: Skyrim* – was at parity with the US, while the majority of games were between 40 per cent to 90 per cent more expensive on the Australian website.<sup>73</sup>

2.83 Digitally distributed games showed even larger price differences. The Choice submission highlighted price differentials for games sold through 'Steam', a popular online-only games platform, and showed consistently higher prices in Australia compared to the US for substantially identical digitally delivered content. The worst price differentials on Steam can be 200 to 300 per cent more expensive in Australia. Choice highlighted the ten products with the biggest price differences:

The average price difference for these 10 games is 232 per cent, even though, like the iTunes products, they can be delivered with minimal rental, labour and distribution costs.<sup>74</sup>

2.84 Mr Myles' submission echoed Choice's concerns, identifying price differences in digitally downloaded games, particularly those distributed

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71 Choice, *Submission 75*, p. 12.

72 Productivity Commission Inquiry Report: *Economic Structure and Performance of the Australian Retail Industry*, 2011, p. XXIII.

73 Choice, *Submission 75*, pp. 13-15.

74 Choice, *Submission 75*, p. 13.

through the Steam store and through Electronic Arts' competing Origin store.<sup>75</sup> Mr Dane Weber observes that:

... 'Steam' ...provides a virtual storefront and service for publishers to sell their content. Publishers are allowed to set their price, and given different currencies, can price their products accordingly. As such, the Australian Steam store frequently suffers extreme price discrimination by publishers, occasionally having games pulled to be re-priced higher.<sup>76</sup>

2.85 Valve Corporation, the US-based company which owns Steam, does not set game prices on Steam (except for games it publishes itself). As Mr Dmitry Brizhinev noted:

Valve, the owners of Steam, are not directly responsible for these prices. Instead, they allow the publisher of the game to choose what price they want the game to be sold at. In particular, games that Valve itself publishes are always sold at fair prices in the US and in Australia. It is also worth noting that Steam prices are unaffected by GST and it costs almost nothing to produce a purely digital copy, so it makes even less sense for them to be higher.<sup>77</sup>

2.86 Steam is not the only digital delivery platform that charges Australian consumers more for games. Mr Scott Sutherland pointed out that Australian consumers buying direct from the publishers' website can also be forced to pay higher prices.<sup>78</sup> The price disparities for digitally delivered content are, as Mr Matthew Kermeen observed, 'highly perplexing' to many consumers:

... purchasing games online via a service such as Steam (<http://www.steampowered.com>) or console-based marketplace platforms such as Microsoft's Xbox Live or Sony's Playstation Network Store, the localisation and distribution costs should be void. However in a recent example, the game Max Payne 3 launched at US\$49.99, available via download from Steam. An Australian customer purchasing this exact same game via Steam is expected to pay A\$89.99, almost double the price for the exact same product, delivered in the exact same manner.<sup>79</sup>

2.87 In some cases price disparities in relation to digitally delivered games are so large that it can be substantially cheaper for Australian consumers to

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75 Daniel Myles, *Submission 33*, pp. 6-9.

76 Dane Weber, *Submission 8*, p. 1.

77 Dmitry Brizhinev, *Submission 30*, p. 2.

78 Scott Sutherland, *Submission 46*, p. 1.

79 Matthew Kermeen, *Submission 48*, p. 1.

purchase a physical copy of new release games from a UK-based online store and have it shipped 15,000km to Australia. Mr Scott Nelson, for example, recounts finding a then new-release game, *Mass Effect 3*, on sale at Electronic Arts' 'Origin' digital store for A\$79.99, while a physical copy could be purchased and shipped to Australia from the UK-based ozgameshop.com for A\$38.99.<sup>80</sup>

- 2.88 The Steam store displays Australian prices based on a customer's IP address, so that by default Australians will not see cheaper US prices. Steam enforces regional pricing through the use of credit card information so that Australian consumers cannot easily circumvent their geoblocking by using a virtual private network (VPN) to obscure their geographical location. Steam also uses its Terms of Service agreement as the basis for blocking the accounts of consumers who circumvent its geoblocking mechanisms.<sup>81</sup> Mr Scott Sutherland outlines a different kind of geoblocking experience with:

I tried to buy a copy of a new game in May called 'Diablo 3'. The fastest way to get this game is to purchase it from their website. On the US website the game is advertised for US\$60 = A\$58. But when I go to buy I am redirected to the Australian website and the game is A\$80.<sup>82</sup>

## Books

- 2.89 While impacts on library users are considered in a later section of this chapter, this section describes some general observations made in evidence about e-books, which are also susceptible to price discrimination. Many submissions highlighted higher costs faced by Australian consumers. The Australian Digital Alliance and the Australian Libraries Copyright Committee (ADA/ALCC), for example, compared the prices of a random sample of 48 books. It found that:

On average, it appears Australian libraries pay approximately 58 per cent more for print books than they are priced in the US, and 44 per cent more for e-books. For some e-books, libraries in Australia may be charged as much as 191 per cent more than that e-book is priced in the US.<sup>83</sup>

- 2.90 After analysing the price of 35 titles from the New York Times best seller list, Mr Jeff Burgess noted that:

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80 Scott Nelson, *Submission 4*, p. 1.

81 Brendan Sherrin, *Submission 29*, p. 2.

82 Scott Sutherland, *Submission 46*, p. 1.

83 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95*, p. 6.

... there is good evidence of a pattern of price discrimination against e-book buyers in Australia.... many of the Australian e-book prices are substantially higher than the e-book price in other countries/regions. This is despite the fact that the e-book is listed, sold on, and downloaded from the same USA-based website and servers for every country/region.<sup>84</sup>

2.91 Mr John Dulley, on behalf of a group of Australian customers of the American e-book vendor Amazon, compared the prices of 100 popular e-book titles sold on Amazon.com. He found that when all publishers were taken together, Australians paid 16 per cent more than consumers in the US, and 32 per cent more than consumers in the UK. His results showed high variability between publishers: Harper Collins books were cheaper in Australia, while Penguin and Pan Macmillan books were 38 per cent and 26 per cent more expensive respectively. Independently published books – known as ‘indies’ – were significantly cheaper, according to Mr Dulley, with prices ‘virtually the same in all countries’.<sup>85</sup>

2.92 Ms Julie Jester noted that e-book prices have risen significantly faster in Australia, subsequent to the ‘agency agreement’ which gave publishers price-setting control:

Initially average e-book prices in the Australian region were close to prices in most other regions in the world. The Agency Agreement, introduced in April 2010, caused minor price increases, particularly on new releases.

The Australian region price increases, in December 2011, took e-book prices to well above most of the other regional prices, making Australian e-books the highest priced e-books in the world. Furthermore many e-books are now priced higher than the paper editions.<sup>86</sup>

2.93 Dr Andrew Leigh MP noted in his submission that there are also significant limitations on Australian consumers’ ability to purchase e-book readers, and, further, that Australian consumers can access a more limited selection of titles than consumers in other jurisdictions.<sup>87</sup>

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84 Jeff Burgess, *Submission 49*, pp. 1-2.

85 John Dulley, *Submission 44*, pp. 2-5.

86 Julie Jester, *Submission 47*, p. 2.

87 Andrew Leigh MP, *Submission 76*, p. 1.

## Impacts on consumers

- 2.94 This chapter has noted the enormous impact of the internet and other IT developments on Australians' lives. It has also discussed aspects of international price discrimination, which while not new, are continuing to impact on charges levied on Australian consumers for a range of products and services. This section will review evidence from individuals and community organisations which suggests that the price differences described above have tangible, and negative, impacts on people's lives.
- 2.95 The Committee notes the irony inherent in digital development, an area identified and discussed at length in other forums.<sup>88</sup> While Australians are aware that the internet, including the National Broadband Network (NBN), will have a transformative impact on the economy and society, including the circumstances of the most isolated and socially disadvantaged people, *access* to web-based services is all-important. If people are experiencing isolation, social disadvantage, financial difficulties, or other challenges, perhaps even relating to their business, and are not able to access affordable IT, their situation is likely to get worse.
- 2.96 The Committee notes that its terms of reference ask it to consider the impacts of IT pricing on business, government and households; but there are many other groups within the community who have expressed their interest in the issues considered by the inquiry. The Committee acknowledges the input from those groups, including those who have presented the Committee with personal experiences to clearly illustrate the challenges faced by many in our community.

## Consumers with low incomes

- 2.97 ACCAN's submission to the Committee observed that:
- Hardware and software has become essential to participation in a modern society. A computer and additional software is often needed to search for a job and self-administration for government income support payments is being moved online. Australians who cannot afford high prices for IT products will be restricted in the way they participate in our increasingly digital economy.<sup>89</sup>
- 2.98 Care Inc, a Canberra-based financial counselling service, observed in its submission that its clients who are experiencing financial hardship have

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88 The nature of the 'digital divide' and the 'digital dividend' have been well canvassed, and the current inquiry does not seek to duplicate or revise earlier observations and conclusions.

89 Australian Communications Consumer Action Network, *Submission 74*, p. 6.



- little capacity to access IT products. 'A new computer' (even second hand) is often stated by clients of financial counselling as something on the 'wish list'.<sup>90</sup>
- 2.99 Care Inc noted that access to IT products can be a barrier for people experiencing financial hardship, and particularly for those consumers who have medical and other health issues. While some people are able to access the internet through their local library or employment service providers, these environments are shared, often require 'bookings' and the organisation of transportation and 'do not reflect the way that technology is used in our community'.<sup>91</sup>
- 2.100 Care Inc notes that low income earners or people who cannot access credit through the mainstream market may attempt to avoid expensive upfront IT costs by resorting to rental or lease agreements; contracts which are 'enormously expensive', thereby paying significantly more in the longer term.<sup>92</sup>
- 2.101 The Committee acknowledges ACCAN's observation that 'the cost of hardware and software is a major concern for not-for-profits',<sup>93</sup> organisations with limited and often low income who seek to provide services to support individuals in need of assistance. Connecting Up is an Australian not-for-profit organisation which seeks to build the capacity of the not-for-profit sector by 'reducing their IT costs, providing educational material and practical workshops and events'.<sup>94</sup>
- 2.102 Connecting Up draws on partnerships with key IT product providers to provide, subject to eligibility criteria, 'industry-standard software and hardware at a greatly reduced cost'. The products are provided through existing Charity Licensing schemes or through direct negotiations with technology vendors, including Microsoft, Adobe and Symantec. Connecting Up note that through this discount program, 'not-for-profit [organisations] can save up to 50 per cent off their products'.<sup>95</sup>
- 2.103 According to Connecting Up, not-for-profit organisations would benefit from a greater awareness that they can potentially access free or discounted technology. Connecting Up also notes the increasing importance of access to high-speed broadband as cloud services develop,

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90 Care Inc, *Submission 131*, p. 2.

91 Care Inc, *Submission 131*, p. 3.

92 Care Inc, *Submission 131*, p. 3.

93 Australian Communications Consumer Action Network, *Submission 74*, p. 7.

94 Connecting Up, *Submission 111*, p. 1. Connecting Up website, viewed 12 June 2013, <http://www.connectingup.org/donations>.

95 Connecting Up, *Submission 111*, pp. 1-2.

and further argues that not-for-profits may need government grants to assist in the acquisition of IT infrastructure.<sup>96</sup>

## Higher education sector

- 2.104 Australia's 39 universities have a combined enrolment of more than one million students, and employ more than 100,000 staff. 'University expenditure accounts for 1.6 per cent of GDP, which in turn benefits students, staff, industry, and the wider community.'<sup>97</sup> Over the past few decades, the education sector has become ever more reliant on information technology. Monash University noted that, for higher education institutions and the students that they educate, IT is of increasing importance to daily operations.<sup>98</sup>
- 2.105 It is estimated by the Council of Australian University Directors of Information Technology (CAUDIT) that 'collectively, CAUDIT member institutions spend approximately A\$1.5 billion on ICT products and services annually'.<sup>99</sup> The Committee would have liked to have heard more from the Australian higher education sector in relation to IT procurement, to provide a greater range of views, but is aware of some reluctance to participate in this inquiry for fear of jeopardising ongoing and future contract negotiations with major IT vendors.
- 2.106 According to Monash University's Annual Report 2012, Monash University spends approximately \$32 million each year on IT products and services.<sup>100</sup> Of this IT operations budget, approximately 10 per cent is spent on software from some 100 suppliers. Monash stated that there is 'clear anecdotal evidence' that software costs are higher for the Australian higher education sector than for comparable institutions overseas.<sup>101</sup> Monash described how it had 'carried out some sample price assessments with a UK comparator university and concluded that, on average and on current exchange rates and eliminating sales tax difference, our underlying unit costs for hardware are 20 to 30 per cent higher'.<sup>102</sup>

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96 Connecting Up, *Submission 111*, p. 2.

97 Background information can be found at the Universities Australia website at: <http://www.universitiesaustralia.edu.au/page/6/australia-s-universities/>.

98 Monash University, *Submission 87*, p. 2.

99 CAUDIT website: <http://www.caudit.edu.au/about-caudit>.

100 Monash University Annual Report 2012, p. A64, <http://www.monash.edu.au/pubs/ar/>, viewed 13 June 2013.

101 Monash University, *Submission 87*, p. 2.

102 Monash University, *Submission 87*, p. 2.

- 2.107 In explaining why IT costs for higher educational institutions in Australia might be more expensive the Monash University submission stated that:

From the perspective of the individual student or indeed individual university, these differentials are created by well-known commercial forces. These forces add up to asymmetry of information and bargaining power between the vendor and the consumer.<sup>103</sup>

- 2.108 As noted earlier in this chapter, the presence of cloud computing has impacts for users. Monash University noted that while cloud services can indeed offer flexibility for consumers and IT vendors, subscription services may have downsides:

The emergence of cloud approaches has increased the range of options available to customers and at the same time created new opportunities for vendors to achieve step changes in their value proposition. It would be naïve not to recognise that although cloud solutions may reduce headline costs to the customer, vendors would not pursue the approach if it did not improve their returns (creating artificially high costs to customer).<sup>104</sup>

## Impacts on students

- 2.109 Monash University's submission to the Committee also highlighted financial pressures on university students who 'manage finite and often limited resources whilst studying':

At Monash, approximately 12 per cent of the domestic undergraduate student population come from a low socio-economic background. For this cohort, meeting living and study-related costs can be very challenging.<sup>105</sup>

- 2.110 Monash noted that universities are increasingly using '... electronic delivery of content and collaboration environments. In light of these changes, the need for students to have easy access to contemporary IT tools increases, as do the attendant financial challenges.'<sup>106</sup> Monash further noted:

The proportion of students affected by difficulty in paying for communications costs is higher than one might imagine, with 43 per cent of respondents to a recent National Union of Student

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103 Monash University, *Submission 87*, p. 3.

104 Monash University, *Submission 87*, pp. 1-2.

105 Monash University, *Submission 87*, p. 2.

106 Monash University, *Submission 87*, p. 3.

survey stated that they struggle to pay communication costs from their normal income.<sup>107</sup>

- 2.111 Monash University is concerned that for ‘...some talented prospective students from low socio-economic backgrounds, the costs of IT in Australia will add to their decision not to take up Higher Education’.<sup>108</sup> The Committee notes Monash’s suggestion that options be examined to allow students to purchase necessary IT equipment through an arrangement such as Higher Education Loan Program, and would be interested to see any progress in this area.

## 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.**

## People living with disability

- 2.112 While the evidence provided to the Committee is largely anecdotal, the Committee accepts that concerns expressed by individuals were genuine, and reflect a growing awareness that many IT products, hardware and software, designed for people with disability are expensive, and often cost significantly more in Australia than overseas.<sup>109</sup> Mr Wayne Hawkins of ACCAN told the Committee that:

... the higher price that consumers in Australia pay is detrimental to all consumers, but there is a significantly higher impact on vulnerable consumers and particularly consumers with disability. The research that is available shows us that Australians living with disability are overrepresented in the low income socioeconomic groupings, and these higher prices significantly impede their

107 Monash University, *Submission 87*, p. 3.

108 Monash University, *Submission 87*, p. 3.

109 Australian Communications Consumer Action Network, *Submission 74*, p. 9; Faye Galbraith, *Submission 78*, p. 1.

access to all of the vital services that are now being provided online with telecommunications.<sup>110</sup>

- 2.113 Such products include optical character recognition software systems used to scan printed materials, screen readers that provide either speech or braille output, magnification software to enlarge text, adapted keyboards, on-screen keyboards and voice recognition software and alternative communication programs.<sup>111</sup> The way in which Ms Faye Galbraith described the importance of modern IT hardware and software to support children with disability to communicate, play games, and participate in education, showed the Committee the necessity of such assistive devices:

There are a multitude of apps available to assist kids with disabilities, to communicate, play and learn. ... It's important to mention that for some of us, technology isn't a desirable object, it's an absolute necessity. It promotes communication, inclusion and independence.<sup>112</sup>

- 2.114 Mr Hawkins outlined his own experiences arising from the comparatively high cost of IT products to assist people with disability, describing vastly different prices for screen reading software which is available as a digital download.<sup>113</sup>

- 2.115 ACCAN argued in its submission that many people with disabilities are amongst the most economically disadvantaged members in our community. The requirement for specialist equipment to support their disability makes it more likely that they will be unemployed and on a Disability Support Pension.<sup>114</sup> A member of Blind Citizens Australia contributing to the ACCAN submission to the inquiry noted that:

It is not unreasonable to conclude that high prices for disability IT equipment has contributed to the high levels of unemployment experienced by people with disability and made social interaction and study more difficult. Any effort to align prices to the lower rates seen in other markets could play a role in increasing employment or social inclusion for this disadvantaged group.<sup>115</sup>

- 2.116 IT products are important, indeed essential, to people with disability. However ACCAN pointed out that:

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110 *Committee Hansard*, Canberra, 19 September 2012, p. 2.

111 'Assistive Computer Devices and Access Aids for PC', *Disabled World*, <http://www.disabled-world.com/assistivedevices/computer/>, viewed 13 June 2013.

112 Faye Galbraith, *Submission 78*, p. 1.

113 *Committee Hansard*, Canberra, 19 September 2012, p. 2.

114 Australian Communications Consumer Action Network, *Submission 74*, p. 10.

115 Australian Communications Consumer Action Network, *Submission 74*, p. 11.

Unlike other countries, there is no legislated right for people with disabilities to have access to technology they require for daily living that can assist them in participating in the community.<sup>116</sup>

- 2.117 The Committee heard from ACCAN that even where IT products are purchased overseas, local warranty and service arrangements are important considerations:

If [consumers with disability] can save a couple of thousand dollars from what the price is in Australia by buying it overseas then that is fantastic, but when they do that they do not have backup warranty and service agreements, so then they are disadvantaged if something goes wrong with the equipment.<sup>117</sup>

- 2.118 The submission of the ADA/ALCC urged the Committee to 'take into account not only the prohibitive costs of IT hardware and software for Australians with disabilities, but other ways in which digital content providers may restrict (or exclude outright) their enjoyment of content'.<sup>118</sup>

- 2.119 ACCAN argued that Australia's small domestic market disadvantages individual consumers who need specialised IT products:

In most cases consumers lack any choice when shopping for disability specific hardware and software ... This is also the case for other disability specific pieces of hardware and software and is likely due to the fact that specialised equipment is aimed at a small section of the market in Australia, which is a small domestic market compared to the USA or UK.<sup>119</sup>

- 2.120 Similarly Ms Galbraith expressed concerns:

We hear many excuses for anti-competitive practice by disability equipment suppliers and IT retailers alike: a narrower market by nature of a smaller population; higher shipping costs; a virtually non-existent manufacturing industry.<sup>120</sup>

## Legal considerations and international obligations

- 2.121 ACCAN suggested to the Committee that employment opportunities can be lost for people with disability because of the high cost to employers of making modifications to IT systems in the workplace:

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116 Australian Communications Consumer Action Network, *Submission 74*, p. 11.

117 *Committee Hansard*, Canberra, 19 September 2012, p. 2.

118 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95*, p. 14.

119 Australian Communications Consumer Action Network, *Submission 74*, p. 11.

120 Faye Galbraith, *Submission 78*, p. 1.

Unfortunately, the high cost of much disability related equipment means that potential employers, educational institutions and service providers may be able to claim 'unjustifiable hardship' under the Disability Discrimination Act 1992 and therefore attempt to legally refuse to hire, educate or provide services to people with disability.<sup>121</sup>

- 2.122 In their evidence to the Committee both ACCAN and Dr Matthew Rimmer of the Australian National University highlighted Australia's obligations under the United Nations Convention on the Rights of Persons with Disabilities.<sup>122</sup> Dr Rimmer observed in his submission to the Committee:

Lamentably, Australia's copyright regime fails to adequately address the problem of disability discrimination, particularly in respect of copyright works in a digital form.<sup>123</sup>

- 2.123 Dr Rimmer in his submission pointed out that 'those with disabilities and their carers suffer problems in respect of access to knowledge'. He argues that under the United Nations Convention on the Rights of Persons with Disabilities, Australia has an obligation to ensure disabled persons are not discriminated against by copyright law and have access to 'cultural materials'.<sup>124</sup> Dr Rimmer noted the estimation by Disability Discrimination Commissioner Graeme Innes that 'only 5 per cent of all books in Australia are published in accessible formats such as large print, audio or braille, while in developing countries it is just 1 per cent'.<sup>125</sup>
- 2.124 ACCAN noted that while the Australian Government is committed to its own National Disability Strategy and a whole-of-government Social Inclusion Agenda, it does not have a comprehensive public procurement policy for accessible IT and that this undermines Australia's commitment to its obligations under the United Nations Convention on the Rights of Persons with Disabilities.<sup>126</sup>

## Public Procurement Policy

- 2.125 ACCAN noted that public procurement of IT products, especially hardware and specialised software, would greatly assist people with disabilities, both in terms of affordability and access, and claimed that

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121 Australian Communications Consumer Action Network, *Submission 74*, p. 11.

122 Matthew Rimmer, *Submission 92*, p. 59; Australian Communications Consumer Action Network, *Submission 74*, p. 12.

123 Matthew Rimmer, *Submission 92*, p. 60.

124 Matthew Rimmer, *Submission 92*, p. 59.

125 Matthew Rimmer, *Submission 92*, p. 8.

126 Australian Communications Consumer Action Network, *Submission 74*, p. 12.

‘Australia lags behind the majority of OECD countries, which have included IT accessibility criteria in their public procurement regimes.’<sup>127</sup> At the present time the Australian Government has no such policy in place, and ACCAN has called for its introduction. Such a policy, ACCAN claims, could be accessed by eligible persons, especially people with disability, either at discounted prices or as a benefit.<sup>128</sup>

2.126 ACCAN argued that this program would also ultimately encourage more employers to hire disabled persons. Currently the price of the IT infrastructure required for disabled persons can in some instances be prohibitive for employers thus disadvantaging the disabled.<sup>129</sup>

2.127 Although the Committee was not able to fully explore the issue of public procurement as a remedy for reducing the costs of accessible IT products for persons with disabilities, the Committee recommends that the Australian Government give consideration to adopting a whole-of-government accessible IT procurement policy to improve the quality of life for people with disabilities and their carers. Noting the report *Accessible Communications Tapping the Potential in Public ICT Procurement Policy*, by the University of Wollongong and GSA Information Consultants in consultation with ACCAN,<sup>130</sup> the Committee considers that such a scheme should be undertaken by relevant agencies including AGIMO (the Australian Government Information Management Office) and involve consultation with relevant stakeholder groups including ACCAN.

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127 ‘Accessible Communications: Tapping the potential in public ICT procurement policy’ Australian Communications Consumer Action Network, [http://accan.org.au/files/Accessible\\_Communications\\_Report\\_Accessible.doc](http://accan.org.au/files/Accessible_Communications_Report_Accessible.doc), viewed 13 June 2013.

128 Australian Communications Consumer Action Network, *Submission 74*, p. 12.

129 Australian Communications Consumer Action Network, *Submission 74*, p. 12.

130 ‘Accessible Communications: Tapping the potential in public ICT procurement policy’ Australian Communications Consumer Action Network, [http://accan.org.au/files/Accessible\\_Communications\\_Report\\_Accessible.doc](http://accan.org.au/files/Accessible_Communications_Report_Accessible.doc), viewed 13 June 2013.



### 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 relevant stakeholder groups including ACCAN.**

## Library users

- 2.128 As the ADA/ALCC noted, almost half of all Australians are members of public libraries, with some 114 million visits to libraries registered in 2009-2010. Libraries often cater for low income earners such as the unemployed, students, pensioners, persons with disabilities, as well as people from non-English speaking backgrounds.<sup>131</sup> Most public libraries in Australia now offer internet access, providing access to digital information, government services, and subscription-only publications.<sup>132</sup>
- 2.129 The ADA/ALCC submission explained that the provision of e-books presents many challenges for libraries, including the contracting away of rights available under Australian copyright law, lack of ability to access new release material, evolving business models that see pricing regimes changing regularly and lack of certainty about long term access to material.<sup>133</sup>
- 2.130 The ADA/ALCC observed that:
- ... there are few publishers offering an outright purchase model for e-book titles, and that in early 2012, Penguin Books without notice withdrew licensing for its e-book catalogue to Australian libraries via the aggregator Overdrive.<sup>134</sup>
- 2.131 As well as noting the higher costs for e-books, discussed earlier in this chapter, the ADA/ALCC highlighted problems with access. Publishers may refuse to license e-books to libraries, or may withdraw access to their e-book catalogue. ADA/ALCC also highlighted recent licensing agreements that force libraries to purchase multiple copies of an e-book,

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131 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95*, p. 5.

132 'The Little Book of Libraries', Australian Library and Information Association, [http://www.alia.org.au/sites/default/files/documents/advocacy/ALIA.Little.Book\\_of\\_Public.Libraries.pdf.for\\_web.pdf](http://www.alia.org.au/sites/default/files/documents/advocacy/ALIA.Little.Book_of_Public.Libraries.pdf.for_web.pdf), viewed 13 June 2013, p. 12.

133 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95*, p. 5.

134 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95* p. 5.

even if they require fewer copies.<sup>135</sup> According to the ADA/ALCC submission:

Some publishers currently refuse to license/sell e-books to Australian libraries at all – at any price. Further, e-books are generally only available to Australian libraries for as long as the publisher is willing to license them (or until the publisher goes out of business...) ...

Australian publisher Allen & Unwin recently amended their e-book licensing arrangements with large public library services and library consortia, mandating the purchase of multiple copies of any e-book, even where only one copy is desired. Until recently, the State Library of Western Australia (SLWA) could license one copy of an Allen & Unwin title for the WA public library network (restricted to single user access). The amended licensing arrangements mean SLWA would have to purchase 12 copies of any e-book (current release or backlist title), with a resultant impact on budget. Even if SLWA only wanted one copy of a particular e-book title, they would effectively pay 12 times the list price. These price differentials will adversely affect acquisitions policy in libraries; in particular, the breadth of e-books available to library users.<sup>136</sup>

2.132 Representatives of the Australian publishing industry acknowledged that the availability of e-book licences to Australian libraries, costs and associated terms and conditions governing access to content by library users is in a state of flux. According to Mr Ross Gibb of Macmillan Australia:

We are still trying to come up with the model for libraries. There are various products out there. The US have been struggling with this one – does the library buy the book once, have it forever and lend it as many times as it wants? That is not going to create much income for the publisher, nor particularly for the author. So we are trying to look at subscription models or models that allow a reasonable amount of usage and wherever it might go from there. There are time periods being set and different models being experimented with. I do not think there is an answer anywhere yet.<sup>137</sup>

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135 Australian Digital Alliance/ Australian Libraries Copyright Committee, *Submission 95*, pp. 5-6.

136 Australian Digital Alliance/ Australian Libraries Copyright Committee, *Submission 95*, pp. 5-6.

137 *Committee Hansard*, Sydney, 30 July 2012, p. 14.

- 2.133 For those who prefer to keep their reading collections on their own devices, rather than access them via a public library, the Committee noted with concern comments made by Mr Gibb, of Macmillan Australia, about ongoing access to cloud-based e-book services: access to a consumer's e-book library would continue for, '[a]s long as your e-reseller is going to maintain your library – so hopefully they stay in business'.<sup>138</sup>

## Small business owners

- 2.134 As with many other sectors of society, business has become increasingly reliant on the use of IT products over the last few decades. Evidence presented to the Committee suggests that certain types of small businesses, such as those using niche software, may be significantly impacted by the higher cost of IT products, and particularly disadvantaged when 'locked in' to a particular suite of products. While large companies and governments may be able to negotiate more competitive prices for IT products, small business may be less able to shop around for alternative cheaper IT products; submissions expressed concern about barriers to choice and competition, and noted the consequent impact of higher prices on their international competitiveness.
- 2.135 Mr Nic Watt, Nnooo's Creative Director, argued that the layer of costs the company is forced to absorb significantly affects its international competitiveness:

Australian [companies] in the film, TV and video games business are being unfairly financially penalised in comparison with their American counterparts. This makes it more expensive to do business in Australia and makes it hard to compete on a global stage.<sup>139</sup>

- 2.136 Other software developers face similar problems and are obliged to absorb higher input costs. Mr James Rudd, an IT professional, noted in his submission that the suite of development tools provided to business by Microsoft can be significantly more expensive in Australia. Mr Rudd concluded that:

These differences in price can significantly raise the cost of becoming an IT Professional or Developer and staying up to date on current technology. They disadvantage Australian businesses that use Visual Studio and MSDN to develop software by having a

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138 *Committee Hansard*, Sydney, 30 July 2012, p. 14.

139 Nnooo, *Submission 114*, p. 2.

much higher yearly fee for their development software compared to similar US businesses.<sup>140</sup>

- 2.137 Freelance web designer Mr Peter Larkin argued that the competitive impact of higher IT prices is felt quite widely:

A major impact is felt within the multimedia/web design community here, as local businesses find it hard to compete with our US counterparts given the tools (Adobe software) is so much more expensive for us to buy than it is for US-based companies...our ability to compete on a global level is compromised.<sup>141</sup>

- 2.138 Australian Commercial and Media Photographers (ACMP) noted that many small businesses in the photographic industry consider they have no choice other than to purchase Adobe software and consequently have a keen sense of international price discrimination :

Adobe provides an easily documentable but single example of how price differences, changed policies and new delivery models can create an added financial burden to our industry, which is significantly higher than our overseas counterparts.

We believe that in an ever tightening market the price differences across the entire spectrum of equipment, software and consumables is making it increasingly difficult for the Australian photographic industry to operate their micro or small businesses and potentially affects the industry's ability to compete equally on the world stage.<sup>142</sup>

- 2.139 The ACMP position was supported by submissions from individual photographers, including Mr Christopher Shain:

The photographs I produce are used all over the world and I compete with similar photographic businesses from other parts of the world, I'm not sure why my business costs are higher in Australia when the product and service are identical.<sup>143</sup>

- 2.140 Mr Russell Zimmerman, Executive Director of the Australian Retail Association, acknowledged that it was possible for small businesses to source cheaper products overseas. However, as discussed earlier in this chapter, warranty and support issues arise that are potentially more important for business than for individual consumers:

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140 James Rudd, *Submission 40*, p. 2.

141 Peter Larkins, *Submission 53*, p. 3.

142 Australian Commercial and Media Photographers, *Submission 54*, p. 3.

143 Chrisopher Shain, *Submission 57*, p. 2.

If [business] know they can get something at a cheaper price from overseas rather than buying it [here] and providing they feel that they can get some support services on it, they would. But then you have to understand that retailers also depend upon those kinds of products to make their businesses operate. So they would make sure there are some kinds of support services available before buying it. ... If you have bought from overseas and no-one is going to help you then you would be reluctant to go down that path. ... The consumer out there would say, 'I am prepared to take the risk on those goods. I'll buy them from overseas and bring them in. I'll have to risk the warranty.' It is a very valid selling point, and it is a point that we emphasise to our members, but it does not always work.<sup>144</sup>

- 2.141 In terms of cloud computing costs, architect Mr Nicholas Fox noted in his submission that subscription-based cloud services are not an economical proposition for every customer, even when sold at a favourable introductory price:

I generally upgrade the Adobe product every two or three years. This is a common practise among other users I know. Adobe are trying to get all of their users onto the Cloud, which will cost almost as much per year as a subscription or about three times the cost of my usual upgrades. For me this is not a fair or equitable solution.<sup>145</sup>

- 2.142 The Committee notes recent media reports indicating that customers wishing to access Adobe's full Creative Suite will not be permitted to purchase perpetual licenses as of its next release. The only way to access the range of products will be via a Creative Cloud subscription.<sup>146</sup> Media reports indicate that consumer reaction to the decision has been mixed.<sup>147</sup>

## Impacts for Government procurement

- 2.143 The Committee received evidence that the Australian Government also faces comparatively high prices for its IT products. AGIMO, part of the
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144 *Committee Hansard*, Sydney, 30 July 2012, p. 30.

145 Nicholas Fox, *Submission 122*, p. 1.

146 Timson, Lia, 'Adobe kills packaged software, bets on cloud alone', *Sydney Morning Herald*, 7 May 2013. <http://www.smh.com.au/it-pro/cloud/adobe-kills-packaged-software-bets-on-cloud-alone-20130507-2j4ht.html>, viewed 7 May 2013.

147 Finley, Klint, 'Unhappy Customers want to Parachute from Adobe's Creative Cloud', *Wired*, 14 May 2013, <http://www.wired.com/wiredenterprise/2013/05/adobe-creative-cloud-petition/?cid=co7887814>, viewed 14 May 2013.

Department of Finance and Deregulation, coordinates whole-of-government procurement of IT hardware and software. AGIMO's submission to the inquiry explained that '[e]xpenditure on procurement by departments and agencies is optimised by aggregating the volumes of goods and services purchased to attract better prices and value for money'.<sup>148</sup>

2.144 In 2009 AGIMO entered into the Microsoft Volume Sourcing Arrangement (VSA) that provided pricing and licensing conditions for the supply of Microsoft products to the Australian Government over a four year period. The VSA provides for a volume discount from Microsoft's government retail price in Australia. AGIMO advised that there are over 250,000 users and 290,000 devices covered by the VSA and that the arrangement was projected to achieve cost savings in excess of \$90 million over its life.<sup>149</sup>

2.145 AGIMO also emphasised that the Australian Government has nonetheless been obliged to pay significantly higher prices than counterparts overseas:

At the time of signature, the exchange rate from the Australian dollar to the US dollar was \$0.64. ... At that time, the base Microsoft Australian Government prices were calculated as being about 13 per cent higher than equivalent US prices. Given variations between the US and Australian situations, this appeared reasonable.

Following the improvement in the exchange rate over the past three years ...the difference in the base government price means that the US Government is paying some 50 per cent less than the base government price in Australia. The Singapore Government prices also appear to be some 50 per cent below those charged to the Australian Government.<sup>150</sup>

## Committee comment

2.146 After reviewing the evidence in submissions from consumers and industry groups, the Committee is of the view that in many cases Australian consumers are paying much more for IT products than consumers overseas. While the Committee notes the concerns of industry groups that price comparisons may not capture elements of consumers' experience in purchasing IT products, the Committee is of the view that

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148 Department of Finance and Deregulation, *Submission 79*, p. 1.

149 Department of Finance and Deregulation, *Submission 79*, p. 3.

150 Department of Finance and Deregulation, *Submission 79*, p. 5.

the evidence before it is strongly indicative of a pattern of higher prices paid by Australian consumers.

- 2.147 The Committee would have liked to have received more input from industry groups and IT providers in order to more effectively address the specific concerns expressed by consumers, however it notes that the evidence it received is consistent with other studies and inquiries where IT pricing has been considered. In particular the Committee notes Choice price comparisons conducted in 2008 and 2011,<sup>151</sup> the Productivity Commission's 2009 review of parallel import restrictions on books,<sup>152</sup> and its 2011 report into the retail industry.<sup>153</sup>
- 2.148 The Committee also notes that there is a range of reasons and methods by which Australian consumers are forced to pay higher prices for identical goods sold more cheaply in international markets. Some claim there is a lack of competition (either a limited range of purchasing options, or a limited range of distributors or licenses), and some describe price increases based on location, identified via credit card or other details which indicate that the purchase is being made in Australia. Submissions indicate that many consumers are acutely aware that they are being forced to pay higher prices for IT products based on their geographical location alone.
- 2.149 In the Committee's view, limited access to IT products in an increasingly interconnected society is a significant contributor to the social isolation and economic marginalisation of Australians, including those who are living with disability.
- 2.150 Many submissions from consumer groups and individual consumers have argued that higher Australian IT prices reflect deliberate regional pricing strategies employed by major IT companies and content rights holders to maximise profit in the relatively small but affluent Australian market. Unsurprisingly, alert consumers have adopted various strategies to circumvent geoblocking and access lower prices overseas. While these are discussed in chapter 4, the Committee acknowledges that most, if not all, of these circumvention methods may violate the terms of service put in place by vendors and service providers. Some of them may even breach copyright, which may expose Australian consumers to civil and even criminal sanctions.

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151 Choice, *Submission 75*, p. 43.

152 Productivity Commission, *Restrictions on the Parallel Importation of Books*, June 2009, p. XVIII.

153 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, 2011, Appendix E.





## Explanations for IT price differences

- 3.1 In chapter 2, the Committee concluded that Australian consumers and businesses do pay higher prices for many IT products when compared to comparable products sold in the United States. The terms of reference for this inquiry ask the Committee to investigate possible reasons for these price differences.
- 3.2 The Committee has never entertained the notion of a single explanation for higher IT prices. The Committee has sought to examine the reasons given by business, consumers and other observers for the higher prices paid by Australian consumers for IT products and services.
- 3.3 It is clear that a range of factors are involved and that these vary in effect from product to product. However, the Committee does consider it possible to draw conclusions about the validity and relative importance of the main explanations for the pattern of IT pricing in Australia.
- 3.4 Industry groups and the majority of IT companies have argued that higher prices are caused by a range of factors which vary significantly depending on the market and the product and services in question. In addition to arguing that price comparisons are an unreliable measure of the value they provide to consumers, industry groups have argued that price differentials for a number of IT products are narrowing.
- 3.5 Mr Russell Zimmerman, Executive Director of the Australian Retail Association (ARA) noted that there was evidence of 'a substantial deflation in electronics and of software price reductions', much of which could be attributed to changes in the value of the Australian dollar. Mr Zimmerman nonetheless noted that:
  - ... there are still clear disparities on many products and services. The real question is what do we believe is causing these? We

believe some of the reasons for this are tariff application and parallel importing, regulation, wages and supply chain.<sup>1</sup>

- 3.6 The Australian Information Industry Association (AIIA) attributes high prices to general factors such as ‘local costs of doing business, retail support requirements, distribution chains and statutory and regulatory imposts’, as well as shipping costs, ‘training and marketing costs, again directly related to the cost of staff ... [and] distribution costs, particularly in terms of import tariffs and coverage across a low density geography’.<sup>2</sup> Ms Suzanne Campbell, CEO of the AIIA, argued that prices for a range of IT products were falling:

The *Canon Consumer Digital Lifestyle Index – 2nd Half 2011* reports that the average selling price for digital devices at Australian retail stores continued to fall, dropping 13½ per cent across all reported categories. This price decline sharply contrasts with overall inflation of 3.1 per cent.<sup>3</sup>

The Committee notes that Ms Campbell’s claim does not address whether prices for these products were falling relative to prices in the US, just that they were falling.

- 3.7 Initially, this chapter considers some general issues relating to price discrimination, including who sets prices of IT products. The Committee notes that there is no single agreed position among industry bodies. Several general reasons proposed by industry are then explored, namely claims about:

- differences in advertised prices
- relative market size
- wages and occupancy costs
- warranties and green schemes
- exchange rates
- channel partners, and
- localisation costs.

- 3.8 The chapter then considers some responses from representatives of major industry sectors and vendors to claims made by consumers, especially with regard to digitally delivered content. The chapter then concludes by surveying a range of industry views about how business operates in the current IT environment.

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1 Russell Zimmerman, *Committee Hansard*, Sydney, 30 July 2012, p. 27.

2 Australian Information Industry Association, *Submission 73*, pp. 5-6.

3 Suzanne Campbell, *Committee Hansard*, Sydney, 30 July 2012, p. 1.

## Responsibility for international price discrimination

3.9 The Committee heard a range of evidence in relation to who sets prices for IT products, although few substantive submissions on this issue were received from individual IT retailers, nor did the ARA directly address the issue. While not seeking to revisit the comprehensive 2011 report of the Productivity Commission into the Retail Industry, the Committee notes that price discrimination can occur at various levels, against retailers at the distribution level:

Specifically, this discrimination is in the form of brand owners or international suppliers/manufacturers charging higher prices to Australian retailers relative to the prices they charge to similar retailers in other regions. These comparatively higher international supplier prices are then passed on to consumers.<sup>4</sup>

3.10 The Committee also notes the observation in the Productivity Commission report that:

It is clear that international price discrimination is being practised against some Australian retailers, to the detriment of Australian consumers.<sup>5</sup>

## Addressing perceptions of price discrimination

3.11 As noted earlier, the Committee is aware of many areas where industry explanations for significant price differences generally relate to the cost of doing business in Australia. These are described below, before a more detailed discussion of matters relating to digitally delivered content.

### Advertised prices

3.12 The Committee acknowledges that some confusion about pricing exists because of different rules in various jurisdictions about including tax in advertised prices. In Australia, advertised prices must include GST, while in the United States advertised prices do not include sales taxes, which may differ across state jurisdictions. Mr Tony King, Vice President of Apple Australia, advised that:

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4 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, 2011, p. 156.

5 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, 2011, p. 163.

When comparing prices it is important to remember that the US retail prices do not include sales tax. Here in Australia, of course, a price includes a 10 per cent GST. That fact alone is responsible for a great deal of confusion and has resulted in some inaccurate conclusions regarding our pricing.<sup>6</sup>

## Market size

- 3.13 In broad terms, industry groups and IT companies argue that Australia's economy is smaller than many comparable markets and that Australia is therefore a higher-cost environment in which to do business.

Mr Zimmerman observed that:

Australia is really a very small player in the global retail landscape, less than two per cent. In this respect, Australia is not able to leverage the same economies of scale as is often enjoyed by other markets such as the US or UK.<sup>7</sup>

- 3.14 The Department of Broadband, Communications and the Digital Economy (DBCDE) acknowledged that while Australian consumers are heavy users of technology, the small size of the Australian market may contribute to higher prices than in larger markets overseas:

In comparison with other regions, Australia is not a major market for software and hardware. With a relatively small population, it cannot support the level of competition found, for example, in the US, which has about 14 times the population and about 15 times Australia's GDP.<sup>8</sup>

- 3.15 Microsoft noted that, while it only provides 'guidance' on recommended retail pricing to its channel partners, its guidance:

...is impacted by market forces including but not limited to the size of the market, which affects supply and demand...<sup>9</sup>

## Wages and occupancy costs

- 3.16 Industry submissions argued that wage and occupancy costs contribute to higher overall costs faced by companies selling IT products in Australia, especially products distributed through retail distribution channels.
- 3.17 The AIIA submission pointed to higher wages as a driver of higher costs in Australia. The AIIA argued that wages have 'risen dramatically' in

6 Tony King, *Committee Hansard*, Canberra, 22 March 2013, p. 1.

7 *Committee Hansard*, Sydney, 30 July 2012, p. 27.

8 Department of Broadband, Communications and the Digital Economy (DBCDE), *Submission 55*, p. 4.

9 Microsoft, *Submission 67*, p. 3.

recent years – both in absolute terms and in terms of purchasing power, as the Australian dollar has risen against the US dollar:

As a result, Australian wages are relatively high compared with workers in comparable markets. The average full-time wage in Australia at the end of 2010 was \$66,594 a year. Converting this to other currencies the 2010 exchange rate gives an average wage in Australia of US\$68,370, £42,580 or €48,500. In comparison, the average full-time average wage in these countries/regions was: USA: US\$44,980; UK: £25,355; Germany: €42,535.<sup>10</sup>

3.18 The Australian Home Entertainment Distributors Association also highlighted Australia's higher labour costs:

- Minimum hourly adult wage: (currency conversion as at 29 May 2012):
  - ⇒ UK is £6.08 = A\$9.682
  - ⇒ US is \$7.25 = A\$7.373
  - ⇒ Australia is \$16.514.<sup>11</sup>

3.19 The Committee notes, however, that hourly and average wage figures are not an accurate indicator of total labour costs. In its 2011 Retail Industry Report, the Productivity Commission concluded that 'comparisons of minimum wages provide no real insight into relative retail industry labour costs in different countries'.<sup>12</sup> The Commission noted that a range of factors contribute to total labour costs in addition to wages, including, for example, paid leave and contributions to pension and insurance funds.

3.20 On that basis, the Commission conducted its own analysis of hourly labour costs in a number of European countries in addition to Australia and the US. It found that, when wages and benefits (including paid leave, employer contributions to pension and insurance funds and government social insurance) were taken into account, hourly labour costs (converted to constant Australian dollar equivalents and also to US dollar Purchasing Power Parity equivalents to adjust for relative purchasing power) were lower in Australia than in the US. When calculating labour costs as a proportion of retail sales, however, Australia was slightly more expensive than the UK and the US.<sup>13</sup> The Commission therefore came to the conclusion that labour costs were indeed higher in Australia as a

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10 Australian Information Industry Association, *Submission 73*, p. 5.

11 Australian Home Entertainment Distributors Association, *Submission 58*, p. 3.

12 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry, 2011*, C.3-C.8.

13 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry, 2011*, C.6-C.7.

proportion of revenue, even if they were comparable or lower in absolute terms.

- 3.21 Retail rents and occupancy costs were also cited as factors affecting the cost of doing business in Australia. The AIIA argued that rent costs, while ‘not usually directly related’ to AIIA members’ expenses, nonetheless affect IT pricing, because a significant proportion of their services are sold through channel partners. Ms Campbell said that rents ‘have a profound effect’ on channel partners:

... a very significant part of their operations is in both the retail outlet and more specifically and generally in wholesaling operations. These costs are real and they are understood to be contributing significantly to the increase in costs in Australia.<sup>14</sup>

- 3.22 Mr Zimmerman of the ARA argued that while there had been some recent reductions in retail occupancy costs, retailers were nonetheless forced to pay too much rent for business premises:

It is very well documented that rents in Australia are artificially set high against places like the US and Europe.<sup>15</sup>

- 3.23 The Productivity Commission highlighted research in its 2011 Retail Industry Report that indicated that:

... labour costs and rental expenses can be as high as 70 per cent of the Australian retail industry’s operating costs – high by global standards.<sup>16</sup>

## Warranties

- 3.24 Several submissions to the inquiry made the claim that the warranty provisions of the Australian Consumer Law (ACL) contribute to high IT prices in Australia. Ms Campbell, of the AIIA, stated that warranty costs in Australia are as high as anywhere in the world, characterising the warranty scheme created by the ACL as:

... a very expensive scheme. The warranty provisions speak to the reasonable life of the product. That could be three years in the case of some of our members’ products. That makes the provision of warranty for those products very expensive in this market.<sup>17</sup>

- 3.25 Ms Campbell added that:
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14 *Committee Hansard*, Sydney, 30 July 2012, p. 4.

15 *Committee Hansard*, Sydney, 30 July 2012, p. 28.

16 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, 2011, p. 148.

17 *Committee Hansard*, Sydney, 30 July 2012, p. 6.

One of my members has reported that, from their experience, our consumer warranty environment is the most expensive that they are dealing with in the world.<sup>18</sup>

3.26 In its submission to the inquiry, DBCDE observed that:

Warranties in Australia can be more rigorous and provide greater protections than those in other countries. The Australian Consumer Law, a schedule of the *Competition and Consumer Act 2010*, can provide different and in some cases stronger protections than that found in US or UK law. Where goods are faulty, this may result in higher costs for importers than they might face if they operated in other markets.<sup>19</sup>

3.27 Ms Molly Lai of Pioneer Computers referred to warranty protection costs:

Strong consumer protection in Australia means high support costs for IT vendors. Consumers see it as their rights to return for refund or replacement even when it is not the manufacturers' fault. In light of the new Australian Consumer Law calling for compensation for consequential losses ... IT vendors are finding it very hard to do business in Australia.<sup>20</sup>

### 'Green' schemes

3.28 DBCDE also pointed out that IT vendors may incur higher costs as a consequence of so-called 'green schemes' that are designed to encourage the recycling of used televisions and IT equipment:

Commonwealth, State and Territory and local government schemes to cover the costs of recycling IT goods can contribute to the costs of hardware products bought in Australia. For example, the National Television and Computer Recycling Scheme can contribute to the costs of providing goods to the Australian market, as it places responsibility on manufacturers and importers to partake in product stewardship arrangements at their own expense.<sup>21</sup>

3.29 The Australian Industry Group (Ai Group) also attributed higher local costs to environmental regulations, noting that higher costs were in part a result of:

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18 *Committee Hansard*, Sydney, 30 July 2012, p. 4.

19 Department of Broadband, Communications and the Digital Economy, *Submission 55*, p. 9.

20 Molly Lai, *Submission 6*, p. 1.

21 Department of Broadband, Communications and the Digital Economy, *Submission 55*, p. 9.

... environmental regulation such as minimum energy efficiency requirements and the new National Television and Computer Recycling Scheme, which imposes significant costs on suppliers of equipment subject to the scheme.<sup>22</sup>

- 3.30 Ms Molly Lai also noted that the National Television and Computer Recycling Scheme, 'making importers and manufacturers bear the burden of recycling' has an impact for IT vendors.<sup>23</sup>

## Exchange rates

- 3.31 Many consumers have expressed frustration that, in their view, IT product prices have not declined in response to the appreciation of the Australian dollar. In addition to submissions to this inquiry, the Committee is aware of substantial public comment in social media and on the internet where consumers consistently raise this issue.

- 3.32 The Committee has received evidence suggesting that prices may take some time to match changes in the exchange rate. As DBCDE noted in its submission there can be a number of reasons for this 'sticky' pricing (in which there is a delay between currency value changes and the consequent adjustment in prices):

These delays can reflect inefficiencies in the supply process or where some importers buy stock well ahead of time in order to protect against currency fluctuations. To some extent, these delays are fixed, for example where the discrepancy is caused by an overstock of goods purchased at an earlier, higher price, or where the price is fixed through a long-term contract. The stability may also reflect lower competition in the Australian market and/or strategies where vendors seek to add value to products rather than reduce prices.<sup>24</sup>

- 3.33 Ai Group noted that a number of factors can affect exchange rate pass-through:

- Supply contracts may be in place that have fixed exchange rates built into them.
  - The lag time between the placement of orders for imported products and the sale of the product in Australia can encompass a number of fluctuations in the spot price.
  - Many business costs are not affected by the exchange rate (for example, domestic labour, freight, transport, storage and regulatory costs).
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22 Australian Industry Group, *Submission 56*, p. 5.

23 Molly Lai, *Submission 6*, p. 1.

24 Department of Broadband, Communications and the Digital Economy, *Submission 55*, p. 6.



- As suppliers and retailers generally offer a large number of individual products it would be impractical to constantly reset these prices based on frequent movements in the spot price.
  - The desirability for consumers, suppliers and retailers of having relatively consistent pricing of goods, smoothing out fluctuations in the exchange rate.<sup>25</sup>
- 3.34 Major IT vendors stated in submissions that their priority was to provide consistent, efficient and fair pricing rather than to respond to exchange rate fluctuations. For example, in its submission, Microsoft said that:
- Microsoft's global policy is to provide consistent and predictable local pricing while maintaining reasonable alignment of local currencies relative to the US dollar.<sup>26</sup>
- 3.35 Adobe said that its policy was to set balanced prices:
- Both suppliers and customers would like to be able to enjoy the benefits of favourable currency movements and avoid the costs of unfavourable currency movements. However, fair and efficient pricing needs to strike a balance between upward and downward currency movements.
- Since most of our business is derived from the local ecosystem, Adobe has an AUD price list which ensures our distributors can always purchase from Adobe in AUD. This leaves the foreign exchange rate risk to be carried by Adobe.<sup>27</sup>
- 3.36 Apple also emphasised consistency in pricing:
- Foreign currency is an important variable in how product prices are compared between countries. It is not uncommon for macroeconomic factors to cause foreign currencies to fluctuate dramatically during a product's life cycle. Over the period of time a particular Apple product is in the market, it may appear to be either priced higher or lower in a local market when compared to the price in the United States or elsewhere... The company's typical practice in such circumstances is to keep local prices the same, whether unfavorable [*sic*] or unfavorable to the company, until replacement products are introduced. This is less disruptive for local customers and local business channels than if Apple were to reprice products up and down on an unpredictable basis in response to all such fluctuations.<sup>28</sup>

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25 Australian Industry Group, *Submission 56*, p. 4.

26 Microsoft, *Submission 67*, p. 2.

27 Adobe, *Submission 81.1*, p. 2.

28 Apple, *Submission 62*, p. 1.

## Channel partners

3.37 Industry groups argued that another factor in higher Australian IT prices was the margin set by channel partners. The term 'channel' refers to the various conduits through which goods or services are delivered from producers to consumers.

3.38 Microsoft, for example, does not sell directly to Australian consumers, but rather through various kinds of 'channel partner'. According to Microsoft Australia's Managing Director, Ms Pip Marlow:

We work on a model where we have a channel and that channel is a little differentiated... we talk about the volume reseller channel. They are our large-account resellers, value-added resellers. They sell our volume licensing, enterprise agreements, select agreements, open agreements. We would then have our OEM [original equipment manufacturer] partners. If you are using a Toshiba, we would license our software to Toshiba to preinstall into the product. You would acquire the product through that. [Finally], we have our retail areas. That would be something like Harvey Norman or JB Hi-Fi, through to a small, single-proprietary business who would sell what is known as retail product.<sup>29</sup>

3.39 Channel partners, Ms Marlow continued, can deliver different value-added services to their customers:

... [D]ifferent areas of the channel will deliver different services to the customers as they consume that product. It might be, as I said, Toshiba and their channel adding desktop management support for your hardware. It might be a volume licensing reseller adding deployment services or software asset management services. It might be a retailer helping the consumer and being their trusted adviser as they make IT decisions, and they would deal with support and management of that. Through each channel you would see different types of value-added services that they would put on as they are sold to the customer.<sup>30</sup>

3.40 Channel partners of major IT companies are, for the most part, based in Australia. Industry groups argued that the costs incurred in moving products through the channel are partly responsible for price differences. The Committee learned from the AIIA that:

Some members have brought to our attention the fact that they do not set the retail price of their products. These are set through their

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29 *Committee Hansard*, Canberra, 22 March 2013, p. 33.

30 *Committee Hansard*, Canberra, 22 March 2013, p. 33.

partner channel and hence are also influenced by channel specific market factors and cost pressures.<sup>31</sup>

3.41 Adobe, itself a member of the AIIA, observed that:

It is important to understand that around 85 per cent, the vast majority of Adobe sales, flow through local channel partners. Adobe's local channel ecosystem is estimated to employ around 3,000 people in Australia.... Since we conduct most of our business through our 500-plus local channel partners, the majority of the costs of the ecosystem as a whole are incurred locally and in local currency.<sup>32</sup>

3.42 Adobe Australia's Managing Director Mr Paul Robson further noted that the prices of digitally downloaded products sold directly by Adobe are 'aligned' with the prices of physical media distributed through the channel, so as to protect channel partners' business:

... in relation to the electronic version of that [product], there is an exact equivalent of a physical product of it that is sold by our partners in a channel format. So the pricing generally is aligned to make sure that the partners can continue to run and operate a business in this country. Where there is not a product that is an exact equivalent, and that is the case for the cloud based product, the pricing is in line with that seen in other markets.<sup>33</sup>

3.43 Microsoft also attributed at least some of the higher prices for its product to locally-based channel partners:

Microsoft provides guidance on recommended retail pricing... Microsoft does not, however, set the final 'to-the-customer' price. The channel and value-added partners who deliver those products to customers ultimately determine retail pricing.<sup>34</sup>

## Localisation costs

3.44 DBCDE noted that IT companies may incur costs in tailoring their products for the Australian market. This can include adapting a product to suit local laws and regulations or to better meet Australian consumers' expectations:

Products which provide customised features based on unique national characteristics, such as local accountancy practices, a

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31 Australian Information Industry Association, *Submission 73*, p. 4.

32 Adobe, *Submission 81.1*, p. 2.

33 *Committee Hansard*, Canberra, 22 March 2013, p. 29.

34 Microsoft, *Submission 67*, p. 3.

person's accent or even the voltage and plug requirements for electricity, will generally require additional research and/or development work to be sold in Australia.<sup>35</sup>

- 3.45 The Ai Group further argued that higher costs may be incurred in complying with local regulations:

In addition to general business regulatory costs such as taxation and OHS, Australian governments at the State and Federal level regulate IT products to ensure that they are safe, reliable and minimise their environmental impact. These regulations and standards impact on price and may differ from other markets. The sector specific regulations that apply to Australian IT products can include electrical safety requirements [and] labelling requirements for radiocommunications and telecommunications equipment such as the A-Tick and C-Tick Marks.<sup>36</sup>

- 3.46 However, in evidence before the Committee, Mr King downplayed the significance of localisation costs, at least in relation to Apple hardware sold in the Australian market:

The product cost may vary slightly market by market. For example, a computer coming to Australia has a slightly different plug to connect to our sockets, etcetera, compared to a product going to the United States. There may be elements like that that would vary on a product bill of material country by country, but they will be small variations. ... [T]he product costs would be broadly similar. There may or may not be some puts and takes but I think it will be broadly similar across markets.<sup>37</sup>

- 3.47 Mr Robson placed particular emphasis on the importance of providing consumers and businesses with IT products tailored to local and individual needs:

One of the great drivers of the internet is the ability for organisations to provide a personal and relevant experience. It is an interesting dynamic. When you actually look at what customers are demanding, it is experiences that are personalised, bespoke. As one of our technology sets in our digital marketing business, we work with customers every day to sell them technology that provides them a personalised, bespoke experience. In a global marketplace the risk for organisations is to become less relevant, to lose the relevance of interaction with an existing customer. To

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35 Department of Broadband, Communications and the Digital Economy, *Submission 55*, p. 7.

36 Australian Industry Group, *Submission 56*, p. 5.

37 *Committee Hansard*, Canberra, 22 March 2013, p. 10.

drive that relevancy organisations seek to provide a personalised and bespoke experience.<sup>38</sup>

3.48 Specifically questioned on how Adobe localises its products for the Australian market, Mr Robson responded:

When we look at relevancy around personalisation, that is in relation to the redirection of customers when they access our website. When customers access the Adobe.com website they can choose to see whichever website they wish to see. We automatically try to get them to look at the Australian site, for a number of different reasons. There is local content. There is information in relation to local user groups and communities that use our technology that they can learn from and contribute to. There is information that is relevant to the local market in relation to Australian based pricing and other content and information. That content is a richer and more personalised experience for an Australian customer than they would get if they accessed a webpage that was in another language or for another country. ... with relation to relevance and personalisation, the personalisation was not of the product; it was the experience when online.<sup>39</sup>

3.49 The following exchange subsequently took place between Mr Robson and the Committee:

Mr Husic: ... What is the local experience, then, that people are obtaining? What is the benefit of it?

Mr Robson: There is access to user groups, communities, information, local pricing, local offers et cetera.

Mr Stephen Jones: Chat sites and blog sites?

Mr Robson: Exactly, yes, user communities where –

Mr Stephen Jones: How much are you suggesting we should be paying for access to blog sites?

Mr Robson: No, I am talking about the personalised experience when a customer is online with adobe.com. We seek to provide a personalised environment where they can interact with other users of our technology. That is how we go to market. One of our key interactions with our customer base is to allow them to talk amongst themselves and to work with us and to provide input into future innovation.<sup>40</sup>

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38 *Committee Hansard*, Canberra, 22 March 2013, p. 15.

39 *Committee Hansard*, Canberra, 22 March 2013, p. 16.

40 *Committee Hansard*, Canberra, 22 March 2013, pp. 16-17.

- 3.50 The Committee notes the evidence from industry that localisation represents an additional layer of cost incurred by some international IT companies selling into Australia. However, the Committee is of the strong view that in many product categories, particularly in relation to digitally delivered content, localisation costs would be negligible at best and certainly not account for the types of price differentials presented in evidence to the Committee.

## Responses by product category

- 3.51 As noted in chapter 2, evidence was received across a range of products including hardware, software and digital downloads including music, games and books. The Committee acknowledges there are challenges when assessing industry explanations for pricing, because some evidence in submissions and at hearings makes little distinction between hardware, and digital downloads; some evidence refers to an overall approach by business. To that end, responses on certain product categories are considered below, before an assessment of some broader business principles.

### Hardware

- 3.52 Noting the above observation, that evidence received is often made across, or on behalf of, a business which sells both physical *and* downloadable products, the Committee acknowledges the claims by Microsoft and Apple on their hardware prices. Apple's Mr Tony King observed that prices for recently released Apple hardware and software products are now near parity with prices in the United States:

Setting aside the daily ups and downs of currency exchange rates, our Apple product prices here in Australia are not materially different from the Apple products sold in the United States. In fact, today the price for the new iPad with retina display and the iPad Mini are within one to five per cent of the prices in the US. The same is true of Apple's own software titles offered on the Mac App Store, including Final Cut Pro, Logic, iPhoto, iMovie and GarageBand. These products are all priced in Australia within one to three per cent of the prices in the United States.<sup>41</sup>

- 3.53 Ms Marlow, noting that variations in the price of Microsoft products should be expected since the company does not endeavour to set a single,
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41 *Committee Hansard*, Canberra, 22 March 2013, p. 1.

global price, observed that the Australian price for some recent Microsoft products has been much closer to the US price:

[Microsoft Office] Home and Premium costs \$119 here, including GST, and \$99 in the US without tax. Office 365 Small Business Premium costs \$13.50 a month here, \$15 a month in the US. Office Home and Business for small business costs \$299 here, including GST, and \$219 in the US.... Office Home and Student 2013, which is the current version of the software, is \$169.00 ERP here including GST and \$139.00 in the US. So our price includes GST and the US price is without that ... . But ultimately we do not have a global price and the prices may be different in the US or other jurisdictions.<sup>42</sup>

- 3.54 As noted earlier in this chapter, while the Committee accepts views that prices may be *generally* lower, it notes that in some cases, the relative or proportional differential may be unchanged. That is, while costs are becoming lower in Australia, they are becoming lower *everywhere*; Australians are still bearing a proportionally high cost burden.

## Software and digital downloads

- 3.55 Much of the evidence from IT vendors on software made little or no distinction between physical and digitally downloaded products. Further to the above consideration of explanations for higher prices for Australian consumers, the Committee sought to better understand the distinctions made for products which are essentially identical.
- 3.56 As outlined in chapter 2, many consumers expressed concern at price disparities for digitally delivered content, including software, music, games and books. The Committee considers this to be an area of special interest as many of the justifications for higher prices made by industry groups are arguably less relevant to digitally downloaded products. Many products sold online, for example, would appear to incur significantly reduced wage costs, much lower occupancy costs, and undergo little or no localisation (none at all in the case of music, movies and many e-books). The Committee is therefore especially interested in why these products still cost Australians more.
- 3.57 The Committee has heard differing views on the pricing of these kinds of digitally delivered content. For the most part, consumers expressed frustration and disbelief at having to pay significantly more for a substantially identical downloaded product, when in their view the vendor incurred no higher costs in providing it. A representative sample

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42 *Committee Hansard*, Canberra, 22 March 2013, p. 40.

of the views of concerned consumers expressed in submissions is presented below. Mr Stephen Delvecchio argued in his submission that digital distribution removes any reason for differential pricing:

The argument of increased costs due to shipping physical goods from overseas died the day we entered the digital age – many years ago. There is absolutely no reason why I should be charged up to \$50 more for the exact same 1's & 0's that are purchased from the exact same store just because I happen to have an Australian accent. The word absurd doesn't even come close to describing it.<sup>43</sup>

3.58 Mr Samuel Lymn argued that:

... in all cases, when discussing digital product pricing, one can make no claim about increased costs for the retailer on the basis of things associated with preparing a physical product for sale. The fact that the product is digital completely eliminates such considerations.<sup>44</sup>

3.59 According to Mr Duncan Wallace:

It could be argued that shipping and costs of operating physical retail stores in Australia cause prices to be higher. However, this does not apply to digital downloads of software.

In most cases, the customer is downloading exactly the same software, from exactly the same servers as other customers around the world. The customer also bears the expense of any bandwidth costs for the actual download.<sup>45</sup>

3.60 Although the above are only three examples of many received, in this section the Committee canvasses the arguments made by IT companies and vendors in response to specific sectoral claims. The Committee acknowledges the view of Microsoft that even in the case of digitally distributed content, a vendor's costs may remain high:

Software that is delivered via an online portal offers the potential for reduced transaction costs for vendors in the way of distribution costs. Nevertheless the costs of providing the services - including establishing, maintaining, supporting and advertising the services - needs to be recovered and a profit from those operations derived.<sup>46</sup>

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43 Stephen Delvecchio, *Submission 12*, p. 1.

44 Samuel Lymn, *Submission 51*, p. 2.

45 Duncan Wallace, *Submission 19*, p. 2.

46 Microsoft, *Submission 67*, p. 3.



## Music

3.61 The Committee heard conflicting views on who controls the price Australians pay for music, movies, books and other copyright content. While many submissions were highly critical of Apple's Australian iTunes store pricing, Apple argued that the prices of music sold through that store is dependent on the wholesale prices set by the music labels:

The pricing of music, movies and TV shows on iTunes is determined by various factors. Prices are heavily influenced by the wholesale price set by the labels and studios, royalties payable for the use of musical compositions and the incorporation of local taxes.<sup>47</sup>

3.62 Mr King told the Committee that:

The iTunes store is a digital media store. Apple must pay the rights holders of the digital content – the record labels, movie studios and TV networks – to distribute content in each of the territories in which the iTunes store exists. The pricing of this digital content is based on the wholesale prices which are set through negotiated contracts with the record labels, movie studios and TV networks. In Australia they have often set a higher wholesale price than the price of similar content in the United States.<sup>48</sup>

3.63 After many attempts to seek input from the Australian Recording Industry Association (ARIA), the Committee was advised that:

ARIA has no relevant information on how music prices are set in the Australian market. ARIA is not involved in the setting of wholesale or retail prices in the music industry - ARIA does not supply music to retailers or consumers. Nor does ARIA have access to information about how record companies or music retailers set their prices. It would therefore be inappropriate for ARIA to comment on price.<sup>49</sup>

3.64 In its efforts to establish reasons for the apparently vastly higher costs to Australian consumers to access digitally downloaded music, the Committee had sought information from the Australian royalty collecting agencies, the Australasian Performing Rights Association and Australasian Mechanical Copyright Owners Society Ltd (APRA-AMCOS). The Committee heard from Mr Richard Mallett, Head of Revenue, that:

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47 Apple, *Submission 62*, p. 1.

48 *Committee Hansard*, Canberra, 22 March 2013, p. 2.

49 Australian Recording Industry Association, *Submission 93*, p. 1.

... it is public knowledge that out of each sale of a single track download the DSPs [Digital Service Providers] will generally keep up to 30 per cent, the record labels will receive between 60 and 70 per cent and APRA-AMCOS receives nine per cent. APRA-AMCOS's rate in Australia is similar to tariffs in operation in other territories. For example, in the UK and Europe it is eight per cent, in Canada it is nine per cent and in the USA it is US9.1c, which is a fixed rate irrespective of sale price.<sup>50</sup>

- 3.65 Given the 'public knowledge' of this matter, the Committee was therefore surprised to hear from the Managing Director of ARIA, Mr Dan Rosen, that in relation to the division of the revenue obtained from music sales:

I think that is something that is split between the retailer and wholesaler. I do not know the details of that split. Then, within that, I do not know how they split that up. I would assume each artist has their own relationship and have a contract with their label on how that gets divided...

I think you would need to speak to a range of retailers, because there is an enormous number of different retailers in Australia, and a range of rights holders. Some of those rights holders would be in Australia and some of them would be overseas.<sup>51</sup>

- 3.66 The Committee continued to seek accurate and transparent advice as to pricing, and invited submissions from rights holders. Universal Music Australia (UMA) maintained in its submission that prices were set by the retailer:

The retail price charged to consumers by Australian digital providers is set by the particular digital provider. UMA has no say in the setting of that retail price. UMA provides its content to retailers according to wholesale price rate cards. UMA has rate cards that apply to physical records and rate cards that apply to digital content. The rate cards set out the prices of the different album and track pricing tiers with multiple tiers being offered. Rates for campaign discounts, which are commonly demanded by digital retailers as a condition for including particular products within a promotional campaign, are also included. There are further categories for deluxe products, compilations and video products.<sup>52</sup>

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50 *Committee Hansard*, Sydney, 30 July 2012, p. 17.

51 *Committee Hansard*, Canberra, 5 October 2012, p. 3.

52 Universal Music Australia, *Submission 129*, p. 4.

- 3.67 Representatives of the Australian music industry also claimed that, even though much of their product is digitally distributed, the industry still incurs costs which must be recovered. ARIA argued that:
- ... the contention that digitally delivered content by a local company with an international parent is identical and should therefore cost consumers the same in Australia as in the US or some other country is unfounded.<sup>53</sup>
- 3.68 According to ARIA, Australia-based national affiliates ‘must run as a viable business in their own right to optimize their activities in the interests of their shareholders (be they overseas parent entities or domestic individuals)’.<sup>54</sup> Mr Rosen stated that record labels incur many costs in producing music and that the idea that digitally delivered products are cost-free is an ‘incorrect assumption:’
- I think that is a misconception because in Australia these businesses are running with local costs – wages, property and, importantly, marketing. There is also what we in the music industry call A&R. This is the R&D of the music industry which goes into sourcing local talent... This is an incredibly important part of what the label members do in Australia. It is a costly exercise and it is something that they are doing in this country.<sup>55</sup>
- 3.69 Universal Music Australia outlined its costs in this way:
- UMA invests heavily in Australian artists as well as providing significant funding to a number of independent Australian labels. In addition, the company carries substantial labour and operating costs. All of these investment and operating expenses must be covered by UMA’s local revenues. In addition, once an artist’s album has been recorded, UMA must invest heavily in the marketing and promotion of such album. It is vital to an album’s success for UMA to achieve local media support including radio play, videoclip play and online exposure. UMA also invests heavily in television and radio marketing campaigns.<sup>56</sup>
- 3.70 As mentioned in chapter 2, the Committee is aware of the emergence of streaming services in the music market. In October 2012, Mr Rosen advised the Committee that eight or nine services, including Spotify, had been launched in the previous 12 months.<sup>57</sup>

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53 Australian Recording Industry Association, *Submission 93*, p. 2.

54 Australian Recording Industry Association, *Submission 93*, p. 2.

55 *Committee Hansard*, Canberra, 5 October 2012, pp. 2-3.

56 Universal Music Australia, *Submission 129*, p. 5.

57 *Committee Hansard*, Canberra, 5 October 2012, p. 4.

- 3.71 Apart from describing the growing number of choices for consumers to access content, music industry organisations have argued that the cost of music in Australia has fallen significantly over the past decade, as have revenues of record companies and the music industry more generally. UMA argues that recorded music in Australia is ‘cheaper than ever’.<sup>58</sup>
- 3.72 UMA claimed that revenue had more than halved in the period 2003-2011, as a result of the ‘prevalence of illegitimate music downloading and streaming platforms’, which has led to a decline in the willingness of consumers to pay for music.<sup>59</sup> ARIA cited the ‘abundance of free or near-free services’ as a factor driving down prices, but considered the impact of copyright infringement to be of primary importance:
- Australian consumers have access to a plethora of unchecked and unregulated web-based suppliers that offer a very wide range of pirated music at no charge. Digitalisation has enabled piracy on a massive scale, so much so that the wholesale revenues of record companies have been almost halved in the last 11 years ... Piracy accounts [for] a significant amount of the music consumed in Australia today.<sup>60</sup>
- 3.73 Copyright issues are considered further in chapter 4.

## Games

- 3.74 As discussed in chapter 2, submissions from many consumers referred to the often significant price disparities imposed on Australian gamers when purchasing through digital distribution platforms like Steam.
- 3.75 Mr Matthew Kermeen found it ‘highly perplexing’ that games should cost so much more in Australia when purchased through digital distribution platforms. Mr Kermeen expressed frustration at paying ‘almost double the price for the exact same product, delivered in the exact same manner’, when localisation and distribution costs should be close to nil.<sup>61</sup>
- 3.76 In relation to the game *Diablo 3*, which cost more than 30 per cent more in Australia than in the US, Mr Zhiliang Huang wrote that:
- There is no difference in the way the game is delivered (by download) between a U.S. buyer and an Australian buyer.

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58 Universal Music Australia, *Submission 129*, p. 6.

59 Universal Music Australia, *Submission 129*, p. 2.

60 Australian Recording Industry Association, *Submission 93.1*, pp. 1-2.

61 Matthew Kermeen, *Submission 48*, pp. 1-2.

The game will [also] be played [on a] U.S. server and there is no difference in the way the game will be played (on battle.net) between an U.S. buyer and an Australian buyer.<sup>62</sup>

3.77 Mr Mark Sinclair summed up consumer frustrations in this way:

The big issue many Australian gamers have is the variation in price that we pay compared to other gamers in other parts of the world, no transport costs are necessary, every time a purchase is made you are only copying a file from a server, no additional production of disk or packaging is required, no additional cost to steam is incurred because we are across the Pacific, transport of the product is covered by the Australian consumer by our download allowance in the contract we have with our internet service provider, we also have a free trade agreement with the US. We are buying a product from this company in exactly the same manner as a US citizen, yet we Australian customers can pay up to double the price.<sup>63</sup>

3.78 The Committee notes no representatives from the gaming industry chose to address this issue.

## Books

3.79 Consumers who purchased e-books expressed their concerns about price discrimination. As Mr Daniel Myles said:

Australians are downloading the e-books from exactly the same place as the rest of the world. It's not as if the books sent to us through our internet connections magically increase in cost depending on where in the world it moves to. It's just bytes of data, 1s and 0s, identical and completely oblivious to a consumer's geographical location.<sup>64</sup>

3.80 Ms Julie Jester concurred, noting that:

e-books do not have the costs associated with printing, distribution and retailing. Once an e-book is formatted, a single copy can be stored on a server anywhere in the world and distributed electronically at a trivial cost.<sup>65</sup>

3.81 Mr Jeff Burgess noted, in relation to licensing books from Amazon, that:

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62 Zhiliang Huang, *Submission 2*, p. 3.

63 Mark Sinclair, *Submission 23*, p. 1.

64 Daniel Myles, *Submission 33*, p. 21.

65 Julie Jester, *Submission 47*, p. 3.

There is no such thing as 'an Australian Amazon website'. Buyers from every country, including Australia, all buy and download e-books from the same USA-based Amazon internet book store at [www.amazon.com](http://www.amazon.com). There is therefore no technical reason for higher pricing of e-books for Australians.<sup>66</sup>

3.82 Representatives of the Australian publishing industry indicated that publishers have ongoing costs regardless of the format their books are published in. Mr Ross Gibb of MacMillan Publishers Australia said:

... e-books cost so little to produce, so why are they not cheaper than what they are? In our business an e-book is just another format; it is not a separate stand-alone product. So the full cost of paying the author, commissioning writers and content, editing, designing, and marketing all still exist. These costs will not go away, even as the e-book market grows.<sup>67</sup>

3.83 Mr Gibb told the Committee:

Today in the US, a market that is about three, possibly four years ahead of our market – it is very hard to tell with technology – e-books account for 16 per cent of total book sales. So 84 per cent of the book market remains in paper and the costs to maintain that business still exist. It is true there is no print cost in producing an e-book and there is no freight cost but digitising content, file and data storage, file distribution by third parties, and managing and combating piracy bring new costs to the business.<sup>68</sup>

3.84 As in the case of digital music, the Australian Publishers Association (APA) also emphasised the regional nature of markets:

Profit margins on each e-book sold can also vary from country to country, depending on factors such as royalty structures, hosting costs, technical support provided by a publisher and the extent to which a book needs to be adapted and enhanced to suit each country (a particular concern in relation to educational publishing). [M]ost publishing of Australian titles is done on the basis that costs must be recovered in Australia, as the largest market for Australian titles.<sup>69</sup>

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66 Jeff Burgess, *Submission 49*, p. 3.

67 *Committee Hansard*, Sydney, 30 July 2012, pp. 10-11.

68 *Committee Hansard*, Sydney, 30 July 2012, p. 11.

69 Australian Publishers Association, *Submission 66*, p. 2.

## Policies and approaches to pricing

3.85 Noting discussion to this point about impacts on costs in Australia, the Committee took a general approach to ascertain overall views of businesses to issues which may affect pricing decisions. Matters considered include observations on pricing models; elements of competition and choice; and managing a market (including through subscription models and geoblocking). The Committee notes Mr King's views that price discrimination begins at the wholesale level, and his argument that Apple would lower prices if it could:

When you boil it all down, where may a price differential arise? It is in the difference in the wholesale price to the retailer. The other costs are either variable in nature, such as the GST, or comparable in nature like the publishing fees or the iTunes store management costs...

We would love to see lower content prices, be it for songs, movies or TV shows. That would drive a wonderful use of our products within the Australian market. I want to make it absolutely clear that it is in our best interests to see that take place.<sup>70</sup>

## Approaches to regional pricing

3.86 Mr King responded to a question about price discrimination and companies charging 'what the market will bear' in the following terms:

We do, and have, for as long as I can remember run an overall model where we offer equivalent pricing on our products around the world. We establish that equivalent price at the time we introduce a product to a market. ... Simply put, we offer an equivalent pricing model rather than the model you are suggesting about what a market may bear. We start with a US denominated price. We do take into consideration some costs of doing business in a market. That may be in the area of freight. The per unit freight charge of an iMac, for example, is more expensive to bring into the Australian market than it is to other markets.<sup>71</sup>

3.87 Mr King subsequently explained that Apple 'set[s] our prices worldwide from Cupertino with input from the local team for factors that may be relevant for the Australian market. We have a global equivalent pricing model that is established at a worldwide level.'<sup>72</sup>

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70 *Committee Hansard*, Canberra, 22 March 2013, p. 3.

71 *Committee Hansard*, Canberra, 22 March 2013, p. 6.

72 *Committee Hansard*, Canberra, 22 March 2013, p. 10.

3.88 Asked whether Apple sets prices charged by its channel partners in Australia, Mr King, responded:

We establish a price on the Apple online store and through our retail stores for a product, but our partners are free to set their prices as they see fit in the market. Indeed, in any given week or month we see very highly competitive offers taking place with our channel partners across Australia. We have 6,000 sites that are within our rich ecosystem, and our partners are constantly driving innovation around the way that they provide value to customers. That will manifest itself in anything from a bundle to an offer and in some cases a discount, but that pricing is purely in the court of the retailer. It is their decision.<sup>73</sup>

3.89 A different approach to pricing was set out by Adobe's Mr Paul Robson. In his evidence to the Committee, Mr Robson outlined a pricing strategy which is not global but regional in nature:

... Adobe seeks to set prices in this market here in Australia that provide a consistent contribution, taking into account the cost of doing business in this region and allowing us to run a regional operation. We do this in most markets around the world while at the same time trying to provide some uniformity across those regions.

...If customers do not feel that they are getting good value, they simply will not buy our products. Price is the key to competitive advantage which in turn underpins the global trading system.<sup>74</sup>

3.90 Ms Marlow also outlined Microsoft's explicitly regional pricing approach:

At Microsoft, whilst we operate in over 100 countries around the world, we do not operate on a single global model. In fact, the countries that we operate in are very different, and therefore the way that we compete and the way that we deliver products and services every day in those countries can be unique. In those spaces, we work to make sure that we understand our customer's needs and the competition and, therefore, have a unique strategy, be it in the different countries or given the different competitive landscape that we have....

[W]e do not operate under a single global market model and there are a range of factors that do impact the way that we go into market. They may start with cost structure, customer perceptions,

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73 *Committee Hansard*, Canberra, 22 March 2013, p. 8.

74 *Committee Hansard*, Canberra, 22 March 2013, p. 15.



partner choices but most importantly the competition that we have in market.<sup>75</sup>

3.91 Ms Marlow later elaborated on this point:

We do not operate on a standard price because we do not believe that every market is the same. We may be selling to an emerging market, for example, where the cost of living, the availability of technology, the ability of customer perception and the competition might be completely different. ... We do not set them on a global market. We know that, in the end, because we are living with competition, our customers will vote, as I said before, with their wallets. If we make the price too high in that particular market, they have choice and they will look elsewhere. We respond to that.<sup>76</sup>

3.92 The Committee received evidence from the Australian Home Entertainment Distributors Association (AHEDA) stating that:

The terms of the Inquiry seem to suggest that there are regional retail price differentials which are attributable to the pricing practices of international suppliers (ie wholesale pricing). However, retailers set their own pricing and average retail DVD prices suggest that they are broadly on par with those in Europe.<sup>77</sup>

## Competition

3.93 Asked whether it was Microsoft's approach to charge whatever a regional market would stand, Ms Marlow responded:

In a market where there is supply and demand in a free economy, yes, absolutely.<sup>78</sup>

3.94 Competition within a free market, and the ability of consumers to make their own purchasing decisions was a common theme of IT vendors. Ms Marlow described the company's operation in a global free market:

We would say that, in the free market, you are going to see pressures come from competition and different areas, and we will continue to compete....

I believe we are not operating in a global economy where organisations need to have a global price. I believe companies should be able to lawfully set prices differently across the market

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75 *Committee Hansard*, Canberra, 22 March 2013, pp. 31-32.

76 *Committee Hansard*, Canberra, 22 March 2013, p. 32.

77 Australian Home Entertainment Distributors Association, *Submission 58*, p.1.

78 *Committee Hansard*, Canberra, 22 March 2013, p. 35.

that works for their business strategy, works with the different investments they make in those different markets, works based on the competitors they have in those markets and on the customer perceptions in those markets in a true supply-and-demand manner.<sup>79</sup>

- 3.95 Both Microsoft and Adobe argued that consumers and businesses can always turn to other products if their customers believe their prices are too high. Ms Marlow said:

[S]mall businesses in this country have choice. There are a plethora of products they can use. There are other products that they can use today for similar functions, and they have a choice to make. We operate in the market very lawfully. We are out there competing every day on price and on the service of product. ... If we price our products too high, then our customers will make different choices.<sup>80</sup>

- 3.96 Asked by the Committee about customer perceptions of Microsoft charging Australian users of one Microsoft product more than 70 per cent more than users in the United States, Ms Marlow argued that the key issue was customer perception of Microsoft's products:

We look to measure our customer's delight and satisfaction with our company's products in a lot of ways. Often that is through sales. Every day we are out there selling our product, making sure that as you are using the variety of hardware that you have in front of you now that we are an eligible and competitive offering for our customers. Ultimately, the choice and the decision for customer satisfaction and delight is for the customer. I think the role of a free market and a company is to be able to then go out and compete every day to do that, to make sure that we through our products, through our support mechanisms and the things that we do every day when we are competing are the moment of value for our customers.<sup>81</sup>

- 3.97 However, in response to the suggestion that software vendors create 'digital handcuffs' that prevent consumers and businesses from switching to a competitor, Ms Marlow said:

Most of our software programs are built with interoperability in mind, so you can use tools to transfer data and technology. ... We have to keep building on those products, keep making sure we

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79 *Committee Hansard*, Canberra, 22 March 2013, pp. 35-36.

80 *Committee Hansard*, Canberra, 22 March 2013, p. 38.

81 *Committee Hansard*, Canberra, 22 March 2013, p. 32.

compete and innovate, keep making sure that we deliver the value they want, because they do have those choices in this market.<sup>82</sup>

- 3.98 However consumer groups argued that market forces are rather less than perfect in relation to IT products. As the Australian Communications Consumer Action Network (ACCAN) observed in its submission to the Committee:

Software has different economic properties to many other products. Due to compatibility issues, unless there are uniform standard allowing multiple software products to access and edit files from different programs, the value of software increase with the number of people using that product. Market power then tends to reside in a few powerful organisations.<sup>83</sup>

- 3.99 ACCAN elaborated, using Adobe's software products as an example:

Adobe has significant market power due to its importance to creative industries. It also structures products in such a way that requires regular investment (through purchasing upgrades and linking products) that make the cost of switching to another piece of software more expensive. This market power would appear to allow Adobe to undertake international price discrimination to the detriment of Australian small business, many of whom have little choice about what product they are able to purchase.<sup>84</sup>

## Managing markets

### Cloud and subscription services

- 3.100 In evidence to this inquiry, industry groups highlighted the utility cloud services offer for consumers and businesses, especially the potential to reduce IT support costs for businesses and consumers by outsourcing hardware and software maintenance and support. According to the Australian Industry Group (Ai Group), for example, cloud computing enables monthly or annual pay-as-you-go pricing models for customers which can be scaled up or down flexibly depending on customer demand.<sup>85</sup> AIIA CEO Ms Suzanne Campbell similarly argued that the cloud provides pricing advantages for Australian consumers and businesses:

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82 *Committee Hansard*, Canberra, 22 March 2013, p. 38.

83 Australian Communications Consumer Action Network, *Submission 74*, p. 8.

84 Australian Communications Consumer Action Network, *Submission 74*, p. 8.

85 Australian Industry Group, *Submission 56*, p. 2.

Cloud presents opportunities. In relation to pricing, cloud based pricing for a product means that consumers no longer need to secure a licence to own the product outright; they can use it on an as-required basis – pay as they go or pay per month. So that is one innovation that comes with cloud. More generally, as a business model, the enabling capacity of cloud relates to lower capital costs, easier access to platforms – and is a particularly significant opportunity for SMEs.<sup>86</sup>

3.101 Mr Robson repeatedly expressed Adobe’s view that its cloud-based subscription service – called ‘Creative Cloud’ – provided significant advantages for Adobe customers including more frequent software updates instead of an annual or biannual version release (as is the case when purchasing perpetual-license software):

... Creative Cloud provides access to continual updates, enhancements and new features of our technology over time... if you bought a copy of Photoshop prior to there being a new operating system in the marketplace or prior to there being a new piece of hardware, such as a tablet or a smartphone, the technology that you purchased would support the technology that was available in the market at that point in time. It is a snapshot of the tech landscape. But by being able to provide a Creative Cloud offering it allows us to then provide enhancements and updates to customers throughout all innovation across the technology landscape. So as other vendors bring hardware or new operating systems to the market our customers get recurring updates and enhancements to our technology.<sup>87</sup>

3.102 Mr Robson went on to highlight special features available to customers via Adobe’s cloud services:

We add features to Creative Cloud that we technically could not offer otherwise. Some features exist in Creative Cloud that you would not get access to if you were to buy a box product, including collaborative services that allow you and I, for instance, to share files and information. It allows us to provide storage to our customers. It allows online storage. It allows them to easily share that content with other parties. It also allows them to sync across multiple devices.<sup>88</sup>

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86 *Committee Hansard*, Canberra, 30 July 2012, p. 3.

87 *Committee Hansard*, Canberra, 22 March 2013, p. 17.

88 *Committee Hansard*, Canberra, 22 March 2013, p. 18.

- 3.103 Mr Robson argued that price differentials for new Adobe products are much lower than in the past. In particular Mr Robson highlighted prices for Adobe's 'Creative Cloud' subscription-based service:

Creative Cloud was launched in April 2012 and we have been monitoring and reviewing its performance in markets since its launch. Last month we made the decision to change the monthly price of creative cloud to \$49.99 on an annual subscription basis. This brings the price in Australia broadly in line with the price in the United States. Historically the price of our student and teacher offering for this cloud based service has been lower in Australia and New Zealand than in most markets around the world and is priced at \$24.99.<sup>89</sup>

### Geoblocking

- 3.104 The practice known as 'geoblocking' has been discussed earlier. The Committee notes that many major IT companies regard geoblocking as a legitimate tool which allows them to set prices in regional markets. Mr Robson explained that:

I am sure you are all aware that geoblocking is a well-established and legal practice seen across many industries. At Adobe we do direct our customers to country-specific websites via what we call 'automatic redirection'. We do this for a variety of reasons, including the ability to recover the costs of delivering a local, personalised and relevant experience for customers. Our customers expect to see marketing, discounts, post-sales support and other information that is customised to their local market. We also do it to ensure that we comply with local legal requirements.<sup>90</sup>

- 3.105 Ms Marlow outlined Microsoft's approach to geoblocking in the following terms:

We do use geoblocking as a lawful mechanism to manage our business, as some of our competitors and other companies do. ...We use geoblocking in a number of different ways. We would use it to ensure we comply with local ratings for games. In different jurisdictions and geographies games will have different ratings, so we will make sure that we manage to that. We would use it to manage licensing arrangements on content, which differ from geography to geography. We would use it to make sure that we can adapt our business strategies, which might be different

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89 *Committee Hansard*, Canberra, 22 March 2013, p. 15.

90 *Committee Hansard*, Canberra, 22 March 2013, p. 15.

from geography to geography. And we would do it to understand what is happening in our own local geographies to make sure that we can make investment decisions to support the consumer demand in those different types of geographies.<sup>91</sup>

- 3.106 Issues surrounding the use of technological protection measures (TPMs) and geoblocking will be explored in further detail in chapter 4.

## Consumer views on cost claims

- 3.107 The Committee heard evidence from consumers and consumer groups which disputed industry evidence in relation to higher costs. The Choice submission made the following assessment of the likely impact of these costs on the price of IT products in Australia:

There is no evidence that factors such as wages and labour costs, occupancy costs and rent, GST, retail profit margins, and logistics and transportation can, even cumulatively, account for some of the price differentials identified in IT hardware and software products.<sup>92</sup>

- 3.108 Mr Matthew Levey from Choice elaborated on these conclusions in evidence before the Committee:

I do not think we deny that there are factors which are specific to doing business in Australia – I am sure there are, just as there are factors specific to doing business everywhere – but on the basis of what has been put forward, whether it is rent, marketing, labour costs or GST, we do not think that the proportionate higher costs of doing business in Australia in any of those areas can amount to a 50 per cent or greater price difference. Therefore, the only place we can look to is the wholesale cost of that product, which would be set by the manufacturer, the international copyright holder of that product.<sup>93</sup>

- 3.109 In relation to the idea that costs associated with warranty support are driving the price of IT goods up in Australia, Mr Levey argued that there is evidence that Australian retailers can combine low prices with strong warranty support:

... when you look at some parallel importers like Kogan, the TV parallel importer, who, as far as we understand it, has an

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91 *Committee Hansard*, Canberra, 22 March 2013, p. 35

92 *Choice, Submission 75*, p. 26.

93 *Committee Hansard*, Sydney, 30 July 2012, p. 23.

extremely strong refund/return policy you will see that, even though the goods that it is selling are parallel imported so you would assume not covered by that manufacturer's domestic warranty requirements, it obviously shows it is quite possible to operate here profitably, sell a lot of products and still offer significant price savings compared to what, if you like, the official supply chains would provide.<sup>94</sup>

- 3.110 Some consumers met the notion of warranty and aftersales support costs driving higher prices with scepticism. According to Mr Magnus Stensson:

I would argue that Australia generally has the worst warranty service in existence. I buy IT hardware from the US or Hong Kong and get better warranty than here, where the trend is to make things as complicated as possible.<sup>95</sup>

- 3.111 Mr Christopher Shain also expressed doubts at the extent to which warranty costs could contribute to higher IT prices, in particular pointing to the trend toward offshore technical support centres:

There are obviously some examples where getting physical support may incur extra costs, but often to nothing like the extent of the price disparity.

For software products particularly, if the service and support was any different, of better quality or easy to obtain then I could understand a price difference, but my personal experience over many years in getting support and backup for professional imaging software related issues is that I'm usually not speaking with someone that's located in Australia anyway.<sup>96</sup>

- 3.112 Evidence from consumers also notes that the multinational IT companies with which they do business are able to amortise many of the costs listed above by operating centralised support, billing and distribution services from a low cost offshore location. Mr Graeme Kitney also expressed doubts at the extent to which local costs could influence the price of his Adobe software:

Last year I wanted to upgrade my Adobe Acrobat and Adobe Photoshop Elements and went to their web site for the price and to order the upgrades. When I put in my address it directed me to their Australian site and the price increased two and a half times.

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94 *Committee Hansard*, Sydney, 30 July 2012, p. 24.

95 Magnus Stensson, *Submission 71*, p. 1.

96 Christopher Shain, *Submission 57*, p. 1.

However this wasn't the end of my annoyance with Adobe, when the software arrived it had been posted from Singapore and I was billed from Dublin.<sup>97</sup>

- 3.113 The Committee remained intrigued throughout the inquiry with regard to the apparent mismatch between industry statements and actions: industry organisations stated a willingness to assist the Committee but demonstrated a clear reluctance to do so. The Committee observed similar attitudes towards addressing consumer perceptions. In noting negative customer feedback, Apple's Mr Tony King told the Committee that:

We are acutely aware of customer feedback in general. ...[W]e are acutely aware of headlines that might be reported in the newspaper, or a letter we may receive from a customer who is concerned that a song price on iTunes in Australia may be more than in the US. I have a very frank and candid dialogue with my counterparts in the US to make sure that they understand this. Indeed, at a global level, within our iTunes teams, we do pass the observation to the global head office of a music label that we are hearing comments in Australia that frankly make us uncomfortable.<sup>98</sup>

- 3.114 The Committee notes, however, that according to Dr Matthew Rimmer, an academic from the Australian National University, in relation to e-books and software sold through Apple's app store, content is sold under an 'agency agreement', according to which prices are set by the publisher or rights holder. In these cases the retailer acts as an agent and takes a percentage of each sale, but does not set the price. According to Dr Rimmer, Apple and a number of publishers are subject to an antitrust investigation in the United States as a result of price fixing concerns arising from the agency agreement.<sup>99</sup>

## Committee comment

- 3.115 Submissions to the inquiry indicate that Australian consumers have developed a strong impression that they are the subject of international price discrimination, in which overseas suppliers of IT products charge Australians substantially higher prices without obvious justification other than that it is 'what the market will bear'. The Committee shares this view.

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97 Graeme Kitney, *Submission 117*, p. 1.

98 *Committee Hansard*, Canberra, 22 March 2013, p. 13.

99 Matthew Rimmer, *Submission 92*, pp. 73-79.



- 3.116 The Committee acknowledges that there are factors specific to the Australian market which can make it a higher-cost environment for IT vendors compared with other markets. Australia's population is comparatively small and spread over a large geographical area, which means that higher distribution, wage and occupancy costs must be covered by smaller unit sales than in a market like the US. There are therefore many products, primarily hardware products or those with a physical distribution model, for which costs are indeed higher than in comparable overseas markets.
- 3.117 That being the case, however, the Committee is of the view that in many instances these higher costs cannot, even cumulatively, explain the price differences consumers experience in relation to many IT products, and especially those delivered via the internet.
- 3.118 The Committee notes the views of some industry groups and major IT companies that price differentials are narrowing. The Committee also notes that the AIIA submission acknowledged that international price discrimination is practiced by some of the AIIA's members as a matter of course. The AIIA referred to this practice as 'a common business strategy necessary to maximise performance in a specific high-cost market such as Australia'.<sup>100</sup> The Committee is therefore disappointed that the AIIA has confused the issue by disputing the validity of consumers' price comparison data and by offering alternative claims about higher costs that may contribute to price differentials.
- 3.119 The Committee's view is reinforced by statements made by government and industry groups which characterise regional pricing differences as a tool used by IT companies and rights holders to maximise profit. The Committee acknowledges the argument made by IT companies that regional pricing arrangements are a legal business strategy and that companies making such arrangements are subject to competitive market forces. The Committee notes that Microsoft and Adobe both rejected the notion of a global market place and explicitly acknowledged that their pricing strategies reflect judgments as to what particular regional and national markets will bear.
- 3.120 The argument that 'sticky' exchange rates continue to affect prices became less persuasive as the inquiry proceeded. The Committee considers that price disparities that persist two years after parity with the US dollar are no longer explicable entirely by reference to exchange rates. Although the Committee is aware that a range of IT products, including Apple

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100 Australian Information Industry Association, *Submission 73*, p. 4.

hardware, is now priced much closer to parity with the US, it notes that significant price discrepancies remain across a range of product categories.

- 3.121 The Committee notes the evidence provided by Apple Australia Vice President Mr Tony King to the effect that localisation costs for IT hardware do not represent a significant additional cost.
- 3.122 The Committee notes that despite industry claims that costs exist for the creation and marketing of digitally distributed content, vendors have not produced any evidence to explain why differentials are so high for such content. In relation to games, for example, the Committee has not received any evidence which explains why it is almost invariably cheaper for Australian gamers to purchase and ship physical media from the United Kingdom to Australia than it is to purchase a digital copy of the same game.
- 3.123 The Committee notes the suggestion from industry groups that price differences are in some way ameliorated by 'non-financial value' provided to consumers through discounts, convenience, or after-sales service. The Committee received many submissions from consumers and small businesses upset at what they saw as unfairly high prices, and who did not feel adequately compensated by the 'non-financial' aspects of their transactions. Although the Committee acknowledges that in some circumstances, non-financial factors may influence purchasing decisions, it is clear that in many circumstances they do not.
- 3.124 Given the evidence presented to the Committee of very large price differentials, it is difficult to avoid the conclusion that these practices amount to international price discrimination to the clear disadvantage of Australian consumers and businesses.
- 3.125 The Committee acknowledges that there is competition in the sale of IT products, however there are also significant barriers to competition and choice. Rights and their control also need to be considered. Copyright, competition and access are explored in the next chapter.

## Copyright, circumvention, competition, and remedies

- 4.1 While chapter 3 canvassed some of the reasons provided by industry for practicing price discrimination, including higher costs for businesses operating in Australia, themes relevant to copyright law and competition arose repeatedly in discussions on IT pricing in Australia. Issues of access for users, ownership and licensing of content, and managing the impacts of infringement were also raised regularly. The development of the copyright regime, and its ability to adequately adapt to the challenges presented by an environment with increasing amounts of digital content were discussed in context with the balance between often competing rights of creators, owners or users to access that content.
- 4.2 Discussions about copyright and intellectual property inevitably include considerations of who benefits: what gives one party an advantage may disadvantage another. The Committee notes the many intersecting, and often conflicting interests, and that what might appear by one party to be solutions to problems, are seen by another party as threats to livelihood. The Committee notes that interpretations are often disputed and interests are often opaque.
- 4.3 This chapter discusses these broad issues of intellectual property as they apply to competition and consumer rights. The Committee notes that in the current legislative framework, there is tension between treatment of physical and digital content, and that current rules are seen by some to be inadequate. The Committee acknowledges the development of measures, including geoblocking, and methods to circumvent such measures, and their different impacts on consumers and industry. The Committee notes that some remedies proposed by inquiry participants to alleviate the effects of price discrimination are therefore not universally agreed, including those relating to the nature of rights and their protection, the legality of circumvention measures, the means of maintaining competition

in markets, and how to improve clarity for consumers. The chapter concludes with an overview of some international aspects: harmonisation of warranties and standards, and concerns about trade negotiations.

- 4.4 The Committee also notes that several claims from inquiry participants relating to price discrimination are *not* relevant to copyright issues, and may simply be business decisions for which there is little observable explanation. In its consideration of all of the above issues the Committee notes previous and ongoing inquiries into Australia's copyright regime.

## Balancing copyright interests

- 4.5 Many of the IT products which appear to be subject to international price discrimination are protected by copyright. According to Dr Nicholas Suzor and Ms Paula Dootson, copyright scholars from the Queensland University of Technology:

Copyright operates to provide an incentive for firms to invest in the production and distribution of creative expression. As a utilitarian statutory monopoly, it operates to balance the incentives provided to producers against the interests of the public in having rich access to expression. Seen this way, access is the goal of copyright – access to culture is a predicate for individuals to learn, grow, create, and contribute back to society.<sup>1</sup>

- 4.6 This inquiry has heard evidence suggesting that the balance between rights holders and consumers in Australian copyright law has shifted in recent years as a consequence of changes in the way content is delivered, changes in the terms under which content is acquired, and changes in the ways in which consumers are permitted to use the content they have purchased. The Committee notes the views of rights holders that these changes have at least in part been motivated by the incidence of copyright infringement, which is discussed later in this chapter. In the view of some observers the balance has swung in favour of rights holders at the expense of consumers, reducing competition in copyright markets and generating higher prices for copyright material, including through international price discrimination.
- 4.7 In its submission to the inquiry, the Treasury noted that the rights conferred by copyright and intellectual property laws have an inherent potential to generate price discrimination:

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1 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 2.

... intellectual property laws provide various rights for the protection of economic investment in innovation and creative efforts. To the extent that these rights allow rights holders to control the marketing and distribution of goods and services, there is a potential for price discrimination, should the rights holder choose to do so.<sup>2</sup>

- 4.8 Lack of balance and competition in the copyright system can generate excessive prices for copyright material, which represents a significant social cost, according to Dr Suzor and Ms Dootson.<sup>3</sup> The Australian Competition and Consumer Commission (ACCC), in its submission to the Australian Law Reform Commission's ongoing *Copyright and the Digital Economy* review highlighted the need for balance in the copyright regime:

Absent copyright laws, it is possible for users to 'free-ride' on copyright materials by using them without payment. Consequently, there may be inadequate incentives for investment in the creation of copyright materials that consumers value... [However], the costs for economic efficiency and consumer welfare associated with too high or too extensive protections for IP rights may be significant.<sup>4</sup>

- 4.9 In its review of the Australian copyright system in 2000, the Intellectual Property and Competition Review Committee (the Ergas Committee) also noted the importance of balance in copyright.<sup>5</sup> The Ergas Committee's report argued that while copyright legislation must seek to 'redress the problems associated with free riding', it must also 'address the adverse economic effects that a grant of protection itself may create':

It is, in this respect, a fallacy to suggest that policies conferring more income on copyright owners in and of themselves are socially desirable relative to those that confer less. Rather, the goal of the intellectual property system is to provide a sufficient incentive for socially useful investment in creative effort... Over-compensating rights owners is as harmful, perhaps even more harmful, than under-compensating them.<sup>6</sup>

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2 Treasury, *Submission 85*, p. 7.

3 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 2.

4 Australian Competition and Consumer Commission, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, p. 2.

5 Intellectual Property and Competition Review Committee (also known as the Ergas Committee, after its Chair, Professor Henry Ergas), *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, p. 33.

6 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, p. 33.

## Development of current legislative framework

4.10 The Committee has considered the development of the copyright regime described by industry and consumers throughout the course of this inquiry. Clearly the increased presence of a digital IT environment has created challenges for interpretation of the balance of rights of access by consumers, protections for the artists, and the ability to generate financial benefits. It has also meant that ideas of appropriate competition are contested.

## Copyright and competition in physical media

4.11 Many inquiry participants addressed issues of costs and competition, and described how these have been managed prior to the advent of the digital environment. The issue of parallel imports was raised extensively, and demonstrated claims that in a digital world, those rules are rapidly losing relevance.

4.12 The Committee notes the Choice description of parallel importation:

Parallel imports are legitimately produced goods imported into another country. The goods are manufactured with the authorisation or consent of the intellectual property rights owner and subsequently imported into another country by an unauthorised distributor. Unlike pirated (counterfeit) goods, parallel goods are genuine and manufactured by the intellectual property owners, or licensee of the owner.<sup>7</sup>

4.13 Parallel importation of copyright material is prohibited by sections 37 and 102 of the *Copyright Act 1968* (Cth). For much of the last century these sections effectively shielded copyright holders in Australia from international competition by preventing consumers and business from importing copyright material from cheaper overseas markets.

4.14 From the late 1980s, however, the Australian Government progressively removed parallel import restrictions (PIRs) for certain products after reviews by the Prices Surveillance Authority and the Copyright Law Reform Committee. In response to these reports the Copyright Act was amended in 1990 to permit the parallel importation of books in limited circumstances, and again in 1997 to permit the parallel importation of CDs.<sup>8</sup>

4.15 The Ergas Committee observed in 2000 that PIRs 'are likely to confer on the owners of copyrighted material the power to charge higher prices to

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<sup>7</sup> Choice, *Submission 75*, p. 36.

<sup>8</sup> Matthew Rimmer, *Submission 92*, pp. 16-19.

Australian consumers than would otherwise be the case'.<sup>9</sup> In relation to PIRs, the report said:

The Committee's considered view is that the restrictions do allow higher prices to be charged for the protected material than would otherwise prevail. A significant proportion of the benefits from these higher prices flow to foreign rights holders. The corresponding costs are borne in Australia, by Australian consumers and industries - such as the domestic software industry - that use imported protected material as an input in their production process. The Committee does not believe the gains to Australia from these restrictions outweigh their costs.<sup>10</sup>

- 4.16 Subsequently, PIRs on e-books, periodicals, sheet music and 'legitimate software' were removed by the *Copyright Amendment (Parallel Importation) Act 2003* (Cth).<sup>11</sup> In 2009 the Productivity Commission was asked to review the effects of continuing PIRs on books, concluded that reform is necessary, and therefore recommended that PIRs be terminated.<sup>12</sup> The ACCC has also advocated the removal of PIRs, most recently in its submission to the Australian Law Reform Commission's review of copyright law. In its submission to the ALRC, the ACCC emphasised its long-held opposition to PIRs:

[The ACCC] has consistently held the view that parallel import restrictions extend rights to copyright owners beyond what is necessary to address the 'free-rider' problem...[G]ranting a monopoly right to import creates the potential for market power to be conferred on copyright owners.<sup>13</sup>

- 4.17 Submissions to this committee indicate that parallel importation of physical media is one of the most effective ways for Australian consumers to mitigate international price discrimination in relation to copyright material. Mr Philip Noonan, Director-General of IP Australia, advised the Committee that the organisation 'favour[s] the retention of the capacity for parallel importation',<sup>14</sup> and the Committee notes Choice's arguments that

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9 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, p. 62.

10 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, p. 7.

11 Matthew Rimmer, *Submission 92*, p. 24.

12 Productivity Commission, *Restrictions on the Parallel Importation of Books*, 2009, p. 7.19.

13 Australian Competition and Consumer Commission, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, p. 11.

14 *Committee Hansard*, Canberra, 13 February 2013, p. 2.

this can be a useful mechanism in reducing international price discrimination:

Parallel imports help overcome IT price disparities in two main ways:

- presenting consumers with lower-priced options for goods; and
- putting competitive pressure on copyright owners to reduce their Australian prices.

If more consumers engaged in parallel importing, this would pressure copyright owners to reduce prices in the Australian market.<sup>15</sup>

- 4.18 Several inquiry participants have noted the benefits Australian consumers derive from parallel imports and have called for remaining restrictions to be abolished. The Australian Digital Alliance and the Australian Libraries Copyright Committee (ADA/ALCC), for example, argued in its submission that the remaining PIRs on books should be removed. Citing the history of independent reviews which have found PIRs to be ineffective and inefficient, and noting the negative effects of the remaining PIRs on Australian libraries, the ADA/ALCC recommended that:

Existing parallel importation restrictions in Australian copyright law should be repealed, to facilitate more competitive pricing of content by domestic retailers and increase consumer choice.<sup>16</sup>

- 4.19 After surveying the history of independent reports and subsequent amendments to the Copyright Act, Dr Matthew Rimmer, a copyright scholar at the Australian National University, concluded that PIRs should be repealed, in order to 'promote consumer choice, competition, and innovation'.<sup>17</sup> Dr Rimmer's views were supported by Dr Suzor and Ms Dootson.<sup>18</sup>

- 4.20 Although Assoc Prof Weatherall argued that lifting remaining PIRs in relation to books and movies would increase competition, the precise extent to which this might translate into lower prices was uncertain:

If local retailers were able, by sourcing parallel imports, to charge a lower price (closer to cheaper prices being charged overseas) this could, indirectly, put pressure on high prices charged to Australians seeking to purchase online. Whether this would in fact occur would depend on all kinds of qualifications and

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15 Choice, *Submission 75*, p. 36.

16 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95*, p. 3.

17 Matthew Rimmer, *Submission 92*, p. 29.

18 Nichols Suzor and Paula Dootson, *Submission 121*, p. 4.



complications (such as local reluctance to source parallel imported goods in order to preserve relationships with suppliers.)<sup>19</sup>

- 4.21 Although the publishing industry did not directly address the issue of parallel import restrictions, industry representatives noted that the industry has been subject to frequent government reviews.<sup>20</sup> Evidence from the movie and music industries did not directly address the issue of PIRs, instead stressing the 'dynamic and highly competitive' state of home entertainment markets.<sup>21</sup>

### Copyright and competition impacts of the shift to digital content

- 4.22 The shift to digital content has transformed the market for copyright material in fundamental ways, including impacts on business models, and access to copyright material by consumers. According to Mr Matt Minogue, First Assistant Secretary of the Civil Law Division at the Attorney-General's Department (AGD), digitally distributed content is treated differently to content on physical media in terms of copyright law:

The whole issue of parallel importation was very much a paradigm in the context of physical supply. It does not really apply in the digital world...<sup>22</sup>

- 4.23 The Committee notes that digital distribution of copyright content is governed to a much greater extent by contractual and licensing agreements which can effectively prevent consumers and businesses from accessing content in cheaper overseas markets. Mr Minogue noted that these licenses can be regarded as a right in themselves and acknowledged that they can be used to defeat parallel importation:

If the original owner has divided the market up in such a way that you can sell to one market and someone else can sell to another, leaving each licensee to exploit it as they can in a different market, it also means that contractually you may not be able to sell at all to the other market.<sup>23</sup>

- 4.24 The Committee has heard concerns that the terms under which digital copyright content is distributed, combined with recent expansions in the rights of copyright holders, may limit competition in copyright markets. The ACCC noted that situations can arise in which the extent of the rights provided by copyright may cause competition issues:

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19 Kimberlee Weatherall, *Submission 127*, p. 4.

20 *Committee Hansard*, Sydney, 30 July 2012, p. 8.

21 Australian Home Entertainment Distributors Association, *Submission 58*, p. 1.

22 *Committee Hansard*, Canberra, 13 February 2013, p. 10.

23 *Committee Hansard*, Canberra, 13 February 2013, p. 8.

Although the mere grant and use of copyright seldom conflicts with competition laws, in some circumstances, the extent and use of those rights may give rise to competition concerns and be detrimental to efficiency and welfare... [G]ranting a monopoly right to import creates the potential for market power to be conferred on copyright owners.<sup>24</sup>

4.25 The ACCC further observed in its supplementary submission to the inquiry that:

... a monopoly right to import, or a monopoly which is analogous to a monopoly right to import through exclusive digital delivery, is only one way in which market power might be conferred on copyright holders. Market power might also, but not necessarily, arise through licensing practices such as collective or exclusive licensing.<sup>25</sup>

4.26 This evidence suggests that in markets for digitally delivered content, rights holders may enforce regional pricing arrangements, creating a monopoly right of sale and substantially lessening competition. The Committee notes that the evidence it has received highlighting high price differentials for digitally delivered copyright material may be an early sign that competition in copyright markets is lessening.

## Access to digital works

4.27 As noted at the beginning of this chapter, impacts of copyright provisions over digital content on consumers and industry are contested, as are views as to how an appropriate level of competition is achieved. Some inquiry participants disagree with industry claims that more choice means more competition in copyright markets; the Committee also notes conflicting views as to effects on pricing, including for IT products. The following section canvasses some of the views on the benefits and disadvantages to stakeholders in a digital market.

## Choice and immediacy of access

4.28 The Committee acknowledges evidence from rights holders and industry groups as to the advantages for consumers of copyright content; for example, more choices as to how copyright content is accessed. Mr Dan

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24 Australian Competition and Consumer Commission, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, p. 11.

25 Australian Competition and Consumer Commission, *Submission 100.1*, pp. 1-2.

Rosen, CEO of the Australian Recording Industry Association (ARIA), highlighted 'a huge range of options' available to music consumers, noting that 'a music fan in Australia has more opportunity to purchase music in different ways than at any time throughout history.'<sup>26</sup>

4.29 Mr Jose Borghino of the Australian Publishers Association also emphasised the variety of options Australian consumers have in accessing written content:

Apart from new e-book platforms... consumers can now log onto the search engines like booko.com.au and choose between American or British hardback editions mailed to them with free freight through Book Depository UK and US... They can buy second-hand books from AbeBooks or de-accessioned library books from Better World Books... They can go online and buy the book direct from the publisher.... The Australian book market is extremely competitive, with Australian consumers having more access to a greater diversity of titles than ever.<sup>27</sup>

4.30 The Committee acknowledges that digitally delivered content can also offer advantages over physical media in terms of near-immediate access to content, and notes that this may be an advantage for which consumers may elect to pay a higher price. The Committee notes that with this increased level of immediate access, there is arguably an even greater focus on copyright protection and industry claims about the need for protective actions. Justifications for these claims are considered below.

## **IT pricing and copyright infringement**

4.31 The Committee notes that there are many reasons for industry to take action against copyright infringement, and not all will be canvassed here. The Committee is also aware that consumers do not necessarily accept industry explanations that price discrimination can, at least in part, be defended by a need to protect against copyright infringement. The Committee understands that consumers will often seek to access material in the most cost-effective way possible.

4.32 Rights holders may seek to justify the use of contractual and technical devices, which may have the potential to affect competition, on the basis that such devices prevent copyright infringement. Rights holders have argued in submissions and in evidence before the Committee that

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26 *Committee Hansard*, Canberra, 5 October 2012, p. 4.

27 *Committee Hansard*, Sydney, 30 July 2012, p. 9.

copyright infringement threatens creative industries and that government action is needed to address it. The Committee has also heard evidence, however, which suggests that high prices for copyright material and anachronistic business practices may undermine the copyright regime generally and may also serve to generate infringement. This section will outline the evidence presented to the Committee in support of these competing claims.

4.33 In relation to the issue of copyright infringement, the Committee acknowledges concerns of rights holder organisations in the music, movie and publishing industries about the ongoing unauthorised access to copyright works made possible by the internet. The Committee received contrasting evidence as to the impacts on revenues for industry or costs to consumers.

4.34 Submissions from the music, movie and publishing industries demonstrated that copyright infringement is of concern to rights holders, and has a serious negative impact on industry revenue. ARIA, for example, indicated in its submission that copyright infringement is a serious issue for its members:

... a major issue for the Australian recorded music sector today is the impact of piracy. ... Unlike some other jurisdictions, there is no coherent industry or legislative framework in Australia to deal with the problem of unauthorised access to music.<sup>28</sup>

4.35 As noted in chapter 3, Universal Music Australia Pty Ltd (UMA) stated that the prevalence of illegitimate music downloads and streaming has led to 'a rapid decline in willingness to pay for recorded music'.<sup>29</sup> In describing the impacts of piracy, UMA stated:

The enormous impact of piracy on the supply of authorised recorded music has dramatically reduced the resources available to UMA and other record companies to invest in new music. It has also fundamentally affected the way in which record companies make music available to consumers...

Piracy has already irreparably damaged the recorded music industry and will continue to be a major competitor to legitimate sales for as long as it remains unchecked.<sup>30</sup>

4.36 The Australian Home Entertainment Distributors Association (AHEDA) made a similar argument in its submission:

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28 Australian Recording Industry Association, *Submission 93*, p. 2.

29 Universal Music Australia, *Submission 129*, p. 2.

30 Universal Music Australia, *Submission 129*, p. 2.

It is important for the Committee to recognise that Australia has some of the highest rates of online piracy (both peer-2-peer and streaming) infringements in the world and 90 per cent of P2P piracy in Australia is infringing. Australia is currently exposed without a legislative regime to counter such behaviour.<sup>31</sup>

4.37 Mr Ross Gibb, Group Managing Director at Macmillan Publishers Australia noted that the publishing industry increasingly regards copyright infringement as a significant problem:

The main issue that we have with piracy is that people can circulate one digital file in very large numbers very quickly, and of course it removes the commercial value for that book.<sup>32</sup>

4.38 Mr Jose Borghino of the Australian Publishers Association elaborated:

It is a growing problem, and we estimate that once the NBN is up and running it will become a bigger problem. All the content industries in Australia are very worried about the increase in piracy that we are facing in the future.<sup>33</sup>

4.39 While copyright holders are clearly concerned about the impact of infringement on their industries, the Committee heard evidence that the impact of infringement may be less severe than rights holders claim. Mr John Stanton, from the Communications Alliance, advised the Committee that in contrast to the claims of rights holders, the entertainment industry grew significantly over the last decade. In describing the overall state of the entertainment industry, a 2012 report notes that:

... you wouldn't know it, just listening to the entertainment industry talk about how much the entertainment industry is 'dying', but data from PricewaterhouseCoopers (PwC) and iDATE show that from 1998 to 2010 the value of the worldwide entertainment industry grew from \$449 billion...to \$745 billion. That's quite a leap for a market supposedly being decimated by technological change.<sup>34</sup>

4.40 The report cites statistics demonstrating growth in world-wide box-office receipts and broader film industry revenue, as well as growth in the global music industry.<sup>35</sup> In addition, the report cites US government statistics which indicate growth in the last decade of household spending on

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31 Australian Home Entertainment Distributors Association, *Submission 58*, pp. 3-4.

32 *Committee Hansard*, Sydney, 30 July 2012, p. 15.

33 *Committee Hansard*, Sydney, 30 July 2012, p. 15.

34 *The Sky is Rising*, 2012, Michael Masnick and Michael Ho, *Exhibit 1*, p. 2.

35 *The Sky is Rising*, 2012, Michael Masnick and Michael Ho, *Exhibit 1*, p. 9.

entertainment, and growth in employment in the entertainment industry, and suggest that the number of creative works being produced has grown 'at a tremendous rate'.<sup>36</sup>

- 4.41 In relation to the problem of widespread copyright infringement, Mr John Stanton, CEO of the Communications Alliance, stated that, while there are several reasons behind high rates of infringement, 'one of the most obvious of those is the lack in some cases of availability of legal and affordable online content'.<sup>37</sup> Mr Stanton also argued that artificial barriers to content created by rights holders can have a huge impact on the level of copyright infringement, and that geoblocking is a 'classic generator of online piracy'.<sup>38</sup>
- 4.42 Mr Stanton advised that the price of copyright material can have a significant impact on infringement, and cited a pricing experiment conducted by computer game vendor Valve (owner of the distribution platform Steam), where the price of one of its most successful games was reduced by 75 per cent, and sales revenues skyrocketed.<sup>39</sup>
- 4.43 The Committee received evidence that high prices and limited availability of content can also undermine the 'the legitimacy of Australian copyright law'.<sup>40</sup> Dr Suzor and Ms Dootson cited research which explored consumer perceptions of fairness, and how content restrictions and price discrimination affected the perceived legitimacy of illegal downloading:
- The more that Australian copyright law is seen as anachronistic and supportive of perceived unfair business practices, the less likely it is to be followed. The apparently unjustifiable difference between prices in Australia and comparable European and US markets is likely to lead consumers to infringement.<sup>41</sup>
- 4.44 The study found that Australian consumers consider higher prices to be 'discriminatory', that they make them feel like 'second-class citizens', and that this can create a mindset in which infringement is seen as more legitimate.<sup>42</sup> Consumer submissions to this inquiry overwhelmingly support this view.<sup>43</sup> Dr Suzor and Ms Dootson went on to argue that high

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36 *The Sky is Rising*, 2012, Michael Masnick and Michael Ho, *Exhibit 1*, pp. 2-3.

37 *Committee Hansard*, Sydney, 30 July 2012, p. 32.

38 *Committee Hansard*, Sydney, 30 July 2012, p. 34.

39 *Committee Hansard*, Sydney, 30 July 2012, p. 33.

40 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 3.

41 Nicholas Suzor and Paula Dootson, *Submission 121*, pp. 2-3.

42 Nicholas Suzor and Paula Dootson, *Submission 121*, pp. 2-3.

43 Including Kye Ridley-Smith, *Submission 61*, p. 1. As mentioned earlier in this report, more than half of the submissions to the inquiry were from consumers, many of whom expressed these concerns.

prices and limited availability of copyright material can generate infringement and undermine the copyright system as a whole, and concluded that:

... by failing to provide reasonably priced, effective, and convenient legal distribution channels, some copyright owners are contributing to infringement and the growing disregard for copyright law. In this context, recent attempts by copyright owners to shift the burden of enforcing copyright law to taxpayers (through criminal copyright regimes) and to internet intermediaries (through litigation against ISPs and lobbying for graduated response regimes) should be treated with strong scepticism.<sup>44</sup>

## Measures to limit access to content

4.45 From the above discussion, the Committee notes that despite industry claims about the costs of copyright infringement, consumers insist that their rights to access copyright material are being unfairly limited by methods such as copyright law provisions, or mechanisms such as geoblocking, which as discussed in earlier chapters can take various forms. The Committee also notes suggestions that copyright provisions can have a practical effect of reducing competition. The Committee acknowledges claims that access to content is sought in various ways, and notes that these claims are often the subject of debate about legitimacy.

4.46 The Committee notes the distinction between technological protection measures (TPMs) and geoblocking technologies. Mr Minogue of AGD, explained that:

... general geoblocking devices that allow market segmentation would not of themselves be a technological protection measure...to the extent that the Copyright Act allows an owner or assignee of property to impose a TPM over the content, that is not the same thing as geoblocking.<sup>45</sup>

4.47 AGD suggested that it is unlikely that geoblocking mechanisms could be considered to be TPMs. The department observed that a particular geoblocking technology would only be protected under the Copyright Act if it falls within the definition of a TPM in section 10(1) of the Copyright Act, which requires the TPM to be used:

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44 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 4.

45 *Committee Hansard*, Canberra, 13 February 2013, p. 4.

- in connection with the exercise of the copyright;
- by or with the permission of the owner or exclusive licensee of the copyright in the material, and
- to control access to the work or other subject matter.<sup>46</sup>

## Technological protection measures

4.48 TPMs (also referred to as effective technological measures, or ETMs) and digital rights management systems (DRM) are measures designed to prevent unauthorised access to or copying of copyright protected content. TPMs initially appeared in the 1990s, in response to concerns held by copyright owners about the rise of easily reproducible digital media. The Australian Copyright Council, in its submission to the current review of the TPM regime, has described access control TPMs as:

... a type of technological lock that prevents a person from accessing copyright material without permission... Technological protection measures are vital in enabling copyright owners to develop new business models and make their material available in digital formats.<sup>47</sup>

4.49 TPMs are justified by some rights holders as necessary to protect content from copyright infringement,<sup>48</sup> but the Committee notes that some TPMs are easily circumvented. The 1996 World Intellectual Property Organisation copyright treaty provided for legal remedies to make circumventing TPMs illegal.<sup>49</sup> Subsequently, legal protections for TPMs were introduced in many international jurisdictions in the late 1990s. Australia enacted measures in the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). As a consequence, as Assoc Prof Weatherall noted in her submission:

Australian copyright law makes it illegal to circumvent certain (access control) TPMs, to manufacture/provide/transmit a device for circumventing TPMs, or to provide or offer a service for circumventing TPMs. Circumvention of access control TPMs for a commercial offence is a criminal offence - a provision that would

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46 Attorney-General's Department, *Submission 124*, p. 2.

47 Australian Copyright Council, *Submission to the Attorney-General's Department on Technological Protection Measures*, August 2012, p. 3.

48 As an example, the Advanced Access Content Licensing System Licensing Administrator, in *Re: Review of Technological Protection Measure exceptions*, October 2012, p. 1, argues that copyright holders would not be willing to offer content for consumers' enjoyment without protection against ready infringement.

49 Matthew Rimmer, *Submission 92*, p. 30.



not impact on individual consumers but could impact on Australian businesses seeking lower prices for software.<sup>50</sup>

4.50 The Committee notes Dr Rimmer's observation that laws around TPMs are a form of 'paracopyright' – it is illegal to circumvent a TPM which has been applied to content, even when that content would otherwise be in the public domain. Under TPM laws, copyright holders effectively have the ability to control *access* to works, whereas previous copyright only allowed control of the *uses* falling within exclusive rights.<sup>51</sup>

4.51 Industry groups did not provide any evidence to this inquiry in relation to TPMs. However, concerns about TPMs were raised in several submissions to this inquiry. Dr Suzor and Ms Dootson argue that while TPMs were developed to protect the interests of copyright holders and should not protect market segmentation, 'the reality of TPMs has turned out much differently'. Dr Suzor and Ms Dootson observe:

TPMs now appear to impose significant costs on legitimate but technically unsophisticated users. They prevent users from making backups of their software as permitted by the copyright act. They prevent blind people from using software to read books aloud. They cause untold headaches for consumers who purchase content only to find that the copy protection is faulty, rendering their purchase useless. If and when Australia introduces new copyright exceptions to allow commonplace activities like making backups of digital copies of films, books, games and music; and making copies of each of these for viewing on portable devices or over cloud services, these activities will also be hampered by TPMs. They do not, however, prevent technically sophisticated individuals from breaking the locks and engaging in large-scale infringement.<sup>52</sup>

4.52 Dr Rimmer argues that not only have TPMs been largely ineffective in preventing copyright infringement (thereby failing at the task that is their primary justification), there is also evidence that:

... TPMs have been used for anti-competitive purposes in attempts to control secondary markets for remote controls, printer cartridges, data storage, and wireless telephone services. There have also been a number of cases in which there have been

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50 Kimberlee Weatherall, *Submission 127*, pp. 7-8.

51 Matthew Rimmer, *Submission 92*, p. 44; Ariel Bogle, *Exhibit 2*, p. 9.

52 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 4.

difficulties engaging in security testing and reverse engineering because of the use of TPMs.<sup>53</sup>

4.53 The ADA/ALCC submission notes that TPMs can limit or prevent a number of legitimate uses of content by libraries, schools and universities. The submission cites a list provided by the Copyright Advisory Group of the Standing Council on School Education and Early Childhood representing Australian schools and TAFES, which highlights:

... circumstances in which teachers are prevented from using content because of TPMs, even where the intended use of that content is non-infringing under copyright law. Where TPMs are attached, educators cannot:

- Create subtitled versions of films for hearing impaired students
- Use devices other than a DVD player (like iPads, laptops, content management systems) to play protected DVDs in the course of classroom instruction
- Compile film clips and other snippets of content protected by TPMs to aid student analysis or classroom discussion.<sup>54</sup>

4.54 The ADA/ALCC also describes practical challenges for legitimate users:

Even where copyright law recognises a specific situation in which TPMs can be circumvented or removed, in practice this may be difficult to achieve... Digital locks attached to content can restrict a user's ability to print, copy or email portions of the text as permitted under copyright law, and in some circumstances, library staff do not have the technical expertise or circumvention device to remove the lock.<sup>55</sup>

4.55 This evidence indicates that TPMs can restrict competition in copyright markets by preventing consumers from accessing and using legally acquired content in legitimate ways. The Committee is also aware that TPMs have been used in some circumstances to enforce geographic market segmentation (that is, as a form of geoblocking).

## Geoblocking

4.56 As discussed earlier in this report, geoblocking is the term given to the methods vendors have adopted to differentiate between regions and to keep customers separate (see chapter 2). From the perspective of industry, it can be a legal means of conducting business. From the perspective of

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53 Matthew Rimmer, *Submission 92*, pp. 31-32.

54 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95*, pp. 12-13.

55 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95*, p. 13.

consumers (see chapter 3), it can mean being unfairly overcharged for IT products or discriminated against based on geographical location. The Committee heard about interpretations of geoblocking practices as they relate to copyright and debates about access to intellectual property, including the way in which it has been suggested that practices have unintended consequences for consumers, markets and the copyright regime.

- 4.57 Despite positive developments in terms of the choices offered by rights holders to consumers to access content, Dr Suzor and Ms Dootson elaborated on content vendors' attempts to limit competition by capturing consumers within 'walled gardens':

The recent trend has been towards the creation of locked digital ecosystems: phones locked to app stores, book readers locked to single retailers, music and films only playable on the retailing company's devices, computer games only available through a single digital distributor. One of the unfortunate results of this trend is to drive up prices for consumers and to enable publishers to exercise unprecedented control over how and where cultural goods are enjoyed. This is bad for three reasons: increased control over how media is used limits legitimate acts of consumption, expression, learning, sharing, and cultural play; increased prices and closed ecosystems limit consumer access to cultural goods; and perceived unfairness challenges the legitimacy of copyright law.<sup>56</sup>

- 4.58 Another way in which rights holders exercise control is through the license agreements under which copyright content is acquired. Cyberworld Publishing explained that digital content is not purchased in the same sense that physical media are purchased. Instead, consumers purchase a license to access that content:

An e-book may be accessed electronically but it always remains the property of the publisher. An e-book purchaser merely acquires a license or the right to access and read the contents of a file they download. They cannot perform any actual process or manipulation with the contents of the e-book file and should not transfer it or its contents - which are subject to copyright - to anyone else.<sup>57</sup>

- 4.59 Similar licensing conditions are attached to the acquisition of other digital media. Conditional licenses to access copyright content contrast sharply

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56 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 5.

57 Cyberworld Publishing, *Submission 34*, p. 2.

with the traditional rights of consumers over purchased copyright content and have broad flow-on effects in relation to the cost of copyright material. The Committee notes views regarding impacts of restrictive licenses, for example, the prevention of resale, on competition. According to Dr Suzor and Ms Dootson, the lack of a robust secondary market entrenches the monopoly power of distributors.<sup>58</sup>

### Limits to geoblocking strategies

4.60 Dr Rimmer noted that for copyright owners who may have hoped that their business models would be protected by elements of 'technological protection measures, digital locks, strong economic rights [and] strong enforcement', this hadn't occurred.<sup>59</sup> In his submission, Dr Rimmer states:

Australian consumers have been locked out by technological protection measures; subject to surveillance, privacy intrusions and security breaches; locked into walled gardens by digital rights management systems; and geoblocked.<sup>60</sup>

4.61 At a public hearing, Dr Rimmer told the Committee:

You would have to say over the last decade the choices by the big copyright owners in publishing, music and film have been to try to rely on exclusive rights, to have a very tight control of that regime through peer networks, but that strategy has not necessarily been effective. Really in the void these other intermediaries have appeared because they have helped satisfy consumer demand for legitimate products in an accessible way.<sup>61</sup>

### Methods of accessing cheaper goods

4.62 As the Committee has been advised, consumers have developed many ways to improve their ability to access content despite geoblocking mechanisms. According to Ms Erin Turner from the Australian Communications Consumer Action Network:

... consumers, due to the high prices in Australia, use a number of methods to purchase overseas – or at least the particularly savvy consumers do. They might shop while they are travelling; they might purchase through online stores that know they are selling to

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58 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 6.

59 *Committee Hansard*, Canberra, 19 September 2012, p. 14.

60 Matthew Rimmer, *Submission 92*, p. 6.

61 *Committee Hansard*, Canberra, 19 September 2012, p. 14.

Australia; or, as we are increasingly seeing, services are offered online – virtual private networks or even stores – that give you a fake US address and then courier products to Australia. They allow you to access those cheaper products.<sup>62</sup>

- 4.63 Consumers may use a proxy server or a virtual private network (VPN) to bypass IP address-based geoblocking. Proxy servers and VPNs create an encrypted tunnel between a customer's computer and a server elsewhere, usually in another country. The customer's internet traffic is routed through that server and as a result vendor websites recognise the IP address of the server, rather than that of the customer, which may enable consumers to access content that would otherwise be region-blocked.
- 4.64 Many IT vendors seek to further enforce geoblocking by checking customers' credit cards at the point of sale, or by only shipping to addresses within a certain region. These geoblocking methods can be challenging for consumers to circumvent. The Committee notes however, that other options are available to consumers seeking to access lower overseas prices. These include the purchasing of US iTunes store gift cards through intermediaries set up for that purpose and by making use of 'freight-forwarding' companies which ship goods from the US on behalf of overseas customers.
- 4.65 The Committee was made aware of various ways which enable access to cheaper computer games. Many consumers expressed a preference for parallel importation of physical media from online stores based in cheaper jurisdictions – the UK-based ozgameshop.com being among the most popular.<sup>63</sup> The Committee is also aware of means by which consumers can access CD keys re-sold from cheaper markets – a practice not generally approved by games publishers, who have been known to remove English-language support from those games, making them unplayable.<sup>64</sup> The Committee also notes that some vendors may terminate a user's account and confiscate that user's legally purchased items if it decides they have breached the terms and conditions which enable geoblocking.<sup>65</sup>

## Legality of circumvention methods

- 4.66 While many submissions strongly support the avoidance of geoblocking mechanisms put in place by IT companies and vendors, there is also uncertainty as to whether such actions are legal in all circumstances,

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62 *Committee Hansard*, Canberra, 19 September 2012, p. 7.

63 Stuart Skene, *Submission 52*, p. 1; Scott Nelson, *Submission 4*, p. 1; Dmitry Brizhinev, *Submission 30*, p. 1.

64 Daniel Myles, *Submission 33*, p. 5.

65 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 6.

including as a possible breach of the Copyright Act's anti-circumvention provisions in relation to access control TPMs.

4.67 AGD noted that 'the relevant provisions of the Copyright Act have not been tested by a court. There are no judicial decisions that provide any further guidance as to whether a particular technology would be considered a TPM or not.'<sup>66</sup> However on the basis of a plain English reading of the definition, AGD:

... considers it unlikely that the technologies discussed would fall within the definition of an 'access control technological protection measure'. Where a geoblocking technology is not a technological protection measure, the Copyright Act does not prevent a person bypassing that geoblocking technology.<sup>67</sup>

4.68 Assoc Prof Weatherall, while agreeing with AGD in some respects, reached a less definite conclusion on whether geoblocking mechanisms could be considered to be TPMs:

Determining whether geoblocking is prohibited turns on deciding whether technologies used to enforce geographical market segmentation fall within the definition of an 'access control technological protection measure' (ACTPM) under section 10 of the Australian Copyright Act.<sup>68</sup>

4.69 According to Assoc Prof Weatherall, it is 'far from straightforward' to determine whether a particular form of geoblocking is protected under the Copyright Act. Such a determination would need to consider:

- the way the technology works
- how Australian courts could interpret the anti-circumvention provisions of the Copyright Act, and
- the language of the Act itself, which is 'complicated and opaque'.<sup>69</sup>

4.70 Assoc Prof Weatherall considered it 'unlikely' that requiring a US credit card or US mailing address could ever be considered as an TPM because 'such measures are too distant from the exercise of copyright rights'. However geoblocking technology on the basis of IP address raises 'questions of legal interpretation for which we have no guidance from the legislative history or court decisions'.<sup>70</sup>

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66 Attorney-General's Department, *Submission 124*, p. 2.

67 Attorney-General's Department, *Submission 124*, p. 2.

68 Kimberlee Weatherall, *Submission 127*, p. 9.

69 Kimberlee Weatherall, *Submission 127*, p. 9.

70 Kimberlee Weatherall, *Submission 127*, p. 10.

- 4.71 In addition to uncertainty over the extent to which geoblocking mechanisms can be considered TPMs, the Committee has heard that there is some uncertainty surrounding the extent to which Australians are permitted to circumvent geoblocking TPMs.
- 4.72 The Committee understands that section 10(1) contains an exception which permits Australians to circumvent some TPMs. The exception arose as a consequence of the High Court's decision in *Stevens v Kabushiki Kaisha Sony Computer Entertainment (Stevens v Sony)*.<sup>71</sup> In that case the High Court ruled that the circumvention of TPMs designed to enforce geographical market segmentation – specifically, the installation of 'mod chips' in PlayStation gaming consoles – was permitted. In his analysis of the case, Dr Rimmer notes that:
- ... the High Court was concerned that an expansive interpretation of 'TPMs' would provide unwarranted protection to regional coding devices, which would allow copyright owners to engage in price discrimination between markets.<sup>72</sup>
- 4.73 As a consequence of the High Court's decision in *Stevens v Sony*, the Copyright Act was amended to permit the circumvention of some TPMs. Section 10(1) provides that Australians are permitted to circumvent a TPM if it is applied to a 'film or computer program (including a computer game)' and if the TPM 'controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the [content] acquired outside of Australia'.<sup>73</sup>
- 4.74 The ADA/ALCC noted that the application of the section 10(1) exception is not clear, as it may exclude geoblocking TPMs which: are applied to books, music or other content; are applied to content acquired in Australia; do not 'prevent playback'; or which have a dual purpose.<sup>74</sup>
- 4.75 This evidence may suggest that the TPM provisions of the Copyright Act are not intended to protect geoblocking mechanisms. The Committee notes the views of Assoc Prof Weatherall that:
- ... the law in this area is plagued by uncertainty. Thus submissions suggesting that the legal status of circumvention of geoblocking mechanisms is a grey area are correct.<sup>75</sup>

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71 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448.

72 Matthew Rimmer, *Submission 92*, p. 41.

73 Matthew Rimmer, *Submission 92*, pp. 49-50.

74 Australian Digital Alliance/ Australian Libraries Copyright Committee, *Submission 95.1*, pp. 1-2.

75 Kimberlee Weatherall, *Submission 127*, p. 12.

- 4.76 Considering the evidence above, and earlier in this chapter, the Committee has considered areas where remedies have been proposed, or may be desirable.

## **Possible remedies to address IT price discrimination**

- 4.77 This chapter has considered the issue of price discrimination in the context of legal frameworks and formal pricing mechanisms. It has considered the competing and often overlapping interests of industry and consumers, based on evidence received during the course of the inquiry. The Committee received various suggestions as to possible remedies to matters which affect the cost burden on Australian consumers, as well as the challenges of providing a sustainable and competitive market. In this section, the Committee deliberates on some areas for possible remedy, including some of the conflicting claims and predictions about their success, and makes recommendations accordingly.

## **Parallel importation restrictions**

- 4.78 The Committee notes views of inquiry participants that the shift to digitally delivered content has altered the balance between the interests of rights holders and those of consumers. The Committee notes concerns about finding a balance in the copyright regime and that, in order to address this challenge, remaining restrictions to parallel importation of goods should be removed. The Committee concurs with views that the remaining restrictions on parallel imports are neither appropriate nor necessary.<sup>76</sup>

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### **Recommendation 4**

**The Committee recommends that the parallel importation restrictions still found in the *Copyright Act 1968 (Cth)* be lifted, and that the parallel importation defence in the *Trade Marks Act 1995 (Cth)* be reviewed and broadened to ensure it is effective in allowing the importation of genuine goods.**

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<sup>76</sup> Kimberlee Weatherall, *Submission 127*, p. 5.



## Clarification of legality of measures

4.79 The Committee notes that there is a degree of uncertainty about the legality of methods used to avoid geoblocking mechanisms, and whether those methods could be considered to circumvent TPMs, and possibly be liable for prosecution. Consumer group Choice was among many inquiry participants who expressed the view that the government should act to remove doubts about the legality of circumventing geoblocking:

The confusion surrounding IP address lockouts means that many consumers may be civilly or criminally liable by circumventing 'access control' TPMs... Choice believes that such circumvention should be exempt because consumers are merely accessing products and services which are being provided knowingly and willingly by the copyright holder.<sup>77</sup>

4.80 The ADA/ALCC suggested that the Copyright Act could be amended to ensure that Australian consumers who remove, disable or circumvent geoblocking mechanisms should not be subject to civil or criminal sanctions.<sup>78</sup> In her submission, Assoc Prof Weatherall canvassed the possibility of drafting legislative amendments to ensure that Australian consumers who do take steps to circumvent geoblocking are not acting in breach of the Copyright Act:

In my opinion it would be possible to draft an exclusion to ensure that Australian consumers who take steps to evade technical measures used to enforce market segmentation on the basis of geographical location are not at risk of infringing the Copyright Act 1968. Such measures should be excluded from the definition of ACTPM [an access control TPM]. This would protect consumers, although individual consumers are unlikely to be sued. More importantly it would have the effect of ensuring that commercial providers of services for evading geoblocking do not risk liability under the Copyright Act 1968; either civil liability under the manufacturing or services provisions of anti-circumvention law, or accessory liability for assisting others to undertake a criminal act.<sup>79</sup>

4.81 Assoc Prof Weatherall further expressed the view that such amendments could be adopted consistent with Australia's international obligations and

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77 Choice, *Submission to the Review of Technological Protection Measure Exceptions Made Under the Copyright Act 1968*, available at [www.ag.gov.au/Consultations/Documents/Choice%20Submission.doc](http://www.ag.gov.au/Consultations/Documents/Choice%20Submission.doc), viewed 23 January 2013.

78 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95.1*, p. 1.

79 Kimberlee Weatherall, *Submission 127*, p. 12.

would have the effect of removing any doubt regarding the potential liability of consumers for circumventing geoblocking technology.<sup>80</sup>

- 4.82 The Committee notes evidence from AGD that geoblocking devices which allow market segmentation are not of themselves a TPM.<sup>81</sup> The Committee also notes AGD's view that 'the Copyright Act is not the appropriate vehicle to consider any such proposed amendment'.<sup>82</sup>

### **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.**

### **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.**

## **Increasing competition and protecting consumer rights**

- 4.83 While some inquiry participants suggested that current levels of competition are adequate, the Committee notes that not all share the view of ARIA that no change is needed as 'very considerable choice' exists for consumers. Referring to the number of services currently operating in the digital sector of the retail segment of the market, and the abundance of free or near-free services, 'there is no policy justification for governmental

80 Kimberlee Weatherall, *Submission 127*, pp. 12-13.

81 Matt Minogue, *Committee Hansard*, Canberra, 13 February 2013, p. 4.

82 Attorney-General's Department, *Submission 124*, p. 3.

intervention by price regulation or by trying to prohibit national differential pricing'.<sup>83</sup>

- 4.84 The Committee notes that evidence was received from inquiry participants which suggested that several aspects influencing competition should be considered for possible remedies:
- competition in digital-only markets
  - mobility and rights in 'locked' environments, and
  - powers of the ACCC to operate in IP markets.

#### Copyright in a digital-only environment

4.85 The Committee received evidence noting that existing competition pressures in copyright markets may only be exacerbated if content is only available in digital form. Consumers' ability to access content at internationally competitive prices may be severely constrained. If content is no longer distributed via physical media which can be parallel imported, evidence from some inquiry participants suggested that competition would likely be adversely affected, and rights holders may come to exercise significantly increased market power.

4.86 The Committee notes the views of the ACCC and others that this may result in negative outcomes for consumers and the Australian economy more generally, owing to the greater cost burden on Australian consumers. The Committee sought additional advice from AGD as to whether the potential loss of the ability to parallel import warranted any government action to maintain competitive markets. In its response, AGD noted that the 'marketplace is evolving very quickly, in terms of method of content delivery, physical or digital form and domestic and international markets', and that:

Buying content in an electronic form is ultimately a consumer's decision. While ever content exists in a physical form such as CDs and DVDs, parallel importation may still be a relevant option. However, parallel importation applies only to hard copies, as the focus is on goods that are imported at the border.<sup>84</sup>

4.87 The Committee notes that the ACCC has stated that it is aware of, and adopting a watching brief in relation to, potential competition issues arising from technological changes in respect of copyright markets:

Given there remains some uncertainty about whether exclusive digital delivery models will become the only mode of delivery in the future, the ACCC has not formed a view at this time as to

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83 Australian Recording Industry Association, *Submission 93*, p. 2.

84 Attorney-General's Department, *Submission 124.1*, p. 1.

whether such a move would necessarily raise competition concerns. The ACCC notes that technological change, including the emergence of exclusive digital delivery models may raise concerns about the nature and extent of copyright. The ACCC considers that, to the extent possible, copyright protection and exceptions should operate on a technology neutral basis. The ACCC will continue to monitor developments in relevant markets carefully to ensure that competition is not restricted.<sup>85</sup>

#### Mobility and rights in 'locked' environments

4.88 The Committee heard evidence to suggest that in order to increase competition, some mobility in digital markets is necessary. Dr Suzor and Ms Dootson suggest that in order to ensure that distributors do not engage in anti-competitive behaviour, it is critical to limit their monopolies:

Consumers should be able to access digital content from a range of suppliers, and creators should have a range of distribution channels available to them.<sup>86</sup>

4.89 Dr Rimmer also addressed these issues in his submission, which contained a quote from IT consumer activist Cory Doctrow in relation to Amazon's e-book cloud service:

...the Kindle is a 'roach motel' device: its license terms and DRM [Digital Rights Management] ensure that books can check in, but they can't check out. Readers are contractually prohibited from moving their books to competing devices; DRM makes that technically challenging; and competitors are legally enjoined from offering tools that would allow readers to break Kindle's DRM and move their books to other devices.<sup>87</sup>

4.90 The Committee notes the views of Dr Suzor and Ms Dootson about the need for the ACCC to take a more active role in investigating whether the contractual restrictions vendors and distributors attach to content do not limit competition or consumer rights. They also recommend that the government establish a legally protected right of resale for digital content.<sup>88</sup>

4.91 The Committee notes the Australian Law Reform Commission's ongoing review of copyright in the digital economy, and AGD's review of TPM exceptions, and will continue to monitor developments in this area with

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85 Australian Competition and Consumer Commission, *Submission 100.1*, p. 2.

86 Nichols Suzor and Paula Dootson, *Submission 121*, p. 5.

87 Matthew Rimmer, *Submission 92*, p. 94.

88 Nichols Suzor and Paula Dootson, *Submission 121*, p. 6.

interest, especially with regard to the way in which consumers' rights to legitimately use legally acquired copyright material are affected.

## 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, businesses, and educational institutions, including restrictions on vendors' ability to 'lock' digital content into a particular ecosystem.**

### Powers of the ACCC to operate in IP markets

4.92 The Committee was interested during the course of the inquiry in the effects of changing demands of markets, and ongoing suitability of legislative frameworks. The Committee was advised that section 51(3) of the *Competition and Consumer Act 2010* (Cth) (CCA) exempts intellectual property (IP) licenses from some parts of Australia's competition law. While limited, the exemptions are potentially significant. According to the ACCC:

Section 51(3) ... provides a limited exception for certain licence conditions from the competition provisions of the CCA (misuse of market power and resale price maintenance are not exempted). While the extent of the exception is unclear, it potentially excludes significant anti-competitive conduct, with substantial detrimental effects on efficiency and welfare, from the application of the CCA.<sup>89</sup>

4.93 The Committee notes the views of Dr Rimmer, who argued the section acts to 'constrain the circumstances in which the ACCC can investigate instances in which there are restrictive trade practices in relation to intellectual property rights'.<sup>90</sup> The Committee also notes suggestions made by some inquiry participants that the section has the potential to permit copyright holders to engage in anti-competitive behaviour. According to the ACCC:

... section 51(3) has the effect of exempting the imposing, or giving effect to, conditions of IP licences and assignments from the competition provisions of Part IV of the CCA (except sections 46,

89 Australian Competition and Consumer Commission, *Submission 100*, p. 1.

90 *Committee Hansard*, Canberra, 19 September 2012, p. 15.

46A and 48) to the extent that the condition *relates to* the subject matter of the IP.<sup>91</sup>

4.94 The section 51(3) IP exceptions were enacted with the then Trade Practices Act (now the CCA) in 1974. At the time, according to the ACCC:

... it was likely that IP laws were believed to confer on the owners of IP a limited economic monopoly. This led to a concern that the unrestrained application of competition law to IP could undermine IP rights. This original rationale is no longer relevant. It is now accepted that, generally, IP laws do not create legal or economic monopolies.<sup>92</sup>

4.95 The ACCC has a long-standing position in favour of repealing section 51(3). In its submission, the Commission said that:

The object of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection. While recognising the importance of granting and protecting exclusive intellectual property rights, the ACCC considers that the subsequent licensing or assignment of those intellectual property rights should be subject to the same treatment under the CCA as any other property rights.<sup>93</sup>

## Recommendation 8

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

### Options for removing geoblocking restrictions

4.96 Consumer groups have argued for the removal of geoblocking to reduce pricing discrepancies between Australian and overseas markets. Choice, the Australian Retailers Association and the Communications Alliance all supported such a change, and the Committee notes the view of the Australian Information Industry Association that geoblocking mechanisms 'warrant scrutiny'.<sup>94</sup>

91 Australian Competition and Consumer Commission, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, p. 31.

92 Australian Competition and Consumer Commission, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, pp. 31-32.

93 Australian Competition and Consumer Commission, *Submission 100*, p. 1.

94 *Committee Hansard*, Sydney, 30 July 2012, p. 6.

4.97 Mr Matthew Levey of Choice told the Committee that geographical restrictions are ‘increasingly making no sense’ in a global marketplace. Choice recommended further investigation and potential removal of such restrictions, labelling the measures ‘anti-competitive when they result in significant price differentials for Australian consumers’.<sup>95</sup>

4.98 The ADA/ALCC submitted that there should be ‘a general prohibition on all geoblocking mechanisms ... where these mechanisms serve to enforce different prices and associated conditions of use of content by Australian consumers’.<sup>96</sup>

4.99 Industry groups argued that the government should be cautious in framing a response to geoblocking. AIIA CEO Suzanne Campbell noted that:

The challenge for us though is that these arrangements are legacies from other times when we were seeking to protect Australian content ... To the extent where we were prepared to be exposed to a global market, then there may be a basis for negotiating a different outcome with international providers of comparable content.<sup>97</sup>

4.100 Adobe’s Mr Paul Robson argued that government should be conscious of how its policy on geoblocking could affect business confidence:

In relation to the first question on geoblocking I think that as representatives of the people of this country and in relation to running and governing the country you would need to take into account the impact that would have on organisations globally being willing to invest in the country and run a local operation employing staff and building an ecosystem that delivers inputs and adds value to the economy.<sup>98</sup>

4.101 In response to consumer calls for action to remove geoblocking mechanisms, and in its consideration of possible remedies, the Committee sought input from three relevant government stakeholder agencies, and notes their responses. Treasury cautioned against interventions in the market. Mr Geoff Francis advised the Committee that:

Treasury is not a fan of geoblocking technology. We are certainly not enthusiastic about price discrimination where it results in

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95 Choice, *Submission 75*, p. 5.

96 Australian Digital Alliance/ Australian Libraries Copyright Committee, *Submission 95.1*, p. 1.

97 *Committee Hansard*, Sydney, 30 July 2012, p. 6.

98 *Committee Hansard*, Canberra, 22 March 2013, p. 30.

Australians paying higher prices. But we are wary of forms of intervention which may end up being counterproductive.<sup>99</sup>

- 4.102 Mr Francis noted that legislation which seeks to ban geoblocking may be counterproductive:

We would be very wary of more interventionist measures that seek to dictate the terms on which consumer and business transactions take place. We believe that they may stifle innovation and reduce competition further ... Those types of measures should only be considered if there is a significant market failure that would cause what we would term a substantial and persistent consumer detriment. We do not believe that such a market failure has yet been demonstrated in this space.<sup>100</sup>

- 4.103 AGD also cautioned against an attempt to ban geoblocking. To prevent the use of geoblocking it would be necessary 'to be satisfied that such legislation would not introduce adverse or unintended consequences such as having the effect of limiting content available to Australians'.<sup>101</sup> The AGD noted that any legislation would only impact geoblocking used on Australian websites, and that a possible outcome of a move to ban geoblocking would be 'that offshore suppliers may not provide goods to Australia, or there may not be any local distributors, which may ultimately drive up prices for Australian consumers and lead to further online piracy'.<sup>102</sup>

- 4.104 Mr Marcus Bezzi from the ACCC argued that Australian consumers' efforts to circumvent geoblocking – including through illegal downloads – would tend to undermine geoblocking over time, and that this might make a legislative response unnecessary:

From our point of view as a competition regulator, these things – and I should say the illegal downloading capacity, which is well-known to many Australians, including probably the majority of teenagers – operate to put some competitive tension into the market. If the methods start to become a big enough way in which consumers are circumventing the limitations that are imposed by the companies on consumers, those methods can start to have an impact on sales, and we are aware that that can have an impact in the market.<sup>103</sup>

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99 *Committee Hansard*, Canberra, 31 October 2012, p. 16.

100 *Committee Hansard*, Canberra, 31 October 2012, p. 11.

101 Attorney-General's Department, *Submission 124*, p. 3.

102 Attorney-General's Department, *Submission 124*, p. 3.

103 *Committee Hansard*, Canberra, 31 October 2012, p. 4.



- 4.105 While the Committee acknowledges that in some cases geoblocking is a necessary business practice, it also notes that many IT vendors appear to use geoblocking as a means to raise prices by constraining consumers' ability to access the global marketplace. The Committee considers this form of geoblocking to be a significant constraint on consumer choice.

### **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.**

### **Options for voiding contractual arrangements**

- 4.106 The Committee notes that AGD also addressed suggestions from consumers and consumer groups that Australia should deny copyright protection to products sold on websites utilising geoblocking technology:

From a copyright perspective, Australia has obligations to provide copyright protection in most circumstances where a work satisfies the basic elements required for copyright to subsist. Where copyright would otherwise subsist in material, the international agreements to which Australia is a party would not allow Australia to deny copyright protection to a copyright owner purely because geoblocking was used in the sale of a work (most likely by someone other than the copyright owner such as a licensee or distributor).<sup>104</sup>

- 4.107 The possibility of using the unfair contract provisions of the Australian Consumer Law (ACL) to void contractual terms that seek to enforce geoblocking was also raised during the inquiry. In response, the Treasury noted that such measures may not be easily enforceable:

It may be possible to draft a specific law that voids contract terms that seek to enforce geoblocking. 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

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104 Attorney-General's Department, *Submission 124*, p. 3.

through an exclusive licensing agreement); or if the geoblocking mechanism was already embedded in the product prior to sale in Australia. In such circumstances an Australian law voiding contract terms may be ineffective.<sup>105</sup>

4.108 The Committee notes, however, evidence from the ACCC suggesting that it is possible to regulate aspects of international trade. Mr Marcus Bezzi of the ACCC said:

If there is any anticompetitive purpose associated with the policies that the companies are applying then there is something that can be done, from our point of view. And that is the case whether the supplier is in Barton or in Botswana. From our point of view, if the supplier is engaging in business in Australia, supplying services to Australians, and it is doing things to stop people from getting access to lower priced goods and it is doing it for an anticompetitive purpose, then action can be taken against them.<sup>106</sup>

### **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.**

### **Banning price discrimination**

- 4.109 In response to views from consumers which suggested that price discrimination could be removed by legislative change, the Committee investigated options, noting a former legislative provision which prohibited price discrimination.
- 4.110 Section 49 of the Competition and Consumer Act (the CCA, known at the time as the *Trade Practices Act 1974*), 'made it illegal to offer or attempt to induce discriminatory pricing if the discrimination was of such magnitude or was of such a recurring or systematic character that it was likely to have the effect of substantially lessening competition'.<sup>107</sup>
- 4.111 Section 49 was repealed after a number of reviews found that it operated to reduce price flexibility, had inflationary effects, and that other sections of the act (especially the provisions on anti-competitive agreements and

<sup>105</sup> Treasury, *Submission 85.1*, p. 1.

<sup>106</sup> *Committee Hansard*, Canberra, 31 October 2012, p. 5.

<sup>107</sup> Treasury, *Submission 85*, p. 8.

misuse of market power in sections 45 and 46 of the CCA) would likely address breaches of the section.<sup>108</sup>

- 4.112 Treasury's Mr Geoff Francis noted that price discrimination laws may function differently to the way they are intended:

Anecdotally, the suspicion is that it [a price discrimination ban] reduces price flexibility rather than increasing it, because typically the activity you see is one company taking another company to court to stop them from discounting.<sup>109</sup>

- 4.113 Consequently the Treasury recommended against reintroducing a provision similar to section 49. The Committee concurs with this view.

## Prospects for international cooperation

### International warranties and standards

- 4.114 Consumer groups argued in submissions to the inquiry that more Australian consumers would shop online if they had confidence that goods they bought overseas were still covered by a warranty. At present, in many cases, such products are either not covered or warranties are difficult to enforce. While chapter 2 looked at consumer perceptions of warranties, and chapter 3 described cost impacts on industry, in this chapter they are considered in terms of international harmonisation.

- 4.115 Mr Madison Cartwright from Choice advised the Committee that some larger IT companies, particularly Apple and Dell, already provide international warranties,<sup>110</sup> but Ms Erin Turner from ACCAN warned that making overseas purchases can also involve some risk:

What these consumers may not know is that Australian consumer law possibly does not extend to these international purchases or, if it does, the law would be extremely difficult to enforce. This matters because if something goes wrong it can be difficult to seek redress. These consumers may not have access to repairs, refunds or replacements, as they would if they had purchased the product in Australia.<sup>111</sup>

- 4.116 Ms Turner called for an international warranty regime to be developed, to provide 'at least some security in shopping elsewhere and accessing lower

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108 Treasury, *Submission 85*, p. 10.

109 *Committee Hansard*, Canberra, 31 October 2012, p. 16.

110 *Committee Hansard*, Sydney, 30 July 2012, p. 24.

111 *Committee Hansard*, Canberra, 19 September 2012, p. 1.

prices – hopefully, bringing competition to Australia'.<sup>112</sup> Ms Turner also acknowledged that:

Not every consumer at the moment feels competent about shopping online. ... Knowing that there is an international warranty for a purchase can go to help ease some of that stress and nervousness.<sup>113</sup>

4.117 Warranty protection is of particular concern for businesses that are heavily reliant on IT products to operate. Mr Russell Zimmerman from the Australian Retailers Association (ARA) told the Committee that in search of cheaper prices, many businesses would look overseas for their hardware and software needs. However, the after sales service and support offered by Australian suppliers is a major issue for businesses that are dependent on IT products for their operation.<sup>114</sup>

4.118 Choice argued that warranties provide an indirect mechanism for IT suppliers to reinforce regional market segregation, and that 'some companies explicitly state that that will not recognise a product's warranty if it was not bought in Australia'.<sup>115</sup>

4.119 In its submission to the Committee, ACCAN urged the Australian Government to encourage the 'development of international warranties, product repair and replacement rights through international trade agreements and discussions with international companies'. ACCAN further recommended that 'education campaigns to inform consumers about the limits of Australian Consumer Law for international purchases' be undertaken by the ACCC and consumer protection bodies.<sup>116</sup>

4.120 The Committee also heard evidence suggesting that the Australian Government could relieve some pressure on IT prices by pursuing international agreements that would reduce localisation costs for IT products. The Australian Industry Group (Ai Group) argued that the government should:

... ensure that Australian regulation harmonises with international approaches where possible to reduce the need for Australian specific product requirements.<sup>117</sup>

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112 *Committee Hansard*, Canberra, 19 September 2012, p. 6.

113 *Committee Hansard*, Canberra, 19 September 2012, p. 7.

114 *Committee Hansard*, Sydney, 30 July 2012, p. 30.

115 Choice, *Submission 75*, p. 37.

116 Australian Communications Consumer Action Network, *Submission 74*, p. 9.

117 Australian Industry Group, *Submission 56*, p. 6.

## The Trans-Pacific Partnership

- 4.121 The TPP is a proposed trade agreement being negotiated by Pacific Rim countries including Australia, New Zealand, the United States, Singapore, Mexico, Peru, Canada and Chile. It is envisioned that the treaty will cover around 20 subject-matter areas, including competition, customs, e-commerce, intellectual property, investment, industrial relations and trade.<sup>118</sup>
- 4.122 Although no official draft text has been released, a draft of the TPP's proposed intellectual property chapter was disclosed by US Congressman Darrel Issa in February 2011, and has caused widespread concern particularly among intellectual property academics, including Dr Rimmer. Dr Rimmer describes the content of the leaked draft chapter as 'alarming in terms of the impact in respect of copyright law and exceptions, parallel importation restrictions, technological protection measures, and, more generally, consumer rights'.<sup>119</sup>
- 4.123 Given that the draft IP chapter contains provisions which would appear to require legislative changes to enact in Australia, the Committee wrote to the AGD seeking clarification on the Department's statement that the TPP would not require legislative change and did not represent an expansion of copyright protections. AGD responded:
- Your letter refers to a document made public by US Congressman Darrell Issa which purports to contain text of the intellectual property (IP) chapter of the Trans-Pacific Partnership. This document has not been acknowledged by the US Government as official text. As such, and as the IP negotiations are ongoing, it would not be possible or appropriate for me to address the clauses identified in your letter or speculative comments made by academics on the purported text.<sup>120</sup>
- 4.124 The Committee notes concerns about the potential impact of the TPP on the Australian copyright regime. Article 4.2 of the draft TPP IP chapter, if adopted, would appear to entrench parallel import restrictions in an international agreement.<sup>121</sup> It has also been suggested it would more tightly constrain Australia's freedom to adopt its own regime governing the use of technological protection measures (TPMs).

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118 Matthew Rimmer, *Submission 92*, p. 81.

119 Matthew Rimmer, *Submission 92*, p. 84.

120 Attorney-General's Department, *Submission 124*, p. 1.

121 Quoted in Kimberlee G. Weatherall, 2011, *An Australian Analysis of the February 2011 Leaked US TPPA IP Chapter Text - copyright and enforcement*, <http://works.bepress.com/kimweatherall/22>, viewed 7 December 2012, p. 5.

4.125 The Committee sought a response to these concerns from the AGD, as the agency that administers the Copyright Act. In response, Mr Matt Minogue, First Assistant Secretary of AGD's Civil Law division, said:

We are aware of those views. Our position is that the TPP in terms of copyright would not require any amendment to the Copyright Act for Australia to implement – subject to it still being negotiated. So they are not views that we share.<sup>122</sup>

4.126 The Committee notes failed attempts in the US to enact expansive copyright regimes similar to that suggested by the leaked draft chapter. In 2011 and early 2012, two pieces of IP-focused legislation – the Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Act (PIPA) – were abandoned after significant public protest against them. Similarly expansive provisions were contained in the proposed Anti-Counterfeiting Trade Agreement (ACTA) which foundered after the EU refused to ratify it and the Australian Parliament highlighted significant problems with the treaty.<sup>123</sup>

4.127 The Committee notes the observation made by the Joint Standing Committee on Treaties in relation to the secrecy with which DFAT conducted negotiations for the Anti-Counterfeiting Trade Agreement:

...confidentiality is not common or appropriate in IP negotiations which impact directly and in minute detail on domestic law and domestic innovation policy.<sup>124</sup>

4.128 The Committee further notes that the Australian Law Reform Commission is currently conducting a review into copyright and the digital economy, and that the Attorney-General's Department is currently reviewing Australia's TPM exception regime. The Committee agrees with the Joint Standing Committee on Treaties that any international agreement relating to intellectual property should not pre-empt the outcome of, nor be incompatible with, those reviews.<sup>125</sup>

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122 *Committee Hansard*, Canberra, 13 February 2013, p. 9.

123 Joint Standing Committee on Treaties, *Report 126: Treaty tabled on 21 November 2011*, June 2012, pp. 57-62.

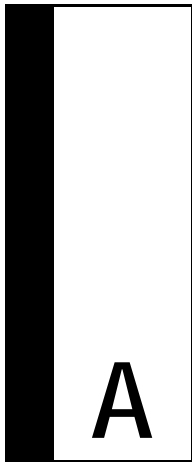
124 Joint Standing Committee on Treaties, *Report 126: Treaty tabled on 21 November 2011*, June 2012, p. 55.

125 Joint Standing Committee on Treaties, *Report 126: Treaty tabled on 21 November 2011*, June 2012, pp. 60-61.

Mr Nick Champion, MP  
Chair







## Appendix A – Submissions and exhibits

### Submissions

- 1 Mr Owen Hoogvliet
- 2 Mr Zhiliang Huang
- 3 Mr Andrew Boisen
- 4 Mr Scott Nelson
- 5 Mr Daniel Prosser
- 6 Pioneer Computers, Ms Molly Lai
- 7 Mr Isaac Hendry
- 8 Mr Dane Weber
- 9 Mr Michael Zeng
- 10 Mr Bane Williams
- 11 Mr Jeremy King
- 12 Mr Stephen Delvecchio
- 13 Applied PC Systems Pty Ltd
- 14 Mr Matthew Wyatt
- 15 Mr Kevin Danher
- 16 Nuclear Fruit Salad
- 17 Mr David Smith
- 18 Mr Chris Wong
- 19 Mr Duncan Wallace
- 20 Mr Phil Festa
- 21 Ms Clytie Siddall
- 22 Mr Jason Austin

- 23 Mr Mark Sinclair
- 24 Mr David Mathews
- 25 Mr Barry Napthine
- 26 Mr Andrew Tozer
- 27 The Limousine Line
- 28 Mr Cameron Holland
- 29 Mr Brendan Sherrin
- 30 Mr Dmitry Brizhinev
- 31 Mr Stuart Kenyon
- 32 Mr Alex Talbot
- 33 Mr Daniel Myles
- 34 Cyberworld Publishing
- 35 CyberText Consulting Pty Ltd
- 36 Ms Christine Hughes
- 37 Mr Derek Brooke
- 38 Mr Michael Clark
- 39 Mr Paul Bicknell
- 40 Mr James Rudd
- 41 Mr Luke Matheson
- 42 Mr Joshua Preston
- 43 Mr Charles Gutjahr
- 44 Mr John Dulley
- 45 Ms Elizabeth Litster
- 46 Mr Scott Sutherland
- 47 Ms Julie Jester
- 48 Mr Matthew Kermeen
- 49 Mr Jeff Burgess
- 50 Mr Tim Greig
- 51 Mr Samuel Lymn
- 52 Mr Stuart Skene
- 53 Mr Peter Larkins
- 54 Australian Commercial and Media Photographers
- 55 Department of Broadband, Communications and the Digital Economy
- 55.1 Supplementary

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- 56 Australian Industry Group  
57 Mr Christopher Shain  
58 Australian Home Entertainment Distributors Association  
59 Mr Daniel Nicholson  
60 Mr Scott Williamson  
61 Mr Kye Ridley-Smith  
62 Apple Pty Ltd  
62.1 Supplementary  
63 Mr Greg Bell  
64 CONFIDENTIAL  
65 CONFIDENTIAL  
66 Australian Publishers Association  
67 Microsoft  
67.1 Supplementary  
67.2 Supplementary  
67.3 Supplementary  
68 J Mahuika  
69 Ms Carol Bruce  
70 Mr Paul Barker  
71 Mr Magnus Stensson  
72 Mr Garth Strong  
73 Australian Information Industry Association  
73.1 Supplementary  
74 Australian Communications Consumer Action Network  
75 Choice  
76 Dr Andrew Leigh MP  
77 Mr David Poole  
78 Ms Faye Galbraith  
79 Department of Finance and Deregulation  
80 Mr Bret Salinger  
81 Adobe Pty Ltd  
81.1 Supplementary  
81.2 Supplementary  
82 Mr Ken Wilson

- 83 Mr Warren Kennedy
- 84 Mr Quintin Rares
- 85 The Treasury
  - 85.1 Supplementary
- 86 Mr Robert Webber
- 87 Monash University
- 88 Australian Customs and Border Protection Service
- 89 Mr Mike Smith
- 90 Mr Trevor Greenfield
- 91 Mr Mateusz Michalik
- 92 Dr Matthew Rimmer
- 93 Australian Recording Industry Association
  - 93.1 Supplementary
  - 93.2 Supplementary
- 94 Mr Kevin Cobley
- 95 Australian Digital Alliance and Australian Libraries Copyright Committee
  - 95.1 Supplementary
- 96 CONFIDENTIAL
- 97 Mr Michael Cunningham
- 98 Dr Jamie French
- 99 Mr Leonard Cronin
- 100 Australian Competition and Consumer Commission
  - 100.1 Supplementary
- 101 Mr David Bannister
- 102 Mr Greg Keeley
- 103 Mr Douglas Linacre
- 104 Ron Rennex Drawing Services Pty Ltd
- 105 Mr David Hepple
- 106 Mr Shane Priddle
- 107 Mr Andrew Whitwell
- 108 Macpherson Greenleaf Lawyers
- 109 Mr John Uri
- 110 Mr Pierre Rousseau
- 111 Connecting Up

- 
- 112 Mr Corey Beagley  
113 IP Australia  
114 Mr Nic Watt  
115 CONFIDENTIAL  
116 Mr Victor Doe  
117 Mr Graeme Kitney  
118 Mr George Tasker  
119 Mr Alvaro Diaz  
120 Mr Andrew Saywell  
121 Dr Nicholas Suzor and Ms Paula Dootson  
122 Mr Nicholas Fox  
123 Mr Brendan Scott  
124 Attorney-General's Department  
124.1 Supplementary  
125 Department of Foreign Affairs and Trade  
126 Mr David Bray  
127 A/Prof Kimberlee Weatherall  
128 Mr Mark Edwards  
129 Universal Music Australia Pty Ltd  
130 CONFIDENTIAL  
131 Care Financial Counselling Service and the Consumer Law Centre of the  
ACT  
132 CONFIDENTIAL  
133 Australian Bureau of Statistics

## Exhibits

- 1      Communications Alliance Ltd  
*The Sky is Rising: a detailed look at the state of the entertainment industry – A detailed look at the state of the entertainment industry.*  
*By Michael Masnick and Michael Ho*
- 2      Dr Matthew Rimmer, Australian National University  
*The Tethered Utility – The Amazon kindle and the right to read.*  
*By Ariel Bogle*  
(Related to Submission No. 92)
- 3      Australian Communications Consumer Action Network  
*Public Procurement Policy for Accessible Information and Communications Technology*
- 4      Australian Digital Alliance and Australian Libraries Copyright Committee  
*E-Book Prices*  
(Related to Submission No. 95)
- 5      Australian Copyright Council  
*Comments on submissions to the Attorney-General's Department – On technical protection measures*  
(Related to Submission No. 124)



## Appendix B – Public hearings and witnesses

**Monday, 30 July 2012 - Sydney**

**Australian Information Industry Association**

Ms Suzanne Campbell, CEO

**Australian Publishers Association**

Mr Jose Borghino, Manager Industry Representation

Mr Ross Gibb, Group Managing Director, Macmillan Publishers Australia

Mr Ian McDonald, Special Counsel, Copyright, Simpsons Solicitors

Mr Peter Saffin, Convenor, Schools Committee

**Australasian Performing Rights Association-Australasian Mechanical Copyright Owners Society Ltd**

Mr Richard Mallett, Head of Revenue

**Choice**

Mr Matt Levey, Head of Campaigns

Mr Madison Cartwright, Campaigns Coordinator

Ms Katrina Lee, Strategic Policy Adviser

**Australian Retail Association**

Mr Russell Zimmerman, Executive Director

**Communications Alliance Ltd**

Mr John Stanton, Chief Executive Officer

**Wednesday, 19 September 2012 - Canberra****Australian Communications Consumer Action Network**

Ms Una Lawrence, Director, Policy and Campaigns

Ms Erin Turner, Policy and Campaigns Officer

Mr Wayne Hawkins, Disability Policy Advisor

**Individuals**

Dr Matthew Rimmer, Future Fellow, Australian Research Council; A/Prof,  
Australian National University College of Law

**Friday, 5 October 2012 - Canberra****Australian Industry Recording Association**

Mr Dan Rosen, Chief Executive Officer

Mr Brent Fisse, Adviser

**Wednesday, 31 October 2012 - Canberra****Australian Competition and Consumer Commission**

Mr Marcus Bezzi, Executive General Manager, Enforcement and Compliance

Mr Richard Fleming, Deputy General Manager, Executive Office, Enforcement and  
Compliance Division

Ms Linley Johnson, Economic Adviser, Competition and Consumer Economic  
Unit

**Treasury**

Mr Geoff Francis, General Manager, Competition and Consumer Division

Ms Ann Bounds, Unit Manager, Consumer Policy Framework Unit, CCPD

Ms Gillie Kirk, Unit Manager, Competition Policy Unit, CCPD

**Wednesday, 28 November 2012 - Canberra****Department of Foreign Affairs and Trade**

Mr Hamish McCormick, First Assistant Secretary, Office of Trade Negotiations

**Wednesday, 13 February 2013 - Canberra****IP Australia**

Mr Philip Noonan, Director General

Dr Benjamin Mitra-Kahn, Chief Economist



**Attorney-General's Department**

Mr Richard Glenn, Assistant Secretary, Business and Information Law Branch

Mr Matt Minogue, First Assistant Secretary, Civil Law Division

Ms Kirsti Haipola, Principal Legal Officer, Business and Information Law Branch

**Wednesday, 13 March 2013 - Canberra**

**Department of Broadband, Communications and the Digital Economy**

Mr Keith Besgrove, First Assistant Secretary, Digital Services Division

Mr Richard Windeyer, First Assistant Secretary, Digital Strategy Division

**Friday, 22 March 2013 - Canberra**

**Apple**

Mr Tony King, Vice President

**Adobe Systems**

Mr Paul Robson, Managing Director

**Microsoft Australia**

Ms Pip Marlow, Managing Director

