

9 May 2008

Address excluded

Australian Competition & Consumer Commission
Adjudication Branch

**EXCLUDED FROM
PUBLIC REGISTER**

Re: eBay International AG – N93365 – eBay Australia

Thank you for providing the opportunity for interested parties to comment on the proposal by eBay International AG to mandate the use of Paypal (which is wholly owned by eBay) as the only payment method for transactions effected on eBay Australia, with some specific exceptions (the Proposal).

I note that the request for authorisation of exclusive dealing has been lodged by eBay International AG which is a Swiss incorporated entity. Any references to eBay include eBay International AG, eBay Australia and eBay US.

I submit that the Proposal is not in the public interest and as a secondary issue, to authorise the relevant conduct would have the effect of substantially lessening competition. I also submit that the ACCC should not grant interim authorisation in relation to the notification. I agree to this submission being made public but I ask that you remove any identifying details.

General

I have been a member of eBay for just over two years and have effected approximately 400 transactions in that period, as both a buyer and a seller. To date I have a 100% rating. There are many good things about eBay. It provides a platform on which a person can offer an item for sale on a worldwide basis at a relatively low cost. Users of eBay are also able to find items that might not ordinarily be available or are hard to find – from a buyer's perspective this is what I ordinarily use eBay for, I only buy second-hand items of a particular kind. I have "met" people from all over the world in the course of my transactions and it has largely been a very enjoyable experience.

I have sold over 200 items to people in countries including Spain, France, Cyprus, Japan, the US, UK and Austria. The amount of these transactions has ranged from 99c to approximately \$1,000. I have also bought a large number of items from sellers primarily in the US, UK and Japan. For those transactions where the other party has been offshore I have used Paypal as it provides a relatively seamless method of payment. In the case of domestic transactions I ordinarily choose to use payment by bank deposit/transfer because it is quick and generally cost-free. Perhaps most importantly it provides me with cleared funds which I can access immediately.

I have never had an issue with a transaction (purchase or sale) associated with payment by bank deposit or transfer, other than a buyer failing to make payment. If a buyer chooses not to proceed with a transaction, this will happen regardless of the payment

method/s offered. I have been fortunate in that I have never had an issue with non-delivery where I have paid by bank transfer.

I check a seller's record carefully before I decide to transact with them, as this is generally a good indication of their trustworthiness. I believe that the difficulties encountered by eBay buyers are in large part due to failure by the buyer to do some basic research. If you choose to buy an iPod or mobile phone from a seller with over thirty negative and 28 neutral feedbacks for non-delivery or faulty product in the past 12 months (from one example I have just looked up on current items available) you are taking the risk that you will be disappointed – a bad buyer experience.

Conversely, I have had difficulties with several transactions effected with offshore sellers where the payment method was Paypal, all of them being non-delivery. In all of those cases there was a resolution of sorts in that the items either turned up or a refund was given by the seller (not Paypal), and I don't believe the issues were due to a bad seller. However where I have received the refund through Paypal it has not been the full amount I initially paid. So in other words, I have not been put back into the position I was in before entering the contract, I have suffered a loss because of the interposition of Paypal, and its "clipping of the ticket" on both sides of the transaction.

Paypal in practice

Paypal promotes itself as a facility whereby you don't have to disclose your details to a third party. As a buyer, you don't have to disclose your details if you are paying by cheque, money order or even bank deposit. In the latter case the only details being disclosed are those of the bank account details of the seller and this does not expose the seller to any additional risk. However a seller using Paypal must provide their credit card details and if they wish to sell at a particular level, their bank account details to Paypal. Paypal can use those details at any time to deduct funds.

Some examples of Paypal in practice:

- Although it is promoted by Paypal as the preferred method of funding, deduction from bank account to pay for an item cleared through Paypal is an "echeque" which commonly takes up to a week to clear. The Paypal payment gateway is set up in such a way that it is difficult to select another funding method. As a general rule I prefer funding payments by credit card as this provides an additional safety mechanism, i.e. I can initiate a charge-back if things go wrong.
- I recently paid a UK seller using my bank account as funding. The seller then advised she had received cleared payment and had sent the item. The seller then went to refund me 3 UK pounds as she had overcharged me postage. I received a message from Paypal that the refunded amount had been put on hold because my original payment had not cleared. I wonder where the funds are?
- A seller refunded me through Paypal for an item that was not received, however the amount I received was less than the amount I originally paid, because of Paypal fees and exchange rates.
- I have had an ongoing problem for three weeks with being unable to sell a particular item worldwide on eBay. eBay has told me it is a Paypal problem. I have spoken to Paypal (in Omaha) three times and they tell me it is an eBay

problem. Although the two organisations promote their ability to share information they seem to do so selectively.

- Paypal does not provide access to cleared funds. If I am paid by someone using Paypal I either have to use those funds for purchases through Paypal or initiate a withdrawal to my bank account. If the withdrawal is under \$150 I will be charged \$1 to access my funds, notwithstanding the range of other fees I am charged by Paypal.

The position of eBay/Paypal as a non-party to the contract

It is a central plank of the eBay model that eBay is not a party to the contract between the buyer and seller. That is, eBay provides the platform on which the parties can transact, but it has no involvement in that transaction, either as a counterparty or mediator. The eBay site contains numerous statements to that effect and section 3.1 of the eBay user agreement specifically states this. If a transaction goes wrong, for whatever reason, the buyer and seller must deal with each other directly to resolve it. It is inevitable given the number of users of eBay worldwide that problems will arise¹.

Query why if eBay is not a party to the sale contract they are able to dictate the payment method used for the transaction. In theory at least, if I want to exchange an item for a bag of marbles, then I should be able to, provided the other party agrees.

Paypal as a Clearing House

Paypal is not a bank – it is not registered as a bank or financial institution in Australia. It acts as an intermediary in processing payments by credit card or bank transfer from the buyer to the seller. Like eBay, it is not a party to the contract between buyer and seller. Therefore Paypal could be characterised as a clearing house.

Analogies can be drawn with other clearing houses which may include elements of exclusive dealing within their models. An example is CHESS operated by ASX Settlement & Transfer Corporation (ASTC) which clears and settles trades effected on the Australian Stock Exchange (ASX). However, there are some distinct differences between the two systems:

- The majority of trades effected on ASX are novated to a central counterparty at end of day and transaction obligations are netted. In this way, risk is managed with a demonstrable public benefit (for all parties). The system also provides significant and proven efficiencies.
- The National Guarantee Fund provides for investor compensation in certain circumstances including completion of sales and purchases, loss for transfer of securities without authority and loss in the case of dealer insolvency.

¹ eBay representatives consistently refer to there being 5 million users of eBay in Australia. This is misleading as users will often have multiple user IDs. For example a regular user may choose to have separate IDs for buying and selling, and a private ID where they do not wish their purchases to be known. It is also not clear whether the number given accounts for “active” IDs as a proportion of users will transact only once or a few times.

- Participants in CHES are subject to a range of rigorous requirements including funding which is supported by contractual arrangements with the relevant banks.
- The settlement and clearing systems operated by ASTC are regulated by comprehensive rules, compliance and monitoring systems and disciplinary processes including appeal mechanisms.

Paypal does not stand as a counterparty to transactions between eBay users. It provides no central fund for compensation of users – the much vaunted Paypal protection is provided by the controls it has over Paypal user accounts, which it can interfere with at any time. It can also access a Paypal user's bank account where the user has given Paypal those details and deduct funds without authorisation. Its rules and policies are opaque and subject to change without notice.

Public Benefit/Interest

It would be reasonable to assume that where an argument is put that conduct is justified on the basis of public benefit, that benefit would accrue to both parties in the transaction. I submit that mandating the use of Paypal skews the benefit so far towards the buyer in any transaction that the seller is put at a significant disadvantage. For example, a buyer can pay me using Paypal, I send the item, and the buyer subsequently claims that the item has not been received even though the item has been delivered and the buyer makes a claim on Paypal. Paypal decides in the buyer's favour, and freezes my account or accesses funds to pay the claim. I have no right of appeal. To that extent, I believe Paypal actually encourages fraud.

I am now so paranoid about fraudulent claims of this type that I send any item over \$50 by registered post and that cost must be borne by the buyer. Ironically, Paypal does not necessarily accept registered post as proof of delivery. The only method that Paypal accepts is a "trackable" delivery system which is beyond the means of the average eBay user.

Protection offered by Paypal

The purported protection offered by Paypal is not insurance, it is made available by Paypal by accessing the funds of the seller. If the seller has disappeared, I believe there would be no protection available. In addition, buyer protection is subject to an extensive set of conditions, including that the seller must be above a certain percentage of feedback and not from certain jurisdictions e.g. Asian countries. Ironically, it is those sellers who are less likely to be the subject of Paypal claims. A search of eBay will find you any number of high volume sellers with feedback and/or location that would exclude a buyer from protection. Ebay could take action to remove those sellers but it doesn't - it has a financial interest in retaining them.

Conclusion

When eBay announced the Proposal I spoke to three friends who use eBay. They are all primarily purchasers and two of them have never used Paypal. One of them only uses Paypal for international transactions. The immediate reaction of all of them was

that if they were forced to use Paypal they would no longer use eBay. Their reasons varied but they had some principal objections, they do not wish to disclose their financial details to a third party, they don't trust Paypal and many people do not have credit cards.

Perhaps one basic question needs to be asked, taking into account that a central part of eBay's submission is that the primary driver for the Proposal is not that of profit to eBay (Paypal being a wholly owned subsidiary of eBay). If Paypal were not owned by eBay, would eBay be seeking authorisation of the relevant conduct/exclusive dealing?

Yours faithfully

Catherine Officer