

April 25, 2008

To the Australian Competition and Consumer Commission,

RE: Notification of Exclusive Dealing submitted by eBay International Notification N93365

I hereby wish to submit an application for review regarding the Notification of Exclusive Dealing provided to the Australian Competition and Consumer Commission (ACCC) by Calum Henderson, on behalf of their client eBay International A.G. on 11 April 2008.

It is my assertion that the intention of eBay International to restrict its customers to use only PayPal for online business transactions, as outlined in their notification, is indeed Exclusive Dealing and is unlawful under sections 47(2)(d), 47(3)(d), 47(2)(e) and 47(3)(e) of the Trade Practices Act 1974. It is my view that this unlawful behaviour will lead to a lessening of competition in the online market place and will result in the detriment to both the current and future participants.

In addition, I contest that by enforcing this restriction on transactions, eBay International is unlawfully misusing their market power as outlined in Sections 46(1)(b) and 46(1)(c) of the Trade Practices Act 1974.

Inline with section 93(1) of the Trade Practices Act, eBay International has provided the ACCC with notice as to their intention to behave in a manner that may be argued as exclusive dealing. The ACCC is obliged to notify eBay International as to whether they are satisfied that this behaviour is not detrimental to the market place, or that any public benefit will outweigh any foreseen detriment.

The following details included in this application are intended to demonstrate that the proposed behaviour of eBay International will cause detriment to current and future users of the eBay online marketplace. It is my assertion that any possible public benefit, can be achieved through alternative methods and that this proposed benefit does in no way outweigh the detriment caused.

I ask that the ACCC consider these points before providing judgement in this matter.

Kind regards,

Annette Causer

In May 2008, eBay International Pty Ltd imposed a requirement on all users of its online market place to complete online transactions through PayPal Australia Pty Ltd.

PayPal Australia Pty Ltd (PayPal) is a company owned by eBay International Pty Ltd (eBay) which acts as an online transaction facilitator. Users are required to set up online accounts with PayPal which are linked back to users' credit cards or bank accounts. Online transactions are completed through PayPal without the need for the users to reveal any personal account information to each other. PayPal charges fees in relation to each transaction and account maintenance.

In June 2008, sellers will not only be required to list PayPal as an option of payment, but as the only form of payment for online transactions, except cash on delivery.

I purport that these restrictions are unlawful and detrimental for the following reasons:

Exclusive Dealing

As directed to in 3.1 of the notification, eBay is aware that section 47 of the Trade Practices Act prohibits 'Exclusive Dealing' where it has the purpose or is likely to lessen competition. This includes forcing buyers or sellers to deal with a particular company in order to secure supply.

As stated in the notification, eBay are aware that they may be deemed to be breaching sections of the Trade Practices Act (TPA) that refer to Exclusive Dealing. By conducting business in a way that can be interpreted as exclusive dealing, it can be argued that eBay are reducing competition in the market place.

Reducing Competition

By excluding all other methods of online transactions and alternative financial organisations, eBay is excluding all competition in the marketplace. No other providers or transaction methods can be used unless first approved by eBay. This behaviour directly removes any competition to PayPal in the marketplace and as such is unlawful.

eBay are prepared to approve a cash on pick up option. This, as the only alternative for payment, is unrealistic. The geographical size of Australia makes this method impractical. As a long time eBay seller it is my experience that the vast majority of items are purchased through online transaction methods and posted to the winning bidder. The option to pay via cash on delivery is negligible as it only applies to a very small percentage of sales. As such, eBay are in fact offering only one method of online transaction.

Public Detriment

The proposed behaviour of eBay is detrimental to the market place in many ways. The members of eBay, and also the general public, who will be directly harmed by this action include the following:

- *All eBay Australia sellers* – loss of income and profit to cover extra fees imposed by using PayPal.
- *All eBay Australia buyers* – increased risk and loss of privacy as personal details must be disclosed in order to open a PayPal account.
- *All Australian Financial Organisations* - loss of potential business, funds and fees.
- *Australia Post* – loss of funds and fees. It is also likely that there will be a decline in items posted as trade falls from eBay when disgruntled sellers and buyers leave or are forced into pick up services.

All eBay Australia sellers will be forced to pay additional fees to manage transactions through PayPal. These additional fees will need to be factored into the sale price of each item. As such, the seller will either be forced to reduce profit margins to absorb the fees, or charge a higher price for each of the items. As a result, the number of online buyers may decrease with the increasing costs.

All eBay users who set up an account with PayPal will be required to go through credit checks, which in turn will be recorded on their credit history. This is undesirable to most consumers who look to keep the number of reported credit checks to a minimum.

Additionally, both buyers and sellers will be increasing the risk associated with online transactions as highlighted in the terms and conditions of the PayPal Pty Ltd Product Disclosure Statement:

“PRODUCT DISCLOSURE STATEMENT FOR PAYPAL'S ONLINE PAYMENT SERVICE

Dated: 27 March 2008

9. Risks associated with using the PayPal Service

Unauthorised transactions: There is a risk your PayPal Account may be compromised and subject to an account takeover, unauthorised transactions, or other type of fraudulent activity.”

The proposed restrictions exclude all other Australian financial organizations from competing in the market and gaining any market share. By doing so it deprives the rights of an individual to use his money as he pleases and denies the seller the ability to trade in any other way which may be more profitable and/or safer for him.

It is reasonable to expect that by imposing the restrictions both sellers and buyers may leave the market place.

Misuse of Market Power

eBay claim to have five million members within the Australian marketplace. This is a significant majority of online users and it is reasonable to assume that eBay is the largest online marketplace within Australia. In addition, PayPal is one of the largest online transaction facilitators and experienced strong growth along side its parent company eBay.

It is my assertion that eBay will be misusing this strong position in the marketplace to force consumers to behave in a certain way, for the direct financial benefit of PayPal and in turn itself.

eBay is the largest online marketplace within Australia and there is no other alternative that is as widely used or accessible to this number of participants, particularly in the sale of second hand goods. Given this fact, consumers are provided with no other alternative to participate in online sales. Those buyers and sellers who do not wish to comply with the new restrictions imposed by eBay will be forced to leave the market entirely.

The ACCC state on their website, that one of their aims is to *"protect you in your dealings with business, for example by ... prohibiting a business from using its superior bargaining power in an unconscionable way"*.

I assert that eBay is using its superior bargaining power in an unconscionable way by:

- removing choice of payment method
- restricting all clients to use a form of trade that not only results in additional fees to the seller, but makes more profit for eBay
- censoring the discussion boards that are provided for exchange of information and by erasing any comments which eBay feels directly opposes their decision.

In the notification submitted by EBay, they argue that the benefits offered by the PayPal online system offered outweigh the detriment caused by the exclusive dealing.

To these perceived benefits I would argue the following:

Increased Safety of Transactions

eBay claim that there is increased security of online transaction using PayPal compared to other transaction methods such as direct bank deposit. However, the PayPal product disclosure document acknowledges there are still risks associated with using their system.

It may be argued that the PayPal online transaction tool offers less risk than other methods. However, competing products such as Paymate offered the same level of security as PayPal.

Increased Market Participants

eBay argue that by restricting users to PayPal transactions they will reduce the number of bad buying experiences and inturn will retain participants of the marketplace. However, as the benefit only applies to those with a score of 50 and above, it only applies to relatively experienced users. As such, it is questionable to what degree new users may benefit from these safety measures.

Encouraging Growth of the Online Marketplace

EBay claim that the restrictive behaviour will grow consumer confidence of online transactions and will inturn encourage other businesses to embark in online retail. I argue that the large number of online retailers in the world will participate in online retail regardless of the success of eBay.

The benefits of online retail transactions have long been identified since the inception and growth of the internet. It is inappropriate to use a world retail trend to support an argument for exclusive dealing. The growth in online retail will happen with or without eBay International imposing restrictions to transactions.

Improving the Online Transaction Experience

eBay argue that the increased security of transactions will discourage 'buyer migration' and that current eBay sellers will benefit from more confident buyers. I assert that the current success of eBay has been due to its flexibility and accessibility. By increasing the number of barriers to the market you will likely see both 'seller' and 'buyer' migration.

The Second Hand Goods Market

The second hand goods market is notoriously unpredictable due to the variability in product, quality, value and demand. Antique, collectable and second hand items are currently offered to a worldwide market using eBay allowing maximum viewing opportunity which would not normally be available.

Due to the nature of this market, buyers will often make offers or ask to trade items to acquire goods. eBay in the past have recognized this by introducing a 'make an offer' feature on some of its sites as well as a 'Swap/Wanted' section. By restricting the method of payment, eBay will remove the ability to trade in this way, thus further discouraging sellers and buyers.

Strengthening of the Economy

eBay argue that this action will strengthen the Australian economy through increasing trade. This claim is flimsy and it is unrealistic to conclude that by restricting payment methods you will encourage and stimulate trade. Surely the nature of a restriction is to reduce trade.

Prevention of Credit Card Fraud

eBay argue that this action will help prevent credit card fraud. However, credit card fraud will happen regardless of whether eBay sellers are restricted to PayPal transactions or not. For PayPal transactions to significantly reduce credit card fraud, consumers will need to place most or all their transactions through PayPal, which is simply unrealistic.

eBay also claim that the restriction to PayPal will help consumers who don't understand the charge back terms of credit cards. The understanding of credit card terms and conditions is a matter for the consumer and the credit card company. Knowledge of terms and conditions amongst consumers is not likely to grow with increased PayPal usage.

Facilitating Small Merchant Transactions

eBay argue that there is a benefit for buyers whose business is too small to qualify for a merchant facility with credit cards. However, PayPal is not the only online transaction facilitator that can offer this and provides no argument for eBay users to be restricted to PayPal alone.

Conclusion

Below is a description of the business supplied by eBay taken from the notification to the ACCC.

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

eBay operates a website in Australia (www.ebay.com.au) (eBay Site) that provides users with an online platform to search, bid for, sell and/or purchase goods. eBay offers sellers a listing service, buyers the ability to search for goods listed by sellers, and both buyers and sellers the ability to transact with one another. eBay is not a party to the transactions that take place between buyers and sellers, does not act as a representative of either party and does not at any time hold possession of or have the opportunity to inspect the goods sold on its website. Rather, eBay provides an online platform on which buyers can search for items, sellers can list items for sale, and members can transact.”

For all online transactions on eBay, sellers pay a percentage of their sales plus a listing fee to cover the services eBay provide as detailed above. This is agreed to when a user joins eBay and engages in any selling activity.

As stated in their notification eBay is not a party to the transactions and absolves itself of any responsibility or accountability for the transactions facilitated by its site. By clearly stating this in the terms and conditions agreed to by all users it is unreasonable for eBay to impose on users any method of transaction. The fees applied to sellers in the terms and conditions are final and it is unlawful to force users to incur additional costs by way of restricting the conditions of trade.

It is a fundamental right of all consumers to do with their money and goods as they please within the confines of the law. To allow eBay to continue to restrict transaction methods to PayPal alone would seriously impact this right.

To allow eBay to behave in this manner sets a precedent for future companies to unlawfully control the manner in which transactions are made in order to specifically gain additional income. Such a decision has implications for all marketplaces, not just those online.

I ask that the ACCC consider these points when making there decision regarding this action. I ask that the ACCC be mindful of the impacts of allowing such behaviour to continue and consider the future impacts that may occur from this precedent.