



9 May 2008

The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
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Attention: Dr Richard Chadwick

General Counsel's Office

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Dear Dr Chadwick

**Submission in response to eBay International AG – notification of exclusive dealing
N93365 (“eBay Notification”)**

1. Executive summary

- 1.1 American Express has two primary concerns with eBay's proposed exclusive dealing conduct. They are that the proposal:
 - (a) removes consumer and merchant choice of payment method on a very significant platform for online purchasing in Australia; and
 - (b) misrepresents the public benefits of the conduct and incorrectly identifies weaknesses in other payment methods.
- 1.2 If the proposal is allowed to stand, it will allow eBay to leverage its powerful position with respect to its internet-based buying and selling platform to eliminate virtually all competition with its wholly-owned subsidiary, PayPal, as a payment method for all online eBay transactions.
- 1.3 This is likely to result in consumer detriment through limitation of payment method choice, leading to the imposition of higher prices to the significant number of sellers (and/or buyers) using eBay (and, indirectly, to higher prices to their customers).
- 1.4 American Express submits that the Commission should withdraw protection for eBay's notified exclusive dealing conduct.

2. Background

- 2.1 eBay operates an internet buying and selling platform with at least 5 million Australian users¹. eBay Marketplaces has 83.9 million active users worldwide². It is generally recognised as the leading internet auction platform worldwide and in Australia³. Local internet auction platforms in Australia either do not cater to the same types of sellers⁴, have a limited regional reach (such as the Trading Post in NSW), or do not have enough buyer recognition to attract sellers.
- 2.2 PayPal was founded in 1999 and was bought by eBay in 2002. PayPal is a payment intermediary that provides "e-payment" clearing house services that allow online merchants wanting to receive card or bank payments over the internet a means of receiving payment without needing a relationship with a merchant-acquiring bank. In a recent submission to the Reserve Bank of Australia, PayPal described itself as follows:
- "...although PayPal offers what could be seen as a payment service, it is truly a user of the traditional Payment Systems, consolidating multiple relationships into an online package for use by non-typical merchants".⁵*
- 2.3 Private buyers who use PayPal pay no or very limited fees. The merchant sellers generally pay fees comprised of a flat fee per transaction and a percentage of the amount deposited into the merchant's PayPal account. Both buyers and sellers must have a PayPal account in order to use PayPal. The account is either self-funded (i.e. kept in credit from sales), funded from a bank account or by a debit or credit card⁶.
- 2.4 eBay has achieved its dominant position in Australia and internationally over recent years in circumstances where the eBay platform has permitted buyers and sellers to use multiple traditional (and regulated) payment systems such as bank deposits, credit or debit card payments or cheques. eBay's proposed exclusive dealing conduct would remove most of those choices for the >5 million registered users of eBay Australia (both sellers and buyers) and indeed many millions of users registered on eBay worldwide who might wish to acquire goods from an Australian merchant seller on the eBay platform. In particular, American Express understands that the notified conduct involves the imposition of a single online payment system on all eBay sellers and buyers, except in the

¹ Para 1.13 of eBay Notification.

² See http://news.ebay.com/fastfacts_ebay_marketplace.cfm and <http://pages.ebay.com.au/aboutebay/media.html>

³ See *infra* at 5.4-5.6.

⁴ For example, Grays-online references online or actual merchants, rather than opportunistic sellers of personal items.

⁵ Paypal Submission to Reserve Bank of Australia, 11 September 2007. American Express notes that not all traditional payment mechanisms are accepted through PayPal in Australia.

⁶ American Express understands that the notified exclusive dealing conduct will not have any effect on how users fund their PayPal accounts. Any such further restriction would be of substantial concern to American Express.

limited cases where buyers and sellers can use cash on pick up (e.g. where the sale is a local sale)⁷.

- 2.5 eBay states that its main purpose for the proposed exclusive dealing is that the network-wide use of PayPal online payment services will result in improved "*buyer experiences*", essentially because PayPal operates as an intermediary between buyer and seller and provides buyer and seller 'protection' services.

3. American Express

- 3.1 American Express is a global financial services company which issues credit and charge cards using a closed loop three-party card system (where a single entity is responsible for both issuing and acquiring card transactions). In Australia it offers (amongst other products) a range of American Express cards.

- 3.2 American Express supports use of its charge and credit cards to make online payments in accordance with its card user terms and conditions. American Express offers sophisticated fraud protection systems, including a customer enquiry and chargeback system which ensures that cardholders will not be charged for any fraudulent use of their card.

- 3.3 There are approximately **EXCLUDED FROM PUBLIC REGISTER** merchants in Australia who are presently authorised to accept American Express cards and there are approximately American Express cards in force in Australia as well as 86.4 million American Express cards in force globally. Australian cardmembers use their American Express cards to purchase goods and services online, including for transactions conducted via eBay⁸. Merchants use their ability to accept payments made by American Express cardmembers to allow completion of online purchases by their customers. Australian merchants can also accept transactions from American Express cardmembers anywhere in the world outside of Australia. If the notified exclusive dealing conduct is permitted, then those merchants authorised to accept American Express cards will no longer be able to do so in respect of eBay transactions and American Express cardmembers anywhere in the world will no longer be able to choose to use their American Express card to make purchases of goods via eBay Australia.

⁷ eBay's Notification also indicates that the exclusionary rules would not apply to sales of certain limited types of products – "cards, motorcycles, aircraft, boats, vehicles (caravans), trailers, trucks (commercial), services, real estate and businesses for sale". E.g., note 9 eBay Notification.

⁸ Attached to eBay's Notification was a copy of a report by AC Nielsen "Australian Online Retail Monitor Report: Quarter 4, 2007". Page 24 of that report states that of the >80% of online Australia shoppers that use a credit card to shop online, some 11% have used an American Express card.

4. Exclusive dealing and the test for under section 93A

4.1 As the Commission is aware, section 93(3) requires the Commission to make a number of findings before it can withdraw the statutory protection provided by a notification under section 93(1). The Commission must be satisfied that:

- (a) the conduct is entered into for the purpose or is likely to have the effect of substantially lessening competition, and
- (b) no public benefit is likely to result from the conduct, or, any likely public benefit would not outweigh the detriment to the public constituted by any lessening of competition that is likely to result from the conduct.

4.2 eBay's statement of this test at paragraph 3.5(1) of its notification omits the first part of the relevant competition test, i.e., that the Commission must consider whether the conduct is entered into for the purpose of substantially lessening, hindering or preventing competition.

4.3 Consideration of the purpose or end sought to be achieved by exclusive dealing conduct is particularly important in the context of s93A because:

- (a) if the exclusive dealing conduct would not achieve the public benefit said to be the end sought; or
- (b) the public benefit said to be the end sought could be achieved in some way without the exclusive dealing conduct,

then it calls into question whether the hindering of competition which arises as a consequence of the exclusive dealing conduct is properly justified.

5. The likely effects on competition

5.1 Exclusive dealing is a form of vertical restraint. As a general proposition it is well accepted that vertical restraints may promote competition by allowing a supplier to achieve efficiencies in the distribution of its products. It is however also recognised that in some instances exclusive dealing arrangements are intended to and can lessen competition.

5.2 We note that American Express has not been permitted to review material prepared by NERA and relied on in eBay's notification and it is therefore difficult to understand or critically assess the basis on which eBay asserts that no competition issues arise.

5.3 The critical question for the Commission in determining whether the exclusive dealing conduct notified by eBay is likely to have any anti-competitive detriment is whether PayPal would be in a position to raise its prices (to buyers and/or sellers) above competitive levels.

- 5.4 eBay is in a very powerful position in the market in which it supplies its internet-based platform service enabling buyers and sellers of goods to transact. The development of online platforms bringing buyers and sellers together across several countries suggests that there are significant first mover advantages that arise from 'tipping' which in turn has led to dominance by one particular player. In reflecting on the impact in the United States of online auction platforms specifically, economists Glenn Ellison and Sara Fisher Ellison from the Massachusetts Institute of Technology made the following observations in 2005⁹:

In the consumer-orientated online auction market, two remarkable things have happened. First, the market has continued its rapid growth. ... there has been nearly a tenfold growth in the value of items successfully auctioned on eBay since 1999. eBay's revenues have grown proportionately. Second, eBay has maintained a completely dominant position. In the summer of 1999 (shortly after Yahoo! and Amazon entered) the value of goods auctioned on Yahoo! and Amazon was estimated to be about 10 per cent and 1 per cent, respectively, of the value of goods auctioned on eBay...

- 5.5 Ellison and Fisher Ellison have observed in regard to other countries:

Foreign markets provide additional evidence that the consumer-orientated auction market is prone to dominance. In Japan, Yahoo! entered before eBay, and eBay abandoned the market in February 2002 after having failed to gain significant market share. In Europe and Australia, eBay's success led Yahoo! to abandon its auction operations.

- 5.6 According to eBay's exclusive dealing notification, there are approximately 5 million registered users of the eBay site in Australia. American Express submits that tipping has already occurred and that eBay occupies a position of substantial power in Australia in the market in which it provides its services.
- 5.7 The notified conduct will allow eBay to leverage that powerful position to virtually eliminate competition with its PayPal subsidiary for the provision of payment services for all online eBay transactions. Accordingly, the proposed exclusive dealing conduct is likely to result in consumer detriment through the imposition of higher prices to the significant number of buyers and/or sellers using eBay.
- 5.8 Further, American Express submits that new and innovative solutions for payment online are developing overseas and in Australia, including payment methods that use existing networks (such as mobile phones and stored value cards) as a widely available platform. The proposed exclusive dealing conduct in a key online purchasing segment would also be likely to stifle that innovation.

⁹ Ellison and Fisher Ellison, 2005, p. 143

6. Consumer detriment

- 6.1 eBay has claimed that the proposed conduct would result in public benefit because:
- (a) buyers and sellers would obtain the benefits of the PayPal protection policies;
 - (b) individuals will have a greater appreciation of the benefits of secure online transaction services, which will lead to a reduction in the number of online transactions that are exposed to fraud, enhancing the security of the internet as a platform for transacting, leading to the further growth of online businesses; and
 - (c) strengthening the eBay platform will benefit those sellers that rely on eBay as their primary source of income, which will result in the expansion of that platform, benefiting the Australian economy.
- 6.2 American Express submits that it is not correct that the proposed conduct would lead to these claimed public benefits; and that, in any case, the public detriment arising as a consequence of the removal of competition for the provision of payment services in regard to online eBay transactions (considered in section 5 above) will outweigh any of those claimed public benefits.
- 6.3 Simply put, PayPal (and its claimed advantages for users) is available to all eBay users now as one of a range of payment system choices. In other words, the proposed exclusive dealing conduct is not necessary in order to make those features available to eBay users. Indeed, eBay's Notification records that "*the overwhelming majority of eBay sellers already offer to accept PayPal in their listings*"¹⁰. Allowing users to make a choice of payment methods based on their preferences has not to date apparently impeded the growth of transactions on eBay. Limiting users of eBay to PayPal's payment service by tying it to the internet-based platform which enables those users to transact is not necessary to achieve the benefits claimed by eBay in circumstances where users can already assess the merits of different payment methods and make choices as to which is most appropriate for them.
- 6.4 American Express further submits that:
- (a) consumers know and are comfortable with the trust and security features offered by payment methods other than PayPal (including those offered by charge and credit card providers), so that a claim that continuing to allow use of other payment methods will somehow impede growth of online purchasing must be seen as far-fetched (see paragraphs 6.5 to 6.8); and
 - (b) the trust and security features offered by PayPal are in many cases already offered by charge and credit card providers (see paragraphs 6.10 to 6.15 below).

¹⁰ Para 2.4 of eBay Notification.

Use of alternative payment systems will not inhibit growth of online transactions

- 6.5 eBay seeks to justify the proposed exclusive dealing conduct on the basis that it will result in improved buyer experiences. It points to its own research that one of the two biggest reasons customers choose not to return to purchase products on eBay in future is "trust and safety reasons". This category includes past "bad buyer experiences"¹¹. Drilling down further, it appears that eBay's research divides bad buyer experiences into various categories. These categories include¹² non-receipt of purchased items, mis-description of items purchased, and unauthorised use of a buyer's financial information. eBay does not in its Notification provide any breakdown of extent to which bad buyer experiences occur when PayPal has been used or when some other method of payment was used in a transaction. In short, eBay has not demonstrated that exclusion of all methods of payment other than PayPal for online purchases would cure the issue of "bad buyer experiences".
- 6.6 Some insight is provided by the 2007 Nielsen Report attached to eBay's notification. In that report, "trust and safety" is the least significant of all the reasons cited as why a person might not shop online¹³. The main negative experiences with online shopping are related to slow or expensive delivery (39% and 31% of respondents), with only 3% and 4% of respondents citing, respectively, identity theft and credit card fraud as a problem¹⁴. The Commission cannot be satisfied that trust and security issues associated with payment systems other than PayPal are a meaningful impediment to the growth of online purchasing.
- 6.7 eBay does not specify how many buyers who reported a "bad buyer experience" nevertheless continued to make purchases on eBay. However, the level of consumer satisfaction with how their credit cards have handled online fraud issues is reflected in the Nielsen Report's finding that, in fact, 75% of credit card fraud victims had shopped online again in the period prior to the Report. In fact, this was a higher proportion than online purchasers who had not experienced difficulties. Furthermore, the Nielsen Report notes that those with past troubles online appear to spend similar amounts online compared to those who have not had difficulties¹⁵.
- 6.8 PayPal has been available as an online payment platform for several years. eBay does not indicate what percentage of its buyers and sellers choose this platform over others, but the 2007 AC Nielsen Online Retail Monitor Report suggests that credit cards are the most common method of payment online¹⁶. The 2006 DCITA review of electronic payments markets also indicated that credit cards were the most commonly used payment method for internet purchases (81% of respondents) with PayPal being used by only 8% of respondents¹⁷. The fact that PayPal is less widely used than alternative online payment methods suggests that consumers who do value online security believe that other payment methods offer suitable levels of security and select those other payment methods

¹¹ Para 2.1 of eBay Notification.

¹² Para 2.2 of eBay Notification.

¹³ AC Nielsen "Australian Online Retail Monitor: Quarter 4, 2007" ('AC Nielsen Report'), p18

¹⁴ AC Nielsen Report, p 21

¹⁵ 2007 Nielsen Report, p 22

¹⁶ AC Nielsen Report, p 23

¹⁷ DCITA June 2006 "Exploration of future electronic payments markets", p87

in preference to PayPal. That conclusion is supported by the AC Nielsen finding that security is "very important" as a factor when deciding which online payment method to use – with the majority of users selecting credit cards¹⁸.

- 6.9 The importance attached by consumers to security of online payment, juxtaposed with the data referred to in paragraph 6.6 which highlights that "[t]rust in available online payment methods is a perceived online shopping obstacle for very few consumers"¹⁹, demonstrates that eBay's claims about consumer detriment from use of payment methods other than PayPal cannot be accepted.

Trust and security features offered by PayPal are in many cases already offered by charge and credit card providers

- 6.10 The DCITA June 2006 report titled "Exploration of Future Electronic Payments Markets" notes that consumers reported that credit cards are the most commonly used payment method for internet purchases, and are perceived as the safest payment method for internet transactions because of the security offered by these cards. As the 2006 DCITA report noted:

*"In most payment situations, consumers do not bear the risk of third party fraud except in limited circumstances. In the case of credit card transactions, including most online, card-not-present transactions, cardholders generally have the benefit of the chargeback arrangements under the card scheme's rules. If the cardholder challenges the legitimacy of a transaction there will generally be a chargeback to the merchant, and this will remain in place unless the merchant can positively establish that the consumer authorised the transaction."*²⁰

- 6.11 The security and buyer protection features offered by PayPal are matched by similar features offered by American Express (and other major credit card issuers). That is, a buyer does not need to use PayPal to protect their personal information or obtain buyer protection. eBay's own website gives the following guidance to users about payment by credit card²¹:

"Some sellers have merchant facilities which allows you to pay them via credit card. When paying by credit card over the Internet, always make sure you input your details over a secure site.

Paying with credit card means your payment is:

- *Traceable*
- *Immediate and convenient*
- ***Limited liability: Most credit card issuers provide online protection. Please read your cardholder agreement for details.***

¹⁸ AC Nielsen Report, p 25 - 26

¹⁹ AC Nielsen Report, p18

²⁰ DCITA "Exploration of future electronic payments markets", p 106

²¹ <http://pages.ebay.com.au/education/learn-to-buy-payments.html#creditcard> (last accessed 8 May 2008), and see also <http://pages.ebay.com.au/help/tp/payment-ov.html> (last accessed 8 May 2008).

- 6.12 Security and buyer protection features offered by American Express and the terms and conditions which apply to them are summarised on our public Internet site (www.americanexpress.com/australia). They include:
- (a) To reduce card fraud, American Express provides monthly statements, details of recently billed transactions and account balances on our secure website, which can only be accessed by logging in with a unique user ID and password.
 - (b) Cardmembers have available via their choice of either SMS or email a weekly alert on balance, payment confirmations and notification when they are approaching their credit limit.
 - (c) All American Express cards offer standard dispute provisions that allow Cardmembers to dispute unknown or incorrect charges on their statements with a telephone call. If the dispute is resolved in the Cardmember's favour, the purchase is generally charged back to the merchant; and the Cardmember is not responsible for the unknown or incorrect charge while American Express's investigation is ongoing²².
 - (d) Various American Express cards include Purchase Protection. For eligible new items which are stolen or damaged accidentally, the Purchase Protection benefit will, subject to exclusions, replace, repair or refund the item for up to 90 days after the date of purchase.
 - (e) Selected American Express cards include Refund Protection. With the Refund Protection benefit, if a Cardmember is dissatisfied with an eligible new purchase made with the Card and the merchant won't take it back, American Express will reimburse the Cardmember for the purchase price, subject to exclusions, up to \$500 per new item within 90 days of the date of purchase.
 - (f) Cardmembers are not liable for unauthorised online transactions where it is clear that the Cardmember has not contributed to the loss.
- 6.13 Set out below is an extract from the American Express website²³ which summarises the additional security features which apply to merchants accepting American Express transactions online in Australia:

²² See http://www.americanexpress.com/australia/statementqueries/uc_stage2.shtml. (last accessed 8 May 2008)

²³ See <https://www212.americanexpress.com/dsm/live/dsm/int/australia/en/merchants/everydayresources/additionalstandardsforonlinetransactions.do?vgnextoid=2e5a0188cbc8e010VgnVCM100000cef4ad94RCRD> (last accessed 8 May 2008)

SECTION 2: ADDITIONAL STANDARDS FOR ONLINE TRANSACTIONS

PROTECTING ONLINE CARDMEMBERS

American Express® expects Merchants to take every precaution to protect Cardmember information at all times, including during online transactions. In addition to the General Security Standards in Section I, the following additional requirements apply to Merchants that conduct (or intend to conduct) online transactions.

INFRASTRUCTURE REQUIREMENTS

When a Merchant processes Cardmember transactions online, the following security requirements must be implemented:

- Web site must be enabled with Secure Socket Layer 3.0, with 128-bit encryption.*
- American Express-certified POS device and/or methodology must be used to transmit all transaction data to American Express.
- Every Web transaction must be authorised using a separate American Express® Internet Merchant number and appropriate POS Data Code.
Note: From January 1, 2003 a Merchant must store all Cardmember payment data using triple DES encryption. In addition, all data that is transmitted **must** utilise Secure Socket Layer 3.0 with 128-bit encryption. As technology and industry standards evolve, these security requirements may be amended to reflect continued technological advancement. Without limiting the generality of the foregoing, the Merchant shall take measures to secure and protect Cardmember payment data, including Card account information, against "hackers" and others who may seek to obtain or modify data without the consent of American Express or the Cardmember.

AUTHENTICATION REQUIREMENTS

- Merchants must authenticate and identify customers prior to payment submission.
- Merchants must follow authentication standards to protect Cardmember data such as:
 - Establish time limits for consumer sessions.
 - Prevent consumer access to secure data, following three failed log-on attempts.
 - Establish safeguards to prevent employee access to Cardmember passwords.
 - Set up administrative authority for resetting passwords, issuing temporary passwords and accessing payment data by restricting access to authorised employee groups and enabling the creation of audit trails.
 - Monitor/track access and usage reporting.

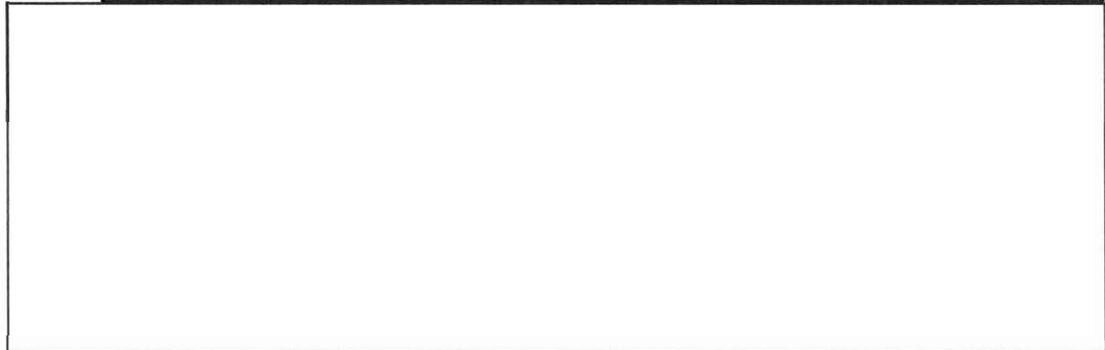
6.14 Set out below is the American Express Online Fraud Protection Guarantee.

Online Fraud Protection Guarantee

Shop online with confidence. You will not be held responsible for unauthorised online purchases. Provided you notify us immediately upon discovery of any fraudulent transactions and you have complied with your Credit Card Conditions, you will not be held liable for any unauthorised charges.

6.15 American Express operates a suite of Fraud Tools to minimise fraud risk for online purchases where a card is not present. Many merchants adopt these Fraud Tools, which include

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6.16 With respect to the security of cardmember data online, the major payment card networks have developed and currently administer the Payment Card Industry (“PCI”) data security standards through PCI Co.²⁴ In addition, American Express implements a data security program (the Data Security Operating Policy or DSOP) to secure cardholder data that is processed and maintained by merchants accepting the American Express Card for online transactions. Merchants who store, process or transmit card transactions must be compliant with both DSOP and the PCI Data Security Standards.

7. Conclusion

7.1 American Express submits that the eBay exclusive dealing proposal:

- (a) allows eBay to leverage its powerful position in the provision of its internet-based buying and selling platform to virtually eliminate competition with its PayPal subsidiary for the provision of payment services for all online eBay transactions;

²⁴ For a description of the PCI Security Standards Council, which was formed by American Express, Discover, Visa, MasterCard and JCB, and the PCI Data Security Standards see <http://www.pcisecuritystandards.org> (last accessed 8 May 2008).

- (b) is likely to result in consumer detriment through the imposition of higher prices to the significant number of sellers (and/or buyers) using eBay (and thereby indirectly to increase prices to consumers who purchase from those sellers);
- (c) removes consumer and merchant choice of payment method on a very significant platform for online purchasing in Australia; and
- (d) incorrectly identifies weaknesses in other payment methods.

7.2 American Express believes there are ways in which the stated objectives of the proposed exclusive dealing conduct can effectively be achieved without losing the benefits of competition associated with forcing registered users of eBay to use PayPal's payment service by tying it to the internet-based platform enabling those users to transact. In particular:

- (a) eBay users can continue to assess the merits of different payment methods and make choices as to which is most appropriate for them based on their preferences and experiences;
- (b) continued education about risks of online fraud remains crucial with American Express regarding card holder education as one of the best ways of preventing fraud and unauthorised use of credit or charge cards (see, for example, <http://www.americanexpress.com/australia/safeandsecure/tips.shtml> (last accessed 8 May 08). Indeed, eBay makes similar recommendations to buyers regarding ways in which to reduce fraud²⁵;
- (c) eBay can continue to improve buyer and seller feedback to allow parties to better assess the trustworthiness of each party²⁶.

7.3 American Express would be pleased to provide further information for the Commission's consideration on request. Any correspondence in respect of this submission should be directed to:

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²⁵ <http://pages.ebay.com.au/securitycentre/index.html> (last accessed 8 May 2008)

²⁶ See Allen Consulting Group "The economic impact of eBay in Australia" February 2008, page ii.