

SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)

eBay and PayPal

Submitted by:
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1. Introduction

- 1.1 This submission is made in respect of eBay International AG's notification N93365, 11th April 2008.
- 1.2 eBay states in its submission, Annexure "A" (1(b)) that "eBay is not a party to the transactions that take place between buyers and sellers, does not act as a representative of either party and does not at any time hold possession of or have the opportunity to inspect the goods sold on its website."
- 1.3 eBay proposes that all listings on its website www.ebay.com.au must offer payment by PayPal only (or cash upon pickup), claiming that this is the only safe method. (For a limited number of times, buyers will be able to use the "guest checkout" facility which will allow them to use PayPal without having a PayPal account. After 5 purchases, this facility will no longer be available to purchasers.)
- 1.4 eBay acknowledges that "PayPal is a subsidiary of eBay Inc. and a related body corporate of eBay" (1.13).
- 1.5 eBay states in its submission that "PayPal operates an online payment service that allows its members to make financial transactions with one another over the internet without providing the other party with financial information, such as bank account or credit card details." (1.14)
- 1.6 eBay further states that "in the case of credit card transactions, PayPal acts as the merchant of record, thus obviating the need for sellers to obtain a merchant facility from a financial institution" (1.20)
- 1.7 eBay states that "There are a number of different account types that a PayPal member may open, including Personal, Premier or Business accounts. The fees imposed on members differ depending on the account type chosen." (1.22)
- 1.8 eBay states that "For payments made by members that have not nominated a secondary funding source, PayPal will issue an "e-cheque". Where an e-cheque is issued, the seller does not have access to the funds until they are cleared by the member's bank, and PayPal advises the seller to delay shipping the item until the payment is cleared." (1.25)
- 1.9 eBay states that PayPal will "hold" funds (making them unavailable for withdrawal into the seller's account) in high-risk transactions. It further states that "eBay will also soon implement a "holds" policy whereby, when eBay considers that a transaction on eBay is high risk for the buyer, it will notify PayPal that it should hold the payment for the transaction. PayPal will then exercise its discretion as to whether to hold the funds and wait until if either receives confirmation from the buyer that he or she has received the item and has no cause to raise a dispute, or 21 days have passed without the buyer having raised a dispute." (1.26)
- 1.10 eBay states that "Under PayPal's Buyer Protection Policy members that purchase eligible items on eBay can currently be protected for up to \$400 for any purchase (excluding certain categories, such as intangible items) or up to \$3,000 where the seller has received an eBay feedback rating from 50 unique transactions and has also achieved at least a 98 per cent positive rating for that feedback." Of note is the caveat concerning intangible items and the requirement for 98 percent positive rating for eBay feedback. eBay further adds that it "is able to offer... additional protection" after 17th June 2008 because it has "additional information in regard to the transaction history of sellers through both feedback ratings and other metrics (such as risk data) shared with eBay". (1.28)
- 1.11 eBay states that where a buyer lodges a dispute for "item not received", PayPal offers protection to "eligible sellers" (although "eligible sellers" is not a term explicated by eBay in its submission) "where the seller can provide proof of shipment of the item through an

- approved postage service and other information, as required by PayPal. In this event, sellers will be entitled to retain the funds.” (1.30)
- 1.12 eBay states that it will only offer buyer protection for payments made using PayPal – “Currently, no other Buyer Protection Program (apart from PayPal’s) specifically exists for eBay transactions.” (1.31)
- 1.13 eBay makes the statement that “eBay’s research indicates that one of the two biggest reasons that customers choose not to return to purchase products on eBay in the future is “trust and safety reasons”, including past “bad buyer experiences” (BBE).”
- 1.14 eBay states that “sellers may only offer to accept payment made through PayPal, Pay on Pickup or Visa/MasterCard processed by PayPal.” (2.5)

2. Issues

- 2.1 In respect of 1.2 of this submission, it is pertinent to note that “Online auction giant eBay was convicted by a French court Wednesday of selling counterfeit goods and ordered to pay 20,000 euros (30,000 dollars) in damages to French luxury group Hermes”. Of especial relevance is the following: “At the Hermes trial in the eastern French city of Troyes in April, Colomes had argued that eBay was more than a mere host for the counterfeit items. ‘eBay is an active player in the transaction because not only does it offer a number of services to improve the sale, but when it does not work well enough or fast enough, they intervene with the client,’ he said. ‘They are perfectly informed of the transactions since they take a percentage cut.’¹
- 2.2 It is clear from the above that the French court considered that eBay is indeed a party to the transactions, contrary to the statement put forward by eBay that “eBay is not a party to the transactions”.
- 2.3 It should be noted also that “Luxury fashion houses Louis Vuitton and Dior Couture have also taken legal action against eBay before the Paris commercial court, respectively seeking 20 million and 17 million euros in damages. Both brands accuse eBay of complicity in the sale of counterfeit goods by allowing buyers and sellers to transact without imposing any controls.” This is relevant not only as regards eBay’s representation of itself but also its behaviour in relation to such transactions.
- 2.4 In respect of 1.3 above, eBay has provided no supporting material to provide evidence of its claim that PayPal is any safer a method of online purchasing than the use of credit cards, direct deposit, or cash upon pickup, let alone the use of other forms of online purchasing facilities such as Paymate. For example: “As far as Paymate managing director Dilip Rao is concerned, however, the claims of eBay Australia that PayPal offers superior buyer and seller protection are pure bunk. What’s more, Mr Rao claims that eBay’s contention that it can’t share data with Paymate in the same way as it can with PayPal are rubbish.”²
- 2.5 In respect of 1.5 above, Frerk-Malte Feller, the CEO of eBay Auction Germany, just recently sold 12 tickets for UEFA EURO 2008, included a very interesting caveat for PayPal buyers. He stated in his listings: „If you pay with PayPal, I need copies of your passport/ID as well as from your credit card that you are using within PayPal (both sides). Please provide these documents as electronic scans immediately after the end of the auction. The tickets will only be shipped after you have provided these documents. These additional terms are important, as PayPal will only protect sellers from unjustified chargebacks in accordance with the above. You as a buyer remain fully protected through PayPal’s Buyer Protection Policy. So both sides are well protected.”³ Mr Feller’s listings demonstrate the

¹ <http://afp.google.com/article/ALeqM5ieVhlM9xNEzcmDtrdw6ToFLtkRAg>

² <http://www.itwire.com/content/view/full/17917/53/>

³ http://presse.ebay.de/news.exe?news_id=101466

- consistent application of this requirement⁴ (although it is of note that eBay has removed the listing for item [140235983232](#).) eBay representatives in Germany are currently stating this is an acceptable requirement (even to the point of one eBay representative apologising for the removal of one listing by a German eBay member who used the “Frerk-Malte” clause).⁵
- 2.6 The particular concern that this raises is the issue of inside knowledge, trustworthiness and transparency. It is not so much, as regards eBay’s notification N93365, that this causes doubts about the protection and security afforded to sellers through the use of PayPal, but rather it raises more severe doubts that eBay insiders themselves harbour such doubts. It raises concern about the integrity and candour of eBay itself, when its German CEO publicly admits that “PayPal will only protect sellers from unjustified chargebacks in accordance with the above”.
- 2.7 This admission is in stark and disquieting contrast to eBay’s claim (shown here in 1.5 above) that “PayPal operates an online payment service that allows its members to make financial transactions with one another over the internet without providing the other party with financial information, such as bank account or credit card details”.
- 2.8 In respect of 1.8 and 1.9, it is clear that the funds paid by buyers using PayPal are held by PayPal at its discretion. This plainly makes nonsense of the claim that PayPal is “instant”, and subjects sellers to the undue stress of knowing that PayPal will not give them buyer protection unless they post sold items within 7 days of the payment being made (not of the payment being received by them and able to be withdrawn into their own bank account). In effect, sellers must send goods paid for by e-cheque (through PayPal) before receiving payment, clearly an inequitable situation.
- 2.9 A disquieting requirement that all sellers must “Have a Premier or Business account or be willing to upgrade to a Premier or Business account upon receipt of a payment” that just been emailed to eBay members.⁶ This will impose further costs upon sellers, particularly impacting the smaller sellers for whom such additional fees are likely to make listing on eBay unaffordable and drive them away without a viable world-wide alternative.
- 2.10 In respect of 1.10 above, victims of the recent “holiday scam” on eBay, being sale of “intangible” items, would not have been protected by eBay’s/PayPal’s buyer protection. The difficulty the many victims had in gaining eBay’s response (not only as regards refunds but also as regards acting upon the many complains about fraud made while the “scammer” was still actively listing on eBay) can be seen in the relevant thread on eBay Australia’s Round Table forum.⁷ This points to a flaw within eBay’s guidelines and customer service with respect to buyer dissatisfaction and protection against fraud/scams, not commensurate with its claims to buyer protection.
- 2.11 In respect of 1.11 above, there is a notable loophole for unscrupulous buyers to claim failure to deliver goods paid through PayPal, if goods were picked up by them. Under PayPal’s policy, there is no proof of delivery possible for pickup. If eBay’s proposed conduct goes forward, sellers cannot even restrict method of payment for pickup to cash on pickup – but are obliged to accept PayPal payment, which leaves them at considerable risk in this situation.
- 2.12 In respect of 1.12 above, eBay’s disingenuous claim that “Currently, no other Buyer Protection Program (apart from PayPal’s) specifically exists for eBay transactions” makes an artificial difference between eBay purchases and other online purchases. Existing

<http://cgi6.ebay.de/ws/eBayISAPI.dll?ViewListedItems&sort=3&page=1&rows=200&since=31&rdir=0&userid=frerk-malte>

⁵ <http://community.ebay.de/forum/ebay/thread.jspa?search=search&threadID=218477&messageID=7265894#7265894>

⁶ <http://forums.ebay.com.au/thread.jspa?messageID=603212538&forumID=18#603212538>

⁷ <http://forums.ebay.com.au/thread.jspa?threadID=500075767&start=0>

methods of dealing with online fraud are in place with banks and credit card companies, and these apply as aptly to eBay purchasing as to any other method of online purchasing. Provided the method of payment is through such methods as are currently accepted on Amazon, other auction sites and other online purchasing sites, trackable and complying with buyer protection, any difference made by eBay as regards buyer protection is artificial and at their own discretion.

- 2.13 In respect of 1.13 above, eBay gives no figures or sources to support its contention about bad buyer experiences, the circumstances in which such bad buyer experiences occur, any comparative material about similar online buyer experiences from other marketplaces, and the extent to which such bad buyer experience may be due to circumstances within the control and purview of eBay (such as investigating reports of fraudulent items, fraudulent listings, etc., and taking immediate steps to remove such listings and sellers). In view of 2.10 above, no conclusion that eBay has acted with consistent responsibility in such circumstances can be reached, and hence its actions have skewed any such result. In any event, without published results, eBay's contention cannot be given credence.

3. Conclusion

- 3.1 These points lead inescapably to the conclusion that eBay's proposed conduct, as outlined in eBay International AG's notification N93365, dated 11th April 2008, should not be permitted by ACCC, as eBay Australia's purpose for seeking permission to mandate use of PayPal for all of its users cannot be considered to be that which eBay has stated. Internal contradictions from within eBay itself, as well as rulings against eBay in an international court for its part in the sale of counterfeit goods, combine to cast the gravest doubts upon eBay's purpose in proposing this conduct to mandate PayPal only.
- 3.2 I therefore submit that the ACCC should rule against eBay's submission.