

**Submission to the
Australian Competition and Consumer Commission**

[RESTRICTION OF PUBLICATION OF PART CLAIMED]

**Exclusive Dealing Notification N93365
Lodged by eBay International AG
on 11 April 2008**

26 May 2008

1. EXECUTIVE SUMMARY

- 1.1 This submission is made on behalf of **RESTRICTION OF PUBLICATION OF PART CLAIMED**. **RESTRICTION OF PUBLICATION OF PART CLAIMED** opposes the exclusive dealing notification N93365 lodged by eBay International AG (**eBay**) on 11 April 2008 (the **Notification**).
- 1.2 eBay proposes to require that all buyers and sellers on its Australian website (www.ebay.com.au) (the **eBay Site**) use only the online payment processing services provided by PayPal Australia Pty Ltd (**PayPal**), its related body corporate, to pay for items purchased on the eBay Site. This will necessarily exclude competitors of PayPal from providing online payment processing services to buyers and sellers on the eBay Site.
- 1.3 It is submitted that:
- (a) There are two markets relevant to eBay's proposed conduct. They are:
 - (i) the market for the supply of online marketplace services to online buyers and sellers in Australia – in which eBay operates; and
 - (ii) the market for the supply of peer-to-peer online payment processing services in Australia – in which PayPal operates or, alternatively, the market for the supply of online payment processing services in Australia (including peer-to-peer and non-peer-to-peer online payment systems) – in which PayPal operates.
 - (b) eBay has substantial power in the market for the supply of online marketplace services to online buyers and sellers in Australia.
 - (c) PayPal is likely to have substantial power in the market for the supply of peer-to-peer online payment processing services and the market for the supply of online payment processing services, more generally.
 - (d) eBay's proposed conduct will immediately increase transaction costs for all eBay sellers and buyers, and remove any impediment to PayPal further raising prices to eBay sellers in future.
 - (e) eBay's proposed conduct will reduce the quality of product/service provided by PayPal on the eBay Site and elsewhere as PayPal will have little incentive to innovate, improve its product offering, or provide better quality customer service and support once it has secured a 'captive market' of online sellers on the eBay Site.
 - (f) eBay's proposed conduct will foreclose competition from all competitors of PayPal currently allowed on the eBay Site.
 - (g) eBay's proposed conduct will foreclose competition from existing competitors of PayPal, more generally. Exclusion from the eBay Site and the network effect of increased adoption of PayPal outside the eBay Site will deter or delay innovation by existing competitors.
 - (h) eBay's proposed conduct will foreclose potential competition from new entrants into the market. Exclusion from the eBay Site, the network effect of increased adoption of PayPal outside the eBay Site, and the difficulties of building critical mass against PayPal's installed customer base, will prevent or delay entry by new competitors.
 - (i) The proposed conduct is not necessary to achieve eBay's claimed purpose, nor is likely, of itself, to be effective in achieving that purpose. One of eBay's substantial purposes for the proposed conduct, is anti-competitive.

- (j) The public benefits claimed by eBay should be disregarded entirely, or alternatively, be given very little weight, by the Australian Competition and Consumer Commission (the **Commission**), because they either:
 - (i) will or are likely to exist in the absence of the proposed conduct and, as such, cannot be said to result or be likely to result from the proposed conduct; or
 - (ii) are illusory.
- (k) eBay's proposed conduct will result in significant public detriments including a reduction in consumer choice and a reduction in the overall quality of online payment processing services in Australia.

1.4 Accordingly, it is submitted that the proposed conduct has the purpose and is likely to have the effect of substantially lessening competition in the market for the supply of online payment processing services, and that any likely benefit to the public from the proposed conduct will not outweigh the significant detriment to the public from the substantial lessening of competition.

1.5 The Commission should revoke eBay's Notification by giving eBay a notice pursuant to section 93(3) of the *Trade Practices Act 1974* (Cth) (the **Act**).

2. INTRODUCTION

2.1 eBay's present conduct

2.2 At paragraph 1.5 of the Notification, eBay, which currently offers the services available on the eBay Site, states that at present it:

...permits buyers and sellers to complete transactions by using one of a number of payment methods [footnote excluded], including:

- (1) cash on delivery/pick up, personal cheques or money order;
- (2) bank deposit, including internet bank transfers;
- (3) credit or debit card payments; or
- (4) payment via an online payment system (such as PayPal) using direct debit from a bank account or an accepted credit or debit card, or in the case of PayPal, a balance in the buyer's PayPal account if the buyer maintains one (similar systems include Paymate and BPAY. Escrow services are also currently available). [footnote: eBay does not permit certain instant cash transfer payment methods (non-bank, point-to-point cash transfers) such as Western Union, Moneygram and other similar services.]

2.3 eBay's current user agreement available on the eBay Site (**User Agreement**) and eBay's Accepted Payments Policy (incorporated by reference into the User Agreement), also available on the eBay Site, indicate that:

- (a) eBay requires sellers who have registered after 17 January 2007 to accept at least one of either PayPal or a merchant credit card facility, in their listings, although other additional payment options **which are currently permitted onsite**, may also be provided.
- (b) sellers may offer to accept:
 - (i) PayPal, credit cards including Mastercard and Visa, debit cards, bank payments;
 - (ii) bank-to-bank transfers, often known as bank wire transfers or bank cash transfers;

- (iii) cash on delivery (COD) or cash for in-person transactions; and
 - (iv) personal cheques, money orders (save for the exceptions below), bank cheques and other negotiable instruments.
- (c) sellers may not solicit (among other things):
- (i) buyers to send cash or money orders through instant cash transfer services (non-bank, point-to-point cash transfers) such as Western Union or Moneygram; and
 - (ii) Payment through **online payment methods not specifically permitted in the Accepted Payments Policy**.
- (d) online payment services specifically permitted on eBay by the Accepted Payment Policy are:
- Allpay.net, Bidpay, Canadian Tire Money, cash2india, CertaPay, Checkfree.com, hyperwallet.com, Moneybookers.com, Nochex.com, Ozpay.biz, Paymate.com.au, Propay.com, XOOM.
- (e) online payment services specifically not permitted on eBay by the Accepted Payments Policy are:
- AlertPay.com, anypay.com, AuctionChex.com, BillPay.ie, ecount.com, cardserviceinternational.com, CCAvenue, ecount, e-gold, eHotPay.com, ePassporte.com, EuroGiro, FastCash.com, Google Checkout, gcash, GearPay, Goldmoney.com, graphcard.com, greenzap.com, ikobo.com, Liberty Dollars, Moneygram.com, neteller.com, Netpay.com, paychest.com, Payko.com, payingfast.com, paypay, Postepay, Qchex.com, rupay.com, sendmoneyorder.com, stamps, Stormpay, wmtransfer.com, xcoin.com.

2.4 eBay's proposed future conduct

2.5 eBay's Notification proposes that 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 (buyers and sellers), relevantly, on the following conditions:

- (a) all sellers on the eBay Site must only offer to accept payment through PayPal¹ or by cash on delivery/pick up²;
 - (b) all transactions must be paid for through PayPal, or using cash on delivery/pick up³; and
 - (c) no other payment method will be allowed to be offered or accepted,
- (collectively, the **Proposed Conduct**).

2.6 eBay also states in the Notification that from 17 June 2008:

¹ Including Visa or Mastercard processed by PayPal (which will be allowed by eBay but only a limited number of times).

² Except when selling cars, motorcycles, aircraft, boats, vehicles (caravans), trailers, trucks (commercials), services, real estate and businesses for sale. "Cash" on delivery/pick up will include money orders, bank or personal cheques and other negotiable instruments, but only on the physical delivery or pick up of or transfer of title to an item.

³ Except where purchasing cars, motorcycles, aircraft, boats, vehicles (caravans), trailers, trucks (commercials), services, real estate and businesses for sale.

...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 the 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.** (emphasis added)

- 2.7 The availability of third party providers of checkout facilities will have no bearing on the Proposed Conduct. That is, sellers using those checkout facility providers will (as with sellers who do not use such checkout facility providers) be excluded from offering and using any payment method to complete a transaction other than PayPal or cash on delivery/pick up.
- 2.8 **The Commission's role in assessing eBay's Notification**
- 2.9 The Commission is entitled to revoke eBay's Notification if the Commission is satisfied, relevantly, that the Proposed Conduct has or would have the purpose or is likely to have the effect of substantially lessening competition within the meaning of section 47 of the Act and that in all the circumstances, relevantly:
- (a) the Proposed Conduct is not likely to result or would not result, in a benefit to the public; or
 - (b) any benefit to the public that is likely to result or would result from the Proposed Conduct, would not outweigh the detriment to the public constituted by any lessening of competition that is likely to result or would result from the Proposed Conduct.
- 2.10 As requested by the Commission, this submission outlines views on:
- (a) the markets relevant to the Proposed Conduct and the Commission's assessment of the Notification;
 - (b) the likely competitive effects of the Proposed Conduct in those relevant markets;
 - (c) the likely public benefits from the Proposed Conduct claimed by eBay; and
 - (d) other issues raised by the Notification.
- 3. MARKETS RELEVANT TO THE PROPOSED CONDUCT**
- 3.1 There are two markets relevant to eBay's Proposed Conduct. They are:
- (a) the market for the supply of online marketplace services to online sellers and buyers in Australia – in which eBay operates (the **Market for Online Marketplace Services**); and
 - (b) the market for the supply of peer-to-peer (**P2P**) online payment processing services in Australia – in which PayPal operates (the **Market for P2P Online Payment Processing Services**) or, alternatively, the market for the supply of online payment processing services in Australia (including P2P and non-P2P online payment systems) – in which PayPal operates (the **Market for Online Payment Processing Services**).
- 3.2 The market for online marketplace services**
- Description of business carried on by eBay*
- 3.3 On the eBay Site, eBay provides users with an online trading platform to search, bid for, sell and/or purchase goods. eBay offers online sellers a listing service, online buyers the ability to search for goods listed by online sellers, and both online buyers and online sellers the ability to transact with one another.

- 3.4 Importantly, eBay is not a party to any of the transactions that take place between online buyers and online sellers. eBay is not the retailer of the goods listed for sale on the eBay Site, nor does it act as a representative of either party or at any time hold possession of the goods sold on the eBay Site. eBay is merely the provider of the online infrastructure which provides the marketplace for online buyers and online sellers to interact.
- 3.5 eBay charges online sellers fees for the use of its online marketplace services (including listing fees and commission on the sale of the item), but it does not charge any fees to buyers (eBay merely invites those buyers onto the eBay Site). eBay sellers are eBay's customers.
- 3.6 eBay allows online sellers to offer their goods for sale to online buyers at auction or at a fixed price. An eBay online seller may be either a 'one-off' seller, for example, offering a second hand bicycle (an **Individual Seller**) or a seller engaged in the business of online sale of goods (a **Business Seller**).

Product substitution

- 3.7 There are very few, if any, **close** substitutes for the online marketplace services provided by eBay to online sellers.
- 3.8 An alternative to eBay's services is only a close substitute for those services if a material proportion of eBay's sellers would be likely to switch to that service in response to a small but significant increase in the price (**SSNIP**) of eBay's services, quickly and without significant investment or switching costs.
- 3.9 The only close substitutes for eBay's services are other online marketplace services that offer (1) listing services for online sellers, (2) the ability to search for goods listed by online sellers, and (3) the ability for online buyers and online sellers to transact with one another online.
- 3.10 Only the online marketplace services offered by OZtion Pty Ltd (**OZtion**) (at www.oztion.com.au) and other smaller Australian providers such as Sell My Stuff, eBid, Bidmate and Bang4Bucks, are therefore closely substitutable for eBay's services. OZtion is an Australian company which offers online buyers and online sellers an online marketplace at which they can interact and transact with each other. OZtion allows online sellers to offer their goods for sale to online buyers at auction or at a fixed price. Theoretically, sellers could switch to OZtion in response to a SSNIP by eBay.
- 3.11 Overseas companies operate similar online marketplace websites and offer similar services to those offered in Australia by eBay and OZtion. For example, StormPay.com, Bidz.com and Amazon.com Auctions.
- 3.12 Services offered on such international websites are, however, **not closely** substitutable for eBay's or OZtion's services in Australia since Australian online buyers tend to use Australian websites for online shopping (online sellers will want to sell on those sites used by online buyers) and online sellers are familiar with local regulatory requirements. . Please see paragraph 4.7(f) which suggests that Australian online buyers use overseas eBay websites in merely 1.1% of cases, whereas they use the Australian eBay Site in 97% of cases. Similarly, Yahoo!'s USA and Japan auction websites were used in less than 1.5% of cases.
- 3.13 Australian eBay sellers are therefore unlikely to switch to international websites because they will lose access to their Australian online customers. Accordingly, those sellers could not quickly and without significant investment and/or switching costs, switch to using those international websites in response to a SSNIP by eBay or OZtion.
- 3.14 The characteristics of online marketplace services which distinguish them from other potential substitutes include:

(a) characteristics of services offered:

The online marketplace offers a suite of services including (1) listing of items, (2) attracting potential bidders, (3) facilitation of either or both of the auction or fixed-price sale, and (4) facilitation of payment. None of the options identified above are an adequate substitute for this suite of services offered as part of an online marketplace. For example:

- (i) an online seller's website typically offers the item for sale but does not of itself attract bidders;
- (ii) classified advertisements list items and attract buyers but do not facilitate an auction (actual offer and acceptance) or facilitate payment; and
- (iii) selling to retailers or opening an outlet to sell directly to consumers does not provide for the conduct of an auction and does not result in the listing of items to attract buyers.

(b) no time constraints:

There are no time constraints on transactions taking place between online sellers and online buyers, in an online marketplace. Bids can be placed by buyers at any time and items are listed by sellers for a number of days. Potential purchasers have time to search, decide and bid. This convenience increases the potential number of bidders for an item offered by an online seller in an online marketplace.

(c) no geographical constraints:

There are no geographical constraints on transactions taking place between online sellers and online buyers, in an online marketplace. Australian online sellers can attract bidders from anywhere in Australia (and potentially elsewhere) the internet has access, increasing the number of potential buyers. This makes items being offered by online sellers more accessible and reduces the transaction costs for buyers of "attending" a sale, increasing the price buyers may be willing to pay for items.

(d) strong network effects:

A larger number of bidders are attracted to an online marketplace because of the potential for a relatively low price (given the significantly lower establishment and transaction costs associated with selling in an online marketplace), the broad scope of products and services available, the ease of access and the fact that large numbers of sellers can be found on the same website.

The large number of online bidders and online buyers will encourage more online sellers into the online marketplace, which, in turn, will encourage more online bidders and online buyers into the online marketplace (and so on). All online sellers benefit from close association and aggregation with other online sellers in the online marketplace.

(e) level of investment required and running costs:

The costs associated with selling in an online marketplace are significantly lower than any other form of online or offline selling. Online sellers pay only listing fees and commissions on sale, whereas most other forms of online and offline selling have significant costs for advertising and promotion, establishment, overheads etc. This influences the prices at which online sellers may be willing to sell their items and the potential profit margins.

3.15 In light of the above, the following online and "offline" services/options potentially available to online sellers, are **not** closely substitutable (for either Individual or Business Sellers) for the online marketplace services offered by eBay and OZtion:

(a) Own Website:

Setting up a website for online retailing involves significant time and cost. In addition, setting up the website itself will not advertise the items for sale. That is, some form of advertising alerting consumers to the sale of the items will also be required.

In particular, it is not feasible for an Individual Seller to set up their own online retailing website to sell a one-off product. The costs of doing so would clearly be prohibitive.

(b) Direct marketing/selling:

Direct marketing/selling involves sending messages directly to consumers. Typically, it involves reaching large numbers of potential customers, usually unsolicited. Common methods of direct marketing/selling include direct mail, telemarketing, email marketing, broadcast faxing, couponing, direct response television marketing and direct selling.

Direct marketing is costly and unlikely to be timely. Clearly, it is not feasible for an Individual Seller to engage in any of the above direct marketing/selling methods to sell a one-off item.

(c) Classified or Other Advertising:

The running of classified advertisements, or any other advertising, may not be prohibitively expensive. However, there are significant differences between the nature of the services acquired by an online seller from a provider of online marketplace services, and the services acquired from a provider of classified or other advertising, whether online or in print (see further below).

(d) 'Live' Auction Houses or Online Auctioneers:

eBay and OZtion are not auctioneers. At live auction houses or at online auction sites (for example, GraysOnline (at www.graysonline.com.au) and AuctionTrader (at www.auctiontrader.com.au)), the auction site operator is an auctioneer, who sells the items on the sellers' behalf. Only the auctioneer can list items for sale on behalf of the seller and may have physical control over the items to be sold. Payments for items sold at the auction are made to the auctioneer, who collects such payments on behalf of the seller.

(e) Distribution to Retailers:

The establishment of distribution facilities and commercial relationships with retailers is an entirely different business model to online sale directly to consumers. This business model requires significant time and investment to establish and run.

This option is clearly not feasible for an Individual Seller to sell a one-off item.

(f) Own Retail Outlets:

As with (e) above, the establishment of a 'shop-front' in order to be able to sell items directly to consumers is an entirely different business model to online sale to consumers. This business model similarly requires significant time and investment to establish and run.

This option is clearly not feasible for an Individual Seller to sell a one-off item.

- 3.16 Most of the potential options listed above would therefore not be a feasible alternative (that is, quick and without significant investment or switching costs) for an Individual Seller or a Business Seller seeking to avoid a SSNIP by a supplier of online marketplace services.

Market definition

- 3.17 For these reasons it is submitted that the market in which eBay operates is the market for the supply of online marketplace services to online buyers and sellers, in Australia.
- 3.18 The market is Australia-wide because the majority of transactions on the Australian eBay Site take place between Australian online buyers and Australian online sellers. The Proposed Conduct also relates only to online sellers on the Australian eBay Site, thereby affecting online buyers, online sellers and competitors or potential competitors in Australia.
- 3.19 eBay users include both buyers and sellers and eBay is considered to operate in a two-sided market with strong network effects.
- 3.20 For the purpose of assessing eBay's Proposed Conduct and the Notification, however, this submission focuses on the services eBay provides to online sellers.

3.21 The market for P2P online payment processing services or the market for online payment processing services

Description of business carried on by PayPal

- 3.22 PayPal operates an online payment processing service that allows its members, both online buyers and online sellers, to transact with one another online without providing the other party with financial information such as bank account or credit card details.
- 3.23 PayPal facilitates online payment transactions by acting as an intermediary for the online exchange of funds between online buyer and online seller. All transactions facilitated by PayPal are made via the PayPal website (at www.paypal.com.au).
- 3.24 For online sellers, PayPal offers a credit card and debit card transaction processing service without the need for sellers (as a recipient of funds) to have a merchant facility with a financial institution. PayPal acts as the merchant of record.
- 3.25 Online sellers must establish a PayPal account in order to receive funds from online buyers for the sale of an item. PayPal imposes transaction fees on online sellers for the receipt of funds, depending on the volume of monthly sales conducted.

Product substitution

- 3.26 It is submitted that only other P2P online payment systems are **closely** substitutable for the online payment processing services provided by PayPal to online sellers.
- 3.27 P2P online payment systems facilitate direct payment communication between an online buyer (payer) and online seller (payee), without using traditional intermediaries such as banks and other financial institutions. P2P online payment systems provide (1) payment infrastructure linking the online payer and payee and (2) authorise transactions using that infrastructure, enabling a relationship of trust between the parties, and (3) records transaction details, so that disputes can be resolved.
- 3.28 In contrast, financial intermediaries in online credit card and debit card transactions facilitate payments using existing legacy infrastructure (for example, clearing and settlement systems). Importantly, there is no direct communication (P2P communication) between payer (online buyer) and payee (online seller) – the payment transaction is instead conducted between the online buyer's financial institution and the online seller's financial institution..

- 3.29 From the perspective of an online seller, P2P online payment systems are unlikely to be closely substitutable for non-P2P online payment systems because P2P online payment systems:
- (a) provide greater scalability – non-P2P online payment systems rely on financial institutions that are a potential central point of failure or bottleneck, which limits scalability; and
 - (b) are faster, easier and cheaper to establish and administer, particularly with respect to smaller, individual online sellers – non-P2P online payment systems require certain sunk costs in infrastructure (for example, merchant facilities) which are not required by P2P online payment systems.
- 3.30 In a competitive setting, in response to a SSNIP by PayPal (all other things being equal), online sellers acquiring and offering PayPal services could relatively quickly and without significant investment or switching costs, switch to acquiring and offering to online buyers any (or some combination) of the online payment processing services provided by other P2P online payment processing service providers such as Paymate, BPay, Google Checkout etc.
- 3.31 For the reasons described above, the following non-P2P online payment systems are unlikely to be closely substitutable for P2P online payment systems:
- (a) credit cards, including Mastercard and Visa, and debit cards of financial institutions;
 - (b) bank deposits, bank-to-bank transfers, often known as bank wire transfers or bank cash transfers; and
 - (c) instant cash transfer services (non-bank, point-to-point cash transfers) such as Western Union or Moneygram.
- 3.32 Escrow services, personal cheques, bank cheques, money orders, other negotiable instruments, cash on delivery/pick up and cash in-person are **not close** substitutes for P2P or non-P2P online payment processing services. In order to be closely substitutable, alternatives to those services must offer the same convenience, immediacy and traceability/protection associated with payments processed by online payment processing services providers, or electronically/online by bank or non-bank financial institutions or money exchanges.

Market definition

- 3.33 The market in which PayPal operates is the market for the supply of P2P online payment processing services, in Australia. Without prejudice to this view of market definition, the analysis below is conducted on the basis of a broader market for online payment processing services in Australia. If the arguments regarding the impact of eBay's Proposed Conduct are accepted in respect of a broader market, then they apply a fortiori in a narrower market for P2P online payment processing services.
- 3.34 The market is Australia-wide because (1) Australian online buyers generally prefer to use payment processing services providers with operations in Australia, (2) local regulatory requirements must be met before overseas online payment processing services providers can operate in Australia, and (3) the Proposed Conduct relates only to online sellers on the Australian eBay Site, thereby affecting online buyers, online sellers and competitors or potential competitors in Australia.
- 3.35 PayPal users include both online buyers and online sellers and PayPal is considered to operate in a two-sided market with strong network effects.
- 3.36 For the purpose of assessing eBay's Proposed Conduct and the Notification, however, this submission focuses on the services PayPal provides to online sellers.

4. EBAY'S POWER IN THE MARKET FOR ONLINE MARKETPLACE SERVICES

- 4.1 eBay is a significant platform for Australian commerce,⁴ with substantial power in the Market for Online Marketplace Services in Australia.
- 4.2 In the Market for Online Marketplace Services, eBay is not constrained, or not constrained to a significant extent, by the conduct of actual or potential competitors, or customers:
- (a) eBay has an extremely high share of the market in Australia;
 - (b) eBay is subject to little if any effective competition from existing competitors in Australia;
 - (c) the threat of effective entry into the Market for Online Marketplace Services is low in Australia; and
 - (d) online sellers exercise little or no countervailing power against eBay in Australia.
- 4.3 As a result, eBay has the ability to raise prices, or reduce the quality of its services, without rivals taking away customers in due time.
- 4.4 eBay's share of the market for online marketplace services**
- 4.5 Exact market shares of each competitor in the Market for Online Marketplace Services in Australia are not readily available.
- 4.6 However, the information set out below suggests that eBay is the leading provider of online marketplace services in Australia, with an extremely large share of sales of those services to online sellers. eBay itself suggests it is Australia's leading online marketplace⁵ and others have suggested eBay is Australia's market leader in 'online auctions'⁶.
- 4.7 The following statistics suggest a very high proportion of online buyers in Australia visit, become members and buy on the Australian eBay Site:
- (a) 5.94 million Australians buy online and 84% of those online buyers choose to visit the eBay Site⁷;
 - (b) eBay has in excess of 5 million members in Australia⁸;
 - (c) one in 3 adult Australians is an eBay member, making the eBay Site the most popular shopping destination in Australia⁹;
 - (d) in March 2006, eBay was ranked the 5th most frequently visited website in Australia¹⁰;

⁴ The Allen Consulting Group, *I Got it on eBay!: The Economic Impact of eBay in Australia*, 5 February 2008, at page i.

⁵ eBay, *eBay Australia celebrates 5 millionth member* (as at 31 January 2007), available at <http://pics.ebaystatic.com/aw/pics/au/pr/5%20Million%20alert%20FINAL.pdf> as at 1 May 2008.

⁶ N Moustakas, *Going Going Gone: Online Auctions, Consumers & the Law*, A Report by the Communications Law Centre 2006 at page 44.

⁷ According to ACNielsen Australia Consumer Report 2H2006, November 2006: eBay, *eBay Australia celebrates 5 millionth member* (as at 31 January 2007), available at <http://pics.ebaystatic.com/aw/pics/au/pr/5%20Million%20alert%20FINAL.pdf> as at 1 May 2008.

⁸ eBay, *eBay Australia celebrates 5 millionth member* (as at 31 January 2007), available at <http://pics.ebaystatic.com/aw/pics/au/pr/5%20Million%20alert%20FINAL.pdf> as at 1 May 2008.

⁹ eBay, *eBay Australia celebrates 5 millionth member* (as at 31 January 2007), available at <http://pics.ebaystatic.com/aw/pics/au/pr/5%20Million%20alert%20FINAL.pdf> as at 1 May 2008.

- (e) during March 2006, the eBay Site had a unique audience of 4,439,000 in Australia¹¹;
- (f) in an online survey of users in Australia of 'online auction' sites conducted by the Communications Law Centre Ltd, users were asked to select from a number of 'online auction' sites that they had used to make a bid or list an item for sale. The results are set out below¹²:

ONLINE AUCTION SERVICES USED TO MAKE A BID OR LIST AN ITEM FOR SALE	NUMBER TIMES SELECTED	% OF TOTAL USERS WHO RESPONDED (462)
eBay (ebav.com.au - Aus)	450	97.4%
OZtion (oztion.com.au - Aus)	60	13.0%
GraysOnline (graysonline.com.au - Aus)	29	6.3%
Amazon Auctions (auctions.amazon.com - USA)	20	4.3%
eroo.com.au	11	2.4%
AuctionTrader (auctiontrader.com.au - Aus)	8	1.7%
Yahoo Auctions (auctions.yahoo.com - USA)	7	1.5%
ausauction.com	5	1.1%
eBay overseas (eg. UK, US etc)	5	1.1%
Yahoo Auctions/sold.com.au (no longer exists)	4	0.9%
aussiebids.com.au	3	0.6%
Trademe.co.nz (New Zealand)	3	0.6%
2bid	2	0.4%
au.eBid.net	1	0.2%
bidonline.com.au	1	0.2%
Bidz	1	0.2%
bigdeals.com.au	1	0.2%
Broadcast Trader	1	0.2%
club chef	1	0.2%
emmx.com.au	1	0.2%

¹⁰ Nielsen//NetRatings NetView (home and work panel measurement, March 2006) (Source: N Moustakas, *Going Going Gone: Online Auctions, Consumers & the Law*, A Report by the Communications Law Centre 2006 at page 43).

¹¹ Nielsen//NetRatings NetView (home and work panel measurement, March 2006) (Source: N Moustakas, *Going Going Gone: Online Auctions, Consumers & the Law*, A Report by the Communications Law Centre 2006 at page 43).

¹² N Moustakas, *Going Going Gone: Online Auctions, Consumers & the Law*, A Report by the Communications Law Centre 2006 at page 44.

ONLINE AUCTION SERVICES USED TO MAKE A BID OR LIST AN ITEM FOR SALE	NUMBER TIMES SELECTED	% OF TOTAL USERS WHO RESPONDED (462)
Industry specific auction sites (e.g. those relating to speciality collectables)	1	0.2%
Lot123	1	0.2%
monkey.com.au	1	0.2%
secure bidz	1	0.2%
Stuff	1	0.2%
textbook exchange	1	0.2%
Yahoo Japan	1	0.2%

- (g) from the survey responses above it was also determined that:
- (i) 72% of users who responded had only used the eBay Site in Australia;
 - (ii) 25% had used the eBay Site and other 'online auction' sites in Australia; and
 - (iii) only 3% had used other sites and had not used the eBay Site in Australia¹³;
- (h) results from internet traffic measurement company Hitwise in March 2006 also confirm eBay's dominance of 'online auctions' in Australia (based on website visits). The results are set out below¹⁴:

Top 10 sites in the "Shopping and Classifieds – Auctions' online industry for March 2006 based on visits			
RANK	WEBSITE	DOMAIN	MARKET SHARE
1	eBay Australia	www.ebay.com.au	72.60%
2	eBay	www.ebay.com	17.53%
3	eBay UK	www.ebay.co.uk	1.15%
4	GraysOnline Auctioneers	www.graysonline.com.au	1.13%
5	eBay Motors	www.ebaymotors.com	0.65%
6	Pickles Auctions	www.pickles.com.au	0.62%
7	Andale	www.andale.com	0.54%

¹³ N Moustakas, *Going Going Gone: Online Auctions, Consumers & the Law*, A Report by the Communications Law Centre 2006 at page 44.

¹⁴ N Moustakas, *Going Going Gone: Online Auctions, Consumers & the Law*, A Report by the Communications Law Centre 2006 at page 45. Note that some of the sites listed in the table are not 'online auction' sites, suggesting they are not **close** substitutes for the eBay Site: www.pickles.com.au operates like a traditional 'live' auction. Users can make bids online during live auctions; www.andale.com offers tools for online auctions but does not conduct online auctions; www.fowles.com.au is an offline auctioneer advertising its service online but it does not conduct any online auctions; www.toabao.com is China's leading auction site but it is not available in English. On the relevant market in issues, eBay's market share is likely to be in excess of 91.28%.

Top 10 sites in the "Shopping and Classifieds – Auctions" online industry for March 2006 based on visits			
RANK	WEBSITE	DOMAIN	MARKET SHARE
8	Fowles Auction Group – Australia	www.fowles.com.au	0.49%
9	Taobao.com	www.taobao.com	0.33%
10	TradeMe	www.trademe.co.nz	0.31%

Source: Hitwise (www.hitwise.com.au)

- (i) on an average day on the eBay Site in Australia:
- (i) a car is sold every 12 minutes and 27 seconds;
 - (ii) a laptop is sold every 8 mins and 46 seconds;
 - (iii) an antique is sold every 3 minutes and 7 seconds;
 - (iv) a baby item is sold every 46 seconds;
 - (v) a DVD is sold every 23 seconds; and
 - (vi) a piece of women's clothing is sold every 13 seconds¹⁵;

4.8 Lack of effective competitors

4.9 For the reasons set out above with respect to market definition, providers of other alternate online and offline forms of selling are not close competitors of eBay, in the provision of online marketplace services to online sellers. As eBay itself suggests, "eBay's success in the Australian market can be attributed to its unique formula..."¹⁶.

4.10 There are very few entities providing the same or materially similar services to those provided by eBay on the eBay Site who could be considered to be close competitors of eBay.

4.11 OZtion, a provider of online marketplace services to online sellers, is the only close competitor of eBay in Australia. OZtion claims to be the second largest dedicated 'online auction' website in Australia. However:

- (a) by August 2005, OZtion had attracted only 1,000 'regular' sellers¹⁷;
- (b) in November 2005, OZtion had only about 100,000 monthly visitors¹⁸; and
- (c) OZtion currently has only 260,238 members (i.e., only around 5% of eBay's members)¹⁹.

¹⁵ eBay, *eBay Australia celebrates 5 millionth member* (as at 31 January 2007), available at <http://pics.ebaystatic.com/aw/pics/au/pr/5%20Million%20alert%20FINAL.pdf> as at 1 May 2008.

¹⁶ eBay, *eBay Australia celebrates 5 millionth member* (as at 31 January 2007), available at <http://pics.ebaystatic.com/aw/pics/au/pr/5%20Million%20alert%20FINAL.pdf> as at 1 May 2008.

¹⁷ Fleur Doidge, 'New online auction site aims at resellers', *IT News*, 29 August 2005 (Source: N Moustakas, *Going Going Gone: Online Auctions, Consumers & the Law*, A Report by the Communications Law Centre 2006 at page 43).

¹⁸ N Moustakas, *Going Going Gone: Online Auctions, Consumers & the Law*, A Report by the Communications Law Centre 2006 at page 47.

¹⁹ OZtion, "Quick Stats" at <http://www.oztion.com.au>. See also OZtion Announcement on 14 April 2008 available at <http://www.oztion.com.au/Company/news.aspx> as at 1 May 2008.

- 4.12 The figures above, when compared to the usage, seller and market share figures set out above in relation to eBay, suggest that OZtion is not an effective competitor of eBay. That is, it is unlikely that OZtion exerts any significant degree of competitive constraint on eBay such that eBay would be constrained from raising prices.
- 4.13 Even if it can be argued that traditional auctioneers operating online in Australia, such as GraysOnline (the best known of those online auctioneers), are close competitors of eBay, they are similarly not effective competitors. For example, in May 2006, GraysOnline had only 320,000 unique website visitors each month and 220,000 registered buyers (i.e., only around 4% of eBay's members)²⁰. These figures are not significant when compared to the usage, seller and market share figures set out above in relation to eBay.
- 4.14 Threat of effective entry is low**
- 4.15 In order for the threat of entry into the Market for Online Marketplace Services to be effective in constraining eBay's conduct, potential entrants must be capable of timely and sufficient entry. The threat of effective entry is low because timely and sufficient entry is not likely. On the contrary, several auction sites have exited the market (see further below).
- 4.16 In particular, the present dominant position of eBay in the Market for Online Trading Marketplace Services in Australia has created powerful network effects which create significant disincentives for new entry. The fact 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 yet further interest from online buyers as the numbers of online sellers on the eBay Site increases (and so on). The larger the eBay Site becomes, the more users which register on the eBay Site etc, the more valuable participation by an online seller on the eBay Site becomes.
- 4.17 In the face of this difficulty, the threat of effective entry is not credible without the ability to capture sufficient scale. It is clear from the difficulties OZtion has faced in attracting members and sellers, three years after establishing its operation, that attracting new or existing sellers away from the eBay Site in sufficient numbers as to become an effective competitor, is extremely difficult.
- 4.18 The recent history of exit from the Market for Online Marketplace Services in Australia (save for OZtion which commenced operations in 2005) suggests that new entrants do not provide competitive constraints in this area. There are several auction sites that existed in recent years that no longer operate for various reasons, for example:
- (a) eBay acquired the 'www.sold.com.au' domain after Yahoo withdrew from the Australian market; and
 - (b) 'www.stuff.com.au' no longer offers auctions²¹.
- 4.19 No countervailing buyer power**
- 4.20 Most online sellers, whether they are Individual Sellers or Business Sellers, are small relative to the size of eBay and represent a small share of overall purchases. There is therefore a large discrepancy in bargaining power between the online sellers and eBay.
- 4.21 In addition, eBay sellers have very limited by-pass options in response to a price rise by eBay. The only competitor to eBay of any note to whom eBay sellers could turn is OZtion.

²⁰ Figures were advertised on a GraysOnline Listing at http://www.graysonline.com.au/sale.asp?SALE_ID=7463 at 1 May 2006 (Source: N Moustakas, *Going Going Gone: Online Auctions, Consumers & the Law*, A Report by the Communications Law Centre 2006 at page 43).

²¹ N Moustakas, *Going Going Gone: Online Auctions, Consumers & the Law*, A Report by the Communications Law Centre 2006 at page 47.

An eBay seller could threaten to move their business to OZtion but there are significant disadvantages to doing so:

- (a) OZtion is a much smaller website than the eBay Site meaning much less exposure to online buyers. The former eBay seller will no longer benefit from the network effect of being associated with other eBay sellers; and
- (b) relative to the overall numbers of eBay sellers, the volume generated by a single Individual Seller, in particular, or even a single Business Seller, is insignificant, and the threat is unlikely to gain any traction with eBay.

4.22 For the reasons discussed above, other forms of online and offline retailing do not present eBay sellers with a credible alternative to a price rise proposed by eBay.

4.23 A review of the eBay buyer and seller submissions posted on the Commission's website in response to the Notification confirms that eBay sellers feel powerless to prevent any price rise by eBay and that their only genuine alternative to accepting eBay's price rise is to cease selling on the eBay Site and, therefore, cease acquiring online marketplace services altogether.

5. PAYPAL'S LIKELY POWER IN THE MARKETS FOR P2P ONLINE PAYMENT PROCESSING SERVICES AND ONLINE PAYMENT PROCESSING SERVICES

5.1 PayPal is a subsidiary of eBay Inc. and a related body corporate of eBay. PayPal first starting operating in Australia in January 2005.

5.2 In the period since commencing operation in Australia, PayPal has grown rapidly. By January 2006, PayPal had nearly 2 million Australian users²². In March 2008, PayPal claimed to have over 5 million registered accounts in Australia²³. PayPal now therefore has a customer base in Australia which reflects that achieved by eBay.

5.3 PayPal is the most preferred and frequently used P2P payment system in Australia. This equates to a substantial share of all online payment processing services provided in Australia. According to one analyst, Sandra Hanchard, PayPal is dominant in the Australian market, although PayPal's closest competitor, Google Checkout, does pose a threat to PayPal's position²⁴. However, PayPal's market share exceeds that of Google Checkout, by 71 to 1²⁵.

5.4 The comments of another analyst also suggest PayPal's dominant position in the Australian market allows it to charge a premium for its services:

Because eBay sellers are commonly independent merchants who do not accept credit cards, PayPal acts as a go-between. Buyers use their credit cards and bank account information to make payments, and PayPal relays the funds to sellers' PayPal accounts, charging them 30 cents plus a commission -

²² eBay, *PayPal: Q1 2006 Fast Facts* (as at March 2006), available at http://pics.ebaystatic.com/aw/pics/au/new/PayPalFastFacts_Q12006Australia.pdf as at 21 May 2008.

²³ See paragraph 1.13 of the Notification.

²⁴ S Hanchard, *Leveraging Online Consumer Behaviour* (18 January 2008) Inside Retailing available at <http://www.insideretailing.com.au/articles-page.aspx?articleType=ArticleView&articleId=1893>.

²⁵ D Utter, *PayPal, eBay Crushing Google's Options* (2 September 2007) Web Pro News available at <http://feeds.feedburner.com/webpronews/all>. **RESTRICTION OF PUBLICATION OF PART CLAIMED**

up to 4.4 percent in Australia. The second-most common method of payment on eBay Australia, bank transfers, cost 20 cents each²⁶.

- 5.5 PayPal is likely to have substantial power in the Markets for P2P Online Payment Processing Services and Online Payment Processing Services. In addition to PayPal's significant share of sales:
- (a) PayPal is not constrained to any significant extent in Australia by the conduct of its existing competitors. For example, Australia is among those countries where PayPal has been able to charge a withdrawal fee (AUD\$1, in Australia) for withdrawals of less than AUD\$150, whenever a user wants to exit the PayPal system and transfer their money to a financial institution. This is not to say that PayPal does not have market power in those countries where it has not implemented this policy, but it is nevertheless a strong indication of its ability to behave independently, to an appreciable degree, of Australian competitors and customers;
 - (b) the threat of effective entry into the Markets for P2P Online Payment Processing Services and Online Payment Processing Services is low, particularly because of the "long tail" of small online sellers in respect of which PayPal has a significant competitive advantage relative to any new entrant and which makes it extremely difficult for a new entrant to build critical mass in a two-sided market; and
 - (c) online sellers exercise little or no countervailing power against PayPal as a seller's decision is largely dictated by the popularity of the online payment system among online buyers (of which PayPal is the most popular) and online sellers are, in any event, generally unfamiliar with the alternatives.
- 5.6 As a result, in Australia PayPal is likely to have the ability to raise prices, or reduce the quality of its services, without rivals taking away customers in due time. Regardless of PayPal's current market position in, either, the Market for P2P Online Payment Processing Services or the Market for Online Payment Processing Services, it is clear that the Proposed Conduct will lead to the lock-in of a substantial proportion of customers and a substantial lessening competition in those markets.

6. PURPOSE AND LIKELY EFFECT OF PROPOSED CONDUCT ON COMPETITION

6.1 The Commission must assess whether the Proposed Conduct has or would have the purpose or is likely to have the effect of substantially lessening competition within the meaning of section 47 of the Act.

6.2 Likely effect of Proposed Conduct on competition

6.3 The Proposed Conduct is likely to have the effect of substantially lessening competition in the Market for Online Payment Processing Services.

6.4 It is noted that eBay must have some concerns that the Proposed Conduct will have a detrimental effect on competition in the Market for Online Payment Processing Services (although eBay has not formed any view on market definition). eBay would not otherwise be seeking to "notify" the conduct under section 93 of the Act.

How likely effect of the Proposed Conduct ought to be assessed

6.5 The following propositions describe how the likely effect of the Proposed Conduct on competition should be assessed:

²⁶ A Fehd, *EBay's PayPal rule in Australia draws fire* (9 May 2008) Business Week available at <http://www.businessweek.com/ap/financialnews/D90IDQ880.htm>.

- (a) a substantial lessening of competition is a 'likely effect' of the Proposed Conduct, if there is a **real chance** or **possibility** that it will occur;
- (b) any lessening of competition likely to arise from the Proposed Conduct will be 'substantial' if it is **real** or **of substance**, or **meaningful** or **relevant** to the competitive process;
- (c) a lessening of competition is 'substantial' if it confers an **increase in market power** that is significant and sustainable²⁷. An increase in market power is likely to be significant and sustainable if the entity whose market power is increasing is able to implement a SSNIP;
- (d) a substantial lessening of competition must arise in a market. However, this does not mean that a lessening of competition must apply to the entire market or to all aspects of competition in the relevant market²⁸;
- (e) sections 47 and 93 of the Act require a forward-looking analysis into the likely effects of the Proposed Conduct, since the Commission's analysis is being conducted before the impact of the Proposed Conduct on competition can be observed. The Commission therefore focuses on the foreseeable future (generally within one to two years) when considering the likely effects of the Proposed Conduct on competition in any relevant market to determine whether a substantial lessening of competition is likely to occur²⁹; and
- (f) this forward-looking analysis of the likely competitive effects of the Proposed Conduct requires a comparison of the following most likely future states:
 - (i) the future with the Proposed Conduct; and
 - (ii) the future without the Proposed Conduct (the counterfactual, which must take into account likely competitive constraints in the foreseeable future) (the **Future With and Without Test**).

Comparing the future with and without the Proposed Conduct

6.6 The following effects on competition in the Market for Online Payment Processing Services flow from the Proposed Conduct:

- (a) Increase in costs to eBay sellers and buyers

PayPal's charges are higher than those of most other providers of online payment processing services and alternative offline payment methods. The Proposed Conduct will force all eBay sellers to purchase the services of PayPal³⁰, thereby causing an immediate increase in costs to those eBay sellers who currently use competing online payment processing services or an alternative offline payment method.

²⁷ Australian Competition and Consumer Commission, *Merger Guidelines*, Draft 2008 at page 7.

²⁸ Australian Competition and Consumer Commission, *Merger Guidelines*, Draft 2008 at page 7: see *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) ATPR 40-315 at 43,888. Even if the Commission considers that non-P2P payment systems such as debit and credit card payments are in the same market as P2P payment systems, it will be sufficient to demonstrate that there is a purpose or likely effect of substantially lessening competition with respect to P2P payment systems.

²⁹ Australian Competition and Consumer Commission, *Merger Guidelines*, Draft 2008 at page 8.

³⁰ While eBay suggests it will continue to permit eBay sellers to offer cash on delivery/pick up as an alternative payment method, cash on delivery/pick up is simply not an option for online buyers and/or online sellers in the vast majority of online transactions. Accordingly, the cash on delivery option is not likely to be a competitive constraint on PayPal in future.

If this increase in cost is passed on to online buyers by eBay sellers, in the form of higher reserve prices for auction items or higher "Buy It Now" prices for fixed-price items, then it is those online buyers who will bear this increase. Either way, eBay will receive greater revenue from eBay sellers as a result of the Proposed Conduct. As demonstrated above, eBay sellers and online buyers do not have the option of switching to a competitor to the eBay Site (please also see the numerous submissions made to the Commission by eBay sellers and buyers as evidence for this proposition).

The Proposed Conduct will remove any impediment to PayPal further raising prices to eBay sellers in future.

This consequence would not result in the future without the Proposed Conduct because those eBay sellers would continue to have the choice to use online payment processing services, and alternative offline payment methods, other than those offered by PayPal. eBay sellers could choose to pay the higher charges for PayPal's services, or not.

(b) Reduced quality of product/service from PayPal

As a result of the Proposed Conduct, PayPal will be 'given' a large number of customers by eBay, that it did not already have, without having to provide those customers with any benefit in return.

In future, PayPal's already strong position in the Market for Online Payment Processing Services will be further strengthened. PayPal will be able to give less and charge more as it will be unnecessary for it to compete on price, features, or customer service standards. PayPal has little or no incentive to innovate, improve its product offering, or provide better quality customer service and support because it has a 'captive market' of online sellers on the eBay Site.

The overall efficiency of the payments system on the eBay Site will be reduced as a result.

In the absence of the Proposed Conduct, PayPal would have an incentive to attract eBay sellers to PayPal on the basis of the merits of the product, and to improve its product offering or lower its price to capture a larger customer base.

(c) Foreclosure of providers of online payment processing services:

(i) foreclosure of competitors currently allowed on the eBay Site

If the Proposed Conduct is given effect by eBay **all** competitors of PayPal currently permitted by eBay to provide online payment processing services to eBay sellers will be excluded from the eBay Site and foreclosed from competing against PayPal for the provision of services to eBay sellers. This will remove opportunities for expansion and improvement/innovation in product offerings on the eBay Site by those excluded providers.

Exclusion from the eBay Site is significant because eBay accounts for a substantial portion of the market for online payment processing services. The eBay Site is particularly important for the "long tail", ie. the vast number of small merchants, including Individual Sellers, selling online. eBay's own analysis suggests that three out of four eBay small businesses believe the eBay Site has helped them reach out to more buyers than is possible through an offline business.³¹

³¹ eBay, eBay Fact Sheet (as of 31 March 2006), at page 1, available at <http://pics.ebaystatic.com/aw/pics/au/new/eBayFactSheetApr06.pdf> as at 1 May 2008.

This foreclosure will apply to at least the following **13** providers of online payments processing services currently permitted on the eBay Site:

Allpay.net, Bidpay, Canadian Tire Money, cash2india, CertaPay, Checkfree.com, hyperwallet.com, Moneybookers.com, Nochex.com, Ozpay.biz, Paymate.com.au, Propay.com, XOOM.

If a broader product market than the Market for P2P Online Payment Processing Services is adopted, the Proposed Conduct will also exclude **all** providers of the following alternative online payment methods currently permitted on the eBay Site, which are also (at least to some extent) competitive with PayPal:

- credit cards, including Mastercard and Visa;
- debit cards of financial institutions; and
- bank deposits, bank-to-bank transfers, often known as bank wire transfers or bank cash transfers.

Although not close competitors of PayPal (based on the definition of the market as the Market for Online Payment Processing Services), providers of alternative offline payment methods to eBay sellers will also be excluded from the eBay Site, including providers of:

- escrow services;
- personal cheques and bank cheques; and
- money orders and other negotiable instruments.

Based on eBay's own statistics (published in January 2006), only 25% of successful transactions of the eBay Site were paid for using PayPal, with 75% of buyers choosing to use an alternative payment method. This means that the proposed conduct will immediately foreclose all of PayPal's competitors on the eBay Site from three quarters of the transactions conducted on the eBay Site.

The Proposed Conduct will also result in an immediate loss of scale for these excluded competitors of PayPal, who will lose access to their current customer base on the eBay Site. This will increase their average costs and make it more difficult for these competitors to compete effectively against PayPal on all websites. This, in turn, causes a loss of scale in future, making it yet more difficult to compete effectively against PayPal. Paymate, for example, has submitted to the Commission that its business will be "significantly weakened" as a result of its exclusion from the eBay Site.

In the absence of the Proposed Conduct, each of the above competitors would be likely to continue to compete against PayPal for the provision of services to eBay sellers, and seek opportunities to expand and improve their product offerings.

(ii) foreclosure of competitors operating in the market more broadly, but not currently allowed on the eBay Site

The Proposed Conduct will remove opportunities to enter onto the eBay Site, for existing providers of online payment processing services who are currently not permitted on the eBay Site. A number of the currently excluded competitors, **RESTRICTION OF PUBLICATION OF PART CLAIMED**, absent the Proposed Conduct, could in the foreseeable future be permitted onto the eBay Site.

In its Accepted Payments Policy (as it stood prior to eBay's Notification)³², eBay stated that it:

...will consider the following factors, among others, in making its determination:

- Whether the payment model offers substantial financial, privacy and anti-fraud protection for buyers and sellers
- Whether the payment model raises the potential for confusion among eBay users, or involves incentives that may present fraud concerns
- Whether the payment model involves precious metals, or other non-cash (points, miles, minutes, coupons, discounts) as consideration
- Whether the payment service has a substantial historical track record of providing safe and reliable financial and/or banking related services (new services without such a track record generally cannot be promoted on eBay)
- The identity, background and other business interests of the payment service sponsor
- The licence/regulatory status of the payment provider in the countries where it provides payment services

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The effect of exclusion from the eBay Site is compounded because the Proposed Conduct makes it more likely that online sellers will acquire services from PayPal outside of the eBay Site (having been forced to use PayPal on the eBay Site). This flow-on effect to online sellers more generally, can be described as follows:

- because of the prominence of the eBay Site among online buyers, the Proposed Conduct (requiring online buyers to set up a PayPal account before purchasing on the eBay Site) means that the vast majority of online buyers, particularly those belonging to the "long tail", will have a PayPal account;
- online sellers operating beyond the eBay Site will have an increased incentive to purchase online payments processing services from PayPal because they will know that the vast majority of online buyers will already have set up a PayPal account; and
- online buyers will be more likely to use PayPal away from the eBay Site because more online sellers, not on the eBay Site, are offering PayPal as an online payment option.

In addition, most online sellers will offer, and most online buyers will use, only a single online payment processing services provider because of user "stickiness"³⁴.

³² At section 2.5(1) of its Notification eBay indicated that on and from 21 May 2008 it would amend its user agreement and alter the functionality of its Site such that all sellers are required to offer PayPal as one of their accepted payment methods. It appears that eBay has modified its Accepted Payments Policy as a result of commencement of this element of the Proposed Conduct.

³³ **RESTRICTION OF PUBLICATION OF PART CLAIMED**

³⁴ "Stickiness" refers to the tendency of users of one provider of online payment processing services to stick to that provider rather than switching to another provider. Some of the factors contributing to this include: the

Online buyers and online sellers are not likely to incur the costs involved in using multiple providers. As compatibility with the eBay Site is a major factor for online sellers in determining from which online payment processing services provider to acquire these services, many online sellers not on the eBay Site will favour PayPal.

eBay itself recognises the potential for the Proposed Conduct to have the effect of increasing the usage of PayPal on websites other than the eBay Site (see, for example, paragraph 5.10 of the Notification).

The loss of potential access to the eBay Site and increased adoption of PayPal outside the eBay Site, is likely to have the flow-on effect of deterring or delaying existing competitors of PayPal operating in the market more broadly, from investing in innovation and improving their offerings of online payment processing services. One of the powerful incentives currently driving innovation and improvement is the possibility of obtaining access to eBay's volume of online sellers. The Proposed Conduct will remove those incentives.

Those incentives are likely to continue to drive innovation and improvement in competitive offerings to PayPal, in the absence of the Proposed Conduct.

(iii) foreclosure of potential competitors seeking to enter the market more broadly

The effect of the Proposed Conduct (relative to the future without the Proposed Conduct) would also be to prevent or delay entry by new competitors in the provision of online payment processing services more broadly.

The inability to access online sellers on the eBay Site is significant because eBay accounts for a substantial portion of the market for online payment processing services. Because of the high number of online sellers associated with the eBay Site and the high volume of online transactions conducted on the eBay Site, it is essential for new entrants to have access to eBay sellers in order to make entry into the Market for Online Payments Processing Services attractive and viable.

Although there are a significant number of online sellers not currently operating on the eBay Site, it would be very difficult for new entry to occur in a timely manner and in a sufficient scale, without access to the eBay Site. It would take significant time and investment for potential new entrants to accumulate a sufficient number of online sellers to make entry viable.

It is very difficult to enter a two-sided market like the market for online payment processing services because acceptance from both buyers and sellers is required. It would be even more difficult, and therefore less likely, in circumstances where a new entrant would need to compete against PayPal's very significant installed customer base derived from the eBay Site and, as described above, the powerful network effect of increasing take up of PayPal beyond the eBay Site.

The fact that some providers of online payment processing services are currently not allowed on the eBay Site does not mean that the Proposed Conduct does not have an effect on them. The Proposed Conduct has a significant "spill-over" effect on them, given the vast increase in the installed customer base of PayPal that the Proposed Conduct will create.

requirements to establish new accounts; the costs associated with and the undesirability of having multiple accounts with different providers; and the time associated with learning how to use a different service.

Substantial lessening of competition in Markets for P2P Online Payment Processing and Online Payment Processing Services

- 6.7 It is submitted that the Proposed Conduct is likely to have the effect of substantially lessening competition in the Markets for P2P Online Payment Processing Services and Online Payment Processing Services, by preventing or hindering competitors of PayPal from competing effectively against PayPal in that market.
- 6.8 The lessening of competition described above is substantial because it confers a significant and sustainable increase in market power on PayPal. In effect, the Proposed Conduct will allow eBay to leverage its substantial power in the Market for Online Marketplace Services to secure an equivalent position for PayPal in the Markets for P2P Online Payment Processing Services and Online Payment Processing Services.
- 6.9 The market power obtained or strengthened by PayPal as a result of its domination of the eBay Site is sufficient, itself, to have the likely effect of substantially lessening competition in the broader Market for Online Payment Processing Services. The effect on competition in that segment of the market (the eBay Site) is substantial enough to cause a substantial lessening of competition in the market as a whole.
- 6.10 There is little doubt that PayPal will have the power to implement a SSNIP on eBay sellers:
- (a) eBay sellers could not by-pass an attempted price rise by acquiring the services of other providers of online payment processing services or providers of alternative offline payment methods, as no competitors to PayPal will be allowed on the eBay Site;
 - (b) eBay sellers could not turn to alternative online payment processing services on alternative sites to eBay. As described above, eBay has market power in the Market for Online Marketplace Services and there are few, if any, close substitutes for the eBay Site in Australia and any competitors to eBay are not effective; and
 - (c) the only way for eBay sellers to avoid PayPal's attempted SSNIP is to cease selling on the eBay Site and, therefore, cease acquiring online marketplace services altogether.
- 6.11 Furthermore, the market power obtained by PayPal as a result of its domination of the eBay Site, plus the network effects of that domination in the broader Markets for P2P Online Payment Processing Services and Online Payment Processing Services, are sufficient to have the likely effect of substantially lessening competition in those markets as a whole.
- 6.12 eBay's purpose is anti-competitive**
- 6.13 eBay's 'purpose' is the end it is seeking to achieve in giving effect to the Proposed Conduct and may be inferred from the nature of the Proposed Conduct, the circumstances in which the conduct is proposed and the likely effect of the Proposed Conduct.
- 6.14 eBay states in its Notification (at paragraph 2.2) that:
- In order to address the issue of problematic or fraudulent transactions and the associated customer churn due to [bad buyer experiences],** 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. (emphasis added)
- 6.15 This suggests that the 'purpose' of the Proposed Conduct, is to provide eBay users with greater security when purchasing online in order to minimise the number of online buyers choosing not to return to purchase products on the eBay Site.

- 6.16 It is submitted that eBay's claimed 'purpose' is not, in fact, the end eBay is seeking to achieve in giving effect to the Proposed Conduct or, at the very least, not eBay's only substantial purpose of the Proposed Conduct.
- 6.17 eBay's real purpose, or one of eBay's substantial purposes, is to substantially lessen competition in the Market for Online Payment Processing Services, by preventing or hindering competitors of PayPal from competing effectively against PayPal in that market. eBay and PayPal are related bodies corporate. eBay is acting to increase PayPal's share of the Market for Online Payment Processing Services, thereby increasing the revenues to the eBay group as a whole.
- 6.18 This purpose ought to be inferred from the following circumstances:

- (a) eBay's suggestion that the Proposed Conduct is **required** for security reasons is clearly not made out. The Nielsen Online (Qtr 4 2007) report attached to eBay's Notification³⁵ suggests that:

Trust in the available online payment methods is a perceived online shopping obstacle for **very few** consumers, with only 3 percent listing this aspect of online purchasing as a perceived barrier - **likely due to an ever increasing variety of payment options** along with improved online security measures. (emphasis added)

and

Overall, experiencing issues with online shopping does **not** appear to deter online Australians from continued purchasing. For example, 75 percent of credit card fraud victims shopped online within the past 30 days (compared to 66 percent of the overall AU online population) - additionally, those with past troubles online appear to spend similar amounts online compared to their problem-free counterparts. (emphasis added)

- (b) there is nothing to suggest that competitors of PayPal must **necessarily** be excluded from providing online payment processing services to eBay users in order to achieve eBay's claimed purpose;
- (c) there is no evidence provided by eBay in the Notification that other providers of online payment processing services are presently any less secure than PayPal or any less capable of being as secure as PayPal in future, or how use of those other providers gives rise to "bad buyer experiences";
- (d) for example, there is no analysis in the Notification as to what buyer protection is in fact provided by other providers of online payment processing services (including protection offered by banks and credit card companies), even if their fraud and buyer protection policies are not eBay-specific. Indeed, it may be arguable that the banks and credit card companies, in particular, offer a legitimate, "secure" alternative to PayPal;
- (e) there is no attempt by eBay to establish that PayPal is the **only** supplier capable of meeting objective security criteria or why assessing other providers of online payment processing services against such criteria would not be feasible;
- (f) a review of the eBay buyer and seller submissions posted on the Commission's website in response to the Notification indicates that eBay users do not consider PayPal to be the safest, or the only safe, payment method or provider of online payments processing services. As at the date of this submission 571 submissions have been posted by the Commission on its website in relation to the Notification. The vast majority of those submissions are from eBay buyers and sellers opposing

³⁵ See pages 18 and 22 of that report at Annexure C to the Notification.

eBay's Notification, at least in part on the basis that PayPal is not the safest or the only safe payment method;

- (g) eBay has not provided any evidence to suggest all, or even any, online buyers and online sellers are prepared to pay higher fees to receive PayPal's (claimed) enhanced security features. There is no evidence that the Proposed Conduct will or could meet eBay's claimed purpose;
- (h) eBay argues that the benefit to PayPal users would extend beyond eBay if the Proposed Conduct encouraged them to use PayPal "or another secure online payment facility for other online payments" (at paragraph 5.10 of the Notification). If such other secure online payment facilities are already in existence then there is no **need** for PayPal to be the exclusive provider of online payments processing services to eBay sellers. If the claimed 'purpose' of the Proposed Conduct is the "security" of eBay transactions, then eBay users should be able to use any provider of existing secure online payment processing services, not just PayPal;
- (i) excluding other providers of online payment processing services and other payment methods from eBay is counter-productive to establishing a safe and secure online marketplace. For example, the prevalence of PayPal may encourage phishing scams and other fraudulent activity;
- (j) the purpose of providing eBay users with greater security when purchasing online could be achieved in less economically detrimental ways, such as:
 - (i) educating buyers and sellers about the risks of online fraud and the benefits of PayPal in protecting users against fraud;
 - (ii) continuing to improve buyer and seller feedback to allow parties to better assess the trustworthiness of the party they are transacting with; and/or
 - (iii) specifying objective criteria for permitting other online payment services providers to offer their services to users of the eBay Site; and
- (k) the application of PayPal's buyer protection measures are entirely at PayPal's sole discretion. Clause 9E of PayPal's Buyer Complaint Policy and PayPal Buyer Protection Policy reads as follows:

Availability. PayPal reserves the right to change or discontinue the PayPal Buyer Complaint Policy or the PayPal Buyer Protection Policy in its sole discretion at any time and without notice. All payments made under these Policies will be made a PayPal's sole discretion. Pending claims at the time of any such discontinuance will continue to be processed until a final decision is reached.

- 6.19 When considered together with the likely competitive effects of the Proposed Conduct (see above), the above circumstances suggest that eBay's purpose is not, as claimed, to provide eBay users with greater security when purchasing online in order to minimise the number of online buyers choosing not to return to purchase products on the eBay Site. Rather, it should be inferred from the above circumstances that eBay's real purpose (or one of eBay's substantial purposes) is to substantially lessen competition in the Market for Online Payments Processing Services, by preventing or hindering competitors of PayPal from competing effectively against PayPal in that market.

7. PUBLIC BENEFITS OF THE PROPOSED CONDUCT

7.1 Public benefits and the "future with-and-without test"

- 7.2 As noted at paragraph 2.9 above, the Commission may revoke eBay's Notification if in addition to being satisfied as to the anti-competitive purpose or likely effect of the Proposed Conduct, it is satisfied that, relevantly:

- (a) the Proposed Conduct is not likely to result or would not result in a benefit to the public; or
- (b) any benefit to the public that is likely to result or would result from the Proposed Conduct, would not outweigh the detriment to the public constituted by any lessening of competition that is likely to result or would result from the Proposed Conduct.³⁶

7.3 In order to satisfy itself that the Proposed Conduct falls within one of the two limbs identified above, the Commission must:

- (a) identify which public benefits and competitive detriments **result or are likely to result from** the Proposed Conduct (in other words, there must be a causal nexus between the Proposed Conduct and the benefits and detriments); and
- (b) measure the likely public benefits against the likely competitive detriments.³⁷

The Commission does so by applying the Future With and Without Test.³⁸

7.4 The Future With and Without Test involves making a judgement as to what, on the information and evidence available, is the most likely future in which the conduct occurs and the most likely future in which the conduct does not occur and a comparison of the public benefits and detriments arising in each of the future scenarios.³⁹

7.5 The following guiding principles apply to the identification and measurement of public benefits and competitive detriments resulting from the Proposed Conduct using the Future With and Without Test⁴⁰:

- (a) If the claimed public benefits are unlikely to exist without the Proposed Conduct, they can be described as benefits flowing from the conduct. (It follows that, if the claimed public benefits are likely to exist in the absence of the Proposed Conduct, they cannot be described as benefits flowing from the Proposed Conduct.)
- (b) If the claimed public benefits exist, in part, in a future without the Proposed Conduct, the weight accorded to them may be reduced appropriately.
- (c) If there are public detriments which are removed or mitigated by the Proposed Conduct, that may be considered as an element of the claimed public benefit flowing from the Proposed Conduct.

7.6 Application of the Future With and Without Test to the Proposed Conduct

Future without the Proposed Conduct (the counterfactual)

7.7 If the Commission revokes eBay's Notification, and eBay does not engage in the Proposed Conduct, it is likely that at least the status quo will be maintained, namely:

³⁶ Section 93(3) of the Act.

³⁷ Professor Allan Fels, speech at the National Competition Policy Workshop, "The Public Benefit Test In The Trade Practices Act 1974", 12 July 2001, at 5; *Re Media Council of Australia* (1996) ATPR 41-497.

³⁸ *Application by Medicines Australia Inc* [2007] ACompT 4, at [119] and ACCC "Assessment in respect of an exclusive dealing notification lodged by Football Federation of Victoria for its apparel licensing program", 31 October 2007, at 9. See also Professor Allan Fels, speech at the National Competition Policy Workshop, "The Public Benefit Test In The Trade Practices Act 1974", 12 July 2001, at 9; *Re Media Council of Australia (No 2)* (1987) ATPR 40-774 and *Re Media Council of Australia* (1996) ATPR 41-497.

³⁹ See *Application by Medicines Australia Inc* [2007] ACompT 4, at [119] and ACCC "Assessment in respect of an exclusive dealing notification lodged by Football Federation of Victoria for its apparel licensing program", 31 October 2007, at 9.

⁴⁰ *Application by Medicines Australia Inc* [2007] ACompT 4, at [119].

- (a) Sellers and buyers on the eBay Site will continue to be able to offer and use PayPal and other online payment processing service providers currently permitted on the eBay Site, such as Paymate, Bidpay etc.
- (b) Sellers and buyers on the eBay Site will continue to be able to offer and use other online/electronic payment processing methods and other "offline" payment methods, currently permitted on the eBay Site, including credit cards, debit cards, bank payments, bank-to-bank transfers will continue to be available to online sellers and online buyers on the eBay Site.
- (c) Online payment processing services providers not currently permitted on the eBay Site, such as Google Checkout, FastCash.com, etc, would be permitted onto the eBay Site if eBay's Accepted Payments Policy as previously published (see paragraph 6.6(c)(ii) above) were applied in an objective fashion (which will remain subject to the prohibitions on anti-competitive conduct in the Act).
- (d) Online payment processing services providers not currently permitted on the eBay Site might also be admitted if the user base of these alternate providers becomes large and vocal enough for eBay to consider their admission.
- (e) The PayPal service will be in all material respects equivalent to the service currently offered, with the exception of the introduction of two new features:
 - (i) the "holds" policy ("soon" to be implemented by eBay), which will involve the notification of PayPal to hold payment for a transaction where eBay considers that the transaction is high risk for a buyer (**Holds Feature**); and
 - (ii) the level of possible protection under PayPal's "Buyer Protection Policy" (which provides additional protection to buyers where an item is not received or is significantly not as described) will be increased to \$20,000 per transaction (**New BPP Feature**).⁴¹

eBay has not suggested in the Notification that these new features will not be implemented in the absence of the Proposed Conduct. Rather, the Notification provides that:

- (i) the Holds Feature will "soon" be implemented; and
- (ii) the New BPP Feature will be implemented on 17 June 2008.⁴²

Furthermore, eBay has offered no explanation as to why the Proposed Conduct is necessary for the implementation of the new features. Accordingly, it ought to be inferred that it is likely that the new PayPal features will be made available, even if eBay does not engage in the Proposed Conduct.

- (f) eBay and PayPal are likely to promote the benefits of payment by PayPal (such as increased security and protection from fraud and other "bad buyer experiences"⁴³), thus increasing online buyer and online seller awareness. Buyers' and sellers' perceptions of risk, the benefits of the PayPal service and the price of the PayPal service (compared to other payment methods) will determine whether there is a migration of eBay users to payment through PayPal on the eBay Site.

⁴¹ Note that another new PayPal feature referred to in the Notification is a new Seller Protection Policy, under which PayPal can provide protection to eligible sellers for unauthorised payments and for "item not received" disputes if certain criteria are met (**New SPP Feature**). It is noted that the Notification suggests that this feature has already been introduced.

⁴² See paragraphs 1.27 - 1.28.

⁴³ Defined in the Notification as including fraudulent/unauthorised use of buyer credit card and/or account details; purchased items not being received and purchased items being significantly different to their description.

- (g) Suppliers of other methods of online and offline payment currently permitted on the eBay Site 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, thus increasing innovation. In particular, it is likely that any natural migration to PayPal will incentivise suppliers of other methods of online and offline payment currently permitted on the eBay Site to improve the security and protection of their offerings. The improved offerings are also likely to be offered by those suppliers on other websites (rather than simply on the eBay Site).
- (h) Online payment processing services providers not currently permitted on the eBay Site, such as Google Checkout, FastCash.com.etc, will be more likely to improve their offerings in the hope of being permitted onto the eBay Site. For example, they are likely to enhance security and protection to online buyers and online sellers in order to compete more effectively with PayPal, thus increasing innovation. The improved offerings are also likely to be offered by those suppliers on other websites (rather than simply on the eBay Site).

Future with the Proposed Conduct

7.8 If the Commission does not revoke eBay's Notification, and eBay engages in the Proposed Conduct, the following is likely:

- (a) PayPal and cash on delivery/pick up⁴⁴ will be the only payment methods allowed to be offered or accepted by online sellers and online buyers on the eBay Site. No other payment method will be permitted.
- (b) eBay buyers and sellers who do not wish to or cannot afford to process their transactions through PayPal will either be forced to use PayPal or cease buying and/or selling on the eBay Site, which may lead to ceasing online buying and/or selling altogether.
- (c) All online sellers who continue to use the eBay Site will incur additional costs in the form of fees for using the PayPal service. Sellers who previously did not accept payment through PayPal will be most affected. All of their transactions (save for those paid for by cash on deliver/pick up) will be affected.
- (d) The PayPal service will be in all material respects equivalent to the service offered today and in the hypothetical likely future without the Proposed Conduct (the counterfactual).
- (e) The ability of new suppliers of online payment processing services to penetrate the Market for Online Payment Processing Services in Australia will be reduced due to their inability to offer their services to the users of the widely popular eBay Site. As such, it is likely that at least some potential new suppliers of online payment processing services will be deterred from or hindered in entering that market.
- (f) The exclusion of other online/electronic and offline payment methods which are currently offered to users of the eBay Site is likely to discourage the suppliers of those other methods of payment from improving their offerings so as to enhance security and protection to buyers and sellers, and is likely to reduce innovation.
- (g) Unconstrained from competition on the eBay Site, PayPal is likely to increase the price of its service to eBay sellers without offering any commensurate increase in the quality of its services in the future. In the absence of pressure from other online payment services providers, PayPal will not have the incentive to further improve its offerings and is likely to become complacent. Furthermore, there will

⁴⁴

See footnote 2.

be nothing to prevent PayPal from withdrawing some of the "enhanced security" features, such as the Buyer Protection Policy, in the future.

- (h) eBay buyers and sellers, having been forced to sign-up to PayPal, will be more likely to use PayPal for other online payments, due to user "stickiness"⁴⁵. This is likely to put pressure on online sellers more broadly to offer PayPal (possibly over other online payment facilities). This will make it more difficult for providers of other online payment facilities to penetrate the Market for Online Payments Processing Services and capture users, and therefore more difficult to compete with PayPal. Competition in that market for the supply of online payments processing services will be lessened.

7.9 Claimed public benefits should be disregarded or given little weight

7.10 The comparison of the future with and the future without the Proposed Conduct indicates that the public benefits likely to result from the Proposed Conduct are very limited. Yet, the Notification contains over 5 pages of public benefits, which eBay claims will result from the Proposed Conduct.

7.11 The public benefits claimed by eBay should be disregarded entirely, or alternatively be given very little weight, by the Commission because they either:

- (a) will or are likely to exist in the absence of the Proposed Conduct and, as such, cannot be said to result or be likely to result from the Proposed Conduct; or
- (b) are illusory.

7.12 The table at Annexure 1 sets out each of the public benefits claimed by eBay in its Notification as likely to result from the Proposed Conduct and the detailed reasons why each claimed benefit should be disregarded or given little weight by the Commission.

7.13 Competitive detriments

7.14 As described in section 6.6 and 7.8 of this submission, the Proposed Conduct is likely to result in significant competitive detriments, in particular, the lessening of competition in the Market for Online Payments Processing Services.

7.15 Other public detriments

7.16 Not only will the Proposed Conduct result in very limited, if any, public benefits, but in addition to the above competitive detriments, the Proposed Conduct is likely to result in a number of other public detriments, namely:

- (a) reduction in consumer choice;
- (b) reduction in the overall quality and safety of goods and services;
- (c) removal of information supply to consumers and businesses to permit informed choices in their dealings;
- (d) increase in inequitable dealings in the market; and
- (e) increase in industry costs, resulting in higher prices at all levels in the supply chain⁴⁶.

⁴⁵ See footnote 34.

⁴⁶ The Commission has previously concluded that the opposite effect of these detriments, would constitute public benefits for the purposes of the Act. See *Re ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108.

(As described at paragraph 7.7 above, the opposite of these detriments (ie. public benefits) are likely to arise in the counterfactual.)

7.17 Competitive detriments outweigh public benefits

7.18 In the circumstances, any benefit to the public that is likely to result from the Proposed Conduct will not outweigh the detriment to the public constituted by the lessening of competition that is likely to result from the Proposed Conduct.

8. CONCLUSION

8.1 For the reasons set out in this submission, the Commission should revoke eBay's Notification by giving to eBay notice pursuant to section 93(3) of the Act.

8.2 There are additional considerations which should be borne in mind by the Commission in considering eBay's Notification, as outlined below.

8.3 Lack of relevant information in eBay's notification

8.4 The "notification" regime established by section 93 of the Act requires the Commission to be satisfied that the likely competitive detriments would outweigh the likely public benefits of the Proposed Conduct, before revoking eBay's Notification. In effect, the onus is on the Commission to justify, pursuant to the statutory test set out in section 93(3) of the Act, why protection should not be afforded to the Proposed Conduct.

8.5 Nonetheless, the lack of evidence provided by eBay for the various propositions and assertions made in its Notification, ought to be a relevant consideration for the Commission in determining the weight to be given to those assertions and propositions.

8.6 In that regard eBay's Notification is deficient in several important respects:

- (a) eBay suggests that NERA Economic Consulting has been unable to form a definitive view on:
 - (i) market definition;
 - (ii) whether eBay possesses a substantial degree of market power; and
 - (iii) whether the Proposed Conduct will have anti-competitive consequences;
- (b) nevertheless, and without anything further, eBay submits that the Proposed Conduct would not be likely to have the effect of substantially lessening competition or, alternatively, that any anti-competitive effect is likely to be relatively minor. Any evidence or reasoning for such a conclusion is entirely absent from the Notification and it is not at all clear how eBay could form this view in light of (a) above;
- (c) all of the conclusions drawn from the NERA Economic Consulting report on market definition and competitive detriments are excluded from the public register, as is the report itself. That report and the conclusions drawn from it ought to be made public to permit better informed discussion about:
 - (i) potential competitive detriments;
 - (ii) the absolute and relative significance of eBay as a supplier of online marketplace services and of PayPal as a supplier of online payment processing services; and
 - (iii) to expose the potential adverse consequences of the Proposed Conduct on eBay users and suppliers of competitive online payment processing services; and

- (d) eBay has not provided any evidence or comparative analysis to support its principal claimed public benefit that PayPal is the safest, and only safe, provider of online payment processing services;
 - (e) in the absence of any information about public detriments, eBay has avoided undertaking any comparative weighting of its claimed public benefits against possible public detriments.
- 8.7 In light of the above, in applying the statutory test set out in section 93(3) of the Act, the Commission ought to:
- (a) give little weight to the numerous assertions and propositions in eBay's Notification, not properly supported by evidence; and
 - (b) give relatively more weight to credible competing submissions.

8.8 Significant number of affected parties seeking review

- 8.9 There are an extraordinarily high number of persons seeking review. As at the date of this submission 571 submissions have been posted by the Commission on its website in relation to the Notification. This is far greater than is typically the case in response to an exclusive dealing notification.
- 8.10 Almost all of those submissions oppose eBay's Notification and provide support and evidence, even if largely anecdotal, for this submission.
- 8.11 In addition, reaction to the Notification has been widely reported in the media. Much of that coverage suggests eBay users, competitors of PayPal and the public generally, are opposed to eBay's notification⁴⁷.
- 8.12 In essence:
- (a) eBay users (online sellers and online buyers) are concerned that the removal of choice among various online payment methods is detrimental to their interests; and
 - (b) competitors of PayPal regard their exclusion from being able to offer to supply online payment services to eBay users as being detrimental to their businesses given the volume of online transactions conducted on the eBay website, and as being detrimental to the interests of consumers.
- 8.13 For example, Paymate, an Australian-based provider of P2P online payment processing services currently allowed on the eBay Site, has submitted that:

If eBay proceeds with its notified conduct, PayPal will become a dominant payment provider on the [eBay Site] and is likely to become equally dominant in the online marketplace...

eBay already restricts choice of payment methods on the eBay Site and the notified conduct will eliminate all alternative avenues for payment providers, including Paymate. By mandating PayPal for all eBay purchases, buyers and sellers will be forced to register with PayPal and link bank accounts and/or credit/debit cards for funding and receipt of payments. This means eBay's 5 million members would all be registered with PayPal.

eBay will constrain payment options even outside eBay...By making PayPal the only payment service provider on the eBay Site, it is highly likely that PayPal will become the dominant payment service provider on other ecommerce platforms and websites.⁴⁸

⁴⁷ See for example, A Moses, "ACCC probe of eBay's PayPal forcing", *The Sydney Morning Herald*, 16 April 2008; J Bajkowski, "eBay fronts ACCC to protect its PayPal", *Financial Review*, 17 April 2008; B Woodhead, "eBay pulls PayPal shunt stunt on shoppers", *Financial Review*, 11 April 2008.

...

Paymate considers eBay's 5 million members to be the most prolific online shoppers and likely to be a significant share of the overall purchasing population. If they are all registered with PayPal as a result of the notified conduct, then they will be more likely to prefer PayPal on other non-eBay platforms. PayPal already uses this client base argument to encourage websites that have their own credit card merchant facilities to accept PayPal as well. PayPal is then likely to become the dominant payment method on other online platforms to the exclusion of other options such as Paymate. These will also become less viable financially due to lack of scale or lowered prices, removing all alternatives and entrenching PayPal.⁴⁹

8.14 Likewise, set out below are two examples of concerns raised by eBay sellers:

1. We will no longer be able to continue selling our products on eBay Australia as a business due to increased fees forced on us by the change.
2. We will no longer be able to purchase any items from eBay Australia's website after the forced PayPal regime comes into place due to the fact we don't use PayPal for safety reasons.
3. Sellers across eBay Australia will have to either raise the price of their products to compensate for the additional fees incurred by eBay's [sic] force of PayPal, or they will need to [bear] the forced second set of fees as a loss to their business, or they will need to cease trading on eBay due to profit margins which will then be uneconomical for most sellers...If eBay's [sic] proposed force of PayPal onto all buyers and sellers goes ahead, we will have no option but to not only shut down our eBay sales completely, but also likely the loss of my business and possibly our home also⁵⁰

and

...eBay has little competition in Australia, and so many customers will be compelled to use PayPal, whether they like it or not⁵¹.

8.15 It is submitted that the Commission ought to have due regard and be concerned with the clear opposition expressed to eBay's Notification by those most clearly and directly affected by the Proposed Conduct.

⁴⁸ Paymate's submission to the Commission in opposition to the Notification, dated 7 May 2008, at 1.

⁴⁹ Paymate's submission to the Commission in opposition to the Notification, dated 7 May 2008, at 17-18.

⁵⁰ Peter Gamble's submission to the Commission in opposition to the Notification, dated 18 April 2008.

⁵¹ Darren Chandler's submission to the Commission in opposition to the Notification, dated 21 April 2008.

ANNEXURE A

	Description of claimed public benefit	Why the claimed public benefit should be disregarded
1	<p>The Proposed Conduct will, due to PayPal's "enhanced security" features:</p> <ul style="list-style-type: none"> • substantially reduce or minimise the occurrence of disputes and bad buyer experiences; and • benefit sellers by reducing the likelihood of loss due to fraudulent/unauthorised use by buyers of credit card and/or bank account details to purchase items (bad seller experiences). 	<p>PayPal's "enhanced security" features (with the exception of two features which are expected to be implemented regardless of whether eBay engages in the Proposed Conduct) are already available to eBay users who choose to use PayPal and will continue to be available even if eBay does not engage in the Proposed Conduct.</p> <p>As such, any benefits resulting from the "enhanced security" features are already available to sellers and buyers on the eBay Site and will continue to be available even if eBay does not engage in the Proposed Conduct. Clearly the public benefit claimed to result from the Proposed Conduct exists independently of the Proposed Conduct.</p> <p>Indeed, there is currently a greater public benefit in having PayPal available to sellers and buyers on the eBay Site and allowing them to choose whether they wish to pay for the additional security features. There is no public benefit if the market places no value or premium on PayPal's (claimed) enhanced security features, but is forced to do so.⁵²</p> <p>If PayPal is a more secure service than other payment methods currently permitted on the eBay Site (this not having been proven by eBay in its Notification), mandating the PayPal service may result in some reduction of disputes and bad buyer and seller experiences compared to the <i>current</i> level of disputes and bad buyer and seller experiences.</p> <p>However, if PayPal is indeed a superior service to other payment methods, even in the absence of the Proposed Conduct, some buyers and sellers are likely to migrate to the PayPal service, having considered the costs and benefits of the service. If that is the case, then it cannot be claimed by eBay that it is the Proposed Conduct which gives rise to the whole of the "enhanced security" public benefit (as some significant part of the claimed public benefit arises even in the absence of that conduct).</p> <p>However, in the absence of the Proposed Conduct,</p>

⁵² As noted in the opposing submission lodged by Centricom, the operator of the POLi online payment service, the Buyer Protection Program, an important part of the "enhanced security features" offered by PayPal, was until recently offered by eBay to buyers regardless of the payment methodology they chose to use. This was changed recently so that only those transactions that were completed using PayPal were covered by the Buyer Protection Program. Nevertheless, buyers and sellers transacting on the eBay Site have continued to use other payment methods rather than migrating to PayPal. This suggests that the market may not value the utility of PayPal's "enhanced security features" highly.

	Description of claimed public benefit	Why the claimed public benefit should be disregarded
		<p>imperfect information will mean that not all buyers and sellers who might otherwise choose to use PayPal will do so, and, as such, concedes that (assuming that PayPal is a superior service capable of yielding the claimed benefits of reducing disputes and bad buyer and seller experiences) the Proposed Conduct itself may result in a <u>small</u> reduction in the level of disputes and bad buyer and seller experiences.⁵³ The Commission should in any event give little weight to this benefit.</p> <p>As to whether PayPal is in fact a superior service capable of yielding the claimed benefits of reducing disputes and bad buyer and seller experiences:</p> <ul style="list-style-type: none"> • eBay has not provided any evidence of a reduction in the level of disputes and bad buyer and seller experiences resulting from the use of PayPal⁵⁴; • PayPal is not immune from security problems and has experienced such problems in the past, including being the target of phishing scams; • eBay has not provided any evidence of other payment methods being "less secure" than PayPal.⁵⁵ If other payment methods were as unsafe as eBay claims they are, they would not be used as widely as they are. Given that credit card and direct deposit, for instance, are universally accepted by online merchants, it is unlikely that these payment methods are fundamentally unsafe. Furthermore, unlike some other providers of online payment services, neither PayPal nor eBay currently subscribe to the Electronic Funds Code of Conduct, which is important in protecting consumers when using electronic funds transfers and covers fundamental issues concerning consumer rights, security, disclosure and resolution of mistaken or unauthorised payments; • the Notification acknowledges that a significant proportion of bad buyer experiences are caused by delivery issues (including lengthy delivery and expensive delivery), disputes regarding misdescription of items, non-receipt of items and faulty, broken or incorrect items. These issues are unrelated to the payment method used to pay for the items – as such, the exclusive use of PayPal

⁵³ It is noted that eBay claims in the Notification (at paragraph 5.9) that buyers and sellers have a poor understanding of the risks involved in transacting on eBay. eBay has not provided any evidence in support of this claim.

⁵⁴ It is noted that such evidence may be presented in the NERA Report, which has not been made publicly available.

⁵⁵ For example, Paymate states in its opposing submission that it has the ability to match the buyer and seller protection benefits offered by PayPal.

	Description of claimed public benefit	Why the claimed public benefit should be disregarded
		<p>will not remedy these bad buyer experiences; and</p> <ul style="list-style-type: none"> • anecdotal evidence provided by sellers using the eBay Site in opposing submissions relating to the Notification casts doubt over the claimed superior security and protection of the PayPal service compared to other payment methods. In addition, a number of opposing submissions indicate that payment through PayPal increases disputes between buyers and sellers, and increases bad seller experiences. The buyer protection offered by PayPal appears to transfer the risks and costs of fraud from buyers to sellers, rather than reducing levels of fraudulent activity (at least in relation to item not received disputes).
2	<p>The Proposed Conduct may contribute to a reduction in the number of online transactions that are exposed to fraud by encouraging buyers and sellers (who were previously unaware of the risks of using less secure payment methods or "perceived the costs of using PayPal to be high relative to the benefits obtained"⁵⁶) to use PayPal or another secure online payment facility for other online payments.</p>	<p>As noted at paragraph 5.7 of this submission, eBay has not produced any evidence to show that:</p> <ul style="list-style-type: none"> • PayPal is more effective in reducing fraud than other online payment facilities; • buyers and sellers are unaware of the risks of using less secure payment methods; or • all, or even any, buyers and sellers are willing to pay more to receive PayPal's services. <p>If buyers and sellers transacting on the eBay Site are forced to use PayPal, those buyers and sellers may be more likely to use PayPal for other online payments. However, it is submitted that this will not be due to increased awareness about the risks of using less secure payment methods or a recognition of the benefits of PayPal⁵⁷, but due to consumer stickiness.</p> <p>eBay buyers and sellers, having been forced to sign-up to PayPal, will be even less likely to use another secure online payment facility for other online payments. As noted above in paragraphs 5.12(e) and 7.8, this is likely to lessen competition in the Market for Online Payment Processing Services. Any benefit will be negated by this detriment.</p> <p>Furthermore, as noted above fraud and identity theft may in fact increase as a result of the pervasiveness of the PayPal service. Increased use of PayPal may encourage phishing scams and other fraudulent activity.</p> <p>In any event, even if the Proposed Conduct does result</p>

⁵⁶ Paragraph 5.10 of the Notification.

⁵⁷ The mandated use of PayPal in and of itself will not increase the awareness of buyers and sellers about the risks of using less secure payment methods. There are more effective and less competitively harmful ways to educate buyers and sellers using online payment services.

	Description of claimed public benefit	Why the claimed public benefit should be disregarded
		in Claimed Benefit 2, for the reasons provided in relation to Claimed Benefit 1, the benefit is likely to also arise in the counterfactual and, as such, should be disregarded or given little weight.
3	<p>The Proposed Conduct may enhance the security of the internet as a platform for transacting to the benefit of all users by encouraging other online businesses and payments services providers to offer similar levels of transactional security and protection to their users.</p> <p>This may have the following flow-on benefits:</p> <ul style="list-style-type: none"> • It may encourage businesses that do not currently have an online presence to enter the online retail marketplace, thereby offering those businesses with the opportunity to expand their customer bases, provide quicker and more efficient services and reduce overheads; and • The growth of online businesses would strengthen the competitive constraint they impose on more traditional offline retailers, and help to ensure the continuation of strong price competition between retailers. 	<p>As noted at paragraph 5.7 of this submission, eBay has not produced any evidence to show that PayPal is a more secure service than other online payment facilities or of the extent of PayPal's ability to contribute to the enhancement of the security of the internet as a platform for transacting.</p> <p>Furthermore, as noted above fraud and identity theft may in fact increase as a result of the pervasiveness of the PayPal service. As noted by BPAY in its opposing submission, it is likely that PayPal will become a "concentrated and centralised point of failure" in the online payments market. As such, rather than enhancing the security of the internet it may enhance the risks associated with transacting on the internet.</p> <p>In any event, the public benefits claimed by eBay are too attenuated. The possibility of the claimed public benefits occurring is too remote and dependent on the occurrence of too many variable factors. The claimed public benefits should accordingly be disregarded or given little weight.</p> <p>It is submitted that the Proposed Conduct is likely to have the opposite effect, by stifling innovation and deterring new entry, which may otherwise have provided greater levels of transactional security and protection, and more competitive pricing outcomes for customers.</p> <p>As such, the flow-on benefits claimed by eBay should be disregarded.</p> <p>Even if the Proposed Conduct were to enhance the security of the internet, it is submitted that eBay has not provided any evidence of the fact that this would incentivise traditional business to enter the online retail marketplace or that the growth of online businesses would strengthen the competitive constraint they impose on offline retailers.</p> <p>In any event, even if the Proposed Conduct does result in Claimed Benefit 3, for the reasons provided in relation to Claimed Benefit 1, the benefit is likely to also arise in the counterfactual and, as such, should be disregarded or given little weight.</p>
4	By strengthening the eBay platform as a secure trading environment, the Proposed Conduct will ensure continued efficiencies in the trading of	<p>eBay has not produced any evidence of how the Proposed Conduct will strengthen the eBay platform as a secure trading environment.</p> <p>Indeed, it is arguable that the continued availability of</p>

	Description of claimed public benefit	Why the claimed public benefit should be disregarded
	<p>goods sold on the eBay Site. By reducing buyer migration (caused by lower confidence in online transactions) to other retail websites or to offline retail stores, will benefit sellers that rely on eBay as their only or primary source of income.</p>	<p>other payment methods to users of eBay will incentivise the suppliers of those alternative payment methods to enhance the security and protection features of their offerings, thus contributing to the strengthening of eBay as a secure trading environment.</p> <p>Furthermore, eBay has not produced any evidence of the claimed reduction in buyer migration from eBay to other retail websites or traditional retail outlets which would result from the Proposed Conduct. There is evidence to suggest that trust and security is not an obstacle to continued online purchasing, on the eBay Site or otherwise (see paragraph 5.7 of this submission). The Proposed Conduct will not, therefore, reduce buyer migration caused by lower confidence in online transactions, as claimed.</p> <p>In fact, anecdotal evidence provided in opposing submissions by sellers using the eBay Site suggests that the mandating of PayPal is likely to drive some buyers away from using the eBay Site, and therefore be detrimental to sellers, including those that rely on eBay as their only or primary source of income. (Indeed, the Proposed Conduct is likely to erode the income of these sellers due to the fees associated with transacting through PayPal).</p> <p>In any event, even if the Proposed Conduct does result in Claimed Benefit 4, for the reasons provided in relation to Claimed Benefit 1, the benefit is likely also to arise in the counterfactual and, as such, should be disregarded or given little weight.</p>
5	<p>Strengthening the eBay platform would benefit the Australian economy.</p>	<p>eBay has not produced any evidence of the benefits that would accrue to the Australian economy as a result of the Proposed Conduct. It is submitted that the Commission ought to disregard or give little weight to this claimed benefit as:</p> <ul style="list-style-type: none"> • the benefits may be outweighed by the competitive detriments resulting from the Proposed Conduct (in particular, the lessening of competition in the Market for Online Payment Processing Services, including due to the deterrence of new entry in that market); and • any benefits to the Australian economy are likely to arise in the counterfactual (for the reasons provided in relation to Claimed Benefit 1).
6	<p>The protection from online fraud offered to PayPal users by the security features of the PayPal service will benefit financial institutions which ultimately bear much of the monetary losses resulting from online fraud.</p>	<p>As noted in paragraph 5.7 of this submission, eBay has not produced any evidence to show that PayPal is more effective at protecting buyers and sellers against online fraud than other payment services or to estimate the amount of benefit which would accrue to financial institutions as a result of the claimed reduction in fraud.</p>

	Description of claimed public benefit	Why the claimed public benefit should be disregarded
		<p>It is submitted that any benefit to financial institutions as a result of a reduction in online fraud should be weighed against the business which these financial institutions will lose as a result of being precluded from offering competitive services to users of the eBay Site.</p> <p>In any event, even if the Proposed Conduct does result in Claimed Benefit 6, for the reasons provided in relation to Claimed Benefit 1, the benefit is likely to also arise in the counterfactual and, as such, should be disregarded or given little weight.</p>
7	<p>The Proposed Conduct would reduce the incidence of fraudulent online purchases and would provide online merchants with the benefit of avoiding losses associated with credit card fraud.</p>	<p>As noted in paragraph 5.7 of this submission, eBay has not produced any evidence to show that PayPal is more effective at protecting sellers against online fraud than other payment services which the Proposed Conduct would exclude from the eBay Site, or to show the extent of this claimed benefit.</p> <p>In any event, even if the Proposed Conduct does result in Claimed Benefit 7, for the reasons provided in relation to Claimed Benefit 1, the benefit is likely to also arise in the counterfactual and, as such, should be disregarded or given little weight.</p>
8	<p>PayPal's buyer protection mechanisms are likely to provide more effective consumer protection because research has shown that many consumers are not aware of their credit card rights.</p>	<p>As noted in paragraph 5.7 of this submission, eBay has not produced any evidence to show that PayPal is more effective at protecting buyers than other payment services or that consumers are not aware of their credit card rights.</p> <p>Furthermore, the application of PayPal's buyer protection measures are entirely at PayPal's sole discretion (see paragraph 5.7(i) of this submission), and as such their future availability and that of any public benefit claimed to arise from them, is doubtful.</p> <p>In any event, even if the Proposed Conduct does result in Claimed Benefit 8, for the reasons provided in relation to Claimed Benefit 1, the benefit is likely to also arise in the counterfactual and, as such, should be disregarded or given little weight.</p>
9	<p>Individuals or merchants that are either too small to qualify for a merchant facility with a financial institution and, therefore, cannot accept payments by credit or debit card, or could obtain such a facility only by paying relatively high fees, benefit from using PayPal, since PayPal acts as the merchant of record for all transactions.</p>	<p>This benefit should be disregarded because the relevant individuals or merchants will be able to reap those benefits in the counterfactual by choosing to use PayPal or some other payment method, other than credit or debit card facilities, which is currently available on the eBay Site.</p>