



**Consumer Affairs Australia and New Zealand
The Commonwealth Treasury
Langton Crescent
PARKES ACT 2600**

Via email: ACLReview@treasury.gov.au

Wednesday 8 June 2016

Dear Consumer Affairs Australia and New Zealand,

Re: eBay Submission - Australian Consumer Law

Background

eBay, one of the world's leading online marketplaces, welcomes the opportunity to submit to the Review of the Australian Consumer Law (ACL) and herewith attaches a copy of our submission for consideration.

Since the ACL commenced 5 years ago, we have continued to witness the ever evolving world of technology and innovation. Therefore, it is timely for the Review, led by Consumer Affairs Australia and New Zealand (CAANZ), to inquire into the effectiveness of the current laws, the administration of those laws and the flexibility of the current regime in the changing world in which we live. We support the collaboration between COAG and the Commonwealth, state and territory consumer protection agencies on this Review given the national consumer protection framework.

Globally, the Internet has been one of the fastest-growing commercial phenomena in history. Companies like eBay, need to keep pace with technological change and our consumer laws also need to keep pace with such change, striking the right balance between consumer protection, consumer choice, and industry innovation enabling new entry or market expansion for sellers and suppliers.

eBay Recommendations on Improvements to the ACL

Given eBay's commitment to consumers and small business, we submit the following recommendations to the Review in response to the Issues Paper.

eBay ACL Review Recommendations:

- ✓ **Online Shopping and Price Transparency:** As consumers are increasingly comfortable using technology to navigate online and mobile content, the standard for ACL enforcement should reflect the knowledge and experience that the modern reasonable consumer has, including that it would be reasonable to expect consumers to "click through" to hyperlinked disclosures rather than expect to see all relevant information on the home page of a mobile site or website;
- ✓ **The Sharing Economy:** The role of online platforms is to facilitate transactions between buyers and sellers and a platform provider should therefore not assume the responsibility of the parties to the transaction, as this would stifle innovation and development by platform providers. It is recommended that the ACCC continues to manage such matters in a manner consistent with the principles articulated by the High Court in *Google*.



Conclusion

eBay would welcome the opportunity to meet with Review team to discuss our submission. Further queries related to eBay's submission can be directed to krfoster@ebay.com

eBay looks forward to the release of the interim report in the second half of 2016 and the final report's release by March 2017.

Yours sincerely,

Kristen Foster
Director, Government Relations
Australia, New Zealand & Japan
Head, Government Relations, South East Asia (Acting)



eBay

SUBMISSION IN RESPONSE TO ACL REVIEW ISSUES PAPER

8 June 2016

EBAY SUBMISSION IN RESPONSE TO ACL REVIEW ISSUES PAPER

1 Background and summary of eBay's position

eBay is pleased to provide this submission in response to the March 2016 Consumer Affairs Australia and New Zealand's Issues Paper on the Australian Consumer Law Review (**Issues Paper**).

The eBay.com.au site was launched in Australia in 1999 and connects a diverse range of buyers and sellers. Like other online marketplaces and platforms, eBay provides consumers with the convenience of online shopping and easy price comparisons, as well as a broader choice of goods, services and suppliers than they would have with traditional "bricks and mortar" retailers. eBay is also a platform used by many large Australian retailers including Myer, Woolworths, Target, Officeworks and the Good Guys, to name a few.

eBay takes a proactive stance on consumer issues and product safety in accordance with the ACL. We work constructively with Governments globally on product safety recalls, including our recent recall of hover-boards on eBay. In 2016 eBay won a biosecurity award from Australia's Federal Government as a result of our work in protecting Australian consumers from harmful plant and seed imports¹. eBay's Money Back Guarantee also protects consumers if the item isn't exactly what a consumer ordered – eBay covers the consumer's purchase price plus original shipping cost on virtually all items, ensuring consumers can shop with confidence on eBay's site². eBay has a dedicated customer service team available 7 days a week to answer consumer concerns. These are just some examples of eBay's consumer focus.

eBay is of the view that the ACL has generally worked well since its inception five years ago. However, in a time of unprecedented technological change and digital disruption, eBay makes the following suggestions to help ensure that the ACL continues to operate effectively and not hinder digital innovation or new entry and expansion into Australian and overseas markets by domestic and international suppliers.

This submission focuses on the issues raised in the Issues Paper that are of most relevance to online marketplaces and platforms like eBay, taking into consideration the changing face of the online retail environment. In summary eBay wishes to address the following issues:

- **online shopping and price transparency:** There should be some acknowledgment that consumers are increasingly comfortable using technology to navigate online and mobile content, and that the navigation of online content is different to the navigation of offline content. The standard for ACL enforcement should reflect the knowledge and experience that the modern reasonable consumer has. For example, it would be reasonable to expect consumers to "click through" to hyperlinked disclosures rather than expect to see all relevant information on the home page of a mobile site or website;
- **the sharing economy:** where a platform simply facilitates connections between two parties for the purposes of trade and commerce, the parties to the transaction should continue to bear the responsibility for the integrity of their dealings and compliance with the ACL (ie the seller should stand by the claims of the sale and the buyer should ensure it completes purchase of the good or service as promised).

¹ With Australians spending an estimated \$37.8 billion online in 2014-15, internet purchases pose an increasing risk to their country's biosecurity. Working with the Australian Department of Agriculture and Water Resources, eBay has reduced the number of restricted plants and seeds making it to the Australian border by preventing their purchase in the first place. eBay has created filters on our site to stop Australian customers from buying high-risk items such as tomato and capsicum seeds, and blocked sellers attempting to move products like giant African snails, live ants and moth larvae.

² http://pages2.ebay.com.au/eBay_Money_Back_Guarantee

2 Online shopping and price transparency

eBay strongly advocates for clear and transparent pricing online. Clear and transparent pricing is vital to the business model of eBay and other online platforms – without clear and transparent prices, trust in the platforms will diminish leading in turn to the diminished use of these platforms.

However, given the significant growth in online shopping and, in particular, the use of mobile phones to purchase goods and services, it is important that what is considered by courts and ACL regulators to be false, misleading or deceptive representations as to price (and other key terms and conditions) develops alongside the evolution of consumers' digital know-how.

With the increased consumer use of mobile phones and other digital devices for purchasing goods and services comes increased consumer familiarity with the online purchase processes involved, including awareness of the fact that it may not be possible for a supplier to clearly display on the home page of its website or mobile site all information relevant to a consumer's purchasing decision. Unlike fleeting advertisements over which consumers have no control, consumers in the digital economy know that mobile sites and websites allow them to take their time to review all relevant information on each page, follow hyperlinks and navigate between pages.

In this respect, eBay agrees with the findings of Foster J in the recent Virgin and Jetstar decisions to the effect that the definition of the 'reasonable consumer' in this case was a member of the public that had internet access and previous experience and was therefore aware of both:

- the need to often click through a number of pages before arriving at the final price:

*[a] significant proportion of the relevant class of consumers will know from previous experience that they cannot ascertain the final firm price for the journey which they intend to undertake without travelling through the booking process. Those members of the relevant class who do not know this before commencing the process become aware of it very soon after entering the process;*³ and

- the ability to click on hyperlinks to find further pricing information:

*"it is highly likely that the overwhelming majority of the relevant consumers would have some level of experience of navigating the internet and of using online booking processes. That knowledge and experience would include an understanding of the use of hyperlinks to navigate particular websites".*⁴

In this overall context, eBay submits that it is sufficient for businesses to disclose the total minimum price before payment and that sections 18, 29(1)(i) and 48 of the ACL already ensure sufficient price transparency for consumers. This is demonstrated by the ACCC's success in relation to sections 18 and 29(1)(i) in the drip pricing proceedings against Virgin and Jetstar.

eBay also suggests that interpretation of ACL laws should also take into account the changing nature of online transactions and increased understanding consumers have of the nature of online platforms in respect of other similar issues such as bait advertising. In the context of selling on online platforms such as eBay.com.au, the quantity of inventory for sale cannot necessarily meet the demand as there could be millions of potential customers that may be interested in a particular item. This challenge should be recognised when considering this issue.

3 The Sharing Economy

³ ACCC v Jetstar Airways Pty Limited [2015] FCA 1263, see paragraph 170.

⁴ As above at [168].

ACL Liability and Sharing Platforms

Delivering a great consumer offering and positive societal impact is shaping the business models of new generations of companies.

'Sharing economy' companies such as Uber and Airbnb offer a smarter way to use resources and, in a relatively short space of time, have become deeply embedded in people's daily lives. Together, we are opening access to goods and services in new ways, extending economic empowerment and driving positive environmental, social and charitable impact.

eBay wishes to make submissions in respect of 2 items:

- (a) the role of online platforms as conduits or hosts of information; and
- (b) the role of the seller and its responsibilities under the ACL.

3.2 Liability of Sharing Platforms

Online platforms provide an ability for very large numbers of buyers and sellers to connect. Given their millions of users, it is unlikely that online sharing platforms would choose to operate to provide access to such large numbers of users if they were exposed to liability under the ACL in respect of their users' conduct. The consequence of this would be of detriment to a large number of buyers and sellers that currently derive significant benefits from the ability to buy and sell directly with each other via online platforms. By way of example, if an online platform were liable for misleading or deceptive conduct engaged in by users of the platform simply because of its role as an enabler of e-commerce, the level of risk to which the online platform provider were exposed could render their business models commercially unsustainable.⁵ eBay agrees with the High Court's decision in *Google Inc. v ACCC (Google)* in this respect, which was to the effect that online platforms, such as Google, do not create "in any authorial sense" the content stored or uploaded by their users, nor do they endorse it, and as such cannot be held liable for any infringements arising from the content.⁶

"That the display of sponsored links (together with organic search results) can be described as Google's response to a user's request for information does not render Google the maker, author, creator or originator of the information of the sponsored link. The technology which lies behind the display of a sponsored link merely assembles information provided by others for the purpose of displaying advertisements directed to users of the Google search engine in their capacity as consumers of products and services. In this sense, Google is not relevantly different from other intermediaries, such as newspaper publishers (whether in print or online) or broadcasters (whether radio, television or online), who publish, display or broadcast the advertisement of others. The fact that the provision of information via the internet will – because of the nature of the internet – necessarily involve a response to a request made by an internet user does not, without more, disturb the analogy between Google and other intermediaries. To the extent that it displays sponsored links, the Google search engine is only a means of communication between advertisers and consumers."

eBay believes the High Court's reasoning is equally applicable to other online platforms.

This must remain the case even where platforms do have in place mechanisms for minimising certain types of illegal or infringing behaviour, or where they provide some form of assistance to their users.⁷

⁵ Nor can they be considered to be 'involved' in them pursuant to s236 ACL as they are not aware of the specific information uploaded by users and whether the information is correct or not.

⁶ *Google Inc. v ACCC [2013] HCA 1*.

⁷ eBay's Verified Rights Owner (VeRO) programme uses filters to detect listings which might contravene the copyright conditions contained in eBay's user agreement in place with all its users.

That is, implementing some protective mechanisms or providing value-added services such as this cannot alter into something more the nature of the platform as a neutral conduit or host of information. These mechanisms are designed to improve the integrity of the online platform and increase trust and safety in it; they are not designed so that the online platform provider becomes liable for the specific content posted by one user.

Making online platforms responsible for the conduct of their users would seriously undermine the business models of these platforms and ultimately lead to their significantly limiting the nature and number of users (such as by accepting the trade of large and established companies only), exiting the market or making them less accessible and/or significantly more expensive. That is, to the extent that it is even possible to control the content uploaded by users, which eBay does not consider to be so, these mechanisms will undoubtedly lead to significant expense which would be passed onto consumers or significant red tape which would deter new entry (both of platforms and the platform merchants) and stifle innovation.

Sharing platforms provide a number of pro-competitive benefits both for consumers, small business owners and trade and commerce generally. They bring vendors together with a wide range of customers to which they normally would not be exposed (and vice versa) and provide consumers with extra tools designed to help them make better informed purchasing decisions. These tools – such as the ability to carry out quick and easy comparisons by searching over a number of different vendors on the one online platform and review impartial customer feedback for the particular product and service as provided by other users of the platform – may not be as readily available in a traditional context.

eBay recommends that the ACCC manages this issue in a manner consistent with the principles articulated in *Google*.

3.3 Liability of users of Sharing Platforms

The Issues Paper queries whether sellers using ‘sharing platforms’ are aware of their ACL responsibilities and suggests there may be uncertainty as to whether ACL responsibilities apply to sellers who do not engage in selling on a regular basis or as a main source of income. eBay considers that the existing provisions in the ACL address this issue satisfactorily.

eBay also submits that in its experience, the sellers on its platform are largely aware of their obligations. Further, eBay provides a transparent environment for buyers and sellers, where buyers are able to leave feedback in respect of transactions and sellers are given a seller rating based on their seller performance. In this regard it is in the interest of the sellers to ensure they know their obligations and meet the highest consumer standards.

Conclusion

As the digital and sharing economies take on increasing importance in Australia, eBay considers that for the purposes of this ACL review, question 38 in the Issues Paper is perhaps the most pertinent, that is:

Does the ACL provide consumers with adequate protections when engaging in the ‘sharing’ economy, without inhibiting innovation and entrepreneurial opportunities?

eBay submits that the approach that it has outlined above achieves the right balance between appropriate consumer protection and sufficient freedom for innovators and disruptors to enter and expand in Australian markets.

Our final recommendations are highlighted again below and we look forward to the Review's consideration of these recommendations.

eBay ACL Review Recommendations:

- ✓ **Online Shopping and Price Transparency:** As consumers are increasingly comfortable using technology to navigate online and mobile content, the standard for ACL enforcement should reflect the knowledge and experience that the modern reasonable consumer has, including that it would be reasonable to expect consumers to “click through” to hyperlinked disclosures rather than expect to see all relevant information on the home page of a mobile site or website;

- ✓ **The Sharing Economy:** The role of online platforms is to facilitate transactions between buyers and sellers and a platform provider should therefore not assume the responsibility of the parties to the transaction, as this would stifle innovation and development by platform providers. It is recommended that the ACCC continues to manage such matters in a manner consistent with the principles articulated in *Google*.