

The General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
GPO Box 3131  
CANBERRA ACT 2601

**Re: eBay International AG - Notification - N93365**

I wish to add my voice to the objections to Notification N93365 and bring to the ACCC's attention some inconsistencies in this Notification.

**Unsupported claim of improved safety**

The claim that PayPal is safer than all other payment systems is not supported by any evidence that has been made available for independent verification and analysis. eBay cites "internal statistics" to support this claim.

In the Notification, eBay asserts that "trust and safety" issues, including "bad buyer experiences" are the basis for the proposed action. In section 5.17 of the Notification, statistics are cited regarding online fraud from two major brand credit cards. However *The Australian* wrote on 12 February 2008 (emphasis added):

**Daniel Feiler, eBay Australia-New Zealand spokesman, says the number of fraud cases that result in charges being laid are only "a fraction of a percentage" of the millions of transactions eBay facilitates globally every day. "It's a real rarity. If it were more common, we wouldn't have 5 million members in Australia," he says.**

While the statistics in 5.17 may be true, the statements reported in *The Australian* state that online fraud is not a significant problem on eBay. The issue of security only arises when inexperienced buyers deal with unscrupulous sellers (and to a lesser extent unscrupulous buyers dealing with inexperienced sellers) which is an extremely small proportion ("a fraction of a percentage") of all trades on eBay.

In section 5.19 of the Notification, PayPal's buyer protection mechanism is cited as likely to provide more effective consumer protection. However the Buyer Protection Policy itself states that "PayPal reserves the right to change or **discontinue the PayPal Buyer Complaint Policy or the PayPal Buyer Protection Policy in its sole discretion** at any time and without notice."

Section 5.19 also notes that "it is debatable whether consumers are aware of their chargeback rights". As noted elsewhere in this submission, in its written submission to the Review of *Building Consumer Sovereignty in Electronic Commerce* eBay advocated improving consumer awareness rather than lessening consumer choice regarding payment methods.

The NERA report states that "trust in the available online payment methods is a perceived online shopping obstacle for very few consumers ... **likely due to an ever increasing variety of payment options**". Figure 3.2 shows that trust in the online payment method is the least important barrier to online shopping. This would suggest that *reducing* the variety of payment

options, as proposed in the Notification, is unlikely to improve trust and safety.

Figure 3.5 of the NERA report shows that credit card fraud is the second least common negative experience with online shopping, indicating that this is not a significant problem and there would be no significant public benefit in reducing the choice of payment methods. In fact the report clearly states that 75% of credit card fraud victims continue shopping online, higher than the overall population.

In addition, eBay's own recent statement to the United States Securities and Exchange Commission notes that (emphasis added):

**“PayPal’s highly automated and liquid payment service makes PayPal an attractive target for 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.**

**“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.”**

This does not support the claims in the Notification that PayPal is safer than all other payment methods and eBay's own statements that fraud is a significant problem for PayPal contradicts the claims in the Notification.

PayPal Australia Pty Limited holds an Australian financial services licence no. 304962 and the Australian User Agreement states that is governed by and interpreted under the laws of New South Wales. However members' funds are held outside Australia and transactions are processed outside Australia by PayPal Inc. The Legal Agreement states that PayPal is not licensed as a bank in Australia and does not provide banking services, however PayPal elsewhere<sup>1</sup> states that (emphasis verbatim) **“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”** and that **“PayPal does not have experience in operating as a bank”**.

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<sup>1</sup> eBay Inc. Form 10-K for the Fiscal Year Ended December 31 2007, p24. Filed with the United States Securities and Exchange Commission on 29/4/2008.

### **Unsupported claim of no lessening of competition**

A 2006 speech by an Assistant Governor of the Reserve Bank documented the growth of alternative payment schemes overseas that had not yet been adopted in Australia. One notable payment scheme, “online debit” (also known as “online EFTPOS”), allows customers to transfer money directly from their bank account to the merchant without needing to use a credit or debit card. The assertion that forcing all eBay members to use PayPal is contrary to the Reserve Bank’s view that both vendors and consumers should have as much choice of payment methods as possible. Such an action does significantly lessen competition including preventing the use of payment methods not yet widely available in Australia.

As already stated, eBay Australia previously owned the Paymate payment system and promoted it as a safe payment method. Paymate is now a competitor to PayPal and is no longer promoted by eBay, however individual sellers are still able to offer it as a payment method. eBay Australia seeks to prohibit the use of a competing payment system which by definition lessens competition.

eBay itself noted<sup>2</sup> that it faces competition in Australia from Paymate and Bpay (emphasis added).

**“Overseas, PayPal faces competition from similar channels and payment methods. In each country, numerous banks provide standard online credit card acquiring and processing services, and these banks typically have leading market share. In addition, PayPal faces competition from Visa’s Visa Direct, MasterCard’s MoneySend, Royal Bank of Scotland’s World Pay and ClickandBuy in the EU, NOCHEX, Moneybookers, NETeller and FirePay in the United Kingdom, CertaPay and HyperWallet in Canada, Paymate and BPay in Australia, Alipay, YeePay, and 99Bill in China and Inicis in South Korea. In addition, in certain countries, such as Germany and Australia, electronic funds transfer is a leading method of payment for both online and offline transactions. As in the U.S., established banks and other financial institutions that do not currently offer online payments could quickly and easily develop such a service.”**

Thus prohibiting payment methods that eBay itself considers to “have leading market share” and “a leading method of payment” would significantly lessen competition.

eBay also notes<sup>3</sup> that the PayPal Value Proposition is to provide a “a more efficient and effective payment alternative for users”. In forcing all Australian users to make payments through PayPal, it no longer becomes an “alternative”.

### **Unsupported conclusion regarding eBay's market**

In 4.3 of the Notification, eBay claims that it is not possible to form a definitive view as to whether eBay possesses a substantial degree of market power. Readily available evidence refutes this claim and gives a clear indication of the degree of market power, indeed supporting the view that eBay is in fact the dominant player in its market.

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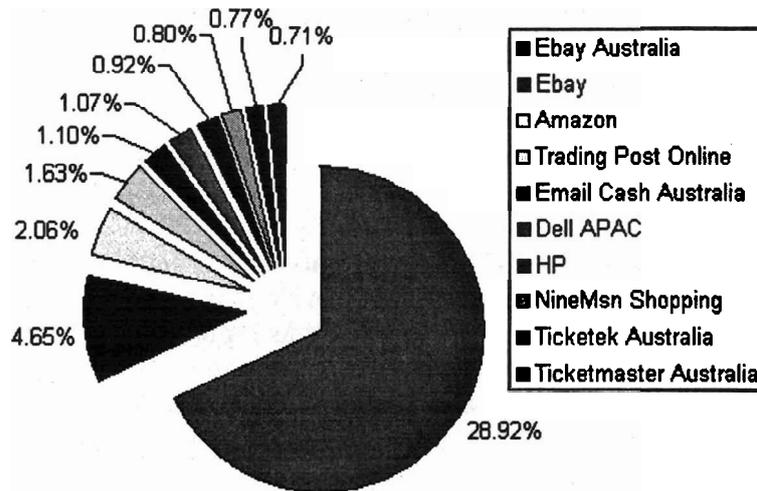
<sup>2</sup> *ibid*, p36.

<sup>3</sup> *ibid*, p8.

eBay had 42.19% of the Australian online classifieds market according to February 2008 data from online monitor Hitwise. This does not include eBay subsidiaries Gumtree.com Australia Pty Ltd and Shopping.com Australia Pty Ltd. The Trading Post site was second with a mere 2.12% of the market.

eBay Australia is also the dominant site for all online shopping, and combined with its parent eBay Inc accounts for one third of all online shopping and classifieds in Australia. Again this does not include eBay subsidiaries Gumtree.com Australia Pty Ltd and Shopping.com Australia Pty Ltd.

### Top 10 Shopping & Classified Websites in Australia



Source: Hitwise data, September 2007

As of October 2007, eBay Australia is the fifth most visited web site in Australia.

| Rank | Website - [Show domain] | Market Share |
|------|-------------------------|--------------|
| 1.   | Google Australia        | 7.47%        |
| 2.   | ninemsn                 | 2.66%        |
| 3.   | MySpace                 | 2.17%        |
| 4.   | Windows Live Hotmail    | 1.85%        |
| 5.   | eBay Australia          | 1.85%        |
| 6.   | Google                  | 1.77%        |
| 7.   | Windows Live Mail       | 1.73%        |
| 8.   | Facebook                | 1.11%        |
| 9.   | YouTube                 | 0.95%        |
| 10.  | Yahoo!                  | 0.90%        |

Source: Hitwise data, Oct 2007

As of March 2008, eBay was the fourth most dominant parent company of all web sites viewed in Australia, ahead of Telstra and the Commonwealth Government, with an audience of 5.1 million Australians and a reach of 45.67% of all Australian online users.

| Top 10 Parent Companies<br>Australia, March 2008<br>Home users |                        |         |                 |
|--|------------------------|---------|-----------------|
| Parent company   | Unique Audience ('000) | Reach % | Time Per Person |
| Google   | 9,140                  | 81.33   | 01:04:35        |
| Microsoft  | 8,873                  | 78.95   | 02:22:14        |
| News Corporation   | 5,248                  | 46.70   | 00:57:46        |
| eBay   | 5,133                  | 45.67   | 02:02:49        |
| Yahoo!   | 5,075                  | 45.16   | 00:58:20        |
| Telstra  | 5,072                  | 45.13   | 00:26:45        |
| Australian Federal Government                                  | 3,822                  | 34.01   | 00:30:28        |
| Apple Computer   | 3,372                  | 30.01   | 01:00:41        |
| Wikimedia Foundation   | 3,279                  | 29.18   | 00:14:01        |
| Fairfax Digital  | 3,257                  | 28.98   | 00:34:51        |

Source: Nielsen/NetRatings, March 2008

This contradicts the conclusion of the NERA report and indicates that eBay is in fact possesses a substantial (and arguable dominant) degree of market power.

#### **Unsupported sundry rationale for Notification**

eBay made a written submission to the Review of *Building Consumer Sovereignty in Electronic Commerce*, the E-commerce Best Practice Model, in 2000<sup>4</sup>. In that submission eBay specifically made the following statements (emphasis added):

**“Although payment is strictly a matter between buyers and sellers, eBay provides a number of safe and easy-to-use payment programs for the benefit of its members.”**

**“Most buyers and sellers are honest and reliable, and often the cause of a dispute is a simple misunderstanding or lack of communication.”**

**“Certain forms of payment used on eBay provide swift, inexpensive and effective avenues for redress for consumers who have problems with their transactions. Many eBay sellers allow buyers to purchase with credit**

<sup>4</sup> [http://www.ecommerce.treasury.gov.au/bpmreview/content/\\_download/submissions/eBay.rtf](http://www.ecommerce.treasury.gov.au/bpmreview/content/_download/submissions/eBay.rtf)

cards. Credit card companies, in turn, often provide substantial protection for users who purchase items online using a credit card, and eBay encourages members to check with their credit card provider as to the availability of chargeback services before entering into a transaction.”

“We are certain that greater devotion of public funds to consumer awareness would be of significant **benefit in educating consumers on how to trade safely**, thereby facilitating increased confidence and growth in the e-commerce sector.”

“**Select a seller that offers a payment method you are comfortable with using** to add to your peace of mind”

“**Credit cards with chargeback facilities add security** but it is important you check with your credit card provider on the level of protection provided”

“**Member-to-member payment services like Paymate and PayPal protect your bank account details** from being seen by others”

In addition, eBay unequivocally states *“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 the user agreement. These statements are inconsistent with eBay’s rationale and statements relating to the proposed changes of payment policy outlined in Notification N93365 in several ways:

1. eBay had made it clear the decision of payment is between the two direct parties, yet the proposed action interferes with a mutual decision between two direct parties. In attempting to impose a monopolistic payment system that some buyers and sellers do not wish to use, eBay is more than acting merely “as an online venue”.
2. Nowhere in eBay’s submission did it recommend exclusive use of a payment system such as PayPal. In fact it recommended several payment methods including credit cards and Paymate, then (2000) owned by eBay Australia and then (as now) a competitor to PayPal. Since eBay Inc bought PayPal, eBay Australia has divested itself of Paymate and ceased promoting this competing payment service.
3. eBay stated that disputes are often as a result of misunderstandings rather than a deliberate fraud, which is inconsistent with the basis of Notification N93365.
4. eBay recommended further consumer awareness rather than restricting the choice of payment methods as a way of increasing confidence.

eBay states<sup>5</sup> that its “PayPal Growth Strategy” is “to establish PayPal as the global standard in online payments” and (emphasis added) “to continue **focusing on increased user adoption of PayPal** on our Marketplaces platforms, and continued expansion of PayPal’s Merchant Services business and our financial products business”. This indicates that the rationale to restrict user choice in payment methods is not for “trust and safety” reasons. This also supports comments in other submissions that the proposed action in the Notification is purely a business growth strategy.

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5 eBay Inc. Form 10-K for the Fiscal Year Ended December 31 2007, p10.

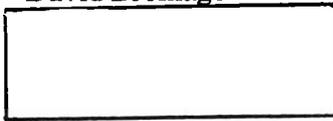
Thus forcing all Australian eBay users to have PayPal accounts, in a country where eBay already notes that bank deposit is the major form of payment, creates a captive market of around 5 million people where it can market its “financial products business”.

**Conclusions**

1. Forcing consumers to make payments through a single payment service, whether or not it was a subsidiary of the applicant, would significantly lessen competition by blocking access to direct competitors to PayPal, restricting consumer choice and preventing new forms of payment, such as online debit, as recommended by the Reserve Bank of Australia;
2. eBay has significant or dominant market power in its market sector;
3. Forcing consumers to make payments through payment service that is a subsidiary of eBay is a misuse of that market power; There is no public benefit (substantial or otherwise) in reducing consumer choice;
4. Improved consumer awareness of the risks and benefits of *all* payment methods so consumers can make an informed choice would provide substantially more competition in the online shopping market than restricting the number of available payment methods;
5. eBay's claim that PayPal is safer than other payment methods is unsupported by any independently tested evidence and is contradicted by its own submission to the United States Securities and Exchange Commission which highlight that PayPal is now and can be expected to continue to be an attractive target for fraud;
6. The conclusion in section 6.1 of the Notification is unsupported by available evidence and is substantially contradicted by readily available evidence.
7. The proposed action should therefore be rejected.



David Bromage



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