



20 June 2014

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Secretariat

Thank you for the opportunity to provide feedback on the *Competition Policy Review Issues Paper*.

Company Background

eBay is a large online marketplace with more than 145 million active users globally which brings together buyers and sellers who trade on their own terms. As an online marketplace provider eBay does sell items itself.

eBay is a powerful enabler of small Australian businesses, with 1 in 5 small businesses enjoying a presence on the eBay platform. Many successful Australian small businesses started out on eBay Inc. platforms. These include: Deals Direct (discount online department stores), Shoes of Prey (online shoe site), Catch of the Day (group buying site) and many more.

eBay's interest in responding to the Issues Paper arises from its unique position as a leader in, and facilitator, of commerce. eBay's annual Online Business Index survey (Survey) found that in 2012, revenue for the top 2,000 eBay.com.au sellers grew by 45%. The Survey also found that sellers are increasingly drawn to, and wish to use, mobile commerce.

We have selected specific questions from within the issues paper to respond to and are available to the Review Committee for any further questions, comments or discussions.

Summary of recommendations

- *eBay recommends that the third line forcing prohibition is removed entirely from the CCA.*
- *In the alternative, eBay supports the imposition of a 'substantial lessening of competition' test for third line forcing. This recommendation is consistent with the findings of both the Hillmer Report and Dawson Review.*
- *eBay recommends that the resale price maintenance prohibition remains in the CCA, but that additional expertise and resources are dedicated to (i) educating small businesses of their rights particularly with respect to suppliers unreasonably imposing restrictive trade practices on them, and (ii) increasing focus on enforcing this prohibition in online business dealings.*

- *eBay recommends the adoption of a technology neutral regulatory framework for competition law and policy. Such an approach would ensure that all conduct that is regulated by the CCA should be investigated and appropriate penalties enforced irrespective of whether the conduct is taking place offline, online or on a mobile device.*
- *eBay respectfully asks that additional attention be paid to business conduct relating to online marketplaces to identify any restrictive trade practices.*
- *eBay respectfully asks that the Committee consider increased transparency measures relating to search engine algorithm changes which unfairly disadvantage businesses with a strong online presence.*
- *eBay recommends the removal of all barriers to the parallel importation and sale in Australia of products manufactured under the authority of the legitimate copyright owner.*

1. Question 5.25: Do the provisions of the CCA on third line forcing operate effectively and do they work to further the objectives of the CCA?

Sections 47(6) and 47(7) of the Competition and Consumer Act 2010 ("CCA") prohibit third line forcing per se. Australia is the only developed country worldwide that has such a provision in its competition law. This conduct is prohibited, irrespective of whether it can be demonstrated to have an anti-competitive effect. Indeed, the current provision ignores the crucial distinction between the efficient combination of goods or services and combinations which (allegedly) leverage existing market power. It ignores that the impact of combining products and/or services is typically neutral or even beneficial to consumers and introduces uncertainty for both business and regulators.

Furthermore, there is a significant cost associated with the preparation, filing and review of notifications and this cost is borne by both industry as well as the ACCC. We respectfully submit that the overall costs to both industry and the ACCC in complying with and enforcing the third line forcing regime outweigh the underlying competition law risks.

There are other remedies that are available where a consumer is of the view that market power is being unreasonably exerted. Sections 45 and 46 of the CCA contain numerous provisions under which a broader claim could be made.

Recommendations:

- *eBay recommends that the third line forcing prohibition is removed entirely from the CCA.*
- *In the alternative, eBay supports the imposition of a 'substantial lessening of competition' test for third line forcing. This recommendation is consistent with the findings of both the Hillmer Report and Dawson Review.*

2. Question 5.26: Do the provisions of the CCA on resale price maintenance operate effectively and do they work to further the objectives of the CCA?



eBay conducts a regular survey of the top 3,000 sellers in Australia to gain insights into their world of commerce. The 2011 and 2012 survey results¹ revealed that 25% and 26% of sellers respectively were instructed by their suppliers to sell at a recommended retail price. This clearly restricts the ability for eBay sellers to price their products at what they consider to be an appropriate price point and puts them at risk of adverse treatment by suppliers should they not comply with pricing instructions. eBay responds to this issue by investing in training and education for eBay sellers, informing them of their rights and the steps and strategies they can take to protect themselves and manage business risk.

eBay remains concerned however about the widespread abuse of the prohibition on resale price maintenance in the context of ecommerce and the ability of small businesses in particular to maximize the opportunities available on marketplace platforms such as eBay. eBay strongly believes in the policy justifications for the prohibition on resale price maintenance but considers that it is not being effectively enforced across all retail channels.

Recommendation:

- *eBay recommends that the resale price maintenance prohibition remains in the CCA, but that additional expertise and resources are dedicated to (i) educating small businesses of their rights particularly with respect to suppliers unreasonably imposing restrictive trade practices on them, and (ii) increasing focus on enforcing this prohibition in online business dealings.*

3. Additional commentary regarding the application and enforcement of the CCA – ‘a level playing field’ in online and offline

- The Internet is leveling the playing field for retailers and enterprises of all sizes, and enabling them to reach customers and markets that were previously unattainable. International trade is no longer the expertise of large players. This has seen the rise of the micro multi-national, small businesses operating both nationally and internationally.
- We note that as the Australian digital economy continues to grow the distinction between online and offline becomes less relevant. In particular, mobile technology is blurring these lines, and for the 72%² of Australians in possession of a smart Internet enabled mobile device (or two!) we are now more than ever always ‘on’ and connected to our digital lives. The Terms of Reference to the Competition Policy Review sensibly make reference to the very different way of life that Australians now enjoy compared to the environment within which CCA was drafted.

¹ eBay Online Business Index 2012 p, 4 http://media.ebay.com.au/Resource/13/Docs/OBI_March2012_FINAL.pdf

² Telstra's Third Annual Smartphone Index October 2013



- In this context there has been significant debate in recent years as to whether the online space somehow evades some competition regulation or whether online is subject to a lesser degree of regulation than the offline space. This discussion is complicated by the enforcement challenges of regulating an environment which has no clearly distinguished territorial borders. eBay favours an approach to regulation which is technology neutral; that is, which applies indiscriminately across all forms of technology and in both the real and online worlds. Any conduct which is regulated by the CCA should apply equally in the online and mobile environment as it does in the physical world.
- The Australian retail industry is widely considered to be lagging behind international counterparts when it comes to adopting multi-channel retail strategies. An Experian report carried out in 2012 found that “there appears to be a reluctance among retailers to divert attention (and budget) away from traditional sales channels”³. eBay’s seller survey results support this perspective, with 34% of sellers reporting that they face pressure from suppliers not to sell their products at all online or alternatively not to sell on specific identified websites⁴. Either suppliers think that applying this type of pressure to their distributors is acceptable behavior or they don’t think that their distributors will complain about this pressure being applied to their business operations. In any event, eBay considers the application of this pressure to be anti-competitive as it restricts sellers’ ability to freely engage in and explore online sales strategies. To this end, eBay would welcome more attention being paid to online marketplaces and the conditions under which sellers are ‘permitted’ to engage in these platforms.
- As the Review Committee would be aware, consumers increasingly navigate their way through the vast amount of online content by using search engines. Furthermore, 89% of consumers use search engines to make purchasing decisions⁵. The ability to purchase advertising within search engines is fairly widely understood, however the order in which organic (i.e. unpaid for) search results are presented can have a direct bearing on purchasing decisions. This has led to a burgeoning market for Search Engine Optimisation (SEO) experts who advise businesses on how to improve their ranking in organic search results. There is, in fact, a science to SEO. However, this science is not transparent. eBay would welcome increased transparency around how organic Internet search results are ordered to ensure that a fair and neutral presentation of results is taking place, especially between competing products and services.

³ Experian Marketing Services Retail in Australia: It’s time to embrace the digital future, September 2012, p5 <http://www.experian.com.au/assets/marketing-services/white-papers/australian-retail-and-digital-future-2012.pdf>

⁴ eBay Online Business Index 2012 p, 4 http://media.ebay.com.au/Resource/13/Docs/OBI_March2012_FINAL.pdf

⁵ <http://fleishmanhillard.com/2012/01/news-and-opinions/2012-digital-influence-index-shows-internet-as-leading-influence-in-consumer-purchasing-choices/>



- As a global market facilitator, eBay strongly supports businesses being able to freely import any goods manufactured with the authority of the copyright owner. The existing framework around parallel imports is unnecessarily complex, inconsistent and an inappropriate impediment to free trade in legitimate goods. We note that the ACCC supports unfettered parallel importation as a competitive measure which is beneficial to Australian customers, due to reduced pricing and the greater availability of products⁶.

Recommendations:

- *eBay recommends the adoption of a technology neutral regulatory framework for competition law and policy. Such an approach would ensure that all conduct that is regulated by the CCA should be investigated and appropriate penalties enforced irrespective of whether the conduct is taking place offline, online or on a mobile device.*
- *eBay respectfully asks that additional attention be paid to business conduct relating to online marketplaces to identify any restrictive trade practices.*
- *eBay respectfully asks that the Committee consider increased transparency measures relating to search engine algorithm changes which unfairly disadvantage businesses with a strong online presence.*
- *eBay recommends the removal of all barriers to the parallel importation and sale in Australia of products manufactured under the authority of the legitimate copyright owner.*

While the current CCA legislative framework is adequately equipped to deal with anti-competitive conduct the ACCC should continue to monitor and enforce the law such that this conduct is deterred.

We thank you once again for the opportunity to make this submission and welcome the opportunity to provide further input to the Review.

Yours sincerely

Sassoon Grigorian
Director of Public Policy, Asia Pacific

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<http://www.accc.gov.au/content/item.phtml?itemId=179183&nodeId=5466d384ea376830f3007417eef6cb72&fn=PARALLEL%20IMPORTING.pdf> accessed 19 September 2012

