

Competition Policy Review Draft Report submission
Competition Policy Review Secretariat
The Treasury
Langton Crescent, PARKES ACT 2600

Via online submission form

17th November 2014

Dear Sirs/Madams,

EFA welcomes the opportunity to provide input into this consultation. Please find our submission on the following pages. Please do not hesitate to contact me should you require any further information.

About EFA

Celebrating its 20th anniversary in 2014, Electronic Frontiers Australia, Inc. (EFA) is a national, membership-based non-profit organisation representing users of digital communications systems concerned with online freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,



Jon Lawrence - Executive Officer, on behalf of EFA's Policy & Research Standing Committee

Submission in relation to Competition Policy

Introduction

EFA is pleased to have the opportunity to offer our comments on certain issues discussed in the Competition Policy Review Draft Report which are relevant to the organisation's remit, namely those parts of the Review which concern the relationship between competition and intellectual property and the relationship between competition and media and broadcasting services.

EFA is generally supportive of the Panel's views and draft recommendations in these areas. However, we view that certain changes to current Australian copyright law may also be necessary in order to ensure Australian consumers can take advantage of market-based methods of accessing genuine online content and software from overseas without risk of falling foul of the law. Furthermore, we would like to see more action taken on the issue of net neutrality in Australia including greater transparency on Internet Service Providers' network management practices and legislative protections for net neutrality.

Intellectual Property

For some time, EFA has been concerned that the balance between intellectual property (IP) holders and IP users in Australia has not been struck properly by current laws, particularly copyright. The rise of the Internet and digital society more generally has exacerbated this imbalance, with information more easily copied and distributed than before. However, IP laws and policies have become ever the more restrictive of users.

EFA strongly supports the Panel's view that the Australian IP system should be designed to operate in the best interests of Australians and strongly agrees that Australia's IP rights regime should be a priority for review. Accordingly we strongly support Draft Recommendation 7 on Intellectual property review.

However, EFA would like to see a thorough, critical review of IP in Australia which does not discount the possibility of abolishing the regime entirely, such as dispensing with the economic rights comprised in copyright and instead supporting creators and innovators directly with public or philanthropic money. While we also recognise that the underlying rationale for IP rights is the promotion of new ideas and creations, empirically there is little evidence to demonstrate that IP rights actually do this in practice. Furthermore, certain assumptions which underlie the neoclassical economics basis of much contemporary IP law and policy have been disproved by real-life events, particularly in the context of free and open source software projects. EFA would thus welcome a consideration of the fundamental principles underpinning Australian IP law and policy, and the extent to which IP law and policy do what they are supposed to, namely stimulate creation and innovation in society.

EFA also supports Draft Recommendation 8, that commercial transactions involving IP rights should be subject to the Competition and Consumer Act (CCA), and that subsection 51(3) of the CCA creating an exception for IP licensing be repealed.

Parallel Imports

EFA has also been concerned about restrictions on parallel imports of genuine goods into Australia, particularly in light of the ‘Australia tax’ imposed on Australian consumers for digital content and software products identified by the Parliamentary IT Pricing Review from last year.

We consider that removing remaining parallel import restrictions in Australian law is the correct approach to addressing this international price discrimination which disfavours Australian consumers. Accordingly, EFA also supports the Panel’s Draft Recommendation 9 on parallel imports.

We would also like to see other recommendations from the IT Pricing Review that the Panel endorses actually implemented in Australia, namely: amendments to s10(1) of the Copyright Act’s anti-circumvention provisions to clarify and secure consumers’ rights to circumvent technical protection measures that control geographic market segmentation; education of Australian consumers and businesses around such circumvention of geographic blocks and its consumer law consequences; a consumer right of resale for digitally distributed content and clarification of consumer ‘fair use’ rights in digital device ecosystems; a possible last resort ban on geoblocking; and the possible invalidation of contractual terms seeking to enforce geoblocking.

We have been disappointed that these recommendations have not been put into practice by the Australian government, and urges that their implementation be a matter of priority, rather than the Online Copyright Infringement proposals which the Government seems to prefer to pursue despite a lack of impartial evidence that such measures are necessary and proportionate.

We are broadly supportive of Draft Recommendation 26 on not introducing legislative prohibitions of international price discrimination into Australian law, and rather relying on market-based mechanisms to achieve consumer empowerment. However, we would like to see some clarification of the legal situation regarding the use of circumvention techniques to get around online geographical blocks. As it stands, the use of these circumvention techniques constitutes a legal grey area given the prohibition on circumventing ‘access control technical protection measures’ in section 116AN of the Copyright Act. If market-based mechanisms are to be successful, then consumers must have legal certainty that they are not falling foul of this provision when circumventing geoblocks used to maintain high prices in Australia for online content and software.

In addition, EFA would also like to see the implementation of a broad ‘fair use’ exception to copyright infringement—and the circumvention prohibition—as recommended by the Australian Law Reform Commission earlier this year in its Copyright and Digital Economy Inquiry final report.

Intellectual Property and international trade agreements

As mentioned above, EFA strongly agrees that the extent of IP protection should be based on what is in the best interests of Australians. Accordingly, EFA has been critical of the inclusion of IP provisions in international trade agreements, and in particular has been campaigning against the inclusion of IP provisions in the Trans-Pacific Partnership as we do not believe these provisions are in Australian users’ interests. As submitted in our response to the Inquiry into the Korea-Australia Free Trade

Agreement (KAFTA), we believe that the strengthening of enforcement provisions has not been adequately balanced with the rights of consumers of IP, particularly copyright.

In our KAFTA submission, EFA already recommended that “in future the Australian Government looks into ways to consult more widely on negotiating positions for trade agreements in order to minimise poor outcomes for Australian consumers and businesses and allow negotiations to proceed with more confidence”. In light of this, EFA strongly supports independent socio-economic cost-benefit analyses being conducted before Australia agrees to IP terms being included in trade agreements. EFA has also been concerned about the limitations on the ability to reform IP law and policy at the domestic level if IP provisions are contained in trade agreements, and so submits that there should be a presumption against their inclusion.

Media and broadcasting services

Although not explicitly mentioned in the Report’s discussion of competition in media and broadcasting services markets, EFA is also concerned that there is no strong legal protection of net neutrality in Australia. We are pleased to see that the Report does acknowledge that the capacity to restrict consumer choice or access is an issue that competition regulators must monitor closely, particularly in the case of a dominant player wishing to leverage its power into another market. However we are fearful that current competition law and enforcement in Australia may be insufficient to address net neutrality concerns.

Indeed, the experience in the United States has shown that cable companies engage in harmful practices by restricting the speed of consumer access to competing video delivery services such as Netflix. This situation arose because the Federal Communications Commission has failed to classify these ISPs as “common carriers”, which would require them to route communications without favour, i.e., not engage in discrimination. While the Australian Internet landscape may, overall, be viewed as more competitive than the US, net neutrality concerns have also arisen in the European Union’s (more) competitive retail Internet access markets. These concerns have prompted the EU institutions to propose ex ante regulation in addition to the ex post competition regime to address the problems which have arisen due to a lack of strong anterior net neutrality regulation incumbent on ISPs.

In Australia, EFA is concerned firstly about the lack of transparency around ISPs’ network management practices. We are not aware of any publicly-available data regarding these practices in Australia, and propose that an appropriate body conducts this information gathering and monitoring. Such information would enable consumers to make more informed choices among ISPs based on their practices and so would be beneficial for competition in these markets. Furthermore, if there is widespread deviation from net neutrality among Australian ISPs, this may strengthen calls for ex ante regulation, as has happened in the EU.

In any event, EFA is supportive of legislated protection against ISPs engaging in non net neutral conduct such as the filtering, blocking or slowing of rivals’ services in Australia, as has already been recommended in the 2012 Convergence Review Final Report (albeit not implemented in practice). We believe that this protection will be beneficial for ensuring consumer choice and for ensuring

small businesses are able to compete against incumbents, particularly if they are disruptive of current business models. Furthermore, given the experience in the US and EU, such legislated protection of net neutrality would be in line with the emerging practice of similar countries to Australia.

Conclusion

In summary, EFA is broadly supportive of the Recommendations of the Competition Policy Review Draft Report relating to competition and intellectual property and the relationship between competition and media and broadcasting services. Particularly, we commend the recommendation of an independent review body being established to scrutinize IP related provisions in Trans-Pacific Trade agreements.

Our outstanding concerns regard: the possible ambiguity in a market-based response to parallel imports of digitised content given the existing legal framework; and the current lack of transparency around ISPs' network management practices and lack of legal protection for net neutrality.

EFA will gladly answer questions or provide feedback relating to any of these matters.