



Australian  
Competition &  
Consumer  
Commission

# Draft Notice

in respect of a notification lodged by

**eBay International A.G.**

**Date: 12 June 2008**

**Notification no. N93365**

**Commissioners:**

Samuel  
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**Public Register no. C2008/568**

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# 1. Introduction

- 1.1 This document is a draft notice to revoke in relation to notification N93365 lodged by eBay International A.G. with the Australian Competition and Consumer Commission (the ACCC) on 11 April 2008 in relation to conduct that may raise concerns under section 47 of the *Trade Practices Act 1974* (the Act).
- 1.2 The ACCC is the independent Australian Government agency responsible for administering the Act. A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.3 Section 47 of the Act prohibits conduct known as exclusive dealing and, other than third line forcing conduct, it is prohibited where it has the purpose or effect of substantially lessening competition. Generally speaking, exclusive dealing involves one business trading with another person, imposing restrictions on their freedom to choose with whom, or in what, it deals.
- 1.4 Businesses may obtain immunity in relation to conduct that might be at risk of breaching the exclusive dealing provisions of the Act by lodging a 'notification' with the ACCC. Once lodged, immunity for the notified conduct commences automatically upon lodgement, except in the case of third line forcing conduct.
- 1.5 The ACCC may proceed to revoke a notification (other than in the case of third line forcing conduct) where it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition within the meaning of section 47 and it has not resulted or is not likely to result in a benefit to the public, or any benefit to the public that has resulted or is likely to result from the proposed conduct would not outweigh the detriment to the public constituted by any lessening of competition that has resulted from or is likely to result from the conduct.
- 1.6 In effect, revoking a notification removes the immunity conferred by the lodging of the notification. The ACCC conducts a comprehensive public consultation process before making a decision to revoke a notification.
- 1.7 Prior to issuing a notice to revoke a notification, the ACCC must first issue a draft notice setting out its reasons and providing an opportunity for interested parties to request a conference.
- 1.8 Once a draft notice is released, the notifying party or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft notice. The ACCC will also invite the notifying party and interested parties to lodge written submissions commenting on the draft notice.
- 1.9 The ACCC then reconsiders the notification taking into account the comments made at the conference (if one is requested) and any further submissions received.

### *Chronology*

1.10 Table 1 provides a chronology of significant dates in the consideration of this matter.

<b>DATE</b>	<b>ACTION</b>
11 April 2008	Exclusive dealing notification N93365 lodged with the ACCC. Immunity commenced from this date.
14 April 2008	ACCC commences consultation with interested parties.
2 May 2008	Closing date for submissions from interested parties in relation to the notification.
25 May 2008	Submission received from eBay in response to issues raised in interested party submissions.
10 June 2008	Submission received from eBay in response to issues raised in late interested party submissions.
12 June 2008	Draft notice issued.

## 2. Background

### eBay<sup>1</sup>

- 2.1. eBay International A.G. (eBay) operates a website in Australia that provides users with an online platform for the sale and purchase of goods. In general terms, eBay offers sellers a listing service, buyers the ability to search for goods listed by sellers, and both buyers and sellers the ability to transact with one another. eBay facilitates trade by bringing buyers and sellers together.
- 2.2. eBay submits that it can also provide a service of ‘the provision of transaction information’ for both buyers and sellers.
- 2.3. eBay allows a seller to offer a wide range of goods for sale, other than those goods which eBay deems to be a ‘prohibited or restricted item’ in its policies. These individual policies set out the circumstances where the sale of certain items is prohibited, and includes items such as firearms and ordnance, alcohol, and stocks and bonds.
- 2.4. eBay offers two main formats for sellers to use to list their items, known as the ‘core listing format’ and the ‘stores listing format’.
- 2.5. Under the core listing format, sellers have the option of offering goods for sale under a fixed period auction, a fixed price sale or a combination involving a fixed period auction and a ‘buy it now’ fixed price.
- 2.6. The stores listing format only allows items to be listed for sale at a fixed price.

### PayPal<sup>2</sup>

- 2.7. PayPal operates a secure 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. For recipients of funds, PayPal offers a payment processing service, whereby it will process credit and debit card transactions without the need for the recipient to have a merchant facility with a financial institution.
- 2.9. PayPal oversees the entire transaction between a buyer and a seller and if either raises a complaint about the transaction, PayPal can act as an intermediary in resolving the dispute. PayPal has the power to reverse transactions where problems arise, although it will try alternatives before doing so.

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<sup>1</sup> Unless otherwise indicated, material in this section is taken from eBay International A.G., *Exclusive dealing notification N93365*, 11 April 2008, Annexure A.

<sup>2</sup> Ibid.

- 2.10. PayPal also conducts payment reviews of a number of transactions. Where a payer is considered to be high risk, PayPal will place a hold on the payment and request the seller to delay shipping until the payment has cleared.
- 2.11. For PayPal members who purchase eligible items on eBay, PayPal offers buyer protection where the goods are not received or they are significantly not as described in the listing by the seller. Currently, under PayPal's buyer protection policy, buyers can be protected for up to \$400 for any purchase and up to \$3000 for transactions with sellers that have high levels of 'positive feedback' on eBay. Upon full implementation of the notified conduct on 17 June 2008, this buyer protection will be extended to cover \$20 000 per eligible transaction.

## **The notified conduct**

- 2.12. Prior to the implementation of the notified conduct, sellers are able to offer their buyers a number of alternative payment options on eBay. eBay requires sellers to nominate the methods they will accept at the time of listing. These payment options include:
- cash on delivery/pick up
  - personal cheque/money order
  - credit or debit card (using the seller's own merchant facility with a financial institution)
  - bank deposit, including internal bank transfers, or BPAY
  - online payment system (such as PayPal or Paymate).
- 2.13. eBay's research indicates that one of the two biggest reasons that customers choose not to return to purchase products on eBay is 'trust and safety reasons' including past bad buyer experiences (BBEs).
- 2.14. In its submission accompanying exclusive dealing notification N93365, eBay submits:
- In order to address the issue of problematic or fraudulent transactions and the associated customer churn due to BBEs, eBay proposes to take advantage of the enhanced security features of PayPal by mandating the use of PayPal for almost all transactions on the eBay Site.
- 2.15. eBay describes the notified conduct as follows:
- (1) effective on and from 21 May 2008, eBay will amend its User Agreement and alter the functionality of the eBay Site such that all sellers (including both new and existing sellers) will be required to offer PayPal as one of their accepted payment methods; and
  - (2) effective on and from 17 June 2008, eBay will amend its User Agreement and alter the functionality of the eBay Site such that eBay will supply the services on the eBay Site to users on the following conditions:

- (a) sellers may only offer to accept payment made through PayPal, Pay on Pickup or Visa/MasterCard processed by PayPal;
- (b) all eBay transactions must be paid for using PayPal, Pay on Pickup or by Visa/MasterCard processed by PayPal, and not through the use of any other payment method; and
- (c) sellers will still be permitted to have arrangements with third party providers that provide checkout facilities (commonly as part of an overall business/inventory management facility). When a customer purchases a product from these sellers, the customer is not taken to eBay checkout – but instead redirected to a third party checkout facility. However the seller must be a PayPal member and the product must be paid for using eBay’s accepted payment methods and not through the use of any other payment method.

2.16. The ACCC notes that the first stage of the notified conduct which requires all sellers to offer PayPal as a payment method came into effect on the eBay site on 21 May 2008. Currently, and until 17 June 2008, sellers continue to have a choice regarding which other payment methods will be offered.

## Online retail industry in Australia

2.17. The ACCC understands that Australia’s online retail industry currently earns approximately \$15 billion in revenue, and has been growing at approximately 5-10% per annum for the past five years.<sup>3</sup>

2.18. A large proportion (approximately 40%) of this revenue derives from online sales of air travel, accommodation and events tickets. The remainder could be categorised as ‘online retail of goods’, which would generally include all items available for sale on eBay and other online marketplaces.

## Online marketplaces

2.19. In a submission to the ACCC on 26 May 2008, an interested party provided the results from internet traffic measurement company Hitwise. Table 2 identifies the top 10 sites in the ‘Shopping and Classifieds – Auctions’ online industry in Australia for March 2006 based on website visits:

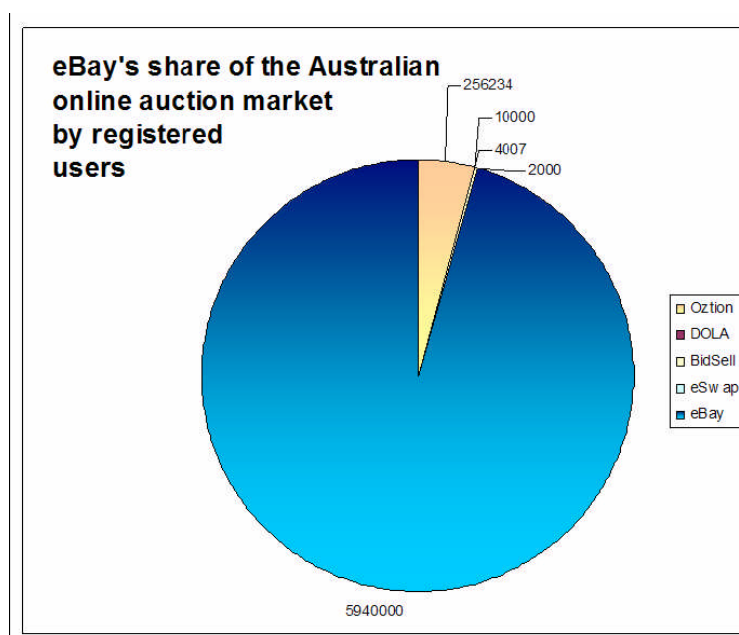
**Table 2**

Rank	Website	Domain	Market share
1	eBay Australia	<a href="http://www.ebay.com.au">www.ebay.com.au</a>	72.6%
2	eBay	<a href="http://www.ebay.com">www.ebay.com</a>	17.53%
3	eBay UK	<a href="http://www.ebay.co.uk">www.ebay.co.uk</a>	1.15%
4	GraysOnline	<a href="http://www.graysonline.com.au">www.graysonline.com.au</a>	1.13%

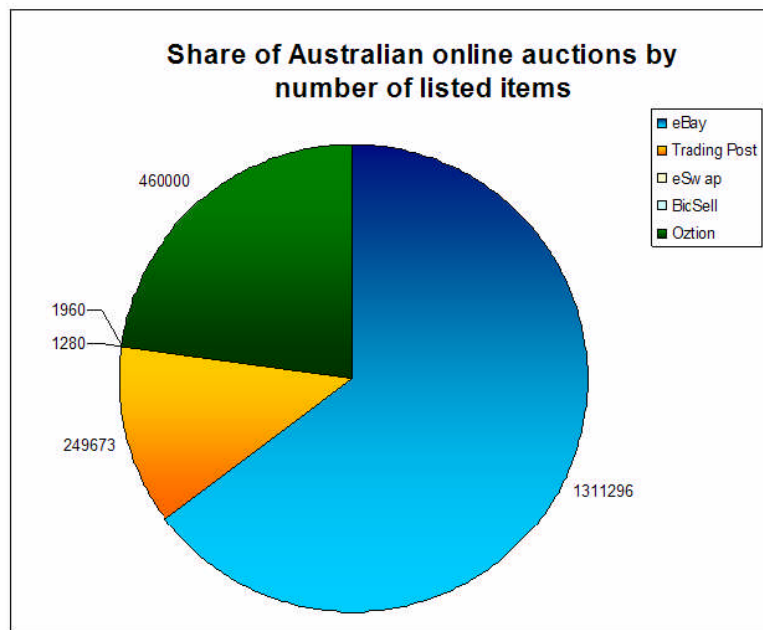
<sup>3</sup> IBISWorld, *Electronic Shopping and Mail-Order Houses in Australia*, 8 April 2008.

	Auctioneers		
5	eBay motors	<a href="http://www.ebaymotors.com">www.ebaymotors.com</a>	0.65%
6	Pickles Auctions	<a href="http://www.pickles.com.au">www.pickles.com.au</a>	0.62%
7	Andale	<a href="http://www.andale.com">www.andale.com</a>	0.54%
8	Fowles Auction Group	<a href="http://www.fowles.com.au">www.fowles.com.au</a>	0.49%
9	Taobao.com	<a href="http://www.taobao.com">www.taobao.com</a>	0.33%
10	TradeMe	<a href="http://www.trademe.co.nz">www.trademe.co.nz</a>	0.31%

2.20. In its submission to the ACCC, BPAY provided an overview of online auction sites, including membership (although statistics regarding Trading Post Online’s membership were unavailable) and listings. Relevantly, BPAY provided the following charts:







### Online payment services

- 2.21. The ACCC understands there to be a number of different types of online payment services, each involving different features, costs and risks.
- 2.22. There are a number of providers which facilitate direct payment communication between online sellers and buyers without using traditional intermediaries such as banks and other financial institutions. These include:
- Online payment providers offering master merchant facilities such as PayPal and Paymate. This involves the seller, and possibly the buyer, having an account with the master merchant which processes the transaction on behalf of the two parties.
  - Online payment providers which operate as a payment gateway, such as eWay and Qpay. This involves a third party providing services to a seller to enable the secure transfer of payments to the seller's own merchant account.
- 2.23. Other payment options include:
- a seller operating a merchant account, which enables the seller to receive debit and credit card payments directly to their merchant account
  - direct bank deposits or bank cash transfers
  - cash transfer services provided by companies such as Western Union and MoneyGram
  - BPAY, which describes itself as an electronic bill payment service offered by Australia's leading banks, building societies and credit unions as a core feature of internet and phone banking

- escrow services, offline payment systems including cash on pickup, cash on delivery, money order, personal cheque, and bank deposit.

### 3. Statutory test

3.1. Section 47(1) of the Act provides that a corporation shall not engage in the practice of exclusive dealing. Section 47 then states that the practice of exclusive dealing includes the supply of goods or services on condition that the purchaser will not acquire, or will limit the acquisition of goods or services from a competitor of the supplier, where the condition has the purpose, effect or likely effect of substantially lessening competition.

3.2. Section 47(13)(b) of the Act states that the reference to competition shall be read as a reference to competition in any market in which:

(i) the corporation engaging in the conduct or any body corporate related to that corporation; or

(ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;

supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.

3.3. Section 93 of the Act provides that a corporation that engages or proposes to engage in conduct of a kind referred to in section 47 may give to the ACCC notice, as prescribed, setting out particulars of the conduct or proposed conduct. The effect of lodging such a notification is to afford protection to the corporation for engaging in the said conduct from legal proceedings under the Act.

3.4. Under section 93(3), if a corporation has notified the ACCC of conduct or proposed conduct of the type described in section 47 and the ACCC is satisfied that the conduct described in the notification has the purpose or has or is likely to have, the effect of substantially lessening competition within the meaning of section 47 and in all the circumstances:

(a) the conduct has not resulted or is not likely to result in a benefit to the public or

(b) any benefit to the public that has resulted or is likely to result from the conduct would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct

the ACCC may give a notice in writing stating that it is so satisfied and setting out its reasons in this respect. The effect of giving such a notice is to revoke the immunity afforded by lodging the notification.

3.5. Before revoking the immunity obtained by a notification, the ACCC must issue a draft notice of its intention (section 93A(1)) and give the applicant and interested

parties the opportunity to respond and to call a conference (section 93A(2)) in relation to the draft notice.

## 4. Submissions received

- 4.1. eBay lodged a supporting submission along with exclusive dealing notification N93365. In summary, eBay submits that:
- it is not possible to form a definitive view as to whether eBay possesses a substantial degree of market power, due to inherent difficulties in defining the markets in which both eBay and PayPal operate
  - despite this, the conduct will have limited impact on competition
  - the conduct will generate substantial public benefits by reducing BBEs, which eBay understands to be one of the two biggest reasons that buyers decide not to purchase additional products on the eBay site.
- 4.2. eBay also provided an economic analysis of the conduct by NERA Economic Consulting (the NERA Report) which, at eBay's request, was excluded from the public register.

### Initial consultation

- 4.3. The ACCC sought public submissions from any party with an interest in the matter, including eBay users, PayPal's competitors, relevant financial industry participants and associations, relevant state and federal government authorities and consumer and community associations. The ACCC wrote directly to approximately 50 of these interested parties to seek their views.

### Submissions from eBay users

- 4.4. Public submissions were received from approximately 650 eBay users, covering a broad range from those conducting a business on eBay to those that largely participate in consumer-to-consumer transactions. In these submissions, the interested parties identified themselves as follows:
- approximately 5% were PowerSellers (i.e. sales average greater than \$2000 per month)
  - approximately 50% were regularly buyers on eBay
  - approximately 33% were sellers.
- 4.5. The overwhelming majority of these submissions were opposed to the notified conduct and raised concerns regarding restriction of choice, increased fees and issues associated with PayPal's security, dispute resolution and customer service. An example of a typical submission is provided by M Barron, who submits:

Most of my buyers pay by Direct Deposit or Money Order therefore I believe that the changes are anticompetitive. Effectively these changes will eliminate potential customers who are unwilling

to use the only online payment option offered by E-bay. This will have a detrimental effect on all sellers & shop owners who currently operate under the E-bay banner.<sup>4</sup>

4.6. Similarly, a seller on eBay, Bede Lawrence, submitted on 23 April 2008:

I offer Paypal as one of many methods of payment to my buyers because I believe they should be afforded just that – a choice. At present my sales would be 40% paypal, 57% bank transfer and 3% pickup and money order. Most of my customers are wary of paypal and similar payment gateways and have told me they wont be using ebay anymore if paypal is the only payment option.<sup>5</sup>

4.7. The submissions received from eBay users are discussed further in Chapter 5 of this draft notice.

## **Other submissions**

4.8. The ACCC also received submissions from:

- a number of online payment providers including Paymate, eWay and Qpay
- a number of financial industry participants and organisations including the Australian Bankers' Association (ABA), the Australian Payments Clearing Association (APCA), Abacus, BPAY, American Express and the Commonwealth Bank of Australia (CBA)
- the Professional eBay Sellers Alliance (PESA)
- government authorities, including the Reserve Bank of Australia (RBA) and the Australian Securities and Investments Commission (ASIC)
- consumer and community associations, including Choice, the Consumers' Federation of Australia (CFA), the Cyberspace Law and Policy Centre, Electronic Frontiers Australia Inc (EFA) and the Youth Enterprise Legal Centre (YELC).

4.9. The ACCC also sought information from eBay's main competitors, including OZtion, which also offers an online marketplace in Australia, and Sensis, which operates the Trading Post online classifieds site.

## **eBay's response to submissions**

4.10. The ACCC gave eBay an opportunity to respond to interested party submissions. On 25 May 2008, eBay provided a further submission.

4.11. A number of submissions have been received by the ACCC since 25 May 2008, including a substantial submission on 26 May 2008. eBay provided a short response to this latter submission on 10 June 2008. In providing its response to this draft

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<sup>4</sup> M Barron, *Submission to the ACCC*, 23 April 2008, p1.

<sup>5</sup> Bede Lawrence, *Submission to the ACCC*, 23 April 2008, p1.

notice, eBay can respond to any issues raised in late submissions that it feels it has not already adequately addressed.

- 4.12. The views of eBay and interested parties are summarised in the ACCC's assessment of the notified conduct in Chapter 5 of this draft notice. Copies of public submissions are available on the ACCC's website ([www.accc.gov.au](http://www.accc.gov.au)) by following the 'Public Registers' and 'Authorisations and Notifications Registers' links.

## 5. ACCC assessment

### The relevant markets

- 5.1. To assist with the necessary assessment of the purpose, effect or likely effect of the notified conduct on competition, it is helpful to identify the relevant markets affected. For the purposes of assessing this notification, the ACCC has considered the following areas of competition:
- the market in which eBay operates
  - the market in which PayPal operates.

### The market in which eBay operates

#### *eBay's submission*

- 5.2. eBay submits that 'due to the complexities of the two-sided markets in which eBay and PayPal operate, it is not possible to form a definitive view of the likely markets in which eBay and PayPal respectively operate.'

#### *Interested party submissions*

- 5.3. Generally, the interested parties who addressed the issue of market definition in relation to eBay's operations consider that eBay operates in either an 'online auctions' market or an 'online marketplaces' market.
- 5.4. The EFA submits that the services provided by eBay are unique, in that they result in a concluded contract between buyer and seller.
- 5.5. PESA submits that:
- large sellers are likely to derive approximately 80% of their revenue from eBay, with the remaining 20% derived from a combination of other methods
  - 'list, search and redirect' sites, online classified sites, and individual online stores are more likely to be considered complementary options to listing on eBay for large sellers, rather than alternatives to eBay
  - the ability for many online stores to compete internationally is limited by exchange rate and freight cost considerations.
- 5.6. Other providers of online sales platforms submit that the ability for a new online marketplace to be established is constrained by a range of factors including:
- capital costs;
  - the need for specialist skills for website development; and



- the network effects of eBay's operations.

#### *ACCC view*

- 5.7. eBay describes itself as an online marketplace, noting that its three primary functions are a search tool for buyers, a listing tool for sellers and a transaction function for both buyers and sellers.
- 5.8. In order to determine the relevant market in which eBay operates, the ACCC has considered a range of potential substitutes on both the demand side and the supply side.

#### Demand side substitutes

- 5.9. The ACCC considers that the full combination of search, list and transaction functions is a key feature of online marketplaces and means that there are very few, if any, close demand side substitutes.
- 5.10. Online classified sites (such as Gumtree), 'list, search and redirect' sites (such as shopping.com) and specialised listing sites (such as drive.com.au) all offer a search function for buyers and a listing function for sellers. Crucially, however, none of these currently offer the ability to complete a transaction. For large sellers, these options are more likely to be used to generate traffic to the seller's own website. Based on the information available, the ACCC considers that sellers would not switch to these alternatives in response to an increase in the fees charged by eBay. It follows that the ACCC does not regard these alternatives as close substitutes for an online marketplace.
- 5.11. For similar reasons, the ACCC does not consider a seller's own website to be a close substitute for listing on an online marketplace for the seller.
- 5.12. From the perspective of buyers, the ACCC considers that the services offered by other online platforms which facilitate transactions between businesses and consumers (such as Greys Online Auctioneers) and online stores (such as Deals Direct) are unlikely to be close alternatives to an online marketplace because there is likely to be a significantly narrower range of products offered for sale on these sites.

#### Supply side substitutes

- 5.13. The ACCC considers that the main option for supply side substitution involves the addition of a transaction function to an existing online classifieds site. The ACCC understands that the integration of a transaction function into these sites is a relatively simple and inexpensive process.
- 5.14. This view appears to be borne out by the fact that Sensis has just launched an online auction service on its Trading Post classifieds site. This suggests that supply side substitution is possible. However, the ACCC notes that the more substantial obstacle in establishing an effective competing online marketplace in Australia is the strong network effects enjoyed by the incumbent online marketplace (discussed in more detail below).

### Conclusion on the market in which eBay operates

- 5.15. The evidence available suggests that there are few, if any, close demand side or supply side substitutes for online marketplaces offering a combination of search, list and transaction functions.
- 5.16. For the purposes of assessing this notification, the ACCC considers that the relevant market in which eBay operates is the supply of online marketplaces in Australia.

### **The market in which PayPal operates**

#### *eBay's submission*

- 5.17. In its response to interested party submissions, eBay submits that regardless of the extent of any market power held by eBay in its relevant market, that power is incapable of being exercised by PayPal in the market for online payment services, because the latter market is:
- vastly larger in size than that segment attributable to eBay transactions
  - dominated by major financial institutions (with considerable countervailing power) and a number of other innovative and competitively aggressive actual and potential participants
  - clearly characterised by consumers adopting more than one payment system for transactions in that market.

#### *Interested party submissions*

- 5.18. Generally, the interested parties who addressed the issue of market definition in relation to PayPal's operations consider that PayPal operates in an 'online payments systems' market or an 'online marketplaces' market.
- 5.19. An interested party submission to the ACCC submits that PayPal operates in the market for 'peer-to-peer (P2P) online payment processing services', as an alternative to it operating in an online payments system market. The interested party states that P2P online payment systems are **closely** substitutable for the online payment processing services provided by PayPal to online sellers.
- 5.20. Paymate notes that the notified conduct will have an effect on 'third party (brokered) payment providers like Paymate who service online sellers.'

#### *ACCC view*

- 5.21. In its notification, eBay describes PayPal as 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 details or credit card details.

- 5.22. The notification also notes that for recipients of funds, PayPal offers (among other services) a service whereby it will process credit and debit card transactions without the need for the recipient to have a merchant facility with a financial institution.

#### Demand side substitutes

- 5.23. The ACCC considers that there are a number of potential demand side substitutes for the services that PayPal offers, including:
- payment mechanisms on merchant websites including credit and debit cards, and payment gateways (eg eWay)
  - internet banking facilities such as BPAY and the 'Pay Anyone' feature offered as part of online banking services
  - offline payment options including cash on delivery, cheques, money orders and money transfers.
- 5.24. The ACCC notes that these methods of payment are currently used by buyers and sellers on eBay and, therefore, they are likely to form part of the relevant market.

#### Supply side substitutes

- 5.25. The ACCC considers that payment gateways and BPAY would appear to be well placed to modify their operations to provide a similar suite of services to PayPal. However, the ACCC notes that there a range of factors that would be relevant to such a decision including the requisite technical systems, regulatory requirements and reputational issues.

#### Conclusion on the market in which PayPal operates

- 5.26. The ACCC notes eBay's submission that PayPal operates in a wide market for online payment services. While the ACCC accepts that PayPal currently faces competition from a range of providers who also operate in a market for online payment services, the ACCC believes that it is important to focus on the intrinsic link between the market in which PayPal operates and the market in which eBay operates. The market in which PayPal operates may be regarded as a derivative of the market in which eBay operates, since the demand for online payment services derives from the demand for a transaction function on online marketplaces.
- 5.27. As noted above, the ACCC considers that there is a market for the supply of online marketplaces in Australia. The key feature of the product in this market is the combination of list, search and transaction functions. The transaction function on online marketplaces is facilitated by online payment providers such as PayPal, Paymate and a range of financial institutions offering online banking.
- 5.28. The ACCC is of the view that it is not necessary to identify the precise boundaries of the market in which PayPal operates. For the purposes of assessing this notification, the ACCC considers it sufficient to note that PayPal currently competes (to varying

degrees) with a range of online payment providers to supply services which facilitate the transaction function on online marketplaces in Australia.

## The counterfactual

- 5.29. To identify and measure the effects of the notified conduct, the ACCC applies the ‘future with and without test’. Under this test, the ACCC compares the situation in the relevant markets in the future with the notified conduct in place with the situation in the relevant markets without the notified conduct. This requires the ACCC to predict how the relevant markets will react if the notifying parties do not engage in the notified conduct. This prediction is referred to as the ‘counterfactual’.

### *Interested party submissions*

- 5.30. Few interested parties addressed the ‘future with and without test’ applied by the ACCC. Those parties who considered the test generally viewed the status quo as the most appropriate counterfactual.
- 5.31. BPAY notes that this counterfactual is characterised by consumer choice, investment in online payment systems resulting in new entrants and Paymate and Google Checkout becoming close rivals to PayPal in Australia.
- 5.32. Similarly, an interested party submission received by the ACCC on 26 May 2008 considers that, in the absence of the notified conduct, potential competitors to PayPal will ‘be more likely to improve their offerings so as to enhance security and protection to online buyers and online sellers in order to compete more effectively with PayPal.’

### *ACCC view*

- 5.33. In the absence of the immunity provided by this notification, the ACCC considers it likely that the current arrangements will continue. Under these arrangements, sellers have choice regarding which payment methods to offer when selling a product on eBay, and buyers have a choice between the options offered by the seller.

## Public detriments

- 5.34. Under section 93 of the Act, the ACCC may revoke a notification where the ACCC is satisfied that the conduct described in the notification has the **purpose** or has or is likely to have, the **effect** of substantially lessening competition within the meaning of section 47 of the Act and where it considers that the conduct is otherwise not in the public interest.

## Purpose of the notified conduct

- 5.35. A corporation will have the purpose of substantially lessening competition if that is its actual purpose for engaging in the conduct.<sup>6</sup> This will be ascertained from direct

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<sup>6</sup> *Universal Music Pty Ltd v Australian Competition and Consumer Commission* (2003) 201 ALR 636, at 693.

and indirect evidence as to the actual intentions and purposes of the corporation.<sup>7</sup> The Act provides that the relevant purpose must be a substantial purpose but not necessarily the sole purpose.<sup>8</sup>

#### *eBay's submission*

- 5.36. eBay submits that the purpose of the notified conduct is to reduce the incidence of BBEs on its site, which occur as a result of problematic or fraudulent transactions. eBay is proposing to take advantage of the 'enhanced security features' of PayPal to address these security issues and the associated customer churn.
- 5.37. eBay contends that the objective of the BBE Project is to 'address a market failure that affects the integrity of the eBay platform, eBay's business and consumer acceptance of online markets.' eBay considers that this failure occurs because:
- eBay sellers choose the payment system(s) they will accept for transactions
  - eBay sellers have a natural incentive to accept the payment method(s) with the lowest net cost to them
  - there is imperfect information about the relative risks and benefits of payment systems between sellers and buyers that education alone cannot redress, particularly where some sellers dissuade buyers from using safer payment methods
  - buyers who have a single negative purchase experience will be reluctant to use eBay (or other online buying platforms) again and are likely to influence others
  - the two-sided nature of eBay's market means that a reduction in available buyers will lead to a reduction in sellers, with a continuing feedback effect.

#### *Interested party submissions*

- 5.38. A large number of interested parties have referred to eBay's proposal as 'double-dipping' and suggest that it is being implemented solely for the purpose of revenue raising.

#### *ACCC view*

- 5.39 At this stage, the ACCC has not relied on any of the information available that might suggest that eBay is implementing the conduct for reasons other than transaction security.

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<sup>7</sup>

Ibid.

<sup>8</sup>

Section 4F of the *Trade Practices Act 1974*.

## Effect on competition

- 5.40 Under section 93 of the Act, it is also relevant to consider the effect or likely effect of eBay's notified conduct on competition.
- 5.41 To assess the effect or likely effect of conduct on a market, it is necessary to look at the relevant market, ask how and to what extent there would have been competition in the market but for the conduct, assess what is left and determine whether what has been lost in relation to what would have been if the conduct had not occurred, is a substantial lessening of competition.
- 5.42 Generally speaking, exclusive dealing conduct will be more likely to have a substantial effect if it is engaged in by a significant market player across a wide section of the market, if there are limited substitute products available or if customers are forced to buy a product or acquire a second product. It can also have a more detrimental effect on competition if the business engaging in the conduct has significant leverage in other markets or where the conduct impedes entry into a market.

### *eBay's submission*

- 5.43 eBay submits that:

In light of the detailed analysis and conclusions contained in the NERA Report, eBay submits that the Conduct would not be likely to have the effect of substantially lessening competition within the meaning of section 47. Alternatively, any anticompetitive effect of the Conduct is likely to be relatively minor.

- 5.44 In its response to interested party submissions, eBay submits that in order for the BBE Project to result in a substantial lessening of competition, it is necessary, but not sufficient, for the following conditions to apply:

- (1) There must be insufficient viable alternatives to buying and selling on the eBay platform; and
- (2) Either:
  - (a) payments for purchases made on eBay must represent a significant proportion of all online payments; or
  - (b) PayPal's membership base must be significantly increased to the exclusion of all competing payment services in the online payments market as a result of the Project

- 5.45 eBay considers that buyers and sellers who do not wish to pay PayPal fees are able to list and purchase items through competing services. eBay notes that since it announced the implementation of the BBE Project, OZtion's membership has reportedly increased by 22% to over 250,000 members. eBay contends that this is evidence:

...to suggest that a number of sellers will choose alternative platforms in response to the implementation of the Project, providing a strong incentive for eBay to maintain a competitive offering.

- 5.46 eBay disputes claims made by interested parties that PayPal is the largest and longest established of the online payment providers. eBay submits that:

PayPal is dwarfed by BPAY and credit card providers that are both bigger and have been operating far longer in Australia. Paymate has been operating in Australia since 2001, over twice as long as PayPal.

- 5.47 eBay submits that PayPal is one of the smallest participants in the online payments market and will continue to face competitive constraints, notwithstanding any increase in memberships as a result of the BBE Project.
- 5.48 eBay claims that the BBE Project will not give PayPal any ability to stifle or foreclose competition in the online payments market. eBay concludes that as conditions (1) and (2) are not met, the BBE Project will not result in a substantial lessening of competition.

*Interested party submissions*

- 5.49 Many interested party submissions consider that the conduct is likely to reduce competition and increase barriers to entry in both the market in which eBay operates and the market in which PayPal operates.
- 5.50 Paymate submits that the notified conduct will adversely impact upon its ability to compete with PayPal on eBay and other economic platforms.
- 5.51 Paymate is concerned that as shoppers on eBay are likely to constitute a significant share of the overall online shopping population, an effect of eBay's proposal is that these shoppers will prefer to use PayPal when they are conducting transactions on non-eBay platforms.
- 5.52 BPAY submits that existing online payment services will be unable to secure a user base and new firms will be strongly dissuaded from entering the market.
- 5.53 BPAY considers that given eBay's share of e-commerce transactions in Australia, a substantial portion of internet transactions will be inaccessible to PayPal's competitors. BPAY further considers that the notified conduct will create significant barriers to entry in the online payment market by excluding new players from major sections of the market. BPAY submits that the likely flow on effect will be to discourage investment in alternative online payment methods and foreclose the emergence of new competition.
- 5.54 PESA submits that eBay has created considerable barriers to entry through its large network and credible reputation. PESA notes that the 'first mover advantage' has given eBay a user base whose size and diversity allows it to offer a wider selection of merchandise than any online retailer.
- 5.55 The CBA considers that by denying future entrants in the online payment market access to eBay transactions, the notified conduct will further entrench the effective PayPal monopoly and discourage innovation and competition.

- 5.56 The CBA submits that PayPal should compete equally with other payment alternatives. The CBA considers that:
- ...if PayPal can demonstrate a superior value proposition to eBay sellers, then sellers will naturally choose PayPal over other payment methods, but market forces should be allowed to apply.
- 5.57 The RBA submits that the proposed conduct may limit competition between PayPal and other existing online payment systems, and reduce the ability of new online payment systems to become established.
- 5.58 The RBA states that it is not in a position to judge whether eBay holds a dominant market position. However, the RBA considers that to the extent that it does, sellers might find it difficult to move their business to another online auction market and would therefore have little choice but to accept PayPal.
- 5.59 In recent years the RBA has expressed concern about the lack of alternatives for payments over the internet. The RBA notes that online payments in Australia have tended to be dominated by credit and scheme debit cards and as a result, the RBA is interested in ensuring competition is encouraged in the online payments space. The RBA considers that although PayPal has added to competition in this area, mandating the exclusive use of PayPal for eBay sales may limit competition.
- 5.60 The CFA is concerned that the conduct will have the effect of significantly reducing competition in payment methods in relation to other online auctions because consumers will increasingly demand the availability of the channel they must use through eBay.
- 5.61 A number of submissions were also received from eBay users who commented on the potential competition issues that may arise as a result of the notified conduct. A representative sample of the comments generally made in these submissions is outlined below.
- 5.62 C Davies submits that eBay's proposal to mandate PayPal as the only payment method will prevent competition from 'Australian banks, Australia Post or other financial institutions based in Australia'.<sup>9</sup>
- 5.63 Robert Bensley is concerned that the conduct will 'create an impregnable barrier to providers of competing online payment services to PayPal'.<sup>10</sup>
- 5.64 Ann Smedley agrees, noting that 'to lock other payment service providers out of a market the size of eBay Australia will necessarily lead to a substantial lessening of competition in this service area'.<sup>11</sup>

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<sup>9</sup> C Davies, *Submission to the ACCC*, 7 May 2008, p1.

<sup>10</sup> Robert Bensley, *Submission to the ACCC*, 22 April 2008, p2.

<sup>11</sup> Ann Smedley, *Submission to the ACCC*, 22 April 2008, p1.



*ACCC view*

- 5.65 Based on the ACCC's assessment of the relevant markets in this chapter, it is relevant to consider the effect or likely effect of the notified conduct on:
- the supply of online marketplaces in Australia
  - the market in which PayPal operates.

The supply of online marketplaces in Australia

- 5.66 Market share data relating to the supply of online marketplaces in Australia are not readily available. However, as set out in Chapter 2 of this draft notice, various information sources indicate that eBay holds a significant share of this market.
- 5.67 The ACCC considers that eBay currently faces limited competition in the supply of online marketplaces in Australia.
- 5.68 The second largest online marketplace after eBay is OZtion which commenced operations in 2005. The data set out in Chapter 2 provides various measures of OZtion's market share – 22% by number of listed items, 4.1% by registered users of online marketplaces and 1.3% by website visits. These figures, and the ACCC's market inquiries, suggest that OZtion is currently not a significant competitive constraint on eBay.
- 5.69 The ACCC also considers that the threat of effective new entry into the supply of online marketplaces in Australia is low.
- 5.70 The ACCC's market inquiries indicate that the structural barriers to entry are relatively low. This appears to be reinforced by the recent announcement by Sensis to introduce online auctions on its Trading Post site. However, the more significant barrier likely to be faced by a new entrant is the powerful network effects currently enjoyed by eBay. As one interested party noted, the fact that the eBay site has such wide recognition among online buyers encourages more online sellers to purchase online marketplace services from eBay. This, in turn, encourages further interest from buyers as the number of online sellers on the eBay site increases and the cycle continues.
- 5.71 The ACCC has considered whether the notified conduct might act as a catalyst for disgruntled eBay users to respond by moving en-masse to an alternative online marketplace. This appears to be a motivating factor in the changes to the Trading Post online classifieds site and the developments at OZtion, including a 50% increase in sales, a 65% increase in the value of merchandise traded and over 10% growth in memberships (of which 14% were sellers) since eBay announced the BBE Project. OZtion has also entered into an agreement to be acquired by the Australian online media company, Jumbuck.<sup>12</sup>

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<sup>12</sup> Announcement 3 June 2008 at <http://www.oztion.com.au/community/announcement.aspx>

5.72 In relation to this issue, the ACCC notes the following:

- Despite the significant changes announced by OZtion, its registrations still only stand at around 275 000 after three years of operation (or around 6% of the eBay membership base of more than 5 000 000).
- PESA states that the other online marketplaces in Australia are not viable alternatives to eBay because they do not attract the same amount of online traffic as eBay. PESA also notes that in the past, where fee increases by eBay have been dramatic, sellers have been forced to either pass on the increase to customers or go into another business.
- In New Zealand, TradeMe is the leading online marketplace. This site was established in 1999 and significantly, has successfully held its leading position despite an attempt by eBay to expand into New Zealand in 2001.

5.73 The ACCC believes that these factors evidence the strength of the first mover advantage and network effects currently enjoyed by eBay.

5.74 Based on the information set out above, the ACCC considers that eBay holds a substantial degree of power in the supply of online marketplaces in Australia. While the notified conduct may not substantially lessen competition within this market, the ACCC must also consider whether this conduct enables eBay to leverage its power into another market.

#### The market in which PayPal operates

5.75 As discussed above, the ACCC considers that PayPal currently competes with a range of online payment providers to supply services which facilitate the transaction function on online marketplaces in Australia.

5.76 Market share data for the supply of online payment services (at any level) in Australia are not readily available. However, the ACCC has viewed data from eBay (excluded from the public register at eBay's request) which indicates that PayPal faces significant competition from other online payment providers. This is reinforced by various public information sources such as the AC Nielsen Online Consumer Report in 2007 which found that, when shopping online, 31% of shoppers preferred to use PayPal, compared to 44% for credit/debit card and 11% for direct debit/transfer.

5.77 For the reasons discussed above, the ACCC considers that eBay holds a substantial degree of power in the supply of online marketplaces. It follows that an online payment provider who wishes to provide services to users of online marketplaces in Australia is likely to want to deal with eBay.

5.78 The notified conduct will have the effect of forcing those eBay transactions which are currently undertaken with other online payment providers to be undertaken with PayPal. Accordingly, the notified conduct will have the effect of increasing the

number and value of transactions that occur through PayPal and, consequently, reduce the use of PayPal's competitors.

- 5.79 In summary, PayPal currently competes (to varying degrees) with a range of online payment providers to supply services which facilitate the transaction function on online marketplaces in Australia. Following implementation of the notified conduct, there will be no competition to supply such services to users of eBay. Given eBay's significant position in the supply of online marketplaces in Australia, the notified conduct will substantially reduce competition to supply online payment services to that market more generally. As a result, the ACCC considers that the notified conduct is likely to have the effect of substantially lessening competition in the market in which PayPal operates.

#### Conclusion on effect on competition

5.80 The ACCC considers that:

- eBay holds a substantial degree of power in the supply of online marketplaces in Australia
- the notified conduct allows eBay to leverage that power into the market in which PayPal operates
- the notified conduct has, or is likely to have, the effect of substantially lessening competition in the market in which PayPal operates.

#### **Reduced consumer choice**

##### *eBay's submission*

5.81 eBay submits that at present, buyers and sellers are permitted to complete transactions by using one of a number of payment methods, including:

- cash on delivery/pick up, personal cheques or money orders
- bank deposit, including bank transfers
- credit or debit card payments (using the seller's own merchant facility with a financial institution)
- payment via an online payment system (such as PayPal) using direct debit for a bank account or an accepted credit or debit card.

5.82 eBay's proposal will restrict payment options for transactions on eBay to:

- PayPal
- pay on pick up.

- 5.83 The ACCC understands that buyers who do not have an existing PayPal account will not immediately be required to join PayPal in order to purchase an item on eBay. These buyers will have the option of using a credit or debit card through PayPal's Guest Checkout facility. Such checkout arrangements will be made available to individual eBay members for a limited period of time before being required to become a PayPal member.
- 5.84 eBay submits that the notified conduct will not significantly restrict the choice of underlying payment instruments. Buyers will continue to have the choice to fund a transaction made through PayPal by using:
- a linked bank account with any bank or other authorised deposit taking institution
  - Visa or MasterCard debit or credit card
  - the user's PayPal account balance.

*Interested party submissions*

- 5.85 A substantial majority of the interested party submissions received by the ACCC consider that the notified conduct would lead to a loss of choice of payment system for both buyers and sellers on eBay.
- 5.86 The RBA considers that competition and efficiency could be enhanced by allowing consumers to weigh PayPal's security attributes against those of alternative payment methods. The RBA submits that if consumers value PayPal's security features highly, they will choose it over other payment methods. This may in turn place pressure on those other systems to improve security for similar transactions.
- 5.87 The RBA submits that the notified conduct has the potential to restrict merchants' ability to negotiate lower fees. The RBA considers that as sellers will be unable to decline to accept PayPal payments or encourage buyers to use alternative payment methods, their ability to put downwards pressure on the fees they are charged will be limited.
- 5.88 In addition, the RBA notes that PayPal's 'no surcharge' rule also has the potential to restrict the ability of merchants to exert competitive pressure on PayPal's fees. The RBA has required these rules to be removed in credit card and charge card systems.
- 5.89 Centricom submits that buyers and merchants should be allowed to choose from a set of payment methods which best meet their needs based upon their own assessment of the security, utility and accessibility on offer.
- 5.90 The CBA submits that it is preferable for customers (both buyers and sellers) to be able to choose the most appropriate payment method and to artificially limit this choice is unnecessarily restrictive.

5.91 The CFA considers that consumers:

...ought to have the choice to utilise a payment channel that enables them access to established complaint systems; systems that enable them to make a complaint by other methods than email and systems which are subject to recognised benchmarks – such as the Banking and Financial Services Ombudsman.

5.92 Some interested parties also noted that the other payment option, cash on pick up, is not available to many buyers due to the large geographic area across which items are bought and sold.

#### *ACCC view*

5.93 The ACCC considers that the notified conduct will result in a detriment by preventing consumers from selecting the payment method they prefer, whether based on security, cost, accessibility, or other reasons. This may be of particular disadvantage to users who are reluctant to provide their personal financial details to an online payment facility, or who wish to use different payment mechanisms depending on, for example, the risk profile of the seller.

5.94 The ACCC notes eBay's submission that the concerns raised by the RBA are only relevant to the competition analysis if a loss of bargaining power to eBay sellers can be construed as a substantial lessening of competition in the online payment systems market.

5.95 The ACCC considers, however, that the principles underlying the RBA's regulatory reforms are consistent with the principles that underpin competition in the payment systems market. The ACCC believes that to the extent it runs counter to these reforms, the notified conduct will likely have an anti-competitive effect in that market.

#### **Increased transaction costs**

##### *eBay's submission*

5.96 eBay acknowledges that sellers will now incur PayPal fees on all eBay transactions, with the exception of items that are paid for on pickup or excluded from the policy.

##### *Interested party submissions*

5.97 As noted above, many of the submissions received indicated that the notified conduct would lead to increased fees associated with using eBay.

5.98 Interested parties commented generally that these increased fees will take the form of:

- higher transaction costs
- increased prices for products sold on eBay

- increased costs to sellers to redesign their checkouts to be compatible with PayPal only.
- 5.99 BPAY submits that there is a significant additional cost associated with accepting a PayPal payment relative to the cost of most items sold on eBay. Referring to Table A.1 in Annexure E to the notification, BPAY notes that the average eBay price for items in popular categories<sup>13</sup> is \$148.82. Using this figure as a representative sample, BPAY calculates that as a result of the notified conduct, costs for the average transaction on eBay will rise to \$12.34 or 8.3% of the transaction value, as compared with a minimum of \$8.47 or 5.69% of transaction value at present. This represents a 45.7% increase over current transaction costs where direct deposit is used to fund a purchase.<sup>14</sup>
- 5.100 The EFA submits that the notified conduct will increase prices because PayPal requires sellers to use traceable delivery methods which provide proof of delivery. The EFA notes that the cost of these methods is up to 10 times higher than the cost of ordinary postal service and in its view would be higher than the cost of the item purchased in many cases.
- 5.101 The CFA expresses concern that the notified conduct may increase transaction costs for consumers making online auction purchases. The CFA notes that as a result of eBay's proposal, consumers will be required to use a range of payment methods with the attendant costs, fees and charges, when they may prefer to use a single method that is not PayPal.
- 5.102 PESA notes that for small value transactions, the higher commission fees payable to PayPal compared with other payment methods will lead to an erosion of the already small margins in this business.
- 5.103 PESA submits that as well as higher transaction costs, sellers are also likely to incur costs associated with redesigning online 'checkouts' to ensure PayPal is the only available payment method. PESA contends that at least some of these increased costs will be passed on to consumers in the form of higher prices.

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<sup>13</sup> Including watches, home ware, computers and electronics, clothing, books, sporting goods, toys, automobile parts, DVDs and movies, jewellery, health and beauty products, music and telecommunications equipment.

<sup>14</sup> BPAY Pty Ltd, *Submission to the Australian Competition and Consumer Commission*, 9 May 2008.

ACCC view

5.104 The following table sets out a comparison of the transaction fees involved in some of the major payment options currently available on eBay.

**Table 3: Comparison of transaction fees**

	<b>PayPal Personal</b>	<b>PayPal Business</b>	<b>Paymate Standard</b>	<b>Paymate Professional</b>	<b>Direct Deposit</b>
<b>Minimum transaction processing flat fee</b>	Free	\$0.30	Free	Free	\$0 - \$0.20
<b>Minimum transaction processing percentage fee</b>	Free for PayPal* 3.4% + \$0.30 for credit or debit card	1.1%-2.4%	2.4% for credit card	1.9% for credit card	Free

\*Unless received in a foreign currency, which attracts a 2.5% fee.

5.105 The ACCC notes that the higher transaction fees involved in using PayPal may reflect the additional protection features offered. However, the ACCC also notes that mandating the use of PayPal as the only payment option removes choice for users who do not value those additional protection features and would not choose to use PayPal (and pay higher fees) in order to obtain the benefit of those features.

5.106 The ACCC notes that if sellers are required to offer PayPal as the only transaction method they are prevented from choosing alternative payment providers based on cost and other commercial considerations.

### **Reduced innovation in the market for online payment systems**

5.107 A number of interested parties expressed concern that by increasing the barriers to entry, the notified conduct would also lead to reduced innovation in the online payment systems market.

5.108 The RBA submits that the notified conduct ‘appears to encourage the growth of PayPal at the expense of other existing and emerging facilities, independent of their relative merits.’

5.109 The ABA submits that banks which might otherwise develop competing services with comparable features to PayPal may be deterred from doing so by the higher barriers to entry in the market that the notified conduct would impose.

## *ACCC view*

5.110 The ACCC accepts that the notified conduct may result in an anti-competitive detriment by reducing the incentive for other payment systems providers to innovate, including mechanisms for reducing BBEs. That is, having a single payment provider on eBay may reduce the incentive for other payment systems to develop more secure and cost effective systems.

### **Public benefits**

5.111 eBay submits that the key public benefit associated with the notified conduct will be a reduction in the number of BBEs that eBay users experience.

5.112 eBay understands that one of the two biggest reasons that eBay buyers decide not to purchase additional products on the eBay Site is 'trust and safety' issues, including BBEs. eBay considers that the most common sources of disputes and BBEs include:

- security issues and fraudulent/unauthorised use of buyer credit card
- purchased items not being received
- purchased items being significantly not as described upon delivery.

5.113 In addressing the likely benefits of the notified conduct, the ACCC has considered whether the mandated use of PayPal on eBay will reduce BBEs and whether a reduction in BBEs is of benefit to eBay users.

### **The benefit of reducing BBEs**

5.114 There is some debate about the extent to which BBEs represent a significant concern for a large number of online shoppers. eBay provided the ACCC with data on the prevalence of BBEs. This data was excluded from the public register at eBay's request.

5.115 In the case of purchased items not being received or being significantly not as described PayPal provides Buyer and Seller Protection Policies. While similar policies are provided by other online payment systems, PayPal is in a unique position in being able to access user information from eBay and as such can offer a higher level of protection than other online payment providers. On implementation of the notified conduct the maximum buyer protection offered by PayPal for eligible items and users will increase to \$20 000. Paymate offers a similar service to PayPal's Buyer Protection Policy however Paymate only offers up to \$3000 of protection.

5.116 In the case of security issues, Nielsen (as quoted in the American Express and Paymate submissions) reports that payment issues or trust in the payment system is a relatively small part of online shopping problems, with only 4% of shoppers experiencing credit card fraud and 3% suffering identity theft. Further, Nielsen finds that fraud does not deter shoppers from making further online purchases. 75% of



credit card fraud victims shopped online in the last 30 days, compared to 66% of the overall Australian online shopping population.<sup>15</sup>

5.117 The ACCC considers that the notified conduct may reduce the number of BBEs if disputes are satisfactorily resolved by PayPal. If the notified conduct is likely to reduce BBEs then the notified conduct is likely to result in public benefit. However, the size of this public benefit is dependent upon the extent to which BBEs present a concern for online shoppers.

5.118 At this stage, the ACCC has insufficient evidence to conclude that the problem of BBEs is as significant as eBay submits.

### **Benefits for buyers on eBay from mandating the use of PayPal**

#### *eBay's submission*

5.119 eBay expects the notified conduct to result in immediate benefits to eBay buyers that would have had one of these BBEs were it not for the implementation of the conduct. Expected benefits are the result of PayPal offering enhanced security through its 'closed loop' system whereby:

- buyers and sellers do not exchange account or credit card details
- users must provide PayPal with account or credit card details and demonstrate that they control the account, or have a stored balance with PayPal
- PayPal can act as an independent mediator and can reverse transactions since PayPal is responsible for processing transactions and has access to buyer and seller accounts. Sellers receive notification of sent funds immediately, however, when the seller is considered high risk, access to these funds may be withheld for a number of days ('holds' policy) (until the buyer confirms they have received the item or after 21 days of no buyer dispute)
- eligible items are covered by buyer protection if the item is not received or is significantly not as described (currently up to \$400 or \$3000 if PayPal deem the seller to be reliable, increasing to \$20 000 with the implementation of the notified conduct). eBay submits that PayPal can offer this service because of the information available from eBay. eBay understands that no other payment systems offer equivalent Buyer Protection or Buyer Complaints Policies
- PayPal's arbitration processes through its online dispute resolution process means buyers are more likely to consider the dispute favourably resolved.

#### *Interested party submissions*

5.120 Many of the submissions received by the ACCC have addressed the issue of the security offered by PayPal. In particular, a large number of submissions, including

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<sup>15</sup> Nielsen report, p21-22 in Paymate Pty Ltd, *Paymate submission to the ACCC*, 7 May 2008, p5.

PayPal's competitors and the CFA, have drawn attention to alternative mechanisms that offer comparable or improved security. A summary of interested party submissions follows.

*Interested party submissions – eBay users*

5.121 A large number of submissions from people that buy or sell items on eBay raised concerns with PayPal's security, dispute resolution, and customer service and/or provided examples of customer service from PayPal that did not meet their expectations.

5.122 A number of people indicated their preference for conducting transactions through a bank because of the security features offered. Anthony Curtis, a buyer and seller on eBay, submits:

...transactions undertaken through a major financial institution (regulated by Australian Law) would be inherently safer than transactions undertaken through a privately owned company that is owned and based overseas.<sup>16</sup>

5.123 John Poynton, a seller on eBay, submits that payment by, for example, bank deposit:

... does not involve the buyer revealing any sensitive data, does not incur additional cost to either party and can easily be monitored by either party by contacting their financial institution.<sup>17</sup>

5.124 One submission from a seller claims that in addition to eBay sharing private information with eBay subsidiaries:

PayPal can and will go into my bank account or credit card and remove funds to pay fines PayPal has imposed if it thinks I may be violating terms of service.<sup>18</sup>

5.125 With respect to dispute resolution Vivien Feeger, a seller on eBay, submits that:

Despite PayPal's advertising, they can offer no guaranteed avenue of redress in case of fraud, unlike banks, credit/debit card companies and other financial institutions.<sup>19</sup>

5.126 Vivien further comments:

The claim and counter-claim process continued between my bank and PayPal for several months and caused my PayPal account to be suspended for some time, as PayPal fought to recover money refunded by them on behalf of a fraudulent seller.<sup>20</sup>

5.127 Submissions suggest that many users are dissatisfied with PayPal's support systems and complain that the primary contact with PayPal is by email and often responses are slow, automated and/or do not address the query. The ACCC notes that, unlike PayPal, many banks and other online payment services offer telephone and in-person support.

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<sup>16</sup> Anthony Curtis, *Submission to the ACCC*, 22 April 2008, p2.

<sup>17</sup> John Poynton, *Submission to the ACCC*, 22 April 2008, p2.

<sup>18</sup> Name withheld, *Submission to the ACCC*, 24 April 2008, p3.

<sup>19</sup> Vivien Feeger, *Submission to the ACCC*, 23 April 2008, p1.

<sup>20</sup> Vivien Feeger, *Submission to the ACCC*, 23 April 2008, p2.

*Interested party submissions- industry bodies and participants in the payments market*

- 5.128 APCA notes that eBay provides no evidence to suggest that the relative frequency of online fraud for PayPal online transactions is any less than found in general online transactions. According to 2007 APCA statistics, card fraud in Australia is 0.0167% of transactions. APCA contrasts this with a statement made by Daniel Feiler, media spokesperson for eBay, quoted in the on-line publication 'The Sheet' on 15 April 2008 saying that the incidence of fraud through PayPal now stands at 0.30% of all transactions. APCA also notes that PayPal's buyer protection is not reducing fraud but instead is reallocating the cost of fraud from buyers to sellers.
- 5.129 ASIC and the ABA recommend PayPal become a signatory to the Electronic Funds Transfers (EFT) Code of Conduct in order to increase consumer protection. Part A of the EFT Code prescribes rules relating to the provision of EFT transactions including: record keeping requirements; liability for unauthorised transactions; liability in the cases of system or equipment malfunction; audit-trails; and complaint investigation and resolution procedures.
- 5.130 Paymate submits that it is able to provide the same level of security and buyer protection that PayPal provides. It also submits that, if eBay was willing to share information, the same efficiencies that enable PayPal to offer increased buyer protection insurance would exist.
- 5.131 Qpay disputes the claim that PayPal is the most secure payment method. Qpay uses a tri-factor security system (involving mobile phone number and pin) while PayPal primarily uses a one factor security system.
- 5.132 The ABA submits that Google Checkout (not offered as a payment method by eBay) like PayPal offers encrypted purchase information, no sharing of account details and full refund of unauthorised transactions.
- 5.133 BPAY believes that the level of protection promised by the notified conduct is already offered by financial institutions and that:
- ...the Notified Conduct will bypass entirely these secure alternatives, denying consumers the chance to benefit from the enhanced security measures and customer service offered by their financial institution and other online payment providers.<sup>21</sup>
- 5.134 The CBA disputes the fact that disclosure of a buyer's account details poses a potential fraud risk since direct debits can only be initiated by authorised Direct Debit Users, whose actions are guaranteed by their sponsor financial institution, with mechanisms existing to investigate unauthorised debit claims. The CBA notes that eBay fails to discuss that fraud in relation to cheques and debit cards is considerably lower than for charge and credit cards.

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<sup>21</sup> BPAY Pty Ltd, *Submission to the Australian Competition and Consumer Commission*, 9 May 2008, p30.

- 5.135 American Express submits that consumers know and are comfortable with the trust and security features offered by payment systems other than PayPal (e.g. American Express provide statements, balance alerts, dispute provisions, fraud tools, data security standards, Purchase Protection and Refund Protection). Paymate submits that even if buyers are not aware of their rights they have no hesitation in enquiring about their rights when a loss is suffered.
- 5.136 The ABA recommends eBay educate users of the risks of online transactions and submits that the view of eBay that consumers are not aware of the risks ‘...seems a paternalistic view, at odds with the perception of most eBay users as savvy consumers.’<sup>22</sup>
- 5.137 The ABA notes that ‘the conduct does nothing to prevent phishing scams’ and that ‘PayPal does not use the same checks to verify the identity of the account holders’<sup>23</sup> as financial institutions use.
- 5.138 BPAY submits that PayPal is not immune from security problems and refers specifically to an incident in 2006 where hackers were able to access the personal information of any registered PayPal user. BPAY submits that the effect of such a security breach would be amplified if PayPal membership were to increase. BPAY and Paymate also submit that eBay and PayPal are the largest targets of phishing.
- 5.139 The CBA, BPAY, Paymate and American Express submit that many BBEs are largely independent of the payment method used and, as such, PayPal will not achieve a reduction in BBEs.
- 5.140 In Paymate’s experience:
- ...the correlation of BBEs with bank account payments... may in fact not be causal, i.e. disputes may be more prevalent in lower value transactions... and with more informal and lower-volume sellers (who may be less professional...).<sup>24</sup>

*eBay’s response to interested party submissions*

- 5.141 eBay maintains that the notified conduct is required to address a market failure in which sellers have an incentive to accept the lowest cost payment method despite safer payment methods being available. eBay states that:
- ...there is imperfect information about the relative risks and benefits of payment systems between sellers and buyers that education alone cannot redress...<sup>25</sup>

- 5.142 eBay submits:

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<sup>22</sup> Australian Bankers’ Association Inc, *Submission to the Australian Competition and consumer Commission re Exclusive Dealing Notification N93365*, 8 May 2008, p5.

<sup>23</sup> Australian Bankers’ Association Inc, *Submission to the Australian Competition and consumer Commission re Exclusive Dealing Notification N93365*, 8 May 2008, p4.

<sup>24</sup> Paymate Pty Ltd, *Paymate submission to the ACCC*, 7 May 2008, p7.

<sup>25</sup> eBay, *Reply to submissions*, 25 May 2008, p2.

It is not possible for eBay to achieve the stated objective of significantly reducing 'bad buyer experiences' for all eBay users without mandating the use of PayPal.<sup>26</sup>

5.143 eBay goes on to say that:

...it is not possible for credit card, debit card and internet banking payment mechanisms to offer the same level of security and protection to buyers and sellers as those offered by PayPal, because PayPal users automatically obtain the benefits of the security and protection mechanisms offered through those payment methods plus the additional layer of security and protection benefits offered by PayPal.<sup>27</sup>

5.144 In eBay's view PayPal users provide sufficient verification of identity since PayPal users must nominate a valid bank or credit/debit card account that has already been subject to identity and other checks.

5.145 Further, eBay argues that:

...parties do not typically know each other, are unable to inspect the goods before purchase and rely on delivery by mail. In this environment, many payment methods expose buyers to an increased risk of fraud and disputes.<sup>28</sup>

5.146 eBay also notes that credit card protection schemes typically are limited to buyers only and do not protect sellers against chargebacks. Also, sellers can accept credit card payment through PayPal without incurring merchant fees.

5.147 eBay maintains that PayPal as an online payments system has unique security features including PayPal's access to eBay information, the level of protection offered to buyers and PayPal's Seller Protection Policy.

5.148 eBay submits that although PayPal is not subject to the same regulation as banks, PayPal is still subject to comprehensive regulatory oversight by government agencies, local and foreign laws, and holds an Australian Financial Services Licence and a banking licence.

5.149 In its response to interested party submissions, eBay submits that data indicates BBEs are less likely when PayPal is the chosen payment method. eBay suggests that PayPal prevents 'incidents caused by fraudulent or otherwise dishonest sellers'.<sup>29</sup> In addition eBay claims that PayPal and the Buyer and Seller Protection Policies are superior in resolving disputes once a BBE has occurred.

5.150 eBay disputes the claim the BBE Project goes beyond the stated objective, and reiterates the importance of the added security provided by PayPal in addition to PayPal and eBay's access to each other's internal data in achieving the objective. eBay further disputes claims that PayPal security issues will be amplified once PayPal is mandated and that PayPal is more prone to phishing.

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<sup>26</sup> eBay, *Reply to submissions*, 25 May 2008, p11.

<sup>27</sup> eBay, *Reply to submissions*, 25 May 2008, p8.

<sup>28</sup> eBay, *Reply to submissions*, 25 May 2008, p8.

<sup>29</sup> eBay, *Reply to submissions*, 25 May 2008, p10.

*ACCC view*

- 5.151 PayPal's closest competitors offer their own forms of buyer protection insurance in the case of items not received or significantly not as described. PayPal does however offer the highest level of buyer protection, with eligible buyers covered up to \$20 000 following implementation of the notified conduct.
- 5.152 Financial institutions have security measures in place and protect their customers against fraud regardless of the online payment method. The EFT Code of Conduct also provides a range of important safeguards for consumers. In addition, many other online payment systems offer the same or similar security features as PayPal. Therefore the ACCC considers that mandating PayPal is unlikely to result in an enhanced security service for all or most transactions, when compared to other alternatives in the market.
- 5.153 As discussed above, this increased protection is associated with increased PayPal transaction fees for users who currently opt for less expensive payment methods. The ACCC notes that this benefit also comes at the expense of users choosing the payment method they prefer, taking into consideration their risk profile and the costs associated with each payment method.
- 5.154 Taking into account the above considerations, the ACCC believes there is some public benefit to users from the notified conduct in the form of increased dispute resolution for high value transactions, to remedy cases where an item is not received or is significantly not as described.

**Benefits for sellers on eBay from mandating the use of PayPal**

*eBay's submission*

- 5.155 eBay submits that there are additional benefits for the seller from the notified conduct which involve preventing fraudulent/unauthorised purchases. eBay submits that PayPal can deliver these benefits as a result of the following features of its system:
- no threat of identity theft since account details are not disclosed
  - if a 'Payment Review' (conducted on many transactions) perceives a buyer to be high risk, PayPal places a hold on the payment and notifies the seller to delay shipping until the payment is cleared
  - the new Seller Protection Policy provides protection to sellers for unauthorised payments and items not received disputes where the seller can provide proof of shipment through an approved postage service.

*Interested party submissions*

- 5.156 In addition to the issues addressed above, BPAY submits that the safeguards for sellers put in place by alternative payment methods provide equal or better protection

than PayPal.

- 5.157 Paymate submits that it currently provides similar protection for its customers that operate as sellers on an online marketplace.
- 5.158 The ABA is concerned that in the case of disputes relating to items that have been purchased but not received, PayPal effectively transfers the risk of the transaction from the buyer to the seller. The ABA and BPAY note that disputes may result in the seller's account being frozen, even if the seller is not at fault.

*eBay's response to interested party submissions*

- 5.159 In response to interested party submissions, eBay submits that PayPal's Seller Protection Policy is unique in providing protection against certain chargebacks imposed by credit card companies.

*ACCC view*

- 5.160 The ACCC considers that PayPal offers sellers more protection than some other methods of payment, however, PayPal is not unique in this respect as it offers similar seller protection to that provided by Paymate.
- 5.161 The ACCC also recognises that PayPal's buyer protection policies will, in some circumstances, operate to increase risk to sellers which may offset the benefits of seller protection.
- 5.162 Accordingly, the ACCC considers the notified conduct will generate negligible public benefits for sellers on eBay.

**Increased transactional security and increased innovation in online businesses generally**

*eBay's submission*

- 5.163 eBay submits that the notified conduct may encourage other online businesses and other payment service providers to offer similar levels of transactional security and protection to their users, resulting in increased online business and increases in online and offline competition.
- 5.164 In addition eBay submits that the notified conduct would strengthen the eBay platform as a secure trading environment, ensuring continued efficiencies in the trading of goods on eBay and reducing migration from eBay. This would benefit users and encourage innovation and new online business. eBay considers that this would benefit the Australian economy as a whole.

*Interested party submissions*

- 5.165 The ABA submits that:

...the incentive to offer better security (at a competitive price) would be greater if it applied across the whole market including eBay transactions.<sup>30</sup>

5.166 As noted earlier in this chapter, the ABA, BPAY and the CBA submit that if PayPal was the only option for payment on eBay, then this would be likely to discourage innovation and competition in the online payments market.

5.167 BPAY submits that in the absence of the notified conduct eBay would continue to grow and customers would continue to benefit from discounted prices. If anything the notified conduct may reduce discounts as a result of increased transaction costs.

#### *eBay's response to interested party submissions*

5.168 eBay maintains that the notified conduct will not result in:

...a reduction in innovation in the online payments market and there can be no harm to the Australian economy.<sup>31</sup>

#### *ACCC view*

5.169 The ACCC considers it unlikely that innovation and efficiency in the trading of goods would result from mandating PayPal, particularly in light of potential competition concerns. In fact, as discussed earlier in this chapter, the notified conduct may reduce the incentives for other online payment providers to innovate (including the incentive to reduce BBEs) as a result of them being excluded from the market.

#### **ACCC conclusion on public benefits**

5.170 The ACCC considers that the notified conduct is likely to result in some public benefits as a result of reducing BBEs. However the ACCC considers that there are a number of providers which offer similar security and protection policies to those of PayPal.

5.171 The ACCC considers that PayPal offers the highest level of buyer protection in terms of the level of insurance cover and, to the extent that the Buyer Protection Policy resolves items not received or significantly not as described disputes, the notified conduct will have public benefit.

5.172 It is not the role of the ACCC in assessing this notification to adjudicate on which payment option has the best features in regards to security, fraud protection, dispute resolution and insurance for every particular type of transactions or customers.

5.173 The evidence available does not support the view that PayPal is the most secure method of payment, or offers the best service for all transactions.

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<sup>30</sup> Australian Bankers' Association Inc, *Submission to the Australian Competition and consumer Commission re Exclusive Dealing Notification N93365*, 8 May 2008, p5.

<sup>31</sup> eBay, *Reply to submissions*, 25 May 2008, p5.



5.174 The ACCC is of the view that consumers are in the best position to determine whether, for their particular transaction, PayPal offers the best features in terms of security, fraud protection, dispute resolution and insurance, at the price offered.

### **Balance of public benefits and detriments**

5.175 As previously mentioned, the ACCC is required to assess whether any benefit to the public that has resulted or is likely to result from the notified conduct will outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct.

5.176 The ACCC considers that the notified conduct is likely to generate some public benefit as a result of reducing BBEs.

5.177 The ACCC considers that the notified conduct has, or is likely to have, the effect of substantially lessening competition in the market in which PayPal operates. The ACCC also considers that the notified conduct is likely to result in reduced choice for consumers, higher transactions costs and reduced innovation in online payment systems.

5.178 Therefore, the ACCC concludes that the substantial anti-competitive detriments outweigh any public benefits resulting from the notified conduct.

## **6 Draft notice**

- 6.1 For the reasons identified above the ACCC considers that the notified conduct has the purpose, effect or likely effect of substantially lessening competition and the benefits do not outweigh the detriments.
- 6.2 Accordingly, the ACCC proposes to issue a notice to revoke notification N93365 lodged by eBay International A.G. on 11 April 2008.