

Roy, Lauren

From: Blanch, Belinda on behalf of Adjudication
Sent: Thursday, 17 April 2008 1:28 PM
To: Chisholm, Shane; Roy, Lauren
Subject: FW: eBay International AG exclusive dealing notification N93365
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From: [REDACTED] **EXCLUDED FROM**
Sent: Thursday, 17 April 2008 10:52 AM **PUBLIC REGISTER**
To: Adjudication
Subject: eBay International AG exclusive dealing notification N93365

A Submission to :
eBay International AG exclusive dealing notification N93365
- interested party consultation

I am objecting to PayPal being the sole method by which payment can be made because it is Third Line Forcing and it is seen by ACCC of being exactly that. It is not in the interest of either sellers or buyers. It has some serious shortcomings. First I'll address the alleged "buyer protection" this is supposed to serve.

ALLEGED PAYPAL PROTECTION

The PayPal (PP) buyer protection does NOT offer full protection, at times none at all. Nor does PP uphold Australian Consumer Laws. It really is a bit of a JOKE when the cost of getting this "protection" can be much greater than the protection offered! Therefore it is clear that the PP "protection" is really a PRETEND thing and an excuse to engage in third line forcing in order to eliminate competition.

Example: A buyer purchases an item for AU\$40 from the UK, with a postage cost of AU\$56 via regular mail - and it has to be returned via express post to obtain a tracking number as required by PP at an extra cost to the purchaser purely by PP's decree, at a guess of some AU\$70. When it is a counterfeit item then an "expert report" has to be obtained, say another \$80 as a MINIMAL fee - and the "protection" then returns only AU\$96 for an EXTRA outlay of AU\$150! The PP "protection" is a JOKE and a con perpetrated on the public in reality!

A Consumer has an inalienable right to inspect, that right cannot be taken away by any "conditions" by eBay or PP - legally that is. The faulty/counterfeit goods can be returned AT THE SELLERS EXPENSE (or abandoned by the seller) on receiving a FULL refund including the postage cost solicited by misrepresenting the goods. THAT IS THE LAW!

This from an actual case as the cheapest cost of returning a particular item, but in a manner that does NOT fully meet PP's "rules" - no tracking From Australia Post the following is obtained:

Delivery confirmation is available in conjunction with: -Insured items

Insurance AU\$8.60 (For cover up to AU\$100)

Delivery confirmation Cost \$3.10

Postage to UK = AU\$24.60 (No tracking)

Packaging and handling AU\$2.50 (proper packing)

Total cost \$38.80

Why should a BUYER suffer this loss caused by a seller's misrepresentation? Where is the "protection"?

There is nothing at all indicating eBay or PP is changing these condition designed to DISCOURAGE claims being made against sellers – that is, there is NO INCREASE in protection for buyers to offset the inevitable increase in costs to them!

So much for the pretend "buyer protection" used as 'justification" for eBay's greed. However there are more problems with this proposal.

THE CHEQUE IS IN THE MAIL!

An e-cheque in this case is when a buyer has authorised PP to draw money for a payment made via PP from the buyer's bank account. It is an electronic promise to say there is enough money in the bank to cover the purchase made. PP does not explain the "e-cheque" to people and write about it in a manner it leads people to believe an "e-cheque" is the same as "payment" instead of merely an electric form of a promissory note, identical to a cheque written on paper.

There is no protection for a seller – that is the rubber cheque is being forced onto the buyer. It is in the form of an e-cheque that PP allows and is used by buyers – a sellers acceptance or not of them is totally immaterial to PP. I have had more bouncy e-cheques in 12 months from PP than I have had real cheques bounce in 27 years of business. Worse is that PP doesn't inform sellers when their e-cheque bounces. There is no mechanism that enables a seller getting payment if it is limited to PP use only. PP will simply continue to try to draw money from an account that has no money! The "second chance" offer eBay has does not exist with an eBay store item – there are no more than one purchaser. It can only work for an auction were there are more than one bidder for an item, and there can be a huge gapo between the "second offer" price and the original winning price. There are MANY occasions when there is only a single bidder. What then? The system FAILS totally at that point.

If the item being sold is a Theatre ticket or like item and is limited to a date, has a use-by date of any kind, it will become so much rubbish after the date it applies to has passed!

What this also does is forces other conditions on a seller – conditions not mentioned by eBay. It forces sellers into giving virtually unlimited time to actually pay because of the e-cheque PP allows and encourages being used. Time for completing a transaction (payment) will be taken out of a seller's effective control and placed in the hands of PP at PP's discretion.

DOES A CONDITION BETWEEN TWO PARTIES EXTEND BEYOND THOSE PARTIES?

Ebay took this issue to the Federal Court in:

eBay International AG v Creative Festival Entertainment Pty Limited (ACN 098 183 281) [2006] FCA 1768 (18 December 2006)

There it was said:

Held – *the relevant condition conveys a misleading representation that Creative is legally entitled to and would detect and cancel any ticket which is resold for profit and the holder of that ticket would be refused entry; applicant entitled to relief in the form of a declaration and injunction.*

The operative words from that summary is "Creative is legally entitled to... cancel any ticket which is resold for profit and the holder of that ticket would be refused entry" – a condition attempting to be extended to apply to a contract eBay is not party to. Implied within that is that Creative cannot prevent entry to a person who has purchased a ticket on-line from eBay. That is, it cannot deny the use of their forum by another who has not purchased the ticket from them or their authorised resellers.

This means the eBay has gone to the Federal Court and has established that a condition between two parties does NOT extend to apply to other parties. That is to say eBay has established **in Court** that a condition between Creative and one of Creative's customers does not extend to eBay. Likewise when eBay is placed in the position of Creative then a condition between it and a seller cannot extend to apply between the seller and a buyer. It also means that eBay cannot disallow a seller to accept and advertise other forms of payment options on eBay than PP as a result of eBay's own actions. That is eBay cannot refuse the use of their forum for a seller NOT willing to abide by eBay's wish to only allow PP. Now it seeks to fly in the face of that very authority they have created with that case! It would be unconscionable to allow eBay the privilege it has actively denied others.

ANTI COMPETITIVE BEHAVIOUR

The ACCC has held on many occasions that competitors must have access to infrastructure belonging to a major operator in order to allow healthy competition. I point to Telstra as an example. There is a continuing monitoring of Telstra's actions in allowing/disallowing other direct competitors to their infrastructure and the charges Telstra are allowed to make.

For on-line Auctions eBay is at least as big as Telstra, if not bigger as it is world wide. The **N93365** application is from a Swiss registered company – that is, a world stage Co.

eBay also has an infrastructure as it is at pains to point out – eBay is not a party/partner to any on-line business or auction using its electronic infrastructure. There is no difference at all in principle between forcing Telstra to allow other to make money from Telstra's infrastructure and that of eBay in order to have healthy competition.

PP isn't a cheap option. That claim by eBay is nonsense. It is because PP charges 2.4% PLUS 30 cents per sale. When there are low priced items being sold (and there is MANY of them) it can result in much higher charges than for regular Credit cards. Say an item sells for \$2.50 – PP charges \$0.06 PLUS 30 cents – or 14.4%. That applies to the majority of sellers. At the very top end for a handful of sellers and the least costly charge is 1.2% PLUS 30 cents – or still a staggering 13.2% rip off!

eBay encourages sellers to start auctions as 0.99 cents saying this will encourage more bidders. It may do so on high value popular items, but it also creates many very low value sales. This PP fee is ON TOP OF eBay's charges – or a DOUBLE DIPPING by eBay via PP.

In fact one of the things that is becoming clear is that the fixed amount of 30 cents should be DISALLOWED as "usury" – a % that is rivaling that of pay-day lenders and loan sharks. How can such outrageous charges promote competition and reduce prices for consumers when competition is actively being prevented? After all each Seller on eBay IS also a consumer of services from eBay – the access to eBay's infrastructure.

What eBay's "proposal" is doing is INCREASING costs. At present a number of people pay by means other than credit cards of which PP can be seen as being one. EFT from one bank account into the seller's bank account or even Bpay. This averages out the cost of credit cards, including PP, as it does with any physical business that can accept cash. Therefore the "cost" of the credit card is watered down so that prices don't have to increase across the board by the full amount of merchant fees (like PP fees) charged for credit cards. Remove that possibility, then prices WILL have to increase by the full amount of the cost imposed. This is diametrically opposed to the very notion of increasing competition so it keeps prices down!

The very idea of allowing a monopoly to PayPal will ensure increases in PP fees are practically guaranteed.

PROHIBITION OF RECOUPING COSTS

Ebay is also attempting to prevent recovery of an increase cost that their notion will cause. They want to DISALLOW the stating in % terms the cost of operating the PP "credit card". It has to be remembered that PP also takes a commission of postage costs – that eBay also wants to control again totally contrary to the legal precedent they created and mentioned earlier. Credit card merchant

clauses prohibiting merchants charging for merchant fee to a customer were abolished by legislation. How come eBay is being allowed – or more likely unscrupulously demanding with threats of sellers being closed down, if that fee is stated to be added to the account in % terms?

After all eBay ALLOWS “seller premiums” of 20% being advertised for their “live” auctions on the US sites. That is they have a PRECEDENT of allowing % increases being included. Here it isn't the issue of a profit being added but a RECOVERY OF COSTS imposed by eBay on sellers. Not only do I believe this to be immoral, I believe this imposition is also against the Law.

UNCONSONABLE AND MISLEADING CONDUCT BY EBAY

Ebay is promoting these changes as a done deal. That ACCC can go suck eggs, it is going to happen – that has been their demonstrated conduct in the past. They say so, and promote it that way on their web site. The ability to make comment on this to the ACCC or that ACCC even has a say at all, is not mentioned. EBAY should be FORCED to promote this paper and the opportunity to comment to ACCC:

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I came across this quite by accident while looking for something else. Their intended implementation should be delayed by at least a month to give maximum opportunity for eBay members and others to comment on this issue. That the promotion for this paper should be at Ebays “safe shopping” advertising where the opportunity to comment to ACCC is promoted just as prominently..

CONCLUSIONS

The alleged “buyer protection” is not entirely GENUINE and the proposed increased amount doesn't apply in the areas where such amounts may actually be involved. It is misleading to suggest \$26,000 “protection” is of any benefit in situations where only a few hundred dollars are involved in a transaction. Where the “protection” conditions are such that the “protection” becomes non-existent or minimal and function contrary to established Australian Consumer Laws in any event. In fact I see an erosion of buyer protection occurring over time.

This notion has not been thought out properly at all. It has a sever problems with the Bouncy, Bouncy Rubber e-cheques and no remedy against such.

It goes against established Legal principles they have argued for and helped to establish to exist in the Federal Court.

It is designed to INCREASE cost and REDUCE, or more accurately ELIMINATE, competition and is 100% against the principles the ACCC is supposed to foster and uphold.

They are attempting to go against thhe Law by disallowing the recovery of PP “credit card” costs via an expression in % terms of that cost.

The are acting in an unconscionable manner they argued Creative did in the aforementioned case, by advertising the changes as established legal changes contrary to the truth.

These opinions and views are by an established seller and buyer on eBay with the eBay identity “Brookunga”.

Not for publication (if possible) is that Brookunga is:



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