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Subject: Submission regarding eBay and PayPal [SEC=UNCLASSIFIED]
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From: Cathy Davies [REDACTED]
Sent: Friday, 2 May 2008 1:26 PM
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Subject: Submission regarding eBay and PayPal

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PUBLIC REGISTER**

Here is my submission to the ACCC regarding eBay's proposed changes under Notification N93365.

I also attach some further information which I did not have time to put into the body of the submission.

Background

eBay is an online auction site. In brief, buyers can list details of products that they want to sell and sellers can either bid for the items or use a Buy It Now (BIN) option to purchase the article. Auctions may last for a number of days, at the end of which, the highest bidder wins. At the time of bidding, the buyer is advised that they are entering into a legal contract with the seller. On winning, a buyer is required to pay for their item within a certain period. On payment, the seller ships the article.

eBay claim to have 5 million users (this is inaccurate, many people have more than one user id which is what eBay actually count), but the number of eBay users in Australia *is* very high. PayPal have 5 million Australian accounts as of November last year.

Most sellers are small individual or mom and pop operations, although some larger (but not very large) companies have a "store" on eBay.

Currently there are several payment methods available: bank deposit, credit card, postal order, cheque and PayPal. PayPal is a subsidiary of eBay.

The Issues

eBay want to make PayPal the only method of payment on eBay. Any Visa or Mastercard transactions will still be allowed, but would have to be put through PayPal. Cash on delivery would also be allowed, however this is rarely used and I believe that should it become more common it holds obvious disadvantages and dangers for both buyers and sellers.

eBay have approached the Australian Competition and Consumer Commission (ACCC) to legalise what they want to do as it is generally illegal under the Trade Practices Act

eBay's notification provides some reasons that eBay consider would promote the public interest, particularly that using PayPal is safer. Many eBay users disagree, not only in Australia, but in the UK and the US. Many eBayers have had very negative experiences with PayPal, one common one being that a person can pay for an item, receive it, but deny they have received it and PayPal will return their money without a real investigation, leaving the seller without money and item. While large corporations may be able to stand such losses, small businesses cannot sustain them. eBay itself admits that there are several problems with PayPal's security. Please see the additional information provided.

PayPal currently charges fees for their service over and above the fees paid to eBay. While there are fees attached to buying a postal order, these are pretty reasonable. Using Visa and Mastercard may be fee free if the cards are used wisely. Bank deposits are generally free. PayPal fees can be up to around 7.5% of the total transaction. Thus, it is one of the most (if not the most) expensive ways of paying. While the fees are paid by the seller, clearly they are going to pass these on to the buyer.

Currently, due to the PayPal plan, sellers are leaving eBay in large numbers. A perusal of an eBay discussion board set up to discuss the proposed changes shows sellers of many years experience closing their eBay and PayPal accounts and either going elsewhere or just not selling.

Another issue (and one that eBay is well aware of) is that if the PayPal system goes down, there are no alternatives. Currently, if a buyer's preferred method of payment is not usable, another can be chosen.

6/05/2008

Under the new regime, if PayPal is not available (due to maintenance, hacking, damage etc), there are no choices. eBay is not well known for clear and fast communication of any failings and I foresee a number of apparently broken contracts as a result of not having a back up payment system.

Competition

The new system is anti-competition.

The plan to limit most financial transactions on its auction site to PayPal will allow no real choice for the buyers and sellers. More importantly, it will also allow no competition from our Australian banks, Australia Post or other financial institutions based in Australia.

PayPal Australia last year celebrated the opening of 5 million Australian accounts. This is not an insignificant number and it will clearly make a difference to many of the other financial institutions when eBay/PayPal is getting the fees or interest that would normally go to our Australian banks.

Now, I have nothing against PayPal: I have a Premium Paypal account. However, if competition to PayPal is eliminated, PayPal has no incentive to remain as good as I think it is now. If there is no choice but to use it, then bad management, higher fees, an inefficient dispute resolution process will make no difference - the audience will be captive.

I have doubts about PayPal being subject to any regulation governing the banking industry. I cannot find that the Banking Ombudsman, for example, has any jurisdiction over PayPal. Again, this results in a lowering of competition with our Australian financial institutions being required to submit to regulation and some measure of control, while PayPal is not subject to the same scrutiny.

If PayPal does have a serious effect on the financial sector here, as seems likely, this in turn will result in job losses. If the large banks increase fees to recoup their losses, this is another hit for Australians.

One thing to note is that PayPal operates very much like a bank: it is possible to keep large balances of money in PayPal accounts. Payments are not limited to eBay transactions, it is possible to pay anyone, anywhere in the world where PayPal operates for anything. All you need to make a payment to someone in the US, for example, is their email address.

This is another issue, many people are aware of people's email address - few people know one's bank account number. Passwords are often not as secret as people would like. I do not feel that PayPal is as secure as a bank. Again, this has ramifications for all Australians: a sophisticated hacking computer program would be able to track email addresses and passwords more easily than bank account details.

Un-Australian

A further issue is that eBay Inc (the parent company) has its headquarters in the US, however, they have subsidiaries such as eBay Australia (www.ebay.com.au), ebay France, Canada, UK etc. PayPal is also based in the US. It seems clear that one way or another, money is going to go outside Australia as a result of this change. Profits and taxes will be reduced here.

An interesting point is that eBay's notification to the ACCC is made by eBay International AG, based in Switzerland (another subsidiary organisation), rather than the US parent company or the Australian based subsidiary, ebay.com.au.

The ACCC

eBay has notified the ACCC of their intention to only allow PayPal.

Their notification states in part:

"3. THE TRADE PRACTICES ACT

3.1 Section 47 of the Trade Practices Act 1974 (TPA) prohibits exclusive dealing if it has the purpose or has or is likely to have the effect of substantially lessening competition ...

3.2 Sections 47(2)(d) and 47(3)(d) may be relevant to the Conduct, because pursuant to the Conduct, eBay users will be restricted from processing payments for eBay transactions other than through PayPal, Pay on Pickup or Visa/Mastercard processed by PayPal. Sections 47(2)(e) and 47(3)(e) may also be relevant for the same reason.

Section 93 of the TPA deals with the procedure by which corporations are entitled to obtain statutory protection in relation to exclusive dealing conduct which may otherwise contravene the prohibition in section 47. Apart from "third line forcing", once a Notification is lodged with the Australian Competition and Consumer Commission (Commission), the conduct the subject of the Notification is deemed not to have the effect or likely effect of substantially lessening competition for the purposes of section 47.

The Commission is required to make certain enquiries and to comply with the predeterminatioti hearing procedure before making any decision to withdraw protection."

(Footnotes omitted)

S.47 of the Act provides in sub-sections (2) and (3) with regard to exclusive dealing:

- (2) A corporation engages in the practice of exclusive dealing if the corporation:*
- (a) supplies, or offers to supply, goods or services;*
 - (b) supplies, or offers to supply, goods or services at a particular price; or*
 - (c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation;*
- on the condition that the person to whom the corporation supplies, or offers or proposes to supply, the goods or services or, if that person is a body corporate, a body corporate related to that body corporate:*
- (d) will not, or will not except to a limited extent, acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;*
 - (e) will not, or will not except to a limited extent, re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;*
 - or*
 - (f) in the case where the corporation supplies or would supply goods or services, will not re-supply the goods or services to any person, or will not, or will not except to a limited extent, re-supply the goods or services:*
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or*
 - (ii) in particular places or classes of places or in places other than particular places or classes of places.*
- (3) A corporation also engages in the practice of exclusive dealing if the corporation refuses:*
- (a) to supply goods or services to a person;*
 - (b) to supply goods or services to a person at a particular price; or*
 - (c) to give or allow a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services to a person;*
- for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate:*
- (d) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;*
 - (e) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description,*

acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;
or

(f) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation to any person, or has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places.

What this means is that if eBay will only provide their service to an individual on the condition that the individual will not use the services of a competitor of eBay (or PayPal) or refuses to provide their services to someone because that person has not agreed to not use the services of a competitor they are indulging in exclusive dealing.

If the ACCC takes no action these changes will be implemented. They clearly breach (as eBay has admitted) s. 47 of the Trade Practices Act, in that they prevent competition. The ACCC has the power to prevent these changes under the Act on two basic grounds:

S.93(3) provides:

If the Commission is satisfied that the engaging by a corporation in conduct or proposed conduct of a kind described in subsection 47(2), (3), (4) or (5) or paragraph 47(8)(a) or (b) or (9)(a), (b) or (c) and referred to in a notice given by the corporation to the Commission under subsection (1) has or would have the purpose or has or is likely to have, or would have or be likely to have, the effect of substantially lessening competition within the meaning of section 47 and that in all the circumstances:

(a) the conduct has not resulted or is not likely to result, or the proposed conduct would not result or be likely to result, in a benefit to the public; or

(b) any benefit to the public that has resulted or is likely to result from the conduct, or would result or be likely to result from the proposed conduct, would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct or would result or be likely to result from the proposed conduct; the Commission may at any time give notice in writing to the corporation stating that the Commission is so satisfied and accompanied by a statement setting out its reasons for being so satisfied.

In other words, if the ACCC is satisfied that

(1) the conduct will or is likely to have the effect of substantially decreasing competition; and

(2) the public benefit that may result from the proposed conduct does not outweigh the detriment to the public caused by the decreasing of competition,
the ACCC may inform the corporation that they are so satisfied, which will mean that the notification is not successful and the anti-competitive behaviour is not permitted.

Conclusion

The changes will lead to a dramatic decrease in competition. The changes will have several likely and unwanted consequences for most Australians.

It is in the best interests of the millions of Australian eBay users (current and future) that the ACCC refuse to allow eBay to make the proposed changes.

Signed:

Cathy Davies

2 May 2008

Additional information:

6/05/2008

The text below is mainly from eBay's annual report found here:

<http://www.secinfo.com/dsvrp.t3Ky.htm>

It was published as seen below on an internet discussion board (by me). The occasional irreverent comments (also by me) highlight some of the concerns that eBay itself has about PayPal's security.

"Content owners and other intellectual property rights owners may also seek to bring legal action against entities that are peripherally involved in the sale of infringing items, such as payment companies. To the extent that intellectual property rights owners bring legal action against PayPal based upon the use of PayPal's payment services in a transaction involving the sale of infringing items, including on our websites, our business could be harmed".

"Litigation and negative publicity has increased as our websites gain prominence in markets outside of the U.S., where the laws may be unsettled or less favorable to us. Such litigation is costly for us, could result in damage awards, injunctive relief, or increased costs of doing business through adverse judgment or settlement, could require us to change our business practices in expensive ways, or could otherwise harm our business. Litigation against other online companies could result in interpretations of the law that could also require us to change our business practices or otherwise increase our costs. In addition, a public perception that counterfeit or pirated items are commonplace on our site could damage our reputation and our business."

"PayPal's payment system is also susceptible to potentially illegal or improper uses. These may include illegal online gambling, fraudulent sales of goods or services, illicit sales of prescription medications or controlled substances, piracy of software and other intellectual property, money laundering, bank fraud, child pornography trafficking, prohibited sales of alcoholic beverages or tobacco products, and online securities fraud. Recent changes in law have increased the penalties for intermediaries providing payment services for certain illegal activities. Despite measures PayPal has taken to detect and lessen the risk of this kind of conduct, including PayPal's ability to fine users in certain jurisdictions up to \$500 or take legal action to recover its losses for certain violations of PayPal's acceptable use policy, including online gambling and illegal sales of prescription medications. Illegal activities could still be funded using PayPal."

Um ... I thought it was secure ... ?

"Failure to deal effectively with fraudulent transactions and customer disputes would increase our loss rate and harm our business.

PayPal's highly automated and liquid payment service makes PayPal an attractive target for fraud. In configuring its service, PayPal continually strives to maintain the right balance of appropriate measures to promote both convenience and security for customers. Identity thieves and those committing fraud using stolen credit card or bank account numbers can potentially steal large amounts of money from businesses such as PayPal. We believe that several of PayPal's current and former competitors in the electronic payments business have gone out of business or significantly restricted their businesses largely due to losses from this type of fraud. While PayPal uses advanced anti-fraud technologies, we expect that technically knowledgeable criminals will continue to attempt to circumvent PayPal's anti-fraud systems. In addition, PayPal's service could be subject to employee fraud or other internal security breaches, and PayPal may be required to reimburse customers for any funds stolen as a result of such breaches. Merchants could also request reimbursement, or stop using PayPal, if they are affected by buyer fraud.

PayPal incurs substantial losses from merchant fraud, including claims from customers that merchants have not performed or that their goods or services do not match the merchant's description. PayPal also incurs losses from claims that the customer did not authorize the purchase, from buyer fraud, from erroneous transmissions, and from customers who have closed bank accounts or have insufficient funds in them to satisfy payments. In addition to the direct costs of such losses, if they are related to credit card transactions and become excessive, they could result in PayPal losing the right to accept credit cards for payment. If PayPal were unable to accept credit cards, the velocity of trade on eBay could decrease, in which case our business would further suffer. PayPal was assessed substantial fines for excess chargebacks in 2001, and excessive chargebacks may arise in the future. PayPal has taken measures to detect and reduce the risk of fraud, but these measures need to be continually improved and may not be effective against new forms of fraud or in connection with new product offerings. If these measures do not succeed, our business will suffer."

Really, really secure ...

"While eBay can suspend the accounts of users who fail to fulfill their payment or delivery obligations to other users, eBay does not have the ability to require users to make payment or deliver goods, or otherwise make users whole other than through our limited buyer protection programs. Other than through these programs, eBay does not compensate users who believe they have been defrauded by other users, although users who pay through PayPal may have reimbursement rights from their credit card company or bank, which in turn will seek reimbursement from PayPal."

But the banks aren't secure ...

"Our business is subject to online security risks, including security breaches and identity theft.

To succeed, online commerce and communications must provide a secure transmission of confidential information over public networks. Our security measures may not detect or prevent security breaches that could harm our business. Currently, a significant number of our users authorize us to bill their credit card accounts directly for all transaction fees charged by us. PayPal's users routinely provide credit card and other financial information. We rely on encryption and authentication technology licensed from third parties to provide the security and authentication to effect secure transmission of confidential information, including customer credit card numbers. Advances in computer capabilities, new discoveries in the field of cryptography or other developments may result in a compromise or breach of the technology used by us to protect transaction data. In addition, any party who is able to illicitly obtain a user's password could access the user's transaction data. An increasing number of websites including, recently, our Korean subsidiary, have reported breaches of their security. Any compromise of our security could harm our reputation and, therefore, our business, and could result in a violation of applicable privacy and other laws. In addition, a party that is able to circumvent our security measures could misappropriate proprietary information, cause interruption in our operations, damage our computers or those of our users, or otherwise damage our reputation and business. Under credit card rules and our contract with our card processors, if there is a breach of credit card information that we store, or that is stored by PayPal's direct credit card processing customers, we could be liable to the credit card issuing banks for their cost of issuing new cards and related expenses. In addition, if we fail to follow credit card industry security standards, even if there is no compromise of customer information, we could incur significant fines or lose our ability to give customers the option of using credit cards to fund their payments or pay their fees. If we were unable to accept credit cards, our business would be seriously damaged.

Our servers are also vulnerable to computer viruses, physical or electronic break-ins, and similar disruptions, and we have experienced "denial-of-service" type attacks on our system that have made all or portions of our websites unavailable for periods of time. We may need to expend significant resources to protect against security breaches or to address problems caused by breaches. These issues are likely to become more difficult as we expand the number of places where we operate. Security breaches, including any breach that results in the release of our users' personal information, could damage our reputation and expose us to a risk of loss or litigation and possible liability. Our insurance policies carry low coverage limits, which may not be adequate to reimburse us for losses caused by security breaches.

Our users, as well as those of other prominent Internet companies, have been and will continue to be targeted by parties using fraudulent "spoof" and "phishing" emails to misappropriate passwords, credit card numbers, or other personal information or to introduce viruses through "trojan horse" programs to our users' computers. These emails appear to be legitimate emails sent by eBay, PayPal, Skype, or a user of one of those businesses, but direct recipients to fake websites operated by the sender of the email or request that the recipient send a password or other confidential information via email or download a program. Despite our efforts to mitigate "spoof" emails through product improvements and user education, "spoof" and "phishing" remain a serious problem that may damage our brand, discourage use of our websites, and increase our costs."

But you said ...

"PayPal is subject to regulation as a bank in Luxembourg, and its status under banking or financial services laws or other laws in markets outside the U.S. is unclear.

PayPal currently allows its customers with credit cards to send payments from 190 markets, and allows its customers to receive payments in 65 of those markets (including the U.S.). Customers can only withdraw funds electronically to local bank accounts in 35 of these 65 markets. In 26 of these 65 markets customers can withdraw funds electronically to their credit or debit card. In two of these 65 markets customers can only withdraw funds locally by receiving a bank draft in the mail, and in another two of these 65 markets, customers cannot withdraw locally and can only withdraw funds if they have a U.S. bank account. These limitations affect PayPal's ability to grow in these markets. PayPal also offers customers the ability to send or receive payments denominated in 17 currencies. Of the 190 markets whose residents can use the PayPal service, 31 (27 countries plus four French overseas departments) are members of the European Union. Previously, PayPal delivered services in the EU through a subsidiary in the United Kingdom licensed to operate as an Electronic Money Institution. As of July 2007, PayPal provides localized versions of its service to customers in the EU through PayPal (Europe) S.A.R.L. et Cie, SCA., a wholly-owned subsidiary of PayPal that is licensed as a bank in Luxembourg. Accordingly, PayPal (Europe) is subject to significant fines or other enforcement action if it violates the disclosure, reporting, anti-money laundering, capitalization, funds management, corporate governance or other requirements imposed on Luxembourg banks. PayPal does not have experience in operating as a bank, and any fines or other enforcement actions imposed by the Luxembourg regulator could adversely affect PayPal's business. PayPal (Europe) implements its localized services in EU countries through an expedited "passport" notification process through the Luxembourg regulator to regulators in other EU member states pursuant to EU Directives, and has completed the "passport" notice process in all EU member countries. The regulators in these countries could notify PayPal (Europe) of local consumer protection laws that will apply to its business, in addition to Luxembourg consumer protection law. The regulators in these countries could also seek to persuade the Luxembourg regulator to order PayPal (Europe) to conduct its activities in the local country through a branch office. Any such responses from these regulators could increase the cost of, or delay, PayPal's plans for expanding its business."

Oh, it's a bank in Luxembourg, eh?

"In markets other than the U.S., EU, Australia and China, PayPal serves its customers through PayPal Singapore Private

Ltd., a wholly-owned subsidiary of PayPal that is based in Singapore. In many of these markets, it is not clear whether PayPal's Singapore-based service is subject to local law or, if it is subject to local law, whether such local law requires a payment processor like PayPal to be licensed as a bank or financial institution or otherwise. Even if PayPal is not currently required to obtain a license in those countries, future localization or targeted marketing of PayPal's service in those countries could require licensure. PayPal could be required to obtain licenses or regulatory approvals that could impose a substantial cost on it and involve considerable delay to the provision or development of its product. Delay or failure to receive such a license would require PayPal to change its business practices or features in ways that would adversely affect PayPal's international expansion plans and could require PayPal to suspend providing services to customers in one or more countries. PayPal may also be subject to other laws and regulations of one or more countries in which it serves its customers, such as data protection and anti-money laundering laws, which vary from country to country and are subject to change. In some cases, these laws may require expensive changes to PayPal's current business practices. If PayPal were found to be subject to and in violation of any foreign laws or regulations, it could be subject to liability, forced to change its business practices or forced to suspend providing services to customers in one or more countries."

Whaddya mean you don't know?

"In addition, if PayPal were to seek to expand the financial products that it offers outside of the U.S., either alone, through a commercial alliance, or through an acquisition, PayPal could become subject to additional licensure requirements, additional laws and regulations, or increased regulatory scrutiny, which could impose substantial costs and delay the introduction of any new products."

Oh, how dreadful ... laws and regulations. Shocking.

"PayPal is required to comply with credit card networks special operating rules for Internet payment services. PayPal and its credit card processors have implemented specific business processes for merchant customers in order to comply with these rules, but any failure to comply could result in fines, the amount of which would be within the credit card networks' discretion. PayPal also could be subject to fines from credit card networks if it fails to detect that merchants are engaging in activities that are illegal or that are considered "high risk," primarily the sale of certain types of digital content. For "high risk" merchants, PayPal must either prevent such merchants from using PayPal or register such merchants with credit card networks and conduct additional monitoring with respect to such merchants. PayPal has incurred fines from its credit card processor relating to PayPal's failure to detect the use of its service by "high risk" merchants. The amount of these fines has not been material, but any additional fines in the future would likely be for larger amounts, could become material, and could result in a termination of PayPal's ability to accept credit cards or changes in PayPal's process for registering new customers, which would seriously damage PayPal's business."

Well then where would we all be?

"Changes in PayPal's funding mix could adversely affect PayPal's results.

PayPal pays significant transaction fees when senders fund payment transactions using credit cards, nominal fees when customers fund payment transactions by electronic transfer of funds from bank accounts, and no fees when customers fund payment transactions from an existing PayPal account balance or use buyer credit issued by GE Money Bank. Senders fund a significant portion of PayPal's payment volume using credit cards, and PayPal's financial success will remain highly sensitive to changes in the rate at which its senders fund payments using credit cards. Senders may prefer funding using credit cards rather than bank account transfers for a number of reasons, including the ability to dispute and reverse charges directly with their credit card provider if merchandise is not delivered or is not as described, the ability to earn frequent flier miles or other incentives offered by credit card issuers, the ability to defer payment, or a reluctance to provide bank account information to PayPal. In addition, some of PayPal's newer offerings, including the ability to make a limited number of payments without opening an account, have a higher rate of credit card funding than PayPal's basic product offering."

Oh, funny that ... I guess credit cards through PayPal will be next to go.

"PayPal's failure to manage customer funds properly would harm its business.

PayPal's ability to manage and account accurately for customer funds requires a high level of internal controls. In some of the markets that PayPal serves and currencies that PayPal offers, PayPal has a limited operating history and limited management experience in managing these internal controls. As PayPal's business continues to grow, it must strengthen its internal controls accordingly. PayPal's success requires significant public confidence in its ability to handle large and growing transaction volumes and amounts of customer funds. Any failure to maintain necessary controls or to manage accurately customer funds could diminish customer use of PayPal's product severely."

What's that about the management?

"System failures could harm our business.

We have experienced system failures from time to time, and any interruption in the availability of our websites will reduce our current revenues and profits, could harm our future revenues and profits, and could subject us to regulatory scrutiny. Our eBay.com website has been interrupted for periods of up to 22 hours, and our PayPal website has suffered intermittent unavailability for periods as long as five days."

So, where does that leave the customers?

Thank you for reading.

C Davies