Legal Issues and Challenges in Online Shopping: A Comparative Analysis of Australia and New Zealand

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This paper aims to evaluate the adequacy and efficacy of the current statutory regimes, both in Australia and New Zealand, as a means of affording various legal protections to consumers who transact their business affairs online. In this respect, this paper provides an overview of some of the legal issues and related problems involved with online shopping in Australia and New Zealand. The author argues that online consumers are entitled to be afforded the same degree of protection as all other types of consumers. The traditional legal rules may be inadequate to provide consumer protection in the digital environment, as they were created before internet shopping and online commerce were even contemplated. Better enforcement of consumer rights is vital for online shopping but while it is simply too expensive and difficult to enforce existing laws — the rights are, in effect, useless.

1 INTRODUCTION

Online shopping has become the fastest growing use of the internet. It offers consumers many advantages in terms of choice of, and access to, goods and services. Australian consumers have been identified as the third largest online spenders, with an average purchase per person of over US$150 — thus only falling behind the United States and the United Kingdom in terms of national online consumer spending transactions. Approximately 5.9 million Australians now undertake their consumer transactions online, with nearly 13 per cent of consumer transactions in the past 12 months being undertaken online. Annual online spending registered record levels in the previous year, with aggregate online spending in Australia recording A$11.35 billion in the financial year ending June 2006. This approximates a spending ratio (per person per year) of A$1900 per online purchaser.

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1 E-commerce refers to doing business using on-line services and computers versus conducting business in more traditional ways such as purchasing goods and services in person or over the telephone; see E Goldsmith, and S L T McGregor, "E-commerce: Consumer Protection Issues and Implications for Research and Education" (2000) 24 (2) Journal of Consumer Studies and Home Economics 124.
3 Ibid.
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indicating that each Australian person who undertakes their commercial transactions online is now purchasing nearly A$2000 worth of goods and services online each year.  

More New Zealanders than ever are turning to the internet to shop, according to a new report from Nielsen Online. The proportion of customers who shop online grew to 45 per cent in the fourth quarter of 2008, up from 39 per cent for the same period in the previous year. The adult online shopping population now stands at a record 1.4 million people out of a total population of about 4.5 million. According to an Auckland University of Technology survey, 83 per cent of internet users surf the web to research products, while 60 per cent buy goods online. Online auctions, in particular, are an extremely popular way to buy and sell goods and services: "TradeMe" is the most popular online auction platform in New Zealand, with 1.2 million members expected to host 35 million auctions in 2006. "TradeMe" also accounts for a third of the country's private vehicle sales and NZ $250 million worth of retail sales.

Business-to-consumer (B2C) electronic commerce, which includes online shopping, has become an increasingly pervasive aspect of trade and commerce, offering both Australian and New Zealand consumers substantial economic, social and utilitarian benefits, such as enhanced consumer choice, improved consumer access to goods and services, and, more generally, greater commercial convenience. There are several advantages inherent in e-commerce as a mechanism for undertaking commercial transactions and these have significant potential to benefit — as will be further argued — both consumers and traders. In particular, online shopping overcomes the geographical constraints and limitations inherent in conventional face-to-face commercial transactions; it facilitates market expansion and decreases administrative, transactional and attendant marketing and logistics costs. Online shopping has fostered market efficiency by this decrease in transactional costs and by promoting a competitive environment, thus enhancing the quality of goods and service delivery. In essence, online shopping has provided Australian and New Zealand businesses with the opportunity to develop new, specifically online, markets, and has broadened and deepened the institutional relationship between traders and consumers in ways never previously envisaged.

Online shopping, however, is not unequivocally beneficial: there are attendant risks and dangers which are not present in more conventional face-to-face commercial transactions and which — it will be argued — present significant legal and institutional challenges to lawyers and policy-makers in ways that will require them to reform the online shopping model so as to enhance its economic security and

5 It was also reported that in terms of retailer share of trade, eBay maintained its position at the head of the online retail market with 57 per cent of online shoppers having made a purchase on eBay, up 11 points from one year ago. Qantas and Virgin Blue maintained the largest online travel shopping audience while Ticketek was the number one seller of concert/event tickets; see AC Nielsen Australia (2006).
7 Ibid.
8 Ibid.
10 K Tokey, "Vendor bidding on online auctions: Protecting consumers from vendor bidding on New Zealand online auctions" (2007) 30 J Consum Policy 137, at p 137.
12 Ibid.

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efficacy. Consumers are, at present, confronted with several difficulties when undertaking online shopping; these are mainly associated with economic or credit security and the absence of institutional protections against the abuse of online consumers’ credit records. The reason that this issue of credit security is so problematic derives from the relatively new and novel nature of online shopping and the lack of time for policy-makers and government regulators to develop institutional and legal checks and safeguards to prevent the abuse of consumers’ credit records. Yet, if online shopping is to flourish and become a dominant market and commercial paradigm in the future, it will be necessary to promote consumer confidence by affording consumers the same institutional and legal rights and protections in an e-commerce environment as they are, at present, accorded in a traditional face-to-face retail environment.

Accordingly, this article seeks to elaborate on the perceived advantages inherent in online shopping as an instrument for undertaking commercial transactions, and then to explore some of the risks and dangers associated with this online shopping forum. It will then explore the influence of “trust” on consumers’ online shopping decisions. Attention then moves to an outline of the current statutory provisions which have relevance to, and which afford some protection for, Australian online consumers. The paper then briefly examines how New Zealand has addressed the precise legal construction of online shopping and its attendant responsibility to online consumers. The intention is to evaluate the adequacy and efficacy of the current statutory regimes — in both Australia and New Zealand — in affording some legal protection to online consumers. This examination specifically aims to ascertain whether there is a need for further consumer protections and safeguards in addition to those that currently exist in the online shopping forum. It should be noted that this paper neither touches on nor analyses jurisdictions that operate outside of Australia and New Zealand, and sell inter alia to Australians or New Zealanders, nor does it examine privacy law in detail; these issues are beyond the scope of this paper, and the discussion and analysis presented here is only preliminary.

2 PERCEIVED ADVANTAGES AND RISKS ASSOCIATED WITH ONLINE SHOPPING

Many attitudes towards the uses of online shopping are underpinned by attitudes towards trust and perceived risk. People’s perceptions about the use of online shopping in commercial transactions are quite diverse, and it is therefore essential that the risks and the benefits are carefully taken into consideration. This section of the article will look briefly at public attitudes — both the perceived benefits and the risks — towards the uses of online shopping. It will also consider the key drivers for those attitudes, particularly the rapid changes in trust and risk perception that have occurred over the past few years.

Internet shopping provides consumers with several benefits, which are especially advantageous when contrasted with the undertaking of traditional retail transactions. Online shopping offers an enhanced selection of products and services, affording a greater range of features than are usually available in conventional face-to-face transactions. For example, online shopping usually includes a computerised search function that enables the consumer to access product information and undertake a far greater search and selection of products and services. This also enables the consumer to browse products and

services extensively; to collect data; locate and download information; compare prices; purchase products; place or change orders; and receive feedback and information without travelling geographical distances and undertaking conventional face-to-face commercial transactions.\textsuperscript{15}

A further advantage of online shopping is the flexibility afforded to consumers to browse and/or undertake their commercial transactions online 24 hours a day, seven days a week, from the convenience of their office or home. This convenience, of course, has the consequence of reducing the time actually spent shopping, as consumers do not have to physically visit the centres and undertake face-to-face commercial transactions. For example, consumers can book flights on airlines’ websites — this accounts for over 70 per cent of bookings with some companies.\textsuperscript{16} Empirical studies have demonstrated that the physical enjoyment of engaging in the process of shopping and/or undertaking commercial transactions is, in fact, a positive aspect of online customer satisfaction.\textsuperscript{17} This satisfaction has been explained on the basis that online shopping affords consumers a greater degree of freedom and control over the commercial transaction.

Additionally, the delivery of products and services online might be cheaper than more conventional face-to-face transactions because costs associated with the provision of labour and fittings, and with renting premises and purchasing franchises and other associated utilities, are obviated in the case of online shopping transactions, where the vendor often operates the online business from home.\textsuperscript{18}

E-commerce further affords consumers with significantly more choices of geographical location from which to purchase their goods or services, resulting in consumer preferences being satisfied more effectively and cheaply.\textsuperscript{19} As a consequence, consumers are afforded increased power over domestic suppliers because they are significantly better informed and are in a position to compare and contrast products and services globally.\textsuperscript{20} Contrast this situation with consumers’ purchasing of goods and services in a conventional face-to-face transaction. In the latter situation, the purchaser is limited by the immediate geographical locality within which he or she is undertaking the commercial transaction. Geographical constraints are irrelevant in the context of e-commerce and an order for goods and services can be placed, for example, in the southern hemisphere, with the vendor supplying the goods and services in the northern hemisphere.

While there are several advantages associated with e-commerce, it is, however, confronted by a number of institutional and legal challenges and uncertainties. In particular, concerns persist in relation to the credibility and security of online transactions.\textsuperscript{21} The Better Business Bureau claims that a


\textsuperscript{20} Ibid.


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significant reason as to why consumers do not purchase goods and services online is their concern about the security of online payments, the reliability of vendor companies, and the absence of any privacy policy in relation to the actual commercial transaction.\footnote{22}

In addition, consumer uncertainty and doubt has also been documented in relation to the professed or purported location and identity of the vendor, as well as the purported description of the goods being sold, and the inability on the part of the purchaser to inspect the goods prior to purchase. Doubt, furthermore, has been documented in relation to the refund policy of the vendor and whether the online purchaser can claim a refund in cases where the goods are faulty or fail to match their description.\footnote{23}

Another issue that arises with online transactions is the difficulty that consumers face in checking the quality of the goods, as they are unable to physically touch and inspect what they wish to purchase prior to the transaction taking place. Unlike in conventional face-to-face transactions, consumers may be dealing with vendors in remote geographical locations where the products and the goods that are sold cannot be tangibly experienced, touched and felt. This may, of course, not be an issue for some standard products such as face creams, food products, or alcohol and the like, where the consumer is familiar with the particular goods because he or she has previously purchased them. The lack of prior contact with goods can, however, become a significant difficulty for the provision of other goods and services — such as clothing, electronics, or jewellery — where their suitability or any defects cannot be assessed and evaluated until the item has been bought, paid for and delivered.

Similarly, the problems most frequently reported by online consumers relate to the actual delivery of ordered goods; these comprise failure to deliver the order, as well as damage to, and defects in, the delivered products. In a specifically Australian context, six per cent of online consumers who were surveyed reported not, in fact, physically receiving an online purchase.\footnote{24}

Finally, the “borderless” nature of the online world has posed a major challenge to traditional consumer protection paradigms, which were constructed within physical boundaries.\footnote{25} It is therefore not uncommon for online traders to “jurisdiction shop” and to locate a country that has limited consumer protection laws.\footnote{26}

These are vital issues to comprehend and confront, since many consumers are still reluctant to utilise online services due to the above mentioned difficulties. The risks that many consumers perceive as being associated with online shopping have a critical effect on their decision-making. Therefore, fostering consumers’ trust in the online shopping e-commerce process is crucial to facilitating online shopping transactions and commercial trading over the internet.


\footnote{24} Ibid.


3 TRUST AS A CRITICAL FACTOR IN ONLINE SHOPPING

As Quelch and Klein have noted, “trust is a critical factor in stimulating purchases over the Internet”. 27 Nonetheless, “although trust is an essential component of all successful buyer-seller relationships, there is a renewed focus on trust when these relationships are conducted through electronic media”. 28 It is due to this precise fact that online transactions reflect the essentially unique features of uncertainty, anonymity, lack of control and, in this particular respect, it is arguable that they encourage potential opportunism in their actual processes. 29 In effect, when placing orders on the internet, consumers are essentially anonymous, since there is no face-to-face or one-on-one contact, and because the vendor has no awareness of the actual physical identity of the consumer who is purchasing his or her products and services. Accordingly, the fostering of consumer trust looms as a critical challenge in online consumer transactions, since the consumer actually having faith or trust in the online transaction that he or she is engaging with may serve as an important consideration in determining whether he or she will undertake the transaction and purchase the goods or services. In this respect, it is arguable that: 30

“In a traditional market, it is easier to believe that the vendor will satisfy its market promise. The risk is typically low. But with online shopping, consumers tend to display lower levels of trust towards online retailers ... Trust is therefore likely to play an important mediating role in an online market.”

The fostering of consumer trust is, therefore, highly desirable for vendors, as it facilitates long-term relationships and encourages repeat purchases. 31 Yet, to date, there is no universally accepted method or strategy for actually facilitating trust online. Nevertheless, trust and security have been identified as major priorities in Australia’s Strategic Framework for the Information Economy 2004-2006, and it is suggested that trust in online communications can, indeed, be enhanced through fostering and promoting one’s personal reputation as a reputable vendor, as well as promoting so-called “boundary setting” or professional boundaries between the purchaser and the provider of the goods and services. Furthermore, trust and confidence can also be developed through promoting the reputation of the organisation and the business, fostering ongoing interaction between the purchaser and the vendor, and promoting a leadership role for the vendor in terms of the business or the organisational context in which he or she is operating. 32 It is, therefore, important to examine precisely what factors might influence and, indeed, foster the development of trust in business or vendor-purchaser relationships that are formed online.


Trust can be positively enhanced by encouraging the vendor to interact or communicate online with the consumer who is purchasing his or her products and services, if he or she does require some assistance in the transaction. Web-based companies should seek to proactively afford online customer service, and should seek to respond to customers' enquiries. Online vendors should, in this respect, be able to provide answers while the customer is undertaking his or her consumer transaction, and it is very likely that the business which seeks to provide the most information and issue the most assurances and guarantees will be the one that the customer chooses.

Other factors that foster trust and contribute to a general perception of professionalism are the online web presentation of the vendor who is advertising his or her services, as well as the technological sophistication and functionality of the online site. Online service providers need to foster trust among customers through the maintenance of a transparent and reputable web-based service by charging a fair price for the advertised products and services, as well as by stipulating clear delivery policies, and delivering goods and services within the timeframes specified in their delivery policies.

It is a fact that "reputation is the result of trustworthy behaviour and plays an important part in determining the willingness of others to enter into an exchange with a given actor." In addition, trust can also be actively secured through so-called "guarantee policies", which are policies that, in effect, guarantee compensation payments in case of damages — such as guarantees to take an item back (return guarantees); satisfaction guarantees; warranties; the completion of finishing touches or the undertaking of repairs; service support; the provision of error-free billing; and the affording of credit on returned items. It is also suggested that "developing and maintaining consumer trust is easier if guarantee policies are combined with certificates of independent trusted third parties." The development and implementation of privacy information policies (where online companies respect customers' privacy by providing a secure service that protects all customer data) are also believed to enhance online trust. The willingness of purchasers to disclose and to provide their respective credit card numbers or other personal information will depend on their assessment of the trustworthiness of the online vendor. Hence, one commentator has argued that:

Privacy has a strong influence on whether an individual trusts an e-commerce business. This trust, in turn, influences the individual's behavioral intentions to purchase from or visit the site again, whether he/she will have positive things to say about the business, and whether he/she would recommend this site to others.

Additionally, one of the most important factors in fostering trust in online trading is the legal and institutional framework within which it operates. The conventional legal rules may be inadequate to

36 Ibid.
address certain types of online activity, and the inadequacy of the existing legal structure may serve to undermine trust and confidence among the participants. A sound legal framework for online consumer protection could thus play a pivotal role in regulating the online industry and in restoring the perception of confidence among customers who are participating in online consumer transactions. Online consumers must have an effective level of consumer protection, the existence of which will be a significant driver in the growth and facilitation of online shopping. Such initiatives need to be developed by the government and would provide an effective basis for fostering online trust against the onset of cyber-crime and the abuse of consumers’ credit details.

4 HAS THE TRADE PRACTICES ACT 1974 (CTH) BEEN EFFECTIVE IN PROVIDING ADEQUATE PROTECTION FOR ONLINE CONSUMERS IN AUSTRALIA?

Online consumers are entitled to be afforded the same degree of protection as all other types of consumers. Accordingly, the consumer protection provisions that are contained in the Trade Practices Act 1974 (Cth) (“TPA”) will apply — provided, that is, that “the person purchasing the online goods and services fulfils the definition of a "consumer" stipulated in s 4B and the goods meet the requirements of s 4B”. In summary, the provisions of the TPA prohibit businesses from engaging in certain misleading advertising, fraud and other unfair and dishonest practices. Division 2 of Part 5 of the TPA implies certain warranties and conditions into contracts for the supply of goods and services in commercial contexts where the “consumer” is, in fact, a corporation. Generally, the implied terms relate to goods and services, and concern issues such as quality, title and compliance with samples or descriptions. Accordingly, the relevant provisions that touch on online consumer transactions are as follows.

Section 52 of the TPA states that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. This section extends to cover all consumer contracts and transactions, including online consumer contracts that are effected in the course of trade or commerce.39

In addition, the TPA does have extraterritorial effect: ss 5(1)40, 6(1) and 6(3) of the Act expressly provide that the Act can operate extra-territorially, especially in relation to consumer protection.41 Section 5(1) of the TPA clearly states that Parts 4, 4A, 5, 5B and 5C extend to the engagement in conduct outside Australia by bodies incorporated or carrying on business within Australia, or by Australian citizens or persons ordinarily resident within Australia.42 Accordingly, if the conduct in question occurred entirely overseas, section 5 provides that the TPA will apply only if the conduct was undertaken by a company registered or carrying on business in Australia.43 This clearly demonstrates

39 If a person has suffered loss or damage as a result of another person’s misleading or deceptive conduct, then they can bring an action against that other person to recover the amount of the loss or damage under section 82, apply for other orders (such as orders to rescind or modify a contract) under s 87, or in relevant circumstances apply for an injunction under section 80.
41 Section 5(1) of the TPA does not apply to Pt VI and s 75B which is to construed as being only applicable to conduct in Australia.
that the scope of s 52 of the TPA is not limited to domestic commercial activities but also applies to overseas activities.

Under s 53 of the TPA, it is unlawful to make particular types of false or misleading representations, such as falsely representing that goods are of a certain standard, quality and value, as well as falsely representing that goods have a certain sponsorship or approval when they, in fact, have no such sponsorship or approval. Section 53 also prohibits the making of a false or misleading representation in relation to the price of goods, as well as the making of a false or misleading representation concerning the place of origin of goods.

Section 53(g) prohibits a corporation from making false or misleading representations about the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy. This provision is especially relevant to online purchasers, as vendors may seek to advertise or represent limited refund policies — for instance, by explicitly stating that no refunds will be provided. This provision may be triggered in situations where “clickwrap” agreements are present, and where the consumer clicks on the “I agree to the terms and conditions of sale” button. In this respect, if the vendor misrepresents the extent or degree of the coverage of the specific terms and conditions he or she may be in breach of s 53(g).

Section 58 of the TPA prohibits accepting payment where there is an intention not to supply goods or services, or to supply goods or services materially different from the goods or services for which payment (or other consideration) is accepted. The section also prohibits accepting payment where there are reasonable grounds, of which the person is aware or ought to be aware, for believing that the person will not be able to supply the goods or services within the period specified by the person, or if no period is specified, then in a reasonable period of time.44

According to ss 70 and 72 of the TPA, goods that are supplied by description or sample must correspond with their particular description or sample. This is especially pertinent to online shopping transactions as, here, consumers are not able to avail themselves of the opportunity to inspect the goods physically before buying them. In accordance with s 68 of the TPA, these statutory rights cannot be excluded, restricted or modified by any means.45

Section 71(1) of the TPA states that where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of doing business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality. Where the provision of goods and services “must be of merchantable quality”, this means that they must meet a basic level of quality and performance that would be reasonable to expect, having regard to their price and the manner in which they are described.46

Section 71(2) of the TPA stipulates that goods must be suitable for any particular purpose the consumer has made known to the supplier when negotiating to buy them, or a purpose that is obvious from the circumstances in which the sale took place.47

45 Section 68 of the TPA.
46 Sections 71(1) and 68(2) of the TPA.
47 Section 71(2) of the TPA.
Section 75A(l) of the TPA confers a right of “rescission” for any breach of a condition implied by virtue of Division 2 of Part 5 into a contract for the supply of goods by a corporation to a consumer. To obtain entitlement to the statutory right of rescission, the consumer is required to either: 48

(a) Serve a timely notice, in writing, on the seller, advising of the particulars of the breach of the implied term; or

(b) Return the goods to the seller and give either oral or written advice of the particulars of the breach of the implied term.

However, the above implied conditions — ss 70(1), 71(1) and 71(2) — do not apply where there is a supply of goods by way of sale by auction. It follows that consumers purchasing goods via online auction sites such as eBay will not be protected by the Part 5 Division 2 implied terms. Australian businesses could potentially use eBay to dispose of goods which are not of merchantable quality, or are not fit for purpose, without being hindered by these implied terms. State-based Sale of Goods Acts may imply similar terms into these transactions, but those terms can generally be excluded by contract, whereas the TPA-implied terms cannot be excluded, in accordance with s 68. 49 These provisions are especially pertinent to online transactions, as the consumer is not able to physically inspect the goods before buying them. The regulators should therefore attempt to expand these provisions to online auctions.

In effect, there seems to be little doubt that most provisions of the TPA would apply to online activities carried out between corporations and consumers in the same way as they apply to offline activities, as the Act does not “explicitly” exclude online shopping from its protection. However, it should be noted that the Act does not “expressly” declare that it works as effectively for online consumers as it does for offline consumers, either. One commentator has argued that: 50

“The Trade Practices Act 1974 (Cth) is, however, generally silent as to whether its provisions apply to conduct carried out electronically, although the breadth of its controls would, arguably, apply to all on-line activities carried out between corporations and consumers. Most of the consumer protection provisions of the Act specifically apply to conduct which “involves the use of postal, telegraphic or telephonic services” (s 6(3) which would seem to exclude the Internet and email which are not specifically “telephonic”). This question has yet to be judicially determined in Australia although the ACCC takes the view that advertising on the Internet comes within the provisions of the Trade Practices Act 1974 (Cth).”

The Australian Consumer and Competition Commission (ACCC) will continue to scrutinise alleged misleading and deceptive conduct in online consumer transactions, and is currently playing a successful role in enforcing compliance with the TPA by taking legal actions against online sellers who breach the TPA. Even though the ACCC attempts to enforce consumer rights under the TPA and protect online consumers as well as offline consumers, it is simply too expensive and difficult to enforce those rights — the rights are, in effect, useless. For example, in the year 2004, the ACCC undertook a survey of the


49 Section 68 of the TPA provides that the implied terms outlined above — ss 70(1), 71(1) and 71(2) — cannot be excluded from contracts for the supply by a corporation of goods or services to a consumer, nor may they be restricted or modified. Any such term to this effect is void.

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1000 Australian sites most visited by Australian consumers, and of those 1000 sites, 334 were transactional. The survey reported that:

(a) 54.3 per cent had a clause attempting to disclaim responsibility for the accuracy of information posted on the site;
(b) 50.9 per cent had a clause which attempted to disclaim warranties;
(c) 66 per cent had a clause which limited liabilities; and
(d) 43.8 per cent had both a disclaimer of warranties clause and a limitation of liability clause.

Significantly, the survey further reported that 62 per cent of online websites had no information about refunds or exchanges policies; 75 percent of sites had no statement about how they would handle consumers’ personal information and, in particular, personal credit card details; and 56 per cent of sites had no information regarding the security of their online payment mechanism.

Another survey conducted in 2007 reported that 27 of the websites examined had a reference to a disclaimer within the terms and conditions, or a stand-alone disclaimer. Of the 27 websites canvassed, the ACCC found that 22 appeared to have breached their legal obligations to consumers, particularly under such sections as ss 52 (1), 53(a), 70(1), 71(1) and 71(2) of the TPA. The ACCC further reported that the 22 disclaimers discovered appeared to be attempting to exclude liability in relation to goods complying with their description, or being of merchantable quality, or being fit for the purposes for which they were bought. Also, the ACCC found that seven of the 22 disclaimers sought specifically to limit or circumscribe the time frame, or time limits, that a consumer had available to return defective, faulty or damaged goods. As a result, it could well be argued that these businesses were, in fact, engaging in misleading or deceptive conduct or providing misleading representations to consumers. This is a major concern, and one that needs to be confronted by regulators and policymakers, specifically in the context of the TPA.

Based on the above factors, it appears that the enforcement of consumer protection laws has become extremely difficult online. Laws protecting online consumers will not be successful without strong, proactive enforcement. The law must encourage the development of self-regulation, as this may be the single most effective way of protecting consumers, especially if it is underpinned by the careful and strategic application of government law enforcement actions.

51 In 2004, the ACCC surveyed the top 1000 Australian consumer websites, especially those selling goods and services online, including the relevant terms and conditions governing the sale. The ACCC found that over half of the active sites had exclusion clauses, limitations of liability and disclaimers that were likely to contravene the TPA, particularly ss 52 and 53 (g).
52 Those websites contain a written contract.
55 Ibid.
56 Ibid.
57 Ibid.
58 Ibid.
59 Ibid.
5 ONLINE SHOPPING AND CONSUMER PROTECTION IN NEW ZEALAND

Consumer protection in New Zealand is managed by the Ministry for Consumer Affairs, which is part of the Ministry for Economic Development. The Consumer Affairs Ministry’s main role is to create an environment that promotes efficient and accurate information flows between suppliers and consumers so that consumers can transact with confidence. The Ministry for Consumer Affairs does not, however, enforce the Fair Trading Act or investigate breaches of the Act; these tasks are performed by the Commerce Commission, which considers complaints about unfair or misleading trading practices, or anti-competitive behaviour by businesses.

The main consumer protection legislation in New Zealand is the Fair Trading Act 1986 (NZ) ("FTA"). The provisions of the FTA are similar to those under the comparable Australian legislation, prohibiting certain conduct and practices in trade, providing for the disclosure of consumer information relating to the supply of goods and services, and promoting product safety. Part I of the FTA prohibits three main types of activities. Section 9 provides that “no person shall in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”. Section 10 covers misleading conduct in relation to goods while section 11 covers misleading conduct in relation to services. The Act also prohibits businesses from engaging in false or misleading representations60 so that no person can make, in relation to an auction, a false or misleading representation that a person has any sponsorship, approval, endorsement or affiliation; or make a false or misleading representation concerning the nature of the interest in land, the price payable for land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put, or the existence or availability of facilities associated with the land. The Act also prohibits various other unfair practices.

In addition, s 3(1) of the FTA, which applies to all businesses carried out in New Zealand, states that: “This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within New Zealand.”

It is thus made explicit that an internationally based business that sells to New Zealand consumers is deemed to be a “business carried out in New Zealand”. The FTA has extraterritorial application to conduct engaged in by companies and persons that affects the home market.61 the Act does technically apply to sellers based outside of New Zealand, and limited legal remedies are available against them. Not surprisingly, the jurisdiction of the seller is the single biggest issue related to consumer protection and online shopping.

In addition, the legislation applies to all goods that are acquired or supplied. Section 2 defines “acquire” as to “obtain by way of gift, purchase, or exchange; and also includes take on lease, hire or hire purchase”. “Supply” is defined as including supply (or re-supply) by way of gift, sale, exchange, lease, hire, or hire purchase. “Trade” means “any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land”. There appears, then, to be no reason why these provisions should not apply to internet transactions.

60 Section 13 of the FTA.
Section 21 of the FTA provides that a supplier must have reasonable grounds to believe that it can supply the goods within the time stated. However, there is no provision to allow the consumer to cancel the contract if delivery times in the contract are not met, or if the goods are not delivered in a reasonable time; nor does the Act require that consumers be informed of these situations.\(^{62}\) If the consumer does reject the goods due to late delivery, they have no way of ensuring that they are not liable for the cost of the goods.\(^{63}\) These provisions may have serious implications for online consumers as problems with online auctions usually take the form of breaches of contract for non-delivery of goods or unreasonable delays in the delivery of goods.

Furthermore, the Act applies only to auctions in which the seller is a professional trader — it does not apply to private, “one-off” sellers. If the transaction occurs with a “private seller” (for example, an eBay seller), the protection provisions of the FTA do not apply. Bidders in an online auction hosted by a “one-off” private seller are not covered by consumer protection legislation.

The FTA was enacted in response to Australia’s TPA. One of the main problems with the FTA is that it contains no specific provision dealing with online consumer protection. The Act prohibits misleading and deceptive conduct and also prohibits unfair trade practices, but it is not clear whether these provisions protect online businesses and consumers. Another problem with the FTA is that it contains no equivalent provision to Article IVA of the Australian TPA which prohibits “unconscionable conduct”. This omission in the FTA implies that behaviour that is prohibited as unconscionable in Australia may be legal in New Zealand.\(^{64}\) In addition, “misleading and deceptive” are not defined in the FTA,\(^{65}\) yet they are defined in the Australian Act.\(^{66}\) Such an approach allows dangerously broad application of the Act.

The New Zealand Consumer Guarantees Act 1993 has the general purpose of providing certain degrees of protection to consumers regarding the supply of goods and services. It states that goods must: be of acceptable quality (s 6); be fit for a particular purpose (s 8); match the sample or demonstration model (ss 9 and 10); and be sold for a reasonable price (s 11). If a guarantee is not met, the buyer may have rights against the trader. However, the Act clearly states that it does not cover goods bought privately — including goods bought at auction or by tender — or goods bought for resale or re-supply. It is unclear whether the Consumer Guarantees Act applies fully to the online environment, as s 41 (3) states that nothing in the Act applies to sales by auction.

Section 59 of the Sale of Goods Act 1908 in New Zealand applies to sales by auction; however, there is no provision in the Act for an online auction, and it is doubtful whether an online auction is an “auction” under the Sale of Goods Act. Section 59(2) of the Act states that a sale by auction is

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\(^{63}\) Ibid.


\(^{66}\) Section 52 of the TPA 1974.
complete when “the auctioneer announces its completion by the fall of the hammer, or in other customary manner.”

The New Zealand Auctioneers Act 1928 does provide a broader definition of an “auction” — s 2 defines a sale by auction as covering not only a sale completed by methods such as the knocking down of a hammer, but also “a competition for the purchase of any property or any interest therein in any way commonly known and understood to be by way of auction which could include online auctions”. However, the Act contains no specific provision for online auctions.

In New Zealand, a Status Report and a Proposed New Zealand Model Code for Consumer Protection in Electronic Commerce undertook a survey of 700 online sites, and reported that:

(a) More than 50 per cent failed to outline their payment security mechanisms
(b) 62 per cent provided no refund or exchange policies
(c) 75 per cent had no privacy policy
(d) 78 per cent failed to explain how to lodge a complaint
(e) 90 per cent failed to advise customers what laws applied to their transactions
(f) 25 per cent showed no physical address.

A major overhaul of New Zealand’s online consumer protection is obviously required. The two main pieces of legislation — the Fair Trading Act 1986 and the Consumer Guarantees Act 1993 — ostensibly cover most instances, but protection of online consumers is largely unregulated. There is neither reference to internet transactions or online shopping, nor any statement whether the above legislation apply to them or not. As the above examples illustrate, the law must be reinforced or the existing laws’ enforcement measures must be strengthened in order to ensure that consumers have effective protection when engaging in electronic commerce.

6 HOw COULD THE LAWS BE IMPROVED?

The enforcement of consumer rights poses one of the greatest current threats to digital technology. There is no doubt that the TPA signifies a high point for Australian consumers as its broad scope of application, flexibility and adaptability have served Australia well over the last three decades. However:

"much has changed since 1974, and issues such as on-line fraud have emerged that did not even exist when the legislation was originally drafted. For our legislation to remain relevant to a new century, it is necessary to put it under the microscope and consider how it can be enhanced or modified, where necessary."

68 The issues of on-line shopping were only addressed in the 2000 discussion paper. This discussion paper produced a Model Code for Consumer Protection in Electronic Commerce to try and increase the protection for New Zealand consumers.
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Briefly, the TPA is not intended to be an exhaustive guide to all the issues that may arise in online shopping. There is thus a necessity to refine existing consumer protection laws to accommodate the unique characteristics of the online environment. It is important that amendments be introduced to the Act to supervise internet-based transactions, as offline rules do not completely cover new technologies on the internet. As one commentator has remarked, “if you are trying to legislate for information technology, it is many years, some will say light years, ahead of the capacity of law makers to comprehend and then address the problems.” 70 Traditional contract laws were, however, created before the ideas of internet shopping and online commerce were even contemplated. Therefore, they have had to be significantly modified to enable an online transaction to be considered a binding contract on both the seller and the purchaser. 71 The full consideration of this issue is beyond the scope of the current research; however, it is important to note the difficulties that arise and the artificial way in which the law has overcome the contractual requirements.

Essentially, the necessary enforcement strategies must be introduced in both countries to initiate more stringent requirements for privacy policies, which are very important for online consumers, who inevitably provide personal information when they conduct a transaction online. Due to the nature of online shopping, information will be passed through a number of third parties (website providers, payment operators). Once the information is entered, consumers have very little control over where their private information goes, and how it is used. 72 Furthermore, as consumer identity information is quite valuable, sellers may be tempted to pass this information on to other parties in an attempt to gain further profits from the transaction. This potential lack of privacy creates a number of problems, including credit card and identity theft. It is important to note that “not only is confidence in privacy an essential precondition for B2C commerce but a lack of adequate privacy regulation has the potential to create continuing trade barriers”. 73 It is therefore essential to ensure that consumers using the internet have the right to be informed whether “cookies” are being used when first visiting a site and before divulging personal information. 74 It is also vital to have adequate security measures for consumers’ personal and payment information, within which secure payment mechanisms can be enforced and overseen by governments.

The other important issue that affects confidence in B2C electronic transactions is the cancellation and refund policy. A proper enforcement mechanism must also be introduced into both the TPA and FTA in relation to cancellations and refund policies. Such a mechanism must allow consumers the opportunity to terminate the agreement and return the merchandise if the product is faulty or not as described. This new mechanism needs to compel the supplier to disclose certain prescribed information, including the name and contact information of the supplier; a fair and accurate description of the goods and services, terms and methods of payment; all charges that a consumer may be expected

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to pay; delivery or performance dates and locations; and any other restrictions, limitations or conditions that might be imposed by the supplier.

Garwith shows that international consumer online transactions can often create difficulties in obtaining legal remedies, even if there has been a blatant disregard of consumer rights and protection.75 Due to the nature of a majority of consumer transactions, the cost of litigating to obtain a remedy in international online consumer transactions will often outweigh the benefits of obtaining judgment in the purchaser’s favour.76 If sellers realise the expense that will be incurred by a consumer in an attempt to enforce their legal rights, they may be more willing to breach laws, as there is a limited chance they will be held accountable for their actions. In general, it is a fact that “the ability to enforce legal rights is essential for consumer confidence in online shopping and also affects the willingness of businesses to use electronic mechanisms for business-to-business transactions”.77 One commentator has argued that:78

“It is a fundamental precondition for public confidence in any regulatory or legal framework that it should contain effective and accessible enforcement and redress mechanisms. In an Internet environment, this means that any rights or penalties must be enforceable on a global basis. This in turn requires harmonisation of legal frameworks to better enable dispute resolution and redress in respect of breaches of the rights of intellectual property owners, consumers and other e-commerce participants.”

The law must ensure that web merchants clearly express and make available their policies to online consumers. It is essential that governments intervene with national legislation requiring the disclosure of an e-trader’s online policies to consumers. Online marketing should not be treated differently from the traditional form — governments should be obliged to introduce new changes to online environments in order to give consumers the right to an inspection period and the right to withdraw from an online transaction within a certain period of time. The law must also be flexible in order to respond to changing market conditions and issues, allowing consumers to terminate the contract and allowing them a “cooling-off period” in a direct sale or marketing agreement. These provisions should be added into the penal code to deal with the offences relating to fake credit card-making and unauthorised use of another person’s electronic card, where this results in potential harm to the rightful cardholder.

Both the TPA and FTA can reasonably be applied to all online activities carried out between corporations and consumers in Australia and New Zealand, respectively. However, it is suggested that consumer protection laws in both countries have no direct reference to transactions conducted online, as legislation relating to consumer protection were created before internet shopping and online commerce were even in existence. It is therefore concluded that there is an urgent need to clarify the legal classification of online shopping and to re-think the liability of online websites, in order to better protect consumers. The existing laws must be strengthened and strict enforcement mechanisms must be introduced to prohibit unfair terms in online consumer contracts, as a matter of priority. It is imperative that online standards be brought into line with consumers’ expectations.

76 Ibid at p 197.
78 Ibid.

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7 CONCLUSION

In conclusion, it has been argued in this article that the rise in the use of online shopping has presented the law with a number of vital challenges regarding consumer protection. The author has argued that traditional legal rules may be inadequate to provide consumer protection in the digital environment, and many of the legal challenges to be found on this new frontier have been discussed. The law must be reinforced or the existing laws' enforcement measures must be strengthened to ensure that consumers have effective protection when engaging in electronic commerce.

Given this, it can be argued that enforceable undertakings may be the most flexible and effective way to improve and enforce compliance with the existing consumer protection laws. Simultaneously, enforcement agencies must also make a concerted effort to enforce existing laws more stringently against online dealers who flagrantly disregard the laws. Furthermore, the role and importance of consumer education should not be ignored, especially with regards to online shopping and e-commerce. Educating consumers about the risks of online shopping will increase general understanding of the nature of transactions and result in greater wariness about the myriad types of online scams. The Australian Competition and Consumer Commission (ACCC)\textsuperscript{79} and the New Zealand Commerce Commission (NZCC) must therefore focus on education and consumer awareness as part of their ongoing campaign against online scams.

\textsuperscript{79} There is a significant part of the ACCC website designated to consumer protection for on-line shopping. The ACCC at present provides a number of information pamphlets and booklets, which can be downloaded or posted to people at no cost. There is also information provided about the different types of scams that are currently being used, in an attempt to prevent similar future occurrences. However, the number of online consumers that have an awareness of the ACCC and their consumer protection rights is questionable. It may therefore be more effective to present the information in more mainstream media types (such as radio and television advertisements) instead of simply relying on consumers to check the ACCC website for information.