



**Submission to the Australian
Competition & Consumer Commission re
Exclusive Dealing Notification N93365
("Notification") by eBay International AG
("eBay")**

Australian Bankers' Association (ABA)

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1. Background

1.1 The Conduct

eBay has notified the ACCC that, from 17 June 2008, it intends to supply services on the eBay site on the condition that buyers and sellers must only pay and accept payment by means of the payment services offered by its subsidiary PayPal ("**the Conduct**"). The limited exceptions to the Conduct are in respect of transactions involving large items such as cars, trucks, aircraft, boats, businesses and real estate.

1.2 The ABA

The ABA is an organisation representing 25 banks in Australia. It works with its members to contribute to the development of public policy on banking and other financial services.

2. Summary

2.1 ABA's concerns

The ABA opposes the Notification, its chief concerns being that:

- (a) the Conduct would limit the choice of both eBay buyers and sellers without justification for doing so;
- (b) the benefits of the Conduct as described in the Notification are overstated; and
- (c) the Conduct will have the effect of eliminating competition in an important segment of the market for online payment services, and of distorting competition in the balance of that market.

2.2 The ACCC should revoke the Notification

ABA submits that the ACCC should revoke the Notification under s 93(3) of the *Trade Practices Act 1974* (Cth) ("**the TPA**") because the Conduct:

- (a) has the purpose and/or is likely to have the effect of substantially lessening competition; and
- (b) is not likely to result in a benefit to the public, or to the extent that it would result in any likely public benefit, any such benefit would not outweigh the public detriment that would be caused by the lessening of competition likely to result from the Conduct.

3. Effect of the Conduct on competition

3.1 Exclusive dealing

The ABA agrees with eBay that the Conduct falls within section 47 of the TPA. Accordingly the only relevant question in determining whether the Conduct would, but for the Notification, breach section 47, is whether or not the Conduct has the purpose or likely effect of substantially lessening competition in a relevant market.

3.2 The relevant market

eBay states in the Notification that it is not possible to form a definitive view as to the likely markets in which eBay and PayPal operate. In the ABA's view, one of the markets which is clearly likely to be affected by the Conduct is the online payment services market.

This is a market due to the functionality of effecting a payment remotely via the internet. It is independent of the underlying payment instrument (direct debit, credit card or an intermediary account such as PayPal) or the underlying clearing system.

PayPal has developed its service quickly and, in a number of respects, has had a first mover advantage. Its relationship with eBay has also given it a huge boost both internationally and in Australia.

PayPal faces limited competition in this market from comparable payment services which have started to emerge, including Paymate, Google Checkout, Bill Me Later, AlertPay and Neteller. Other competitors in this market include the banks (through their internet banking and their debit and credit card products), other credit card companies and BPay. However, not all of these payment methods are accepted by all online auction/shopping sites. The ABA understands that up to 50% of transactions on eBay's Australian site occur through PayPal, with the next most popular payment method being bank transfer, followed by cheques and money orders.¹

3.3 Substantial lessening of competition

Purpose of substantially lessening competition

eBay has provided a number of reasons for the Conduct, including increased security and buyer confidence in eBay. The ABA submits that, due to eBay's common ownership with PayPal, it is reasonable to infer that eBay has the additional, anti-competitive purposes of:

- (a) excluding PayPal's competitors from a large segment of the market for online payment services, thereby obtaining the benefit of increased market share and revenue for PayPal;
- (b) obtaining a "sling-shot" advantage for PayPal in the broader market for online payment services by forcing sellers and buyers on eBay to have PayPal accounts and to use them so that they find it less

¹ Conversation with Phil Leahy, Professional eBay Sellers Alliance, 1 May 2008.

convenient to adopt other payment services for off-eBay transactions.

Likely effect of substantially lessening competition

Even if eBay does not have a proscribed purpose, eBay's substantial share of the Australian online auction and shopping market means that the Conduct is likely to substantially lessen competition in the market for online payment services. According to the Notification, there are over 5 million registered eBay accounts (including both buyers and sellers) compared with 8.6 million active Australian internet users who have ever shopped online.² eBay is estimated to contribute \$2.6 billion to the Australian economy and \$364 to each Australian household's income each year.³

As a result of the Conduct, competitors of PayPal may be excluded from up to 65% of online auction transactions.⁴ Due to their exclusion from eBay, competing providers of online payment services are likely to find it even more difficult to enter and compete with PayPal in the online payment services market. This is because, due to the inconvenience of registering for multiple accounts, eBay users are likely to use their PayPal accounts on other auction/shopping websites even if better, competing products are available. As a result, sellers on other sites will be forced to accept PayPal payments because their customers will demand it. The lack of opportunities for other providers of online payment services to compete may mean that some may fail even if they may be better or cheaper than PayPal. Potential new providers of online payment services may be deterred from entering the market. Even banks, which might otherwise be expected to develop their competing services with comparable features to PayPal may be deterred from doing so by the higher barriers to entry in the online payments market that the Conduct would impose.

4. Response to eBay's claimed public benefits

4.1 Overview

Given the serious anti-competitive effects that are likely to result from the Conduct, the ABA submits that the ACCC should revoke the Notification because eBay has been unable to identify any public benefits sufficient to outweigh the anti-competitive effects and the reduction in consumer choice which would be caused by the Conduct.

4.2 Reducing 'bad buyer experiences'

eBay argues that the Conduct is necessary to address "trust and safety" issues and "bad buyer experiences" that deter buyers from returning to make further purchases on eBay. eBay gives examples of "bad buyer experiences" including fraudulent use of buyer credit card and/or account details, non-receipt of

² Nielsen report, Annexure C to the Notification, p5.

³ Report by the Allen Consulting Group, Annexure E to the Notification, p1.

⁴ Based on the registered user statistics provided by the major online auction sites: eBay, Trading Post, eSwap, BidSell and Oztion.

purchases and the receipt of purchased items which are significantly different from the seller's description.

According to the Notification, PayPal offers a number of features designed to address these issues including protection for users' credit card and account details (as they are not disclosed between transacting parties), an ability to freeze payments and proposed "holds" policy for "high risk" transactions and the Buyer Protection Policy.

The ABA acknowledges the issue of online payment fraud. However PayPal also suffers from fraud. Although PayPal may avoid credit card or bank account details being provided by the payer to the payee, the instructions are given by email which can be (and has been) "phished". According to Phishtank.com, 72% of the phishing sites it identified in February 2008 were fraudulently imitating eBay or PayPal websites.⁵ More recently, eBay has been subject to phishing scams affecting sellers.⁶ The Conduct does nothing to prevent these phishing scams. A further potential security issue for PayPal is that PayPal does not take the same steps that banks take to verify the identity of their account holders by requiring the provision of drivers' licences, birth certificates, etc.

PayPal is not the only online payment system that offers protection for consumers against fraud. The ABA submits that PayPal's protection is limited and largely takes advantage of the underlying protections offered by the financial institutions which are involved in the transaction (for example, the bank issuing the credit card or the debit card). PayPal is **not** a signatory to the Electronic Funds Code of Conduct, whereby the banks and other signatories are required to refund credit card holders amounts fraudulently deducted from their accounts if the transactions in question are reported within 14 days. Banks are also constantly developing more secure online payment methods. For example, a number of banks now provide for instant notification to the customer by email or SMS whenever a payment is made from the customer's bank account to a new recipient.

Other online payment service providers also offer similar or superior levels of protection. For example, Google Checkout (a payment method banned by eBay) offers a similar level of protection to PayPal, including encrypted purchase information, no sharing of account details amongst parties and full refunds for unauthorised transactions.⁷

To the extent that PayPal does offer features over and above other online payment service providers (assuming this is the case), this does not justify requiring every eBay user to take these "benefits" over other benefits that are, or may be, offered by alternative payment methods. If an eBay user decides it is not in his or her best interest to use PayPal, then forcing him or her to use PayPal will result in a loss of utility for that user. eBay suggests that eBay users are not fully aware of the risks involved in online transactions, but would choose PayPal if

⁵ <http://www.phishtank.com/stats/2008/02/>

⁶ See, eg, eBay Inc, *eBay Phishing Scam — Watch Out and Avoid Similar Sites* (8 April 2008) eBay Guides http://reviews.ebay.com/eBay-Phishing-Scam-Watch-Out-and-Avoid-Similar-Sites_W000uqidZ10000000001942853.

⁷ <http://checkout.google.com/support/bin/answer.py?answer=29075&ctx=sibling>

they were. This seems a paternalistic view, at odds with the perception of most eBay users as savvy consumers.⁸

It is also ironic that a site that prides itself on providing its users with the opportunity of shopping around for the best deals and prices, wishes to mandate that its users must use eBay's own payment service and pay whatever fees and charges PayPal chooses to levy.

The ABA submits that if eBay were genuine in its motives and consistent with its principles, it could address the perceived problems by informing its users of these risks and of the alleged benefits of PayPal, it having ample opportunity to do so. eBay users could then make their own, informed decision as to whether or not using PayPal is in their best interests.

4.3 Benefits to general users of the internet

eBay submits that the Conduct would also benefit PayPal users "if the mandated use of PayPal on eBay also encouraged them to use PayPal or another secure online payment facility for other online payments." This in turn "may encourage other online businesses and payment services providers to offer similar levels of transactional security and protection to their users". The ABA rejects this argument. Apart from indicating that PayPal does expect to get a flow-on benefit in segments where it will continue to face competition, the incentive to offer better security (at a competitive price) would be greater if it applied across the whole market including eBay transactions. The claimed benefit, therefore, is not a benefit at all.

4.4 Benefits to sellers

eBay has also suggested that PayPal features such as "Payment Review" which identifies fraudulent purchasers, the protection PayPal provides for users' credit card and account details and its Seller Protection plan (providing protection for "item not received" disputes) mean that the Conduct would benefit sellers as a result of the "reduced likelihood of loss due to fraudulent/unauthorised use by buyers of credit card and/or bank account details to purchase items".

The ABA is not able to comment on the extent or effectiveness of these protections for sellers. But again, even if these features are desirable to many sellers, this does not justify forcing sellers to use PayPal. This is particularly so when eBay sellers pay not insignificant fees for using PayPal to receive payments from their customers. The transactions fees for sellers range from 1.1% to 2.4% of the item purchase price (plus an additional 3% in the case of transactions involving currency conversion or 1% for international transactions in Australian dollars) in addition to a flat fee of AUD \$0.30. For high-volume, low-margin sellers these are significant costs. eBay sellers should be allowed to make their own assessment as to whether the additional security features offered by PayPal justify the additional cost. The reduced choice for eBay sellers that would result from the Conduct is contrary to the views of the Board of the Reserve Bank, as expressed in its recent review of Australia's payments systems, that payment

⁸ See for example the Neilsen report (Annexure C to the Notification) which shows that online consumers consider a number of factors when choosing a payment method, including security, convenience and speed.

schemes should allow merchants to make independent decisions as to which forms of payment they will accept where there is a cost to them in accepting those payments.⁹

It is apparent that many eBay sellers dislike PayPal, for both cost and other reasons.¹⁰ For example, in the case of "item not received" disputes, PayPal effectively transfers the risk of the transaction from the buyer to the seller. The increased costs to the seller as a result of this risk will undoubtedly be passed on to the consumer in the form of higher prices. Further, due to the control which PayPal exercises over users' accounts (unregulated by the Reserve Bank), users can, and do, have their accounts frozen without warning. In the case of "item not received" disputes, sellers may be prevented from accessing their funds for long periods of time until the dispute is resolved, even if they were not at fault.

4.5 Conclusion

Clearly, the public benefits are exaggerated or illusory. Some would not flow from the Conduct (they flow from either the features offered by PayPal or from competition which would drive those features and would drive innovation and development of new features). Some would flow from the Conduct (because it would drive greater use of PayPal), but those will be directly proportional to the anti-competitive effects of the Conduct and will be out-weighted by those anti-competitive effects as competition will be restricted, innovation and development will be constrained, new entry will be discouraged and PayPal will be able to increase fees and charges to eBay users.

⁹ Reserve Bank of Australia, *Reform of Australia's Payments System: Preliminary conclusions of the 2007/08 review* (April 2008), pp 33 & 40.
http://www.rba.gov.au/PaymentsSystem/Reforms/RevCardPaySys/Pdf/preliminary_conclusions_2007_2008_review.pdf.

¹⁰ See, for example, <http://www.paypalwarning.com>.