



A submission in response to  
**Senate Inquiry into Ticket Scalping in  
Australia**

**February 2014**

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## **INTRODUCTION**

eBay is pleased to provide this submission to the Senate inquiry into ticket scalping in Australia.

Much of this submission is drawn from information supplied by eBay in 2010 in response to the Commonwealth Consumer Affairs Advisory Council Ticket Scalping: Ticket Onselling and Consumers Issues Paper in 2010.<sup>1</sup>

eBay's policies and practices support widespread access to lawful goods and services, balanced against the need to protect consumers from dangerous or illegal items, and the need to ensure continued consumer confidence in the platform. However, eBay does not consider that ticket sales for sporting events, concerts or similar, whilst popular and sought after, should be regulated, restricted or prohibited.

The majority of ticket sales on ebay.com.au are consumer-to-consumer sales.

Tickets should be treated like any other consumer good which can be transferred or on-sold.

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<sup>1</sup> [http://archive.treasury.gov.au/documents/1879/PDF/ebay\\_101007.pdf](http://archive.treasury.gov.au/documents/1879/PDF/ebay_101007.pdf)

## THE PRIMARY AND SECONDARY TICKET MARKET

The parties with the most to potentially to gain from regulation of the secondary ticket market is the primary market. The primary market often control tickets, prices and supply. Any regulation of resales will assist them to do this but may not be in consumers' interests.

The existence of a secondary ticket market helps to create competitive pressure on the primary ticket market. The competition and transparency posed by new market entrants, actually prompt the primary market to design new and more efficient means of ensuring fans can get hold of tickets in the first place. If such competitive pressures were removed or reduced through regulation, the already-limited options available to consumers would be further reduced, and the incentive to innovate and improve services in the primary market would greatly diminish.

The Australian ticketing industry is made up of a number of companies, the two major players selling sports, concert and theatre tickets are Ticketek and Ticketmaster.

It is estimated that the total ticketing market generates annual ticket sales of about \$2 billion, and it is estimated both Ticketek and Ticketmaster have around 80% market share.<sup>2</sup>

According to a survey eBay commissioned with Newspoll<sup>3</sup>, the vast majority of consumers bought their ticket via an official ticketing agency (i.e. Ticketek or Ticketmaster): 68% for sporting events and 75% for concert. Other places where consumers could purchase tickets include fan clubs, stadium memberships and other avenues.

There has been criticism directed at the primary ticket market regarding its distribution of tickets.

Problematic primary distribution practices include:

- **Underpricing:** tickets made available at a price deliberately below market value to achieve a sell out event and secure artist commitment to touring.
- **Spreading risk:** it has been alleged that scalpers may be welcomed by some promoters because they are effectively a form of insurance (by self-assuming the risk of not selling tickets).
- **Pre-sales and Sponsorship allocations:** tickets made available for priority purchase through presales are often based on arrangements with third party partners that fail to give real priority access to genuine fans.
- **Corporate and Hospitality Package Allocations:** Promoters regularly hold back significant volumes of tickets for corporate interests, sponsors and hospitality packages, resulting in a significant reduction in tickets that the general public can access in the first place.
- **Failing to identify purchasers and effectively limiting the number of tickets per purchase:** Failing to pre-qualify/identify purchasers and/or impose limits on the number of tickets that any individual can purchase in the primary tickets market causes concern. Some promoters also impose caps but fail to set-up systems to enforce the measures effectively.
- **Poor timing of ticket sales:** It is common practice that all publicly available tickets are dumped onto the market simultaneously, usually at 9am AEST on a Monday morning,

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<sup>2</sup> Adele Ferguson, CVC looks to Ticketek sale to trim debt, The Sydney Morning Herald, March 6, 2012, <http://www.smh.com.au/business/cvc-looks-to-ticketek-sale-to-trim-debt-20120305-1uefb.html>

<sup>3</sup> Newspoll survey conducted online over the period 26-29 September 2013, among a national sample of 1213 respondents aged 18 to 64.

causing phone lines and Internet sites to collapse under the pressure. Early sales of tickets to events – in particular, major finals (in some cases before the teams are even known) so far in advance of the event – also generate unwanted tickets.

Recent Australian examples where this may have occurred is Rugby's Lions Tour of Australia in 2013 which reportedly sold out in 15 minutes<sup>4</sup>, and Manchester United vs A Leagues stars (football) in 2013.<sup>5</sup>

International examples include Justin Bieber's Nashville show in February 2013, only seven per cent of tickets to the show were available to purchase at the general sale, meaning 93 per cent of tickets had already been set aside for other partners.

At Taylor Swift's US concerts, just 15 per cent of tickets were available at the advertised on-sale date. For Miley Cyrus' Hannah Montana tour, the numbers were similar, about 15 to 20 per cent.<sup>6</sup>

The secondary market is different however, based on the size of the secondary market say the UK, estimates vary 5-20% depending upon the type of event say football, concert etc.<sup>7</sup>

The Australian market also has more competition in the secondary market, including Showbiz, Viagogo, Facebook, Localbroker, Gumtree, My Tickets, Seatwave and others.

In addition, primary ticket companies like Ticketmaster have begun testing out its new TM+ system, which allows for tickets to be re-sold on the Ticketmaster website. In effect becoming a player in the secondary market as well.

The high concentration in the primary ticket market has attracted scrutiny.

In 2010, the Australian Competition and Consumer Commission (ACCC) took action against Ticketek, having investigated its treatment of discount-ticketing retailer Lasttix.

In December 2011, the Federal Court imposed a penalty totalling \$2.5 million on Ticketek, finding that on four separate occasions Ticketek engaged in conduct with the anti-competitive purpose of deterring or preventing Lasttix from supplying its services. In declaring the conduct had contravened the Act, Justice Bennett said:

*"The four incidents comprising the conduct were not accidental. They each arose due to a deliberate decision and, apparently reflected a policy or practice not limited geographically within Australia. The conduct was engaged in by both lower level employees and by more senior management."*<sup>8</sup>

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<sup>4</sup> Rupert Guinness, Megan Levy, Long-awaited Lions tour sells out in 15 minutes, The Sydney Morning Herald, February 19, 2013, <http://www.smh.com.au/rugby-union/lions/long-awaited-lions-tour-sells-out-in-15-minutes-20130218-2eng9.html>

<sup>5</sup> Megan Levy, Fans disunited as supporters accuse Ticketek of own goal, December 12, 2012, <http://www.smh.com.au/sport/football/fans-disunited-as-supporters-accuse-ticketek-of-own-goal-20121212-2b8w3.html>

<sup>6</sup> Why you cant get a ticket to your favourite concert, News.com.au, May 3 2013, <http://www.news.com.au/entertainment/music/why-you-cant-get-a-ticket-to-your-favourite-concert/story-e6frfn09-1226634119343>

<sup>7</sup> Europe Economics, Analysis of the Secondary Sales market for Tickets for sporting, cultural and other events, September 2009, [http://www.europe-economics.com/publications/secondary\\_sales\\_market.pdf](http://www.europe-economics.com/publications/secondary_sales_market.pdf)

<sup>8</sup> <http://www.accc.gov.au/media-release/ticketek-pty-ltd-penalised-25-million-for-misusing-its-market-power>

## **TICKET RESALES USING EBAY DATA**

According to eBay data, the demand to sell tickets on eBay largely comes from consumers wishing to re-sell a ticket for an event that they can no longer attend. eBay offers an important resale avenue to consumers when they have no rights to obtain a refund to an event.

Further the ticket category is no different to other categories on eBay in terms of buyer experience. Bad Buyer Experience (BBE) is when a seller rates as one or two stars (out of 5 stars) on any transaction for any of the following matters: ie item as described, postage time, communication, postage and handling charges. The tickets category has approximately the same rate of BBE as other categories, in other words the rate of a poor transaction is as low as in other categories yet the ticket category attracts much more attention than any other category.

eBay therefore questions why tickets should be treated any differently to any other non-essential goods or services for the purposes of resale or transfer. eBay is unable to find examples of other optional consumer items which cannot be transferred or resold in the free market, or can only be resold at a pre-determined price, or which require resale through the primary sales channel or some other exclusive resale/distribution arrangement.

One argument raised by promoters in an attempt to differentiate an event ticket from any other consumer good is that a ticket is a non-transferable contract between the promoter and the original ticket purchaser. However, the enforceability of any such terms prohibiting transfer will inevitably depend upon various factors, including the terms of the particular contract, the circumstances in which the ticket purchaser entered the purported contract, whether the terms and conditions of the ticket comply with consumer protection laws, and the manner in which they are disclosed to consumers.

For example, in 2006 the Federal Court case<sup>10</sup> between eBay and the organisers of the Big Day Out concert, very few of the tickets sold on the primary market were found to contain enforceable contract terms, this was due to the lack of transparency and ineffective incorporation of restrictive terms, the existence of inconsistent terms, and due to the insufficient notice provided to consumers of those terms, as well as issues relating to contractual privity.<sup>11</sup>

### **Data relating to ticket sales on ebay.com.au**

When a ticket to a popular event is advertised at a significant premium on ebay.com.au, this attracts significant publicity, even if the tickets do not ultimately sell. This misrepresents ticket sales on ebay.com.au. It is important to identify the distinction between actual ticket prices achieved by sellers, as compared with the advertised ticket prices, and then consider the overall picture rather than focusing on one-off sales taking place through eBay.com.au. It is also misleading to simply compare the resale cost to the original face value of the ticket, without considering the (typically) considerable surcharges and other additional costs like

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<sup>10</sup> <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2006/1768.html?stem=0&synonyms=0&query=ebay%20big%20day%20out>

<sup>11</sup> <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2006/1768.html?stem=0&synonyms=0&query=ebay%20big%20day%20out>

postage/packaging costs that the promoters have added to the primary market ticket sale, above and beyond the face value of the ticket.

Further on ebay.com.au sometimes ticket listing result in no sale at all. This means that, although the seller may have advertised the tickets for a price above face value, they may not have actually attained such prices from buyers, or in fact any sale at all. Those sellers who could not sell their unwanted tickets, or return them to the original ticketing agency for a refund, were actually out of pocket. eBay contends that this issue impacts far more consumers than the instances where tickets are resold at a price above face value.

It is not uncommon for the sale price achieved on eBay.com.au to be lower than the true cost of the original purchase, being both the face value and the add-on costs such as booking and delivery fees. Examples of recent events where the price on eBay.com.au for equivalent ticket categories was below the actual price charged to the original ticket purchaser in the primary market for the same category of ticket included:

- NRL Grand Final 2013
- Justin Bieber concerts Australia, 2013

For the NRL 2013 Grand Final, contrary to belief that most tickets listed at that price are sold, 30 percent of tickets listed were not sold on eBay.com.au.<sup>12</sup> There were many instances where South Sydney fans who purchased tickets prior to the semi-finals, had sold their tickets below cost price as their team did not make the Grand Final. They often were resorted to go to the secondary market to recover some funds from their ticket as the opportunity for refunds ended prior to the semi-final.

According to media reports, consumers on eBay and Gumtree were selling tickets below cost price with many offering "two for the price of one" deals. One seller, by the screen name of brian\_bloodaxe, offloaded two platinum tickets worth \$570 for just \$226.50.<sup>13</sup> Of the tickets that did sell, around 60% were from auction, and around 40% were fixed price.

For Justin Bieber concerts in Australia in 2013, 29.7% of tickets listed were not sold.<sup>14</sup> It was reported that C reserve tickets for Bieber's Brisbane concert were selling for \$54 on viagogo, almost half the \$100.25 the ticket was bought for on Ticketek. A reserve tickets at his Melbourne concert were going for \$65.56 - that same ticket was selling for \$145.60 on Ticketek. In Sydney, a multitude of A reserve tickets were going for \$83, while on eBay.com.au tickets with a starting price as little as \$50 had been unable to attract a single bid with just a few hours remaining on the auction.<sup>15</sup> Of the tickets that did sell, around 42% were from auction, and around 58% were fixed price.

For these events, many consumers suffered loss as a result of being unable to return their tickets for refund to the ticketing agent. Had they been unable to resell them they would have suffered more loss.

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<sup>12</sup> eBay internal data

<sup>13</sup> Eamonn Duff, Andrew Webster, Seats left empty as Bunnies bolt for home, The Sydney Morning Herald, October 6 2013, <http://www.smh.com.au/rugby-league/league-news/seats-left-empty-as-bunnies-bolt-for-home-20131005-2v0xh.html>

<sup>14</sup> eBay internal data

<sup>15</sup> News.com.au, Justin Bieber: The concert no one wants to go to anymore, November 18, 2013, <http://www.news.com.au/entertainment/music/justin-bieber-the-concert-no-one-wants-to-go-to-anymore/story-e6frfn09-1226762423759>

## COUNTERFEITS AND CANCELLATIONS

One of the key concerns raised in the terms of reference of the inquiry is that sales in the secondary market may result in a consumer acquiring a ticket which is counterfeit. However, the actual incidence of counterfeit ticket being listed for sale on ebay.com.au is practically non-existent, and is certainly insufficiently high to warrant regulatory intervention.

This percentage would include cases where valid tickets are sent and received but where the tickets may be different to what the buyer expected based on the listing information. For example, the listing may have said that the tickets were gold class when in fact the seats were in another class. This percentage would also include situations where the buyer is provided with tickets which are not valid. The tickets may not be valid because they may have been cancelled by a Promoter.

### *Cancellation of Tickets by Promoters*

There are risks that a consumer may acquire a ticket which is worthless, as promoters may cancel legitimate tickets which have been sold in *alleged* breach of their terms and conditions.

It is questionable whether the terms and conditions are enforceable in some circumstances.<sup>18</sup> The cancellation of tickets by the promoter can punish fans who may not be involved in the resale at all. It also impacts fans who have paid to go to an event and are unable to attend, yet are unable to obtain a refund due to the promoter's own terms and conditions. It also punishes those buyers who, through no fault of their own, may not have been able to procure tickets on the primary market. Indeed, their inability to procure a ticket is much more likely to have been due to the many inadequacies arising in the primary ticket distribution market.

Cancellation of tickets, based on the seating claimed in an advertisement or listing, raises additional concerns, as it could result in incorrect seat numbers being stated in advertisements to deliberately avoid detection and the wrong ticket being cancelled by the promoter. This can result in another fan holding the ticket advertised having his or her ticket cancelled without his or her knowledge and being barred from entry, even though they purchased a valid ticket at face value from an official outlet.

If the purpose of such disclosure is to provide buyers with better information about the quality of the ticket seating, this can be achieved through alternative means. Most ticket sellers on online marketplaces, for example, provide information as to the general location/vicinity of the ticket, thus indicating its overall quality. In addition, secondary market buyers can access publicly available venue seating plans to determine the location of their seats.

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<sup>16</sup> eBay's submission 2010 Commonwealth Consumer Affairs Advisory Council

<sup>18</sup> <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2006/1768.html?stem=0&synonyms=0&query=ebay%20big%20day%20out>



## **EFFECTIVENESS OF CURRENT LEGISLATION**

### **Australia's regulatory experience**

In 2010 the Commonwealth Consumer Affairs Advisory Council (CCAAC) reviewed ticket onselling and its impact on consumers. Following the review the Council reported that the volume of on-selling tickets is exaggerated.

Their research showed that most reselling is being done by legitimate fans offloading tickets that can no longer be used, and they were not doing it as a business. As a result, the Council recommended to Treasury that there is no need to bring in laws to regulate the ticket onselling market as current laws are adequate.

Australia also has comprehensive, easily accessed and regularly used consumer protection laws and regulations at Federal and State levels - the Australian Consumer Law. These laws can be leveraged to ensure that consumer interests are protected in the primary market, which is where eBay submits the majority of issues arise and also is the only place they can be practically addressed.

### **Australian Consumer Law**

There are a number of provisions under the Australian Consumer Law (**ACL**) which are relevant to the regulation of the ticket industry.

These include:

- (a) the misleading and deceptive conduct provisions (sections 18 and 29). These provisions prohibit both primary ticket sellers and ticket resellers from making misleading statements about the tickets they are selling;
- (b) the unconscionable conduct provisions (sections 20-22 of the ACL). The unconscionable conduct provisions prevent ticket sellers from taking advantage of vulnerable consumers;
- (c) the provisions regarding unfair consumer contracts (sections 23-28 of the ACL). The unfair contract provisions should work to limit the ability of ticket sellers and resellers from including terms in their contracts which are excessively burdensome on consumers;
- (d) the consumer guarantees (sections 51-59 of the ACL). The consumer guarantees are designed to ensure that consumers get the item that they paid for.

There is scope for regulators to take more action against ticket sellers and resellers utilising the existing ACL provisions (as an alternative to implementing a completely new federal regulatory regime in respect of tickets).

eBay submits that the ACL provides a sufficient consumer protection mechanism at the federal level. The CCAAC in 2010 supported this view. It found that the existing regulatory framework in Australia, made up of generic consumer protection laws and supported by enhanced protections under the ACL, was adequate to protect consumers from unfair trading practices in relation to ticket onselling and therefore that consumer protection regulation specific to the industry was not required.

Queensland and Victoria have implemented legislation to regulate ticket onselling.

### **Victoria**

The Major Sporting Events Act 2009, designated for certain major events in Victoria, provides that the sale and distribution of tickets is in accordance with an approved ticket scheme.

A number of requirements need to be met before additional events can be incorporated under the Act. For example the AFL Grand Final is a declared event. Under the Major Sporting Events Act 2009, it is illegal to on-sell AFL Grand Final tickets at a premium or part of a package, unless the seller is authorised by the AFL.

eBay considers the following features of the Victorian legislation to be positive:

1. The legislation improves transparency as promoters are required to disclose the ticket allocations, so consumers have better visibility of the number of tickets made available to the general public and the number of tickets set aside for corporates, members, hospitality etc. The legislation can lead to improvements in primary distribution practices because it requires that an approved ticket scheme for an event provide that specified minimum proportion of tickets to the event be made available for sale or to distribution to the public generally or to particular classes.
2. As it is event specific, the legislation is focused on a limited subset of events which are expected to be popular and likely to generate sufficient demand to lead to ticket shortages. This is preferential to legislation which attempts to regulate all events, including events which are unlikely to generate sufficient demand to lead to ticket shortages. Legislation focused on a limited subset of events enables secondary marketplaces to more easily review and understand the requirements around ticketing pricing and constraints around resale, and to work with the relevant department and promoters to implement steps to support compliance by users. The limited number of events so far declared under the Victorian legislation has meant these requirements, though creating additional complexity and effort have been manageable.

### **Queensland**

Queensland legislation focuses on specific events or facilities. The Act makes it unlawful for a seller to sell or offer for sale tickets to events held at eight specified stadiums in Queensland at a price greater than 10% above the original ticket price. The law provides that it is also unlawful for a buyer to purchase a ticket for such an event at a price greater than 10% above the original ticket price. These prohibitions apply even if the seller had to pay additional charges greater than 10% of the original ticket price in order to procure the ticket, and even if the purchaser is willing to pay a greater amount.

The absence of requirements for promoters to provide information about their ticketing scheme and to put in place reasonable distribution practices to ensure an adequate number of tickets are released to the general public in the first instance are significant shortcomings associated with the Queensland legislation. This impacts the law's ability to meet its stated intention of ensuring consumer access to affordably priced tickets at major venues in Queensland, and increase the risk of driving resales underground.

In addition, by being targeted at venues rather than events, the Queensland legislation goes beyond what is required to protect consumers and creates considerable increased difficulty and

costs for online marketplaces and law enforcement. Most major events in Queensland are held at these eight venues. Therefore the majority of major events in Queensland are captured by the legislation – even those events where ticket supply may actually exceed demand. Monitoring infringing ticket purchases and sales must also be extremely difficult for police, who are relied upon to enforce these laws.

The Queensland legislation fails to address the large volume of tickets allocated to corporate, hospitality and other groups in the primary market, and creates a market advantage and protection for promoters who may choose to enter the secondary market and resell tickets themselves.

## NSW

The NSW Government has introduced the Fair Trading Amendment (Ticket Reselling) Bill 2013 which proposes restricting ticket onselling. Ticket listings must reveal:

- details of the ticket number and the row and seat number; details of the terms and conditions of sale of the ticket, or details of where to find them (for example, on a website);
- notice of any condition which allows the ticket to be cancelled if it is resold in breach of its terms and conditions; and
- a clear and legible image of the ticket, showing the ticket number, seat and row number. The photograph must not show any barcode on the ticket.

There are several issues with the proposed Bill including:

1. *'A person conducting the business or undertaking of a forum must, within a reasonable time after being notified in writing by any person of an unauthorised advertisement in the forum,...'* s60(3) It could be literally anyone and is too broad, it should be an authorised agency or the original seller. This could lead to vexatious individuals with no direct or indirect interest identifying whole classes of listings, and place additional compliance measures for platforms.
2. The photograph of the ticket could contain the original purchaser's name which could lead to identify theft, abuse and is an unfair disclosure of the seller's identity.
3. *'A resale restriction that provides for a ticket to be cancelled or rendered invalid if it is resold (or if it is resold in certain circumstances) is void unless the ticket contains a warning in the form prescribed by the regulations.'* s60A – This is uncertain.

This legislation gives the promoters' additional legal means to enforce the terms and conditions on their tickets so that the ticket holder cannot offer a ticket for sale if it is in breach of the promoter's conditions. eBay is unaware where Government has done this with contracting terms between private parties on retail purchases. The tiny number of consumer complaints to NSW Fair Trading relate to cancelled events and refunds, this legislation does not address those legitimate consumer concerns.

This Bill is also potentially inconsistent with the *Competition Principles Agreement* signed between all the states almost two decades ago as it is potentially anti-competitive and preserves the power in the hands of the ticket issuers for the primary market. It effectively locks out competition.

The proposed legislation is also contrary to NSW Department advice. In an email from NSW Fair Trading Commissioner, Rob Stowe, dated Tuesday 11 October 2011, addressed to the NSW Fair Trading Minister's Office stated on the issue of ticket scalping:

*"The view, to date, has been that there has not been a sufficient market failure to justify regulatory intervention. There has been a strong view from central agencies that there is not a cost/benefit case for regulation, particularly in view of some of the anti-scalping measures taken by event organisers and promoters in recent years."*<sup>19</sup>

Following a Freedom of Information (FOI)<sup>20</sup> request that eBay undertook with NSW Fair Trading, it was found that of the 44,016 complaints NSW Fair Trading received in 2012, only one complaint fell within the scope of ticket scalping.

In addition, another Freedom of Information (FOI) request revealed that 128<sup>21</sup> ticket related complaints received by NSW Fair Trading as of 26 July 2013 (in 2013), there has been none specifically in relation to scalping, and that 70% of complaints received were in relation to cancelled/postponed events or purchasing issues such as online technical difficulties. None of which will be addressed by the proposed legislation in NSW into ticket reselling.

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<sup>19</sup> Document 341, Freedom of Information, NSW Fair Trading, Date of Decision 8 May 2013

<sup>20</sup> Freedom of Information, NSW Fair Trading, Date of Decision 8 May 2013

<sup>21</sup> Document 1488, Freedom of Information, NSW Fair Trading, Date of Decision 23 October 2013

## **INTERNATIONAL REGULATORY EXPERIENCE**

### **Overview**

Many regulatory options have been explored in Australia and overseas to attempt to restrict or prohibit the resale of tickets in an attempt to curb ticket onselling. eBay has expressed its concerns that regulation is likely to have the effect of pushing ticket resales underground, thereby depriving consumers of the protection and visibility offered by transparent mechanisms such as some online marketplaces.

Regulation has also had other serious, unintended consequences including: reducing the availability of and access to tickets; driving up pricing; impacting consumers' privacy and personal security; and causing inconvenience to fans when tickets are cancelled or when they are unable to obtain a refund, transfer, onsell or otherwise recoup the cost of tickets which they are unable to use.

Attempts to regulate the secondary tickets market have not been effective in reducing scalping and protecting consumer's interests; which is why many jurisdictions in the United States have been moving towards deregulation of the market, rather than regulation.

For example the State of Michigan is considering House Bill 5108 to repeal a 1931 law that prohibits scalping, or selling tickets for more than face value unless granted permission by the venue. The bill has bipartisan support and would bring Michigan in line with most other states that allow the practice in some form.<sup>22</sup>

The primary ticket market should be the focus of any review and reform, as improving primary distribution practices is the only practical way to minimise or eliminate opportunities for scalping to occur in the first place.

Regulation solely focused on the secondary market or some areas of the secondary market would be counter-productive in that it would reduce the impetus for promoters to improve their primary distribution systems to the real benefit of fans and may further entrench anti-competitive practices. The most effective way to minimise scalping is for the promoters to take steps to ensure that the tickets reach those people who value them the most, and who therefore are least likely to want to sell them on at an inflated price.

### **Regulation of the secondary market alone fails to address the root causes of ticket onselling**

It is both inevitable and desirable that a secondary ticket market exists to some extent. Some of the factors that determine the scale of the secondary market, other than supply and demand and the proportion of tickets initially made available to genuine fans in the primary tickets market, include:

- how far in advance of the event tickets go on sale;
- the inevitability that not all people who purchase tickets will be able to or continue to desire to attend the event and may want to transfer their tickets to other people;

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<sup>22</sup> Melissa Anders, Michigan lawmakers consider decriminalizing ticket scalping, mlive, October 29, 2013, [http://www.mlive.com/business/index.ssf/2013/10/michigan\\_lawmakers\\_consider\\_de.html](http://www.mlive.com/business/index.ssf/2013/10/michigan_lawmakers_consider_de.html)

- that some people will not want or be able to spend time (and potentially take time off work and forgo income) seeking tickets when they initially go on sale in the primary market; and
- that others will not decide to attend an event until close to the event.<sup>23</sup>

Furthermore, as the New York Department of State asserted in its February 2010 “*Report on Ticket Reselling and Article 25 of the Arts & Cultural Affairs Law*” (the “**NY Report**”):

*“The establishment of ticket prices on the primary market that are below the true market value of such tickets in fact **creates the opportunity** for speculation and subsequent markups on the secondary market.”* (emphasis added).<sup>24</sup>

A report by OSKR LLC in 2010 found that in markets with laws restricting the resale of tickets, the resale prices of tickets in those markets were actually higher (due to lack of transparency), whereas in those places where there were no such laws, the prices for the re-sale of tickets remained steady.<sup>25</sup>

Further research published in the Sport Management Review supports that legislation is ineffective in addressing its intention to protect consumers:<sup>26</sup>

*“The findings of the current study suggest that these laws do little to accomplish what they were originally set out to do: protect consumers.”*

### **Pricing regulations in the secondary market are ineffective and fail consumers**

Legislation regulating ticket onselling has previously existed in numerous North American states and other countries for years, and data from those countries does not suggest that the legislation has been effective, or improving consumers’ access to tickets. Quite the contrary: empirical data supports the contention that such legislation has actually had an inflationary effect on the face value of tickets in jurisdictions in which secondary sales are restricted or banned. This is one of the reasons that most jurisdictions in the United States have either chosen to not implement, or repeal, legislation that regulates the secondary tickets market. Prior to the enactment of amendments to New York’s *Arts & Cultural Affairs Law* in July 2010, the New York Department of State conducted detailed research into the impact of price-capping legislation on ticket pricing and availability for consumers. This research culminated in a February 2010 report entitled “*Report on Ticket Reselling and Article 25 of the Arts & Cultural Affairs Law*”<sup>27</sup>(the “**NY Report**”), in which the New York Department of State suggests that regulatory regimes that restrict or cap ticket prices in the secondary market have *not* proven to be effective at ensuring genuine fans can get tickets in the first place or in limiting the existence of the secondary tickets market:

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<sup>23</sup> Jasmin Yang, *A Whole Different Ballgame: Ticket Scalping Legislation and Behavioural Economics?* Vanderbilt University, *Journal of Entertainment Law and Practice* 111 (2004-2005) <http://law.vanderbilt.edu/publications/journal-entertainment-technology-law/archive/download.aspx?id=1757> at 26 July 2010.

<sup>24</sup> New York Department of State, “*Report on Ticket Reselling and Article 25 of the Arts & Cultural Affairs Law*”, February 2010, at p6. Available at: [http://www.bettersicketing.com/articles/Ticket\\_Reseller\\_Report.pdf](http://www.bettersicketing.com/articles/Ticket_Reseller_Report.pdf)

<sup>25</sup> Daniel A. Rascher & Andrew D. Schwarz, “Paperless Ticketing” and its Impact on the Secondary Market: An Economic Analysis, OSKR LLC, December 2010

<sup>26</sup> Joris Drayer, Examining the effectiveness of anti-scalping laws in a United States, *Sport Management Review*, Volume 14, Issue 3, August 2011, Pages 226–236, [markethttp://www.sciencedirect.com/science/article/pii/S1441352311000234](http://www.sciencedirect.com/science/article/pii/S1441352311000234)

<sup>27</sup> Available at: [http://www.bettersicketing.com/articles/Ticket\\_Reseller\\_Report.pdf](http://www.bettersicketing.com/articles/Ticket_Reseller_Report.pdf)

*“In comparing the availability and cost of tickets in New York State with that of other states where price caps in the secondary market are in effect, **the Department failed to establish any causal connection between the existence of price caps and the availability and cost of tickets on the primary and secondary market.**”<sup>28</sup> (emphasis added).*

Independent economic studies in fact support the view that laws prohibiting ticket resales actually reduce supply and drive up prices<sup>29</sup>, whereas legitimised onselling can increase competition and keep prices low bringing benefits to consumers.<sup>30</sup> One explanation offered is that tickets sold on the eBay marketplace have competing prices available as a means of price comparison and that the competition created by multiple sellers means prices adjust to what the market will bear.<sup>31</sup>

Other studies also show that markets which restrict on-line trading end up significantly pushing up prices on resold tickets. The emergence and power of exclusive licensed or “authorised” dealers in such markets is considered to be a contributing factor.<sup>32</sup>

In 2007, *Fortune Magazine* highlighted the flaws in the argument that restricting the secondary market will lead to lower prices, citing research findings that anti-scalping laws actually had an *inflationary* effect on ticket prices:

*“Originally, scalping laws were intended to protect consumers, on the belief that allowing the reselling of tickets would limit access to events only to the super wealthy. Much of the economics literature over the years has described the folly of anti-scalping laws. A study last year by Craig Depken, an economist at the University of Texas at Arlington, found that such laws actually result in higher prices at the box office - an average of \$2 extra for a baseball ticket and \$10 extra for a football ticket.”<sup>33</sup>*

This finding has been supported by additional studies that been conducted on the effects of anti-resale laws on ticket pricing. For example, according to one study, ticket prices in markets with licensed dealers are, on average, estimated to be about 50% higher than in other markets.

<sup>34</sup>Regulating all ticket sales to ensure that only licensed dealers have access to the secondary market also leads to increased costs to consumers and effectively diverts Government resources to protecting the private sector business interests of licensed secondary market dealers and primary market players.<sup>35</sup> The existence of a strong secondary market with many sellers generates lower prices than would be achieved without the possibility of resale or with restrictions on licenses limiting the number of sellers.<sup>36</sup>

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<sup>28</sup> New York Department of State, “*Report on Ticket Reselling and Article 25 of the Arts & Cultural Affairs Law*”, February 2010, at p5. Available at: [http://www.betterticketing.com/articles/Ticket\\_Reseller\\_Report.pdf](http://www.betterticketing.com/articles/Ticket_Reseller_Report.pdf)

<sup>29</sup> For example Elfenbein, D *Do Anti-Ticket Scalping Laws Make a Difference Online? Evidence from Internet Sales of NFL Tickets*, June 30, 2006.

<sup>30</sup> For example, P County, *Some Economics of Ticket Resale*, *Journal of Economics Perspective*, Spring 2003.

<sup>31</sup> Live Performance Australia, *Ticket Scalping Discussion Paper* Australian Entertainment Industry Association, dated December 2006, page 9.

<sup>32</sup> Kevin Haskett (2008): *Estimating the Consumer Benefits of Online Trading*, Mimeo, page 25

<sup>33</sup> Tim Arango, “*StubHub sets ticket prices free*”, *Fortune Magazine*, 31 May 2007. Available at: [http://money.cnn.com/2007/05/31/magazines/fortune/pluggedin\\_arango\\_stubhub.fortune/index.htm](http://money.cnn.com/2007/05/31/magazines/fortune/pluggedin_arango_stubhub.fortune/index.htm)

<sup>34</sup> Kevin Haskett (2008): *Estimating the Consumer Benefits of Online Trading*, Page 4

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

A 2006 study conducted by Daniel Elfenbein in the United States<sup>37</sup> analysed data for nearly 400,000 transactions for National Football League tickets completed on eBay.com between 2002 and 2005. The study classified states into 5 different categories, depending on their anti-scalping laws:

1. states with no regulation
2. states with restrictions on resales at event sites;
3. states which require resellers to be licensed (markups unrestricted);
4. states which require resellers to be licensed (markups restricted but in some states as high as 50%); and
5. states which prohibit resale above face value of the ticket.

The Elfenstein study found that:

*“stricter anti-ticket scalping regulation are associated with lower levels of online trade, with higher incidence of transactions that occur across state boundaries and are hence harder to regulate, and with prices and markups for online transaction that are even higher than those in states with no anti-scalping laws. States that require resellers to be licenses and limit markups by statute see the highest prices in the online resale market.”<sup>38</sup>*

The Elfenstein study was expanded and further analyzed by Kevin A Haskett in his paper “Estimating the Consumer benefit of online Trading” using ebay.com data from 2005 to 2007.<sup>39</sup>

Again this was a substantial study analyzing more than 4.9 million ticket sales. Both studies reported very similar findings. The Haskett study confirmed that, in the sample, there were roughly 225 fewer tickets sold through eBay.com, where resellers were required to be licensed, and 500 fewer tickets where resales were prohibited above the face value of the ticket. Both studies demonstrated that ticket prices were, as a result of reduced supply, *higher* in states where resales were prohibited or restricted, *“any kind of regulation is associated with higher prices overall”*.<sup>40</sup>

In the Haskett study, requirements for resellers to be licensed drove the per-ticket price for the relevant sample up by more than \$200, and restrictions on resales drove the price up by \$50. Consumers in regulation-free states paid on average \$145 less per ticket than those in regulated states.<sup>41</sup> Stricter regulations were associated with fewer online transactions, a greater frequency of transactions that crossed state borders, as well as higher prices and markups in the secondary market, prompting Haskett to conclude:

*“We find that states with anti-scalping laws have created an environment which is anything but consumer friendly. Indeed, prices in regulated states are much higher, and aggregate spending on NFL tickets in resale markets would increase, according to our estimates, by about \$1 billion per year if anti-scalping regulations were adopted nation wide.”<sup>42</sup>*

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<sup>37</sup> Elfenbein, Daniel W, “Do Anti –Ticket Scalping Laws Make a Difference Online? Evidence from Internet Sales of NFL Tickets (June 30 2006). Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=595682](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=595682)

<sup>38</sup> Elfenstein, Daniel W, “Do Anti –Ticket Scalping Laws Make a Difference Online? Evidence from Internet Sales of NFL Tickets (June 30 2006). Pg 2 Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=595682](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=595682)

<sup>39</sup> Kevin Haskett, Ibid

<sup>40</sup> Ibid at page 24.

<sup>41</sup> Ibid, page 25

<sup>42</sup> Ibid, page 29



Gary Adler, counsel for the National Association of Ticket Brokers in the United States, references other empirical data which shows that, in free markets, prices come down. He confirmed that 40% of tickets resold on the secondary market in the United States are sold below face value.<sup>43</sup>

Price regulation is unnecessary in a market with multiple suppliers lacking any great ability to differentiate their product, other than by price. If many sellers were able to distribute the same tickets, competition would have a downward impact on overall ticket pricing.

These studies support the contention that deregulating to allow legitimised competitive on-selling brings benefit to consumers. Attempts to regulate are unnecessary as there is very limited data to support that consumers suffer any detriment as a result of on-selling and in fact there is data to suggest that in many instances consumers pay less when on-selling is available. The emergence and growth of the secondary market in deregulated markets who offer consumers competitive prices and operate legitimate businesses, some of which offer refunds and other consumer protections, provide an improvement on the options currently available to consumers in the primary market. These benefits have been recognised in New York:

*“One of the greatest benefits in removing the price caps has been the legitimization of the ticket resale industry, providing business and employment opportunities for New York residents. These legitimate businesses also contribute to the State’s economy. The ticket resale market allows consumers unable to attend an event for which they have tickets to recoup their costs by selling the tickets to another consumer. Additionally, the secondary market provides a valuable service to tourists and visitors willing to pay a premium to purchase high-quality tickets to events on short notice. In fact, the resale market provides significant benefits to the hotel industry, which uses concierge-procured tickets as a selling point. In most cases, the secondary marketplace also offers a safe alternative to unlicensed street-based scalpers, against whom consumers have no recourse when sold fraudulent tickets.”<sup>44</sup>*

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<sup>43</sup> Ibid, page 15

*Ticket resale is spreading*, USA Today, dated 5 July 2007, [http://www.usatoday.com/sports/2007-07-04-ticket-resale-deregulation\\_N.htm](http://www.usatoday.com/sports/2007-07-04-ticket-resale-deregulation_N.htm) at 26 July 2010.

<sup>44</sup> [http://www.betterticketing.com/articles/Ticket\\_Reseller\\_Report.pdf](http://www.betterticketing.com/articles/Ticket_Reseller_Report.pdf) P7

## CONSUMER ISSUES

In independent research commissioned by eBay conducted nationally by leading research company Newspoll<sup>45</sup>, found:

*In terms of ticket distribution:*

- 8 in 10 respondents think there should be more tickets available for the general public and less for corporations and sponsors.
- 76% of respondents think the event organiser should not sell tickets in bulk so tickets do not fall into the hands of scalpers.

*In terms of reselling or buying tickets on the second-hand market :*

- 81% of respondents think that if they had a ticket to a sporting event, concert or other event that they could no longer use then they should be allowed to resell it.
- 76% of respondents agree that they should be able to get a refund if they can no longer attend an event for legitimate reasons (73% said that individuals selling spare tickets if they are no longer able to attend, is not the same as ticket touting or scalping).

Other findings of the survey included:

- 80% of respondents agree that ticket distributors have too many surcharges and additional fees;
- 75% of respondents said that the number or percentage of tickets available to the general public should be disclosed publicly by the ticket distributor;

These statistics demonstrate that consumer concerns focus on measures to be implemented to make the primary ticket market more transparent, and that there is benefit in the secondary ticket market.

A major area of consumer concern is the issue of ticketing surcharges in the primary market.

For example, a Sydney Festival event, the Dido & Aeneas seat was \$55, but after selecting the number of tickets a transaction of \$6.50 was applied, a 12 percent markup on the \$55 ticket. The same flat fee is applied for more expensive tickets. On the Ticketmaster website that same event a handling fee of \$7.95 applies per transaction.<sup>46</sup>

According to CHOICE's website:

*"...fans who bought tickets in 2012 through Ticketek for Jack White's Sydney show had to pay a \$7.60 charge for a ticket they were sent as an email attachment and had to print themselves. To top it off, they had to pay a credit card surcharge as well.*

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<sup>45</sup> The survey was conducted online, over the period 26-29 September 2013, among a national sample of 1213 respondents aged 18 to 64.

<sup>46</sup> Steve Dow, The Sydney Morning Herald, Ticket Price Gouging taking consumers for a ride, January 20 2014, <http://www.smh.com.au/entertainment/sydney-festival/ticket-price-gouging-taking-consumers-for-a-ride-20140117-3102w.html>

*Those buying tickets from Ticketmaster to The Nutcracker on Ice in Melbourne in late 2012 were in the same boat – a \$7.15 handling charge is levied even at those who elect to print their own tickets, and is revealed only at the very end of the booking process.”<sup>47</sup>*

In 2012, Ticket and Ticketmaster were recipients of CHOICE’s Shonky Awards.<sup>48</sup> The Shonky awards shine a spotlight on products and services that are sneaky, slippery, unscrupulous and sometimes unsafe. While Shonky award winners may not be breaking laws or breaching regulations, “CHOICE believes that consumers deserve better products and services, and the 2012 lemons are ripe for the Shonky picking.”<sup>49</sup>

The Shonky award was for:

*“over-the-top and inescapable fees applied when purchasing tickets to an event or concert. The price of the additional fees depends on the ticket company, venue and the performer however examples include a \$9.50 handling fee or \$5.20 to receive an email ticket to print at home; \$7.60 to pick up the ticket up from the venue; \$5.60 to have the ticket sent via SMS; \$11.10 to have the ticket sent via registered post, or \$7.60 to have the ticket delivered by regular mail. Add a 1-3% credit card surcharge on top of that.”<sup>50</sup>*

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<sup>47</sup> <http://www.choice.com.au/reviews-and-tests/money/shopping-and-legal/shopping/ticket-pricing/page/booking-and-postal-charges.aspx>

<sup>48</sup> CHOICE Media Release, Tuesday 30 October 2012, 2012 CHOICE SHONKY’S AWARDS

<sup>49</sup> CHOICE Media Release, Tuesday 30 October 2012, 2012 CHOICE SHONKY’S AWARDS

<sup>50</sup> CHOICE Media Release, Tuesday 30 October 2012, 2012 CHOICE SHONKY’S AWARDS

## CONCLUSION & RECOMMENDATIONS

eBay is opposed to the introduction of ticket onselling legislation.

eBay recommends the consideration of other options, including focusing on the primary ticket market by requiring ticket promoters to:

- **Stagger ticket releases**, for example by releasing tranches to fans within fanclubs first;
- **Limit the number of tickets a person can purchase** (these numbers vary for different events);
- **Increase transparency on the primary ticket market**, so consumers are made aware how many tickets are being made available to the public and fan clubs, as opposed to corporate sponsors, VIPs, promoters and credit card companies.
- **Reduce ancillary costs** associated with primary ticket purchases (and thereby reducing overall ticket cost). Currently consumers have to pay handling fees; printing ticket fees; collection from venue fees; SMS fees; postage fees; and credit card surcharges; (all of which they are keen to recoup if unable to attend the event);
- **Provision of refunds**, promoters should provide more extensive rights to refunds. Most other sellers of goods and services provide refunds for unused goods. Even in instances where consumers can purchase ticket insurance, they often have many conditions and caveats.

In addition eBay recommends:

- **Conducting further research** into this area and seeking consumer views regarding the re-sale of tickets; and
- **Examining the secondary ticket market, particularly international jurisdictions** such as the US and the UK, where viable economic arrangements exist between sporting clubs and ticket promoters, and the secondary market, ultimately benefiting consumers and all parties.

Though eBay is not advocating legislation, a Federal approach to the issue should consider aspects of the Victorian legislation.

These include:

- Promoters are required to disclose the ticket allocations, so consumers have better visibility of the number of tickets made available to the general public and the number of tickets set aside for corporates, members, hospitality etc.
- Legislation is event specific and targets primarily sold out events where demand will outstrip supply. Legislation focused on a limited subset of events enables secondary marketplaces to more easily review and understand the ticketing pricing and constraints around resale, and to work with the relevant department and Promoters to put in place steps to support compliance by users.

Further, current provisions in the ACL are sufficient to address concerns raised by the Inquiry.

## **APPEXDIX**

### **EBAY POLICIES**

ebay.com.au is an open and transparent marketplace where individuals and businesses can legitimately buy or sell practically anything with greater safety than other traditional marketplaces.

eBay's policies prohibit sales that are illegal or dangerous.

Items may be advertised for sale in auction format, at a fixed price (called "Buy It Now"), through a combination of auction and Buy It Now formats, or through classified advertisements.

eBay requires its buyers and sellers to act lawfully and has in place various measures to protect consumers using ebay.com.au. These include providing buyers and sellers with education and information about their potential legal obligations; acting upon failures to comply with eBay policies and applicable legal requirements; and working with law enforcement and regulators to develop methods and diagnostic tools to identify and catch lawbreakers.

Since its formation, eBay has demonstrated its commitment to work with the government, regulatory bodies and other stakeholders to produce measures that strengthen consumer protection. Consumer confidence is at the very core of eBay's business model.

eBay has a fundamental interest in protecting consumers who trade on ebay.com.au from unscrupulous sellers. Given that eBay's business reputation is strongly associated with that of its sellers, poor buyer experiences caused by unscrupulous sellers serve to harm the reputation of eBay, as well as its community of members in general. To improve consumer confidence and buyer experiences, and to protect consumers, eBay has in place many self-regulatory protection measures.

At the same time, eBay believes fundamentally that unrestricted, transparent markets are the best way to deliver lower prices and better value to consumers. This includes in relation to tickets.

For many ticket buyers, ebay.com.au –provides a transparent means of obtaining a ticket to an event at a price they are willing to pay. Many individuals, cut losses tickets purchased but unable to be used, given that promoters typically fail to provide purchasers with refund rights; a situation that many consumers are unaware of when they purchase tickets in the primary market.<sup>51</sup>

If regulation is implemented, there is a genuine risk that consumers' ticket purchases will be driven off transparent marketplaces and underground to places with little to no consumer protection.

### **Provision of Information**

In respect of ticket sales, eBay has in place clear trading policies, and displays prominent notices in the selling and purchasing flows on ebay.com.au,.

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<sup>51</sup> According independent research conducted by leading research company UMR in July 2010 83% of respondents pay little to no attention to ticket sale terms and conditions when purchasing tickets.

eBay has also taken proactive steps to support consumers' compliance with legislative requirements relating to ticket reselling in Victoria and Queensland.

### **Full Pricing Disclosure**

#### *Price comparison*

Consumers buying tickets on ebay.com.au can make a more informed choice prior to purchase than they can in the primary ticket market. Consumers can take their time to research prices offered on and off ebay.com.au, and to view prices that other buyers have agreed to pay for comparable ticket listings (both active listings and actual prices paid for completed listings).

This information allows consumers to compare prices between sellers and to make an educated decision about how much they are willing to pay, and from whom they are willing to purchase tickets.

#### *No surcharges*

eBay does not permit sellers to impose a surcharge on any payment method that buyers may use to pay for items bought on ebay.com.au. This reduces confusion among buyers as to the total price payable for their item; reduces potentially misleading or deceptive practices on the part of sellers about the full cost of an item; and helps to prevent unscrupulous or unprofessional sellers from using surcharges to steer buyers towards less safe payment mechanisms. As a result, consumers who trade on ebay.com.au have certainty about the final price they will be charged.

### **Registration Details**

All users of ebay.com.au, both buyers and sellers, are required to register with eBay and provide accurate contact details as a condition of membership. In the very unlikely event of fraud or dispute, there is not only transparency but also an audit trail.

eBay's Privacy Policy also enables eBay to provide member contact information to government bodies and regulators in relation to lawful investigations.

### **eBay Feedback**

On completion of a transaction, buyers and sellers rate each other with feedback – over time this creates a reputation for each eBay user. For example, the buyer would provide feedback about the seller, whether the goods sold were as advertised and whether they were delivered within the promised time, etc. As a result, an eBay username develops a “reputation” within the eBay environment. The positive, neutral and negative comments provided by other members of the eBay community.

ebay.com.au provides evaluation of a seller's previous trading history and helps to build an accurate profile and reputation of that seller.

The quantity and the quality of accumulated feedback that attaches to an eBay username is vitally important when buyers are considering transacting on ebay.com.au. A buyer who does not receive the tickets that he or she has paid for can leave adverse feedback against the seller's profile, thereby warning other buyers of the risks of transacting with that seller. If a seller receives multiple or continued neutral or negative feedback ratings, eBay will take appropriate action against that seller.

## **Education**

eBay is committed to raising consumer awareness about trust and safety issues in transacting online. eBay has a long and consistent record of educating consumers about how to avoid problematic and fraudulent online transactions, and has invested millions of dollars in so doing.

## **eBay dispute resolution process**

If a buyer doesn't receive tickets they have paid for and they can't resolve the matter directly with the seller, the buyer can report the seller to eBay – regardless of how they have chosen to pay for the tickets. eBay will investigate and, if warranted, the seller's account may be restricted or suspended. eBay will also fully co-operate with any police or regulatory investigation if the buyer wishes to report the matter to the police or to a regulatory authority.