



Australian Payments
Clearing Association

**eBay International AG
Exclusive Dealing Notification
N93365**

**Submission by the Australian
Payments Clearing Association
May 2008**

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1. Executive Summary

1. The Australian Competition and Consumer Commission (ACCC) received an exclusive dealing notification from eBay International AG (eBay) pursuant to 93(1) of the *Trade Practices Act (1974)*. The Australian Payments Clearing Association (APCA) was invited to make a submission on the likely public benefits and effect on competition, or any other public detriment from the proposed arrangements.
 2. In this submission, APCA does not intend to specifically comment on whether the proposals by eBay are anti-competitive *per se*. However, APCA has some relevant observations in relation to determining the public benefits arising from the exclusive dealing notification.
 3. APCA questions the assertion by eBay that its systems offer greater protection against card fraud than other payment systems and believes more evidence is required to substantiate this claim.
 4. It is APCA's view that the proposed conduct is inconsistent with the stance of the Reserve Bank of Australia's (RBA) most recently espoused in its Paper "Reform of Australia's Payments System: Preliminary Conclusions of the 2007/08 Review" (Preliminary Conclusions). A competition policy that would allow the exclusive dealing notification to stand would be contrary to the RBA's policies.
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2. About APCA

5. APCA is the Australian payment industry's principal self-regulatory body. It is the primary vehicle in Australia for payments industry collaboration, with a mandate to improve the safety, reliability, equity, convenience and efficiency of the Australian payments system.
6. APCA was established in 1992 as a mutual organisation for administering the technical and operational rules and standards between banks, building societies, credit unions and other payments organisations. APCA's role has since extended to managing and developing regulations, procedures, policies and standards governing payments clearing and settlement within Australia. It has around 80 members comprising the Reserve Bank, banks, building societies, credit unions and other participants in its five clearing systems. The 5 systems clear more than 98% of Australia's non-cash retail payment values.
7. APCA's clearing systems provide definitive, participant-driven sets of rules and decision-making structures governing the conduct of clearing and settling transactions in relevant payment instruments. APCA does not process payments. In general, individual institutions participating in each clearing system are responsible for their own clearing operations which they must conduct according to APCA's rules.
8. APCA's Core Principles focus on a broad role to enhance Australian payments system. The principles articulate three core APCA activities:
 - Industry policy development and advocacy, where APCA's role is to facilitate the development of industry positions and views on the evolution and regulation of payment systems, and to communicate those views to government, regulators and other stakeholders as needed;
 - Industry standards and self-regulation, where APCA seeks to ensure that system participants decide how they will operate and be governed, and members collectively set the self-regulatory framework for the industry; and
 - Industry change management, where APCA coordinates and facilitates payments system development programmes as required by its members.
9. This strategic orientation is the basis for APCA's submission to the ACCC investigation.

3. Background

10. According to its subsection 93(1) notification, eBay provides a 'platform on which sellers can list items for sale', charges the sellers fees and is not a party to transactions between buyers and sellers.
 11. In addition, eBay owns and operates PayPal, a payment scheme which acts as a conduit between the seller and the buyer.
 12. eBay is seeking to mandate the use of its PayPal service for all sellers in order to arguably protect the interests of buyers. This is based on eBay's assertion that it loses buyers due to bad buying experiences caused by fraud, and that this loss would be addressed by what it claims to be the higher level of security offered by its PayPal service.
 13. APCA does not wish to comment on whether such an arrangement is anti-competitive. However, eBay's application for exclusive dealing appears to be based on the premise that the proposed restrictions to sellers' choice of payment methodology are justified since public benefits outweigh any anti-competitive effects. In addition, eBay seems to claim that despite the large financial flows within the Australian economy from eBay's operations, eBay's market position is uncertain and that no conclusion can therefore be drawn about its dominance.
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4. Public Policy Benefits: Incidence of Fraud

14. eBay appears to be seeking an exclusive dealing ruling on the basis that the public benefit of the alleged enhanced security offered by PayPal outweighs any anti-competitive concern. However, it should be noted that no evidence has been provided that the relative frequency of fraud for on-line transactions being undertaken through PayPal is any less than found in general on-line transactions taking place in the community.
15. Fraud statistics published by APCA in December 2007 indicate that the level of card fraud in Australia for the period 1 July 2006 – 30 June 2007 is 0.0167 per cent of all transactions¹. The only available public information on fraud levels experienced by PayPal appears to be a statement made by Daniel Feiler, media spokesperson for eBay, quoted in the on-line publication "The Sheet" on 15 April 2008 saying that the incidence of fraud through PayPal now stands at 0.30 per cent of all transactions. This is more than 10 times APCA's recorded incidence of credit/charge card fraud. Without further details from PayPal on specific fraud levels operating through PayPal, it is difficult to reconcile these figures.
16. In eBay's application, it is argued that PayPal's buyer protection security is an added feature that provides customers with comfort when purchasing items through eBay in the event of fraudulent misrepresentation or failure to receive goods. This is cited as an additional public benefit to justify any anti-competitive effects of the application. However, there is a difference between measures that reduce fraud in society generally and those that protect buyers from the effects of fraud through, for example, compensation. In the former case, there is general public benefit (i.e. a net increase in welfare), while in the latter there is merely a reallocation of fraud costs - the fraudulent activity still takes place, however someone other than the buyer bears the consequences. APCA suggests that eBay's buyer protection through PayPal largely falls in the latter category. Whether measures of this kind constitute public benefit for competition policy purposes is for others to determine.
17. APCA believes that more evidence is required from eBay to substantiate its claims that PayPal offers greater protection against fraud.

5. Restricting Merchant Choice: Public Policy Consistency

18. If eBay's application is accepted it would appear to contradict measures that have been introduced by the RBA to prohibit the restriction of merchant choice of payment instrument. Card schemes such as Visa International or MasterCard have been prevented from requiring merchants to accept all card payment methodologies (honour-all-cards obligations). eBay's proposal would have the effect of forcing sellers to use only one payment methodology. The latter seems to be a much more severe restriction of sellers' or merchants' freedom of choice than the practices the RBA has struck down.
19. In its payment systems reforms, introduced in 2003, the RBA removed the ability of card schemes to oblige merchants to honour all cards. The 'Honour All Cards' rule was introduced by Visa International requiring merchants to accept all Visa cards regardless of issuer or product type. The RBA accepted that it was in the public interest for consumers to expect that their credit card regardless of issuer would be accepted wherever cards of that type were accepted, but that this was outweighed by the detrimental effects on competition. The RBA stated:

...the Bank does not view the extension of the 'honour all cards' rule across product types to be in the public interest. By 'tying' acceptance of one card product to another, normal competitive forces are diminished.²

¹ See APCA's press release dated 17 December 2007 on its website at www.apca.com.au

² Reserve Bank of Australia, *Reform of the EFTPOS and Visa Debit Systems in Australia: A Consultation Document*, February 2005, at page 41.

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20. The RBA stated that it believed that overall the Australian payments system would be likely to be enhanced if cardholders and merchants were in a position to 'freely evaluate the benefits' provided by card schemes against any costs and to make appropriate decisions on the payment methodology best suited to them.³
21. Indeed, the RBA, in its April 2008 Preliminary Conclusions paper, noted that the removal of restrictions on honouring all cards (the Standard) has, in its view, led to improved efficiency and competition, particularly in relation to interchange fees.⁴ The corollary of this is that restrictions on merchant choice of payment method impinges on competitive efficiency and leads to higher fee burdens for merchants (the reason for introducing the Standard in the first place).
22. Australia's card payments systems have been required to comply with, and to implement, the 'Honour All Cards' Standard, and have done so on the basis that the RBA has stated this will enhance competition. Irrespective of the validity of this Standard in terms of promoting competition, the application by eBay, if approved, may be seen to go against the restrictions placed on other parts of the payments industry.

6. Conclusion

23. APCA believes that in order to promote and enhance competition and efficiency in the market, there should not be inconsistent messages about the competition policy that applies to the Australian Payments system.
24. APCA does not believe that eBay has sufficiently detailed how forcing sellers to use PayPal as the sole payment mechanism available to buyers would translate to a public benefit. No evidence has been presented of a net increase in welfare arising from reduced fraud (as distinct from better fraud compensation for buyers), and such evidence as is publicly available seems to suggest otherwise.
25. It is APCA's view that eBay's proposals are contrary to the competition policy underlying the RBA's 'Honour All Cards' Standard and, if accepted, would introduce a precedent that would have wider consequences for the regulatory framework of the payments system in Australia.

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³ RBA, *Op. Cit.*, at page 42

⁴ See *Reform of Australia's Payment System*, RBA, *op. cit.*, at 26ff.