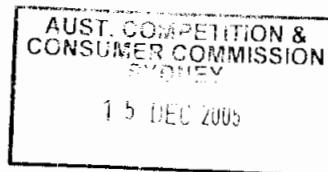


N 31491

Deacons

FILE No:
DOC:
MARS/PRISM:



1 Alfred Street
Circular Quay
Sydney NSW 2000
Australia
GPO Box 3872
Sydney NSW 2001
DX368 Sydney
Tel +61 (0)2 9330 8000
Fax +61 (0)2 9330 8111
www.deacons.com.au

Other Offices

Brisbane
Canberra
Melbourne
Perth

Independent Affiliated Firms

Hong Kong
Indonesia
Malaysia
People's Republic of China
Singapore
Taiwan
Thailand
Vietnam

14 December 2005

General Manager
Adjudications Branch
Australian Competition and Consumer Commission
Level 7 Angel Place
123 Pitt Street
SYDNEY NSW 2000

Our Ref: 2576206

Dear Sir

eBay International A.G. - Notification of Exclusive Dealing

We act for eBay International A.G. We lodge on behalf of eBay International A.G. ("eBay") the **enclosed** Notification pursuant to sub-section 93(1) of the *Trade Practices Act 1974* (Cth) ("Act").

As you will see from the Notification, eBay proposes to launch a new service on www.eBay.com.au called 'Digital Downloaded Goods' ("DDG"). This service provides an opportunity for eBay members to buy and sell digital content through www.eBay.com.au. The conduct in question concerns the proposal that eBay Members using the DDG service will be required to use a nominated payment system called PayPal.

We enclose a cheque in the amount of \$1,000 in payment of the filing fee. If you require any further information, please contact the undersigned on (02) 9330 8444 or Andrew Ward-Harvey on 9330 8432.

Yours faithfully

Robert Anderson

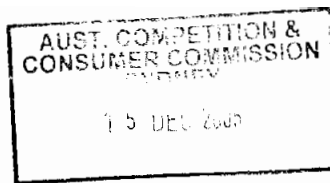
Partner

Deacons

Direct line: +61 (0)2 9330 8444

Email: robert.anderson@deacons.com.au

Encl.



N 31491

Regulation 9

Form G

Commonwealth of Australia
Trade Practices Act 1974 — Sub-section 93(1)

**EXCLUSIVE DEALING
NOTIFICATION**

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(2), (3), (4), (5), (6) or (7), or paragraph 47(8)(a), (b) or (c) or (9)(a), (b), (c) or (d) of that Act in which the person giving notice engages or proposes to engage.

1. (a) Name of person giving notice

This notice is given by eBay International A.G. ("eBay"), a foreign company which is the holding company of eBay Australia And New Zealand Pty Limited ABN 22 086 288 888.

(b) Short description of business carried on by that person

eBay operates the eBay website and the associated services located at www.eBay.com.au ("eBay Site"). The eBay Site provides users an on-line platform to offer, bid for, sell and/or buy goods. There are more than 50,000 categories of goods which can be sold or bought on the eBay Site. Only registered users of the eBay Site ("eBay Members") can offer, bid for, sell or buy goods on the eBay Site. Although the eBay Site is tailored to Australian users, it is an international platform which allows both Australian and international buyers and sellers to trade in goods. eBay is not a party to the transactions taking place between buyers and sellers and is not their agent or representative. eBay never has possession of, nor the opportunity to inspect, the goods being offered or sold.

(c) Address in Australia for service of documents on that person

C/- Robert Anderson
DEACONS
1 Alfred Street
Circular Quay
Sydney NSW 2000

2. (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates

On 3 January 2006 eBay intends to launch a new service on the eBay Site called 'Digital Downloaded Goods' ("DDG"). This service provides an opportunity for eBay Members to buy and sell digital content on the eBay Site. eBay Members using the DDG service will be required to use a nominated payment system called PayPal. For details of how this system operates, see the Submission attached as Annexure A.

(b) Description of the conduct or proposed conduct

See Submission attached as Annexure A.

3. (a) Class or classes of persons to which the conduct relates

The public generally and more specifically to eBay Members (who may offer, bid for, sell and/or buy digital content on the eBay Site)

(b) Number of those persons:

(i) At present time

Not applicable.

(ii) Estimated within the next year

There are over 3 million eBay Members in Australia. It is not possible to predict at this stage how many eBay Members will use the DDG service but it is expected to have limited take-up given the nature of the digital products likely to be offered for sale using the DDG service.

(c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses

Not applicable.

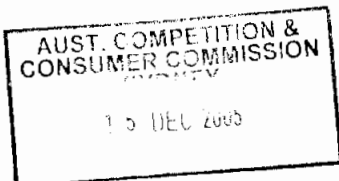
4. Names and address of person authorised by the person giving this notice to provide additional information in relation to this notice

C/- Robert Anderson
DEACONS
1 Alfred Street
Circular Quay
Sydney NSW 2000

Dated: 14 December 2005

Signed by/on behalf of the applicant giving notice

N 31491.



(Signature)

Robert Anderson

(Full name)

Partner, Deacons
(Description)

DIRECTIONS

1. If there is insufficient space on this form for the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the person giving the notice.
2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. In item 1(b), describe that part of the business of the person giving the notice in the course of which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in sub-section 47(2), (3), (4), (5), (6), (7), (8) or (9) of the *Trade Practices Act 1974* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. In item 3(a), describe the nature of the business carried on by the persons referred to in that item.
6. In item 3(b) (ii), state an estimate of the highest number of persons with whom the person giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.

NOTICE

If this notification is in respect of conduct of a kind referred to in sub-section 47(6) or (7) or paragraph 47(8)(c) or 9(d) of the *Trade Practices Act 1974* ("the Act"), it comes into force at the end of the period prescribed for the purposes of subsection 93(7a) of the Act ("the prescribed period") unless the Commission gives a notice under sub-section 93A(2) of the Act within the prescribed period, or this notification is withdrawn.

The prescribed period is 21 days (if this notification is given on or before 30 June 1996) or 14 days (if this notification is given after 30 June 1996), starting on the day when this notification is given.

If the Commission gives notice under sub-section 93A(2) of the Act within the prescribed period, this notification will not come into force unless the Commission, after completing the procedures in section 93A of the Act, decides not to give a notice under subsection 93(3a) of the Act. The notification comes into force when that decision is made.

If this notification is in respect of conduct of a kind referred to in subsection 47(2), (3), (4) or (5), or paragraph 47(8)(a) or (b) or 9(a), (b) or (c), of the Act, it comes into force when it is given.

ANNEXURE A

SUBMISSION BY EBAY INTERNATIONAL A.G. IN SUPPORT OF NOTIFICATION UNDER SECTION 93(1) OF THE TRADE PRACTICES ACT 1974 ("ACT")

1. Introduction

- 1.1 The purpose of this submission is to assist the Australian Competition and Consumer Commission ("Commission") in its consideration of the Exclusive Dealing Notification given by eBay International A.G. ("eBay").
- 1.2 Capitalised words and expressions, unless defined in this Annexure A, have the meanings ascribed to them in the Exclusive Dealing Notification.

2. Background

- 2.1 The Commission will be familiar with the background of eBay from previous discussions and applications to the Commission.
- 2.2 One of the strategies developed by eBay to ensure that the eBay Site remains a leading on-line shopping platform is to provide innovative new services on the eBay Site, including adding new categories of goods which can be bought or sold on the eBay Site. The expansion of the services operating on the eBay Site allows eBay Members to take advantage of increased choice in buying and selling their goods on-line.
- 2.3 eBay now intends to provide eBay Members a new service known as DDG so that they can buy and sell digital content on the eBay Website.

3. DDG

- 3.1 The DDG service will enable sellers to efficiently sell and buyers to efficiently buy and instantly receive digital content in select categories (ranging from eBooks to software to music) ("Digital Items") on the eBay Site.
- 3.2 The service is primarily targeted at sellers of consumer created content which is reduced to digital form (such as amateur video and music recordings). The DDG service provides the creators of Digital Items (or sellers authorised to distribute them) an on-line venue at which to display, publicise and sell such content and recordings. The DDG service will also allow buyers to download the relevant digital offering immediately the decision to purchase is made.
- 3.3 The current:
 - (a) industry standards (examples: iTunes, Symantec); and
 - (b) consumer expectations,are that buyers demand to receive digital content immediately and automatically once purchased (e.g. immediate delivery for ring tones using SMS via a mobile phone).
- 3.4 In order for the DDG service to be commercially viable on the eBay Site, it must be available to eBay Members in accordance with current industry standards and consumer expectations



for digital downloads. Accordingly, there must be an integrated service on the eBay Site to allow for immediate exchange of funds and goods between buyers and sellers

4. The Proposed Conduct

- 4.1 It is proposed that the only payment option for Australian eBay Members wishing to buy Digital Items through the DDG service will be PayPal Inc.'s (and from 2 February 2006 its Australian subsidiary's [PayPal Australia Pty Ltd]) payment service ("PayPal"). PayPal is already integrated into the eBay Site for on-line sales and purchases. PayPal Inc. has been issued an Australian financial services licence and APRA has granted it an interim exemption under the Banking Act 1959 (Cth).

The proposed wording on the eBay Site will be as follows:

- (a) In the "Sell Your Item" flow (for sellers):

"To sell a digital item, you must offer only PayPal as a payment method and require immediate payment"; and

- (b) In the "Help" page (with respect to the DDG service):

"Offer only PayPal as a payment method so that buyers can access the item immediately once payment is confirmed."

- 4.2 PayPal is a widely used online payment service. PayPal enables individuals or businesses to securely, easily and quickly send and receive payments online. PayPal can be used by buyers to send money to sellers and by sellers to receive money from buyers. In broad terms, it functions as follows with respect to on-line transactions on the eBay Site:

- (a) in order to use PayPal as a payment service for on-line transactions, both the buyer and the seller must be registered as users of PayPal ("PayPal Member"). To become a PayPal Member, a user must provide a number of details (such as, for personal accounts; full name, contact number, address, e-mail address, primary currency, country of residence and password, and for business accounts; further business details and contact information) ("Personal Details"). There are various types of accounts (personal, premium and business) ("Account Types");
- (b) PayPal Members can use a variety of funding sources for transactions through PayPal (including, without limitation, but depending on the Account Type; Visa or MasterCard credit/debit card, PayPal stored balance and bank funding). This financial information does not have to be provided to PayPal upon registration, but must be provided if a PayPal Member has insufficient balance in their PayPal account to pay for a particular item they wish to purchase;
- (c) if both the buyer and seller are PayPal Members (and of course eBay Members), a buyer on the eBay Site can purchase an item through the eBay Site using PayPal as follows:
- (1) shop at the eBay Site, select an item for purchase and then select PayPal as the payment method;
 - (2) the buyer will then be required to log into their PayPal account before the buyer is allowed to complete a transaction through the PayPal service;
 - (3) the buyer confirms details of the transaction (amount and item); and



- (4) payment is then sent securely to the seller's PayPal account *without revealing the buyer's financial details (e.g. credit card number) to the seller*,
- (d) the seller then receives an email notification of the buyer's payment. After clicking on the link included in the email, the seller can log in to their PayPal account and the money will *immediately* appear in the seller's account balance. The seller can then transfer the money to any nominated Australian bank account or keep it in the PayPal account as a stored PayPal balance;
- (e) payment is accepted by PayPal as the merchant on record for credit card purposes; and
- (f) there is no charge or other fee to become a PayPal Member and to send payments using a PayPal account (except when sending payments off-shore), but depending on the account type of the seller, a fee may be charged for receiving payments, and for withdrawals of less than \$150 AUD from PayPal balances.

4.3 PayPal Inc. is a wholly owned subsidiary of eBay Inc (the parent company of eBay International A.G).

4.4 PayPal is the only on-line payment system integrated into the eBay Site.

There are a number of other payment methods listed on the eBay Site which sellers can offer for buyers to utilise for payment such as bank deposit, bank drafts, cash on delivery, credit cards, escrow, money orders, personal cheques, cash and instant cash wire transfers.

None of these payment systems are, however, actually integrated into the eBay Site as the actual transactions for goods which take place through the eBay Site do not involve eBay as a party. eBay is merely a *facilitator* of transactions, not a merchant/seller or purchaser/buyer with respect to the transactions.

With these other payment methods, eBay lists items on the eBay Site up until the item is 'sold', but then the actual payment for the goods itself takes place *personally between the buyer and seller*. In other words, once eBay confirms that a buyer has successfully bid for or bought an item through the eBay Site, it is then up to the seller and buyer to finalise payment (i.e. choose from the payment methods that the seller has listed with respect to the item on the eBay Site) and *provide personal details, including payment details, to each other* (i.e. name and number of bank accounts and credit card details) to finalise payment and delivery of goods. For these non-integrated payment systems, the seller must reconcile the payment received and their relevant eBay records manually.

With PayPal being integrated into the eBay Site, however, PayPal basically acts as a 'conduit' between buyer and seller and automatically reconciles PayPal payments with seller's relevant eBay records. No personal and financial information of the *buyer* is shared with the *seller*, and vice versa. Such information is protected by top range encryption technology provided by *both* eBay and PayPal. Further, payments from buyers appear in the accounts of sellers instantly (as opposed to bank transfers which can take days), so sellers can dispatch items immediately once payment is made.



5. Reasons for the proposed conduct

5.1 The principal reasons why it is proposed that PayPal be offered as the only payment option for the DDG service are:

(a) **Immediacy:** Due to the integration of PayPal into the eBay Website, once a buyer makes payment for a Digital Item through PayPal an immediate credit of funds is made to the seller's PayPal account. This means that:

(1) the Digital Item purchased can be delivered instantly and automatically to the buyer. Once a Digital Item is purchased, buyers automatically receive immediate notification of receipt of their purchased item and a link (which the seller provides to eBay) from which the buyer can download the purchased file. This immediacy emulates current industry standards and consumer expectations; and

(2) there is also potentially an improvement to current market processes for sales of digital goods as often funds are currently only credited to a seller after a settlement period.

(b) **Security:** With respect to every transaction utilising PayPal as the payment system on the eBay Website:

(1) all sellers and buyers must be registered with PayPal;

(2) PayPal has the extensive Personal Details of both buyers and sellers which makes it easier to detect fraud and other irregular practices and to counter such practices should they occur;

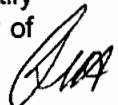
(3) buyers must log into their PayPal accounts before they are allowed to complete a transaction through PayPal; and

(4) no confidential financial details such as bank account or credit card numbers and other details are shared between buyer and seller.

Accordingly, due to the integration of PayPal into the eBay Website and the facts in (1) to (4) above, if PayPal is used for all transactions for the DDG service, eBay can effectively deploy its range of systems and technologies to monitor DDG transactions between buyers and sellers by combining both the eBay and PayPal surveillance systems (along with PayPal's one-time account verification processes) designed to detect wrongdoing. This provides greatly enhanced safety for buyers and sellers and likelihood of seller performance (i.e. providing the Digital Item to buyer).

(c) **Fraud:** The major risk to purchasers buying goods at on-line sites such as the eBay Site is that the seller will not supply the goods purchased but will keep the purchase price tendered. In normal circumstances it will take some time for a buyer to realise that the goods are not going to be supplied and then to report this situation to eBay and members of the eBay community using the "Seller Information" facility on the eBay Site.

eBay has developed a variety of electronic tools to detect likely fraudulent sellers and uses these tools together with "Seller Information" input from buyers to identify fraudulent sellers. As discussed above, PayPal also provides an additional layer of



extensive anti-fraud software to identify fraudulent transactions. Once identified, fraudulent sellers are prevented by electronic means from offering goods and services for sale on the eBay Site.

eBay does all in its power to minimise instances of fraud on the eBay Site because buyer members of the eBay community and potential buyer members are unlikely to use the eBay Site unless they are satisfied that they will receive the goods or services they have purchased. eBay is constantly refining existing tools and developing new tools to identify and counter fraud and other irregular practices on the eBay Site.

One of the most effective ways of identifying fraudulent sellers is to minimise the time between a buyer paying for goods or services and delivery of those goods or services to the buyer. In the normal course sellers will not dispatch goods or provide services until they have received payment. Traditional payment methods can take days before the seller is advised that cleared funds have been received in payment for goods or services offered for sale. This means it will take even longer before negative feedback is posted to the "Seller Information" facility by disappointed or defrauded buyers.

One way to shorten this timeframe is PayPal which, as stated above, allows cleared funds to be sent by a buyer to a seller immediately after a purchase decision is made. Notification of payment is immediately made to the seller and, by automated process, the seller will immediately send a link to the Digital Item purchased to the buyer.

With PayPal, eBay can notify the authorities and the buyer/seller if there is a fraud issue given the instantaneous nature of the transaction. Further, given that no payment details are shared between buyer and seller in this payment method, there is a significantly decreased risk of fraud.

- (d) **Efficiency:** No other payment system in Australia can process micropayments as efficiently or cost effectively as PayPal (note our commentary on Paymate below). With PayPal integrated into DDG, more of the community can become digital content sellers and buyers.

6. Other Options

6.1 There are no other feasible options for payment for Digital Items through the DDG service for the following reasons:

- (a) **BPAY/Bank Transfers:** Whilst BPAY and Bank Transfers can be used to pay for goods online, *neither offer immediate payment for the seller*. Accordingly, such payment methods would not be workable for the DDG service, as the current industry standards and consumer expectations are that digital content is delivered immediately. Further, from a security viewpoint, Bank Transfers require a seller to disclose its personal details to the buyer, which increases the risk of fraudulent or criminal activity;
- (b) **Credit/Debit Card:** Although credit cards can offer immediate payments, no credit facility is offered through eBay, as eBay is merely the facilitator of on-line transactions, not a party to the transactions (see above). Some sellers on other websites offer credit card payment methods for immediate downloads of digital goods. Those sellers, however, own or hold the digital goods and therefore have credit card merchant facilities to instantaneously approve the transaction.



Sales of Digital Items through the DDG service will generally be small scale transactions and in the vast majority of cases the sellers will be too small to be able to afford, and will not have, their own credit card merchant facilities. It is therefore of little utility for the vast majority of sellers of Digital Items to have credit cards as a payment option.

Finally, those buyers who wish to use Visa or MasterCard to pay for goods can use those cards through PayPal, and PayPal offers immediate settlement as the *payment is accepted by PayPal as merchant on record*. There are also no additional costs for buyers associated with making domestic payments for Digital Items through PayPal when using a credit/debit card, bank funding or stored balances;

- (c) **Paymate:** Paymate is a local payments system similar to PayPal, but it is not integrated into eBay. Integrating it into eBay is not feasible due to extensive product and IT development required. Further, its user base is significantly smaller than PayPal's, so there are no significant community benefits in integrating its services into eBay; and
- (d) **Others:** No other payment method offers instantaneous payment, and therefore they would not be workable for the DDG service.

7. Public Benefit

7.1 Arguably the proposed conduct could constitute exclusive dealing that falls within sections 47(6) and (7) of the Act. However section 93(3A) of the Act provides that if a corporation notifies the Commission of conduct which falls within the definition of exclusive dealing in sections 47(6) and (7), but the Commission is satisfied that the likely public benefit from the proposed conduct will not outweigh the likely detriment, the Commission can provide the corporation with notice of that decision accordingly.

7.2 The proposed conduct will be of benefit for the public as it will:

- (a) enable eBay to launch the DDG service. Without the proposed conduct, eBay could not feasibly launch the DDG service. PayPal, as described above, is the only feasible payment mechanism which can provide instantaneous payment, which will allow sellers to provide their digital material instantaneously to buyers, which is the industry standard and consumer expectation for download of digital goods. The DDG service will be of benefit for the public as it will:
 - (1) provide creators of digital content (often independent artists) an opportunity to display, publicise and commercialise their works on-line when they otherwise would not have the ability to do so;
 - (2) promote competition amongst creators and also owners of digital content, as it will allow them to have a venue to compete in selling digital content when they otherwise did not have the financial or commercial ability to do so;
 - (3) provide buyers with a greater range of goods to choose from on-line; and
 - (4) promote competition for the sale of digital content;



- (b) provide a streamlined and efficient transactional process, as it will provide sellers of Digital Items immediate payment after purchase and provide buyers with immediate receipt of the Digital Items they have purchased. Thus, more of the community can become digital content sellers; and
- (c) provide enhanced security for both buyers and sellers of Digital Items (as detailed in this submission) and increased transactional oversight to detect fraud and wrongdoing.

7.3 The proposed conduct will not lessen competition in the market for the provision of financial services for payment to others ("Financial Payments") as:

- (a) in using PayPal for the DDG service consumers will still actually have to source their funds from other Financial Payment providers (including, without limitation, but depending on the Account Type; Visa or MasterCard credit/debit card, PayPal stored balance and bank funding);
- (b) the Australian Financial Payments industry is very competitive; and
- (c) consumers may obtain digital goods offered by many other sellers on-line in Australia. These sellers generally have credit card merchant facilities.

8. Conclusion

8.1 eBay is confident that the public benefit flowing from the proposed conduct outweighs any anticompetitive detriment caused by the lessening of competition.

