

I would like to comment on the eBay International AG exclusive dealing notification with the ACCC. I note that, if granted, this would provide eBay with immunity from the Trade Practises Act in the area dealing with its notification.

I would like to note the difficulty in responding to eBay's notification when the wording of that notification is unavailable. I am advised by ACCC's staff that this is for reasons of Privacy. I do understand this, but this must have an impact on my ability to respond precisely to eBay's claims to the ACCC. I can only provide arguments against eBay's public statements on its website. But, if there is a disparity between eBay's public statements (which can be found through the link below) and their notification I hope that the ACCC would take this corporate behaviour into their consideration of the exclusive dealing notification.

Your advice is that you may remove the immunity if:

1. the proposed conduct will result in a **substantial lessening of competition**; or
2. the **public benefit** that may result from the proposed conduct would not outweigh the **detriment** to the public caused by the lessening of competition.

### **Lessening of Competition.**

I expect that eBay would claim that the acceptance of credit cards and payment on pick-up is evidence that competition is available. Any payment through PayPal will cost the seller considerably more than other currently available options. Under the current system the seller can elect which payment type they will receive. Using direct deposit may in many cases be free to both parties (in some cases a minimal service fee from the buyer's bank may apply). If sellers are directed only to allow PayPal as the payment method the seller will loose choice (competition) and eBay via it's PayPal entity reaps the benefit of charges against every sale on eBay. The PayPal portal therefore effects the lessening of competition through the removal of a cheaper method of payment.

I would also like to see clarification on the entity status of PayPal. If they are a separate entity then the argument that they are owned by eBay is moot. They should be treated as a separate company for the purposes of eBay's application.

As an example of how determined eBay is to introduce PayPal, eBay is aware of some sellers who state that they will pass on these costs to buyers. Ebay has responded by banning the passing of costs to consumers. This shows that they acknowledge the increased cost of PayPal.

### **Public benefit and detriment.**

In relation to the public benefit eBay appears to argue that safety is the key reason for requesting the ACCC to provide immunity from the TPA. EBay's opening page on its news portal <http://www2.ebay.com/aw/au/200804.shtml#2008-04-10105658> states this belief clearly.

I would like to address eBay's statements below, to argue that in the balance of public benefit versus the detriment to the public that there is more detriment than benefit.

I will also provide information about the nature of eBay's business which includes eBay's own conditions and policies that clearly state that eBay has no part in the contract between the buyer and seller.

### **Public Benefit and Detriment.**

#### **1. eBay statement:**

***"We're making it safer for all our members to trade on eBay.com.au. To ensure members use only the most secure payment methods, it will soon be required to offer PayPal on all listings on eBay.com.au.***

***We believe buyers will be more confident shopping on eBay if only the safest payment methods are permitted.***

My response.

The internet offers many "electronic" payments systems. All major banks such as The National Australia Bank, The Commonwealth, ANZ, Westpac and a host of smaller banks and Credit Unions offer electronic systems that are secured using the same technology as PayPal. Under the heading of Encryption the ANZ outlines security as follows:

*Encryption is turning words and numbers into a coded language. Encryption prevents unauthorised users from being able to change or read your data. ANZ encrypts your personal data using 128-bit SSL (Secure Socket Layer) encryption technology. You can identify whether the Internet Banking session is secure or encrypted when you see https:// in the Address bar and/or when you see a padlock in the bottom right corner of the browser window. You can double click on the padlock to view the Digital Certificate ie the electronic signature to view details.*

(From - <http://www.anz.com/aus/personal/Ways-To-Bank/internet-banking/protect-your-banking/How-Does-ANZ-Help.asp#list1>)

Some institutions offer additional security beyond that offered by PayPal, such as secure icons (Community CPS Credit Union), which defeats keylogging software, that can copy a user's password and transfer it to a third party. Any claim that PayPal is more secure than current banking technologies is open to dispute, and eBay has not established that its PayPal system is "the most secure Payment Method". In fact any PayPal user making a payment must provide a link to an electronic banking account of some type of another, a bank account or credit card. This fact alone diminishes eBay's argument. On the one hand it claims that PayPal is "safest" and will deny users the right to conduct internet banking directly with the purchaser, and on the other hand its preferred system PayPal requires a link to one of these types of banking accounts to effect payment.

Using eBay's logic, inserting a third party into the payment stream must expose the user to a greater overall level of internet/IT exposure to fraud. Therefore the public benefit claimed by eBay cannot be truthfully established and the detriment lies in the compulsory nature of the use of PayPal, which deprives the user (buyers in eBay's case) of the right to exercise their own judgement when it comes to the risk they are willing to take in making the internet payment.

**Fig 1 Direct payment flow:**

User's bank/credit card account ———→ Seller's bank account.

**Fig 2 Indirect eBay required payment flow:**

User's bank/credit card account → PayPal (non banking entity) → Seller's bank account.

**2. eBay statement:**

*"In 2007 on eBay.com.au those who paid with PayPal were much less likely to enter a dispute. In fact those using PayPal were almost four times less likely to have a dispute over their purchase than people who paid with bank deposit."*

My response.

This argument is central in eBay's linking of its claims of safety to its desired monopoly over the electronic payments system. For this argument to hold, eBay would have to establish that the disputes relate directly to the payment method used. Further that the dispute would not have occurred had PayPal been used. This is easy to establish. An inquiry from the ACCC to the banking sector would provide evidence of complaints from eBay buyers about fraud, payment handling, delays or any other payment "dispute". What is more likely the case is that those disputes relate to misrepresentation of goods such as their stated: condition, colour, size, quality and quantity, or unstated elements: missing parts, not operable, not current model and if the item was used rather than new.

It is also possible that eBay is playing with semantics. For example the wording that, "...those who paid with PayPal were much less likely to enter a dispute..." It is possible that many complaints are in fact not from buyers but in fact from sellers who do not receive payment at all.

It is important to remember that eBay is using this claim to force buyers and sellers into their payment system. If I as a buyer do not receive payment because I choose to accept direct deposit (or postal order) then that is my issue not eBay's. If I assess the risk and cost of PayPal as excessive (which I do) then the supposed benefit (PayPal) is available to me *if* I choose. Again I believe that the public interest claimed by eBay is less than that claimed by eBay.

### 3. eBay statement:

*“Buyers and sellers don’t have to share their financial details when using PayPal, which is one of the biggest fears consumers have when transacting online. PayPal eliminates this concern, making it one of the most secure ways to transact online. In fact PayPal topped the list of preferred online payment methods according to the Nielsen Consumer Report 2H 2007.”*

My response:

This is a furphy. For any internet payment transaction to take place the seller must reveal the details of the account into which amounts will be paid. This is also true for Bpay, internet banking and PayPal (which is an online system).

All sorts of payment transactions take place on the internet which require the receiver to reveal their account details. To suggest that eBay sellers, councils, governments, statutory authorities and other commercial entities are faced with consumers who fear sharing details is a demonstrable misrepresentation of fact. The consumer, or in eBay’s case the buyer does not reveal their bank details, the seller does. So once again the public benefit claimed does not exist. If people truly feared sharing their financial details then the eBay entity this would refer to is the sellers each of whom can currently choose PayPal if they wished.

The overwhelming detriment is to the sellers who will have no choice but to accept PayPal and fees when there is no demonstrable safety benefit of that system. PayPal is no safer than a simple bank to bank transfer. In fact I would argue that the safety protocols between banks would be at least equal and potentially more advanced than PayPal’s. Detriment also applies to the removal of choice for the consumer/buyer who wishes to use money orders – (this does not require the revelation of any details). Detriment also applies to sellers of small, low cost items who will have to absorb high PayPal costs (vs current no cost options) relative to the item sale cost, where the risk in such low cost transactions hardly warrants the imposition of such draconian measures. Where is the public benefit here?

The public benefit cannot be established through the use of rhetoric. The fact is that internet consumers broadly, use an existing suite of alternate payment options which includes postal orders and direct deposit which are safe, widely used and trusted.

### **Other**

i) EBay has a series of community notice boards at:

<http://forums.ebay.com.au/forum.jspa?forumID=1008&antcache=1208698002854>

<http://forums.ebay.com.au/forum.jspa?forumID=18>

The former is directly about PayPal and in it the views of eBay users can be seen. Complaints abound in regards to this imposition being sought by eBay.

The majority of writers while expressing support for PayPal generally, write more passionately of their anger at the removal of choice and the imposition of costs. It should be noted for example that under PayPal, if a buyer claims not to have received an item the seller will, at a minimum have to produce a registered post form to support their counterclaim that the item was sent. This means that to defend him/herself from fraudulent claims each item will cost buyers an additional \$2.70. This in my view constitutes detriment to the buyer who will be charged that fee.

ii) eBay users are adults and do not need to be told how to assess risk or conduct their business dealings. It should be remembered that eBay is a facilitating party. Evidence of this is contained in their, "Your User Agreement" which they cite as. "The most important eBay policy." In it can be found the following:

*"eBay is not an Auctioneer.*

**3.1 Online Auctions.** *Although we are commonly referred to as an online auction web site, it is important to realise that we are not a traditional "auctioneer". Instead, our Site merely acts as an online venue to allow members to communicate and offer, sell, and buy just about anything, at anytime, from anywhere, in a variety of formats, including a fixed price format and an auction-style format commonly referred to as an "online auction".* **YOU ACKNOWLEDGE AND AGREE THAT EBAY IS NOT INVOLVED IN THE ACTUAL TRANSACTION BETWEEN BUYERS AND SELLERS. AS A RESULT, EBAY HAS NO CONTROL OVER THE QUALITY, SAFETY OR LEGALITY OF ITEMS OR CONTENT POSTED BY MEMBERS ON OUR SITE, THE TRUTH OR ACCURACY OF LISTINGS, THE ABILITY OF SELLERS TO SELL ITEMS OR THE ABILITY OF BUYERS TO BUY ITEMS. WE CANNOT ENSURE AND DO NOT GUARANTEE THAT A MEMBER OR BROWSER OF OUR SITE WILL ACTUALLY COMPLETE A TRANSACTION OR ACT LAWFULLY IN USING OUR SITE.**

*When you enter into a transaction you create a legally binding contract with another member, unless the item is listed in a category under the Non-Binding Bid Policy (located at: <http://pages.ebay.com.au/help/policies/non-binding-bid.html>) or the transaction is prohibited by law or by this Agreement or our Policies. You are responsible for ensuring that you comply with your obligations to that other member. If you do not, you may become liable to him or her. You must ensure that you are aware of any laws relevant to you as a buyer or seller, or in any other uses you make of our Site. If another member breaches any obligation to you, you - not eBay - are responsible for enforcing any rights that you may have.*

*Except as specifically advised otherwise on our Site, eBay does not offer any form of insurance or other buyer or seller protection which will assist you, because **our Site merely provides the online venue for members to offer, sell, and buy and we are not otherwise involved in the transactions and interactions between buyers and sellers.** However, some forms of payment permitted on the Site, such as PayPal or credit card, may offer limited buyer or seller protection or chargeback services and you should familiarise yourself with these before proceeding with a transaction of any kind through the Site."*

Available at: <http://pages.ebay.com.au/help/policies/user-agreement.html>

While some rules are of course required eBay state on the one hand that they are not involved in the actual transaction, as the bolded words above confirm. Yet on the other they are compromising their own, "The most important eBay policy." By seeking to import their PayPal company and product into transactions they state they have no part in.

**Summary:**

I do not believe that it is clear that eBay has established, without resort to rhetoric, that it is in the interests of safety that the PayPal rule is in the public interest the proposed conduct will result in a substantial lessening of competition, and detriment to eBay users. I would also argue that eBay is using its substantial resources and size to advertise, coerce the public and members, and bypass the Trade Practices Act.

Signed  
Daniel Geus  
**Contact details excluded**

**EXCLUDED FROM  
PUBLIC REGISTER**