

**EXCLUSIVE DEALING NOTIFICATION N93365 –
eBAY INTERNATIONAL**

SUBMISSION OPPOSING NOTIFICATION

1 May 2008

Executive Summary

1. eBay International (**eBay**) has notified conduct that it describes as “mandating the use of PayPal for almost all transactions on the eBay Site” (the **Conduct**) on the basis that the Conduct may amount to exclusive dealing under section 47 of the Trade Practices Act 1974 (Cth) (the **Act**).
2. The Conduct effectively prevents eBay’s customers (the eBay Sellers and Buyers) from electing to use other forms of payment in their transactions with each other. It will create an absolute barrier to entry or expansion for any existing or future alternative payment options, producing a substantial lessening of competition in the provision of payment services to eBay’s customers. This is demonstrated by:
 - (a) customers being prevented from choosing between alternate payment options (be it cash on delivery, direct deposit, cheque, instant cash transfer methods or the use of other internet financial intermediaries such as Paymate) based a range of commercial considerations, including cost/price; and
 - (b) the fact that the Conduct will deliver to PayPal (a subsidiary of eBay itself) effective monopoly control of the payment system within eBay.
3. In a broader sense, the Conduct is also likely to result in a substantial lessening of competition as it will effectively exclude from the eBay marketplace those Buyers and Sellers that do not wish to use PayPal (and thereby make their banking details available online). This will immediately reduce competition within the eBay forum on both the buy and sell sides. Furthermore, to the extent that these Buyers and Sellers stop buying/selling altogether, there are negative ramifications for competition in any more broadly defined retail market.
4. Even assuming the Conduct could result in some public benefits by way of enhanced security measures for Buyers, these benefits could equally be delivered in a competitive marketplace where Sellers are free to elect to take advantage of PayPal’s benefits and Buyers can elect to purchase goods only where PayPal is offered as a payment option. eBay has not attempted to link the alleged benefits associated with the Conduct to its need for absolute exclusivity, nor has it provided any support for the view that other payment methods, including direct deposit, are somehow fatally compromised in terms of security.
5. Ultimately, any benefits arising from the Conduct are more than outweighed by the significant lessening of competition associated with creating a virtual monopoly for PayPal in the supply of payment services to eBay Buyers and Sellers and the accompanying public detriment.

Legal Background

6. The Conduct notified by eBay amounts to exclusive dealing under section 47 the Act. In this case, the exclusive dealing can be broadly characterised as the supply of goods or services on condition that the buyer will not acquire, or will limit the acquisition of, goods or services from a competitor of a body corporate related to the corporation (section 47(2)(d)).
7. Under section 93 of the Act the ACCC has the power to revoke eBay's notification if it is satisfied that:
 - (a) the conduct has the purpose, effect or likely effect of substantially lessening competition; and
 - (b) the likely benefit to the public will not outweigh the detriment to the public from the lessening of competition.
8. Each of the criteria set out in paragraph 7 is addressed in some detail below.

Market Definition – Some Comments

9. The concept of the “market” is integral to any assessment of substantial lessening of competition under section 47 of the Act (see section 47(13)(b)). In this regard, it is quite extraordinary that eBay has been able to have its submission regarding the relevant market(s) – including any conclusion in this regard – treated as confidential in its totality by the ACCC.¹ As a result, interested parties have no means of knowing the market definition that is being submitted to the ACCC by eBay.
10. In any event, it is clear that the market(s) in which eBay and PayPal operate are potentially complex to define, which eBay uses as justification for arguing that it may not have a “substantial degree of market power” in any market. Unfortunately, this is not sustainable.
11. At the simplest level, eBay describes itself as providing an “online marketplace” for buyers and sellers to interact. Whilst eBay Buyers may have other alternatives to turn to for the acquisition of goods (including traditional offline retailers or online), potentially making eBay part of some more broadly defined market from a Buyer's perspective, it is more difficult to maintain such a definition when eBay Sellers are considered.
12. I would argue that for a significant majority of eBay Sellers (including myself), eBay represents at present an effective monopoly supplier of online trading services². According to ‘smartcompany’ (<http://www.smartcompany.com.au>):³

¹ The ACCC makes it clear information can be excluded from the public register at its discretion if it is satisfied that it is desirable to do so. This is perfectly understandable in cases of information that is commercial in confidence or contains business secrets. However, I would suggest the expression of an opinion or view in relation to market definition is hard pressed to meet these requirements – particularly when such an opinion is expressed by an independent third party (eg. the NERA Report).

² By way of illustration, on 18 June 2007 The New York Times quoted the following: “eBay is still far and away the biggest auction site on the market, commanding about 95 percent of auction listings, according to Jupiter Research, an Internet consultancy”: Tedeschi, B “eBay moves to recharge its auctions”
<http://www.nytimes.com/2007/06/18/technology/18ecom.html?ei=5088&en=3eb260a9fbb02f33&ex=1339819200&adxnnl=1&partner=rssnyt&emc=rss&adxnnlx=1185539491-sK0+szXRwf7e5ViiZulXXw>

“eBay is the dominant online shopping and classifieds player, with 42.19% of the total market, according to February data from online monitor Hitwise. The Trading Post website is second with a mere 2.12% of the share.” (my emphasis)

13. Though there may well be alternatives, they are presently nascent and do not have the economies of scale necessary to offer a genuine competitive alternative to eBay, which is a global operator. This may change over a medium to long term horizon, but in the interim period of many years there are few effective constraints on eBay’s operation and there are significant barriers for new competitors to overcome in the short to medium term (including obtaining a critical mass of customers and developing a well recognised and trusted brand).
14. As a result, eBay Sellers are effectively faced with a monopoly provider of services for online trading. In this market there are a number of payment options currently available. PayPal presently competes with a range of alternatives, including cash on delivery, direct deposit, bank cheque, other financial intermediary payment options (such as Paymate) and potentially instant cash transfer facilities (such as Western Union).⁴

Substantial Lessening of Competition & Public Detriment

15. **(Counterfactual)** It appears that when the ACCC conducts an analysis of a notification it uses what is termed the “future with and without test”. In this case, the “counterfactual” without the eBay notification is that eBay Sellers (and Buyers) would be free to continue using the wide range of payment options currently available to them. Effectively, there would be a continuation of the status quo.
16. **(Lessening Competition)** Being forced to use PayPal will have the effect or likely effect of substantially lessening competition relative to the counterfactual for the following reasons:
 - (a) Buyers and Sellers are effectively prohibited from using payment options beyond PayPal – there are no exceptions apart from cash on delivery, which is not appropriate or available in many cases. This will erect what must be an absolute barrier to the entry or expansion of any alternate payment options for eBay’s Sellers.
 - (b) PayPal will have what amounts to monopoly control of the payment system within eBay, which will result in eBay Sellers facing increased fees and charges. This arises from the suite of fees PayPal charges Sellers using its service, including (but not limited to):
 - (i) Transaction Fee – when a Seller accepts payment for an amount between A\$0 - \$5,000 (which encompasses all my transactions) he or she is charged 2.4% - 3.4%⁵ + A\$0.30 for the privilege.

³ Barosevic, M “RBA may weigh in on eBay case at ACCC”, 17 April 2008:
<http://www.smartcompany.com.au/Free-Articles/The-Briefing/20080417-RBA-to-weigh-in-on-eBay-case-at-ACCC.html>

⁴ The final option is presently banned by eBay.

⁵ Depending on whether it is a domestic or cross-border transaction.

- (ii) Withdrawal Fee – when a Buyer pays for an item the money is held by PayPal and not automatically transferred to the Seller, this must be done by the Seller. If the amount is under \$150.00 an additional withdrawal fee is charged.

This can be distinguished from other currently available payment options, most notably direct deposit transfers, which do not involve any specific fees for the monies transferred between accounts.

Without any competitive constraint available from other payment options, there is nothing to stop PayPal increasing these fees at its complete discretion.

- (c) In a broader sense, the Conduct will also effectively exclude from the eBay marketplace those Buyers and Sellers that do not wish to use PayPal (and thereby make their banking details available online). This will immediately reduce competition within the eBay forum on both the buy and sell sides. The potential impact of this is not minimal (regardless of how the market is defined) given eBay itself has presented material that concludes, on a weighted average across 50 items, the present price saving from using eBay is in the order of 25.2% relative to offline retailers.⁶

To the extent that these Buyers and Sellers stop buying/selling altogether, as opposed to moving to some other online or offline forum, there are also negative ramifications for competition in any more broadly defined retail market.

- 17. **(Public Detriment)** In addition to amounting to a substantial lessening of competition, the increased costs outlined in paragraph 16(b) are a clear public detriment associated with the Conduct. Using PayPal also automatically subjects Sellers to unilaterally imposed terms and conditions (including a dispute resolution process) that can potentially increase the risk of fraudulent conduct on the part of unscrupulous Buyers and expose Sellers to losses. This can include freezing of funds, transferring funds out of a Seller's account without any consultation or discussion and long, drawn out dispute resolution processes that are arbitrarily determined by PayPal with no formal statement of reasons or explanation being issued. By mandating the use of PayPal, all eBay Sellers will be forced into this process, which will result in higher business costs and greater potential risk for thousands of legitimate Sellers.

Lack of Public Benefit

- 18. Against the substantial public detriment there is very little, if any, substantiated public benefit that will flow from the Conduct. eBay seems to be making the following public benefit arguments:
 - (a) PayPal has a 'closed loop' system that enhances Seller and Buyer security;
 - (b) Forcing the use of PayPal means there will be less risk of disputes via other payment methods;

⁶ Annexure E to eBay's ACCC submission – "I got it on eBay: The economic impact of eBay in Australia", The Allen Consulting Group, p. 2

- (c) Forcing the use of PayPal will raise online consumer awareness and encourage PayPal's use beyond eBay – indeed, it may even encourage higher standards and hence growth from other online businesses.
 - (d) Forcing the use of PayPal will reduce Buyer migration from eBay to other retail websites.
 - (e) Forcing the use of PayPal will enhance the Australian economy.
19. **(Security)** Though it may be correct that PayPal offers a high degree of security, predominantly due to the fact Sellers (and sometimes Buyers) do not have to disclose credit card or account details to each other, PayPal is by no means the only facility offering this service. For example, Paymate (<http://www.paymate.com.au>) is one other alternative offering a similar system. Indeed, other services such as cheques and money orders also have this benefit without any requirement that Buyers or Sellers disclose any of their financial information online. This often makes them the payment option of choice for many users.
20. Ultimately, enhanced security is already available to Sellers and Buyers from a range of suppliers and PayPal does not meet the security needs of everybody that trades online. As a result, tying eBay exclusively to PayPal does not produce a public benefit associated with enhanced security – it merely removes the ability for Buyers and Sellers to choose the level of security they are most comfortable with.
21. Furthermore, any security benefits associated with PayPal need to be properly offset against the many problems and issues users of PayPal continue to experience. These have been documented in many submissions to date and some concerns have already been raised above. I will not outline them exhaustively here, but only note in particular issues with obtaining satisfactory feedback from PayPal in relation to complaints (including difficulties actually speaking to a real person) and the fact that the limits of the unique “protection” it claims to offer are highly circumscribed at best.
22. Finally, the ACCC should also take into account the fact that complete exclusivity effectively denies eBay's Sellers access to any new technological developments in internet security that may become available in the future outside of PayPal. This is a dynamic area of growth and investment and it should not be assumed PayPal has any monopoly in respect of innovation.
23. **(Less Disputes)** I have never experienced any difficulties using Western Union transfers (when allowed), direct deposits or any other method in my years of using eBay. I would be interested to see any statistics to support the assertion that direct deposits (and other payment options) lead to higher levels of payment disputes.
24. **(Other)** Any assertions that forcing eBay Sellers to use PayPal will somehow leave to greater growth in the online market, reduce buyer migration and enhance the Australian economy are nebulous in the extreme. Indeed, the reverse is likely to be true, given present eBay Buyer and Seller feedback regarding the Conduct.

Conclusion

25. As an eBay Buyer and Seller of many years standing I cannot accept the reasoning put forward by eBay in support of this Conduct. I have personally utilised a variety of payment methods over that period, including PayPal, depending on the particular circumstances of the transaction. It is this versatility which allows the vast majority of Buyers and Sellers (including myself) to transact efficiently and effectively via eBay.
26. I strongly encourage and support a continuation of this system, which allows Sellers to offer PayPal as one of a number of payment options. Any change which mandates that payment must be made utilising PayPal alone is the very kind of exclusive dealing conduct the Act was designed to prevent. I submit that the ACCC should revoke this notification in accordance with the terms of the Act.

N. Lau
1 May 2008