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Standing Committee on Industry, Innovation, Science and Resources
PO Box 6021
Parliament House
Canberra ACT 2600

Sent by email: iisr.reps@aph.gov.au

To the Committee Secretary

Re: Inquiry into impacts on local businesses in Australia from global internet-based competition

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the inquiry into the impacts of global internet based competition on local businesses.

Developments in the digital economy mean that it is increasingly common for global online businesses to compete with Australian businesses. The impact of this competition is considered by the ACCC in administering the competition, fair trading and consumer protection laws contained in the *Competition and Consumer Act 2010 (Cth) (CCA)*.

Impact of disruptive technology

As a general principle, the ACCC considers that new entrants to markets have a positive impact on competition by providing consumers with a greater range of products, services and purchasing methods. New entrants also challenge the efficiency of incumbent business practices, leading to an overall improvement in competitive conditions.

Technological enhancements in the reliability and availability of online purchasing that result from the emergence of global online businesses cause disruption to, and create opportunities for, local businesses. In our work we have seen benefits to Australian small business by being able to access an increased range of distribution and supply channels, as seen through the emergence of online intermediaries that bring customers and suppliers together on one platform.

It is clear in our engagement with the business sector that many businesses, particularly small businesses, consider an online presence through intermediaries to be an essential component of their marketing to potential consumers. This movement of businesses onto online platforms can only be expected to grow, creating greater risks for businesses that do not move online. In the case of new entrants to the retail sector, which is relatively concentrated in Australia, new entrants also offer local small businesses the benefit of increasing the number of avenues through which they can sell their products. The new avenues to market increase the bargaining position of small local businesses.

At the same time, concerns have been expressed about the interactions of new entrants with the Australian businesses that use their platforms. Some of these concerns relate to global online businesses imposing unfair contract terms in their contracts with Australian businesses, such conduct would raise concerns under the business to business unfair contract term provisions of the Australian Consumer Law (ACL) contained in Schedule 2 of the CCA¹.

The competitive challenge from global online businesses, which provides benefits for consumers, is also a significant threat for some established businesses that must adapt to the presence of competitors capable of offering cheaper prices, a wider range of product choices, and alternative ways of buying goods and services.

The practices of global online businesses may also raise broader competition and consumer protection issues, particularly for global entities that seek to apply their off-shore business practices in Australia. Concerns arise where these practices are not consistent with the fair trading and consumer protection provisions under the ACL. A particular example of this relates to global online businesses that fail to comply with the product safety provisions contained in the ACL. Global online businesses that fail to comply with the product safety provisions of the ACL could distort the competitive process by placing local businesses that are compliant at a disadvantage. The ACCC has taken enforcement action in relation to non-compliant products sold online and will continue to enforce the ACL and the competition law provisions against online businesses, including those based overseas.

ACCC's engagement with the entry of global online businesses

The ACCC has considered the conduct of a number of global online businesses under both the restrictive trade practices provisions of the CCA and the ACL. The ACCC has taken action to address conduct of concern from global online businesses, including:

- Instituting proceedings against Google Inc and Trading Post Australia Pty Ltd for misleading and deceptive conduct in relation to sponsored links that appeared on the Google website,²
- Reaching an agreement with Uber Australia Pty Ltd to remove certain contract terms that raised concerns under the Business to Business Unfair Contract provisions under the ACL,³
- Reaching an agreement with Expedia and Booking.com in September 2016 to amend certain price and availability parity clauses in their contracts with Australian hotels and accommodation providers.⁴ The ACCC has since commenced a subsequent investigation into the conduct of Expedia and Booking.com (online travel agents (OTA) investigation), which is considering the market power of both parties in their dealings with Australian businesses.

¹ There has been a notable increase in contacts received by the ACCC recently regarding unfair contract terms. Between May and October 2017, monthly average contacts about business to business unfair contract terms were 67 per cent higher than in the first six months (November 2016 – April 2017) after the law came into effect.

² The Federal Court found that Trading Post Pty Ltd has engaged in misleading and deceptive conduct, however the High Court of Australia found that Google Inc did not engage in the conduct in question. Nevertheless, the proceedings led to an important change to the behaviour of online platforms in relation to the display of sponsored links.

For further information see: *ACCC v Trading post Australia Pty Ltd (No 2)* [2011] FCA 1086 and *Google Inc v ACCC* [2013] HCA 1

³ Further information is available at: <https://www.accc.gov.au/media-release/accc-says-small-businesses-just-need-a-level-playing-field>

⁴ Further information is available at: <https://www.accc.gov.au/media-release/expedia-and-bookingcom-agree-to-reinvigorate-price-competition-by-amending-contracts-with-australian-hotels>

The ACCC has also proactively sought to understand the interaction of new markets with the CCA and ACL by working with the Organisation for Economic Co-operation and Development and the International Consumer Protection and Enforcement Network, as well as commissioning a report into the effects of the emergence of the sharing economy in Australia⁵.

Guidance and education on how emerging markets interact with the CCA and ACL is provided to Australian small businesses through the ACCC's Small Business Information Network⁶. Additionally, the Small Business and Franchising Consultative Committee provides a forum where competition and consumer law concerns relating to small business and the franchising sector can be discussed by members representing industry as well as observers from other government agencies and departments.

The ACCC anticipates that the recent changes to the CCA, following the recommendations from the 2015 Harper Competition Policy Review⁷, will provide it with effective mechanisms to address anti-competitive conduct by global internet based competitors affecting markets in Australia. It will continue to monitor the operation of the amendments.

Through its consideration of the OTAs investigation and other work relating to global online competition, the ACCC has observed a number of benefits and some concerning impacts that global online competition can have on local businesses.

Australian businesses using global online platforms

The ACCC's primary observations about the impact of global online businesses relate to the use of online intermediaries by Australian businesses. Online intermediaries operate in 'two sided' markets that bring buyers and sellers together. Small businesses use the marketing and distribution services of online intermediaries to access a wider range of local and international customers, while consumers use online intermediaries to access and compare a wider range of goods and services.

Many global online intermediaries operating in Australia have developed substantial brand recognition and large networks of customers located around the world. In providing their services to local businesses, the intermediaries are also providing local businesses with the ability to access these networks of customers. By using efficient mechanisms to translate sales listings, convert currencies and by investing in global advertising and marketing campaigns, the intermediaries provide local businesses with access to consumers and markets that would otherwise be more difficult for them to access or for such access to come at a higher cost.

Some local businesses use intermediaries as part of an overall marketing strategy to attract new consumers and find this an effective way to reach new consumers, and to remain relevant to established customers as their purchasing habits change. Global online intermediaries also benefit consumers by increasing the choices available, improving visibility of the prices offered to consumers and providing them with a facility to easily purchase the goods or services being offered. Global online aggregators that compile pricing information also assist to improve price visibility and choices available to consumers.

⁵ The report can be accessed at <https://www.accc.gov.au/publications/the-sharing-economy-and-the-competition-and-consumer-act>

⁶ In the 12 months leading up to 30 September 2017, the online business education resources on the ACCC's website had been accessed over 1.46 million times.

⁷ Further information on the amendments can be found in the *Competition and Consumer Amendment (Competition Policy Review) (Cth)* and *Competition and Consumer Amendment (Misuse of Market Power) (Cth) Bills*.

The ACCC has observed some broad instances where global online intermediaries have had the ability to increase their margins over time where parity clauses may have limited the competition between intermediaries and local businesses. This has a particularly significant impact on local businesses that are reliant on the services of the intermediaries and may also result in higher prices for consumers. The ACCC also notes recent media reports that Australian small businesses are departing from some online platforms due to the high level of commissions being charged. This response is indicative of a competitive market and it acts as a restraint on the exercise of market power. The ACCC will continue to consider whether the conduct or agreements of some major online intermediaries have the purpose or effect of substantially lessening competition in Australian markets.

Another concern that the ACCC is aware of is the imbalance in power that can occur between the intermediaries and local businesses. In many cases, the online intermediary represents a significant source of online revenue for the local business, and is often substantially larger in size. This bargaining dynamic can make it challenging for local businesses to negotiate the terms and conditions included in contracts. As noted above, business-to-business unfair contract terms legislation assists to alleviate concerns about online intermediaries using their bargaining position to impose unfair contract terms.

The ACCC would also be concerned where Australian businesses may be misusing online intermediaries to the detriment of consumers, as can be seen by the action taken against Meriton Property Services Pty Ltd (Meriton).⁸ In these proceedings, the Court found that Meriton engaged in misleading and deceptive conduct by altering its processes, making it less likely to receive negative reviews on the TripAdvisor sites. The provision of false or misleading information to consumers through online intermediaries prevents consumers from making informed decisions as well as giving the business in question an unfair advantage over its rivals. Further examples of action taken by the ACCC to address such conduct include:

- Instituting proceedings in April 2017 against Apple Pty Limited and Apple Inc. for alleged false, misleading, or deceptive representations about consumers' rights under the ACL.⁹ The ACCC had previously accepted a court enforceable undertaking from Apple Pty Limited in December 2013 following an investigation into Apple's consumer guarantees policies and practices,¹⁰ and
- Instituting proceedings against Valve Corporation, a video game developer incorporated in the United States that operates a global digital distribution platform that sells video games worldwide, for making alleged misleading representations to Australian consumers about their consumer guarantee rights under the ACL,¹¹

Conclusion

The ACCC considers that global online intermediaries offer local businesses opportunities to access customers that may otherwise be difficult to access. Global online competition also provides Australian consumers with access to more suppliers and a greater level of transparency about price and available goods and services. It is also important to acknowledge that online intermediaries can give rise to concerns under the ACL and that in some circumstances the practices of global intermediaries can give rise to market harm

⁸ <https://www.accc.gov.au/media-release/court-finds-meriton-misled-and-deceived-consumers-on-tripadvisor>

⁹ Further information is available at: <https://www.accc.gov.au/media-release/accc-takes-action-against-apple-over-alleged-misleading-consumer-guarantee-representations>.

¹⁰ Further information is available at: <https://www.accc.gov.au/media-release/apple-australia-gives-undertaking-to-accc-to-improve-its-consumer-guarantees-policies-and-practices>

¹¹ On 24 March 2016, the Federal Court found that Valve made misleading representations to Australian consumers about their consumer guarantee rights in contravention of s18(1) and s 29(1)(m) of the ACL. This decision is currently under appeal.

For further information see: *ACCC v Valve Corporation Pty Ltd* (No 3) [2016] FCA 196.

through anti-competitive conduct. The ACCC continues to engage closely with online markets to address these concerns. If you would like to discuss the ACCC's submissions further, please contact Bruce Cooper on [redacted] or by email at [redacted]

Yours sincerely

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Rod Sims
Chairman