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Details of Filing

Document Lodged: Concise Statement
File Number: VID311/2022
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v AIRBNB IRELAND UC (IRELAND COMPANY REGISTRATION NUMBER 511825) & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 8/06/2022 10:44:22 AM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form NCF1

Concise Statement

No. _____ of 2022

Federal Court of Australia

District Registry: Victoria

Division: General

Commercial and Corporations National Practice Area (Regulator and Consumer Protection)

Australian Competition and Consumer Commission

Applicant

Airbnb Ireland UC (Ireland Company Registration Number 511825) and another named in the schedule

Respondents

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 1 This is a claim against the Respondents for displaying prices in United States dollars (**USD**) on the Airbnb peer-to-peer rental accommodation service (**Platform**), to users in Australia seeking accommodation in Australia, without making clear that those prices were denominated in USD. The value in Australian dollars (**AUD**) of the charges levied on users in Australia for accommodation booked on the Platform was higher than the dollar figures displayed on the Platform. When some consumers raised this issue with Airbnb customer support, they were told, falsely, that they had made a selection to be charged in USD.

Background

- 2 The Second Respondent (**Airbnb, Inc**) is a limited liability company incorporated in the United States of America. It is the ultimate owner of the First Respondent (**Airbnb Ireland**), and a number of other corporate entities (together, **Airbnb Group**). Airbnb Ireland is incorporated in Ireland as an unlimited company.
- 3 At all relevant times, Airbnb, Inc owned all intellectual property related to the source code for the Platform, and was responsible for creating or approving the content and display of the pages the Platform showed to users in Australia when booking and/or searching for accommodation. At all relevant times, Airbnb Ireland operated the Platform, and published the pages the Platform displayed to users in Australia.

Filed on behalf of (name & role of party) Australian Competition and Consumer Commission, Applicant

Prepared by (name of person/lawyer) Andrew Riordan

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4 At all relevant times, users in Australia could access the Platform using a desktop or laptop computer, by visiting the web address <https://www.airbnb.com.au/> (**Website**). They could also access the Platform using a handheld device such as a mobile phone or tablet, by visiting that web address (**Mobile Site**) or by using Airbnb mobile application software (**Apps**). They could seek assistance by communicating with customer support personnel (**CS Personnel**) by telephone or through a “chat” function on the Platform. The CS Personnel used Airbnb branding and titles when dealing with users. Some CS Personnel were employees of Airbnb Ireland or Airbnb, Inc; others were engaged by third parties who supplied their services to Airbnb Ireland and/or Airbnb, Inc (in which case the third parties or the CS Personnel were agents of Airbnb Ireland and/or Airbnb, Inc).

The AUD Representation

- 5 For some users in Australia (**Consumers**) who used the Platform to book and/or search for accommodation in Australia during the period from at least January 2018 to August 2021, the process operated as described below.
- 6 The Consumer accessed the Platform by opening the Website, the Mobile Site or an App, entered information about the accommodation they sought (such as location and dates), and clicked a “Search” button.
- 7 The Platform then displayed search results which showed previews of accommodation listings. The previews briefly described the relevant property and its approximate location, and displayed an amount, with a dollar sign, as the “total” price for the accommodation. In at least some instances, this page also displayed, or allowed the Consumer to access, a map which showed each property’s approximate location, and repeated the “total” price.
- 8 If the Consumer clicked on one of those previews, the Platform displayed a page showing a more detailed listing for the relevant accommodation listing, which again identified the “total” price for the accommodation as an amount with a dollar sign. A button labelled “Reserve” appeared near (either below or next to) that amount. In at least some instances, the Platform also displayed the words “Price shown is the total trip price including additional fees and taxes”, and a table which identified that the “total” price comprised separate amounts, with dollar signs, for the nightly fee, and cleaning and service fees. The bottom row in the table repeated the “total” price.
- 9 The dollar amounts described in paragraphs 7 and 8 were displayed to Consumers without any nearby indication of whether the amount was in AUD or USD. The only reference to USD appeared in the footer of the Website and Mobile Site (not the Apps), in small font, well below those dollar amounts.

- 10 In circumstances where Consumers were using the Platform in Australia, in relation to accommodation in Australia, and (for Consumers using the Website or Mobile Site) using a website address ending in “.au”, the Respondents’ display of dollar amounts in this way conveyed to Consumers that the prices a Consumer would be charged if they booked accommodation using the Platform were the displayed amounts in AUD (**AUD Representation**). In fact, Consumers would be, and in numerous cases were, charged the displayed amounts in USD for accommodation booked on the Platform.
- 11 After (but not necessarily immediately after) the Consumer clicked the “Reserve” button described in paragraph 8, the Platform displayed a page which included a heading “Price Details” above a version of the table described in paragraph 8. Consumers were charged for the booking if they clicked a button under that table labelled “Confirm and Pay”.
- 12 In at least some instances, the bottom row of that table read “Total (USD)” on the left hand side, and on the right hand side repeated the “total” price. The text “(USD)” was in small font. It appeared late, and only once, in the booking process, after the Platform had displayed numerous dollar amounts (including, repeatedly, the “total” price) without nearby reference to USD, and after the Consumer had clicked to “reserve” their accommodation.
- 13 Once the Consumer had paid, the Platform displayed a page headed “Your reservation is confirmed!”, which repeated the “total” price without reference to USD.
- 14 Consumers to whom the Respondents made the AUD Representation, who booked accommodation on the Platform, incurred costs as a result of being charged in USD that they would not have incurred if charged in AUD, being the difference between the USD price and the price they would have paid if charged in AUD (**Price Difference Costs**). Some Consumers also paid charges to their financial institution which would not have been levied had they been charged in AUD (**Transaction Fee Costs**).

The Selection Representation

- 15 Some Consumers raised concerns with CS Personnel about having been charged in USD (**Complainant Consumers**).
- 16 From at least January 2018 to August 2021, CS Personnel made statements to Complainant Consumers to the effect that the Platform had used amounts in USD for the Complainant Consumer’s booking because the Complainant Consumer had selected for the Platform to do so (**Selection Statements**). Examples of these statements are in Annexure A.
- 17 By making the Selection Statements, the CS Personnel, and therefore Airbnb Ireland and/or Airbnb, Inc, represented to Complainant Consumers that the Platform had used

amounts in USD for the Complainant Consumer's booking because the Complainant Consumer had selected for the Platform to do so (**Selection Representation**). In fact, numerous Complainant Consumers had made no such selection.

B. RELIEF SOUGHT FROM THE COURT

18 The Applicant claims the relief set out in the accompanying Originating Application:

- (a) declarations under section 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**);
- (b) injunctions under section 232 of the Australian Consumer Law (**ACL**), contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth);
- (c) pecuniary penalties under section 224 of the ACL;
- (d) orders for redress for non-party consumers under section 239 of the ACL;
- (e) publication and compliance orders under section 246 of the ACL; and
- (f) costs under section 43(1) of the FCA Act.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

19 By reason of the matters identified in paragraphs 5 to 14 above, by making the AUD Representation, the Respondents, in trade or commerce, made a false or misleading representation as to the price of accommodation available on the Platform in contravention of section 29(1)(i) of the ACL, and engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the ACL, and thus caused the classes of Consumers identified in paragraph 14 to suffer loss or damage.

20 By reason of the matters identified in paragraphs 15 to 17 above, by making the Selection Representation, the Respondents, in trade or commerce, engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the ACL.

D. ALLEGED HARM SUFFERED BY CONSUMERS, AND BENEFIT TO THE RESPONDENTS

21 The Consumers to whom the Respondents made the AUD Representation suffered harm, as they were deprived of the opportunity to make an informed decision about whether and at what price to book accommodation using the Platform. Consumers who booked accommodation on the Platform suffered further harm in the form of Price Difference Costs, and in at least some cases, Transaction Fee Costs.

- 22 The harm was exacerbated for those Complainant Consumers to whom Airbnb Ireland and/or Airbnb, Inc made the Selection Representation, as it was apt to deflect responsibility from the Airbnb Group and thereby discourage Complainant Consumers from exercising their rights under the ACL.
- 23 The consumer harm was further exacerbated by CS Personnel, from at least 14 February 2018 to 6 August 2021, making statements to Complainant Consumers to the effect that the Consumer was not entitled to a cash payment from the Airbnb Group to compensate them for Price Difference Costs or Transaction Fee Costs (or both) that they had incurred (**Remedy Statements**). Examples of these statements are in Annexure B.
- 24 The Consumers to whom Airbnb Ireland and/or Airbnb, Inc made the AUD Representations, and either or both of the Selection Representation and the Remedy Statements, also suffered harm to the extent that they spent time and energy communicating with CS Personnel in order to seek, in the case of:
- (a) the AUD Representation, redress from the Airbnb Group for any Price Difference Costs or Transaction Fee Costs (or both);
 - (b) the Selection Representation and Remedy Statements, to persuade the Airbnb Group of the inaccuracy of those representations and/or statements.
- 25 The Respondents obtained commercial benefits from making the AUD Representation, because Consumers booked accommodation at prices in USD, in circumstances where they may not have booked accommodation on the Platform at those prices, or at all, absent that representation. The Respondents are also likely to have gained an advantage over their competitors to the extent that the false and misleadingly low prices conveyed by the AUD Representation wrongly made the accommodation available on the Platform appear to be more attractive than accommodation offered by their competitors. The Respondents obtained commercial benefits from the Selection Representation and Remedy Statements, to the extent that Complainant Consumers were discouraged from pursuing their rights under the ACL at all, or to their full extent.

Date: 7 June 2022



.....
Signed by Andrew Riordan
Norton Rose Fulbright Australia
Lawyers for the Applicant

This Concise Statement was prepared by Michael Borsky QC and Alice Muhlebach of counsel.

Schedule

No.

of 2022

Federal Court of Australia

District Registry: Victoria

Division: General

Commercial and Corporations National Practice Area (Regulator and Consumer Protection)

Second Respondent: Airbnb, Inc (Registration Number 4566980)

Date: 7 June 2022

Certificate of lawyer

I Andrew Riordan certify to the Court that, in relation to the Concise Statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 7 June 2022

Handwritten signature of Andrew Riordan in black ink, consisting of the letters 'AR' followed by a stylized flourish.

.....
Signed by Andrew Riordan

Lawyer for the Applicant

ANNEXURE A

Date of communication	Examples of Selection Statements (expression and spelling retained from the original statements)
3 January 2018	... we only apply charges based on the user's selection.
12 January 2018	... your preferred currency as per your profile settings is USD. this is the reason you've been charged in USD instead of AUD.
26 January 2018	... you chose USD as your preferred currency in your profile. This is why you see and are billed in USD.
7 February 2018	After a thorough investigation, I have found that ... your preferred currency is USD.
9 February 2018	...in your profile you have selected your preferred currency as USD. When you select your preferred currency in your profile, you will see prices as per that currency and you will be charged in that currency only. This is the reason that you were charged in USD for your reservation.
7 April 2018	... it seems that while making payment for this reservation you selected by default USD currency and this is the reason your billing receipt is displaying in USD than AUD.
26 April 2018	...while you have chosen Australia as the payment country, you have set your preferred payment currency to US dollars at the time of the booking and this was the payment preference that was captured by the system.
26 April 2018	...you were charged in the default currency which was selected at the time of booking.
7 June 2018	... you chose USD as payment that is why you were charged in USD.
5 July 2018	... the currency under the listing that you selected is in US dollars that's why you've been charged for Conversion fee and Cross-border fees.
16 July 2018	You were charged currency conversion fee of 3% because currency you selected on the checkout page is different from the listing's country currency.
16 December 2018	... the currency you selected at the time of booking was USD.
17 January 2019	We will display prices on Airbnb in the currency you select.
26 March 2019	... you chose to pay in USD. At the final moment of the payment, you were notified about the currency, and you selected USD instead of AUD.
8 April 2019	... the initial currency chosen at the time you booked your reservation with [host name] is USD.
7 August 2019	... the system will follow the currency that you selected at the time of booking and we do not have a way to change that.

Date of communication	Examples of Selection Statements (expression and spelling retained from the original statements)
5 September 2019	... you initially selected USD currency upon booking. That is the reason why you've been charged in USD instead of AUD.
23 March 2020	... Our system records the currency selected upon completing the reservation and it shows that it was in USD.
27 March 2020	... the USD currency was selected at the time you made the reservation.
4 April 2020	I can really see here that you selected USD when you booked it.
15 June 2020	It seems like on the booking process, you selected USD instead of AUD as a currency.
19 June 2020	After thorough investigation, as you were informed by my colleague that when you booked your selected currency was in USD....
19 June 2020	... our system only collects the amount along with the currency selected on your account.
23 July 2020	... your selected currency was USD. So, even though you are logged in an Australian website if your selected currency is USD, you will still be charge in USD.
30 September 2020	... the reason why it shows as USD currency because that was the selected currency upon completing the reservation.
7 November 2020	... the system will only charge based on the preferred settings on your account.
20 November 2020	... when you were asked to select the currency at the checkout, you have selected USD, hence, charging your card in USD.
20 November 2020	Please know that guests are always charge in currency they selected at checkout, upon checking that reservation, you have selected in USD.
3 December 2020	... you're the one who initially selected USD as your currency for payment.
10 January 2021	It appears that the chosen currency is USD.
18 January 2021	You were the one who chose the USD currency for this reservation.
20 May 2021	The receipt reflects the currency you chose to pay in, which is USD, not AUD ...
4 July 2021	Initial selected guest currency is in USD that is why you were charge in USD.
31 August 2021	... you selected \$ currency on the checkout page.

ANNEXURE B

Date of communication	Examples of Remedy Statements (expression and spelling retained from the original statements)
14 February 2018	I have read your issue about the currency. But we can't refund an amount that we didn't cause.
18 February 2018	... there will be no refund of 230 to you because there is no error on our end.
15 March 2018	... when the Bank processed the payment for the reservation, they paid us in USD and charged the conversion fee on your card. ... You will have to contact the bank for the extra charges.
17 March 2018	... we are not able to cover the bank fees, as this charge is not from Airbnb.
24 March 2018	As for the international fees, we are not able to cover as this charge is not from Airbnb but rather bank fees.
10 April 2018	... the amount shown on the receipt is what we have charged and the difference is not charged by Airbnb, therefore, we cannot compensate a guest for these exchange fees...
12 April 2018	... we cannot compensate a guest for these exchange fees which is charged by your bank.
26 April 2018	...I have already refunded the international transaction fee to your Mastercard...I'm unable to process any other refund since we only collected the actual cost of the reservation.
4 May 2018	The best thing you can do is discuss this directly with your host in the message thread and see if they would be willing to waive their cancelation policy and allow you to rebook using your native currency.
14 June 2018	I cannot proceed the refund for you.
19 June 2018	Tried to request for a refund for the conversion fee but was denied.
21 June 2018	... the difference is not charged by Airbnb, therefore, we cannot compensate for these exchange fees. In terms of being reimbursed the difference, we really cannot process this for you ...
5 December 2018	Airbnb will not shoulder currency conversion rates ...
26 March 2019	... the conversion fee is valid, and we cannot have that refunded.

Date of communication	Examples of Remedy Statements (expression and spelling retained from the original statements)
7 April 2019	I have to inform you with a heavy heart that we cannot refund you the amount that you're asking because the initial payment currency that you selected is USD.
19 May 2019	... no refund can be provided.
24 September 2019	... We cannot provide a full refund because of the currency.
25 September 2019	As much as I'd love to help you out but for this concern, we cannot provide a full refund.
9 February 2020	I am sorry that I can not process any partial refund for this issue.
15 June 2020	As much as I would like to refund you the difference, by the time that you booked the reservation, it shows here that currency that you used was in USD and not AUD and we are unable to refund this to your account.
19 June 2020	... we can't grant your refund request.
7 July 2020	Please refer to your billing receipt to show the amount Airbnb charged and/or refunded. If the amount is different from what's shown on our billing receipt, this is a good indicator that your bank charged an additional fee. The difference is not charged by Airbnb, therefore, we cannot compensate for these fees.
15 July 2020	Any refund needed will be at your host's discretion.
8 October 2020	You will have two options for this booking: 1. Keep the reservation 2. Cancel the trip and you will need to coordinate with your host to arrange a full refund.
28 December 2020	... we regret that we cannot provide a cash reimbursement for the additional fees incurred.
26 January 2021	... you are not eligible for any reimbursement, because: You were charged in this currency because you selected it on the checkout page. You are always charged in currency that you selected at checkout.
25 May 2021	...since this has been already processed by your bank for the conversion fee then we won't be able to make a refund on our end.
6 August 2021	No, we cannot refund or change the currency you chose to pay with.