

# JONES DAY

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2 November 2012

Partner

Nicolas Taylor

Telephone: +61 2 8272 0715

Email: [NJTaylor@JonesDay.com](mailto:NJTaylor@JonesDay.com)

Mr Richard Chadwick  
General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
Canberra ACT  
[by email]

*Note: This covering letter does not  
form part of the s93 notification  
and is not for disclosure on  
the ACCC register.*

Dear Mr Chadwick

We act for Adobe Systems Software Ireland Limited ABN 18 586 921 900 ("Adobe") a developer and supplier of software packages for a broad range of private, business and government customers. Adobe wishes to implement Point of Sale Activation (POSA) for the retail sale of Adobe products which will require a POSA service to be implemented at a retailer's premise.

We have previously lodged notification on behalf of Adobe and its distributor Scholastic Australia ABN 11 000 614 577 with respect to POSA implementation. We now lodge Notification for another distributor of Adobe; Express Data Holdings Pty Ltd ABN 65 003 371 239 ("Express Data"). The terms of this Notification is the same as the terms originally lodged for Adobe and Scholastic.

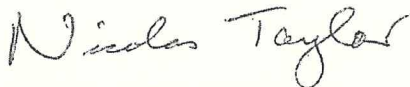
Provided with this covering letter is the Notification.

Express Data has given Adobe authority for us to lodge this notification on their behalf.

Enclosed is a Notification pursuant to section 93 of the *Competition and Consumer Act 2010*. We have already contacted by telephone providing credit card details for the \$100 statutory fee for Express Data as applicants.

If you have any questions concerning this letter or the notification itself, please do not hesitate to contact Nick Taylor at 02 8272 0715 or by email on [njtaylor@jonesday.com](mailto:njtaylor@jonesday.com) or Rae Ho at 02 8272 0710 or by email on [rho@jonesday.com](mailto:rho@jonesday.com).

Regards



**Nicolas (Nick) Taylor**  
Partner



**Rae Ho**  
Law Graduate

## Form G

Commonwealth of Australia  
*Competition and Consumer Act 2010 — subsection 93 (1)*  
**NOTIFICATION OF EXCLUSIVE DEALING**

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Competition and Consumer Act 2010*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

### 1. Applicant

- (a) Name of person giving notice:  
(Refer to direction 2)

N96235 Express Data Holdings Pty Ltd ABN 65 003 371 239

- (b) Short description of business carried on by that person:  
(Refer to direction 3)

Express Data Holdings Pty Ltd ('Express Data') is a licensed distributor of Adobe Systems Software Ireland Limited's ('Adobe') retail products (amongst other products, including Adobe's software products that are available as volume licences). Express Data is licensed to purchase retail software copies of Adobe products to re-sell to individual retail outlets ('Retailers').

- (c) Address in Australia for service of documents on that person:

For the attention of:

Nicolas J. Taylor  
Partner  
Jones Day  
Aurora Place, Level 41  
88 Phillip Street, Sydney NSW 2000

## 2. Notified arrangement

- (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

Adobe Systems Software Ireland Limited's ('Adobe') products are a broad range of software packages. The software packages include important tools that customers use in producing high quality documents, drawings, images and audio-visual material.

- (b) Description of the conduct or proposed conduct:

A POSA or 'Point of Sale Activation' system is one that allows a good to be 'activated' for use after the point of sale. Examples include pre-paid mobile telephone recharge cards or gift cards, where upon purchase of a 'card' by a customer the POSA system will authorise value to be added to that card to be used by the customer.

To implement POSA, a POSA 'terminal' or machine is required at a retailer's site which can access the POSA network and send data to it.

It is evidently economically viable for retailers to use different proprietary POSA terminals from a number of service providers and indeed some retailers are understood to have multiple terminals.

POSA are used for items that are small, are of significant monetary value, could be easily stolen and where the items can be rendered ineffective unless activated.

Currently, each Adobe product contains a unique serial number inside the product box that a consumer uses to activate the product once it is installed. The Adobe serial number represents the consumer's licence to use that software. Activation is the process by which Adobe validates that the software and serial number are genuine. Only genuine Adobe software entitles a customer to updates and technical support.

Furthermore, due to the small physical size of Adobe products (where a serial number is the primary value for a consumer), theft is a large issue for Adobe and retailers. For these reasons retailers often keep less stock of Adobe products and store them in protected glass cabinets which make the products less accessible to customers when making purchasing choices.

Implementing POSA would mean that that an Adobe product's serial number is ineffective until the point of sale, where at sale, POSA would 'activate' the serial number that is unique to the copy being purchased for a consumer. This allows Adobe to recognise a legitimately purchased source and removes the chance of product theft from a retailer.

Retailers purchasing POSA equipped Adobe products also need to establish

the capability to activate the Adobe Products by entering a relationship with an Adobe authorised POSA service provider.

At present, Adobe has authorised Epay Limited (a company registered in England and Wales) to perform these POSA technology services for Adobe in Europe and other regions worldwide, and intends to authorise its related company, Epay Australia Pty Ltd ACN 093 566 056 ('Epay'), to perform similar services in Australia. Adobe does not have an exclusive agreement with Epay and Epay is not a related company to Adobe.

Adobe may authorise other POSA technology service providers to supply their service to retailers if they meet Adobe requirements and there is a commercial case for it.

*(Refer to direction 4)*

**3. Persons, or classes of persons, affected or likely to be affected by the notified conduct**

- (a) Class or classes of persons to which the conduct relates:  
*(Refer to direction 5)*

Retailers of fast moving consumer goods and their legitimate customers would be positively affected.

Persons seeking to misappropriate products from Retailers would be negatively affected.

- (b) Number of those persons:

- (i) At present time:

On a conservative count, there are at least 65 retailers who are already Adobe resellers or have the potential to be so.

At least 7,035,000 households, which is the number of households with access to computers (and could use Adobe products), data taken from Australian Bureau of Statistics 'Household Use of Information Technology, Australia' 2010-2011.

- (ii) Estimated within the next year:  
*(Refer to direction 6)*

Same as 3 (b) (i)

- (c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

Not applicable.

#### 4. Public benefit claims

- (a) Arguments in support of notification:  
(Refer to direction 7)

Theft raises the cost for legitimate customers and require retailers to implement expensive security protection measures which also puts a degree of separation between consumers and the products they are choosing between. POSA avoids theft of the product from retail stores thereby creating a positive public benefit.

POSA will allow retailers to stock a broader range of products, enabling them to better service their customers.

A retailer is currently restricted in stocking a broader range of goods due to the amount of capital tied up in pre-activated products. As a POSA product is not activated until a customer purchases it, there is no cost to the retailer until the customer buys. Although Retailers will have significant physical inventories, as these inventories are inactive and sold on consignment, Retailers will not carry significant holding costs or need to spend money on burdensome security protection methods.

POSA therefore allows a greater selection of Adobe products to be displayed for consumers to interact with as retailers do not need to keep Adobe products locked up in glass cabinets for security purposes that can take up significant floor space. A greater variety of products to choose from allows consumers more choice in choosing software that suits them best.

POSA therefore offers the benefit to customers by giving them increased choices and therefore competition as to where they buy their Adobe products.

Intellectual property rights are also protected as POSA counters piracy from people who 'skim' serial numbers from boxes which can also affect legitimate customers who may receive 'spent' serial numbers.

This system promotes competition in software industry in allowing greater choices for consumers to choose from as more choices can be displayed by retailers.

(b) Facts and evidence relied upon in support of these claims:

The Crime Prevention Division of the NSW Department of Attorney General & Justice released a background paper in October 2011 on Retail Crime in Australia.

The report summarised the status of Retail Theft in Australia, and highlighted findings stating:

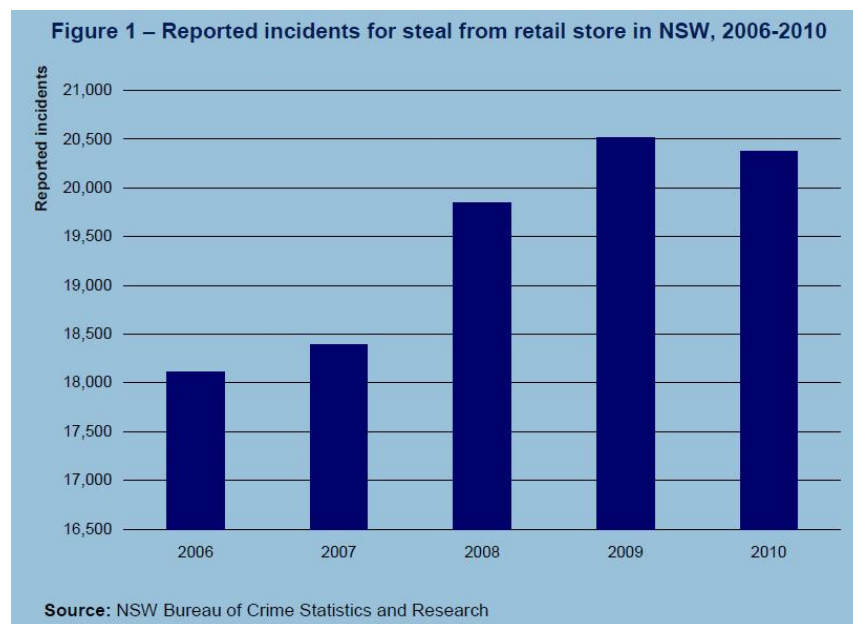
“ · Almost half of retailers (41.6%) reported they experienced increased shoplifting in 2009 as compared with the previous 12 months.

· Loss prevention spending in 2009 for Australia was equivalent to an average of 0.35% of retail sales, higher than the global average of 0.31%.

· \$499 million was spent on loss prevention and security costs by Australian retailers in 2009.

· The overall cost to address shrinkage including loss prevention in Australia in 2009 was estimated at \$2.27 billion with shoplifters and employee theft costing retailers \$1.64 billion.”

The following graph was also included on reported retail crime in NSW:



Source: Hanna Mohammad ‘Background Paper: Retail Crime’, NSW Attorney General & Justice, October 2011

Documentation of the benefits of a POSA system is summarised on the Epay website, which can be found at the following website link:

<http://www.epayaust.com.au/Retailer/Whyepay/tabid/59/Default.aspx>

**5. Market definition**

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):  
*(Refer to direction 8)*

Software development and supply.

Retailing of electronic consumer goods and/or other non-perishable fast moving consumer goods.

Providers of point of sale solutions for activation, payment, stock tracking, etc. and other service providers who achieve similar outcomes, whether or not they use equipment at the point of sale.

**6. Public detriments**

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:  
*(Refer to direction 9)*

There are no detriments in establishing POSA systems.

- (b) Facts and evidence relevant to these detriments:

Not Applicable

**7. Further information**

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

For the attention of:

Nicolas J. Taylor  
Jones Day,  
Aurora Place, Level 41  
88 Phillip Street, Sydney NSW 2000  
Australia

Dated 2 November 2012

Signed on behalf of the applicants

(Signature)



.....  
Nicolas John Taylor  
Jones Day  
Partner



## **DIRECTIONS**

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Competition and Consumer Act 2010* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
8. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.