
Online Auctions and Consumer Protection in the United Kingdom and Australia: The Value of Transparency

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This article analyses the challenges associated with online auctions and consumer protection. Online auctions are increasing in popularity – however, they come with a range of potential legal issues. This article focuses on two potential concerns under the laws of both the United Kingdom and Australia: first, when an online auction fulfils the requirements of an auction for the purposes of consumer protection legislation; and second, when online auction sales occur “in trade or commerce”. Both of these – apparently simplistic – questions highlight the complexity of the laws surrounding online auctions. Such complexity undermines the transparency of the legal system and puts consumers at risk of not understanding or appreciating their rights. The article concludes by making some initial points on potential reforms to improve transparency in the regulation of online auctions.

INTRODUCTION

Online auctions are growing in popularity and are fast becoming one of the main ways consumers purchase items. It is therefore unfortunate that there is significant uncertainty regarding the legal rights and responsibilities associated with these transactions. This lack of certainty and transparency has the potential to disappoint consumer expectations and undermine consumer confidence in an otherwise thriving market. Further research, and potentially legal reforms, are therefore justified. The general legal issues associated with online auctions have already been addressed by academics in both Australia and the United Kingdom.¹ The existing literature provides an effective framework for understanding the legal issues associated with these types of transactions; there is, however, still much more work to be undertaken. This article considers these complexities from the context of transparency, arguing that the current legal regime lacks transparency in two key areas – that is, when an online auction is an auction, and when it is trade or commerce – thereby undermining the legal protections available. This puts consumers at risk of being disappointed in their purchase or, far worse, being scammed by online sellers. Clarification is therefore crucial, both for the effectiveness of the legal regime and to benefit buyers in online auctions.

BACKGROUND AND RISKS OF ONLINE AUCTIONS

Auctions have had a long and interesting history. They were first recorded in 500 BC when Babylonian women were sold to the most generous bidder when they came of marriageable age.² Auctions have, however, changed significantly since that time, posing a range of challenges for policymakers. In response, the law has developed special rules. For example, Art 4(1)(g) of the *Rome I Regulation* (EU) states that “a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place”, showing that they are treated differently in the member states of the European

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¹ See, eg, Christine Riefa, *Consumer Protection and Online Auction Platform: Towards Safer Legal Framework* (Ashgate Publishing, 2015); Kanchana Kariyawasam and Scott Guy, “The Contractual Legalities of Buying and Selling on eBay: Online Auctions and the Protection of Consumers” (2008) 19 *Journal of Law, Information and Science* 42.

² Riefa, n 1, 1.



Union. In the United Kingdom, the law of auction sales is “well settled”.³ The standard principles of offer and acceptance are applied to determine whether the creation of an auction is an invitation to treat (advertising) or an offer.⁴ Yet these transactions are not merely two-party matters between the seller and the buyer; in certain circumstances auctioneers can be held personally liable for breach of contract if they do not accept the highest bid.⁵

The development of the internet and online auctions has exacerbated the challenges associated with auction sales.⁶ For example, the proliferation of the internet has changed the way consumers and businesses buy and sell products. Online auctions have become one of the most common transactions on the internet, facilitating a “virtual flea market” featuring an endless array of merchandise from around the world.⁷ Online auctions have many benefits when compared with conventional markets. They allow borrowers more choice and sellers access to more buyers. Auctions also allow consumers to access an enormous amount of information very quickly and to locate sellers beyond those locally accessible.⁸ In addition, consumers experience the thrill of “winning” a product (potentially at a bargain price)⁹ as opposed to the standard concept of “buying” it.¹⁰

The first internet-based auction site was OnSale, established in May 1995.¹¹ During the early years of this auction site, OnSale almost perished due to a lack of interest, which was mainly due to the scepticism associated with the risk of online transactions. However, as the public’s trust grew, OnSale expanded. The success of early online auction sites was brought about, amongst other reasons, by the fact that businesses ordering supplies were satisfied that goods ordered over the internet arrived more quickly than through their ordinary suppliers.¹² Soon afterwards, in September 1995, Pierre Omidyar established AuctionWeb (later renamed eBay) in San Jose, California, which began with Omidyar offering a laser pointer for sale on his homepage through an auction process. The laser pointer cost him US\$30 to buy new and it sold for only US\$14 on his website.¹³ After this transaction, the popularity of the site grew. He began to charge 5% of the sold price for items selling less than US\$25 and 2.5% for listings selling more than US\$25. This began to result in a profit. By June 1996, eBay was providing a greater source of income for Omidyar than his day job.¹⁴ The popularity of his website continued to increase with 28,000 auctions hosted by October 1996, rising to 250,000 by January 1997.¹⁵

³ Paul S Davies, *JC Smith: The Law of Contracts* (OUP, 2016) 23.

⁴ See *Sale of Goods Act 1979* (UK) s 57, which codifies the pre-existing common law.

⁵ See *Barry v Davies* [2000] 1 WLR 1962 (CA) where the auctioneer was held personally liable for £26,000 for refusing to accept a bid of £400 on items worth approximately £28,000.

⁶ Paul B Lowry et al, *The E-Business Handbook* (St Lucie Press, 2002) 85.

⁷ Paul Adler et al, “Online Auction Sites and Trademark Infringement Liability” (2003) 2 <<http://www.nycbar.org/pdf/report/Online%20Auction%20Sites%20Final%20Report.pdf>>.

⁸ Martin H Thelle et al, “Online Intermediaries: Impact on the EU Economy” (2015) <http://edima-eu.org/wp-content/uploads/2017/10/EDiMA_Online-intermediaries.pdf>.

⁹ The price may not, however, always be a “bargain” and there are a variety of factors that impact the resulting price of online auctions: David Lucking-Reiley et al, “Pennies from eBay: The Determinants of Price in Online Auctions” (2007) 55(2) *The Journal of Industrial Economics* 223; Eric B Budish and Lisa N Takeyama, “Buy Prices in Online Auction: Irrationality on the Internet?” (2001) 72(3) *Economics Letters* 325. For a discussion on auctions versus fixed prices, see Riefa, n 1, 5–6.

¹⁰ Alok Gupta and Ravi Bapna, “Online Auctions: A Closer Look” (2002) 2 <<https://pdfs.semanticscholar.org/5de1/86a0f5b510a0b6a6a774e6e76d62b233bd7f.pdf>>. See also Dan Ariely and Itamar Simonson, “Buying, Bidding, Playing or Competing? Value Assessment and Decision Dynamics in Online Auctions” (2003) 13(1–2) *Journal of Consumer Psychology* 113.

¹¹ Howard Millman, “Online Auctions Are Changing the Face of Retail Landscape” (1998) 20(10) *InfoWorld* 77, 77.

¹² Millman, n 11, 77.

¹³ Elen Lewis, *The eBay Phenomenon: How One Brand Taught Millions of Strangers to Trust One Another* (Marshall Cavendish, 2009) 23.

¹⁴ Lewis, n 13, 27–28.

¹⁵ Lewis, n 13, 30, 36.

Online auctions became increasingly popular around the world. For example, as at 1 September 2016, eBay was the most visited online shopping site by Australians.¹⁶ In the 2015/2016 financial year, 7.8 million Australians over the age of 14 visited eBay in an average four-week period compared to only 3.8 million visiting Amazon.com, a non-auction online shopping site that is the second-most visited site in Australia.¹⁷ eBay is just as popular in the United Kingdom, visited by 23 million people each month. With 171 million shoppers in 190 countries, eBay had 1.1 billion listings in 2016/2017.¹⁸ Despite this increasing importance, “online auctions are under-studied and misunderstood by online auction platform users and legislators”.¹⁹ Further analysis and research, particularly on the impact of auctions on consumers, is clearly necessary.

Online auctions are platforms that facilitate sales between remote parties in which auction users sell or bid for products or services via the internet. In a traditional auction, the bidders make offers and the auctioneer collects the payments, distributes auctioned goods, acts as an agent on the vendor’s behalf, and then obtains the best possible price for the item by rejecting or accepting bids on their behalf. There are two fee models adopted by online auctions: the pay-to-sell model; and the pay-to-buy model.²⁰ Online auctions, such as eBay, do not physically deal with the bids, nor do they collect the money, with the item being passed directly from the vendor to the buyer.²¹ Online auction platforms, as intermediaries, are not directly involved in the auction process, but rather facilitate the auction and the exchange of goods. Many platforms also offer separate dispute resolution processes for unhappy sellers and/or consumers that work in addition to the consumer laws in place. These can be exceptionally important as consumers are unlikely to want to go to court for what are likely to be reasonably small purchases. There are many examples of successful and effective online auction dispute resolution processes – for example, Rabinovich-Einy and Katsh outline how eBay’s dispute resolution system handles over 60 million disputes annually with a success rate of over 80%.²²

Due to the way they function, online auctions present consumers with several risks that are not present in the traditional retail environment. One of the most obvious and common risks is consumers receiving a product that does not meet their expectations, as the product is often not physically “experienced” before it is purchased.²³ Online auction sites are also the most common forum for scammers, taking advantage of the inability of consumers to see or physically handle the goods.²⁴ The nature of an online auction allows for numerous different types of scams on unwitting victims. Often a scam can be identified when a price is offered for goods or services that is slightly less than the ordinary price; this appears

¹⁶ Elouise Keating, “eBay Tops List of Australia’s Most Popular Shopping Websites, as Shopping Forum OzBargain Rises Up the Ranks”, *SmartCompany*, 2 September 2016 <<http://www.smartcompany.com.au/industries/retail/eBay-tops-list-australias-popular-shopping-websites-shopping-forum-ozbargain-rises-ranks/>>. It should, however, be noted that not all sales on eBay (or more generally, sales defined as “online auctions”) actually meet the requirements of being an online auction. A number of sales that occur have no bidding involved and are merely straightforward purchases at a specified listed price.

¹⁷ Roy Morgan Research, “eBay Is Australia’s Top Shopping Website But OzBargain’s Community Forum Is the Fastest Growing” (1 September 2016) <<http://www.roymorgan.com/findings/6945-eBay-leads-but-ozbargain-is-booming-among-shopping-websites-australia-june-2016-201609011026>>.

¹⁸ eBay, “A Nation in Numbers” <<https://www.ebayinc.com/stories/press-room/au/aussie-point-balances-set-to-take-off/>>.

¹⁹ Riefa, n 1, 219.

²⁰ Riefa, n 1, 4.

²¹ Kariyawasam and Guy, n 1, 46; see also S Klein, “Introduction to Electronic Auctions” (1997) 7 *Electronic Markets* 3.

²² Orna Rabinovich-Einy and Ethan Katsh, “Lessons from Online Dispute Resolution for Dispute Systems Design” in Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishing, 2011) 52–55. For further discussion on the importance of ADR, see Henry H Peritt Jr, “Dispute Resolution in Cyberspace: Demand for New Forms of ADR” (2000) 15(3) *Ohio State Journal on Dispute Resolution* 675.

²³ This was discussed in the Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth) [25.117], which helpfully states “the case of on-line auctions where the consumer is not able to inspect the goods, there is a need for greater consumer protection”. See also *Malam v GraysOnline* [2012] NSWCTTT 197, [49]–[51].

²⁴ Miriam Albert, “eBay Buyer Beware: Why Online Auction Fraud Should Be Regulated” (2008) 39(4) *American Business Law Journal* 575.

to purchasers as a bargain and hence induces them to enter into a fraudulent transaction. Likewise, online scammers commonly identify their products using photos found elsewhere on the internet with the written description lacking details, such as how to contact the seller. In auctions where feedback plays a role in decision-making, scammers often attempt to skew their feedback by undertaking a high number of purchases and, hence, as a buyer, they receive a high level of positive feedback, but not as a seller.²⁵ Further, those involved will often endeavour to have the sale proceed outside the auction site in an attempt to circumvent any anti-scramming measures imposed by the website.²⁶ Scammers commonly seek to obtain credit card details from purchasers so they can misappropriate the balance on the card.²⁷ Alternatively, they can offer a “dummy bid” using a fake name to induce consumers into paying a higher price.²⁸ Counterfeit products, pirated forms of media and stolen goods are often offered for sale by way of online auctions.²⁹ Finally, online auctions allow sellers to be located in a different country to the consumer. This creates significant practical hurdles for individuals wanting to enforce their legal rights, even if it is clear that there has been a breach of the relevant consumer protection law.

Transparency is a key aspect of any effective consumer protection regime. Consumers must be aware of their rights and how to enforce them, otherwise their rights on paper will not translate into rights in practice. Australia and the United Kingdom have both relatively recently undertaken extensive reforms to their consumer protection regimes in part to make them more transparent and easier to understand. This occurred through the creation of the *Australian Consumer Law (ACL)* and the *Consumer Rights Act 2015* (UK), the latter largely incorporating Directives from the European Union. The importance of transparency is further explicitly stated in some legal provisions. For example, under the *Consumer Rights Act* a term that is “the main subject matter of the contract” or “price payable under the contract” can now only be excluded from the unfairness test if they are “transparent and prominent”.³⁰

Because of the risks associated with online auctions, it is important that there are robust and transparent consumer protection measures for these types of transactions. Consumers who have been scammed or defrauded must have access to effective remedies in an efficient manner, regardless of whether the item was purchased from an individual or a business. In addition to being robust and effective, consumers’ rights and sellers’ responsibilities must be clear and easy to understand. Without this transparency, there is a real risk that any protections in place will be insufficient, and consumers will be unsure if and when they apply to the transaction in question. The creation of a more transparent and consumer-friendly legal regime will thus address some of the issues associated with internet auction scams. This article therefore considers two key areas where there is a lack of transparency and discusses ways that the law may be improved.

FIRST TRANSPARENCY ISSUE: WHEN IS AN ONLINE AUCTION AN “AUCTION”?

The first issue to be addressed is whether online auctions constitute an “auction” under the Australian and United Kingdom legal regimes. In Australia, if a sale is not classified as an auction, then the standard *ACL* consumer guarantees apply to the transaction. Conversely, if a sale is classified as an auction, consumers do not obtain these protections.³¹ It is therefore important that all parties are aware if an online auction is an “auction” for the purposes of consumer protection legislation and the impact of this classification. Section 2 of the *ACL* defines “sale by auction”, in relation to the supply of goods by a

²⁵ Sarah Coles, “Seven Ways to Spot an Online Shopping Scam” (Aol News, 12 July 2017) <<https://www.aol.co.uk/news/2017/07/12/7-ways-to-spot-an-online-shopping-scam/>>.

²⁶ WA Scamnet, “Online Auction and Shopping Scams” (WA Government) <http://www.scamnet.wa.gov.au/scamnet/Scam_Types_Buying_selling_and_online_sales_scams-Online_auction_and_shopping_scams.htm>.

²⁷ WA Scamnet, n 26.

²⁸ WA Scamnet, n 26.

²⁹ Australian Institute of Criminology, “The Risk of Criminal Exploitation of Online Auctions” (2007) <<https://aic.gov.au/publications/htcb/htcb015>>.

³⁰ *Consumer Rights Act 2015* (UK) s 64(2).

³¹ *Australian Consumer Law* ss 54(1)(b), 55(1)(b), 56(1)(b), 57(1)(b), 58(1)(b), 59(1)(b).

person, as “[one] conducted by an agent of the person (whether the agent acts in person or by electronic means)”. This covers traditional auctions, where auctioneers act as agents on behalf of another person in the sale of goods. Notably, the definition specifically includes “whether the agent acts in person or by electronic means”, thus encompassing electronic versions of traditional auctions.³² The reasoning is that, although the website operator may set the rules of use, individual sellers and buyers deal with one another directly – in other words, online platforms essentially operate as a “virtual marketplace”.³³ The operator is most likely not involved either in bidding or acting as an agent.³⁴ Popular online auction websites, such as eBay, constitute “marketplace” online auctions, where the business merely provides a forum for the transaction to take place (ie for the seller and buyer to conduct their dealings), and would be likely not to fall under the *ACL* definition of an auction.

The question of whether online auctions qualify as “auctions” was considered in the case of *Smythe v Thomas*.³⁵ This decision was, however, made before the enactment of the *ACL* and under the earlier *Sale of Goods Act 1923* (NSW). Therefore, while it can provide a useful summary of the challenges associated with distinguishing traditional and online auctions (and the courts’ potential approach to these issues) it is not directly relevant to the application of s 2 of the *ACL*. In *Smythe*, the Court considered an eBay auction of a restored World War II plane; the claimant (the buyer) placed a bid that won and the defendant did not want to honour the bid. The relevant issue was whether a winning bid on an eBay auction could, as in the case of traditional contracts, create an agreement between buyer and seller that was binding and enforceable. The claimant argued that a contract for the sale of goods was entered into due to the winning bid; the defendant suggested that the acceptance of eBay’s terms and conditions was not an agreement between the two users, but rather an agreement between the users and eBay. He argued that eBay, in this context, was not an auctioneer and – as a result – the bid was merely an invitation to treat.³⁶ Rein AJ stated that online auctions have both similar and different features to auctions in other fields.³⁷ Traditional auctions and online auctions differ in that, at a traditional auction:

- (1) ... there is of course a human agent in the form of the auctioneer;
- (2) the auctioneer is the agent of the seller ...;
- (3) ... the seller can at any time before the hammer is lowered withdraw his goods from sale: in “Benjamin’s Sale of Goods” it is stated that “each bid is an offer which the auctioneer as agent for the seller, is free to accept or reject” (para 2.004).³⁸

As Rein AJ noted, in online auctions not all of these conditions are present; for example, there is no human agent and, in the case of eBay, its terms and conditions reject the role of auctioneer³⁹ and it does not possess the authority to execute a contract.⁴⁰ However, on the question of the status of online auctions, the judge indicated that they constitute a species of auctions – even if the website does not intervene as auctioneer.⁴¹ A contract does exist between seller and buyer, as opposed to there being two contracts: one between the seller and eBay; and the other between the buyer and eBay. In *Smythe*,

³² *Australian Consumer Law* s 2.

³³ Consumer Affairs Australia and New Zealand, “Australian Consumer Law Review: Final Report” (Commonwealth of Australia, 2017) 69.

³⁴ Consumer Affairs Australia and New Zealand, n 33.

³⁵ *Smythe v Thomas* (2007) 71 NSWLR 537; [2007] NSWSC 844.

³⁶ *Smythe v Thomas* (2007) 71 NSWLR 537; [2007] NSWSC 844.

³⁷ *Smythe v Thomas* (2007) 71 NSWLR 537, [35]; [2007] NSWSC 844.

³⁸ *Smythe v Thomas* (2007) 71 NSWLR 537, [28]; [2007] NSWSC 844.

³⁹ For example, eBay’s terms and conditions state “eBay is a marketplace that allows users to offer, sell and buy just about anything in a variety of pricing formats and locations. The actual contract for sale is directly between the seller and buyer. eBay is not a traditional auctioneer”: eBay Customer Service, “User Agreement”, Term 2 <<https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259>>. The company denies that it is acting as an agent for the seller, therefore the sale does not fall within the scope of the definition of an “auction” under the *ACL*.

⁴⁰ *Smythe v Thomas* (2007) 71 NSWLR 537, [29]; [2007] NSWSC 844. Some of these implications in terms of consumer guarantees are discussed further below.

⁴¹ *Smythe v Thomas* (2007) 71 NSWLR 537, [35]; [2007] NSWSC 844.

despite noting differences between traditional auctions and online auctions, Rein AJ held that there was no difficulty in treating the parties as accepting that online auctions will have similarities and differences to standard auctions.⁴²

It should be noted that, although some commentators have generally interpreted the decision in *Smythe* as classifying online “auctions” as a type of auction (or at least meeting the definition of auction for the purposes of the *Sale of Goods Act*),⁴³ not all commentators agree with this reading. Blount suggests instead that:

In *Smythe v Thomas*, the Supreme Court of New South Wales accepted that a transaction over eBay is not an auction and that eBay was neither an auctioneer nor an agent for the vendor. However, as a matter of commercial policy, the judgment appears to give certainty to users of online auction sites by holding that, where a vendor and a bidder have both agreed to the conditions of use of the auction site, the vendor makes an offer capable of acceptance by the bidder conforming to the terms of the offer. It follows that a successful online sale of goods may not need to establish agency on the part of the online auction house. The bidder may simply rely on having complied with the terms of the vendor’s offer without qualification.⁴⁴

As highlighted above, *Smythe* was handed down before the implementation of the *ACL*. The interpretation of “sale by auction” in the *ACL* was considered in *Solomons v Valley Motor Auctions Pty Ltd*.⁴⁵ In this case, DAC Robertson of the Consumer and Commercial Division of the New South Wales Civil and Administrative Tribunal noted that “[t]here is no definition of ‘sale by auction’ in the *ACL*”.⁴⁶ In the absence of some nuance qualifying DAC Robertson’s observation, this appears to be an error of law. The better view is that online auction websites, such as eBay, which provide a virtual marketplace in which consumers can “bid” for and purchase items displayed on the website, do not utilise a form of “sale by auction” for the purposes of the *ACL*.⁴⁷

The application of the relevant *ACL* section for online auctions was also considered in the case of *Malam v GraysOnline*.⁴⁸ In this case the New South Wales Consumer, Trader and Tenancy Tribunal considered an application by a consumer for damages or replacement of items purchased via an online auction from the Australian auction website, GraysOnline.⁴⁹ After considering the definition of “sale by auction” in s 2 of the *ACL*, the tribunal member concluded that the sale in question in this case did not satisfy the definition of “sale by auction” because the first respondent, GraysOnline, was not acting in the capacity of an agent of any third party.⁵⁰ The tribunal member concluded that it was not the policy intention of the *ACL* to extend the exceptions from the consumer protections afforded to sale by physical auctions to sale by online auctions. This accords with the Explanatory Memorandum to the *ACL*, which creates a clear distinction between physical and online auctions.⁵¹ This distinction is not, however, likely to be particularly clear for the consumers purchasing the items.

⁴² *Smythe v Thomas* (2007) 71 NSWLR 537, 546; [2007] NSWSC 844.

⁴³ See, eg, Jo Daniels and Chris Bitmead, “Implications of the New Australian Consumer Law for On-line ‘Auction’ Websites” (2010) 13(6) *Internet Law Bulletin* 120, 120; Bernard McCabe, “Online Auctions and the Perils of Changing Tires: Consumer Transactions and the Law” (2008) 16 *TPLJ* 147, 148; Kariyawasam and Guy, n 1; Jeannie Marie Paterson, “The New Consumer Guarantee Law and Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions” (2011) 35 *Melbourne University Law Review* 252, 254.

⁴⁴ Simon Blount, *Electronic Contracts* (LexisNexis Butterworths, 2nd ed, 2015) 100.

⁴⁵ *Solomons v Valley Motor Auctions Pty Ltd* [2016] NSWCATCD 63, [31].

⁴⁶ *Solomons v Valley Motor Auctions Pty Ltd* [2016] NSWCATCD 63, [31].

⁴⁷ CCH Australia, *Australian Competition and Consumer Law Commentary* (2010) [30-130].

⁴⁸ *Malam v GraysOnline* [2012] NSWCTTT 197.

⁴⁹ *Malam v GraysOnline* [2012] NSWCTTT 197.

⁵⁰ *Malam v GraysOnline* [2012] NSWCTTT 197, [47]–[48].

⁵¹ See “Comparison of Key Features of New Law and Current Law” section in Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth) 7.14. See also discussion in 7.16, 25.86–25.88.

The United Kingdom has its own classification challenges; the status of online auctions is quite uncertain and made more complicated by the differing approach taken by various European Union members. The law on auctions in the United Kingdom has been codified in s 57 of the *Sale of Goods Act 1979* (UK). This section covers multiple issues, such as each auction being a separate contract,⁵² auctions being completed by the fall of the hammer,⁵³ the impact of reserve prices,⁵⁴ and prohibitions on sellers making bids in their own auctions.⁵⁵ These are, however, generally considered to apply only to physical auctions. Their applicability to online auctions is uncertain.

The *Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts (DSD)* may also apply to online auctions; however, this is highly debated. The *DSD* provides buyers of products under distance contracts with significant rights, including the right to cancel 14 days after the product has been delivered without providing any reason for doing so. Distance contracts are defined under Art 2(1) of the *DSD* as “any contract concluded between a trader and a consumer under an organised distance sale ... without the simultaneous physical presence of the trader and consumer”. Article 3(1) of the *DSD* excludes “contracts concluded at an auction” from the Directive. No definition of “auction” is given, raising the question as to whether the *DSD* applies to online auctions. Different member states have interpreted the auction exclusion in various ways. Belgium and Greece have not applied the exception in Art 3(1) at all, so the issue did not arise. Other states (eg France and Luxembourg) drew a distinction between online auctions and public auctions, and only excluded public auctions from *DSD* protections. Yet others (eg the Netherlands) did not draw a distinction between the different types of auctions, so prima facie online auctions are not within the scope of the *DSD*.⁵⁶ A final group of states (including Latvia and Estonia) have explicitly included online auctions in the definition of “auction”, therefore excluding them from the scope of the *DSD*.

The position of the exemption in the United Kingdom is controversial. There was no further definition provided in the *Consumer Protection (Distance Selling) Regulations 2000* (UK), which implemented the *DSD*. Many prominent academic authors have argued that online auctions are excluded, but this is far from unanimously accepted.⁵⁷ In addition, the advice given by the government for exemptions does not specifically mention online auctions.⁵⁸

Due to the challenges discussed above and the general difficulties consumers experience in understanding their rights relating to online auction purchases, the final report into the *ACL* commented that the exemption for a “sale by auction” should be “modernised” to ensure that the consumer guarantees apply to all online auctions where a consumer is the purchaser.⁵⁹ It is argued that:

Indeed, it is difficult to find a compelling reason to allow traders to escape liability under the consumer guarantees regime simply because they choose to use the online auction method of selling, rather than using some other online selling method or selling in a face-to-face transaction.⁶⁰

This recommendation is relevant to both Australia and the United Kingdom, and is discussed in more detail below. The complexities related to the definition and scope of online auctions create a situation where the applicability of relevant consumer protection legislation is uncertain. This means that there is a lack of transparency and it is more difficult for consumers to be aware of, and be able to enforce, their legal rights.

⁵² *Sale of Goods Act 1979* (UK) s 57(1).

⁵³ *Sale of Goods Act 1979* (UK) s 57(2).

⁵⁴ *Sale of Goods Act 1979* (UK) s 57(3).

⁵⁵ *Sale of Goods Act 1979* (UK) s 57(4), (5).

⁵⁶ Although this is subject to academic argumentation, see discussion in Riefa, n 1, 18–19.

⁵⁷ See discussion in Riefa, n 1, 19.

⁵⁸ United Kingdom Government, “Online and Distance Selling” <<https://www.gov.uk/online-and-distance-selling-for-businesses>>.

⁵⁹ See Consumer Affairs Australia and New Zealand, n 33.

⁶⁰ Kate Tokeley, “When Not All Sellers Are Traders: Re-evaluating the Scope of Consumer Protection Legislation in the Modern Marketplace” (2017) 39(1) *Sydney Law Review* 59, 63.

SECOND TRANSPARENCY ISSUE: WHAT IS TRADE OR COMMERCE?

A further concern is whether the online auction occurs in the scope of “trade or commerce”. Whether auctions are deemed to occur in this manner will impact the rights of buyers (and responsibilities of sellers) in online auctions. In both the United Kingdom and Australia, buying from a business gives people more rights than if they buy from a consumer. This is uncontroversial and there are strong justifications for the law operating in this manner. The online auction environment, however, makes “trade and commerce” more of a concern. There are two main reasons for this: first, when purchasing in “real life” it is often clear whether the seller is a business or a consumer;⁶¹ and second, as discussed above, when purchasing online buyers do not get to see or feel the items. This exacerbates their vulnerability and allows for people to be mis-sold items or scammed in another manner. Having consumer protection mechanisms that apply to as many transactions as possible is therefore very important.

In the absence of statutory protection over consumer-to-consumer online auction transactions, a consumer who purchases goods from a private seller is particularly vulnerable if buying through online auctions.⁶² It is, however, often unclear whether the seller is operating as a business or a private individual, particularly in light of the rise of “amateur entrepreneurs” – that is, individuals who have a side-business selling items via online auctions.⁶³ People purchasing goods in this manner will often not know the type of seller they are dealing with and will therefore be unaware of any legal rights (or lack thereof) they have in relation to the transaction.

In Australia, s 2 of the *ACL* provides that “trade or commerce” means: (1) trade or commerce within Australia; or (2) trade or commerce between Australia and places outside Australia; and (3) includes any business or professional activity (whether or not it is carried on for profit). The notion of “business activity” in the definition in s 2 includes an “activity which is unequivocally and distinctively characteristic of the carrying on of a non-profit business, or of the carrying on of a trade, or of the carrying on of a profession”.⁶⁴ However, the term “in trade or commerce” does not extend to persons who act in a purely private capacity in domestic transactions, even if they use facilities commonly used in commercial transactions. For example, the supply of goods or services by an individual who is not carrying on any business does not attract the statutory protections or consumer guarantees under the *ACL*.⁶⁵ This is of particular concern in online auctions. As outlined by Riefa:

There is a fine line between a consumer *stricto sensu* who simply uses the Internet to offer sale of a few unwanted items; the individual who decides to empty the contents of loft and garage; and the individual who decides to start actively buying goods with a view to reselling them. In the latter case, the activity is most likely to enter the business sphere. The same interpretation would apply in a virtual world.⁶⁶

It is therefore very important, but increasingly difficult, to distinguish between a seller acting as a “trader” as opposed to a consumer. Certain online auction platforms, such as eBay, have taken steps to distinguish between different types of sellers – including encouraging people to register as a “shop” or “power seller”. This makes it clear to buyers that they are dealing with professional sellers, and therefore have the additional rights that go along with this.⁶⁷

In Australia the scope of the meaning of “in trade or commerce” has been subject to extensive consideration by the courts, both in relation to the *ACL* and its predecessor, the *Trade Practices Act 1974*

⁶¹ Tokeley, n 60, 70–71.

⁶² The purchaser will continue to have rights for breach of contract, even if they have limited or no rights under consumer protection legislation.

⁶³ See discussion in Riefa, n 1.

⁶⁴ *Pilmer v Roberts* (1998) 80 FCR 303.

⁶⁵ See, eg, *Williams v Pisano* (2015) 90 NSWLR 342; [2015] NSWCA 177.

⁶⁶ Riefa, n 1, 26.

⁶⁷ Riefa, n 1, 26.

(Cth). In general, courts have interpreted “in trade or commerce” broadly,⁶⁸ but have sought to limit its scope with respect to the purpose of the *ACL*. The case of *Walker v Sell*⁶⁹ provided an example of an online sale that raised the question of “in trade or commerce”. The appellant argued that the transaction was in “trade or commerce” as the advertisement on the selling website Gumtree was equivalent to an open market, the transaction was at arm’s length, commercial terms were present, the dominant purpose of the sale was to make money, the car had substantial value, there was a letter of authenticity with the sale of the car and there were representations as to value.⁷⁰ By contrast, the respondent argued that the transaction was not in “trade or commerce” because Gumtree was an informal online sales platform by private individuals, the terms of the sale were the bare necessity (compared to commercial standard form contracts), the funds raised were for private and not business use, and the car was owned for pleasure and not used in a commercial manner. The respondent further argued that the letter of authenticity was not sufficient to change the nature of the transaction.⁷¹

Although both parties had plausible arguments, the Court in *Walker* ruled in the respondent’s favour – the private sale of a car on Gumtree was not in “trade or commerce”, having not been done in the course of a business activity or arising in a business context. It was argued that “private sales of goods, services or real property are not considered to be ‘in trade or commerce’ unless they form part of a scheme or transaction engaged in for profit and the characteristics of the parties indicate the activities are commercial rather than personal in nature”.⁷²

The ultimate question concerning private sales of goods by online auction appears to be whether the private seller is selling the goods in the course of a business activity or arising in a business context. For private sellers, some factors that could be relevant to assessing whether they are selling goods for personal or for business purposes include:

- (1) the number or frequency of sales by the seller (whether the sale was more akin to a one-off transaction, or whether the seller sold the goods with some repetition or regularity); and
- (2) the extent to which the sale of goods, including sales by online auction, comprised a significant portion of the seller’s income (such as where, for example, the seller receives a significant regular income from the sale of goods and does not hold another job).⁷³

Tokeley highlights some additional factors that could be relevant to assessing whether conduct is “in trade or commerce”. These include whether the person bought the goods for the purpose of reselling, whether the person regularly or habitually sells goods or services, the total number of sales, the total amount of income received per year from sales, the span of time of the selling activity, the nature of the digital platform used, whether the person is registered for the relevant tax obligations, whether there are staff or assistants used, and whether the person has incorporated or has another type of trading vehicle.⁷⁴

While these are all relevant factors to consider, it would be difficult for buyers to locate and understand this information. In particular, when buying products on online auction sites there may be little guidance as to whether the seller is private or commercial.⁷⁵ Buyers will therefore struggle to know and appreciate who they are dealing with and in what capacity. Transparency is an important aspect of any functioning consumer protection regime. Having a complex list of factors that need to be weighed and balanced

⁶⁸ *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, 234; *Larmer v Power Machinery Pty Ltd* (1977) 29 FLR 490, 493. See also Tokeley, n 60, 65.

⁶⁹ *Walker v Sell* (2016) 245 FCR 308; [2016] FCA 1259.

⁷⁰ *Walker v Sell* (2016) 245 FCR 308, [69]; [2016] FCA 1259.

⁷¹ *Walker v Sell* (2016) 245 FCR 308, [72]; [2016] FCA 1259.

⁷² Stephen Corones, Sharon Christensen and Nicola Howell, “Submission to Australian Consumer Law Review Issues Paper” (Queensland University of Technology Commercial and Property Research Centre, 2016) 22.

⁷³ See generally Australian Government, “Australian Consumer Law Review: Issues Paper” (2016) 58 <https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Commercial_and_Property_Law_Research_Centre_QUT.pdf>.

⁷⁴ Tokeley, n 60, 81–82.

⁷⁵ Tokeley, n 60, 70.

creates unnecessary confusion. It should be clear and simple for buyers to know: (1) the status of the seller; and (2) the legal rights that go along with the transaction.

Australia is not alone in its attempts to settle the relationship between online auctions and “trade and commerce”; in fact, “most of the legal regimes in place struggle to find an appropriate application in the online auction world”.⁷⁶ The definition of a distance contract in the United Kingdom requires a “trader” and a “consumer”, therefore raising similar challenges to those under the *ACL*. Only contracts between a business and consumer will be protected by the *DSD*, making the status of the seller very important in terms of the legal obligations under the sales contract. A trader is defined under Art 2(2) as “any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting ... for the purpose relating to his trade, business, craft or profession”. Further direction on this definition can be found in Recital 17, which explains that:

The definition of consumer: should cover natural persons who are acting outside their trade, business, craft or profession. However, [if] the contract is concluded for purposes partly within and partly outside the person’s trade [dual purpose contracts] and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.

Predominance is therefore the key issue in determining whether an individual should be treated as a trader or consumer. Riefa, however, highlights that this definition focuses upon whether the *buyer* should be treated as a consumer or trader. It is silent with respect to the *seller*.⁷⁷

In the online world, it is becoming increasingly difficult to determine who qualifies as a “trader”. This is particularly the case for “hybrid consumers” – an emerging category of sellers at online auctions. In the United Kingdom there is no fixed definition of a trader, although this issue has been considered widely in cases focused on various pieces of legislation (such as the *Trade Description Act 1968* (UK) and the *Sale of Goods Act 1979* (UK)).⁷⁸ The application of such legislation to online auctions is, however, uncertain and it is unclear whether these statutes will apply to amateur entrepreneurs selling through online auctions.

The determination of the requirement “in trade or commerce” is far from clear. The question is “at what point a person’s activities move from personal to commercial in nature is not a straightforward question and potentially creates uncertainty in the application of existing consumer protection provisions within peer to peer transaction[s]”.⁷⁹ Tokeley argues that prior to the digital era this had less importance; however, the expansion of transactions conducted via digital means has created increased confusion about whether or not the seller qualifies as a commercial seller.⁸⁰ It is also arguably much easier to set up an online business, and sellers have less physical accountability when making sales online.

The challenges of distinguishing between sellers operating as traders and those as consumers is not unique to Australia, and the United Kingdom (applying the relevant EU directive) is grappling with it as well. The solution is far from obvious.

IMPROVING TRANSPARENCY – WHAT CAN WE DO?

It is clear that neither the United Kingdom nor Australia have an adequate approach to the challenges of online auction liability. It is an area ripe for more analysis and discussion. The question therefore remains, what is the best way forward? The purpose of this article was chiefly to identify the challenges associated with online auctions and transparency. Some initial points on potential reforms can, however, be made. This section considers the New Zealand approach of requiring vendors operating in trade to identify themselves, creating enhanced obligations for online auction platforms, focusing on the status of the buyer and not the seller, and finally removing the distinction between private and commercial sellers.

⁷⁶ Riefa, n 1, 219.

⁷⁷ Riefa, n 1, 28.

⁷⁸ Riefa, n 1, 24–25.

⁷⁹ Australian Government, n 73, 23.

⁸⁰ Tokeley, n 60, 61.

Since 2014, New Zealand has dealt with the identification of “in trade and commerce” and online auctions by requiring vendors who are operating “in trade”⁸¹ through online sales to provide a statement to consumers that they are a “person in trade”.⁸² Section 28B(2) of the *Fair Trading Act 1986* (NZ) states that if the vendor of the goods or services is in trade, the person making the offer must inform potential purchasers of their status. The New Zealand legislation can therefore be seen to transfer the risk and uncertainty from the buyer to the seller in these circumstances. This is arguably justified where the costs of compliance by sellers is less than the costs to consumers arising from uncertainty as to their rights. However, no equivalent provision exists in Australia or the United Kingdom.⁸³

While the New Zealand approach has a number of benefits, it is unlikely to make a significant improvement on the issues associated with online auctions. While increasing transparency is inherently valuable, consumers will not hugely benefit from having their attention drawn to the fact that the seller is “in trade”. If they are buying from a seller “in trade”, they will have access to the relevant consumer protections in place. What consumers need more is to be aware of: (1) the legal status of the transaction; and (2) when they are buying from sellers who are *not* “in trade” – as this will be when they have limited legal rights. The former will only occur when the legal status of online auctions is clarified in the jurisdiction in question (in this case Australia and the United Kingdom). And, as discussed above, it is difficult to see why online auctions should not attract the same protections and legal responsibilities as standard auctions.

Under current consumer law in Australia and the United Kingdom, a consumer has limited rights⁸⁴ against the vendor or the auction site if they choose to buy from a private seller. There are many ways that this issue can be more effectively addressed. It certainly should be the responsibility of online auction platforms to disclose whether the vendor with whom the purchaser is dealing is a trader or a private seller. This would allow the purchaser to make a suitably informed decision. Online auction platforms could certainly afford this kind of distinction for their purchasers, especially as it could avoid confusion regarding the status of the seller and the impact this has on the purchaser’s rights. Online auction platforms could even consider verifying the identity of both parties given the sheer size of the markets. It would not be a particularly burdensome requirement for the online platform. As the platforms are making significant profit from running the auctions, it is not unreasonable to give them legal responsibilities to help buyers become aware of the consequences of different transactions.

Alternatively, and more dramatically, the responsibility could shift to focus on the status of the buyer and not the seller. This was the solution recommended by Riefa. This would mean that if a consumer was purchasing an item in an online auction for social or domestic use, they would be afforded the full range of consumer protection rights – regardless of whether the seller was “in trade or commerce”. This is, however, likely to be considered as swinging the pendulum too far in the other direction and unfairly penalising personal sellers, many of whom may not have control over who buys the items on sale.

A final option could be to remove the distinction between private sellers and commercial sellers. Consumer legislation is designed to protect the legitimate interests of buyers who are involved in the sale of contract. The protection should exist irrespective of whether the item is purchased from a private seller. This is particularly important in light of the difficulty in accurately identifying whether the seller is operating in trade or commerce and what protections apply to the transaction in question. By comparing the United Kingdom and Australia, it is clear there are complexities arising in relation to consumer protection in online auctions. In both countries, the protections afforded under the relevant legislation do not apply to private sellers. Because of this lack of transparency, there are strong arguments in favour

⁸¹ The term “in trade” is the relevant term in the New Zealand legislation, not “in trade or commerce”. Nevertheless, Tokeley argues that the two terms can be treated as having equivalent meanings: Tokeley, n 60, 60.

⁸² *Fair Trading Act 1986* (NZ) s 28B(2); see Tokeley, n 60, 61.

⁸³ Tokeley, n 60, 61.

⁸⁴ The buyer will continue to have rights under the common law of contracts, specifically implied terms and the right to take an action for breach of contract.

of removing the distinction between sellers who are in trade and those who are not – particularly in the context of online auctions.

All of the options considered have their advantages and disadvantages. While it is clear and well-established *something* needs to be done, *what exactly* is far from certain. Online auctions are an increasingly important mode of commerce and we should be reluctant to recommend any amendments that could drastically impair or undermine their utility. It is therefore important to understand the impact that any legal regime would have on the profitability and effectiveness of these types of transactions. Further regulatory-based research, potentially of an empirical nature, is necessary to accurately determine the best way forward.

CONCLUSION

The legal regime associated with online auctions suffers from a significant and concerning lack of transparency. This arises in two key areas: first, when an online auction constitutes an “auction”; and second, when an online auction transaction is “in trade or commerce”. The answers to these questions are far from clear, and this undermines the utility of the legal regimes discussed and protections associated with these transactions. The current situation leaves consumers vulnerable to general disappointments and subject to scams, as well as a lack of awareness of legal rights associated with auction purchases. Clarification is therefore needed – however, it is unclear how this should occur. This article has provided a range of potential options, including shifting the focus on the status of the buyer and/or removing the distinction between sellers who are operating in trade and commerce and those who are not. Further research is needed so that we can fully understand and appreciate the impact that any amendments may have on the effectiveness of the online auction market.