

# Net Neutrality in Australia

Claudia Carr, a finalist in the 2018 CAMLA Essay Competition, provides some thoughts on the debate about the regulation of net neutrality in Australia, including the extra-territorial effect of the repeal of net neutrality regulations in the United States.

## Introduction

On 14 December 2017, the United States Federal Communications Commission ('FCC') voted 3-2 in favour of repealing net neutrality regulations. The regulations, introduced under President Obama in 2015, sought to prevent internet service providers ('ISPs') from prioritising or privileging certain online content.<sup>1</sup> The vote to repeal those regulations proved divisive. FCC chairman Ajit Pai led the repeal, arguing that the regulations stifled telecommunications market growth.<sup>2</sup> That position met vociferous opposition from activists, Democrats, and large technology companies, such as Alphabet (the parent company of Google), Amazon, Facebook, Microsoft, Netflix and Dropbox, who argued that the repeal of net neutrality would bring about the end of the open internet.<sup>3</sup> Predictably, ISPs sided with Pai.<sup>4</sup>

Despite the fact that net neutrality is a hot button issue in America, it has been hardly discussed in Australia, and there is scant Australian legal scholarship on topic. This paper explains what net neutrality is and considers whether we have net neutrality in Australia. It goes on to discuss the extra-territorial effect in Australia of the American repeal of net neutrality regulations. Although it is unlikely that Australia

will experience any immediately significant effects as a result of America's repeal, it is possible that in conjunction with other factors, the American repeal will spur a gradual decline in net neutrality in Australia. This paper explains why that is undesirable, and suggests that Australia consider adopting laws to safeguard net neutrality.

## What is 'net neutrality'?

Net neutrality is the principle that ISPs should treat all online traffic and content equally and cannot give preference to certain digital content providers, or block consumers from particular sites, content, or services.<sup>5</sup> According to this principle, consumers do not have to pay more to access certain online content or to access faster internet speeds. Digital content providers do not have to pay fees for their online content to be prioritised for consumer viewing.

Net neutrality recognises that the internet is a vital resource in the twenty-first century, and so ought to be accessible to all equally. The American net neutrality regulations prohibited ISPs from blocking legal content, applications, services or non-harmful devices, impairing or degrading lawful internet traffic on the basis of legal content, applications, services, or non-harmful devices, or favouring

particular lawful internet traffic over other lawful traffic for consideration. They also prevented ISPs from unreasonably interfering with or disadvantaging consumers' ability to select, access, and use lawful online content, applications, services, or devices.

The rationale for net neutrality is persuasive. The internet is a major source of information for the public.<sup>6</sup> When advocating for net neutrality and the characterisation of the internet as an essential utility, President Obama said 'there are no toll roads on the information superhighway'.<sup>7</sup> Proponents of net neutrality argue that America's repeal will hurt consumers: net neutrality preserves healthy competition in the telecommunications market.<sup>8</sup> Google said that 'the Internet should be competitive and open... no Internet access provider should block or degrade Internet traffic, nor should they sell "fast lanes" that prioritize particular Internet services over others'.<sup>9</sup> Without net neutrality, ISPs may discriminate between consumers.<sup>10</sup> Consumers might have to choose their internet service providers based on what content those companies provide access to – in the process, sacrificing access to other content. This may also stunt innovation in the development of online content.<sup>11</sup>

1 *Protecting and Promoting the Open Internet*, 80 FR 19737, 19737–19850.

2 Ajit Pai, *How the FCC can Save the Open Internet* (21 November 2017) The Wall Street Journal <<https://www.wsj.com/articles/how-the-fcc-can-save-the-open-internet-1511281099>>.

3 Kara Alaimo, *How Google and Facebook could Save Net Neutrality* (7 December 2017) Bloomberg <<https://www.bloomberg.com/view/articles/2017-12-06/how-google-and-facebook-could-save-net-neutrality>>.

4 Andrew Nusca, *Net Neutrality Explained: What it Means (and Why it Matters)* (23 November 2017) Fortune <<http://fortune.com/2017/11/23/net-neutrality-explained-what-it-means-and-why-it-matters/>>.

5 However, the definition of net neutrality different according to different sources. See further James Endres, 'Net Neutrality – How Relevant is it to Australia?' (2009) 59(2) *Telecommunications Journal of Australia* 22.1, 22.3.

6 Matt Liddy, *Australians don't trust the news* (16 January 2015) ABC <<http://www.abc.net.au/news/2015-06-16/australians-digital-news-trust/6548232>>.

7 Peter Suciu, *Obama and net neutrality: What it means* (10 November 2014) Fortune <<http://fortune.com/2014/11/10/obama-net-neutrality-explained/>>.

8 Endres, above n 5, 22.2.

9 Nusca, above n 4.

10 Endres, above n 5, 22.2.

11 Richard French, 'Net Neutrality 101' (2007) 4 *University of Ottawa Law and Technology Journal* 109, 125.

Opponents of net neutrality argue that the internet does not need to be regulated. The justification for this argument posits that net neutrality regulations hurt investment; 'red-tape' should be reduced to encourage market growth and healthy competition.<sup>12</sup> Part of the issue is that ISPs are facing increased traffic through their networks, which requires them to incur costs to conduct network upgrades. Meanwhile, online content providers that are driving the increase in online traffic (such as Netflix and Stan) are profiting from the increased distribution of their content. Arguably, internet service providers should be permitted to recover their costs through non-neutral models, such as by charging consumers more to access certain content. Non-neutral models also allow ISPs to ensure that internet service is not degraded by managing different kinds of online traffic in different ways.<sup>13</sup>

### Do we have net neutrality in Australia?

Before we can consider the extra-territorial effect of America's repeal of net neutrality regulations, we need to determine whether net neutrality currently reigns in Australia. At present, there are no Australian laws that regulate or enforce net neutrality. However, for the most part, Australians enjoy equal access to the internet.<sup>14</sup>

Despite the lack of regulation, several factors contribute to the prevalence of net neutrality in Australia. First, Australian consumers pay for a certain amount

of internet usage per billing period, unlike in the US.<sup>15</sup> Thus, Australian ISPs are less affected by prolific growth in online traffic; their customers' data usage is capped and those who use more pay higher fees. Second, the ISP market in Australia is much more competitive than that in America, with low barriers to entry.<sup>16</sup> If one ISP were to break tradition and implement non-neutral practices, consumers could switch providers. Third, the Australian Consumer Law prohibits misleading and deceptive conduct in trade or commerce, which would require ISPs to disclose any practices that restricted consumer use of the internet.<sup>17</sup> For example, when Telstra sought to slow the delivery of certain content for particular customers, ACCC Chairman Rod Sims stated that where ISPs treat particular online traffic differently, those providers must be transparent and ensure that 'customers can easily understand the implications of these practices on the services they receive'.<sup>18</sup>

Fourth, Australia's competition laws prohibit ISPs from abusing their market power in a way that substantially lessens competition.<sup>19</sup> Section 151AJ of the *Competition and Consumer Act 2010* (Cth) pertains specifically to the telecommunications market. It provides that an ISP that has a substantial degree of market power engages in anti-competitive conduct if it takes advantage of that power in the telecommunications or any other market with the effect or likely effect of substantially lessening competition, or takes advantage of

that power combined with other conduct with the combined effect or likely effect of substantially lessening competition. Section 151AJ(6) provides that an ISP may engage in anti-competitive conduct even if its conduct involves the exercise of an existing legal or equitable right. Despite the fact that the law does not prohibit non-neutral practices, those same practices are still capable of contravening competition law. Thus, it would be risky for a dominant market player to adopt non-neutral practices.

Finally, protection of net neutrality can also be found in Pt XIC of the *Competition and Consumer Act 2010* (Cth). That part sets out the telecommunications access regime, which is the process by which ISPs may obtain access to input services. ISPs do not have a general right of access – the ACCC must 'declare the service', before which it conducts a public inquiry to determine whether that access will promote the long-term interests of users of the service.<sup>20</sup> Subsequently, the provider can be requested to supply services on non-discriminatory terms. The provider must also comply with the standard access obligations, which require particular standards of services.<sup>21</sup> Endres argues that Pt XIC 'negates the need for a specific net neutrality rule'.<sup>22</sup>

Despite the above factors, non-neutral practices are present in Australia. O'Halloran claims that the subtlety of those practices allows them to 'continue unabated', rather than making them less harmful than more overt contraventions of net neutrality principles.<sup>23</sup>

<sup>12</sup> Pai, above n 2.

<sup>13</sup> French, above n 11, 124.

<sup>14</sup> See also Cheng Lim and Ian Ranson, 'Net neutrality: the Federal Communications Commission's new Open Internet Order' (2015) 2(4) *Australian Media, Technology and Communications Law Bulletin* 39.

<sup>15</sup> Endres, above n 5, 22.6.

<sup>16</sup> *Ibid* 22.5; Bryon Frost, 'Net Neutrality – Overseas Experiences and Australia' (2015) 34(2) *Communications Law Bulletin* 5.

<sup>17</sup> *Competition and Consumer Act 2010* (Cth) sch 2; Endres, above n 5, 22.7.

<sup>18</sup> Frost, above n 16, 12.

<sup>19</sup> *Competition and Consumer Act 2010* (Cth) s 151AJ.

<sup>20</sup> *Ibid* s 152BCA.

<sup>21</sup> *Ibid* s 152AR.

<sup>22</sup> Endres, above n 5, 22.8.

<sup>23</sup> Xavier O'Halloran, 'Net neutrality: "if you can't control the arteries...get hold of the blood"' (2015) 23 *Australian Journal of Competition and Consumer Law* 129, 129.

Within Australia, several ISPs carry on the practice of 'zero rating', which does not align with the principle of net neutrality.<sup>24</sup> Zero rating occurs when ISPs do not count particular internet usage towards a consumer's total usage allowance.<sup>25</sup> For example, at the time of writing, Telstra offers consumers a deal in which usage of the Australian Football League ('AFL') application and website to watch football games does not count towards the consumer's usage allowance – ie, the consumer can watch as much football as he or she would like without contributing to or exceeding his or her data allowance. Non-Telstra customers can still access mobile broadcasts of AFL, but it will count towards their usage allowance. Although zero rating is permitted in Australia, several other countries prohibit the practice.<sup>26</sup> While it advantages consumers in the short-term, O'Halloran expresses concern that, in the long term, consumers will end up paying for zero rating in the form of decreases in competition and choice.<sup>27</sup> When Netflix launched in Australia, it initially engaged in zero rating, but later abandoned the practice for being contrary to the company's support for net neutrality.<sup>28</sup>

Although Australians benefit from a mostly neutral net, there is nothing stopping ISPs from adopting other non-neutral practices in future. While Australian ISPs do impose data caps on consumers, growth in the use

of streaming services may degrade the quality of internet services and necessitate service upgrades. The cost of those upgrades may yet see ISPs adopt non-neutral practices in Australia.<sup>29</sup> Further, there has been a recent increase in the development of network virtualisation technologies.<sup>30</sup> Network virtualisation involves the simulation of hardware, such as an internet server, in virtual software. North and Pascoe posit that there will 'almost certainly be net neutrality implications' as a result; networks may be managed so that they behave differently for different services, making it difficult to maintain neutrality.<sup>31</sup>

The introduction of the National Broadband Network ('NBN') may also signal the decline of net neutrality in Australia. NBN Co offers four different kinds of traffic classes, which allows ISPs to offer different classes of services to different classes of consumers.<sup>32</sup> Frost identifies this as a 'form of paid prioritisation which demonstrates that one of the key rules has already been thwarted in Australia by commercial [realities] of a future need for slow and fast lanes'.<sup>33</sup> However, Frost believes that market forces will self-regulate such that there is no need to be concerned about the effect of the NBN on net neutrality.<sup>34</sup> While this may be true with respect to consumers' ability to access online content, it does mean that certain consumers benefit from faster internet speeds.

It remains to be seen whether Australian lawmakers will weigh in on whether net neutrality should be regulated in Australia. In the past, net neutrality principles have been treated as important by lawmakers. In 2008, the Rudd government's proposed reforms to the *Broadcasting Services Act 1992* (Cth) were dumped pursuant to criticisms, including the concern that the reforms contradicted net neutrality principles.<sup>35</sup> The reforms involved requiring ISPs to block certain online content in an effort to make the internet safer for children. The introduction of net neutrality laws in other countries exemplify a path by which Australia may maintain equality of internet access for consumers.<sup>36</sup> However, Frost contends that net neutrality will never find strong support in Australia, and that the strength of the ACCC will negate the need for net neutrality rules.<sup>37</sup>

### The effect of the American vote on net neutrality in Australia

America's repeal of its net neutrality regulations is unlikely to have any immediately significant impact on Australian consumers, ISPs, or online content providers. For the reasons identified above, Australia is not likely to see the sudden, overt introduction of non-neutral practices. The ACCC says that America's repeal will not affect Australians,<sup>38</sup> suggesting that

24 Ibid.

25 Lim and Ranson, above n 14.

26 See, eg, *Telecommunications Act* (Netherlands) art 7.4a; *Network Neutrality: Guidelines for a Neutral Internet* (24 February 2009) (Norway); European Union Regulatory Framework for Electronic Communications, Directive 2002/21/EC on a common regulatory framework for electronic communications networks and service, OJL 108, 24.4.2002.

27 O'Halloran, above n 23, 130.

28 James Elton-Pym, *Australia's competition regulator says existing laws should be enough to stop internet providers teaming up with content makers like Netflix to create content monopolies* (21 December 2017) SBS <<https://www.sbs.com.au/news/will-the-us-net-neutrality-decision-affect-australian-internet-users>>.

29 Cheng Lim and Ian Ranson, 'Net neutrality and Netflix' (2015) 2(5) *Australian Media, Technology and Communications Law Bulletin* 64.

30 James North and Richard Pascoe, 'Network virtualisation – what will it mean for communications regulation?' (2016) 3(3) *Australian Media, Technology and Communications Law Bulletin* 26.

31 Ibid 29.

32 Frost, above n 16, 14.

33 Ibid.

34 Ibid.

35 Alana Maurushat, David Vaile and Alice Chow, 'The aftermath of mandatory internet filtering and s 313 of the *Telecommunications Act 1997* (Cth)' (2014) 19 *Media and Arts Law Review* 263, 265; David Vaile and Renee Watt, 'Inspecting the Despicable, Assessing the Unacceptable: Prohibited Packets and the Great Firewall of Canberra' [2009] *University of New South Wales Faculty of Law Research Series* 35.

36 O'Halloran, above n 23, 131.

37 Bryon Frost, above n 16, 11-2.

38 Elton-Pym, above n 28.

Australia's existing laws are likely to be sufficient to deal with any issues that may arise.<sup>39</sup>

However, it is arguable that America's repeal, in conjunction with zero rating and changing technologies, could result in Australia seeing an insidious long-term decline in net neutrality. One internet advocate suggests that the American regulations acted as a standard according to which Australian internet service providers operated; without those regulations, Australian providers may seek to move away from more neutral practices in accordance with precedent behaviour emerging from America.<sup>40</sup> So long as their behaviour does not contravene Australian competition or consumer laws, ISPs are free to engage in non-neutral practices as they wish.

The repeal may result in higher costs for certain online services. If online content providers, such as Netflix, are forced to pay fees to American ISPs for the prioritisation of their content, those costs may be passed onto consumers globally.<sup>41</sup> The repeal may also affect Australians who engage in online business catering to American consumers. If they rely on American servers to reach overseas consumers, those businesses may see an increase in costs, or even the failure of some smaller servers.<sup>42</sup>

The long-term effect of America's repeal will depend on whether Australia legislates to protect net neutrality. While America's new position may encourage non-neutral conduct in Australia, it's worth noting that not all non-neutral practices are per se harmful.<sup>43</sup> For example, the different traffic classes adopted by NBN Co is an arguably harmless practice: it simply allows ISPs to cater for consumers with different needs. The needs of a large-scale corporation are different to that of individual user at home. Any potential laws on net neutrality may differentiate between different kinds of non-neutral conduct for that reason.

While currently allowing small concessions, Australia should remain vigilant about adhering to the broader principles of net neutrality. The erosion of net neutrality risks the health of the telecommunications market and may disadvantage consumers. Most importantly, the erosion of net neutrality will allow ISPs to control the content that customers can access online. The health of Australian democracy depends on access to information, and information is increasingly garnered via online sources.<sup>44</sup> A serious risk would present in allowing ISPs to prioritise particular online content, such as news sources. Those providers would have the opportunity to serve the political agenda of their parent company by prioritising favourable news sources. The wealthiest content providers could pay ISPs to prioritise their content for customers.

These risks are far removed from current practices like zero rating,

and it is highly unlikely that they will manifest in Australia as a result of recent developments in America. However, a gradual decline in net neutrality is something to be wary of. For that reason, the introduction of net neutrality laws in Australia should at least be considered.

## Conclusion

Australia currently enjoys relative net neutrality. Although America's repeal of its net neutrality regulations is unlikely to have any short-term impact in Australia, in the long-term, it may increase the relevance of the net neutrality debate in Australia by encouraging non-neutral conduct. The risks presented by that possibility make it worthwhile to at least consider the adoption of net neutrality laws in Australia.

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39 Ibid.

40 Flint Duxfield, *Net neutrality: US ruling could affect internet access in Australia, groups warn* (16 December 2017) ABC <<http://www.abc.net.au/news/2017-12-16/net-neutrality-us-decision-could-affect-australians/9265056>>.

41 Tara Donnelly, *What is net neutrality (and how does it affect Australians)?* (15 December 2017) WhistleOut <<https://www.whistleout.com.au/Broadband/News/what-is-net-neutrality-and-how-does-it-affect-australians>>.

42 Ibid.

43 Endres, above n 5, 22.4.

44 Vaile and Watt describe the degradation of net neutrality as 'Orwellian': David Vaile and Renee Watt, 'Inspecting the Despicable, Assessing the Unacceptable: Prohibited Packets and the Great Firewall of Canberra' [2009] *University of New South Wales Faculty of Law Research Series* 35.

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