

The Absence of Competition in the Privacy Terms of Online Marketplaces

Submission in Response to the
ACCC General Online Retail Marketplaces Issues Paper,
Digital Platform Services Inquiry

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The views in this submission are my own, based on my research, and do not represent the official views of UNSW Sydney.

This submission does not attempt to address all of the topics raised by the Issues Paper, but is limited to the issue of the consumer data collected, used and disclosed when consumers use general online retail marketplaces ('online marketplaces') according to their privacy terms.

It provides an analysis of the privacy terms offered by four key online marketplaces in Australia, to offer some assessment of both:

- the quality of privacy terms offered to website users via those notices; and
- the extent of competition between firms with respect to the privacy terms offered to website users.

This analysis is based on the various notices containing privacy terms published by the online marketplaces in question as at 16 August 2021, and concerns only the terms offered in respect of use of relevant the website, including making purchases via the online marketplace. For example, the analysis does not include terms published in respect of Amazon's Fire TV or Kindle devices.

The analysis does not attempt to report on the actual data practices of these marketplaces, but is based on a good-faith interpretation of the published privacy terms.

Executive Summary

This analysis, together with existing research on consumer data practices, gives rise to the following key recommendations and conclusions:

- At a minimum, it should be **unlawful for online retailers and marketplaces to collect data relating to an individual consumer from a third party**, unless the consumer has requested the online retailer or marketplace to do this by taking clear and unequivocal action with respect to specified third parties. There should be an exception if the collection and use are only for strictly necessary purposes, such as detection of unlawful activity, address verification and credit checks, where credit is sought.
- There is **negligible competition** between the major online marketplaces operating in Australia in respect of the privacy terms offered to website users and marketplace customers. This is illustrated by the tables in Annexures 1 and 2.
- In particular, the privacy terms of all major online marketplaces in Australia:
 - include numerous **vague, open-ended and confusing terms** that limit consumers' information and decision-making.
 - offer **no real and substantial choices about excess data collection and data uses** (that is, collection and uses beyond those necessary to facilitate browsing and purchasing via an online marketplace).
 - universally **require consumers to “consent” to the online marketplace obtaining further data about the consumer from third parties**, often including data brokers and/or advertising companies, as a condition of using the website or marketplace. This is not necessary for the operation of the website or marketplace.
 - promise consumers they **can opt out of seeing** or receiving targeted ads or marketing, without highlighting the fact that this will not prevent the marketplace from continuing to collect and use excess data about the consumer. A warning about this should be highlighted.
 - require consumers to engage in the Sisyphean task of adjusting privacy settings and rejecting and/or deleting cookies and similar technologies, in a **likely fruitless attempt to avoid tracking** by these means. There should be a “no-cookie”/“no-tracking” default setting.
- Those major online marketplaces operating in both the European Union and Australia expressly offer **more privacy-protective terms and defaults to EU users than Australian users**, which can be taken to be a consequence of stronger privacy regulation in the EU.
- The **three recommendations** in this submission – the third-party data collection rule; the no-cookie /no-tracking default; and the warning on personalised advertising opt-outs – are modest, simple and achievable steps towards greater transparency and choice, while major changes to our privacy laws are still being considered.
- The following high-level observations can be made about the privacy terms of some key online marketplaces:
 - The **eBay** privacy terms offer the most detail and transparency of the terms considered *only if* the 22,000 words are read carefully. However, eBay does not highlight, or headline with,

the terms that would be of most concern to consumers. eBay does not provide significantly greater privacy choices than other marketplaces.

- The **Amazon** privacy terms make some gestures towards greater privacy protections, having regard to the pseudonymisation of some requests for data from third parties and its promise not to materially reduce privacy protections through unilateral amendments. However, Amazon does not provide consumers with significantly greater privacy choices than other marketplaces and the use of pseudonyms does nothing to mitigate Amazon's requirement that consumers agree to Amazon collecting excess data from third parties.
- It is difficult to give a clear indication of the extent of Kogan's data collection and sharing since the **Kogan** privacy terms are some of the vaguest and potentially least complete of all the privacy terms analysed.
- It seems likely that few consumers would be aware that **Catch.com.au** is part of the Wesfarmers group and that companies in the Wesfarmers group (including Kmart, Officeworks, Target and Bunnings) automatically share and combine data about consumers interacting with any member of the group to create a more detailed profile of the consumer for marketing purposes.

1. The absence of competition in privacy terms in online marketplaces

The privacy terms of online marketplaces analysed for the purposes of this submission are detailed in Annexure 4.

These privacy terms vary significantly in their form, from eBay's 22,000 words to Kogan's 1,500 words. Amazon Australia spreads its 4,200 words of marketplace privacy terms over three documents, while eBay chooses to present its privacy terms by way of headings that can be expanded to reveal much more information and includes information about other jurisdictions' privacy terms.

However, when the substance of these privacy terms was distilled, there was very little that varied between them in the quality of their privacy offering. This is evident in the pervasive lack of choice and the unnecessary collection, uses and disclosures of consumer data illustrated in Annexures 1 and 2.

It cannot seriously be suggested that online marketplaces in Australia genuinely attempt to compete on the privacy terms they offer consumers. Some may argue that this is because consumers "don't care about privacy". Such arguments ignore, or seek to contradict, consumers' express attitudes in surveys.¹

The more likely explanation for this lack of competition is that:

- the true privacy terms of online retailers and marketplaces are concealed by vague, complex wording and their failure to highlight or headline with practices that would be of most concern to consumers; and
- no marketplace wishes to provide consumers with substantial privacy choices while their rivals may continue to undermine consumers' privacy to their own advantage without detection, which makes the present situation a 'race to the bottom'.²

¹ Phuong Nguyen and Lauren Solomon, 'Consumer Data and the Digital Economy: Emerging Issues in Data Collection, Use & Sharing' (Consumer Policy Research Centre, 2017) 4, 36-38; ACCC, 'Digital Platforms Inquiry: Final Report' (June 2019) 389-390; OAIC, 'Australian Community Attitudes to Privacy Survey' (2017) ii.

² See further Katharine Kemp, 'Concealed Data Practices and Competition Law: Why Privacy Matters' (2020) 16 *European Competition Journal* 628 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3432769

These factors can be overcome by a combination of substantive rules concerning data practices that are prohibited; and procedural rules concerning choices and information that must be provided.

The influence of the regulatory context on the quality of privacy terms offered to consumers in different geographic markets is clear where major platforms expressly provide different and more privacy-protective terms and defaults to consumers in the European Union relative to consumers in Australia, as in the privacy terms of Amazon and eBay, for example. This is a reflection of the higher privacy standards required by the EU General Data Protection Regulation.

The three recommendations in this submission are modest, simple and achievable steps towards greater transparency and choice, while more substantial changes to our privacy laws are still being considered.

2. Third-party data collection rule

2.1 Rationale for focusing on the third-party data collection rule

This submission focuses in particular on the recommendation of a general prohibition on the collection of data relating to a consumer from third parties, for four reasons:

- First, unlike many confusing and opaque consumer data practices that presently prevail in Australian markets,³ the unnecessary collection of data relating to a consumer from third parties is a practice most consumers would readily understand and would clearly find objectionable.
- Second, terms requiring consumers to “consent” to companies obtaining data about the consumer from third parties are pervasive, but obscured, in the privacy policies of many companies in Australia.⁴ The result is consumers are not capable of knowing what they are consenting to.
- Third, the collection and use of data about the consumer from third parties is generally unnecessary for the provision of the product in question and represents opportunistic behaviour on the part of the companies in question.⁵
- Fourth, a clear rule prohibiting this type of data collection would have impacts on unfair consumer data flows along the unseen data supply chain by preventing a key final intended use of that data.

While there are many more aspects of privacy regulation which must be improved as a matter of urgency, for the above reasons, this recommendation is for a simple rule that consumers would readily understand and support, to eradicate a practice that cannot be justified.

2.2 Pervasive and unnecessary third-party data collection terms

The privacy terms of each of the marketplaces considered in this analysis require consumers to “consent” to the online marketplace obtaining data about the consumer from third parties where the consumer has not provided that information themselves, as a condition of using the website or marketplace. These third parties often include data brokers and/or advertising companies. Examples of these terms are provided in Annexure 3, alongside similar terms from other major companies.

Under these terms, third-party data collection is not limited to that which is necessary to enable consumers to browse the website, make purchases, or receive delivery of goods or services. It is not limited to data necessary for the operation of the website or the marketplace, including the detection of unlawful activity.

³ See, eg, Katharine Kemp, ‘Submission in Response to the Australian Competition and Consumer Commission Ad Tech Inquiry Issues Paper’ (26 April 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587239

⁴ See Annexure 3.

⁵ Use of personal information in these circumstances is arguably already unlawful in Australia: see *Flight Centre Travel Group (Privacy)* [2020] AICmr 57. It would clearly be unlawful in the European Union.

Rather, marketplaces use this third-party data to create and build a more detailed profile of the consumer for purposes such as marketing, profiling, advertising and/or product development.

It is reasonable to assume most consumers would not have discovered these terms, which are not highlighted in the privacy terms, but buried below numerous other terms about obvious, uncontentious data practices.

2.3 Consumer choice on third-party data collection

Consumers wishing to browse or purchase items in an online marketplace should not be forced to “consent” to third parties unnecessarily sharing data about them. Currently consumers are given no choice.

Some consumers may be comfortable providing online retailers with further information about themselves for these purposes, and they should be able to do that. Such consumers could provide that information directly to the retailer for those purposes on request, or they might ask the retailer to collect the data about them from third parties, if that is their preference. But this preference should not be assumed.

2.4 A clear third-party data collection rule

The general rule should be that online retailers and marketplaces must not collect data relating to an individual from another company, unless the individual has requested the online retailer or marketplace to do this by taking clear and unequivocal action.

For example, the collection would be lawful if the consumer ticks an unticked box next to a plain message, such as:

Please obtain information about my interests, needs, behaviours and/or characteristics from the following data brokers, advertising companies and/or other third-party suppliers:

The third parties should be named. In the absence of such a request, the default should be that no such data is collected. The box is unticked. This rule would be consistent with the desires of Australian consumers, as revealed by consumer surveys: the majority of Australian consumers are not comfortable with companies unnecessarily sharing their personal information.⁶

There will be reasonable exceptions to this rule, such as obtaining information about a consumer strictly necessary for the operation of the marketplace, such as detecting unlawful activity, address verification and/or credit checks, if the consumer has sought credit. But data obtained for these purposes should not be repurposed for marketing, advertising, business development and/or general “research”.

2.5 Pseudonymisation and device identification not exempt

Collection would not be exempt from this rule simply because the companies use a pseudonym or unique identifier, rather than the consumer’s given name or contact details, to link data collected by the marketplace with data about the same consumer collected by a third party.

Amazon, for example, states that it collects data about the consumer from third parties using pseudonyms. This may have the relatively minor benefit that Amazon is presumably not broadcasting the consumer’s given name or contact details to third parties who do not already have those in their possession. However, it still permits Amazon to insist on building more detailed profiles about consumers using data from third parties, against the wishes of many consumers.

⁶ See, eg, Phuong Nguyen and Lauren Solomon, ‘Consumer Data and the Digital Economy: Emerging Issues in Data Collection, Use & Sharing’ (Consumer Policy Research Centre, 2017) 4, 36-38; ACCC, ‘Digital Platforms Inquiry: Final Report’ (June 2019) 389-390; OAIC, ‘Australian Community Attitudes to Privacy Survey’ (2017) ii.

Similarly, using advertising identifiers or other device identifiers to link data still permits a company to probabilistically connect data relating to that individual consumer. Use of these identifiers should not circumvent the rule.

2.6 Turning off the tap on implied “consents”

A number of companies expressly seek to justify data collection from third parties on the basis that the consumer has previously given their (presumably implied) consent to some company sharing data about them with a data broker, data platform, corporate group member or other company; although they were likely opaquely labelled as “trusted partners”. These implied consents are fictional and pervasive. They should be eliminated through improved privacy regulation, including deterrent financial penalties.

In the meantime, it is possible to turn off the tap on some unfair data flows by creating a simple rule that online retailers and marketplaces must not collect data relating to a consumer from a third party, unless the consumer requests the retailer or marketplace to do this through the consumer’s own clear and unequivocal action.

Such a rule can be expected to have impacts along the unseen data supply chain. It may also give rise to welcome calls for other digital platforms to be prevented from relying on similarly obscure and fictional consents. Even if there are arguments that digital platforms that provide “free” online services can be expected to extract data about consumers while consumers are using their platforms, there should be no expectation that such platforms can also insist on collecting data about the consumer from third parties.

3. “Choices” concerning cookies and other tracking technologies

The privacy terms analysed generally specify that the consumer must take action to avoid cookies and similar technologies being used to track their behaviour online, if that is their preference. These terms are objectionable for two reasons.

First, the default position should be that the marketplace does not set cookies on the consumer’s browser or device, or allow third parties to do the same, beyond cookies strictly necessary for functionality, unless the consumer actively opts in to the setting of those cookies. Consumers who favour cookies for other purposes are likely to be content to have a cookie set on their device or browser which signals their consent.

Second, the fact that marketplaces in fact require the opposite – that is, that the consumer must attempt to opt out of default marketing cookies – puts consumers in the fairly absurd position that they must use their device or browser settings to block and/or delete cookies, but the blocking of cookies prevents the website from functioning and the deletion of cookies removes the very cookie that indicates the consumer’s preference not to be subjected to targeted advertising. These preferences then need to be reset.

As the eBay Cookie Notice points out:

If you delete all cookies on your device, any opt-out cookies that have already been set will also be deleted, so that you will have to declare again any opt-outs that have already been declared.

The Amazon Privacy Notice states that:

Because cookies and identifiers allow you to take advantage of some essential features of Amazon Services, we recommend that you leave them turned on. For instance, if you block or otherwise reject our cookies, you will not be able to add items to your Shopping Cart, proceed to Checkout, or use any Services that require you to Sign in.

Some privacy terms also direct consumers who wish to avoid tracking to visit third party websites of advertising associations to attempt to opt out of third party advertising cookies. These processes also fail if the consumer's browser blocks cookies, and will have to be repeated if the consumer deletes cookies.

This approach to imposing cookies used for marketing and advertising purposes is clearly dysfunctional and disingenuous. While the privacy terms of online marketplaces also refer to other tracking technologies, such as web beacons, pixels and tags, they provide consumers no option to avoid these. Companies should not bundle such uses of consumer data with uses that are necessary for the operation of the marketplace.

A plain default rule that cookies and similar tracking technologies must not be used without clear, unequivocal and active consent is appropriate, except for strictly necessary cookies and technologies used for functionality.

4. Opting out of *seeing* behavioural advertising: Warning required

Most of the major marketplaces emphasise that consumers can opt out of seeing "personalised advertising" and/or receiving marketing communications. This may sound encouraging, but it is likely to give many consumers a false impression. That is, many consumers would not notice that the privacy terms only promise that the consumer can opt out of viewing behavioural advertising. The terms do not suggest that the consumer can opt out of the collection, retention and use of their data for marketing and advertising purposes.

None of the marketplaces highlight this distinction in their privacy terms. However, the following term can be found in the more obscure passages of eBay's Cookie Notice:

If you choose not to have your personal data processed by us for advertising purposes using cookies (and similar technologies), ... advertisements will not be personalised for you by means of cookies, web beacons or similar technologies. As a result, you will no longer receive personalised advertising in the future, *but your data may still be collected as described in our User Privacy Notice.* (emphasis added)

The User Privacy Notice gives eBay the right to collect data about the consumer from data brokers and use personal data for broader marketing purposes, and to share that data with very broadly-defined third parties.

While other marketplaces are not specific on this score, a careful reading of their privacy terms suggests that their position is likely to be the same. The opt-out offered only concerns whether the consumer will see the advertising in question. Amazon, for example, states:

Amazon offers you choices about receiving interest-based ads from us. You can choose not to receive interest-based ads from Amazon.

If it is the position that the marketplace gives the consumer the ability to opt out of seeing personalised advertising, but not the ability to opt out of the collection and use of data for marketing purposes that are not necessary for the provision of the service, this should at the very least be highlighted for the consumer. (To be clear, a company behaving appropriately would not bundle consents and set less privacy as the default in this way in the first place. This is a second-best measure.)

For example, the company should give a warning such as the following:

"You can opt out of viewing personalised advertising by changing the privacy setting below.

Important note on limited choices: Even if you opt out of seeing personalised advertising, we will continue to collect and use your personal data for our own marketing, product development and

other advertising purposes, and disclose that data to third parties for their marketing or advertising purposes. We do not provide consumers with the ability to opt out of these uses of data about them. This would avoid giving consumers a false impression about the extent of privacy choices the marketplace is permitting.

5. Conclusion

The absence of competition on privacy terms between online marketplaces is evident when the terms are compared on matters of substance.⁷ The comparisons in Annexures 1 and 2 below demonstrate a consistent lack of choices and information offered to consumers on issues that are known to concern consumers.

- All of the published privacy terms headline with obvious, uncontentious uses and leave the revelation of more controversial collections and disclosures until later terms and/or other webpages that the consumer must navigate to and attempt to interpret as a whole.
- The platforms offer consumers no choices regarding most of the unnecessary tracking, uses and disclosures. Some choices that are touted – particularly those regarding tracking cookies – are farcical.
- All of the policies use a number of vague, open-ended, inconsistent and undefined terms to describe purposes for which the data is used and/or other parties with whom data is exchanged. Consumers cannot guess who an “affiliate” might be; how their data will be used for “internal management needs”; or how the platform has determined the consumer already consented to other parties sharing their personal data.
- None of the marketplaces indicates the number of third parties to whom consumer data is disclosed, or from whom data is collected, or provides the names of all these third parties. This prevents comparisons between marketplaces on this score. One might share with 60 third parties and another with 600, but the consumer has no way of finding out. This also means consumers cannot test claims that they have already consented to these third parties disclosing data about them.

The use of online retailers and marketplaces is no longer a matter of choice. Millions of Australians are presently in lockdown, remaining in their homes to avoid disastrous health outcomes for our communities. In the midst of the pandemic, a much-needed and major review of our privacy legislation has also been delayed. The modest recommendations made in this submission would go some way to avoiding online retailers and marketplaces taking advantage of these circumstances to impose unnecessary, unfair and privacy-degrading data practices on Australian consumers.

⁷ Some marketplaces even signal the lack of choice and competition on key aspects to consumers – eg, Amazon Interest Based Advertising Notice states, “As is common in the advertising industry, we use cookies, pixels, and other technologies...”.

Annexure 1

Key Online Marketplace Privacy Terms – Privacy Settings and Choices

Privacy settings and choices	Amazon	eBay	Kogan	Catch
Australian consumers get terms and defaults that are as privacy-protective as those provided to consumers in the EU	No	No	n/a	n/a
Privacy settings for Australian consumers:				
Defaults that are set to more privacy, but consumers can choose less privacy	Nil	Nil	Nil	Nil
Defaults that are set to less privacy – and choices that are provided to consumers:				
Platform discloses data about the consumer, and/or activity on consumer's device, to third parties	No choice, but uses advertising identifiers ⁸ with ad companies	No choice	No choice offered, but Kogan considers the consumer has consented in some way ⁹	No choice
Platform obtains data about the consumer from third parties (eg data brokers, ad companies and/or other suppliers) for profiling and/or marketing	No choice, but uses pseudonym ¹⁰ for some	No choice offered	No choice offered	No choice offered
Platform and/or third parties will show consumers targeted ads	Can opt out of <i>seeing</i> the ads ¹¹	Can opt out of <i>seeing</i> the ads	Not specified	Opt-out not apparent
Platform and/or third parties will send marketing communications to consumer	Can unsubscribe from <i>receiving</i> messages	Can unsubscribe from <i>receiving</i> messages	Can unsubscribe from <i>receiving</i> messages	Can unsubscribe from <i>receiving</i> messages
Platform uses data about the consumer for additional purposes not necessary for purchases, delivery or security	No choice, other than the above	No choice, other than the above	No choice, other than the above	No choice, other than the above

⁸ While Amazon states that it uses “an advertising identifier like a cookie or other device identifier” to provide ad companies with information about the consumer, rather than “your name or other information that directly identifies you”, this does not alter the fact that ad companies would thereby add detail to the profile of that consumer or activities on their device.

⁹ It seems likely that Kogan is relying on broadly worded notices and implied “consents” in its own and/or third-party website privacy policies.

¹⁰ Amazon does not explain the pseudonymisation process, but this is likely to involve Amazon and the third party essentially agreeing on a pseudonym for the consumer in order to connect data they respectively hold about the consumer or the consumer's device, without directly using the consumer's name or contact details. Amazon obtains more data related to the consumer / activity on the consumer's device regardless.

¹¹ The limits of these options offered by Amazon and eBay are explained in section 4 of this submission.

	Amazon	eBay	Kogan	Catch
Platform places unnecessary tracking cookies on the consumer's browser/device and/or uses similar tracking technologies	Dysfunctional self-help only ¹²	Dysfunctional self-help only	Dysfunctional self-help only	Dysfunctional self-help only
Platform allows third parties to place unnecessary tracking cookies on the consumer's browser/device and/or use similar tracking technologies	Dysfunctional self-help only	Dysfunctional self-help only	Dysfunctional self-help only	Dysfunctional self-help only
Platform will sell / transfer data about the consumer as part of a sale of business / business assets	No choice	No choice	Not specified	No choice ¹³
Platform makes changes to the privacy terms, without first obtaining consumer consent	No choice, but makes a qualification ¹⁴	No choice	No choice	No choice
Consumer's ability to withdraw consent for future uses, other than viewing ads/receiving messages	None mentioned	Unclear ¹⁵	None mentioned	None mentioned

Definitions for this analysis:

'Additional purposes' are purposes beyond those necessary to enable the consumer to purchase, pay for, and receive delivery of, products via the marketplace. We count credit checks, detection of unlawful activity, address verification and disclosures required (rather than authorised) by law as activities that are necessary to provide you with this service.

'Behavioural or targeted advertising' means advertising targeted on the basis of information about the consumer's behaviour / activities online and / or offline.

'Data about the consumer' means any data relating to an identified or identifiable individual, including direct or indirect identification by association with online identifiers other than the individual's name or contact details. This may be broader than the currently uncertain definition of "personal information" under Australian law (which is under review). We are now tracked in ways that were not possible in 1988.

'Device fingerprinting' uses the unique configuration of the consumer's device's operating system and browser to identify their device or browser so that they can be tracked online when they use that device. This can be the unique combination of features such as the consumer's address, browser version, language preferences, plug-ins and screen resolution. These are recognisable even after you delete cookies.

'Do' / 'Does' – If the privacy policy gives the company permission to do something, we assume they do it.

'Profiling' means collecting and combining information that reveals the consumer's demographics (age, gender, income, location); purchases; interests; and/or searches, to advance the company's business through marketing, advertising, product development and/or providing data services to, or exchanges with, other companies.

¹²For each of these marketplaces, consumers are advised that they can block or delete cookies via their device or browser settings to avoid tracking via cookies for marketing purposes; and potentially select an opt-out cookie, which will likely need to be reset, and visit third party websites to opt out of some third-party cookies. The onerous and futile processes are described in Section 3 of this submission.

¹³ The Catch term is less protective of consumers' privacy than the corresponding terms in Amazon and eBay privacy terms, since Catch does not promise that this transfer would be subject to the existing privacy terms.

¹⁴ Amazon says it will not "materially change" these terms "to make them less protective of customer information collected in the past without the consent of affected customers". Amazon does not specify whether this would only be with active, opt-in consent, or whether that consent could be implied by inaction.

¹⁵ The eBay User Privacy Notice states that rights to withdrawal of consent and erasure are "[s]ubject to possible restrictions under national law", and the eBay DPO had not responded to questions concerning the position for Australian consumers prior to this submission.

Annexure 2

Key Online Marketplace Privacy Terms – Extent of Data Collection, Use and Disclosure

Extent of data collection, use and disclosure	Amazon	eBay	Kogan	Catch
Third parties to whom platform discloses data about the consumer and/or activity on consumer’s device, for purposes not necessary for purchasing, delivery or security	Very broad, incl: - Subsidiary companies of Amazon.com Inc - Third-party “ad companies” (using an advertising identifier)	Very broad, incl: - eBay Inc corporate family members - “Other companies, like websites or ad networks” - Facebook - Google - Google Analytics, unless user takes steps to block	Likely very broad - “Third-parties” engaged by Kogan for marketing / management - “Any person or entity” where Kogan considers the consumer has consented in some way ¹⁶	Very broad, incl: - “Third parties in order for them to provide or market services to you, such as our commercial partners” or loyalty partners - Other companies in Wesfarmers Group, incl Kmart, Target, Officeworks, Bunnings
Third parties from whom platform obtains data about the consumer for profiling and/or marketing, such as data brokers, ad companies and other suppliers	Very broad, incl: - “Some third parties” - “Our affiliates” - “Some merchants” - “Ad companies” - “Third-Party Advertising Services”	Very broad, incl: - “Data brokers” - “Data providers” - “Third parties” - “Public sources” - “eBay Inc corporate family members”	Very broad, incl: - “Reputable third party lead generation sources” and other “third parties” where Kogan considers the third party has given notice or the consumer has consented in some way ¹⁷	Very broad, incl: - Third parties “affiliated with” Catch - “Related companies” - Third parties providing services to Catch, incl Google, Flybuys - Other companies in Wesfarmers Group, incl Kmart, Target, Officeworks, Bunnings
Invisible or less obvious data collected about the consumer and/or device:				
Data about the consumer from third parties, such as data brokers, ad companies or other suppliers	Collected	Collected	Collected	Collected

¹⁶ It seems likely that Kogan is relying on broadly worded notices and implied “consents” in its own and third-party website privacy policies.

¹⁷ It seems likely that Kogan is relying on broadly worded notices and implied “consents” in third-party website privacy policies.

	Amazon	eBay	Kogan	Catch
Data about the consumer from single sign-on partners such as Google or Facebook	No – Amazon sign-in only	Collected	Collected	Collected
Location information, unless blocked by device settings	Collected	Collected	Not specified ¹⁸	Collected
Clickstream data, such as time spent on page, time of access, clicks, scrolling	Collected	Collected	Not specified	Collected
Browsing and/or viewing history on the website	Collected	Collected	Not specified	Collected
Data about the consumer's interactions with ads, eg clicking, subsequent purchases	Collected	Collected	Not specified	Not specified
Device fingerprinting identifiers, such as operating system; preference settings; software	Collected	Collected	Not specified	Collected
IP address, which indicates location and device ID	Collected	Collected	Not specified	Collected
How long the platform keeps data about the consumer before deleting	Not disclosed	No specific time. Notes variation of retention depending on types of data and jurisdiction.	Vague Until "Kogan no longer needs your personal information for any of the purposes set out in this policy" unless "otherwise required by law".	Vague "When no longer required, personal information is destroyed in a secure manner or deleted."
Third parties that can place cookies, or other tracking technologies, on the consumer's device when consumer uses the website	Very broad - "Search engines" - "Social media networks" - "Approved third parties" - "Providers of measurement & analytics services" - "Advertising companies" - "Third party advertisers"	Very broad - "Selected third parties" - "Authorised third-party providers" - "Ad networks" - "Ad exchanges"	Unclear - "Third party partners" operating Kogan branded websites - Inclusive list only	Very broad - "Third party affiliate marketing or aggregation services" - Google - Google Analytics, unless blocked

¹⁸ The Kogan Privacy Policy only provides a broad definition of personal information collected and states that the information collected "includes, *without limitation*" several types of information (emphasis added). It is not at all clear whether Kogan does not collect further personal data collected by other marketplaces or whether it collects such data but has decided not to list it as an example in the privacy policy.

	Amazon	eBay	Kogan	Catch
Data used for additional purposes by default				
For third-party targeted ad businesses, including tracking responses elsewhere online ¹⁹	Yes	Yes	Not specified	Not specified
For the platform's targeted ad business, including tracking responses ²⁰	Yes	Yes	Unclear – potentially part of broad “marketing activities”	Not specified
To build a profile of consumer's likely interests, preferences, and/or characteristics	Yes	Yes	Unclear – potentially part of broad “marketing activities”	Yes
To send marketing and/or promotional messages, unless opt out	Yes	Yes	Yes	Yes
To conduct research or analysis to develop the platform's content, products, and/or services	Yes	Yes	Unclear – potentially part of “management needs”	Yes
To measure and analyse the performance of the platform's products and/or services	Yes	Yes	Unclear – potentially part of “management needs”	Not specified
To make co-branded product offers or marketing with other companies	Yes	Yes	Possibly part of Kogan-branded offers by third parties	Not specified

'Additional purposes' are purposes beyond those necessary to enable the consumer to purchase, pay for, and receive delivery of, products via the marketplace. We count credit checks, fraud detection, address verification and disclosures required by law as activities that *are* necessary to provide you with this service.

'Behavioural or targeted advertising' means advertising targeted on the basis of information about the consumer's behaviour / activities online and / or offline.

'Data about the consumer' means any data relating to an identified or identifiable individual, including direct or indirect identification by association with online identifiers other than the individual's name or contact details. This may be broader than the currently uncertain definition of “personal information” under Australian law (which is under review). We are now tracked in ways that were not possible in 1988.

'Device fingerprinting' uses the unique configuration of the consumer's device's operating system and browser to identify their device or browser so that they can be tracked online when they use that device. This can be the unique combination of features such as IP address, browser version, language preferences, plug-ins and screen resolution.

'Profiling' means collecting and combining information that reveals the consumer's demographics (age, gender, income, location); purchases; interests; and/or searches, to advance the company's business through marketing, advertising, product development and/or providing data services to, or exchanges with, other companies.

¹⁹ This allows third-party advertising businesses to decide which targeted ads to show the consumer and measure effectiveness of their targeted ads based on the consumer's actions, such as clicking or purchasing.

²⁰ This allows the platform to decide which behavioural ads to show the consumer, for which the platform may use information such as the consumer's interactions with websites, content, or services.

Annexure 3

Examples of Third-Party Data Collection Terms

Text in bold in this annexure was not in bold in the original terms, but has been added to highlight certain distinctions, details and ambiguities of the third-party data collection terms.

Amazon Australia:

Amazon Privacy Notice:

“Examples of information we receive from other sources include:

- ...
- account information, purchase or redemption information, and page-view information from some merchants with which we operate co-branded businesses or for which we provide technical, fulfilment, advertising, or other services;
- Information about your interactions with products and services offered by **our affiliates**;
- search results and links, including paid listings (such as Sponsored Links);...

Amazon Interest Based Ads Notice:

“We work with third parties, such as advertisers, publishers, social media networks, search engines, ad serving companies, and advertising companies working on their behalf, to improve the relevance of ads we serve. In providing you interest-based ads we do not associate your interactions on **unaffiliated** sites with information which **on its own** identifies you, such as name or email address, and we do not provide any such information to advertisers or to third-party sites that display our interest-based ads. Advertisers and other third parties may assume that users who interact with or click on an interest-based ad or content are part of the group that the ad or content is directed towards (for example, users in a particular geographical area or users who purchased or browsed for classical music). **Some third-parties may provide us pseudonymized information about you** (such as demographic information or sites where you have been shown ads) **from offline and online sources** that we may use to provide you more relevant and useful advertising.”

Catch.com.au Privacy Policy:

“We collect personal information for the primary purpose of conducting our business as an online retailer, trader and service provider (including as a marketplace for third party sellers to list and sell goods) including to: ...

undertake data analytics (including **data matching with related companies in the Wesfarmers Group** being Wesfarmers Limited and its subsidiary companies which **includes but is not limited to Kmart, Target, Officeworks and Bunnings** (Related Companies)) to enable us to better understand our customers’ requirements and preferences, conduct product and market research, personalise and improve our platform, services, websites and apps (our platform), and to provide offers that are of greater interest or benefit to customers;...”

“In addition, we may **collect personal information you disclose to third parties who are affiliated with us** or otherwise provide services to us. This includes our Related Companies, third parties who provide services to us such as Flybuys, Catch Connect or other Catch Essentials products or services, or other third party services. These third parties will collect and store your personal information in accordance with

their own privacy policies and procedures, which they will make known to you. We will take reasonable steps to ensure that the individual is made aware of the matters above.”

“We may disclose your information to (a) other members of the Catch Group; and (b) our Related Companies, each of whom may use that information to **undertake data analytics and matching** to enable them to better understand your requirements and preferences, and (if you interact with that business) to personalise and improve their offer to you and to offer products or providing services to you or send direct marketing to you (where you have consented to receiving direct marketing).

In addition, Catch and our Related Companies disclose personal information to, and collect personal information from, each other to understand how you interact with them and what products and services you like, which allows Catch and Related Companies to better understand your preferences and requirements, conduct product and market research, personalise and improve services, websites and apps and to provide offers that are of greater interest or benefit to you.”

eBay Australia User Privacy Notice:

“We also collect personal data from other sources (such as other eBay Inc. corporate family members, credit agencies or bureaus, **and other data brokers**).”

“We also collect personal data about you from other sources and from third parties to the extent permitted by applicable law. In particular, this includes the following data: ...

- Data from **data providers** (e.g. ... demographic, interest-based and online advertising related data)

We combine or connect the personal data we collect from you with data from these other sources.

Where personal data is disclosed to us by third parties, we take steps to confirm that these third parties are legally permitted to disclose your personal data to us. We also receive access to personal data about you from other members of the eBay Inc. corporate family.”

Kogan Privacy Policy:

“Kogan may collect your personal information from **reputable third party lead generation sources for marketing purposes**, but only where you have consented to the disclosure of your information to Kogan and for Kogan to send you marketing communications.”

“Kogan may enter into arrangements with **third parties** (including third parties with whom Kogan has partnered to provide you with its various products or services using the Kogan brand) to collect your personal information in circumstances where the third party notifies you, at the time of collection, that your personal information will be provided to Kogan.”

[The claim that, at the time of collection, consumers consented to each relevant third party providing their personal information to “Kogan” in particular should be substantiated by Kogan.]

Grays Privacy Policy:

“Sometimes we may collect your personal information from other sources. These other sources include:

- ... **commercial information services providers** ...;
- ... agencies and **lead generation providers**;

other businesses involved in our dealings, including our business partners ...;”

Alibaba Privacy Policy:

“We may receive personal information about you from **third parties that are engaged by us ... to improve our marketing efforts.**”

“We may disclose (or provide access to) ...

marketing and advertising platforms, such as Google, Twitter, Facebook and Instagram, and providers of analytics services relating to users’ behavior, in order to tailor the content you see when visiting our Platform. These platforms **may combine information they collect on our Platform with data on their platforms** and data they collect from other websites or through other sources in order to conduct targeted advertising. The processing activities of these third party marketing platforms are governed by their own privacy policies, not this Privacy Policy;”

MyDeal Privacy Policy:

“We may also **collect Your Information from other sources**, for example:

- our **affiliated** and related **companies**;
- **third party suppliers and contractors** who assist us to operate our business; ...

Where personal information is collected from a third party, MyDeal will treat Your Information in accordance with the practices described in this Privacy Policy. MyDeal cannot guarantee the accuracy of personal information provided by a third party.”

Woolworths Group Privacy Policy:²¹

“We may also **collect personal information about you from third parties**, including Endeavour Group (which includes BWS).”

NAB Privacy Policy:²²

“We may **use or disclose information about you in order to combine the information that we hold with information collected from or held by external sources**. We do this in order to enable the development of customer insights about you so that we can serve you better.”

Bunnings Privacy Policy:

“We may collect, use or disclose information about you in order to combine the information that we hold about you with **information about you collected from** or held by Related Companies, **other trusted partners** or from public sources. We may do this to enable us to derive insights about you.”

²¹ <https://www.woolworths.com.au/shop/discover/about-us/privacy-policy>

²² <https://www.nab.com.au/content/dam/nabrwd/documents/policy/banking/nab-privacy-policy.pdf>

Annexure 4

Documents reviewed in this analysis, published as at 16 August 2021

Amazon Australia

Amazon.com.au Privacy Notice	3,293 words
Interest Based Ads Notice	565 words
Cookies Notice	399 words
Total	4,257 words

Catch.com.au

Catch Privacy Policy and Privacy Collection Statement	2,701 words
Total	2,701 words

eBay Australia

eBay User Privacy Notice	16,021 words
eBay Cookie Notice	5,744 words
eBay AdChoice Ad Preferences	379 words
eBay User Agreement, Clause 20	222 words
Total	22,366 words

Kogan

Kogan Privacy Policy	1,537 words
Total	1,537 words