

## NOTICE OF FILING

### Details of Filing

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Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
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File Number:	NSD971/2023
File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v PAYPAL AUSTRALIA PTY LIMITED ACN 111 195 389
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Registrar

### Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



## Concise Statement

No. \_\_\_\_\_ of 2023

Federal Court of Australia  
District Registry: New South Wales  
Division: General

IN THE MATTER OF PAYPAL AUSTRALIA PTY LIMITED (ACN 111 195 389)

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

**PAYPAL AUSTRALIA PTY LIMITED (ACN 111 195 389)**

Defendant

1. This proceeding concerns a term (**Fee Error Term**) in standard form small business contracts between the defendant (**PayPal**) and small businesses. The Fee Error Term permits PayPal to retain any fees PayPal overcharged and/or wrongly charged unless the small business account holder notices PayPal's error and complains to PayPal of the error within 60 days of the fee appearing on their account.
2. The plaintiff (**ASIC**) contends that the Fee Error Term is unfair within the meaning of s 12BG(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**the Act**) and void by operation of s 12BF(1) of the Act where the Fee Error Term appears in standard form small business contracts.

#### A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

3. PayPal is authorised under s 9(3) of the *Banking Act 1959* (Cth) to carry on banking business in Australia confined to providing purchased payment facilities within the meaning of s 9(1) of the *Payment Systems (Regulation) Act 1998* (Cth).
4. PayPal issued financial products described as "**Business Accounts**". Persons who acquired Business Account products from PayPal are described in this Concise Statement as "**Users**".
5. The terms governing a User's Business Account are set out in a contract between PayPal and the User (a **Business Account Contract**) consisting of:

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Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Plaintiff
Prepared by (name of person/lawyer)	Elizabeth Honey
Tel 0466 133 294	Fax _____
Email	<a href="mailto:Elizabeth.Honey@asic.gov.au">Elizabeth.Honey@asic.gov.au</a> ; <a href="mailto:Tina.Beltrame@asic.gov.au">Tina.Beltrame@asic.gov.au</a>
Address for service (include state and postcode)	Level 5, 100 Market Street Sydney NSW 2000

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- a. the PayPal User Agreement (**User Agreement**) published by PayPal on its website (including policies and applicable agreements incorporated into that User Agreement by reference);
  - b. a Product Disclosure Statement (**PDS**) published by PayPal on its website; and
  - c. an online registration form completed by the User.
6. Both the PDS and the User Agreement contain the Fee Error Term which provides:

**Your responsibility to notify PayPal of pricing or fee errors**

Once you have access to any account statement(s) or other account activity information made available to you by PayPal with respect to your business account(s), you will have 60 days to notify PayPal in writing of any errors or discrepancies with respect to the pricing or other fees applied by PayPal. If you do not notify PayPal within such timeframe, you accept such information as accurate, and PayPal shall have no obligation to make any corrections, unless otherwise required by applicable law. For the purposes of this provision, such pricing or fee errors or discrepancies are different than unauthorised transactions and other electronic transfer errors which are each subject to different notification timeframes as set forth herein.

7. Each of the Business Account Contracts is a financial product by reason of s 12BAA(1)(c) of the Act.
8. Under the terms of each Business Account Contract:
  - a. a User is obliged to pay various fees to PayPal in stipulated circumstances;
  - b. PayPal is entitled to deduct such fees from the User's Business Account (including from amounts credited to the User's Business Account); and
  - c. each User has the right to receive an account statement showing the activity on their Business Account.
9. The standard pricing and fees applicable to a User's Business Account from time to time are set out in clause 18 of the PDS. The applicable pricing and fees vary depending on the circumstances of each transaction including, but not limited to, whether the transaction is a domestic transaction or cross-border transaction, the payment type, the total transaction amount, whether micropayment pricing applies, whether the transaction involves a currency conversion, is a chargeback, is sent to multiple recipients (called a PayPal Payout) or is a refund and whether the User is withdrawing a balance to a linked debit card or bank account.
10. Users are able to view their account activity information and view and download their account statements by logging onto PayPal's website.
11. The account statements and other account activity information accessible by a User do not specify with particularity:
  - a. which of the types of pricing or other fees (together, described as "**fees**") set out in clause 18 of the PDS has been applied in respect of each transaction; and

- b. the manner in which each fee charged has been calculated.
12. Each of the Business Account Contracts contains the Fee Error Term.
  13. As at 30 June 2023, there were approximately 608,275 Business Account Contracts on foot between PayPal and active Users.
  14. Some of the Business Account Contracts (**Small Business Contracts**) are both:
    - a. standard form contracts within the meaning of s 12BF(1)(b) of the Act; and
    - b. small business contracts within the meaning of s 12BF(4) of the Act.
  15. The Users who are party to the Small Business Contracts are described in this Concise Statement as "**Small Businesses**".
  16. Each of the contracts identified at Annexure A to the Originating Process is a Small Business Contract.

## **B. RELIEF SOUGHT FROM THE COURT**

17. ASIC seeks the relief set out in the accompanying Originating Process consisting of declarations pursuant to ss 12GND and 12GNB of the Act, and/or s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), injunctions pursuant to s 12GD of the Act and/or s 23 of the FCA Act and corrective orders pursuant to s 12GNB of the Act and/or s 23 of the FCA Act.

## **C. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT**

18. Under each Small Business Contract:
  - a. PayPal owes a duty to the Small Business to keep the Small Business' account accurately and to render accurate account statements; and
  - b. subject to the Fee Error Term:
    - i. PayPal is obliged to correct any error or discrepancy in a Small Business' account that is caused by PayPal overcharging or wrongly charging a fee upon PayPal becoming aware of the error or discrepancy; and
    - ii. a Small Business owes no obligation to PayPal to examine account statements or other account activity information to identify whether PayPal has overcharged and/or wrongly charged fees.
19. The Fee Error Term would cause a significant imbalance in the parties' rights and obligations arising under each Small Business Contract because:
  - a. the term permits PayPal to retain fees which it has overcharged and/or wrongly charged to the Small Business' account as a result of PayPal breaching its obligation to keep the Small Business' account accurately;

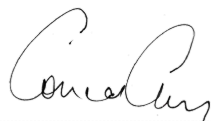
- b. the term imposes a *de facto* obligation on the Small Business (which would not otherwise exist) to examine account statements and other account activity information to identify whether PayPal has overcharged and/or wrongly charged fees;
  - c. PayPal is better placed and able than Small Businesses to:
    - i. prevent the overcharging and/or wrong charging of fees; and
    - ii. identify that fees have been overcharged and/or wrongly charged; and
  - d. there is no cognate term which prevents the Small Business from being charged fees which PayPal has undercharged or neglected to charge, unless PayPal rectifies the error within 60 days; and
  - e. the Small Business Contract does not oblige PayPal, absent request, to provide the Small Business with account statements or other account activity information which specify with particularity the type of each fee charged or the manner in which each fee has been calculated.
20. ASIC relies on the presumption in s 12BG(4) that the Fee Error Term in each Small Business Contract is not reasonably necessary to protect PayPal's legitimate interests. Further, the Fee Error Term is not reasonably necessary in order to protect PayPal's legitimate interests because:
- a. any interest that PayPal has in retaining fees which it has overcharged and/or wrongly charged is not "legitimate"; and
  - b. any perceived need for the Fee Error Term could be obviated by PayPal taking steps to ensure that it complies with its obligation to keep proper accounts and does not overcharge and/or wrongly charge fees to Small Business accounts, such that the Fee Error Term is not "reasonably necessary".
21. The Fee Error Term would cause detriment to the Small Business under each Small Business Contract were it to be applied or relied on for the reasons given in paragraph 19 above.
22. For the purposes of s 12BH(1) of the Act, the Fee Error Term falls within the following classes of examples of terms of a contract that may be unfair:
- a. a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract: s 12BH(1)(a);
  - b. a term that limits, or has the effect of limiting, one party's right to sue another party: s 12BH(1)(k); and
  - c. a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract: s 12BH(1)(l).

23. The Fee Error Term is not presented prominently or otherwise drawn to the attention of a Small Business upon entering into a Small Business Contract. In that respect, and in light of its onerous and unusual nature, the Fee Error Term lacks transparency for the purposes of s 12BG(2)(b) of the Act.
24. By reason of the matters in paragraphs 18 to 23 above, ASIC contends that the Fee Error Term in each of the Small Business Contracts is unfair within the meaning of s 12BG(1) of the Act and void by operation of s 12BF(1) of the Act and that the relief sought in the Originating Process ought be granted.

### **Certificate of lawyer**

I Conrad Gray certify to the Court that the factual and legal material available to me at present provides a proper basis for each allegation made in this concise statement.

Date:



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Signed by Conrad Gray  
Plaintiff's legal practitioner